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"The sufficiency of conditionality as Governance Mechanism in European External Agreements"

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Content

Introduction

Clauses in international agreements are regulatory mechanisms that tell the storyline of the European Union's striving for uniform value representation. This has been heavily reinforced by the Lisbon Treaty. In its action the Union *"[…] on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms […]"* and therefore the principles that have by themselves helped to mount the project of European integration.[1]

Since the end of the cold war the external relations of the EU are amplifying through a multiplication of international agreements and[2] the union has progressively set up political conditionality in exchange with others. From 1992 on the EU systematically puts in place clauses into its agreements which are meant be applied in occurrence of grave violations to the principles of human rights, democracy, the rule of law. Moreover, since 1995, for future negotiations the union strived even to increase democratic standards and fundamental rights for a participation of all countries in *all* agreements.[3] These so-called *human rights clauses* are today introduced into all different types of EU agreements: mixed agreements (like the Cotonou Agreement), stabilization and association agreements, partnership and cooperation agreements, as well as regionally shaped agreements as the Euro-Mediterranean Agreement or the Andean/South American partnership agreements.[4]

But unfortunately, human rights clauses lack of coverage of implementation and power – the way in which the EU is addressing its values, still seems to lack of effectiveness and coherence. Thus, *this PhD project wants to examine the general question, whether human rights and democracy and economic clauses are a sufficient instrument for the governance of EU external agreements. More precisely we want to know how partners evaluate the clauses'*

[1] Treaty of the European Union; Article 21, Article 6, OJ C 83/13 of 30.3.2010, the reference to the European charter on Fundamental Rights is important as it has now the same legal value as the treaties.
[2] COM 2006/567/final; especially mixed and association agreements are concerned; the EU is now developing a comprehensive commercial framework which is going beyond WTO provisions; Article 203, Treaty of the Functioning of the European Union;
[3] COM (1995) 216 final
[4] We use the term *human rights clause* here because it has become common language for the technical description of such clauses. In fact and approximately half of all applied *human rights clauses* are due to violations of *democratic principles* or the *rule of law*, one case because of *good governance* issues. The designation can therefore be misleading as it covers general principles guided under Article 21 TEU rather than pure issues of human rights violations. When we refer later to *non-execution clauses* we talk about the later developed mechnism of interrupting the agreement partially. In the PhD it is meant to give a clear distinction on the vocabulary.

existence and application and lastly, what outlook can be given in the light for current important agreement negotiations.[5]

After a short overview about history, profile and function of clauses under political conditionality, the state of literature on the subject will be presented and gaps in coverage will be made visible. In a second part, my analytical proposal will be firstly explained by the presentation of major findings of my prior MA thesis research on conditionality under the Cotonou Agreement. Finally, approach, analysis and precise research questions on work should be explained more thoroughly.

I) The state of play on human rights clauses: why a consolidation is necessary.

a) What are human rights clauses? Why are clauses interesting as a governance mechanism?

i) Human Rights, Democracy and Rule of Law-conditionality

Today, so-called *human rights clauses* take reference to the upholding of human rights, democracy and rule of law standards and partly to good governance mechanisms. But clauses have also been, as they shall be applied since the 1990s, subject to an evolutionary process over time. They haven't been set on a highly elaborated level since the very beginning. Therefore, in the following it is tried to give a short but incomplete overview about the historical development and the today's coverage of the mechanism for the European Union.

Modern human rights clauses can be characterized as a serving mechanism, based on universally recognized norms such as the Universal Declaration of Human Rights, to co-govern international agreements *without breaking them entirely up*: after the development of mere suspension clauses in the agreements with Latvia, Estonia, Lithuania and Albania the EU has gradually and successfully found its way towards clauses that are based on *essential elements* and permit optionally this new partial suspension which is *reciprocal* for both

[5] Current important agreement negotiations take i.e. place with Canada, the USA, or China. Third country agreements in negotiation (05/2014) can be counted to ca. 30. of whom free-trade agreements are currently negotiated with the US, China, Canada, Japan, the ASEAN community, Southern Mediterranean Countries, India, Mercosor, the Gulf Cooperation Council (GCC); see: European Commission Memo/13/1080 of 3.12.2013 Moreover, the re-negotiations for the 2015-mid term revision and the future of the 2020 expiring Cotonou Agreement shall commence within the year 2014; Exchange with ACP Official, 17.02.2014.

parties.[6] Followed by interpretative declarations, the European Commission published in 1995 an important Communication that anchored the inclusion of human rights clauses into any following external agreement draft, containing in its conclusions a *standard wording* about necessary elements that need from now on to be included into key areas of this concerned agreement.[7] The most elaborated human rights clause to date has been introduced into the Cotonou Agreement, where the EU governs its relations towards 79 African Caribbean and Pacific (ACP) countries. The Cotonou framework (with its predecessors, the Lomé III-IV Convention) is also the only agreement where the Human Rights clause has been frequently made use of in practice. Current EU-interior developments carry the idea of political conditionality further, by trying to enhance this mechanism with the elaboration of complementary clauses that should govern bureaucratic performance of partner countries in Economic Partnership Agreements (EPA).[8] The trend that conditionality is enhanced steadily on a non-enlargement level as well, becomes to seize.

Secondly, questions about human rights clauses are not purely political and touch the economic sphere: the heavy dovetail of economic and political issues is revealed by measures that have to be taken in case of the execution of a clause: parties should *"see to it that the objectives set out in the agreement are attained"*, which entails all obligations that EU-external agreements bring within, and therefore also obligations that go beyond the restoration of the respect for human rights, democracy and the rule of law.[9] In other words, a human rights clause could not be executed once the measures taken to remedy these violations are against other objectives of the agreement.

While generally the Commission's policy regarding the uniformity of the wording in human rights clauses is described as a success,[10] they are not implemented into all European trade or partnership agreements. They are notoriously missing in agreements with developed countries

[6] Examples for suspension clauses are to find in EEC-Estonia 1992 OJ L403/2, EEC-Lativa 1992 OJ L403/11 etc., the forthcoming non-execution clause has firstly appeared in EC/MS Bulgaria (1994) OJ L358/1; While the suspension clause carry since then their name "Baltic clause", the modern non-execution clause is also known as the "Bulgarian clause". A complete and excellent history about the implementation of clauses is delivered by Bartels; see: Bartels, Lorand: Human Rights Conditionality in the EU's Human Rights Agreements; Cambridge University Press, Cambridge: 2005; p. 15 ff.

[7] COM (1995) 216 final; see D. Conclusions; the Communication elaborates regulations at for different parts of the agreement, first in the Preamble, later in the in agreements body, with an article defining the elements at stake, an article containing the appropriate measures that can be taken in case of failure and lastly interpretative declarations.

[8] COM (2014) 205 final; the European Commission wants to foster administrative controls at the origin. Clauses are meant to be established once i.e. missing declarations of product origin are not delivered.

[9] The citation is taking from a standard non-execution clause as now contained in almost all agreements,The Cotonou Agreement is the only exception where the question *on all objectives of the agreement* is not applicable.

[10] cit. op Bartels: p. 26

(i.e. with Australia, New Zealand or various customs unions), but also in the old partnership framework with China and other partners.[11] While current re-negotiations of existing partnerships take place with important countries, the implementation of human rights clauses into these new frameworks are widely discussed and contested. Recent public developments show that the inclusion of clauses, on the human rights side or even for the accomplishment of administrative trade issues, are far from being automatically integrated with so-called developed countries: Japan and Canada are strictly rejecting the implementation of human rights clauses into their agreements with the EU. Also, current negotiations with the East African Community are turning around the drop of a tax governance clause as regards their future Economic Partnership Agreement.[12] In brief observation of these actual developments it is interesting to see already the gulf between the theoretical demand and the practical execution of conditionality.

ii) EU conditionality under WTO law

Clauses and conditionality are further part of European external *economic* governance, as provisions from the WTO framework need to be achieved by the EU in interaction with thirds. The EU treats its General Scheme of Preferences (GSP) *unilaterally* under WTO law, whereby the Most Favoured Nation's Clause (MFN) and the derogating Enabling Clause are important key aspects for governance of European external acting. Also, the Vienna Convention on the Law of Treaties, as treaty under international law, has lastly an influence on the applicability of human rights clauses. Both legal dimensions can present conflict areas with the current state of human rights clauses.[13]

GSP conditionality-features interlink human rights more directly with trade aspects and consolidate the field of development cooperation to find their contestation in their unilateral

[11] Ex. For Australia, 1994 OJ L 188 /18, 1994 OJ L 86/1, or the customs union with Turkey: 1995 96/142/EC;
[12] http://www.ctvnews.ca/business/eu-canada-trade-talks-hit-snag-over-wording-of-human-rights-clause-1.1488967; http://www.japantimes.co.jp/news/2014/05/06/national/politics-diplomacy/eu-demands-human-rights-clause-linked-economic-partnership-agreement-japan/#.U52PP_l_vHQ; http://www.nation.co.ke/business/EU-agrees-to-drop-clause-in-trade-talks/-/996/2249346/-/l5e2qd/-/index.html ; in the partnership agreement with Canada, the human rights clause would not appear in the Comprehensive Economic and Trade Agreement, but in a separate Strategic Partnership Agreement. The rejecting of a human rights clause by the Canadian government can have a guiding impact on negotiations on a human rights clause within the TTIP.
[13] For exemplary interpretations see Von Bogdandy, Armin: The European Union as a Human Rights Organization; Common Market Law Review, Vol. 37, 2000; p. 1319; also, Bartels, in contrary to others,

character.[14] On the other hand the EU follows a more *positive approach* in its GSP system, where trading partners can get rewarded once they comply and apply for higher labour standards. Also, while the EU has set out provisions in the annex of the GSP regulation to withdraw preferential treatment after human rights violations from its partners, this has practically only occurred in very few cases.[15] As with human rights clauses as well it can be considered that the procedure to withdraw preferential treatment from others is subordinated to a very open wording.[16] Perceptions about conditionality in trade schemes would complete and complement different perspectives and they would be even considered as helpful to improve the mechanism. Nonetheless the focus on conditionality perception under WTO law shall rest the minor part of the project, mostly because of the grown field of action under EU law to address the problem of conditionality in partnership frameworks.

Thus, one first question results as a guidance for this work: can the EU as a normative power ensure the implementation of human rights clauses into all of its external agreements or are future non-implementations illustrative for the EU's submission under simple bargaining clusters? It is lastly also a question, if clauses under political or economic conditionality *serve the need of reinforcing* human rights and democracy standards as such or if they prove redundancy when the EU interacts with economically powerful partners. In order to analyse this problem, and for me as a logic consequence, partner country perceptions and point of views from different socio-economic levels and expert positions need to be taken into account and worked out. The necessity of this third country expertise becomes visible in b), where I give a current state about the literature on the subject and the fact, that third country influence, expertise and pre-occupations on conditionality (and clauses) have been heavily ignored so far.[17]

[14] Regulation (EU) 978/2012, L 303/1, (4)
[15] Non Paper, Using EU Trade Policy to promote fundamental human rights, http://trade.ec.europa.eu/doclib/docs/2012/february/tradoc_149064.pdf ; Article 19, Regulation (EU) 978/2012, L 303/1
[16] Temporary withdrawal goes after "serious and systematic violation" of principles laid down in the Annex., see: Article 19 (1) (a), Regulation (EU) 978/2012, L 303/1; So would also be the conclusion of Schneider; Schneider, Friedrich : Human Rights Conditionality in the EU's General System of Preferences: Legitimacy, Legality and Reform; ZEuS, 03/2012, p. 327
[17] To analyse perceptions by thirds regarding the EU is not a revolutionary method. For the EU's role in the WTO this has been done; see: van Well, Lisa: The WTO and the EU: Leadership vs. Power in International Image; Work Package 4, Politics and Ideology, 04/2011s

b) Literature on conditionality and clauses, the missing perspective of third country players

For the logic within political conditionality it is often distinguished between conditionality the EU sets in context of its enlargement policy and political conditionality that is not followed by accession. The distinction is important as it has repercussions on partner countries' efforts, the transfer of values, rules and regulations. For pure external conditionality without potential accession, such an incentive is less given.[18]

Regarding conditionality not related to enlargement, literature focuses majorly on case studies and more generally on the question, whether the EU can guarantee an *institutional congruent/coherent* action towards the world, about EU sanction policy or whether clauses have been successfully applied or not. Case study reviews, deriving from the Cotonou framework, are majorly discussed in terms of resolution capacity and the level of cooperativeness after the violation of the clause.[19] Generally, as human rights clauses have been solely applied under the Cotonou Agreement, the academic community literally pounces on conditionality in European development policy. But beyond, human rights clauses are an integral part to agreements where they *haven't been applied yet* before and therefore few empirical data is available.

Into the space of general neglecting of clauses, Cambridge fellow Lorand Bartels enters in order to hand in an excellent and still recent legal analysis about the shape of human rights clauses and the EU's capacity of reinforcing human rights standards in third countries. Nevertheless, as it is told, his analysis keeps to be *"[…] squarely legal, rather than political […]"*[20] and does rarely take into account the perspective of key actors or experts of third countries. While diplomatic and political importance misses, it still needs to be determined. Secondly, as features of Human Rights enforcement on the international scene are well treated, analysis on enforcement possibilities for democracy and rule of law issues remain open. Without doubt it can be stated that till date he delivers the most far-reaching work on

[18] Schimmelpfennig, Frank/Scholtz, Hanno: EU Democracy Promotion in the European Neighbourhood: Political Conditionality, Economic Development, and Transnational Exchange; National Centre for Competence in Research Working Paper No. 9; Zurich: 2007; p. 3, see also contributions on conditionality of Börzel/Risse, Balfour, Abusara etc.

[19] The European Center for Development Policy Management in Maastricht provides good studies and a practical overview about the mechanism. See: Mbangu, Lydie: Recent Cases of Article 96 Consultations, ECDPM Discussion Paper 64C, 08/2006, pp. 1-18; and other ECDPM Discussion Papers as well for case study reviews.

[20] Cit. Op, Bartels: preface; Bartels, Lorand: A Model Human Rights Clause for the EU's International Trade Agreements; German Institute for Human Rights Study, 2014

clauses as conditional instrument. But the question of an important dimension, of how the principle of political conditionality and the application procedure of clauses in particular are perceived or evaluated, is left aside and was, on a small scale, already touched by my MA-thesis research pattern afterwards. In this sense, the PhD projects wants to add a new and original, more global analysis. It enters into this grey area to add an important element to the debate, *how* the EU governs its external political conditionality and *how* do rule transfers and obligations affect others theoretically and practically?[21]

II) The pertinence of conditionality perception as new research dimension.

a) The consolidation of MA-thesis research on third country positions. How can the pattern be enlarged?

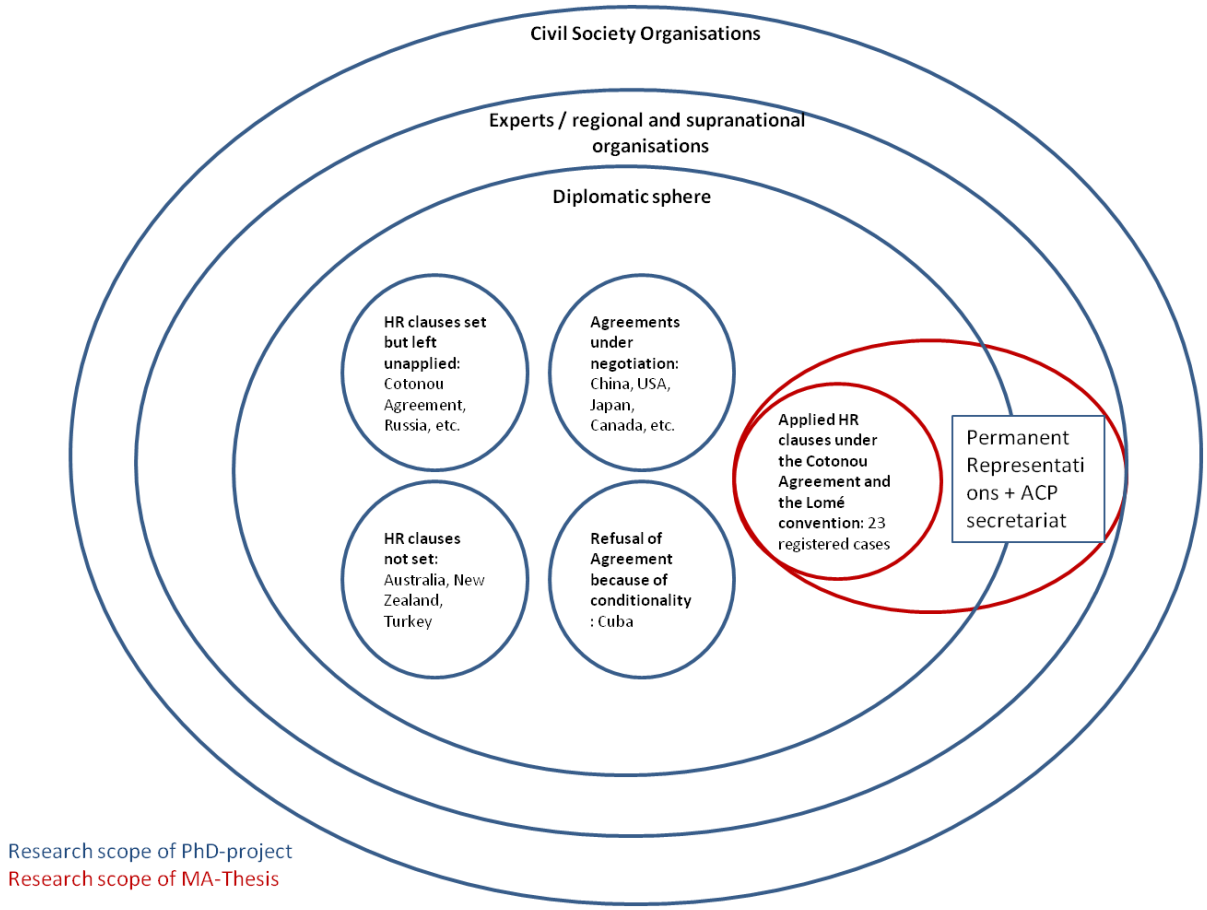
The idea of conducting this comprehensive work results of my MA-thesis analysis about the perception and evaluation of ACP-officials on the ACP-secretarial and diplomatic level. Majorly it reveals an institutional intransparency on access and exchange of information after Human Rights clauses have been executed in practice. The work showed that (1) there exists a perceived retaining of information held back by the European institutions what results in a misunderstanding during the process of applying the clause between the EU and the ACP-countries. (2) Secondly, rather on a legal level, it showed that construction problems of the Human Rights clause, Articles 96 and 97 in the Cotonou Agreement, are only reported but hardly facilitated during the five-year term revision procedures. (3) Finally, and most importantly, a huge disagreement in the perception of state officials regarding European political conditionality became visible that characterized this principle rather as an instrument, or if extremely interpreted as a *disguised mechanism of control*.

Unfortunately, the restricted research time and the low quantity of individual interview partners reduced the work geographically and functionally. Therefore only state officials of countries, who have been subject to an application under Articles 96 and 97 of the Cotonou Agreement have been contacted.[22] States that have not been targeted by sanctions under the Agreement, neither officials of civil society organizations (CSO), employees in regional

[21] To see here the modeling of *how* the EU governs its conditionality: Schimmelpfenning, Frank/Sedelmeier, Ulrich : Conditionality : EU rule transfer to the candidate countries of Central and Eastern Europe ; Journal of European Public Policy, 11/4; p. 669 ff.

[22] Contributions have been given by officials of the ACP secretariat, from Cuba, the Central African Republic, the Fiji Islands and Madagascar. Another contribution of a Comoro official has been foreseen but couldn't be completed in due time.

economic communities (such as ECOWAS, SADC or Mercosur)[23] or concerned European Institutions (especially Council and Commission officials) have been integrated into the analysis. Also, other geographic levels where the European Union has negotiated Human Rights clauses, with which Human Rights clauses have not been set (basically developed countries) and countries where Human Rights clauses are currently negotiated, have been ignored. In other words, significant statements about the impact, evaluation and integration of political conditionality have only been made for the most "easy-to-seize" cases and, with the consideration of the diplomatic sphere, on an "easy-to-seize" level. The inclusion of multiple evaluations by more diversified actors takes us to collect global findings to complete the remaining open question about the *governing character of clauses in external agreements*. The scheme below wants to illustrate possible coverage of the PhD-project.



Expansion of research field by the PhD-proposal for political conditionality features in external agreements: taking into account multiple spheres under which the EU treats political conditionality.

[23] With regard to the above cited COM (2014) 105 final, the conditionality on negotiated partnership agreements could grow for regions that have completed negotiations of Economic Partnership Agreements (i.e. CARICOM) in regard to other ACP countries. Interesting would it be to see, whether this would have an influence on Article 97 of the Cotonou Agreement, which is upholding *good governance* as fundamental element of the agreement.

b) Course of research: clauses as a "regulatory dilemma" in EU external relations.

The leading research question shall not focus on the debate whether the EU follows *either* strategic *or* normative values in the implementation and governance of clauses in its external agreements. Both ways of acting are idealtypic and surely given. Much more, it shall be questioned to which extend and how the acting and bargaining of the EU can be re-felt in comparison to the ideals on human rights, democracy and rule of law it generates, manages and externalizes.

An illustrative example for the necessity of this analysis is the yet undefined position towards conditionality taken by civil society organizations (CSO). Following the logic of external political conditionality, the establishment of human rights clauses should be welcomed by CSOs, as the EU should deliver a protective instrument to the weak once grave violations should occur. However, first brief statements of CSO representatives from developing countries prove the contrary, arguing that political conditionality menaces their work indirectly and fails to strengthen their power towards their political leaders.[24] The brief example would refute the argument that human rights clauses are a pure mechanism to protect the poor. Moreover it incites the idea to find out, how citizens' rights can effectively be protected, legally as politically, and how participative policies can be elaborated.

Thus, following research questions are trying to seize the ideas generated by this proposal:

- Which (textual) points in human rights and democracy clauses should be modified and why?

- Which detailed dispositions (like infractions) or rights should be contained in clauses? How can they be practically interrelated?

- Which changes in the clause application-procedure should be undertaken?[25] How can be made sure that CSOs and citizens are integrated into the procedure? How can they have their saying on political conditionality?

- Which are main arguments for or against implementation and execution of clauses, as they exist to date? Are they reasonable and realistic?

[24] Mabanza, Boniface: Why does the non-execution clause split the civil society? KASA, Ecumenical Service for Advocacy Work on Southern Africa, Heidelberg, 03/2011; first impressions from civil society organizations gives tendancy towards a disaccord with conditionality principles and human rights clauses, as they are implemented into the Cotonou Agreement.

[25] We acknowledge here that the practical execution of human rights clauses is not identical to their textual, mechanical reference in the agreements. Even though the Cotonou Agreement provides a clear and detailed formulation in its consultation procedures, the procedure during the application remains vaguely regulated and flexible.

- For which partners do non-execution clauses have highest relevance? Where is their existence/impact rather neglected? What does it mean for EU external conditionality?

- Which consequences (i.e. in trade, developmental or diplomatic terms) do governments and civil society organizations fear in detail? Where do chances lie?

- Lastly, which more "positive" or alternative instruments could be established in order to satisfy the needs of the EU's partners taken out of the empirical research? How could they be governed?

Modifying clauses towards the partners' logic would not only mean toning down their possible "striking power" but also rendering them more effective. This is not an uncontested claim.[26] But in my MA-thesis it was observed that for human rights and democracy clauses, in order to be efficient, both partners or at least important peer countries (regional powers) need to agree on the infractions done. During the procedure especially regional and multilateral organizations of countries (as the ACP group for example) play a very important role as consultative bodies and for successful outcomes everybody must be willing to accomplish the consultation procedures[27]. To the other end it is feared that clauses would lose their forcefulness once they are applied multilaterally so that an element of pressure is missing for the 'contributing side'. With the partners' demand of gaining more legal security by precising the clauses textual shape the EU fears a loss of their flexible approach towards the country. *These claims provoke an international and modern regulatory dilemma* which is difficult to resolve to the satisfaction of both sides, but at least it is necessary to try if bearing in mind that clauses are a future promising mechanism for the EU to enact in international relations.

Despite, it would be too rash to argue that human rights and democracy clauses, as well as political conditionality in general, are perceived as simply negative by the EU's partners. This too rapid pre-formulation for the perception of these countries' officials would not be distinctive enough for a complex discussion and leaves room for surprises.[28] Rather major problems are estimated to be found in detailed provisions of the clauses what complicates and

[26] During MA-research the discussion about the „effet utile" of the human rights clause was probably one of the most exciting and controversial parts. It was discussed on the base of case study experience, whether clauses should only be applied with the consent of partner or peer countries and almost never unilaterally, as their resolution capacity is reduced if these peers are not participating in finding a solution.

[27] Consultation procedures are established once the human rights clause is invoked against a state under the ACP framework. Its state and evolution over time is made visible in a scheme in my MA-thesis, p. 58

[28] Interview with ACP Official; for example an ACP group official was arguing during an interview that the principle of conditionality is generally accepted and that the EU's approach is logic and comprehensible.

diversifies research simultaneously. On the other side it is this open no-clue-hypothesis about different opinions and evaluations that adds an extraordinary attractiveness to the topic.

So while the proposal consolidates the known and opens a new perspective, the project identifies itself in between the coercive character of the EU as an International actor and questions the transformative dynamics that the model of occidental democracy can produce. The perception and evaluation of Europe's clause governance has therefore an important influence on the EU's credibility as a partner worldwide.

Consequently, findings from this work could
(a) help improve conditionality talks under current existing frameworks and
(b) have a high practical serving for EU policy makers in future negotiations