



Union of Industrial and Employers' Confederations of Europe
Union des Confédérations de l'Industrie et des Employeurs d'Europe

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Preliminary UNICE Position on WTO Dispute Settlement

I. Introduction

With this position UNICE would like to contribute to the ongoing review of the WTO dispute settlement system as provided for in the Ministerial Decision, adopted on 15 December 1993, on the Application and Review of the Undertaking on Rules and Procedures Governing the Settlement of Disputes. In particular, it makes recommendations on how to improve further and adapt an already effective system. Industry hopes that the WTO Ministerial Meeting in Seattle can successfully conclude this review.

II. WTO Dispute Settlement System Works, Yet It Requires Implementation

As „final“ user of the multilateral trading system European Industry fully supports an effective and efficient dispute settlement system. As compared with GATT dispute settlement the present system is a milestone of progress. In general, the system works to ensure that WTO members comply with their obligations and bring their laws into conformity with the provisions of the multilateral trading system. It is a system which „bites“, as bitterly noted by the European industries affected by WTO legal retaliatory action.

European industry accepts the need for a system with „teeth“ in order to ensure compliance and effective enforcement. However, at the end of the day, it is industry that has to pay the price of non-compliance. Whilst the system provides a process for settling disputes between states, industry requests not to be left on the sidelines of the process and not have to suffer in cases of non-compliance. The particular situation of industry as the eventual victim of the dispute settlement system requires the following action:

Faithful Implementation

Industry expects WTO members to comply fully, both in letter and in spirit, with WTO dispute settlement rulings. Whilst WTO provides for compensation or allows retaliatory actions, these measures are no alternative to implementation. They are a means to force reluctant WTO Members to implement WTO rulings faithfully. If compensation or retaliation became the norm, the WTO dispute settlement would be rendered nugatory, since rich countries could afford to pay the price of non-implementation whilst poor countries would have no alternative but to implement.

Responsible Use of the System

European Industry believes that WTO members should try to settle trade disputes through consultation and mediation. Industry considers that an unduly legalistic approach tends to forget that one of the aims of the system is the search for compromise before the legal machinery takes effect. It therefore urges all WTO Members to take full advantage of these possibilities and not to see them as a necessary, but intermediate step in a fully-fledged dispute settlement process. We regret that parties to disputes shun using the good offices of the WTO Director General as a mediator and would encourage more and proper use of this possibility.

Trade Policy Assessment of Legislation

The WTO dispute settlement process requires all WTO Members to ensure that their laws and regulations are in conformity with WTO. After having ratified the results of the Uruguay Round Agreements, the legislator is bound to assess whether draft legislation is compatible with WTO before it is adopted. The system does not tolerate a „wait and see“-position. UNICE therefore encourages a process by which it is ensured that national legislation is assessed and specifically analysed with respect to its WTO compatibility.

III. The WTO Review of the Dispute Settlement System Must Lead To Further Improvements of the System

UNICE considers that the first years of experience with the present system have demonstrated that there is room for further improvements, in particular in the areas of transparency and implementation. UNICE expects the WTO Ministerial Meeting to conclude this review successfully and to enable WTO to benefit rapidly from an even clearer and more precise system. Should the Seattle Ministerial fail to reach an agreement, improvement of the DSU should be included in the new round of trade negotiations. The following points are of particular interest to industry:

Transparency

Industry fully welcomes efforts to make the dispute settlement more transparent and to allow interested parties further and more efficient access to the available information on the dispute in question. Industry welcomes the ruling of the Appellate Body in the shrimps/turtle case whereby amicus curiae briefs of interested parties received certain recognition, and expects that the review will establish rules as to how and when these parties can make their views heard. UNICE is of the firm opinion that the more legalistic the process becomes the more transparent it has to be. This includes making panel proceedings public and publishing the findings of the panel expeditiously.

Transparency should be improved throughout the dispute settlement process, even at its early stage. In particular, in the case of amicable settlement of disputes, an approach which UNICE strongly supports, it would welcome notification of such agreements to all WTO Members.

Control of Implementation

Whilst industry appreciates the speed with which the WTO is able to settle the disputes it recognises that there are diverging views on how to check whether a WTO member has faithfully implemented a dispute settlement ruling. Given the fact that these questions did not occur under the GATT system, it is not surprising that DSU has left certain aspects of implementation unclear and that particular cases have shown that the system contains some legal lacunae. The review should therefore clarify these provisions and make sure that WTO members comply with their obligations. There are several possibilities for clarifying those rules:

- The Appellate Body could be given the task of making authoritative interpretations of certain articles of DSU in the case of divergent opinions. This approach would require a change of the agreement language and could probably only be accepted as a result of a renegotiation of DSU.
- The WTO membership could also decide to install an expeditious and one-stop panel process to check whether a WTO member has faithfully implemented the WTO ruling issue.

Industry believes that, whatever solution is chosen, it must provide for a rapid solution of the issue and discourage the possibility of protracted litigation. The process of checking whether a WTO member has faithfully implemented a dispute settlement ruling should therefore be taken within the timeframe already provided for by the system, in other words the original panel and appeals process might have to be shortened in order to fit this new process into the present timeframe. UNICE recognises the creativity demonstrated in the bananas case, combining the request for arbitration with control of correct implementation, but would prefer an expeditious process to establish whether a WTO violation continues to exist, followed by arbitration on the amount of compensation due.

Standing Panel Body

Industry supports the idea of establishing a standing panel body comprising independent experts knowledgeable in WTO matters to decide WTO cases as a first instance. Members of this body should not only consist of government officials but also include representatives of other interested parties, such as industry, provided that these experts are knowledgeable in WTO matters. The standing panel body should be obliged to look for amicable solution of the matter before deciding the issues of law. Such a body would guarantee consistency of legal reasoning, thus alleviating the task of the Appellate Body to some extent. It would also be able to cope better with the reduction of the timeframe proposed above, and to fulfil the subsequent functions, such as control of correct implementation and a decision on the amount of compensation due.

IV. Conclusion

UNICE considers that the WTO dispute settlement mechanism is one of the main achievements of the Uruguay Round. The above comments are UNICE's preliminary views on how to make it more effective in ensuring enforcement of WTO agreements. These views might be reviewed/ complemented as the discussions on this matter evolve at EU and WTO levels.
