



*ASSESSING THE DEVELOPMENT FRIENDLINESS OF
DISPUTE SETTLEMENT MECHANISMS IN THE ECONOMIC
PARTNERSHIP AGREEMENTS
&
AN ANALYTICAL AND COMPARATIVE GUIDE TO THE
DISPUTE SETTLEMENT PROVISIONS IN THE EU'S FTAs*

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PREFACE

This report consists of two main parts. The first Part is the report entitled '*Assessing the Development Friendliness of Dispute Settlement Mechanisms in the Economic Partnership Agreements*'. The second part is composed of four different Appendices. These Appendices together form the '*Analytical and Comparative Guide to the Dispute Settlement Provisions in the EU's FTAs*'.

The four Appendices are as follows:

- Appendix A: First Generation of Dispute Settlement clauses in the EU's RTAs
- Appendix B: Comparison of the EU's and the ACP's Negotiation Positions on the Review of the WTO Dispute Settlement Mechanism
- Appendix C: Timeline of Disputes under the WTO, the EU-Mexico and the EU-Chile FTAs, and the EU-CARIFORUM EPA
- Appendix D: Analytical & Comparative Guide to Dispute Settlement Mechanisms in the WTO, the EU-Mexico FTA, the EU-Chile FTA and the EPAs

The Report and the Guide (Appendices) are connected to each other; in that, the Report frequently refers to the tables provided in the Appendices therefore it should be read together with them. On the other hand, the Guide could also be used separately for detailed comparisons across several agreements and could serve negotiators by making it easier for them to draw on other agreement's relevant provisions.

ABOUT THE AUTHOR

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- Multi-level rule making in international economic governance through WTO and Regional Trade Agreements;
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EXECUTIVE SUMMARY

This study aims at assessing the 'development friendliness' of the dispute settlement (DS) mechanisms provided for in the newly initialled EPAs between the ACP countries and the EU. EPAs concluded with the CARIFORUM, SADC, Pacific States, Côte d'Ivoire, Ghana and Cameroon contain new DS mechanisms and they form the subject of the research.

The DS mechanisms provided for in these agreements are representative of a fundamental shift in the EU's DS policies towards a judicial model largely inspired by the WTO DS mechanism. This shift has first started with the Mexico and Chile FTAs. Therefore, the EPA DS mechanisms are examined in comparison with the WTO DSU, and Chile and Mexico FTAs' DS provisions.

In order to define the criteria against which the development friendliness of a DS system could be assessed, this study makes use of the ACP proposals put forth during the negotiations for the reform of the WTO DSU. Considering the similarities of difficulties these countries face with respect to DS activity, proposals that carry the signature of one or more ACP countries are deemed to represent the ACP views. Since the EPA DS mechanisms are largely similar to the WTO DS system, the problems that the ACP countries face at the WTO and the proposals they put forth to cure these problems become highly relevant for this research as well.

In light of this reasoning, a detailed examination of the ACP proposals is carried out with a view to determining the main political demands that underlie them. There are five such main political demands:

- 1) The DS system should address the ACP's human and financial resource constraints in the form of legal aid;
- 2) The remedies and retaliatory measures should be strengthened;
- 3) The multilateral character of the DS mechanism should be strengthened;
- 4) The Special and Differential Treatment (SDT) provisions of the system should be made mandatory, precise and operational, and there should be more SDT especially with regard to the DS timeframes;
- 5) The inter-governmental character of the DSU should be preserved.

The study then examines the provisions of EPA DS systems in light of these five main political demands. It highlights the main shortcomings of EPA DS provisions and makes some suggestions as to how to address these shortcomings in the follow-up negotiations between the ACP and the EU.

HUMAN AND FINANCIAL RESOURCE CONSTRAINTS AND THE EPAS

The EPAs do not provide for any sort of legal aid. No mechanism is established to replace even the much criticized and minor assistance that the Secretariat gives to the developing countries under the WTO. Bearing in mind that the scarce resources of NGOs, academia, pro bono lawyers etc. will most probably focus on the multilateral level, ACPs will lack this type of assistance as well. Therefore, in terms of legal aid matters, the EPAs seem to even aggravate the situation compared with the WTO. The ACP-EU parties should consider the possibility of setting up regional trade law centres that would assist the ACP countries. These centres would have positive spill-over effects for the ACP's representation and participation at the WTO as well.

REMEDIES AND RETALIATORY MEASURES UNDER THE EPAS

The agreements do nothing to address the long criticized 'lack of effective remedy' problem either. Most of the agreements reproduce the WTO remedy of 'bringing the measure

into compliance'; although with slightly different language. While the differences between the WTO and EPA texts may be used to push for some ACP friendly remedies, it may be preferable for the ACP countries not to have any provision on remedies at all. This is the case, for instance, under the Pacific EPA. Not having an explicit remedy clause may open the door for future developments and negotiations on this matter.

The system of retaliation provided for in the EPAs, while taking some positive steps, falls, nevertheless, short of meeting the ACP's demands. As a positive development, some EPAs recognize the possibility of 'financial compensation'. However, as the financial compensation is made subject to the agreement of parties, in effect, it does not go substantially beyond the WTO. Having said this, such an explicit reference to financial compensation would provide the ACP countries with a better hand in compensation negotiations. Hence, they must be preserved and if possible strengthened. In that regard, the SADC EPA includes a more permissive financial compensation clause that may be drawn upon by the others.

Another positive development under the EPAs with respect to retaliatory measures is that the agreements provide for 'appropriate measures' in addition to compensation. 'Appropriate measures' under the EPAs replace the 'suspension of concessions and other obligations' under the WTO. As this new term provides the ACP countries with a larger array of measures it may be considered as a positive step. However, the fact that the same measure is also available for the EU and that there are no proper judicial checks to control their utilization by the Union, this positive change carries a large risk as well.

In terms of necessary disciplines to control the use of these measures by the EU, the relationship between 'appropriate measures' and the development assistance is of crucial importance. Other ACP countries should draw upon the Ghana EPA clause, which explicitly proscribes the appropriate measures to affect the development assistance. In fact, a more general provision to the effect that no utilization of the EPA DS mechanisms by the ACP countries will affect the development assistance to them would also be an important guarantee for ACPs.

The most important shortcoming of the EPA retaliation system, which has long been a subject of complaint for ACP countries under the WTO, is its bilateral nature. That is to say, the DS mechanisms allow only the winning party to retaliate, not any other country. The demand for the right to retaliate collectively has long been aired under the WTO by developing countries, including the ACP. Although, it may be maintained that the bilateral character of the EPAs, as opposed to the multilateral WTO, necessitates such a structure, the possibility of making use of quasi-multilateral Cotonou institutions should not be discarded.

STRENGTHENING MULTILATERALISM AND THE EPAS

The possibility of making use of and benefiting from the quasi-multilateral institutions and character of the Cotonou Agreement should also be considered for such stages like the surveillance of the implementation of arbitral awards. In the same vein, there is also a good case to allow EPA signatory states to become third parties in other EPA disputes. Considering the similarities between the substantive obligations of different EPAs, ACP countries have a systemic interest in participating in each other's cases.

SDT PROVISIONS IN THE EPAS

Most of the requirements of a development friendly DS necessitate the special and differential treatment of ACP countries. Not only the DS provisions should include SDT, but also the SDT provisions should be mandatory, precise and operational. While the EPAs provide for some SDT clauses they are very few and they do not meet, in particular, the preciseness and operability criteria. One of the prime examples of the lack of SDT could be seen in the regulation of timeframes. Although the capacity differences between the ACP

countries and the EU are well known, the treaty text does not entail any reference to SDT with respect to panel timeframes. While some flexibility and SDT may be injected with the Rules of Procedures to be adopted once the agreements start functioning, without amending the text of the treaty the flexibilities would be limited.

With regard to timeframes, the EPAs contain an implicit SDT in respect of the reasonable period of time that the losing party would be allowed to implement the arbitral award. However, this SDT provision also fails to meet the preciseness criterion. Moreover, the SDT provision only regulates the situation where an ACP country is a defendant. The situation where the EU is the losing party is also, if not more, important for the ACP countries. A SDT provision to the effect that the EU must make use of expedited legislative and administrative means to implement the arbitral decisions, in cases where the delay in implementation may have serious effects for the ACP economies should be considered.

PRESERVING THE INTER-GOVERNMENTALITY: AMICUS CURIAE AND THE GOVERNMENT OFFICIALS AS PANELISTS

The Agreements reflect the EU's positions with regard to the amicus curiae briefs and the selection of government officials as panellists. Contrary to the position they have taken in the WTO, the ACP countries accepted the admission of amicus curiae briefs by the EPA arbitral panels. In order to attenuate the risks of such a position, ACP countries should insist on imposition of strict criteria on the submission of amicus briefs. The conditions laid out in the Chile FTA may be inspirational in that regard.

In the same vein as the amicus briefs, the EU's position with regard to the selection of government officials as panelists seems to have prevailed over the ACP's. The EPAs require the panelists not to be government officials. This provision should be clarified to the effect that the condition must only be met during the time the person actually serves as a panelists; not during the whole time while he/she is on the roster of panelists. Otherwise, the ACP countries may find it difficult to come up with nominations.

CONCLUSIONS

In conclusion, this analysis of the EPAs DS provisions indicates that the deal reached in ACP-EU negotiations has serious shortcomings in terms of its developmental credentials. It seems to be difficult to give a pass mark to the EPA DS mechanisms with respect to their performance on development friendliness. EPA DS mechanisms are a modified version of the WTO DS. The important point is that most of the modifications are reflections of the proposals that the EU put forth for the reform of the WTO DSU. Things like the establishment of a post-retaliation compliance review panel, acceleration of panel timeframes, admission of amicus briefs do all point to the fact that the EPAs DS mechanisms are formed under the EU's vision. Very few ACP demands seem to have been accommodated, and even those which are accommodated, lack the necessary preciseness and operationality. If the EPA DS systems remain as they currently are, it may be plausible to say that the incentives for the ACP countries to use them would be even less than the incentives that these countries have to use the WTO DS mechanism. Therefore, it would not be wrong to conclude that, unless some serious changes are introduced, only the EU could make use of the new EPA DS mechanisms. For the ACP they will remain inaccessible and represent just another pompous legalese with no real word effect.

INTRODUCTION

The year 2008 marks the beginning of a new chapter in the African Caribbean Pacific States (ACP)-European Union (EU) relations, which go back to the establishment of the European Community¹. The main feature of this relationship was the granting of unilateral trade preferences by the EU under the successive Lomé Agreements and the following Cotonou Agreement². As the EU did not grant these same preferences to other non-ACP developing countries, these arrangements prompted criticisms regarding their GATT compatibility since the early GATT years³. Consequently, the EU and the ACP States requested and received a waiver from the GATT Contracting Parties for the Lomé IV⁴, and another waiver from the WTO for the Cotonou Agreement that succeeded the Lomé regime⁵.

However, even before the beginning of negotiations for the Cotonou Agreement in September 1998, the EU had decided that the relationship could not continue under such waivers for an indefinite period and that the ultimate goal should have been the establishment of WTO-compatible FTAs with the ACP States⁶. Hence, the Cotonou Agreement provided for the negotiation of WTO-compatible FTAs that it christened as Economic Partnership Agreements (EPAs)⁷. These Agreements were supposed to enter into force by 1 January 2008⁸ and accordingly this was the period for which the EU and the ACP States received the Cotonou waiver from the WTO⁹.

The negotiations for the EPAs started on 27 September 2002 with 76 ACP countries divided in six regional groupings¹⁰. However, the talks proved 'extremely challenging' and not much progress could have been made until the last months of 2007¹¹. Despite serious pressure by the European negotiators, by the end of 2007 -hence before the end of the WTO waiver- only 18 African states, two Pacific states (Fiji and Papua New Guinea) and the CARIFORUM group countries had initialled the EPAs¹². Moreover, only the agreement initialled with the CARIFORUM states is a full EPA; the others are just interim EPAs which require further negotiations for their completion¹³. As of June 2008 the situation remains the same¹⁴.

I. FINE-TUNING EPAs AND THE DISPUTE SETTLEMENT PROVISIONS

The negotiations tactics used by the European negotiators and the content of EPAs attracted several and serious criticisms from the ACP officials, the civil society and the academia¹⁵. Eventually acknowledging these criticisms, the Council of the EU underlined the

¹ For a perfect history of this relationship: L Bartels 'The Trade and Development Policy of the European Union' (2007) 18(4) EJIL 715-757.

² J Huber 'The Past, Present and Future ACP-EC Trade Regime and the WTO' (2000) 11(2) EJIL 427-438.

³ Huber (n 2) 428-430.

⁴ GATT BISD, 41st Suppl. 26.

⁵ WTO ACP-EC Partnership Agreement, Decision of 14 November 2001 (14 November 2001) WT/MIN(01)/15. [Cotonou Waiver].

⁶ Huber (n 2) 431.

⁷ Cotonou Agreement [2000] OJ L317/3 amended [2005] OJ L287/1 Article 37. [Cotonou Agreement].

⁸ *ibid.*

⁹ Cotonou Waiver (n 5).

¹⁰ EU Pres Release *EU Opens trade negotiations with African, Caribbean and Pacific countries* (Brussels 27 September 2002) available online at http://ec.europa.eu/trade/issues/bilateral/regions/acp/pr270902_en.htm

¹¹ C Stevens S Bilal et al. *The New EPAs: comparative analysis of their content and the challenges for 2008 Final Report* (ODI/ECDPM March 2008)1. [The New EPAs]. Available online at http://www.odi.org.uk/EDG/Projects/0708010_The_new_EPAs.html

¹² ODI ECDPM 'Interim EPAs in Africa: What's in them? And what's next?' (April 2008) 7(3) Trade Negotiations Insights [TNI] 1-2. TNIs are available online at www.ictsd.org/tni

¹³ The New EPAs (n 11) 70-84.

¹⁴ M Julian 'EPA Negotiations Update' (June 2008) 7(5) TNI 14.

¹⁵ OXFAM International *Partnership or Power Play? How Europe should bring development into its trade deals with African, Caribbean, and Pacific Countries* (Oxfam Briefing paper April 2008) 5-11. Available online at

importance of 'a flexible approach' for the follow-up negotiations¹⁶. The same point has been reiterated during the meeting of the ACP-EC Council of Ministers where the Council recognized 'the value of a flexible and pragmatic approach when moving from interim agreements towards regional EPAs'¹⁷. When these statements are combined together with the fact that as a matter of international law, the 'initialled' agreements do not create any obligations it becomes clear that the parties may easily modify the present EPA texts¹⁸ and there is still room for fine-tuning these agreements.

In this context, in order to determine how the agreements could be fine-tuned, analyses into the content and development-friendliness of EPAs gain a particular importance. Most of the recent analyses have naturally focused on the substantive provisions of the EPAs, such as those on trade liberalization schedules, trade in services and investment¹⁹. This study aims to complement these analyses by providing an examination of the dispute settlement clauses of the EPAs.

Although as of June 2008 only the text of the CARIFORUM EPA had been officially made public²⁰, it is also possible to have access to the texts of interim EPAs initialled with the ESA²¹, the EAC²², the SADC²³, the Pacific group²⁴, and the agreements initialled with Côte d'Ivoire, Ghana and Cameroon²⁵. Importantly, the interim EPAs with the EAS and the EAC groups explicitly state that their dispute settlement provisions will further be negotiated²⁶. For the period until the conclusion of new dispute settlement provisions, both agreements provide for the same dispute settlement mechanism as the Cotonou Agreement had²⁷. Therefore the analysis will focus on the dispute settlement (DS) mechanisms introduced by the CARIFORUM, SADC, Pacific, Côte d'Ivoire, Ghana and Cameroon EPAs.

Four initial observations should be stated at the outset. Firstly, the DS provisions of the six EPAs under scrutiny are a great deal similar to each other. In several instances, the provisions are even identical. Secondly, there are also important similarities between the EPA DS provisions and the DS clauses of the FTAs that the EU concluded with Mexico²⁸ and Chile²⁹. A key EU Commission official recently stated that the DS mechanisms of Chile and Mexico FTAs represent 'a fundamental shift' towards judicialization in the EU's policy of DS in RTAs³⁰; it should thus be noted that the EPAs reproduce and continue this new paradigm. Thirdly, the DS mechanisms of both the EPAs, and the Mexico and Chile FTAs are largely inspired by the judicial model of the WTO Dispute Settlement Understanding (DSU)³¹.

The similarities with the WTO DSU calls in the fourth and last observation: the shift in EU's RTAs towards a WTO-inspired judicial model comes at a time when the development

http://www.oxfam.org/en/policy/bp110_EPAs_europe_trade_deals_with_acp_countries_0804 [OXFAM Report]; The New EPAs (n 11) 70-85.

¹⁶ Council of the EU *Council Conclusions on Economic Partnership Agreements* (2870th External Relations Council 26-27 May 2008) para. 3. [EU Council Resolutions].

¹⁷ ACP-EC Council of Ministers *Resolution of the ACP-EC Council of Ministers* (Addis-Ababa 13 June 2008) 3. [ACP-EC Resolutions].

¹⁸ L Bartels 'The Legal status of the initialed EPAs' (April 2008) 7(3) TNI 4-5.

¹⁹ OXFAM Report (n 15); The New EPAs (n 11).

²⁰ See: http://ec.europa.eu/trade/issues/bilateral/regions/acp/pr220208_en.htm (last accessed in July 2008).

²¹ Not all of the ESA group of states initialed the agreement; the initialing states are: Comoros, Madagascar, Mauritius, Seychelles and Zimbabwe: The New EPAs (n 11) 6.

²² In addition to the CARIFORUM states, the EAC is the only other group where all its members have initialed the agreement: The New EPAs (n 11) 4-6.

²³ The SADC members who have initialed the text are: Botswana, Lesotho, Mozambique, Namibia and Swaziland: The New EPAs (n 11) 6.

²⁴ Only Fiji and Papua New Guinea have initialed the text.

²⁵ Côte d'Ivoire and Ghana, both partaking of the ECOWAS group, each initialed separate interim EPAs. Cameroon, on the other hand, is the only country within the CEMAC group which has initialed the agreement: The New EPAs (n 11) 4-6.

²⁶ ESA-EPA Article 54:h; EAC-EPA unnumbered Article paragraph g. These are the so-called rendez-vous clauses.

²⁷ ESA-EPA Article 56; EAC-EPA Chapter VI unnumbered Article. These two provisions are almost verbatim copies of Article 98 of the Cotonou Agreement.

²⁸ Decision 2/2000 of the EC-Mexico Joint Council of 23 March 2000 [2000] OJ L157/10 and annexes [2000] OJ L245/1.

²⁹ EC-Chile Association Agreement (in force 1 March 2005) [2002] OJ L352/3.

³⁰ IG Bercero 'Dispute Settlement in European Union Free Trade Agreements: Lessons Learned?' in in L Bartels F Ortino (eds) *Regional Trade Agreements and the WTO Legal System* (OUP 2006) 383. [Bercero-DS in EU FTAs].

³¹ Bercero-DS in EU FTAs (n 30) 383: Bercero prefers to describe this model as quasi-judicial.

credentials of the WTO DS system are increasingly questioned by academia and by developing countries within the frame of WTO negotiations for the clarification and improvement of the DSU³². Therefore, the criticisms of the DSU and the reform proposals put forward by developing countries, and especially by the ACP countries, for the reform of the WTO DS mechanism provide an important yardstick against which the developmental credentials of the EPA DS provisions could be assessed.

Using the ACP's reform proposals for the WTO DS as a yardstick for the evaluation of development-friendliness of the EPA's DS provisions is based on a simple logic: Since both the WTO and the EPA DS mechanisms are largely similar, and since the ACP's proposals for the reform of the WTO DS reflect these countries' political choices as to how a DS mechanism can be development friendly, the same political choices must also be valid for the EPAs' DS mechanism.

The development friendliness of a DS mechanism could, of course, also be defined by reference to the wide academic literature on the development credentials of the WTO DS system³³. However, not all proposals put forth by academic observers are taken up by the ACP countries. It makes more sense to primarily take into account the stated political choices of these countries because, at the end, whether these choices are met or not is the main factor that will define the *ownership* of the DS system by these countries.

Moreover, such an examination would also reveal to what extent the EPA DS provisions fulfil the stated aim of the whole EPA negotiations, which is to foster 'the smooth and gradual integration of the ACP States into the world economy, *with due regard for their political choices and development priorities*'³⁴. This study could, hence, reveal if *due regard* has been given to the ACP's political choices.

Finally, in order to further refine this analysis, this enquiry will also involve the review of the EU's reform proposals with respect to the WTO DSU; and shall explain whose political choices have been dominant in the formulation of the EPA DS provisions.

In light of these four observations, the analysis of the EPA DS provisions shall have two axes. Along the first axis, which may be called as the multilateral-regional vertical axis, the EPA DS provisions are to be examined by comparison to the WTO DS mechanism and its criticisms by developing countries. The guiding questions of this enquiry shall be: What are the ways developing countries require the WTO DSU to be reformed? What are the similarities and differences between the WTO DSU and the EPA DS provisions? And to what extent do the novelties introduced by the EPAs address the developing countries' –especially the ACP's- concerns?

The second axis of the analysis is to be a horizontal regional-regional one, along which the similarities and differences between individual EPAs, and Mexico and Chile FTAs could be examined. The guiding questions of this enquiry shall be: What are the differences and similarities between EU RTAs DS provisions? Which provisions do meet the ACP's political choices as defined by reference to the ACP countries' reform proposals to the WTO DSU? In light of the EU Council's recent conclusion which states that 'ACP countries and regions who so wish could draw, if appropriate, on provisions agreed by other in their EPA negotiation', this comparison has an important practical value.

The enquiries shall be carried out in the following three Sections. Section II shall first provide a short summary of how the WTO DS mechanism works³⁵. The Section shall then examine the low participation -if not non-participation- of the ACPs into the WTO DS mechanism and shall lay down the reasons for this problem. Section III shall review the proposals that the ACP countries made in the WTO to address their lack of use of the DS

³² Infra Section II.B.

³³ For a comprehensive catalogue of reform proposals put forth in academia: AH Qureshi 'Participation of Developing Countries in the WTO Dispute Settlement System' (2003) 47(2) Journal of African Law 195-198. [Qureshi-Participation].

³⁴ Cotonou Agreement (n 7) Article 34:1. The statement that the ACP's political choices, development priorities and administrative capacities should be taken into account in the EPAs has also been reiterated both in EU Council's May 2008 Conclusions' para. 3 (n 16) and the ACP-EC Council's Resolution in June 2008 p.3 (n 17).

³⁵ Readers who are already acquainted with the basics of the WTO DS system could dismiss the section II.A.

mechanism. Finally, the Section IV shall examine the EPA's DS provisions in light of the ACP positions on development-friendly DS mechanisms.

II. THE WTO DISPUTE SETTLEMENT MECHANISM AND PROBLEMS WITH REGARD TO ACP PARTICIPATION

The establishment of the WTO DS system has been hailed as one of the most important achievements of the Uruguay Round of negotiations which also gave birth to the WTO as an international organization³⁶. The Dispute Settlement Understanding (DSU), annexed to the WTO Agreement, has set up a very elaborate system of DS. The system started functioning in 1995 and 'has rapidly become arguably the most important international tribunal'³⁷. As such, the WTO DS characterizes a new stage in international trade relations: an increasingly legalized, judicialized and rule-oriented stage³⁸.

A. THE WTO DS MECHANISM: AN ELABORATE JUDICIAL SYSTEM

The most important novelty of the WTO DS system which distinguished it from its GATT predecessor is its automaticity. In contrast with the GATT years, no longer a State can block the establishment of a panel, or the adoption of a panel report. In the new system, for a panel request, or for a panel/Appellate Body (AB) report to be *rejected* –not to be *adopted*–, there needs to be the consensus of all Members, that is, there also needs to be the consent of the complaining party. This is called the *reverse consensus requirement*³⁹. Therefore, under the new rules, a complaining state can push for its case until the end⁴⁰.

Although, in practice, the panels and the AB are the most important organs of the DS, it should not be forgotten that the organ which has the main responsibility of administering the system, and which takes the decisions regarding the establishment of panels, adopts panel/AB reports, monitors the implementation of judgments, and authorizes retaliatory measures is the Dispute Settlement Body (DSB)⁴¹. All members of WTO are represented in the DSB. As most of the key decisions vis-à-vis the DS process requires reverse consensus, the DSB may not have an important leverage in the process. However, as it forms a platform for the whole WTO membership to raise their concerns and to continuously monitor the system, its role cannot be discarded.

A dispute starts with the filing of a request for consultations from a Member addressed to another Member⁴². If parties cannot solve their problem during their consultations, the complainant may ask the DSB to establish a panel⁴³. While the defendant may block this process in the first DSB meeting, it cannot do so in the second meeting⁴⁴. The parties to the dispute shall try to reach an agreement on the names of panelists; they will be assisted by the Secretariat, which will propose nominations⁴⁵. If parties cannot agree on the names, the Director General of the WTO shall determine the composition of the panel⁴⁶. Any

³⁶ JH Jackson *The World Trading System Law and Policy of International Economic Relations* (2nd ed. MIT Press 1997) 124. [Jackson-Trading System].

³⁷ M Matsushita, T Schoenbaum and P Mavroidis *The World Trade Organization: Law, Practice and Policy* (Oxford University Press 2nd Edition 2006) 104. [Matsushita et al – The World Trade Organization 2nd ed.].

³⁸ Matsushita et al – The World Trade Organization 2nd ed. (n 37) 108.

³⁹ It is 'reverse' because during the GATT years for the establishment of the panels and for the adoption of their reports there needed to be the consensus of all parties, that is, including the consent of the defendant.

⁴⁰ Jackson-Trading System (n 36) 124-125.

⁴¹ DSU Article 2.

⁴² DSU Article 4; the complete WTO DS process is illustrated in details in the Appendix B.

⁴³ DSU Article 6.

⁴⁴ DSU Article 6:1.

⁴⁵ DSU Article 8:6 and 8:7.

⁴⁶ DSU Article 8:7.

other WTO Member that has a substantial interest in the matter under dispute may join the dispute as a third party⁴⁷.

The panel process is very much judicialized. Parties make two sets of written submissions; the initial submissions and the rebuttals⁴⁸. The panels usually hold two sets of hearings, where main parties and the third parties would be heard⁴⁹. In practice, this process leads to presentation of sophisticated legal arguments by the parties and to highly legalistic and at times complex panel decisions.

Another important novelty and feature of the WTO DS system is that it provides parties with an opportunity to appeal the panel decisions. Under the DSU Article 17, a standing AB is established⁵⁰. A panel report would first be considered by the DSB. If no party to the dispute notifies the DSB that it will appeal the report, the panel report shall be adopted by the DSB⁵¹. The appellate review controls the application of law by the panels and serves to streamline the case law. The AB may uphold or reverse a panel's findings. The AB's report would be considered and adopted by the DSB, unless there is a consensus not to accept it⁵². With the decision of the DSB, the rulings and recommendations pronounced by the panels and the AB would become the ones of the DSB and they will be binding upon the defendant⁵³.

If the panels/AB find that the complained measure is inconsistent with WTO obligations, the remedy they pronounce is to recommend the defendant to bring its measure into compliance with its WTO obligations⁵⁴. If the complainant so requests, the panels/AB may also issue 'suggestions' as to how the measure could be brought into compliance⁵⁵. While the recommendations of the panels/AB are binding, their suggestions are not⁵⁶.

The preferred solution is that the defendant promptly implements the decision; however, if it is impracticable to do so, it may propose a 'reasonable period of time' (RPT) by the end of which it can comply with the decision⁵⁷. If the complainant and the defendant can not reach an agreement on the RPT, an arbitrator would decide what the RPT should be⁵⁸. This period of time should not exceed 15 months from the date of adoption of the panel or the AB report⁵⁹. It may, nevertheless, be shorter or longer depending on the circumstances⁶⁰.

Starting from six months after the establishment of the RPT, the issue of implementation of the decision will be under the surveillance of the DSB. The issue will remain on the agenda of the DSB until it is resolved⁶¹. If the defendant adopts a measure and claims that it hence brought itself into compliance; and if the complainant disagrees with this claim, the DSU provides for a compliance review panel⁶². This panel stage is expedited than a normal panel process. The role of these panels is to decide whether the defendant had brought itself into compliance. The decisions of these panels may be appealed too.

If the complainant does not comply with the decision of the panels/AB within the RPT, the complainant may retaliate. The DSU provides for two types of retaliatory measures: compensation or suspension of concessions or other obligations⁶³. Neither of these measures replaces the obligation for the defendant to bring itself into compliance with its

⁴⁷ DSU Article 10.

⁴⁸ DSU Appendix 3 Working Procedures.

⁴⁹ *ibid.*

⁵⁰ DSU Article 17:1.

⁵¹ DSU Article 16:4.

⁵² DSU Article 17:14.

⁵³ *Jackson-Trading System* (n 36) 126.

⁵⁴ DSU Article 19:1.

⁵⁵ DSU Article 19:1.

⁵⁶ Matsushita et al – *The World Trade Organization* 2nd ed. (n 37) 147.

⁵⁷ DSU Article 21:3.

⁵⁸ DSU Article 21:3(c). This is the so-called 21:3 arbitration.

⁵⁹ *ibid.*

⁶⁰ DSU Article 21:3.

⁶¹ DSU Article 21:6.

⁶² DSU Article 21:5. This is the so-called 21:5 panel.

⁶³ DSU Article 22.

WTO obligations. These measures are temporary and aim at inducing the defendant to comply⁶⁴.

Compensation is voluntary, and therefore requires the agreement of the parties. It may be characterized as the price that the defendant agrees to pay for not complying on time. To reach this agreement is difficult; hence, compensation as a retaliatory measure has rarely been used⁶⁵. Accordingly, the suspension of concessions or other obligations has been the preferred retaliation. In less legalistic terms, suspension of concessions would mean for the complainant to have the right to increase the duties on the import of a set of products from the defendant. And the suspension of other obligations would denote the suspension of obligations other than tariff commitments.

The suspension of concessions and other obligations should be in the same sector as the initial violation occurred⁶⁶. If this is impracticable or effective, the suspension may take place in other sectors under the same agreement. Only if this is impracticable and effective too, the authorization for retaliating under another agreement could be given. The latter is called cross-agreement retaliation and it rarely takes place. However, it was authorized in two cases where in response to violations in trade in goods and/or trade in services, the complainant has been given the right to retaliate under the TRIPS⁶⁷. If there is disagreement between the parties regarding the level of suspensions, this issue will be decided by arbitration⁶⁸.

Finally, in order to ensure the prompt settlement of disputes⁶⁹ the DSU imposes strict timeframes for different stages of the process⁷⁰. The DSU requires, as a general rule, for the time from the establishment to the adoption of panel report not to exceed 9 months if the decision is not appealed; and not to exceed 12 months if appealed⁷¹. Moreover, the DSU stipulates that the total time from the establishment of the panel to the determination of the RPT should not exceed 18 months⁷². However, these timeframes may be extended with the agreement of the parties.

B. WTO DS IN THE REAL WORLD AND DEVELOPING COUNTRIES' CRITICISM

Largely thanks to the automaticity of its process the WTO DS has become the most actively used state-to-state DS mechanism of the international system. As of 1 January 2008, 369 requests for consultations have been filed with the WTO⁷³. Over the same period 114 panel reports have been circulated and 78 of these reports were appealed; 23 DSU Article 21:5 Compliance Review Panel reports have been circulated, of which 14 have been appealed; 21 DSU Article 21:3 RPT determination arbitration awards and 10 DSU Article 22:6 Level of Suspension Arbitration awards have been circulated. These numbers signal a very active use of the system⁷⁴.

In addition to the high level of utilization of the system, empirical studies on the implementation of panel/AB reports also portray a positive image of the system. A study conducted in the summer of 2004 indicates that the successful implementation of panel/AB

⁶⁴ DSU Article 22:1.

⁶⁵ Matsushita et al – The World Trade Organization 2nd ed. (n 37) 167.

⁶⁶ DSU Article 21:3.

⁶⁷ WTO DS27 *European Communities — Regime for the Importation, Sale and Distribution of Bananas (Complainants: Ecuador; Guatemala; Honduras; Mexico; United States)* All reports of the case are available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_e.htm; WTO DS285 *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services (Complainant: Antigua and Barbuda)*. All reports of the case are available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm [US-Gambling]

⁶⁸ DSU Article 22:6. This the so-called 22:6 arbitration.

⁶⁹ DSU Article 3:3.

⁷⁰ These timeframes may be seen in detail in the chart in Appendix B.

⁷¹ DSU Article 20.

⁷² DSU Article 21:4.

⁷³ K Leitner S Lester 'WTO Dispute Settlement 1995–2007 – A Statistical Analysis' (2008) 11(1) JIEL 179-192. [WTO DS Statistics].

⁷⁴ *ibid.*

decisions took place in 83 per cent of cases⁷⁵. For a system where disputes can be initiated and finalized without the prior consent of the defendant, it is a very encouraging implementation rate.

While the system could be deemed successful in terms of settling the disputes, the same cannot be said for another correlated aim of the DS, which is to settle disputes promptly⁷⁶. According to a statistical study conducted for the World Bank, as of the end of 2006, the average time from the start of consultations until the adoption of the AB report was almost two years⁷⁷. The average RPT awarded by arbitrators was 12 months⁷⁸. The compliance review stage, starting with 21:5 panel and ending with the adoption of the AB report on the 21:5 panel, on average took almost a year⁷⁹.

1. Underutilization of WTO DS Mechanism by the ACP and its Reasons

Apart from the problem with the delays in the procedure, another very important criticism of the system relates to its use by developing countries. Although there are some optimistic studies with regard to developing country participation into the DS system, it must be noted that these studies do not accurately reflect the situation of the the ACP countries⁸⁰. The relatively optimistic picture with respect to developing countries is largely due to the participation in the DS system of large developing countries like India and Brazil, who developed important trade policy and litigation expertise⁸¹.

When the participation of the ACP countries is analyzed separately the picture becomes less rosy. As of June 2008, there were only two cases that reached the panel stage where an ACP country was a main party; i.e. was a complainant or a defendant. The most significant of these cases is the idiosyncratic example of Antigua and Barbuda's complaint against the US, in the US-Gambling case⁸². In this case, as the US has not implemented the decision within the RPT, the DSB authorized Antigua to impose retaliatory measures against the US. The second example is the case that Honduras brought against the Dominican Republic with regard to the latter's treatment of imported cigarettes from Honduras⁸³.

The low level of participation, or almost non-participation, of low-income developing countries to the WTO DS system led observers to conduct several studies into the possible reasons of this problem. The findings of the literature may be divided into two non-mutually exclusive groups.

The first group of reasons relate to the structural problems/features of the economies of these low income developing countries. The fact that their share of global exports is low; that their exports are not diversified; that their exports are usually comprised of primary materials which do not lend themselves to many disputes; that their aid-relationship with their main export markets would prevent them from bringing a dispute; that their small economies would not allow them to retaliate if a decision in their favor is not implemented; that the lack of private-public partnership in these countries would prevent them from determining potential cases are all given as possible reasons for the low level of participation of these countries⁸⁴.

⁷⁵ W Davey 'Dispute Settlement in the WTO and RTAs' in L Bartels F Ortino eds. *Regional Trade Agreements and the WTO Legal System* (OUP 2006) 347-348. [Davey-DS RTAs].

⁷⁶ DSU Article 3:3; Davey-DS RTAs (n 75) 349.

⁷⁷ H Horn PC Mavroidis The WTO Dispute Settlement System 1995-2006: Some descriptive statistics (World Bank 2008) 28. Available online at http://siteresources.worldbank.org/INTRES/Resources/469232-1107449512766/DescriptiveStatistics_031408.pdf

⁷⁸ *ibid.*

⁷⁹ *ibid.*

⁸⁰ V Mosoti 'Africa in the First Decade of WTO Dispute Settlement' (2006) 9(2) JIEL 429. [Mosoti-Africa].

⁸¹ *ibid.*

⁸² US-Gambling (n 67).

⁸³ WTO DS302 *Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes (Complainant: Honduras)* All reports of the case are available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds302_e.htm

⁸⁴ Mosoti-Africa (n 80) 429; A Alavi 'African Countries and the WTO's Dispute Settlement Mechanism' (2007) 25(1) *Development Policy Review* 27-28. [Alavi-Africa WTO].

The second group of reasons, on the other hand, relate to the hurdles these countries face due to the structure of the WTO DS system. For instance the fact that DS has become technically too complex and these countries do not possess such a high level of technical/legal expertise; that the highly technical character of the system dramatically increased the cost of bringing a case –an estimated cost of \$500,000-; that the settlement of disputes takes too long and that these countries cannot afford to wait for such a long time; that the DS system only provides for prospective remedies significantly reduces the utility of bringing a case are all cited as examples of reasons preventing these countries bringing a case⁸⁵. The concerns expressed under this category may be summarized as reflecting two main problems: high entry barriers/costs of the DS system and the skewed nature of the enforcement of DS decisions⁸⁶.

Reviewing the system in light of this second category of concerns led some commentators to conclude that, as opposed to initial developing country support for the WTO DS based on the understanding that a more judicialized system would be in their favour because it would cancel out the power imbalances⁸⁷, the judicialization and further legalization of the system may well have deteriorated the developing country participation into the DS. Two prominent experts of the field conclude as follows:

By adding 26,000 pages of new treaty text, not to mention a rapidly burgeoning case law; by imposing several new stages of legal activity per dispute, such as appeals, compliance reviews and compensation arbitration; by judicializing proceedings and thus putting a premium on sophisticated legal argumentation as opposed to informal negotiation; and by adding a potential two years to the defendants' legally permissible delays in complying with adverse rulings, the WTO reforms have raised the hurdles facing [developing countries] contemplating litigation⁸⁸.

The choice if the first or second group of reasons is prioritised in explaining the lack of utilization has an important consequence. If the emphasis is put on the structure of the economy/trade of developing countries, it may well be concluded that, at this stage of development, these countries do not much need a DS system. However, the second group of concerns is based on the assumption that these countries do actually need a DS system, but the shortcomings of the system do not allow them to use it; that is, there is an institutional bias against them. This choice, of course, would also have an important consequence for this study. If the structure of their economy and trade is the reason why the ACP countries cannot use the WTO DS system, as the context is the same for the EPAs as well, they will not be able to utilize the EPAs' DS mechanisms either. Such an answer would certainly reduce the significance of any study into the DS provisions of EPAs. Therefore, first of all, the question if the ACP needs a DS system must be answered.

2. Do the ACP Countries Need a DS Mechanism?

This study maintains that the ACP countries need a well functioning DS system. Firstly, it is because this is the position stated by these countries themselves. The active participation of ACP countries into the negotiations on the WTO DSU⁸⁹ reflects the view that these countries still believe that if a DS system is properly designed it can work for their benefit. The first African Group submission makes plainly clear what these countries see as

⁸⁵ Mosoti-Africa (n 80) 429; Alavi-Africa WTO (n 84) 27-28; Qureshi-Participation (n 33) 195-198.

⁸⁶ Alavi-Africa WTO (n 84) 31-35.

⁸⁷ Alavi-Africa WTO (n 84) 27.

⁸⁸ ML Busch E Reinhardt, *Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement* (Paper presented at the University of Minnesota Law School Conference on the Political Economy of International Trade Law, 15 – 16 September 2000) Paper available at <http://www.carleton.ca/ctpl/pdf/conferences/REINHARDT-BUSCH!95.pdf>

⁸⁹ Appendix B and the ACP proposals summarized therein stands as a proof of the active participation of these countries.

the main hurdle for their participation into the DS system: 'This diminutive participation [to the WTO DS system] is not because they [the African Group states] have never had occasion to want to enforce their rights, or the obligations of the other Members, but due to *structural difficulties of the DS*'⁹⁰. This diagnosis of these countries may be challenged; however, if the political choices of these countries will be taken into account, it cannot be discarded.

Secondly, as Mosoti's comprehensive analysis of the WTO case law demonstrates, there have actually been several disputes, such as the US-Cotton Subsidies, EC-Tariff Preferences or India-Quantitative Restrictions, that may closely affect the interests of some ACP countries regardless of how small their economies are⁹¹. The DS activity is not only about settling bilateral disputes, it is also about clarifying the rules and some clarifications may have serious effects for the ACP economies.

Thirdly, while such negative reasons as aid-dependency may be reasons for non-participation in the DS system, there is a strong normative case that they ought *not* to be. 'Justice' and 'fairness' based arguments would strongly militate for an agenda of change that would attenuate the weight of these concerns upon the DS decisions of developing countries⁹².

Fourthly, while reforming or structuring a DS system anew, the hopeful possibility that these countries will increase and diversify their exports should be taken into account. These developing countries 'have a current interest in ensuring a fair system of dispute resolution is available when they will be actually ready for its use in the future'⁹³.

All these reasons militating for the need of a WTO DS system that could be effectively used by the ACP are also valid in the case of EPAs. There certainly is a need for the EPAs to comprise a DS system. Legalization of international trade relations still has an attractive potential of attenuating power imbalances between countries, provided that DS systems are designed in the right way. If this system is designed in a development-friendly way it could help creation of a regional trade system where 'right prevails over might'; an ideal the EU cannot object to. In light of this need, the following section sets out the parameters of a development-friendly DS system.

III. ACP POLICY CHOICES REGARDING DISPUTE SETTLEMENT - *PARAMETERS OF A DEVELOPMENT FRIENDLY DISPUTE SETTLEMENT SYSTEM*

Several ACP countries have submitted proposals for the reform of the WTO DSU⁹⁴. The summary of all ACP proposals and the corresponding EU proposals could be seen in the comparative table provided in Appendix B.

An overview of the ACP proposals reveals that they prioritize the shortcomings and problems with regard to the structure of the WTO DS system rather than those which relate to their trade policy infrastructure. As mentioned in the previous section, these countries see the '*structural difficulties of the DS*' as the main reason for their underutilization of the DS system⁹⁵. Consequently, the proposals made by the ACP countries suggest serious structural reforms to the WTO DSU. This stance contrasts with the position of the EU which states that the WTO DS 'while working in a satisfactory manner, can and sometimes needs to be

⁹⁰ WTO *Negotiations on the Dispute Settlement Understanding Proposal by the African Group* (25 September 2002) TN/DS/W/15 p.1.

⁹¹ Mosoti-Africa (n 80) 445-451.

⁹² Qureshi-Participation (n 33) 175.

⁹³ *ibid.*

⁹⁴ ACP group of states have not made any submission for the reform of the WTO DSU as a whole group. As may be seen in the Appendix B, some ACP countries co-sponsored texts together with other countries like India, Sri Lanka and Pakistan; the African Group made submissions as a whole; and some other ACP countries made submissions within the frame of the LDC group. Since the underlying concerns that these submissions are trying to address are mostly the same, these submissions should be considered as being representative of the ACP's choices with respect to the DSU reform.

⁹⁵ WTO *Negotiations on the Dispute Settlement Understanding Proposal by the African Group* (25 September 2002) TN/DS/W/15 p.1..

improved on a number issues⁹⁶. Consequently, the EU's proposals aim at fine-tuning the present WTO DS mechanism and at clarifying some textual ambiguities.

There seem to be five main policy demands that underlie all concrete ACP proposals:

1. The DS system should provide for a mechanism that would address the ACP's human and financial resource constraints with respect to litigation.
2. The remedies and retaliation system of the DSU should be strengthened to respond to the particular circumstances of ACP countries.
3. The multilateral character of the DS mechanism should be enhanced by for instance easing the conditions of joining panel and AB proceedings.
4. The SDT provisions of the system should be made mandatory, precise and operational; and there should be more SDT, in particular, with regard to the DS timeframes.
5. The inter-governmental character of the DSU should be preserved.

The following sub-sections lay down the concrete reform proposals that aim at materializing these policy suggestions. It must, however, also be stated that these policy suggestions are mutually enforcing, in that, they jointly inform concrete ACP proposals. Hence, a proposed reform may well serve more than one of these principles.

A. ADDRESSING THE PROBLEMS WITH HUMAN AND FINANCIAL RESOURCES

The ACP proposals listed under the title of 'Legal Aid' in Appendix B aim at addressing the human and financial resource problems that these countries face. In order to overcome the resource constraints, the ACP countries chiefly suggest three solutions. The first one is to improve the Secretariat assistance as it is already provided under the DSU Article 27:2. This Article provides that:

While the Secretariat assists Members in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country Members. To this end, the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests. This expert shall assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat.

The problem in the application of this provision relates to the requirement that whatever expertise is provided, it should be done 'in a manner ensuring the continued impartiality of the Secretariat'. As it is also mentioned in the LDC group proposal, the impartiality requirement seriously constrains the Secretariat assistance⁹⁷. A prominent expert and practitioner states that the impartiality requirement 'makes it impossible for the experts of the Secretariat to act as an advocate for one Member in a legal proceeding against another and they have in practice not done so'⁹⁸. Consequently, the ACP countries suggest that there should be a roster of lawyers and experts that they can, if need be, make use of; and the experts in this roster should be fully able to fully discharge the functions of a counsel⁹⁹.

The second ACP proposal is the establishment of a WTO Trust Fund that would assist them in their DS activities. This proposal is common to all three submissions made by

⁹⁶ WTO *Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding* (13 March 2002) TN/DS/W/1 p.1.

⁹⁷ Appendix B 13-14.

⁹⁸ F Roessler 'Special and Differential Treatment of Developing Countries in WTO Dispute Settlement' 5 available at <http://www.ictsd.org/dlogue/2003-02-07/Roessler.pdf> [Roessler-SDT]

⁹⁹ Appendix B 14.

the African Group¹⁰⁰. This Fund should be financed from the budget of the WTO; however, it can also receive extra-budgetary funds such as voluntary contributions by Members.

The idea of the establishment of a WTO Fund seems to be inspired by the experience of the Advisory Centre on WTO Law (ACWL) in Geneva in 2001¹⁰¹. The ACWL is an intergovernmental organization independent from the WTO, which is funded through the contributions of its developing and developed country members. The Centre's mission is to provide developing countries and especially LDCs with advice on issues relating to WTO law, including but not limited to WTO litigation advice¹⁰². While the ACP countries welcome the activities of the ACWL, they maintain that such initiatives are not a sufficient panacea for the resource constraints¹⁰³. Therefore, they propose to complement such initiatives¹⁰⁴ with a Fund which will be financed from the WTO budget and which would therefore be more sustainable and reliable.

Finally, the third proposal put forth by the ACP countries to address the financial resource constraints is to confer upon the WTO Panels and the AB the power to award litigation costs if the winning party in a case is a developing country¹⁰⁵. While the first two proposals address the resource problem in an ante-dispute manner, this proposal would serve the same purpose in a post-dispute manner.

While the proposals to address the resource restraints feature prominently in the ACP submissions, interestingly, the EU submissions stay completely silent on this issue.

B. STRENGTHENING THE REMEDIES AND THE RETALIATORY MEASURES

The proposals put forth by the ACP countries and summarized in Appendix B¹⁰⁶ under the titles of remedies and retaliation aim at strengthening the remedy of 'bringing the WTO inconsistent measure into compliance', at present the only remedy available, and adding teeth to the most commonly used retaliatory measure which is the suspension of concessions¹⁰⁷.

As set out in the previous Section, the fact that the WTO DS mechanism only provides for a prospective and non-pecuniary remedy seriously reduces the utility of the DS for ACP countries. In order to address this problem, the ACP submissions propose that retroactive and monetary compensation should be available for developing countries. The ACP countries also emphasize that this compensation should be provided in addition to cessation, that is to say, in addition to 'bringing the inconsistent measure into compliance'¹⁰⁸. Developing countries have been reiterating this proposal since the 1960s¹⁰⁹.

This proposal would bring the WTO DS mechanism more in line with the general international law which stipulates that the wrongdoer state's responsibility covers the cessation of the wrongful act, the continuing duty of performing the obligation and compensation for the loss suffered due to this act¹¹⁰. The loss suffered, under this approach,

¹⁰⁰ Appendix B 13-15.

¹⁰¹ www.acwl.ch

¹⁰² A full list of cases where the ACWL assisted developing countries could be found at:

http://www.acwl.ch/e/dispute/wto_e.aspx

¹⁰³ Appendix B 13.

¹⁰⁴ Roessler-SDT (n 98) 6.

¹⁰⁵ Appendix B 14.

¹⁰⁶ Appendix B 10-13.

¹⁰⁷ The other possible retaliatory measure is the so-called 'compensation'. As compensation requires the agreement of both parties, it forms a *sui generis* retaliatory measure. Moreover, as, when compensation is offered it must be extended to all other Members on an MFN basis, however, as only the complainant makes use of the suspension of concessions, the latter is largely preferred over compensation.

¹⁰⁸ Appendix B 11.

¹⁰⁹ JH Jackson et al *Legal Problems of International Economic Relations Cases, Materials and Text* (West Group 4th ed. 2002) 336. [Jackson – Legal Problems]

¹¹⁰ The relevant source for the principles of state responsibility is the 'Articles on State Responsibility' drafted by the International Law Commission. The Articles were taken note of the UN General Assembly. The Articles are believed to represent the customary international law with regard to state responsibility. They are annexed to the UN General Assembly resolution 56/83 (12 December 2001) as corrected by A/56/49 (Vol. I)/Corr.4. Part Two of the Articles describes

would be calculated as of the date of the wrongful act, ie as of the date of application/adoption of the WTO inconsistent measure¹¹¹. Adoption of such an approach would dramatically reduce the incentives for a wrongdoing state to try to drag out the DS process. Such a remedy, especially if it is applied on a SDT basis, would greatly strengthen the hand of developing countries against developed countries. Perhaps unsurprisingly the EU's proposals remain silent on the issue remedies as well.

The second group of proposals aiming at strengthening the hand of developing countries against developed ones concern the improvement of the present retaliation system. As described in the previous Section, the present WTO DS mechanism confers the right to retaliate, that is, to suspend concessions, only to the winning party in a dispute. The small size of ACP countries means that even if they suspended some concessions vis-à-vis any developed country this is unlikely to be felt by the developed country; to the contrary, such suspensions would most probably hurt the ACP countries more.

Consequently, the ACP countries propose that, in a dispute where the losing party is developed and the winning party is developing, all WTO members should be authorized to retaliate. This is the so-called collective retaliation mechanism¹¹². It must be noted that the ACP proposals leaves unaddressed the question of how this collective right of retaliation could be allocated between the Members who are willing to resort to it. Like the monetary compensation proposal, developing countries have been reiterating this proposal since the 1960s¹¹³. The adoption of such a proposal would signify an important structural change in the system.

A less radical proposal that the ACP countries put forth, concerning the mechanism of suspension of concessions, involves the so-called cross-retaliation. The ACP proposes that the authorization to cross-retaliate, that is, to retaliate in a different sector or under a different agreement, should more easily be available for developing countries. More specifically, they suggest that developing countries, should not be asked to establish that retaliating in the same sector, or under the same agreement is not effective or practicable before getting the authorization to cross-retaliate¹¹⁴.

The EU's submissions remain silent on the issue of collective retaliation. The EU's proposals in the general field of implementation of judgements relate to its experience mainly during the EC-Hormones case¹¹⁵, and the USA's threats of carousel retaliation¹¹⁶.

the 'content' of the responsibility of a state when it commits an internationally wrongful act, *in casu* that would be the violation of a WTO obligation. The first and foremost attribute of responsibility is for the wrongdoing state to cede the breach (Article 30). Article 29, moreover, provides that the wrongdoing state would still be under an obligation to continue performing the obligation that was initially breached. Subsequently, Article 31 provides that, in addition to cessation, the wrongdoing state is also under an obligation to provide *full reparation*. According to Article 34 the reparation would take the form of either restitution, or compensation or satisfaction. Compensation, provided for in Article 36, is by far the most common form of reparation. It usually entails financial compensation and aims at compensating for the financially assessable damage caused by the wrongful act. Therefore the computation of the damage caused would start as of the day of the wrongful act, as the damage starts incurring as of that day. Hence, the WTO DSU system, by not providing for 'full reparation' and by not providing any remedy for the damage caused as of the day of the commission of the wrongful act (i.e. the breach of the WTO obligation) –i.e. by not providing for a retroactive remedy– forms an exception to general international law.

¹¹¹ *ibid.*

¹¹² Appendix B 12-13.

¹¹³ Jackson – Legal Problems (n 109) 336.

¹¹⁴ Appendix B 12; DSU Article 22:3.

¹¹⁵ WTO *European Communities — Measures Concerning Meat and Meat Products (Hormones)* (Complainant: United States) available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm and the follow-up dispute which prompted the EU to propose the establishment of a post retaliation compliance review mechanism: *United States — Continued Suspension of Obligations in the EC — Hormones Dispute* (Complainant: European Communities) available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds320_e.htm The EU's concern relates to the lifting of retaliatory measures. In the present situation, where and when a Member imposing retaliatory measures decline to lift them by asserting that the defending party's implementation measures had not brought her into compliance with her WTO obligations, the only option open to the defending party is to initiate a new dispute. The latter dispute (US-Continued Suspension) is such a complaint brought by the EU as a response to the US which declined to remove the retaliatory measures by insisting that the EU had not brought itself into compliance vis-à-vis the EC-Hormones dispute. The EU's proposal would make it possible for the defending party to have recourse to an expedited procedure than a new complaint.

¹¹⁶ Carousel retaliation denotes that the retaliating party may change the composition of the products that it retaliates against for as long as it respects the overall amount of retaliation.

Accordingly, the EU proposes a post-retaliation compliance review mechanism whereby a decision to lift or to continue the retaliatory measures would be made, and a clarification that the DSU does not allow for carousel retaliation.

C. FURTHER MULTILATERALIZING THE DS MECHANISM

Strengthening multilateralism, hence allowing for the formation of coalitions and accordingly having the opportunity to counterbalance developed countries, is a priority for the ACP countries within the DS mechanism. The fact that most of the DS procedures are conducted under the scrutiny of the WTO Dispute Settlement Body (DSB) where all Members are represented is a gain for the ACP. In particular, the multilateral surveillance of the implementation of panel/AB reports by the DSB¹¹⁷ creates an important element of informal pressure which is important for developing countries which have less power to push for implementation through bilateral countermeasures.

Having said this, there are still parts of the DS system which preserve their bilateral character and the ACP efforts envisage multilateralizing these parts as well. A prime embodiment of this underlying policy is the proposal for collective retaliation analysed above. However, the ACP proposals for strengthening multilateralism do not stop there.

ACP countries also put forth proposals that would help them multilateralize –or ‘collectivise’- such prior phases of the DS as consultations, panel and the AB stages. The way for the ACP countries to further multilateralize these stages of DS is to relax the conditions of third party participation to the disputes. By relaxing these conditions the ACP countries not only envisage being able to join in and being heard in disputes which might have important systemic effects, but also, they aim to make it easier for them to become third parties to each others’ –and other similarly situated developing countries’- disputes and hence forming litigation-coalitions.

According to DSU Article 10:2, only Members which have a ‘*substantial interest*’ in the matter before a panel can become a third party in a dispute. The ACP countries propose that in the case of developing countries and LDCs, any amount of international trade and even gaining legal experience should be considered as substantial interest. Hence, ACP countries in effect intend to enable all developing countries to join any dispute as third parties.

In addition to enlarging the scope of those who can join in disputes as third parties, the ACP countries also propose to extend the rights of third parties concerning access to the documents and hearings of a dispute¹¹⁸.

The EU’s submissions do not contain anything with regard to the extension of the scope of Members who can join as third parties. The EU, however, proposes to extend the rights of third parties to access the main parties’ submissions and to the hearings of a case. Apart from the third party rights, the EU’s proposal to establish a post-retaliation compliance review mechanism, mentioned above under the section on retaliation, may be viewed as a positive step for ‘furthering multilateralism’ as it intends to establish a more effective control upon the lifting of retaliatory measures.

As a conclusion it may be said again that while the ACP countries envisage a more structural reform, the EU is merely interested in fine-tuning the present DSU.

D. MORE, MANDATORY AND OPERATIONAL SDT IN DS

A quick look at Appendix B, and especially at the section on ACP proposals exposes that most of their suggestions involve insertion of new SDT provisions into the DSU¹¹⁹. This goes true for almost all ACP proposals laid down above. The ACP countries have

¹¹⁷ DSU Article 21:6.

¹¹⁸ Appendix B 18.

¹¹⁹ In cases where an ACP proposal explicitly or implicitly entails SDT this is indicated in the table between the brackets following the summary of the proposal.

increasingly realized that judicialization and accompanying litigation do not cancel out power imbalances. And in order for the power imbalances between developed and developing countries not to be reproduced through the DS, they have started calling for more SDT provisions within the DSU¹²⁰. Consequently, the ACP countries made DSU-related submissions not only within the frame of DSU review negotiations, but also within the context of the Doha Round negotiations which aim at reviewing SDT provisions ‘with a view to strengthening them and making them more precise, effective and operational’¹²¹. Inserting new SDT provisions, and making the already existing ones mandatory, precise and operational has been a pervasive theme of ACP and other developing country submissions¹²².

Apart from the proposals analysed above, which all require SDT to a certain extent, the one other area where the ACP countries’ SDT calls seem to be clustering is the timeframes of the DSU. The ACP countries, on the one hand, call for extended time-limits for themselves –as their capacity constraints make it difficult for them to cope with the present time-limits-, and, on the other hand, they urge for stricter time-limits for developed countries, as the delays in the resolution of disputes carry a much higher relative price for the ACP economies¹²³. An example of these requests is with respect to DSU Article 12:10, which states the following as regards the timeframes of the consultations and the panel-stage-submissions:

If, after the relevant period has elapsed, the consulting parties cannot agree that the consultations have concluded, the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long. In addition, in examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation.

Having provided this SDT, the Article goes on to state that these SDT provisions are confined by the global timeframes imposed upon the DS process under Articles 20:1 and 21:4¹²⁴. The ACP proposals intend to make these SDT provisions more precise hence operational by specifying that the Chairman’s extension could not be any less than 30 days; and that the extra time allowed before the first written submission must be at least two weeks¹²⁵; and that ‘one additional week’ should be granted ‘thereafter at each stage of written submission or presentation’. Besides, as the global timeframes would constrain the use of these SDT provisions, the extra-times provided as SDT should be added to the global timeframes¹²⁶.

The ACP countries’ proposal on DSU Article 21:2, in a similar vein, aims at extending the reasonable period of time, which should not exceed 15 months under the present provision 21:3(c), up to three years¹²⁷. The ACP countries, on the other hand, underscore that this period should not be any more than 15 months if the defendant is a developed country¹²⁸.

While the ACP proposals chiefly aims at extending the timeframes for themselves, the EU seems to be favouring the speeding-up of the process for the whole membership¹²⁹. The EU’s proposals provide for scrapping of several stages of the present system, and hence

¹²⁰ For a contrary view: Roessler-SDT (n 98) 3-4. For the arguments against Roessler: Alavi-Africa WTO (n 84) 33.

¹²¹ WTO Ministerial Conference Doha- 9 - 14 November 2001 - Ministerial Declaration - Adopted on 14 November 2001 (20 September 2001) WT/MIN(01)/DEC/1 paragraph 44.

¹²² Appendix B 15-18.

¹²³ Appendix B 8-10 on timeframes.

¹²⁴ These global time-limits could be seen in the Appendix C at 22-23.

¹²⁵ The order in which and the timing of written submissions and hearings during the panel process could be seen in the Appendix C 22-23.

¹²⁶ Appendix B 8-10.

¹²⁷ Appendix B 17.

¹²⁸ *ibid.*

¹²⁹ Appendix B Timeframes.

bringing about a total reduction of time up to 47 days. While the EU seems to recognize that, during the panel stage, there may be SDT to allow for the developing countries to still enjoy 3-6 weeks for the filing of the first written submission, instead of 3-4 as the Union proposes; this flexibility seems to have been confined by the reduction in global timeframes that their proposal stipulates.

In order to accelerate the process, and also in order to increase the quality of the reports, the EU additionally suggests the establishment of a system of permanent panellists. This is, perhaps, structurally the most important EU proposal. This proposal raises concerns within the ACP states with respect to their representation in the proposed list of permanent panellists.

The EU's stance on other SDT provisions in the DSU could also be characterized as 'minimalist'. EU suggestions just concern fine-tuning of the already existing SDT provisions. And these fine-tuning suggestions merely involve making some SDT provisions mandatory by changing the 'should' language to the 'shall' language¹³⁰. However, the EU seems not to be willing to further specify and operationalize these provisions.

Under this policy heading as well, the ACP countries and the EU appear to have diverging stances. In general, while the ACP push for an enlarged SDT agenda, the EU upholds a significantly more conservative, if not minimalist, position vis-à-vis the SDT provisions. In particular, the positions of the ACP countries and the EU as regards DS process timeframes appear to be contrasting.

E. PRESERVING THE INTERGOVERNMENTAL CHARACTER

The policy assertions that the WTO DS system must preserve its essentially intergovernmental character finds its most significant embodiment in the ACP countries' fierce opposition against the acceptance by the Panels and the AB of the so-called amicus curiae briefs, that is to say, the unsolicited submissions. The controversy first came into the WTO arena with the WTO AB's decision in the US-Shrimp case that the Panels and the AB could accept unsolicited amicus briefs¹³¹. This decision of the AB came under strong developing country criticism. The developing countries, including certainly the ACP states, were concerned that this practice would, in effect, open the door for the developed world's business groups and the NGOs to make indirect use of the WTO DS system against them. Through these unsolicited amicus briefs the business groups and NGOs could present new and additional arguments in cases that the developing parties would have to respond; and this would further strain, if not drown, the already scarce human and financial resources¹³². Despite these strong criticisms, the AB continued its practice of accepting amicus briefs on a case by case basis, although the views contained in these briefs have been considered in few cases¹³³.

The proposals put forth by the ACP for the reform of the DSU demonstrate that the ACP countries still fiercely oppose the acceptance of these briefs by the panels and the AB. They argue that the acceptance of these briefs is against the intergovernmental nature of the WTO DS mechanism¹³⁴. Whereas the EU supports the current practice of admitting the amicus briefs, however, it proposes that the framework for allowing them should be clarified¹³⁵. The EU, while in principle being in favour of the admission of amicus briefs in all cases, suggests that a clear framework is needed so as not to allow these briefs to slow down the DS procedures. It may be concluded that the developing countries' concern with the non-governmentalization of the system is very much related to their lack of resources.

¹³⁰ Appendix B Other SDT Issues 15-16.

¹³¹ WTO *United States — Import Prohibition of Certain Shrimp and Shrimp Products (Complainants: India; Malaysia; Pakistan; Thailand)* available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm; also D Palmetier PC Mavroidis Dispute Settlement in the World Trade Organization Practice and Procedure (2nd ed. CUP 2004) 113-114.

¹³² Alavi-Africa WTO (n 84) 37.

¹³³ *ibid.*

¹³⁴ Appendix B Amicus Curiae 15.

¹³⁵ *ibid.*

These countries are trying at least to delimit the number of interlocutors/negotiators/lawyers that will be sitting on the other side of the table.

Another good example of the close relationship between the ACP countries preference for inter-governmentalism and their lack of resources has been witnessed when the EU, as part of its proposal for the establishment of a permanent roster of panellists, suggested that no panellist should be a government official¹³⁶. This would be a change from the present situation. This proposal attracted negative reactions, especially from developing countries, on the grounds that such a requirement would make it very difficult for them to present candidates. Considering that a great deal of the ACP countries have no more than a handful of experts on WTO matters, and most of these persons are government officials, it is not difficult to understand their concerns. Such proposals only serve to increase the already significant anxiety among developing countries regarding their representation in the WTO adjudicating organs¹³⁷.

In conclusion, the analysis of the reform proposals that the ACP countries put forward gives the opportunity to detect the underlying policy assumptions of these countries with regard to a development friendly DS system. Similarly, the study of these policy assumptions by comparison to the proposals made by the EU reveals the potential conflict points and signals where the enquiries should focus on. The five policy assumptions examined above, although not being exhaustive, seem to have been prioritized by the ACP countries. An important feature of these policy assumptions that needs to be underlined again is that they form a unity, they complement each other. For instance, while it would seem to be development-friendly to extend timeframes for developing countries, for as long as there is no solution to address capacity constraints, the ACPs would not be able to benefit from these extensions. In the same vein, if remedies and retaliation measures are not strengthened, no matter how much resource is used to assist the ACP in their DS endeavours, it may not be possible to obtain effective implementation results. Many such examples can be given. Therefore, what is needed for a development- friendly DS is a comprehensive approach which pay due regard to all these policy suggestions. Whether or not, or to what extent the EPAs have such an approach is the guiding question of the following and last section.

IV. TESTING THE DEVELOPMENT-FRIENDLINESS OF THE EPA DISPUTE SETTLEMENT MECHANISMS

The examination of the development friendliness of the EPA DS mechanisms will be done by reference to parameters of development-friendliness set out in the previous section. This examination will involve both a comparison between the multilateral and regional norms (the vertical axis) and another one between the different regional norms (the horizontal axis).

A. EPAs AND THE HUMAN AND FINANCIAL RESOURCE PROBLEMS

Following the order in which the development-friendly DS mechanisms' policy assumptions are examined, the first question to ask is whether the EPAs DS systems provide for a mechanism that would address ACP's human and financial resource problems with respect to litigation. Although the ACP-EU Partnership has an important element of aid, and although a substantial part of this aid is earmarked for the so-called aid-for-trade projects, there is no reference either in the Cotonou Agreement or in the EPAs under examination to any sort of legal aid mechanism that would assist the ACP countries in the application of the DS provisions. This absence substantially reduces the potential for the EPAs DS mechanisms to be used by the ACP countries; and to a large extent makes it an option only for the EU side.

¹³⁶ Appendix B Other Structural Reforms 20.

¹³⁷ For the LDC proposal regarding their representation in the panels, see Appendix B Other Structural Reforms 20.

While the same problem exists in the WTO as well, the problem is even aggravated under the EPAs. For, the DSU at least provides for the Secretariat assistance -no matter how limited and how inadequately effective it is due to the 'impartiality' requirement- to developing countries. Any ACP state that decides to bring a complaint under the EPAs shall be deprived of even such minor assistance.

Perhaps more importantly, another reason which puts the EPAs DS in a worse position than the WTO DS is that, such forces as the academia, civil society and pro bono lawyers¹³⁸ that could assist the ACP countries in their DS activities are, and most probably will be, focused on the WTO level, rather than the regional level. Considering the scarcity of resources that could be used in such activities, it is normal for these organizations to give weight to the multilateral level. A good example would be the ACWL. The Centre, according to its charter, could only give advice with regard to WTO law matters. Hence, the ACP states, should they decide to bring a case under the EPA, cannot tap into the ACWL expertise.

A way of overcoming this vitally important shortcoming of the EPAs DS system would be to provide for the establishment of regional advisory centres, preferably on both WTO and EPA law¹³⁹. It should not be forgotten that according to the Cotonou Agreement, the 'ultimate aim of economic and trade cooperation' between the ACP and the EU is 'to enable the ACP States to play a full a part in international trade'¹⁴⁰. The Agreement also stipulates that 'particular regard shall be had to the need for the ACP States to participate actively in multilateral trade negotiations'¹⁴¹. For the ACP States to play a full part in international trade, they not only need to actively participate in negotiations, but they also need to actively participate in the further clarification and enforcement of these rules. Establishment of regional advisory centres on WTO and EPA law would certainly serve this purpose. Moreover they would contribute to the training of human resources; hence having positive spill-over effects for the trade infrastructure.

B. REMEDIES AND RETALIATORY MEASURES IN EPAS

1. Remedies in EPAs

The second enquiry to assess the developmental credentials of the EPAs DS should ask the question whether the remedies and retaliatory measures provided for in the agreements are strengthened vis-à-vis the corresponding measures in GATT/WTO. It has been laid down above that the present WTO system provides merely for the cessation of violation as a remedy; that is to say, the panels and the AB, if they find a violation, merely ask the wrongdoing party to 'bring the measures into compliance' with its WTO obligations. As this remedy seriously fall short of the needs of ACPs, they proposed the DS mechanism make provision not only for cessation, but also for retroactive monetary compensation; i.e. the loss suffered due to the WTO inconsistent measure should be computed as of the date of adoption/application of the measure, and the wrongdoing party should be asked to compensate for the calculated amount financially.

Annex IV of the Appendix D shows the remedies-related provisions of the WTO DSU, the EPAs and the Chile and Mexico FTAs. A first observation is that the most detailed provision is Article 19 of the WTO DSU. The agreements with Pacific States, Chile and Mexico contain no provision on remedies. The provisions of the other EPAs are almost identical and state that parties 'may request the arbitration panel to provide a recommendation as to how the Party complained against bring itself into compliance'. This provision bears a great deal of similarity to the second sentence of Article 19:1 which

¹³⁸ For possible litigation assistance strategies involving these forces: CP Bown M Hoekman 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector' 2005 JIEL 861-890; Mosoti-Africa (n 80) 451-453.

¹³⁹ Mosoti-Africa (n 80) 453.

¹⁴⁰ Cotonou Agreement (n 7) Article 34:1.

¹⁴¹ *ibid.*

provides that '[i]n addition to its recommendations, the panel or the Appellate Body may suggest ways in which the Member concerned could implement the recommendations'. It is safe to assume that what is known as 'suggestions' under the WTO DSU system is coined as 'recommendations' under the EPAs.

The most important observation that could be made with regard to remedies provisions of all EPAs and FTAs is that none of them includes a clause similar to the first sentence of Article 19:1 which directs the panels and the AB to 'recommend'¹⁴² 'the Member concerned [to] *bring the measure into conformity*'. The WTO DS practice demonstrates that the presence of this clause directed the WTO adjudicating organs to develop a case law where *only* this recommendation can be made, and contrary to general international law principles on state responsibility, compensation for loss suffered cannot be awarded. It must, however, also be noted that this practice of the WTO organs was largely based on the fact that in no WTO complaint any plaintiff explicitly asked for monetary compensation. According to the principle of *non ultra petita* a panel cannot award a remedy that the plaintiff has not asked for.

In light of this background, the question for the developmental credentials of the EPA DS mechanisms is whether it is better to have no provision on remedies, or to have one like most of the EPAs have, providing for the WTO equivalent of suggestions, or to have a provision similar to Article 19. Or put differently, if the intention of an ACP complainant state is to get awarded a remedy which is more than mere cessation of the breach, under which type of provision is this possible?

The answer seems to be: when there is no remedial provision at all. Because the present provisions in the EPAs provide for a recommendation as to how a party 'may *bring itself into compliance*', it might be assumed that the essential remedy that the EPAs provide is also merely the 'bringing into compliance'. Although the text of the provision is not as clear as DSU Article 19:1, considering the well established practice in WTO, it is highly likely that the implicit reference to 'bringing into compliance' would be interpreted in such a way. However, when there is no remedial provision at all it would be relatively easier to argue for retroactive and monetary compensation, which would be the normal remedy under general international law¹⁴³. For ACP countries preferring this option, it is possible to draw on the example of the Pacific EPA, which does not contain any remedial provision.

It should be noted that such an arrangement would also open the door for the EU to be able to ask for monetary compensation in cases where it is the complainant. Trying to open the door for retroactive and monetary compensation by making use of the silence of the treaty carries such a risk. As this risk indicates, the ideal solution for the ACP countries would be to have the treaty text providing for retroactive and monetary compensation in explicit language incorporating SDT. In order to convince the EU for the inclusion of such a clause some ceilings for potential compensation awards may be negotiated. That is, the upper most amount an arbitration decision could award may be capped. However, if such arrangements could not be pushed through due to EU opposition, not having any remedial provision may at least open the door for negotiations on a case-by-case basis.

2. Retaliatory Measures in EPAs

The second leg of the enquiry entails the analysis of the retaliatory measures of the EPAs. Retaliation, both under the WTO DSU and other agreements under scrutiny, is authorized when the wrongdoing party has not provided the remedy to the winning party within the RPT. The retaliatory measure would be available if the disputed measure had not been brought into compliance within the 'reasonable period of time'. As summarized above, the DSU allows for two main retaliatory measures: compensation and suspension of concessions or other obligations.

¹⁴² It is worth to recall that, although the term used is 'to recommend', once these recommendations are adopted by the DSB they become binding on the Members to whom they are addressed.

¹⁴³ See supra footnote 110.

It is worth recalling that in this context ‘compensation’ as a *retaliatory measure* is not the same as ‘compensation’ discussed above as a *remedy*. Compensation in the context of retaliatory measures denotes the price that a recalcitrant party would agree to pay to the winning party for not being able to provide her with the *remedy* that had been decided. As such, it is a temporary measure that needs to be lifted when the recalcitrant party eventually complies with the remedy¹⁴⁴. Put differently, while remedial compensation aims at making good for the loss already suffered due to the wrongful act, the retaliatory compensation seeks to cover the loss that will occur due to the continuation of the breach and, by doing that, to induce eventual compliance.

In the WTO context compensation usually entails providing the winning party with new market access. However, in exceptional cases it also took the form of monetary payments. Yet, it must be underscored that monetary payments were mainly used as a form of retaliation because the parties agreed on that method; not because any panel, or arbitration, or the DSB provided for it.

On the other hand, the suspension of concessions or other obligations does not require the agreement of parties. If the losing party does not comply with the decision in the time given to her, and if the parties cannot agree on compensation as a retaliatory measure, the winning party may suspend concessions vis-à-vis the recalcitrant party. In practice, this retaliatory measure, usually takes the form of prohibitively increased tariffs on the imports of the recalcitrant party. This is the retaliatory measure that the ACP countries demand to have on a collective basis.

Annex VII of Appendix D compares the retaliatory provisions included in the agreements under examination. While the FTAs with Mexico and Chile contain provisions largely similar to the WTO system, EPAs seem to comprise some important differences than the WTO system. There also seems to be some potentially significant differences between the EPAs as well.

a. Retaliatory Compensation under EPAs

Notwithstanding their differences all agreements provide for compensation as the first-choice retaliatory measure. In all agreements under examination compensation is subject to the agreement of parties. While the WTO DSU, the FTAs with Chile and Mexico, the Ghana-EPA, and the Cote d’Ivoire EPA do not contain any provision describing the form the compensation may take, the other EPAs do contain some potentially important clauses. The Pacific states, the SADC and the Cameroon EPAs explicitly provide that this ‘compensation may include or consist of financial compensation’¹⁴⁵, however, all three also stipulate that nothing in the Agreement shall oblige the defendant to offer financial compensation. The CARIFORUM EPA just stipulates that the defendant shall not be obliged to make a financial compensation offer; it does not contain the permissive reference that the compensation may be financial. Finally, the SADC EPA contains yet another provision (article 79:4) stating that if the SADC party is a complainant and the EU the recalcitrant party, when the SADC party asserts that other retaliatory measures would ‘make significant damage to its economy, the EC Party shall consider providing financial compensation’. This is the most important SDT clause in that regard.

While on the one hand, it may be praised that the possibility of financial compensation is acknowledged in some agreements, the provisions merely show a best-endeavour character. Nonetheless, such provisions may prove useful during negotiations. Therefore it is worth looking into for ACP states to ask for clauses acknowledging the possibility of financial compensation. At the same time some ACP states may have deliberately not asked for the inclusion of financial compensation provisions, by taking into account that they may be used against them. In that regard, it would be prudent to include SDT provisions. The SDT clause

¹⁴⁴ DSU Article 22:1.

¹⁴⁵ The Cameroon EPA is in French, however, the relevant part translates exactly the same: ‘... indemnisation peut comprendre ou consister en une indemnisation financière’.

provided for in the SADC EPA may be drawn upon to emphasize the best-endeavours commitment on the part of the EU to consider financial compensation. On top of that novel SDT clauses should provide that in cases where the defendant is an ACP state, the EU shall not ask for financial compensation.

b. Appropriate Measures as Retaliation under the EPAs

If parties cannot agree on compensation, the complaining party may retaliate unilaterally. In line with the WTO approach, this retaliation takes the form of 'suspension of concessions or other obligations' under the FTAs with Mexico and Chile. Here lies one of the most important differences between the EPAs and other agreements. The EPAs provide for '*appropriate measures*' instead of suspension of concessions. The term '*appropriate measures*' entails a greater variety of retaliatory measures than the strictly defined '*suspension of concessions*'. The term belongs to the previous generation of EU DS mechanisms. The analysis of the DS provisions of the Euro-Mediterranean Association Agreements in Appendix A would reveal that, in the event either party considers the other party does not fulfil one of its obligations, the former party may apply '*appropriate measures*'. *Appropriate measures* seem to be a reference to countermeasures under general international law.

Considering how difficult, if not impossible, it is for most ACP countries to suspend any concessions vis-à-vis the EU, let alone harming the EU, the additional flexibility provided by the use of the term '*appropriate measures*' may be welcome. This flexibility would give to the ACP countries the chance to enjoy a richer tool box of retaliatory measures. On the other hand, it must not be forgotten that the EU party also enjoys the same right. Having said this, the EPAs contain provisions that discipline the use of *appropriate measures* both for the EU and the ACP; and also some additional disciplines only for the EU. The disciplining of these *appropriate measures* on an SDT basis carries importance in view of the potentially large scope of *appropriate measures*. Therefore, the main question in this respect is to what extent these disciplines effectively reduce the risk caused by the possibility of EU resorting to '*appropriate measures*' without reducing the flexibility that the term creates for ACP.

b.(1) Disciplines on Appropriate Measures

The most common of the provisions disciplining the use of *appropriate measures* state that the complaining party shall endeavour to choose the *appropriate measure* that least affect the attainment of the objectives of the treaty. This provision is common to all EPAs. Indeed, this provision as well goes back to the previous generation of EU FTAs, and can be seen in the Euro-Mediterranean Association Agreements' DS provisions as well¹⁴⁶.

Another provision that is common to all EPAs is that the retaliating party must take into consideration the impact on the economy of the defending party. Having said this, there is a minor difference in the Pacific text regarding this last provision. While all other EPAs provide that impact on the economy shall be taken into consideration, the Pacific EPA provides that the impact on the economy *or development* shall be considered. Although minor, this wording seems to be more in favour of ACP states and may be drawn upon by other ACPs.

Another discipline on the application of *appropriate measures* is the requirement of proportionality. The provision that the *appropriate measures* should be '*proportionate to the violation*' is contained in the EPAs with the Pacific States, SADC and Cameroon. There is no such reference in other EPAs. On the one hand it may be maintained that, as '*appropriate measures*' are generically countermeasures, and as countermeasures all should be proportionate to the violation, the inclusion of these provisions does not carry importance. However, it may also be safer to ask for the inclusion of this reference into the EPAs where it does not feature.

¹⁴⁶ Appendix A.

One important difference between the EPAs, and the disciplining of appropriate measures relates to the procedure of the initial imposition of these measures. The CARIFORUM EPA provides that the complaining party may adopt appropriate measures only 10 days after notifying the other party. No other EPA contains such a procedural guarantee. Such a procedural guarantee exists in the Mexico FTA too, and indeed it is much stronger. No party, under the Mexico FTA, may adopt appropriate measures any time before 60 days after the date of notification. This timeframe may be arranged on an SDT basis as well.

Finally, maybe the single most important discipline on the utilization of appropriate measures can only be found in the Ghana and Cote d'Ivoire EPAs. The Ghana EPA provides that '[u]nder no circumstance, the appropriate measures taken to comply with the present paragraph will affect *development assistance to Ghana*'. The same provision is included in French in the Cote d'Ivoire EPA. Considering the EU development assistance to the ACP, the importance of clearly stating that development aid cannot be used as a retaliatory mechanism cannot be overstated. Therefore, it is a great deal beneficial to include this same provision in the other EPAs too.

The provision that development aid cannot be used for retaliation, while being an important step in improving the EPA DS system, is certainly not enough. As Section II demonstrates one of the reasons for many developing countries' shyness in using DS mechanisms is their developmental aid relationship with the potential defendants of their cases. Therefore, there seems to be a need for a clearer provision that would indicate that the use of the EPA DS by the ACP countries shall not have an impact on their development aid relationship with the EU. Such a statement perhaps would not terminate such fears, but may help to alleviate them. In this respect, the WTO DSU Article 3:10 which states that the use of the WTO DS 'should not be intended or considered as contentious acts' may serve as a guide. The EPAs too may state that the use of their DS mechanisms should not be considered as a contentious act and that no EPA dispute case should have any effect on decisions of development aid.

Apart from the above-mentioned specific disciplines on appropriate measures, the EPAs do also contain a general 'due restraint' clause which provides that the 'EC party shall exercise due restraint in asking for compensation or adopting appropriate measures'. This due restraint clause partakes of all EPAs under examination. The EPAs due restraint clause is reminiscent of the WTO DSU's LDC due restraint clause in Article 24. Therefore, the LDC demands for the strengthening of DSU Article 24¹⁴⁷ would also be relevant for the EPA due restraint clause.

Of all the above listed disciplines on appropriate measures most relevant for the ACP are 1) the obligation to show best endeavours that the adopted measure is the one that least affects the attainments of the objectives of the agreement and 2) proportionality. While certainly restraining the scope of measures that may be adopted, these two rules do not seem to impose a tight discipline on the types of measures that ACP may adopt. Therefore the flexibility that the term 'appropriate measures' provides the ACP countries seems to stay largely unaffected by these disciplines, which is a positive development. Less positive however is the fact that the disciplines are similarly flexible with regard to the use of retaliatory measures by the EU.

b.(2) The Lack of Operationality of Disciplines on Appropriate Measures

Developing countries' demands with regard to strengthening of SDT provisions by making them mandatory, more precise and operational are all relevant to the above mentioned disciplines too. While at an abstract level the disciplines provided for make a generally good case, the question of how they may be operationalized remains open under the EPAs.

It must be underscored that the problem of operationality of development-friendly checks on retaliatory measures looms larger under the EPAs than under the WTO DSU. This

¹⁴⁷ Appendix B 16.

is so, because while the retaliatory measures under the DSU are under the control and surveillance of both judicial (DSU 22.6 arbitrations on the determination of the amount and structure of the suspensions of concessions) and political (DSB) bodies of WTO; no such control exists under the EPAs. In particular, it remains to be answered why the EPA DS system on the hand promotes further judicialization –eg post-retaliation compliance reviews- but on the other hand abolishes another very important arbitral mechanism – eg the arbitral mechanisms that correspond to DSU 22:6 arbitrations which could control the legality of retaliatory measures-.

The only EPA DS mechanism which is similar to DSU 22.6 arbitration is the post-retaliation compliance reviews¹⁴⁸. This mechanism provides for the review of consistency of measures, taken after the imposition of retaliation, with the EPAs and the rulings of the initial panel. According to the decision of the panel, appropriate measures would either have to be terminated or they could be continued. However, these panels are not entrusted with the competence to decide if the appropriate measures comply with the disciplines laid out above. Similarly, if they decide that the appropriate measures could be continued, they can not make any findings as to how they should be applied in the future.

This presents a contrast with the EU's proposal on the post-retaliation compliance review mechanism for the WTO DSU. The proposal not only entrusts these new panels with the power to decide if the suspension of concessions could be continued, but also, if they could be continued, with the additional competence to judge what should be the new amount and structure of the continuing suspension of concessions¹⁴⁹. This contrast also serves to accentuate the absence of any judicial control on appropriate measures.

The so-called appropriate measures are more prone to power politics' abuse than perhaps any other part of the EPA DS mechanisms. To abolish the judicial control of legality of a complaining parties' suggested 'appropriate measures' does not fit into the general judicialization approach of the EPA DS. Indeed, only through such a judicial control the operability of above examined disciplines could be safeguarded.

c. Retaliatory Measures under the EPAs and the Issue of Collective Retaliation

A final observation regarding the EPAs' retaliatory mechanisms relates to the ACP countries demand within the WTO regarding the retaliations: collective retaliation. Since the EPA DS mechanisms do not function under such a multilateral organization as the WTO, and since more generally the EPAs provide for a bilateral relationship, it may be maintained that the lack of 'multilateral approaches' in them, and for the purpose of this analysis, the lack of collective retaliation should be seen as normal. However, this view misses the point that the EPAs draw on Cotonou regime, which has established a quasi-multilateral -104 state members- ACP-EU partnership. The Cotonou Agreement, and in particular its institutions, shall not terminate when the EPAs enter into force. On the contrary, the Cotonou Agreement still provides the larger framework of the ACP-EU relations. This point has been confirmed during the most recent ACP-EC Council of Ministers meeting in June 2008, when ministers stated:

The Council underlines the importance of an ongoing dialogue on EPAs, at all levels, so as to strengthen the partnership spirit, and to *ensure synergies between institutions created under EPAs and those of the Cotonou Agreement*, which remains the framework for all relations between the ACP and the EU.¹⁵⁰

That is to say that, in particular by leveraging the institutional possibilities that the Cotonou Partnership provides, and by creating 'synergies between' the Cotonou and EPA institutions and mechanisms, it is well possible to inject quasi-multilateral elements to the

¹⁴⁸ Appendix D Annex VIII.

¹⁴⁹ WTO Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding (13 March 2002) TN/DS/W/1 p.19.

¹⁵⁰ ACP-EC Resolutions (n 17) p.4

EPA relations. The institutions and mechanisms do exist, what is required is the political will. This point also relates to the following enquiry that will further elaborate the 'multilateralization' issue.

C. LOSS OF MULTILATERALISM THROUGH THE EPA DS MECHANISMS

The bilateral character of the EPA DS mechanisms, when considered against the WTO background where the ACP countries are trying to *further* multilateralize the already largely multilateral system, seems to represent a significant step back for development-friendliness. The loss of multilateralism is due to the fact that while WTO DS activities are conducted under the authority of the WTO DSB, the EPA DS activities shall be conducted under the authority of two parties to a dispute.

A prime example of the loss of multilateralism is the lack of any multilateral surveillance of the implementation of EPA DS mechanism's arbitral awards. This absence deprives the ACP countries of the institutional and informal pressure that the multilateral surveillance would exert upon the other party. As a prominent expert of the field observes:

Failure to comply with an RTA dispute settlement ruling is an irritant in bilateral relations; failure to comply with a WTO ruling is not only a bilateral irritant, but has multilateral consequences. Non compliance is raised at least monthly at the WTO and the defending party will be accused of cavalierly undermining an otherwise successful dispute settlement system. Countries may often want to avoid those consequences and accusations and thus be more likely to comply with a WTO ruling ¹⁵¹.

This lack of multilateral surveillance would further accentuate the power disparities between the parties to a dispute and would deprive the ACP countries of the power-disparity-offsetting effect of the WTO.

Another example of the step back with regard to multilateralism is the case of third party participation. While under the WTO, the ACP countries are pushing to expand their right of third party participation, they completely lose this right under the EPAs. Furthermore, the fact that the EPAs do not provide for collective retaliation could be cited as another example of the ACP not being successful in promoting the multilateralist agenda.

As EPAs are bilateral trade agreements, the loss of multilateralism may be deemed inevitable. However, as it has been pointed out with regard to the collective retaliation issue, the institutional structures of the Cotonou Agreement –in particular the ACP-EC Council of Ministers¹⁵² and the Committee of Ambassadors¹⁵³- provide the means to rectify the problems caused by the bilateral nature of EPAs. For instance, these institutions may be vetted with the mandate to observe the implementation of any EPA arbitration ruling. As it could convene more frequent meetings, the Committee of Ambassadors of the ACP-EU Partnership may be the ideal platform for such surveillance function. These meetings would be useful so that the ACP countries may exert a quasi-multilateral pressure for the effective implementation of arbitral awards.

Moreover, there is no legal constraint on granting all ACP countries -or depending on the political choice, perhaps only the ACP countries which have signed an EPA- with the right to participate as a third party in a dispute under any other EPA. Treaties may create rights for States which are not party to them as well¹⁵⁴. In addition to the lack of any legal constraint, there is indeed a strong legal policy case in favour of granting third party rights for all ACP in EPA disputes. The substantive provisions of many EPAs are significantly similar. The EPA DS activity will not only solve individual disputes under these provisions but also will it clarify these provisions. Any clarification on any EPA provision set out by an arbitral

¹⁵¹ Davey-DS RTAs (n 75) 356.

¹⁵² Cotonou Agreement (n 7) Article 15.

¹⁵³ Cotonou Agreement (n 7) Article 16.

¹⁵⁴ Vienna Convention on the Law of Treaties Article Article 36 provides for such possibility.

panel, even if it is legally not binding on non-parties to the dispute, would certainly carry a weight for the interpretation of the same provision in the future. Therefore, the EPA signatories will have a systemic interest in participating in each other's disputes.

In conclusion, the problems created due to the bilateral nature of EPAs are not impossible to solve. The Cotonou institutions may serve to attenuate the problems due to the lack of multilateral institutions, in particular the lack of surveillance of implementation of arbitral awards. Moreover, there is no legal constraint on granting to the ACP countries the right to participate in each other's disputes. What is needed to materialize these steps that would quasi-multilateralize the DS system, hence that would render it more development-friendly, is the political will of the parties.

D. EPAS AND THE SDT

The fourth test regarding the development-friendliness of the EPA DS mechanisms entails the examination of their accommodation of SDT provisions. Some of the SDT-related provisions of EPAs have been examined in the previous three sections. It is worth underscoring that, with regard to legal aid, remedies and retaliation, and multilateralist aspects of the EPAs, only the provisions on retaliatory measures contain some elements of SDT. However, even these SDT provisions do fall short of the threshold set by the Doha Declaration with regard to effective SDT, because they are neither precise nor operational.

1. EPA Panel Timeframes and SDT

An analysis of the EPA DS timeframes¹⁵⁵ indicates that the EPA panel timeframes do not provide for any differential treatment of the ACP countries; they just expedite the whole process for all parties in accordance with the EU's demand on the WTO DS. While the statutory maximum timeframe for a WTO dispute would be 20 months -2 months for the consultations and 18 months from the establishment of the Panel until the determination of the 'reasonable period of time for the implementation of panel/AB rulings'¹⁵⁶, the maximum statutory timeframe for the same process under the EPAs is 11 months 5 days for all EPAs but the SADC EPA, which provides for 11 months 20 days as the maximum limit.

Some of this acceleration provided for in the EPAs is normal as the bilateral arbitration nature of the EPA DS mechanisms brings about the elimination of stages where the DSB comes into play. Moreover, as the EPAs do not provide for an appellate review, this also brings about an important acceleration. However, the acceleration is not limited to these stages. For instance, the most important part of the process, i.e. the panel stage, is also affected. While the panel stage under the WTO could take 7 months and one week to 8 months under the WTO DS¹⁵⁷, this period is reduced to a maximum of 6 months under the

¹⁵⁵ Appendix D Annexes III, V, VI and VIII. The timeframes and the progression of a dispute may be seen in more details in Appendix C.

¹⁵⁶ See Appendix C. This maximum timeframe excludes the time that will be consumed between the end of consultations and the establishment of the panel, that is to say the timeframe between the actions 2 and 4 as they are indicated in the Appendix C. It should also not be forgotten that, as indicated in the Section II, all these timeframes could be and actually quite often are extended by the agreement of the parties. The maximum time-limits would, nevertheless, exert a pressure upon the adjudicators and the parties.

¹⁵⁷ As the panel stage under the WTO DS mechanism entails actions that the RTA DS mechanisms do not, for reasons of comparability, what is meant by the 'panel stage' in the WTO DS should be clarified (The following clarification should be read by reference to the DS charts provided in the Appendix C). There are two points that need clarification. One is with regard to the start of the panel process and the other is with regard to the end thereof. With regard to the start of the process, the panel stage should be considered to run from the *composition* of the panel, not the *establishment*. Because in contrast with the WTO DS mechanism, RTA mechanisms deem an arbitral panel established when all arbitrators are selected, however the WTO DS names that stage the '*composition*' as distinct from the '*establishment*'. There could be a maximum of 30 days between the establishment of the panel and the composition of the panel (actions 5 and 6). As in practice most of this time is fully consumed to select the members of a panel, this time is deduced from the 9 months statutory timeframe for the panel stage provided under DSU Article 12:9. With regard to the end of the panel stage, it should be noted that the panel stage should be deemed to finish with the circulation of the panel's report to the *parties* not to the *whole WTO membership*. The Working Procedures for the panels provided for in the Appendix 3 of the DSU

EPAs. This acceleration would reduce the time allowed for the filing of parties' legal submissions; hence it would increasingly strain the ACP resources.

Moreover, it is currently not possible to pass judgment as to whether the timetables for the submissions of the parties will provide for SDT as the Rules of Procedure that will provide for such detailed timetables will be adopted once the EPAs enter into force¹⁵⁸. However, considering that the Rules of Procedures of the Chile and Mexico FTAs are significantly similar, it may be assumed that their text will be taken as a model. Importantly, neither the Chile nor the Mexico text provide for SDT with regard to the filing of submissions to the panels; that is to say, they do not provide for an additional time for the developing country when it is making its submissions, be it written or oral. The ACP countries may negotiate for such SDT clauses to be inserted in the future Rules of Procedure, however, the utility of such clauses would not be high if the global timeframe of 6 months stays untouched.

Therefore, it would be wise to negotiate for the inclusion of a new provision to the EPAs to the effect that SDT provisions for the ACP countries will be stipulated in the future Rules of Procedure of these Agreements, and the SDT time-flexibilities to be provided for in the Rules of Procedure shall be added to the 6-month general timeframe. By adding such a provision, the ACP countries would gain the chance of having a meaningful negotiation in the future on SDT with regard to timeframes. The same logic should also apply to other panel timeframes, such as the timeframe for compliance review panels or the post-retaliation compliance review panels.

2. RPT under the EPAs and SDT

Having said that the EPA DS mechanisms do not provide for SDT with regard to timeframes, it should also be noted that the text of the provisions on the determination of the reasonable period of time (RPT) for the implementation of judgments at least has the potential to be interpreted in a SDT manner¹⁵⁹. In contrast with the WTO DSU, which stipulates 15 months as an indicative maximum of the RPT¹⁶⁰, the EPAs do not spell out any particular time interval to guide the RPT determination. The standard EPA provision in that regard states that the panel shall 'take into consideration the length of time it will normally take the defending party to adopt' the legislative or administrative measures to bring itself into compliance. More importantly, the EPA RPT provisions further qualify this initial general guidance by stipulating that the panel 'shall also take into consideration demonstrable capacity constraints which may affect the defending party's adoption of the necessary measures'. While it is not cast in an explicit SDT language, it would be safe to assume that the latter part of the provision is mainly devised for ACP utilization.

While the inclusion of such a SDT provision is a positive step, it falls short of meeting the ACP demands that were voiced in the WTO. Firstly, the ACP countries urge for the taking into consideration of not only their capacity constraints but also their development needs in the determination of the RPT. An ACP country may have the legislative or administrative capacity to adopt and implement a measure necessary to bring itself into compliance with EPAs, however, the immediate adoption of such a measure may have detrimental effects for their development. Therefore, it would be advisable to insert the 'development needs' as another factor that should compulsorily be taken into consideration by the panel.

stipulates an indicative time of 3 weeks between the circulation of the report to the parties and the eventual circulation to other WTO Members. Such an action naturally does not exist for RTA DS mechanisms. Therefore, by 'panel stage' it is meant the stage between the actions 6 and 18. As the time between the actions 18 and 19 is flexible, the time provided for the action 19 could be reduced to extend the time provided for 18. Hence, with the additional 3-week flexibility provided for in the action 19, the general timeframe for the panel stage is between 7 months 1 week to 8 months.

¹⁵⁸ The timetables for the legal submissions to the arbitral panels will be regulated by the Rules of Procedures that will be adopted by the competent EPA organs once the Agreements enter into force. Therefore, at the moment, no EPA entails a detailed timetable for the filing of legal submissions to the panels. However, as the Rules of Procedures of the Chile and Mexico FTAs demonstrate a high level of similarity, it would not be wrong to assume that they will be taken as a model for the EPA Rules of Procedures as well (see the Chile and Mexico charts in the Appendix C).

¹⁵⁹ Appendix D Annex V.

¹⁶⁰ WTO DSU Article 21:3(c); the Article also provides that this 15-month period 'may be shorter or longer, depending on the particular circumstances'.

Secondly, the SDT addresses only one dimension of the ACP concerns with regard to the RPT; namely, the RPT when the ACP countries are the defending party. The other dimension of the RPT, that is, the issue of RPT determination when the ACP countries are complainant should also be addressed. Accordingly, in addition to taking into consideration the normal length of legislative/administrative process that would bring about compliance, a panel must also be mandated to consider the potential economic impact of the delay in implementation on the ACP country. If the economic impact could be serious for the ACP country, the panel must be able to order an RPT which would force the EU side to expedite its normal legislative/administrative procedures and to resort to an expedited procedure.

In conclusion, the EPA DS mechanisms provide for a few SDT provisions. Even these SDT provisions do not always meet the preciseness and operationality criteria. In the particular example of timeframes, the EU vision seems to have prevailed over the ACP's. For, the EPA DS mechanisms not only do not provide for any explicit SDT, but also they expedite the process in line with the proposals that the EU aired vis-à-vis the WTO DS. While the implicit SDT with respect to the RPT determination may be seen as a positive step, it is inadequate and needs further refinement to meet the ACP's demands.

E. INTERGOVERNMENTAL CHARACTER OF THE DS AND THE EPAS

The final enquiry of the EPA DS provisions in light of the ACP's political preferences with regard to a development-friendly DS concerns the inter-governmental character of these mechanisms. The ACP countries express a clear opinion in favour of preserving the intergovernmental character of the WTO DS system. As it is laid out above, this choice is embodied in their positions with regard to the admission of amicus curiae briefs by the panels and with regard to the involvement of government officials as panellists in disputes.

1. EPAs and the Amicus Curiae Briefs

In respect of the amicus briefs, all the EPAs under examination state that 'interested parties are authorized to submit amicus curiae briefs to the arbitration panels in accordance with the Rules of Procedure'¹⁶¹. This provision is in clear contrast with the express opposition that the ACP countries aired vis-à-vis the amicus briefs in the WTO. Since the Rules of Procedures shall be determined once the agreements enter into force, it is not possible to judge what sort of conditions and procedures will be imposed into these submissions. However, the conditions for the admission of amicus briefs set out in the Chile FTA may provide some guidance¹⁶².

The Chile FTA, while as a default position authorizes the submission of amicus briefs, also provides that within three days of the establishment of a panel, parties may agree otherwise. More importantly, the relevant provision imposes strict conditions for these submissions: they must be made within ten days of the establishment of the panel; they may not be any longer than 15-pages; the organization/person making the submission must reveal its activities and the source of its financing; and the briefs must be directly relevant to the factual and legal issue under consideration. Equally importantly, the provision also stipulates that the arbitration panel shall not be obliged to address the arguments put forth in these submissions. These conditions are in line with the EU's policy under the WTO, which is to authorize the amicus briefs provided that they do not slow down the DS process. Therefore, it is plausible to assume that, during the negotiations on the EPAs' Rules of Procedure, the EU would take a similar stance.

There are several options available to the ACP in order to prevent themselves from being faced with amicus briefs in EPA DS cases. Depending on the strength of the EU's resistance, they may demand that either as an amendment to the treaty text, or as a

¹⁶¹ Appendix D Annex X.

¹⁶² While the Chile FTA authorizes the submission of amicus briefs, the Mexico FTA remains silent on this matter.

provision of the Rules of Procedure, the authorization of the amicus briefs should be made subject to the approval of the ACP party. A rule of procedure to the effect that the ACP party shall have the right to close the proceedings to amicus submissions if she makes a notification to that effect within a certain time from the establishment of the panel would still be compatible with the text of the EPA provision. For, the default position would still be that the briefs are authorized; however, the ACP party is given a SDT right to close the sessions to such submissions.

If this proposal faces strong opposition from the EU side, another possibility would be to limit such a SDT right to close the panel proceedings to amicus briefs only to cases where the ACP side is a defendant. Considering that, in cases where the ACP side is a complainant, they would have relatively more time to prepare their case - due to the fact that they have the control of the period prior to the initiation of a dispute- they may be better positioned to confront amicus submissions. However, in cases where they act as a defendant, they may be caught in a relatively more unprepared situation. Therefore it would make more sense to give them the SDT right to veto amicus submissions.

Finally, if either of these proposals could not be pushed through by the ACP countries, it would be strategically correct to negotiate for the inclusion of the same conditions as comprised in the Chile FTA, and perhaps with an additional condition which would stipulate a maximum number of amicus briefs that a panel may accept in any given dispute.

2. EPAs and the Selection of Government Officials to the Panels

In respect of the composition of the panels and the selection of government officials to serve in them, DSU Article 8:1 clearly states that government officials could also serve in the panels. Citizens of Members whose governments are either parties or third parties to the dispute cannot serve in the Panel¹⁶³. It has been highlighted above that the EU proposed a new system whereby government officials cannot serve in the panels, or at the least, during the time they serve as panelists they should be on a temporary leave. The proposal attracted some developing country opposition registering that most of these countries only have government officials as trade policy/law experts.

It must, first of all, be underlined that by providing for a permanent list of arbitrators, the EPAs' approach adopts the permanent panelists approach defended by the EU in the WTO. By having a permanent list of arbitrators, the parties guarantee both the automaticity and the composition of the arbitral panels. In almost all EPAs, parties shall select five individuals each¹⁶⁴, and shall also agree on 5 other names who are not nationals of any of the parties and who, in the event of a dispute, shall be serving as the chairperson of the panels¹⁶⁵. Importantly for this analysis, all EPAs provide that the arbitrators 'shall be independent, serve in their individual capacities and not take instructions from any organization or government, or *be affiliated with the government of any of the Parties*'.

The EPA provisions are not clear as to when and how this non-government-affiliation condition needs to be satisfied. If it is only during the arbitration, it is not clear if the condition could be fulfilled only by providing the temporary leave of the arbitrator from his/her office. More importantly, if one takes the view that the non-government-affiliation condition must be met before and during the formation of the roster –i.e. not only during the performance of the arbitral duty- this would present a significant difficulty for the ACP countries.

While it is not compulsory for parties to nominate their own nationals, it should not be underestimated that, not being able to nominate sufficient number of their own nationals to

¹⁶³ DSU Article 8:3.

¹⁶⁴ Only in the case of the SADC EPA the numbers are different. Under that agreement, the parties are to select 8 members each and shall select 5 non-nationals, thereby forming a roster of 21 arbitrators.

¹⁶⁵ There is an important difference between the Cameroon EPA and all the others. While the latter provide for the selection of arbitrators no later than *three months* after the *provisional application*, the former provides for the roster to be formed no later than *six months* after the *entry into force* of the agreement. This may translate into a serious difference in the timing of the formation of the Cameroon EPA roster.

the roster, while the EU could well do that, would certainly reduce the legitimacy and the ownership of the DS system in the eyes of the ACP countries. Therefore, either by an addition to the treaty text, or as part of the Rules of Procedure, or in the Code of Conduct of arbitrators, it must be made clear that the non-government affiliation may be satisfied by a temporary leave from the governmental duty. Such an arrangement would both ensure the impartiality of the process and would also not make the process burdensomely difficult for the ACP countries¹⁶⁶.

CONCLUSIONS

The analysis of the EPAs DS provisions, in light of the criteria of development friendliness based on the ACP countries' positions as to the reform of the DSU in WTO, indicates that the deal reached in ACP-EU negotiations has serious shortcomings in terms of its developmental credentials.

The EPAs do not provide for any sort of legal aid. No mechanism is established to replace even the much criticized and minor assistance that the Secretariat gives to the developing countries under the WTO. Bearing in mind that the scarce resources of NGOs, academia, pro bono lawyers etc. will most probably focus on the multilateral level, ACPs will lack this type of assistance as well. Therefore, in terms of legal aid matters, the EPAs seem to aggravate the situation compared with the WTO. The ACP-EU parties should consider the possibility of setting up regional trade law centres that would assist the ACP countries. These centres would have positive spill-over effects for the ACP's representation and participation at the WTO as well.

The agreements do nothing to address the long criticized 'lack of effective remedy' problem either. Most of the agreements reproduce the WTO remedy of 'bringing the measure into compliance'; although with slightly different language. While the differences between the WTO and EPA texts may be used to push for some ACP friendly remedies, it may be preferable for the ACP countries not to have any provision on remedies at all. This is the case, for instance, under the Pacific EPA. Not having an explicit remedy clause may open the door for future developments and negotiations on this matter.

The system of retaliation provided for in the EPAs, while taking some positive steps, falls, nevertheless, short of meeting the ACP's demands. As a positive development, some EPAs recognize the possibility of 'financial compensation'. However, as the financial compensation is made subject to the agreement of parties, in effect, it does not go substantially beyond the WTO. Having said this, such an explicit reference to financial compensation would provide the ACP countries with a better hand in compensation negotiations. Hence, they must be preserved and if possible strengthened. In that regard, the SADC EPA includes a more permissive financial compensation clause that may be drawn upon by the others.

Another positive development under the EPAs with respect to retaliatory measures is that the agreements provide for 'appropriate measures' in addition to compensation. 'Appropriate measures' under the EPAs replace the 'suspension of concessions and other obligations' under the WTO. As this new term provides the ACP countries with a larger array of measures it may be considered as a positive step. However, the fact that the same measure is also available for the EU and that there are no proper judicial checks to control their utilization by the Union, this positive change carries a large risk as well.

In terms of necessary disciplines to control the use of these measures by the EU, the relationship between 'appropriate measures' and the development assistance is of crucial importance. Other ACP countries should draw upon the Ghana EPA clause, which explicitly proscribes the appropriate measures to affect the development assistance. In fact, a more

¹⁶⁶ The option of panelists serving without even taking a temporary leave from their governmental office is not considered here. Such an option may seriously hamper the impartiality of the panelists, hence the legitimacy of their judgments. While under the WTO government officials could serve without taking a temporary leave, this is counterbalanced by the fact no national of any party to a dispute can become a panelist in the same dispute.

general provision to the effect that no utilization of the EPA DS mechanisms by the ACP countries will affect the development assistance to them would also be an important guarantee for ACPs.

The most important shortcoming of the EPA retaliation system, which has long been a subject of complaint for ACP countries under the WTO, is its bilateral nature. That is to say, the DS mechanisms allow only the winning party to retaliate, not any other country. The demand for the right to retaliate collectively has long been aired under the WTO by developing countries, including the ACP. Although, it may be maintained that the bilateral character of the EPAs, as opposed to the multilateral WTO, necessitates such a structure, the possibility of making use of quasi-multilateral Cotonou institutions should not be discarded.

The possibility of making use of and benefiting from the quasi-multilateral institutions and character of the Cotonou Agreement should also be considered for such stages like the surveillance of the implementation of arbitral awards. In the same vein, there is also a good case to allow EPA signatory states to become third parties in other EPA disputes. Considering the similarities between the substantive obligations of different EPAs, ACP countries have a systemic interest in participating in each other's cases.

Most of the requirements of a development friendly DS necessitate the special and differential treatment of ACP countries. Not only the DS provisions should include SDT, but also the SDT provisions should be mandatory, precise and operational. While the EPAs provide for some SDT clauses they are very few and they do not meet, in particular, the preciseness and operationality criteria. One of the prime examples of the lack of SDT could be seen in the regulation of timeframes. Although the capacity differences between the ACP countries and the EU are well known, the treaty text does not entail any reference to SDT with respect to panel timeframes. While some flexibility and SDT may be injected with the Rules of Procedures to be adopted once the agreements start functioning, without amending the text of the treaty the flexibilities would be limited.

With regard to timeframes, the EPAs contain an implicit SDT in respect of the reasonable period of time that the losing party would be allowed to implement the arbitral award. However, this SDT provision also fails to meet the preciseness criterion. Moreover, the SDT provision only regulates the situation where an ACP country is a defendant. The situation where the EU is the losing party is also, if not more, important for the ACP countries. A SDT provision to the effect that the EU must make use of expedited legislative and administrative means to implement the arbitral decisions, in cases where the delay in implementation may have serious effects for the ACP economies should be considered.

The Agreements reflect the EU's positions with regard to the amicus curiae briefs and the selection of government officials as panellists. Contrary to the position they have taken in the WTO, the ACP countries accepted the admission of amicus curiae briefs by the EPA arbitral panels. In order to attenuate the risks of such a position, ACP countries should insist on imposition of strict criteria on the submission of amicus briefs. The conditions laid out in the Chile FTA may be inspirational in that regard.

In the same vein as the amicus briefs, the EU's position with regard to the selection of government officials as panelists seems to have prevailed over the ACP's. The EPAs require the panelists not to be government officials. This provision should be clarified to the effect that the condition must only be met during the time the person actually serves as a panelists; not during the whole time while he/she is on the roster of panelists. Otherwise, the ACP countries may find it difficult to come up with nominations.

In conclusion, it seems to be difficult to give a pass mark to the EPA DS mechanisms with respect to their performance on development friendliness. EPA DS mechanisms are a modified version of the WTO DS. The important point is that most of the modifications are reflections of the proposals that the EU put forth for the reform of the WTO DSU. Things like the establishment of a post-retaliation compliance review panel, acceleration of panel timeframes, admission of amicus briefs do all point to the fact that the EPAs DS mechanisms are formed under the EU's vision. Very few ACP demands seem to have been accommodated, and even those which are accommodated, lack the necessary preciseness

and operationality. If the EPA DS systems remain as they currently are, it may be plausible to say that the incentives for the ACP countries to use them would be even less than the incentives that these countries have to use the WTO DS mechanism. Therefore, it would not be wrong to conclude that, unless some serious changes are introduced, only the EU could make use of the new EPA DS mechanisms. For the ACP they will remain inaccessible and represent just another pompous legalese with no real world effect.