COTONOU ARTICLE 96

When Agreement Breaks Down, What Next?

The Cotonou Agreement's Article 96 Consultation Procedure

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Contents

This discussion paper is intended as a basic introduction to Article 96 of the EU-ACP Cotonou Partnership Agreement. It looks at the content and meaning of the article, as well as the consultation procedures for which the article provides when one of the signatory parties feels that the Agreement's essential elements have been breached. It is also an introductive text for a series of ECDPM-published papers written by different authors on the difficult questions raised by the use of Article 96 (www.ecdpm.org/article96). The idea behind this series is to make information available on Article 96 and to encourage debate on whether Article 96 serves its intended purpose and how it can best be applied. Three papers and an overview table of cases are available in this series, or will be shortly, and ECDPM hopes that further publications will follow in due course.

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1. Introduction

Article 96, and its rarely used sister Article 97, are easily the most controversial articles in the Cotonou Partnership Agreement. They provide the legal basis for the suspension of the Cotonou Agreement in cases where one of the parties feels that the agreement's *essential* and *fundamental elements* are not being respected. The articles are therefore inevitably linked to some form of disagreement or breakdown in relations between signatory parties. Yet, the inclusion of these articles in the Cotonou Agreement is not surprising: breakdown clauses, describing what to do when parties no longer agree on the way forward, are common currency in contracts and memoranda of agreement. So why the controversy?

In drafting the Cotonou Partnership Agreement, the EU and ACP negotiators took the trouble to specify that the use of Article 96 should be preceded by a period of dialogue and that it was therefore only to be used if all attempts to resolve differences had failed. Indeed, the main content of Article 96 relates to further discussion or 'consultations' as these are called. The emphasis is therefore heavily on dialogue and trying to reach agreement. Finally the Article does not even specify what action should be taken if no satisfactory resolution to the differences can be found, it merely refers to 'appropriate measures', thereby leaving the door open to more or less serious sanctions that can take a wide variety of different forms and be adapted to different situations. In this respect, Article 96 therefore allows officials considerable latitude. This is perhaps the first reason for controversy, as once the EU invokes Article 96, ACP governments often feel they will be locked into an unknown yet inevitable process which they are powerless to oppose.

Another reason for controversy is of course that such cases attract attention. With the growing public demand for accountability in the use of development cooperation funds, OECD country governments are increasingly asked to explain how aid funds are used and to ensure that no misuse occurs. Globalisation too has meant that the public is better informed, and cases of human rights abuses, the breakdown of the rule of law and anti-democratic practices are likely to be brought to the public's attention by the media. The world has become used to viewing such cases as everyone's business and not just as the internal affairs of one country. Donor governments are therefore under pressure to be seen to be doing something and invoking Article 96 is one obvious action to take.

Despite the controversy there remains little published material on the use of Article 96. In an effort to remedy this ECDPM is producing a series of short papers that explore different aspects of Article 96 application. The intention is both to inform stakeholders on the use of Article 96 and to encourage debate around the subject. In the longer term, this will hopefully promote better understanding and, perhaps, even lead to a more sensitive use of the dialogue possibilities to resolve differences. This might ultimately result in fewer cases of breakdowns in relations and imposition of sanctions.

The series starts with three very different contributions, in addition to this introductory text. In the first, Lydie Mbangu provides a concise description of three recent cases of the use of Article 96: in the Central African Republic, Togo and Guinea-Bissau. Mbangu's paper is particularly interesting because the chosen cases show how Article 96 consultations can bring about positive outcomes. She also stresses the value of the involvement of other actors beyond the formal parties. As such, her paper points to the useful contributions that can be made by such actors as the ACP Group and the African Union.

In the second paper, Hadewych Hazelzet reviews the background and origins of Article 96 and the use made of its predecessor, Article 366a from the Lomé Convention. Dr Hazelzet's perspective is more historical in that she analyses cases from the period before Cotonou which set the scene for the drafting of the provisions in the current agreement. She systematically analyses how the provisions were applied, in particular the consistency of their application, and concludes that there is little evidence to support one of the most frequent criticisms made of Article 96: that the EU tends to apply the article inconsistently. Her article also offers a number of explanations for why the provisions were or were not applied.

The third contribution consists of a short article and a a table compiled by Andrew Bradley listing details of all the cases in which Article 96 has been used since the Cotonou Partnership Agreement was signed. This table serves as a basic guide to the whole question.

A further paper by James Mackie and Terhi Lehtinen, which will be published in the coming months, looks at the Zimbabwe case, and to what happened when Article 96 was invoked there in 2001. The main lesson here is that Article 96 is of little or no use for resolving a difference without the requisite political will on both sides.

The importance of examining Article 96 and 97 consultation procedures, understanding how they work and how best to use them should not be underestimated. The international development community has come to recognise the vital role played by good governance in promoting development. There is also growing appreciation of the fundamental value of the framework that the state must provide in terms of the rule of law, well-functioning public institutions and respect for human rights and democracy if a country is to develop systematically. This was already recognised in the Lomé IV Convention and led the EU and the ACP to agree to include some of these principles as *essential elements* in the Lomé Convention. In the Cotonou Partnership Agreement they went further and named good governance as the *fundamental element*.

Obviously the aim should be to take steps before matters get out of hand and ensure that these principles are not broken, but when things do go too far there comes a point when one of the parties to the Agreement must draw a line and indicate that in their view these *elements* are being broken and the Agreement breached. If that is not done the essential and fundamental nature of these principles lose their meaning and the very foundation of the partnership, as both parties have themselves defined it, is undermined.

Yet it is not enough to draw the line. A way must be found to resolve the situation and re-establish the partnership on a firm footing. That is where Articles 96 and 97 come in. Their success must thus be measured against their ability to provide a framework for problem resolution and the reinstitution of respect for the *essential and fundamental elements*.

2. What is Article 96?

2.1 The political dimension of the Cotonou Agreement

Although not formally placed in Title II (Articles 8-13) on the 'Political Dimension' of the Cotonou Agreement, but in its Final Provisions, Article 96 is closely associated with the political pillar of the Agreement. It can only be invoked when the 'essential' elements spelled out in Article 9 of Title II have been breached, and should only be used after the means of regular political dialogue under Article 8 of the same title have been exhausted. The political dimension of the Cotonou Agreement is one of its major innovations. Title II includes articles on peacebuilding policies, conflict prevention and resolution (Article 11) and migration (Article 13), in addition to the above-mentioned Article 9 on "essential elements" (human rights, democratic principles and the rule of law) and the "fundamental element" (good-governance) and Article 8 on political dialogue.[1] During the Cotonou Review in 2005 two further articles on the fight against terrorism (Article 11bis) and on countering the threat of weapons of mass destruction (Article 11ter) have been added.

2.2 The article itself

Article 96 in essence stipulates that formal consultations can be called when a breach of the essential elements listed in Article 9 is deemed to have occurred, and provides the basis for the application of 'appropriate measures' (sanctions) which can lead to the suspension of cooperation [Article 96(3)(a) and (c)[2] , see Box 1 below]. A separate Article 97 in the Final Provisions foresees a similar consultation procedure when the 'fundamental' element of the CPA (good governance) has been breached, that is in 'serious cases of corruption'. However, this has not been used in practice, although issues of serious economic mismanagement were addressed in the context of Article 96 consultations in both the cases of Liberia (2001), where the EC had also requested Article 97 consultations and the Central African Republic (2003), discussed by Lydie Mbangu in this series of papers.

Notes

1 For further information on the political dimension of the Cotonou Agreement, see for instance, ACP-EU Courier (2003) and ECDPM (2001).

2 The text of the Cotonou Agreement used in this paper is that as amended in the first quinquennial review of the Agreement concluded at the end of February 2005.

Formal consultations under Article 96 are foreseen only if the regular political dialogue between the parties, as envisaged in Article 8 of the Cotonou Agreement, fails to prevent a violation of human rights, democratic principles and the rule of law [Art. 96(2) and (3)(a)]. As such, Article 96 is clearly designed as a measure of last resort. The link between Article 8 and Article 96 was further reinforced in the recent quinquennial review of Cotonou which made *clear that 'all possible options for dialogue under Article 8*' [Art. 96(2)] must be exhausted before Article 96 is invoked. The Review also added a new Annex to the Cotonou Agreement which further stresses this link and provides for *'intensified Political Dialogue preceding Article 96 Consultations'* [Annex VII, Art. 2, see annex to this paper] and indicates that this dialogue should be *'systematic and formal'* [Annex VII, Art. 2(3)]. Two exceptions to this obligation of prior intensified political dialogue are foreseen, that is, in *'cases of special urgency'* and in cases where *'there is persistent lack of compliance with commitments taken by one of the Parties during an earlier dialogue, or by a failure to engage in dialogue in good faith'* [Annex VII, Art. 2(4)].

The consultations are intended as a means of *'seeking a solution acceptable to the Parties',* to *'focus on the measures taken or to be taken by the party concerned to remedy the situation'* (i.e. the breach of the essential elements), and should lead to "appropriate measures" only where consultation fails to reach a *'solution acceptable to both parties'* or is refused, or in *'cases of special urgency'* [Art. 96(3)(a)].

If "appropriate measures" are taken, these should be *'proportional to the violation'* and *'in accordance with international law'*. Suspension of cooperation should be a *'measure of last resort'* only, and all measures should be *'revoked as soon as the reasons for taking them have disappeared'* [Art. 96(3)(a)]. In cases where the EU deems that the appropriate measures possible within the legal framework of the Cotonou Partnership Agreement are insufficient, it can decide to impose further sanctions unilaterally in the framework of its Common Foreign and Security Policy (CFSP).

Article 96 states that consultations can be called by either party to the agreement (defining as "party" the European Community and EU Member States on the one hand and each ACP state on the other) when one *'considers that the other Party fails to fulfil an obligation stemming from respect for human rights, democratic principles and the rule of law'* [Art. 96(3)(a)]. In practice, the provision has been invoked only by the EU in response to violations of the essential elements on the ACP side. For this reason it has come to be seen as an article of sanction to be used by the EU against ACP states.

Historically, Article 96 succeeds Article 366a of the Lomé IV Convention, which in the 1995 mid-term review of the convention introduced for the first time a legal basis for taking "appropriate measures" or even suspending EU-ACP cooperation if human rights, democracy or the rule of law (Article 5) were violated. Previously, EU cooperation had been suspended without a formal procedure or specific legal basis for a number of ACP countries, as in, for instance, the Sudan in 1990. This state of affairs was, of course, often seen as lacking in transparency.

Box 1: Article 96 of the Cotonou Agreement, as amended in 2005

Essential elements: consultation procedure and appropriate measures as regards human rights, democratic principles and the rule of law

1. Within the meaning of this Article, the term "Party" refers to the Community and the Member States of the European Union, of the one part, and each ACP State, of the other part.

2. Both **parties agree to exhaust all possible options for dialogue under Article 8**, except in cases of special urgency, prior to commencement of the consultations referred to in paragraph 3(a) of the present Article.

3.(a) If, despite the political dialogue on the essential elements as provided for under Articles 8 and paragraph (2) of the present Article, **a Party considers that the other Party fails to fulfil an obligation stemming from respect for human rights, democratic principles and the rule of law** referred to in paragraph 2 of Article 9, it shall, except in cases of special urgency, supply the other Party and the Council of Ministers with the relevant information required for a thorough examination of the situation with a view to **seeking a solution acceptable to the Parties**. To this end, it shall **invite the other Party to hold consultations that focus on the measures taken or to be taken by the party concerned to remedy the situation** in accordance with Annex VII.

The consultations shall be conducted at the level and in the form considered most appropriate for finding a solution.

The consultations shall begin no later than 30 days after the invitation and shall continue for a period established by mutual agreement, depending on the nature and gravity of the violation. In any case, the dialogue under the consultation procedure shall last no longer than 120 days.

If the consultations do not lead to a solution acceptable to both Parties, if consultation is refused, or in cases of special urgency, **appropriate measures may be taken**. These measures shall be revoked as soon as the reasons for taking them have disappeared.

(b) The term "cases of special urgency" shall refer to exceptional cases of particularly serious and flagrant violation of one of the essential elements referred to in paragraph 2 of Article 9, that require an immediate reaction.

The Party resorting to the special urgency procedure shall inform the other Party and the Council of Ministers separately of the fact unless it does not have time to do so.

(c) The "**appropriate measures**" referred to in this Article are measures taken **in accordance with international law, and proportional to the violation**. In the selection of these measures, priority must be given to those which least disrupt the application of this agreement. It is understood that suspension would be a measure of last resort.

If measures are taken in cases of special urgency, they shall be immediately notified to the other Party and the Council of Ministers. At the request of the Party concerned, consultations may then be called in order to examine the situation thoroughly and, if possible, find solutions. These consultations shall be conducted according to the arrangements set out in the second and third subparagraphs of paragraph (a).

Source: The ACP-EU Partnership Agreement, consolidated version 2005.

3. Key Issues on Article 96

Article 96 has acquired a somewhat negative image partly due to its very nature, as it indicates that there is *serious disagreement* between the Parties concerned (i.e. the EU and an ACP country). Since it is used only when one party considers that the other has failed to fulfil an obligation and when this situation has not been resolved during 'normal' political dialogue discussions under Article 8 between the parties, the initiation of a consultation procedure signals the existence of serious differences.

Moreover, although the EU prefers to view the consultation procedure as an ultimate means for resolving differences through deepened discussions, the perception on the ACP side is that of a *sanctions article*, given that so far it has only been used by the EU in response to ACP actions, and failure to reach agreement during consultations has meant some form of punishment of the ACP state concerned. This imbalance clearly stretches the concept of a partnership of equals and points to the limits of the Cotonou Agreement as an international cooperation contract between partners that are unequal in terms of resources. Of course, this also links to the broader debate about *political conditionality*, which concedes that sanctions do not necessarily achieve their desired result, as evidenced by the data in Hazelzet (2005) published in this series. Moreover, many ACP states reject being judged by an entity made up of former colonial powers. There is perhaps also an intrinsic unfairness in a procedure that sets one country against a group of countries and forces it to defend its actions, although this is somewhat reduced by the fact that increasingly the ACP country concerned chooses to involve friendly countries in the procedure.

Perceptions of Article 96 have also been affected by a certain *lack of clarity about when and how it is used*, about the political dimension of the Cotonou Partnership Agreement in general and especially about the distinction between Article 8 and Article 96. Thus, while the Cotonou Agreement envisages that regular political dialogue under Article 8, which *'shall also encompass a regular assessment of the developments concerning the respect for human rights, democratic principles, the rule of law and good governance'* [Art. 8(4)], should prevent the necessity of resorting to formal consultations under Article 96 [*'The objectives of the dialogue shall also include preventing situations arising in which one Party might deem it necessary to have recourse to the non-execution clause'* Art. 8(2)], in practice the distinction between the regular dialogue under Article 8 and the ad hoc, one-off dialogue under Article 96 has somewhat blurred, at least for many ACP observers.

Scepticism on the ACP side and the perception or fear of Article 8 discussions as simply a prelude to Article 96 consultations does seem to have meant that the *tool of regular political dialogue has not been used extensively or consistently* by the EU and ACP states. Thus, while in some countries Article 8 dialogue did prevent an Article 96 procedure, in other cases differences could not be resolved in consultative discussions. This was especially so in the controversial case of Zimbabwe (discussed in more detail in a forthcoming paper in this series). Critics argue that in Zimbabwe the quick move from Article 8 discussions to a formal Article 96 procedure prevented a less confrontational dialogue from taking off. The 2005 review of the Cotonou Agreement clarified the link between Article 8 and Article 96 making it very explicit that *'intensified dialogue'* under Article 8 is mandatory before Article 96 is invoked. It remains to be seen whether this will resolve the difference in perception and encourage a more relaxed attitude towards Article 8.

This discussion also highlights a procedural point, namely that consultations under Article 96 can be called by a *unilateral decision* of one of the parties, which in practice means that they start after an EU decision. Many ACP countries feel that such decisions lack transparency, are political, inconsistent and frequently taken too quickly. Not surprisingly - given that the Cotonou Agreement is based on the principle of partnership - the ACP Group would like to make this a joint EU-ACP decision (Sardjoe 2004). The ACP countries in fact sought to change this and proposed in the 2005 review of the Cotonou Agreement that the opening of Article 96 consultations be made a joint decision. However, the EU refused this change arguing that it robbed the article of its purpose. Instead the provision for *'intensified dialogue'* under Article 8 before moving to Article 96 was agreed.

4. Article 96 in Practice

4.1 Guidelines for the article's application

Unlike ACP-EU political dialogue under Article 8, for which guidelines were jointly agreed in May 2003, until recently *no guidelines* existed for how Article 96 should be applied. This lacuna was partially remedied by the new Annex VII drawn up during the 2005 review, although the new guidelines are still not as detailed as those for Article 8. The article itself gives some indications of how and when Article 96 should be implemented (see Box 1), but many points remain open to interpretation. This is particularly true regarding the move from Article 8 dialogue to Article 96 and the start of a consultation procedure, which is seen by the ACP as lacking in transparency, though as mentioned above this has been redressed to some extent in the 2005 revision.

The new Annex VII of Article 3 encourages the parties to *'strive to promote equality in the level of representation during consultations'* and *'to transparent interaction prior to, during and after formal consultations' and to 'use the 30-day notification period... for effective preparations and deeper consultations'* within the ACP and the EU. There is also a specific reference to the value of the role of ACP peers in the dialogue. Moreover, the revised version of the article doubles the periods of notification and of the consultation procedure, to 30 and 120 days respectively [Art. 96(3)(a)]. So there is now more indication of how to proceed with the consultations and more time in which to conduct them. Both of these measures should help those involved to conduct a dialogue that is less formal, hurried and stultified.

The basic steps of an Article 96 *procedure* are outlined in Box 2 and are described in more detail in Hazelzet's paper in this series.

Box 2: Consultations under an Article 96 procedure

- One of the parties *'considers that the other Party has failed to fulfil an obligation stemming from the respect for human rights, democratic principles and the rule of law'* [Art. 96(3)(a)].
- The party conducts its own internal discussions to clarify its position and consider how it will present its concerns to the other party.
- In the EU's case this involves:
  - Discussions in the relevant working groups in the EU Council;
  - The Commission issues a proposal to the Council to start consultations (either at own initiative or on request by the Council)
  - Further discussion and perhaps amendment of the proposal in the Council at working group level, then acceptance by the EU Committee of Permanent Representatives and the Council of Ministers.
- The demanding party supplies 'the *other Party ... with the relevant information required for a thorough examination of the situation'* and invites *'the other Party to hold consultations that focus on the measures taken or to be taken by the party concerned to remedy the situation'* [Art. 96(3)(a)]. For the EU this is done by letter from the EU Council to the authorities of the ACP country concerned.
- The other party accepts or declines invitation to start consultations (in which case the demanding party can move straight to 'appropriate measures')
- *"The consultations shall begin no later than 15 [now 30] days after the invitation',* are *'conducted at the level and in the form considered most appropriate for finding a solution'* [Art. 96(3)(a)] and normally take place in Brussels.
- Participants in the consultations are, for the EU, the Troika; for the ACP, the ACP state in question, the "group of friends" of the country in question, relevant regional organisations (e.g. the African Union) and the ACP Secretariat.
- During the consultations, attempts are made to agree on a list of commitments and a timeframe in which to fulfil them.
- Consultations last *'for a period established by mutual agreement'*, and *'no longer than 60 [now 120] days'* [Art. 96(3)(a)]. They are closed officially through a procedure similar to that of initiating the consultations. For the EU, this is by decision of the Council on proposal of the Commission
- If agreement is reached on the commitments, the country concerned takes the agreed steps.
- If no agreement is reached, if the country refuses to fulfil the measures or keep to the timeframe of the consultations or in cases of special urgency:
  - The other party takes "appropriate measures";
  - The other party may or may not apply appropriate measures until the commitments are fulfilled (i.e. until respect for the essential elements is fully restored).
- The appropriate measures to rectify the situation should be *'revoked as soon as the reasons for taking them have disappeared'* [Art. 96(3)(a)].
- To this end, the situation in the country to which the appropriate measures apply is monitored regularly, usually on at least a six-monthly basis.

Sources: Based on Article 96(3)(a) and Hazelzet (2005).

4.2 Where has Article 96 been applied

From 1996 to 2004, consultations under Article 96 and its predecessor Article 366a were called with 11 ACP countries (Niger, Togo, Guinea-Bissau, Comoros, Cote d'Ivoire, Haiti, Fiji, Liberia, Zimbabwe, Central African Republic and Guinea-Conakry), sometimes several times with the same country (see Bradley 2005, Box 3 provides a summary list). The consultations were mostly called in response to coups d'état and flawed election processes[3] but also in response to other violations of human rights, democratic principles and the rule of law (the essential elements set out in Article 9 of the Cotonou Agreement). In 11 of the 15 cases consultations led to the application or continuation of "appropriate measures" of some sort, ranging from the non-notification of new resources (e.g. in Comoros in 1999) to the complete suspension of cooperation (e.g. in Fiji in 2000). At the time of this writing in mid-2005, measures applied to six ACP countries, namely Togo, Haiti, Liberia, Zimbabwe, Central African Republic and Guinea-Conakry.

Other papers in this series examine instances in which the consultation procedure was used. The cases of Guinea-Bissau (2004), Togo (2004) and the Central African Republic (2003) are assessed by Mbangu (2005). The case of Zimbabwe (2002) is analysed by Mackie and Lehtinen (forthcoming).

Box 3: Application of Article 96 /97 of the Cotonou Agreement and Article 366a of the Lomé IV Convention

Consultations held under Article 96/97 of the Cotonou Partnership Agreement and Article 366a of the Lomé IV Convention:

- Togo (1993; 1998 and 2004) - Art. 366a and Art. 96
- Niger (1996 and 1999) - Art. 366a
- Guinea-Bissau (1999 and 2004) - Art. 366a and Art. 96
- Comoros (1999) - Art. 366a
- Cote d'Ivoire (2000 and 2001) - Art. 366a and Art. 96
- Haiti (2000) - Art. 96
- Fiji (2000) - Art. 96
- Liberia (2001) - Art. 96 and 97
- Zimbabwe (2002) - Art. 96
- Central African Republic (2003) - Art. 96
- Guinea-Conakry (2004) - Art. 96

Sanctions/appropriate measures apply to the following ACP countries:

- Sudan (since 1990)[4]
- Togo (since 1993)
- Haiti (since 2001)
- Liberia (since 2002)
- Zimbabwe (since 2002)
- Guinea-Conakry (since 2005)

Source: Bradley (2005).

Notes

3 Hazelzet (2005)

4 Commenced prior to inception of Article 366a

5. What makes for successful Article 96 consultations? What could be improved?

Without at this point going into further definitions of what should or should not be considered successful Article 96 consultations - *'finding a solution acceptable to both parties and/or implementing measures to remedy the situation'* (European Commission 2003) - a number of factors have been cited which have in the past helped conclude consultations positively. Both Hazelzet and Mbangu discuss these in more detail in their contributions to this series. Here we merely draw out some key points.

5.1 Factors contributing to success

One key factor determining the positive or negative outcome of a consultation procedure is, perhaps not surprisingly, the *commitment of the authorities* of the (ACP) country concerned to remedy the situation that led to the invocation of Article 96. This could be seen in the recent cases of Guinea-Bissau (2004) and Guinea-Conakry (2004). The cooperative attitude of the governments of these countries enabled the consultation procedure to be concluded positively and with a set of commitments agreed.

Also important, as the European Commission's communication on governance and development highlights, is *'the coherence of the EU position and the coordination between donors'* (European Commission 2003: 9). As the cases of Guinea-Bissau (2004), the Central African Republic (2003) and Togo (2004) discussed by Mbangu illustrate, a coordinated response by the EU and the international community to a violation of human rights, democracy or the rule of law increases the chance of reversing the situation and achieving a positive outcome of a consultation procedure.

Further elements that are important in facilitating a positive outcome of a consultation procedure are the *clear identification of the concrete violations of the essential elements and of the steps that need to be taken* by the authorities concerned and the *adoption of positive measures* by the EU to assist in achieving these steps (European Commission 2003). This was clearly evident in the case of Guinea-Bissau (2004), where the non-suspension of cooperation and the provision of additional assistance to support the transition towards democracy and the rule of law by the EU and some of its Member States contributed to the positive results achieved by the country after the consultation procedure (elections considered free and fair were held within the envisaged timeframe).

As many commentators and EU officials stress, maintaining close *political dialogue* (Article 8) *during and after an Article 96 procedure* is another factor which can contribute to the success of consultations, as such dialogue enables both sides to maintain regular contact. This is perhaps one of the lessons learned from the case of Zimbabwe (Mackie and Lehtinen, forthcoming), where Article 8 political dialogue never really got off the ground and was completely blocked once Article 96 was invoked.

Once remedial measures to be taken by the authorities have been agreed and a timetable set in a consultation procedure, *monitoring and regular reviews* of the situation in the country concerned are vital to ensure that commitments are met. As Mbangu (2005) stresses, *'the follow-up phase could be considered one of the biggest challenges to a successful consultation procedure'* (p. 16).

Finally, *the active involvement of the ACP Group and the "group of friends" of the ACP country concerned* have increasingly been shown to have a positive influence on the outcome of an Article 96 consultation procedure. The cases of Guinea-Bissau (2004), the Central African Republic (2003) and Togo (2004) illustrate the influence of the moderating role played (or not played) by the ACP Group, relevant regional organisations and neighbouring states of the country concerned - in other words, its peers - in the success of consultations.

5.2 What could be improved?

Arising from the above are a number of lessons which, if taken into account, could improve the chances of success of an Article 96 consultation procedure.

Lesson 1: Use fully the possibilities offered by political dialogue under Article 8 before initiating an Article

96 procedure; and do not move too quickly from Article 8 to Article 96. This is in fact the key thrust of the changes made during the 2005 review of the Cotonou Agreement. This is not to say that persistent problems with a country's democratic record should be ignored (as some commentators feel has happened in the case of the Central African Republic). Rather, sufficient time allowed for Article 8 dialogue to produce a positive result could in some cases avert the necessity of resorting to formal consultations under Article 96, which by nature risk being much more acrimonious. If an Article 96 procedure is started, maintaining political dialogue or regular contact at the field level during and after the consultations can improve the likelihood of positive change by ensuring that communication on a broad range of issues is maintained and relations upheld in a less formal context.

Lesson 2: Make decisions on Article 96 as transparently and consistently as possible and allow the other party *sufficient time to prepare its position*. This might increase the chance of achieving a positive outcome of the consultations; in other words, an agreed way forward.

Lesson 3: Involve the ACP Group and the friends of the country concerned at an early stage. The positive contribution of the ACP Group, of regional organisations and of neighbouring states has been apparent in past applications of Article 96 (such as in the consultations with Guinea-Bissau and Togo). Broader participation might also reduce the perception of Article 96 as a "trial" of an ACP country by the EU. The presence of peers as mediators might influence the attitude of the authorities within the country in question. To ensure that mediators are in a position to play this moderating role proactively (and given the difficulties of coordination between such a large number of countries), the ACP is working on various measures, such as setting up an early warning mechanism, organising fact-finding missions, developing a procedure for assisting countries "at risk" of consultations, composing "groups of friends" and creating peer groups to support countries under EU sanctions.[5]

Lesson 4: Realism is required in agreeing steps to be taken by the authorities of the ACP country concerned. Further, adequate support and regular monitoring according to clearly defined benchmarks throughout the follow-up phase are key in determining whether the procedure will ultimately be judged a success.

Notes

5 On this point, see the response of the ACP Council to a parliamentary question by Marie-Arlette Carlotti, MEP, at the ACP-EU Joint Parliamentary Assembly in Bamako (Mali) in April 2005.
"The decision to establish an ACP Early Warning Mechanism was based on the wish of the Group to detect problems before they mushroom into a crisis and conflict situation. The Mechanism, which is cost-effective, takes into account efforts undertaken by sub-regional, regional, continental and international organizations, and recognises the importance of accurate information gathering as an important tool to facilitate the early detection of crisis situations. The Mechanism is to operate in close collaboration with the affected ACP State, ACP Missions in the affected ACP State, the appropriate regional organization(s), and the ACP Secretariat. To this end, the ACP Group developed and agreed upon a six-step procedure to operationalise the Mechanism, if and when required.
In terms of appropriate mechanisms to assist countries under sanctions, the ACP Group developed modalities for the creation of a Peer Group. It is envisaged that this Group would work closely with the affected ACP State to facilitate closer relations with the European Council and the European Commission. The Peer Group would also seek to facilitate frank and honest discussion, and evaluation of events. It was agreed that the Peer Group should utilize a Graduation approach that will warn ACP States of certain boundaries that should not be crossed if crisis is to be avoided. The composition of the Peer Group could be at the following three levels:
- Heads of State and Government;
- Ministerial; and
- Ambassadorial.

The mechanisms and modalities for the establishment of an ACP Early Warning Mechanism and the creation of a Peer Group are in place, and I can assure this august Assembly that should and when the need arises, these instruments will be operationalised.
Furthermore, to assist ACP States under sanctions within the ACP-EU Framework and to further enhance intra-ACP political dialogue, the ACP Group decided to establish a permanent Working Group on Sanctions, which functions under the guidance of the ACP Committee of Ambassadors."

6. On partners and peers

Since the Cotonou Partnership Agreement was signed in 2000, Article 96 has been a source of controversy, not least because the whole area of conditionality of aid is a subject of heated debate. Efforts to respond to ACP criticisms were made in the recent five-year review of the Cotonou Agreement, so it is to be hoped that some of the controversy will recede although it is unlikely to disappear completely. The changes made to the text in 2005 pick up a number of lessons learnt over these past five years as identified above.

In particular, the 2005 review sought to put an even greater emphasis on the need for thorough dialogue between parties before either invokes Article 96. It also stressed the importance of transparency and openness. Perhaps the most significant change, however, is the recognition in the new Annex VII that the ACP as a group can play a useful role in Article 96 consultations. This point could have been given more prominence by including it in the agreement itself rather than in an annex. Moreover, as currently formulated, no explanation is given as to why the role of the ACP Group is important, but at least the point has been formally accepted and there is an opening for explaining its value further in a discussion on modalities to be communicated by the ACP to the EU. The ACP therefore has an opportunity to make the case for greater involvement of the ACP Group more fully in writing and in public to ensure that the point is well understood by all stakeholders.

The importance of assigning the ACP Group a formally recognised role in the Article 96 proceedings lies of course in the generally greater effectiveness of peer group pressure over conditionality in securing changes in behaviour in a recalcitrant government. This is one of the early conclusions of this series of publications. It is also a point that is increasingly recognised in other fora, such as the New Partnership for Africa's Development (NEPAD) with its African Peer Review Mechanism and in the international community's growing reliance on the African Union, as the most appropriate lead actor in cases of unconstitutional changes of government in Africa. The question of the role of the ACP Group goes to the very heart of the concept of partnership and yet is one that perhaps is not yet given enough credence in the Cotonou Agreement.

The Cotonou partnership is often criticised as not being an equal one, but partnerships rarely are, and productive partnerships are more often based on the principle of complementarity than on equality. Parties enter into partnerships when they can identify a common goal which they both value, but which neither can achieve on its own. Each party is expected to bring something to the partnership, and it is putting these contributions together in a common effort which achieves the goal. But each partner also brings certain conditions which they want respected if they are to remain in the partnership. In the Cotonou partnership the *essential and fundamental elements* are some of the key conditions that the parties have agreed upon as underlying the partnership, primarily because these are widely recognised internationally as preconditions for development and poverty reduction, which are the overall objectives of the Cotonou Partnership Agreement.

The *essential and fundamental elements* are therefore *already a conditionality* in the Cotonou partnership. The problem with imposing any sanctions that may emerge from Article 96 consultations therefore lies not so much in the imposition of a new conditionality, but rather, in one party pulling back from the partnership because it feels the other has failed to respect the agreement on which the partnership is based. The issue with Article 96 is thus not so much one of conditionality of aid, but of re-establishing a partnership when one partner, usually the stronger of the two, feels the other is not respecting the original agreement, and the weaker partner feels the stronger one is seeking to use its strength to impose its will.

This is the point at which peer groups become useful. In an unequal partnership, the peers of each partner might be able to persuade the partner in question that they stand more to gain by taking action to re-establish the partnership than by insisting they are no longer willing to fulfil the original conditions of the partnership. This applies to both sides of the partnership; it is not just the weaker partners that may need the persuasive powers of peers to see reason, the same is true of the stronger partner. As Article 96 has worked so far, there has been a system of peer group discussion going on within the EU group,[6] but the same cannot be said on the ACP side, where peer discussion has only recently started, but

Notes

6 The EU Member States and the European Commission are part of a number of peer groups, the most important of which is probably the OECD Development Assistance Committee. Although peer dialogue is not necessarily visible in Article 96 consultations, there is little doubt that the DAC has had and continues to have considerable influence on how the EU behaves as a donor, be it vis-à-vis Cotonou or in other partnerships.

has already demonstrated itself as playing a clearly useful role. It is therefore excellent that the 2005 review of the Cotonou Agreement gives some recognition to the role that the ACP as a group can play in helping keep the partnership on track. Though groups and sub-groups of ACP states at the regional and sub-regional level can also support this role, it is only correct for the ACP as a whole to be formally accorded this task in the Cotonou Agreement. It is then up to the individual ACP countries to decide whether individually to also call upon the good offices of other groupings of which they might be a member.

It is unlikely that controversy can be completely removed from the use of Article 96 given its nature, but the redoubled emphasis on dialogue added during the 2005 review of the Cotonou Agreement should help. More importantly, recognising, as the new Annex VII does, and making use of, the persuasive power of peers may well be the secret to improving the Cotonou partnership in this difficult area.

Annex:

Cotonou Partnership Agreement
Annex VII:
Political Dialogue as Regards Human Rights, Democratic Principles and the Rule of Law

(Annex VII, which was added to the Cotonou Agreement upon its revision in February 2005)

ARTICLE 1

Objectives

1. The consultations foreseen in Article 96(3) (a) will take place, except in cases of special urgency, after exhaustive political dialogue as foreseen in Articles 8 and 9(4) of the Agreement.

2. Both Parties should conduct such political dialogue in the spirit of the Agreement and bearing in mind the Guidelines for ACP-EU Political Dialogue established by the Council of Ministers.

4. Political Dialogue is a process which should foster the strengthening of ACP-EU relations and contribute towards achieving the objectives of the Partnership.

ARTICLE 2

Intensified Political Dialogue preceding Article 96 Consultations

1. Political dialogue concerning respect for human rights, democratic principles and the rule of law shall be conducted pursuant to Articles 9(4) and 8 of the Partnership Agreement and within the parameters of internationally recognised standards and norms.[7] In the framework of this dialogue the Parties may agree on joint agendas and priorities.
2. The Parties may jointly develop and agree specific benchmarks or targets with regard to human rights, democratic principles and the rule of law, within the framework of internationally agreed standards and norms, taking into account special and particular circumstances of the ACP State concerned. Benchmarks are mechanisms for reaching targets through the setting of intermediate objectives and timeframes for compliance.
3. The political dialogue set out in paragraphs 1 and 2 shall be systematic and formal and shall exhaust all possible options prior to Article 96 consultations.
4. Except for cases of special urgency as defined in Article 96(3)(b) of the Agreement, Article 96 consultations may also go ahead without preceding intensified political dialogue, when there is persistent lack of compliance with commitments taken by one of the Parties during an earlier dialogue, or by a failure to engage in dialogue in good faith.
5. Political dialogue under Article 8 will also be utilised between the Parties to assist countries subject to appropriate measures under Article 96, to normalise the relationship.

Notes

7 **Joint Declaration: The internationally recognised standards and norms are those of the instruments referred to in the Preamble of this Agreement.**

ARTICLE 3

Additional rules on consultation under Article 96 of the Agreement

1. The Parties shall strive to promote equality in the level of representation during consultations under Article 96.

2. The Parties are committed to transparent interaction prior to, during and after the formal consultations, bearing in mind the specific benchmarks and targets referred to in Article 2(2) of this annex.

3. The Parties shall use the 30-day notification period as provided for in Article 96(3) of the Agreement for effective preparation by the parties, as well as for deeper consultations within the ACP Group and among the Community and its Member States. During the consultation process, the Parties should agree flexible timeframes, whilst acknowledging that cases of special urgency, as defined in Article 96 3(b) and Article 1 (4) above, may require an immediate reaction.

4. The Parties acknowledge the role of the ACP Group in political dialogue based on modalities to be determined by the ACP Group and communicated to the European Community and its Member States.

5. The Parties acknowledge the need for structured and continuous consultations under Article 96. The Council of Ministers may develop further modalities to this end.[8]

Notes

8 **Declaration of the Commission and Council of the European Union: As regards the modalities foreseen in Article 3 of Annex VII, the position to be taken by the Council of the European Union within the joint ACP-EU Council will be based on a proposal by the Commission.**

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Further Reading

This paper introduces a series of publications on Article 96 of the Cotonou Partnership Agreement, which are available online. It is our hope that these papers will stimulate debate on this topic. ECDPM aims to publish further articles within this series in due course.

Website

- All publications in this series, as well as relevant links on the subject of Article 96, are available on the Internet (www.ecdpm.org/article96).

Publications in this series

Bradley, Andrew (2005) An ACP Perspective and Overview of Article 96 Cases (Discussion Paper No. 64D). Maastricht: ECDPM

Hazelzet, Hadewych (2005) Suspension of development co-operation: An instrument to promote human rights and democracy? (Discussion Paper No. 64B), Maastricht: ECDPM.

Mackie, James & Julia Zinke (2005) When agreement breaks down, what next? The Cotonou Agreement's Article 96 consultation procedure. (Discussion Paper No. 64A), Maastricht: ECDPM.

Mackie, James & Terhi Lehtinen (forthcoming) Implementing the political dimensions of the Cotonou Agreement: EU political dialogue and consultations with Zimbabwe, Maastricht: ECDPM.

Mbangu, Lydie (2005) Recent cases of Article 96 consultations. (Discussion Paper No. 64C), Maastricht: ECDPM.

Relevant websites

- ACP-EU Partnership Agreement: http://www.europa.eu.int/comm/development/body/cotonou/index_en.htm
- EU website on applied sanctions: http://europa.eu.int/comm/external_relations/cfsp/sanctions/index.htm
- ACP Secretariat: www.acp.int

Other references

ACP-EU Courier (2003) Dossier on political dialogue and Cotonou. (No. 200, September-October), Brussels: European Commission.

Coye, Evadne (2004) Speech of the Ambassador of Jamaica and Head of Mission to the European Union, delivered on 18 March at the Conference on EU Development Policy and Human Rights organised by the Dutch NGO EU Presidency Campaign at the University of Maastricht, Maastricht, the Netherlands.

ECDPM (2001) Cotonou infokit: Politics of the partnership. (Infokit Nos. 18-21), Maastricht: ECDPM

European Commission (2003) 'Human rights and good governance clauses: Consultation procedures', pp. 8 -10 in *Communication on governance & development*. (20.10.2003, COM(2003)615 final, section 2.5), Brussels: European Commission.

Sardjoe, Ramdien (2004) Address of Honourable Ramdien Sardjoe, ACP Co-President, at the opening of the 8th session of the ACP-EU Joint Parliamentary Assembly (22 November 2004), The Hague, the Netherlands. Available on the Internet via www.acp.int.

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