

The Non-Execution Clause in the Relationship between the European Union (EU) and the African, Caribbean and Pacific States (ACP)

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A. Introduction

[1] It has become common for some States, international or regional organizations to establish a link between good governance, respect of human rights and the democratization of States. This idea is now a condition for development aid. (1) Paragraph 1 of Article 5 of the Lomé Convention between the European Community (EC) and African, Caribbean and Pacific States (ACP) of 15 December 1989, revised at Maurice 4 November 1995, provides that the politics of development and cooperation are closely linked to the respect and the enjoyment of fundamental human rights, to the strengthening of the rule of law and good governance. In Paragraph 2, cooperation is established as an instrument for promoting the enjoyment of economic, social, politic and cultural rights. The democratic clause contained in Article 5 of the Lomé Convention, and for which the respect of human rights, democratic principles and rule of law are essential elements of this Convention, firstly favours the achievement of positive actions in this framework and dedicates these elements as topics of common interests and a matter of dialogue. The European Union has stressed its willingness to develop a positive approach to these essential elements, which are the bedrock of the EU-ACP relationship besides being fields of cooperation and Community support. For that purpose, the Cotonou Agreement signed on 23 June 2000 strengthens this approach in Paragraph 2 of Article 9. The EU clearly places these essential elements at the heart of its partnership and defines the shared values that underpin this kind of relationship. It is in the spirit of common commitment to the respect and promotion of universal values that this approach has been taken. (2)

[2] A system of guarantee is provided by Article 366a of the Lomé Convention, in the case of a failure by a State to fulfil an obligation concerning one of the essential elements. This guarantee is reiterated in Article 96 of the Cotonou Agreement. It is a means to satisfy European public opinion, which demands that the Council and the Commission make all the efforts necessary to ensuring that public money is used in line with the principles and objectives of its partnership. For the ACP States, this non-execution clause must not be a way for the EU to take arbitrary unilateral decisions against individual countries.

[3] The provisions of the non-execution clause refer to Article 60 of the Vienna Convention on the Law of Treaties, which relates to the denunciation or the suspension of the application of a treaty in case of substantial violation. Indeed, under Article 60 Paragraph 3, a substantial violation of a treaty is the violation of any provision essential for the realization of the object and the goal of the treaty. It follows that in the case of grave human rights violations by the other contracting party or of brutal interruption of the democratic process, the European Union has the competence to denounce or suspend the implementation of the Cotonou Agreement. This authority was explicitly recognized by the European Community Court of Justice in its decision of 3 December 1996, relating to the cooperation agreement between the European Community and the Republic of India. (3) Article 1 of that agreement also contains an "essential element" clause. In the same decision, the European Community Court of Justice adopted the position of the Council, whereby this clause does not constitute a corollary of the requirement of Article 130 U Paragraph 2 of EC Treaty (Article 177 Paragraph 2 of the consolidated version of the Treaty). In other words, the consecration of the general objective to promote democracy, the rule of law and human rights can imply, besides positive measures, but also the adoption of restrictive measures, including, in the last resort, the suspension, even the denunciation of the cooperation agreement.

[4] This note has two aims: on the one hand, to describe and analyze the various procedures leading to the adoption of the non-execution clause and, on the other hand, to consider its implementation in specific cases. Thus, I intend to show that the existence of this clause and its various applications contribute to the strengthening of the enjoyment of fundamental human rights and to a different understanding of state sovereignty.

B. The Consultation Procedures

[5] Both Articles 366a of the Lomé Convention and 96 of the Cotonou Agreement explain and pinpoint the "moment " and the "actors " of these consultation procedures. The non-execution clause permits a graduated reaction, which is combined with a consultation on a partisan basis before the adoption of any measure except in case of urgency.

1. The normal procedure

[6] In practice, the European Union, by the means of the Council or the Commission, reacts through a series of declarations to any situation which it considers contrary with the essential elements of the partnership agreement. According to Paragraph 2 of Article 366a, the injured State or EU must invite the party concerned for consultations. Theoretically, the consultations are strictly limited in time, to begin no later than 15 days after the invitation and as a rule lasting no longer than 30 days. Article 96 of the Cotonou Agreement expanded this period to 60 days. This time, however, is not rigid insofar as, in practice, the parties can unanimously agree on its prolongation if necessary. (4)

[7] The provisions of Article 366a mandates the presence of many personalities during these consultations: the Community side is represented by its Presidency, assisted by the previous and next Member States to hold the Presidency, together with the Commission; and the ACP side is represented by the ACP State holding the co-presidency, assisted by the previous and the next ACP States to hold the co-presidency. The consultation is also open to two additional members of the ACP Council of Ministers chosen by the party concerned. All this formalism does not appear in Paragraph 2 of Article 96 of the Cotonou Agreement. It is only provided that "the consultations shall be conducted at the level and in the form considered most appropriate for finding a solution." These consultations must give to the party concerned the opportunity to specify the means which it proposes to implement and the terms planned to answer to the requirements of the European Union. (5)

[8] The Council adopted two decisions on 11 March 1999, each one relating to "the procedure for implementing Article 366a of the Fourth ACP-EC Convention." In its Decision 1999/213/EC, the first Article provides that the position of the Member States on the question of competence is taken by the Council. The Council can also act at the initiative of one of the Member States when the measures that will be taken infringe upon the competence of the Member States. Moreover, Article 1 of the Decision 1999/214/EC, provides that the Council must act by a qualified majority to invite the ACP State concerned to hold consultations. The measures taken by the Council pursuant to Article 366a are adopted on a proposal from the Commission. The Council acts by a qualified majority in the case of partial suspension of the application of the Convention, and in the case of full suspension it must act unanimously. The Council regularly reviews, at least every six months, the above measures.

[9] At the end of the period assigned to the consultations, three possibilities exist: no agreement was concluded between the parties; the party concerned refused to participate in consultations; or the means proposed in order to put an end to the violation of the alarming situation were accepted.

[10] In the case of the Cotonou Agreement, the parties have reached an agreement on the need to increase the importance to be given to dialogue in case of a violation of an essential element of the Agreement. The decision to engage consultations with a State will depend on a political appraisal case by case. But, this appraisal should take into account a deep analysis of the situation in the State-party concerned and the reports presented by the delegations of members States and by the Commission. It should be founded on elements permitting an appreciation of the evolution of the country in matters concerned with human rights and the rule of law, the progress on the State-party's road toward democratization. Such an appreciation is important in the context of consultations between parties "with a view to assessing the situation in detail and, if necessary, remedying it." It will also permit the identification of the measures that should be taken in order to restore and improve the situation which has caused the violation of one of the essential elements.

[11] But, it is not always the case that this process will be followed, as with the divergences between the ACP States and the EU that emerged in connection with the sanctions recently adopted by the EU against Haiti. The Haitian government has considered "premature and precipitate" the European Union decision of 31 January 2001 imposing sanctions on Haiti. (6) The ACP General Secretariat has considered that the consultations procedures under Article 96 of the Cotonou Agreement must be defined clearly and transparently. In this particular case in point it has regretted that only one formal meeting was held between the two parties. The discussions the EU representatives held in Haiti, without any notification to the Haiti, which did not permit Haiti to properly prepare its responses, could not be considered as being within the framework of the consultations enshrined in Article 96 of the Cotonou Agreement. The aim of consultations being to remedy a situation, and sanctions being a last resort, the ACP Secretariat has since engaged the European side to pursue true consultations with Haiti. (7) The ACP parliamentarians of the ACP-EU Joint Parliamentary Assembly, held in Libreville from 19 to 22 March 2001, called for consultations pursuant to Article 12 of the Cotonou Agreement. From the perspective of the ACP parliamentarians, the EU violated the letter and the spirit of the political dialogue enshrined in the Cotonou Agreement. (8)

II. The procedure in case of "special urgency"

[12] The procedure in case of "special urgency" is an exceptional one. This expression is derived from Paragraph 2 of Article 65 of the Vienna Convention on the Law of Treaties. There is no definition of it in the partnership agreements. In Article 96.2(b) the term "case of special urgency" refers to exceptional cases of particularly serious and flagrant violations of the one of the essential elements outlined in Paragraph 2 of Article 9, violations which require immediate

reaction. The situation of "special urgency" is not an autonomous appreciation of the violating ACP State or EU. Insofar as this clause is also incorporated in other agreements between the EU and the Non-Member State, the significance of this expression is generally specified in a Joint Declaration annexed to the agreement, even in the provisions of present agreement. It is often specified that this expression corresponds to a case of substantial violation of the agreement either to a violation of the essential elements of the agreement aimed in the democratic clause.

[13] Is this to misuse Article 60 of the Vienna Convention on the Law of treaties, by invoking the violation of this "democratic" clause to suspend the agreement between the ACP-UE and States? In any event, the parties are supposed to attach the designated consequences to the violations of all conventions to which they are a party even if the convention is concluded under conditions that are not identical to those set out by Article 60 of the Vienna Convention on the Law of Treaties; this, however, does not form part of *jus cogens*. Thus, for Professor Verhoeven, it is not important that a clause is known as essential or not; it is enough that the parties wanted to attach to its violation a particular consequence. (9)

[14] Then, the measures of urgency can be taken individually or collectively. For that purpose, the party concerned can react immediately without inviting the wronged party to hold consultations. The only compulsory formality that must be accomplished before measures may be taken is to inform the party concerned and the Council of Ministers. Thus, this clause would tend to avoid the procedural conditions of Article 65 of the Vienna Convention on the Law of Treaties and permit to react immediately. For ACP countries, such provisions would run counter to the principle of equality between partners and to the establishment of a genuine dialogue between the two sides. After the violating party and the Council of Ministers have been informed, the violating party can be invited "to hold consultations with a view to assessing the situation in detail and, if necessary, remedying it."

C. The Implementation of the Non-Execution Clause

[15] After the evaluation of the absence of an obligation in matter of human rights, democratic principles and rule of law, the party which invokes the failure to fulfil an obligation may take appropriate measures. It does so in three cases: if consultation is refused; if no solution has been found; and in cases of special urgency. All these measures are "taken in accordance with international law, and proportional to the violation."

I. The purposes and implications of measures

[16] The appropriate measures aim to exercise pressure to improve the situation for which both Article 366a and 96 has been invoked. This objective shall be reached by taking measures "which least disrupt the application of this agreement." If possible, the decision on the appropriate measures must be followed by positives measures of immediate interest, which can create a good context to ensure the restoration and the improvement of the situation.

[17] In fact, these measures can imply partial or full suspension of the treaty's terms between the parties. According to Paragraph 1 of Article 72 of the Vienna Convention, the suspension of the treaty releases the parties from the obligation to perform the treaty in their mutual relations. This would mean in the present context that the partnership agreement is temporarily no longer compulsory and the provisions affected by the suspension cannot be invoked during this period.

[18] Theoretically, the wronged party can choose any provision of the treaty. But by taking these "appropriate measures" the European Commission thinks that a number of criterion must be applied. The best comprehension and implementation of this article as a whole, and particularly in the process of taking and revoking the negatives measures, requires one to take into account the general context of the country and the kind of violations which have been recorded. In the choice of measures, it is necessary to avoid penalising the population and general citizenry. These measures must be followed by increasing actions that directly favour of the population. For example, if the measures provide for the suspension of cooperation it will be opportune to examine case by case the projects in order to determine which one should not be affected because the poorest sectors of the population are its beneficiary. This decision has to be coordinated with the measures taken by Member States. Finally, the measures must be proportional to the violation.

II. The different types of measures applied

[19] Actually, except for humanitarian relief or cooperation destined to the poorest sector of the violation State's population, technical and financial cooperation has been deferred with respect to Sudan in 1990 and the Democratic Republic of Congo since 1992. Recently, some conditions in matter of respect of human rights have been formulated and presented to the authorities of the Democratic Republic of Congo for a full resumption of cooperation. It is also the case concerning countries like Somalia, Sierra Leone and Burundi, for which particular treatment is justified by

the situation of crisis or conflict with which they are confronted. With some States, cooperation meets difficulties which call for a particular treatment. This is the case of Equatorial Guinea, with which the progressive resumption of financial and technical cooperation depends on progress made with respect to human rights, democratic principles and rule of law. The cooperation as to development was suspended in 1991 because of the lack of democratic process in the country. Since 1996, Equatorial Guinea and the EU have been holding consultations with a view to resuming cooperation, but to this point without concrete results.

[20] Nigeria was subjected to different types of sanctions between 1993, after the annulment of the 12 June presidential elections and the refusal of the military to hasten the return to democratic rule, and May 1999, when democratic rule was restored. (10) But these sanctions had a limited impact and did not achieve their aim of forcing General Abacha out of office. The EU suspended its cooperation with some ACP countries in 1999, because of *coups d'état*: Niger, Comoros and Bissau Guinea. In Niger, only the project of cooperation concerning health, education and food security has been maintained in order to avoid penalising the poorest sector of the population. It was the same in Comoros following the dismissal of the government on 30 April 1999.

[21] The ACP-EU Joint Assembly have decided to create a Working Group on the impact of sanctions and, in particular, of embargoes on the people of countries on which such measures are imposed. The Joint Assembly decided to create this Working Group in light of the growing perception that sanctions imposed for political reasons were frequently imposed without regard for their negative impact on the ordinary people of the country. Any link between this negative impact and the effects of the sanctions in leading to desired change of policy by the country on which the sanctions had been imposed was at best unclear. In some cases the suffering of ordinary people may have had no effect on the intended outcome at all, and indeed it may sometimes have made a policy change in the desired direction even less likely. (11)

[22] One can, however, assert that the reactions of the EU sometimes lack coherence with regard to the ACP States. The various declarations and joint positions of the Council on the situations that have occurred in the ACP States really do not make it possible to identify guidelines in its policy of sanctions. Sometimes, it gives the feeling of a selective practice, of a policy of double standards, or even arbitrariness. The recent sanctions adopted against Haiti on 31 January 2001 show, on the one hand, that there is a risk of abuse in the use of the non-execution clause and, on the other hand, that no means of recourse is envisaged in the case of divergences on the legality of these measures. It is democracy itself which commands not to misuse the means of making it respect (12).

III. The difference of reaction: the search of dialogue to promote democratic regime

[23] However, concerning the *coups d'état*, the notable difference is that between the reactions that preceded the adoption of the non-execution clause and those arising after its adoption. Before, no text envisaged and organized the reaction to be adopted *vis-à-vis* violations of Article 5 of the Lomé IV Convention. Beginning with the revised Lomé IV Convention, and in particular the adoption of the Article 366a, the EU benefited from a legal base to circumscribe its reactions to the serious violations of the essential elements of the treaty. It is what explains the difference in gradation between the reactions to the *coups d'état* perpetrated in Haiti in 1991 and in other ACP States since 1995.

[24] In fact, violation of essential elements does not necessarily lead to the implementation of the non-execution clause. For instance, a change of regime took place in Côte d'Ivoire on 24 December 1999, when a National Committee of Public Safety, headed by General Gueï, took power. These events resulted in the overthrowing of the President of the Republic, the suspension of the Constitution and the dissolution of the National Assembly, the Constitutional Council and the Economic Social Committee. It is obvious that this situation constituted a violation of the essential elements defined in Article 5 of the revised Lomé IV Convention. The consultations between the EU and the ACP Group of States on Côte d'Ivoire, pursuant to Article 366a of the revised Lomé IV Convention took place in Brussels on 7 February 2000. According to the conclusions of the Presidency of the EU at the closing of the above consultations, in particular concerning the declarations of intent and information provided by the Côte d'Ivoire authorities in favour of a return to constitutionality in accordance with a democratic and pluralist process, the Council of the EU decided to monitor very closely how the situation in Côte d'Ivoire develops, without pronouncing, at this juncture, on the possibility of suspending implementation of the Lomé Convention in respect of development cooperation. (13) Likewise, while consultations between the EU and the Republic of Fiji Islands under Article 366a of the Lomé Convention were opened in July 2000, the ACP-EU Joint Parliamentary Assembly urged "the European Union institutions to delay consideration of the imposition of sanctions and given the positive conclusion of the consultation on Fiji, to allow instead the current positive political developments to evolve and review the situation periodically." (14) Thus, the dialogue is aimed at promoting a quick implementation of a democratic regime.

IV. The lifting of measures

[25] Finally, "these measures shall be revoked as soon as the reasons for taking them have disappeared." For instance, due to the fact of progress realized by Togo with respect to democratization and the reinforcement of the rule of law, the second Summit of Head of States and Governments of the ACP countries, held in Santo Domingo from 25 to 26 November 1999, adopted a resolution on the resumption of the relations of cooperation between the European Union and Togo to put an end to the bad effects of sanctions on the Togolese civilian population and to enhance the democratic process. Likewise, "having regard to the signature on 17 February 2001 of an agreement between the ruling military junta, the Anjouan separatist leaders and the Comoro opposition members seeking to end the political crisis affecting the islands," (15) the ACP-Joint Parliamentary Assembly has called "on the Commission to strengthen progressively its cooperation with Comoros to assist the current process of a return to democracy and civil peace." (16)

D. Concluding Remarks

[26] The political dialogue should be effective and efficient so that it can play an implementing role in the ACP-EU partnership on the questions relating to democratization, human rights, rule of law and good governance. It should also help to limit situations arising in which one of partner may deem it necessary to use the non-execution clause.

[27] The non-execution clause shows that the sovereignty of a State is limited by its international obligations in accordance with international law. Sovereignty is no longer a defence that permits governments to do what they want in their internal relationship with peoples. Thus, a State is accountable to the international community for the manner in which it treats its nationals. In only a few years, an important number of ACP countries has accomplished sensitive progress in the implementation of reform implying a profound reorganization of the way of devolution and the exercise of political power, as well as the relationship between public authorities and citizens. These reforms have modified the institutional landscape and the political practice by increasing the participation of the governed in the management of public affairs. Nevertheless, much progress must still be made in these directions.

(1) See, for example, Joe Verhoeven, "La communauté européenne et la sanction internationale de la démocratie et des droits de l'homme," in *Liber Amicorum- Mohammed Bedjaoui* 771-790 (Emile Yakpo & Tahar Boumedra eds., 1999); Joan M. Nelson and Stephanie J. Eglinton, "Conditioned Aid and the Promotion and Defense of Democracy," in *Beyond Sovereignty: Collectively Defending Democracy in Americas* 169-186 (Tom J. Farer ed., 1998); Patrick McAuslan, "Good governance and Aid in Africa," 40 *Journal of African Law* 168 (1996); Gordon D Cumming, "British aid to Africa: a changing agenda?" 17 *Third World Quarterly* 487 (1996); Peter Uvin and Isabelle Biagiotti, "Global Governance and the 'New' Political Conditionality," *Global Governance* 377 (1996); Christopher Clapham, "Political conditionality and structures of the African state," 25 *Africa Insight* 91(1995); Thomas Carothers, "Democracy Promotion Under Clinton," 18 *The Washington Quarterly* 13 (1995); Toood J. Moss, "US Policy and Democratisation in Africa: the Limits of Liberal Universalism," 33 *The Journal of Modern African Studies* 189 (1995); Yokabdjim N. Mandigui, "L'aide au développement et les droits de l'homme", 6 *RADIC* 59 (1994); Pierre Célestin Ulimubenshi, "La problématique de la clause des droits de l'homme dans un accord de coopération économique: l'exemple de la Convention de Lomé," 6 *RADIC* 253 (1994); Kofi Kumado, "An Analysis of the policy of Linking Development aid to the Implementation of Human Rights Standards," *The Review*, No50 p. 23 (1993); Stephen P Riley, "Political adjustment or domestic pressure: democratic politics and political choice in Africa," 13 *Third World Quarterly* 539 (1992).

(2) Theoretically, respect for these conditions was not interpreted as a prerequisite to the adhesion. But in practice, since the signature of the Cotonou Agreement, the EU has tried to make the essential elements of the new partnership agreement standards for adhesion. On 27 April 2000, Cuba decided to withdraw its candidature to accede to the ACP-EU new Partnership Agreement. The Minister of External Affairs of Cuba, Mr. Felipe Pérez Roque, explained this act by pointing to the support of the European Union countries for a motion against Cuba adopted at the United Nations Human Rights Commission in Geneva on Tuesday 18 April 2000. The Cuban Minister considered that certain European Union countries "feel particularly hostile to our country's admission into the new ACP-EU Convention..." and that "insisting on the adherence application would only serve to expose ourselves as victims of unacceptable demands from the European Union..." Further, he explained that "the European Union made a request for its troika to visit Cuba... During the preparations for this visit, we could see that the European Union would indeed attempt to subject Cuba's admission into the ACP-EU Partnership Agreement to the performance of political, economic and social changes in Cuba, fully rejected by our country, in what is a flagrant interference in our domestic affairs." According to the Cuban authorities, their country had been subject to discriminatory treatment that had never before been applied to other candidate countries. But Cuba is still open to dialogue with the EU and prepared to sign the Cotonou Agreement on condition that the EU refrains from imposing any prerequisite conditions

on the country. At its meeting in Brussels, on 14 December 2000, the ACP Council of Ministers admitted Cuba as the 78th member of the ACP Group. Cuba thus became the first ACP member-state that does not participate in cooperation with the EU. This eventuality is not provided for by the Georgetown Agreement, which is the charter of the ACP Group. The Council's decision in Cuba's favour comes as a result of an amendment to the charter.

(3) Decision of the ECCJ of 3 December 1996 in Case C-268/94, Rec. 1996-12, pp.I-6214-6218; and specifically p.I-6217, par.27. On this topic, see the relevant remarks of Joe Verhoeven, "La Communauté européenne et la sanction internationale de la démocratie et des droits de l'homme," in *Liber Amicorum Mohammed Bedjaoui* 786-788 (Emile Yakpo & Tahar Boumedra eds., (1999))

(4) For instance, it is the case of consultations between the European Union and the ACP on the political situation in Côte d'Ivoire, which began on 15 February 2001. At the end of consultations, the two parties agreed to extend the consultations for three months and to jointly assess the progress achieved at the end of that time. Press release 146b044e, 16 February 2001.

(5) These procedures are strongly inspired by the mechanism envisaged by Article 65 of the Vienna Convention on the treaties between international organizations or States and international organizations. It answers an essential concern, which is the guarantee of the stability of relations deriving from conventions. Thus, one could not speak about the introduction of a right to the suspension or the automatic or immediate denunciation of the international agreements.

(6) Blocking a 44.4 million Euro financing provision under the second tranche of the National Indicative Programme (NIP) under the 8th EDF; suspension of direct budget aid, which mainly affects structural adjustment and a food security programme; and exclusion of Haiti from the management of the left-over of the first tranche of the NIP under the 8th EDF. The European Union accused the government of Haiti of violating Article 9 of the Cotonou Agreement relating to Democracy, Human Rights and Good Governance, invoking two arguments: a bad system for counting the votes of nine senators during the recent legislative elections in Haiti, and the intimidation exerted on opposition candidates at that time. During the consultations between the EU and Haiti held on 26 September 2000, the Haiti government observed that the criticized counting system was the one applied in the previous elections in Haiti, which were hailed as free and honest by the international community, and that government made all efforts to look for the authors of intimidation and other crimes perpetrated against high officials. The Government of Haiti complained that the "the European Union has not taken due account of the process of dialogue, which has been intensified in Haiti and has considerably progressed these past weeks." Furthermore, Haiti has complained that "the European Union has ignored all the efforts underway in Haiti, by adopting sanctions barely a few days after the investiture of the new, democratically-elected President of Haiti."

(7) Press release 146b042e, 5 February 2001.

(8) Press release 146b050, 17 March 2001. See also, ACP-EU 3170/01/fin. resolution on the situation in Haiti.

(9) Joe Verhoeven, *op. cit.*, p.789.

(10) These sanctions adopted by the EU included suspension of military cooperation and arms sales; suspension of visits by members of military and intelligence services; visa restrictions for military and security forces (and their family members); a sports boycott; and suspension of development cooperation.

(11) The Working Group is to examine the following: a) the circumstances leading to the imposition of sanctions; b) what kind of sanctions were imposed; c) which countries, regional groupings or international organisations imposed sanctions; d) the aim of the sanctions; e) the impact of the sanctions on the mass of the population, sector by sector where appropriate; f) the impact of the sanctions on the policy-makers/governments. See, Working document 1 on the Working Group's mandate and Nigeria. DT/411/411175EN.doc. AP/2969.

(12) Joe Verhoeven, *op. cit.*, p.790.

(13) The ACP-EU Joint Assembly, Resolution on the situation in Côte d'Ivoire, 20-23 March 2000, Abuja (Nigeria).

(14) ACP-EU 3168/01/fin. Resolution on the situation in Fiji, the Salomon Islands, paragraph 13.

(15) ACP-EU 3145/01/fin. Resolution on the political situation in the Comoros, E.

(16) *Ibidem*, E.4.