

UNICE POSITION PAPER

TRANSPARENCY AND EFFECTIVENESS OF THE WTO

Executive Summary

This position assesses the business perspective of the issues of WTO internal and external transparency and of transparency in Dispute Settlement proceedings.

Further progress on internal transparency would ensure more effective participation by all WTO members in the WTO decision making process. UNICE proposes notably an enhanced role for the Chairmen of a WTO body and/or the Director General in initiating consultations and the establishment of a consultative group (formal or informal) broadly representative of the WTO membership, which could advise the DG and present non-binding recommendations. It also proposes measures to foster the flow of information and participation by all WTO members, notably technical assistance linked to the implementation schedule and regional seminars as a means of enhancing developing countries' knowledge. Finally, it suggests measures to improve Ministerial meetings and an enhancement of the role of the General Council.

Further progress on external transparency would reinforce the role of the WTO and its legitimacy towards civil society. On this issue, UNICE believes that the WTO secretariat should consider to publish documents as soon as they are available in one of the three official WTO languages as well as measures to enhance contacts and exchange of information between the WTO Secretariat and NGOs.

Further progress on transparency in Dispute Settlement would increase the credibility of the WTO in general. Greater public insight and awareness of the issues surrounding particular dispute settlement cases could generate additional incentives for governments to bring about compliance. UNICE believes that making panel proceedings public would politicise the process and could lead to attempts to unduly influence the process. The parties to the dispute should be given all possibilities to settle the dispute without interference from outside. On the other hand, it believes that the panel report should be published as soon as it is available. At the appellate stage of the dispute, UNICE believes that there is no reason to limit transparency. It therefore supports the introduction of public appellate stage proceedings as it would enhance the legitimacy of the process. It suggests in particular that the Dispute Settlement Understanding be amended to provide explicitly for amicus curiae at the appellate stage. The WTO needs to demonstrate that it is an open process.

Introduction

Since the failure of Seattle Ministerial Conference questions have been raised about the need to ensure a better balance between the effectiveness and transparency of WTO procedures. Measures on how to improve internal and external transparency are being discussed intensively within the WTO.

The WTO is an intergovernmental forum where member states meet to promote trade liberalisation. Member states' governments are the legitimate representatives of their country and have an important role to play to ensure that the intergovernmental nature of the WTO is understood. Governments are consequently the proper channel for all contributions to the WTO decision-making process.

European business believes a transparent WTO management is essential for a good understanding and support of the WTO system.

Suggested improvements

Broadly speaking, the suggested improvements to the WTO transparency and functioning can be classified under the following three headings:

1. Increased internal transparency
2. Enhanced external transparency
3. Transparency in Dispute Settlement Proceedings

1. Increased internal transparency

The following suggestions are based on the paper presented by the European Commission on how to improve the functioning of the WTO.

a) Measures to improve decision-making including issues relating to the organisation and functioning of informal consultations

Although the basic procedures for decision-making are considered to be functioning in a generally satisfactory manner, a need is widely felt to consider intensified consultation procedures to foster consensus in a manner which is transparent and participatory. European business agrees with the European Commission's view that informal consultations are needed, but any apparent tendency to replace decision-making in the competent WTO bodies by these informal processes would jeopardise the speed, effectiveness and legality of the decision-making process.

An enhanced role for the Chairmen of a WTO body and/or the Director General (or one of his deputies) in initiating these consultations and ensuring adequate representation of the WTO membership in the meetings is strongly supported by European business. However, for this purpose European business believes the position of the Director General has to be revised, as these tasks require an enhanced, independent and objective capacity. At the moment the DG does not have an expressly recognised right of initiative and normally acts on the basis of mandates specifically given by the membership.

Another suggestion has been the establishment of a consultative group (formal or informal) broadly representative of the WTO membership, which could advise the Director General and present non-binding recommendations to the General Council. European business agrees such a consultative group could contribute towards ensuring greater involvement of senior level capital based officials in the management of the WTO and foster open discussion on broad trends affecting the WTO system.

b) Measures to foster the flow of information and participation by all members

European business recognises the need for targeted measures to facilitate participation by non-resident representatives and small developing country delegations. Knowledge and capacity building are key to creating broad support and fostering proper implementation. The focus should therefore be on technical assistance, preferably linked to the implementation schedule. Useful help in identifying assistance needed could be provided by companies active on foreign markets.

Sufficient financial means should be made available for technical assistance programme to developing countries. An increase in the financial basis for technical assistance should however be coordinated with other international organisations such as UNEP, ILO and UNCTAD. An orchestrated approach in the field of trade and development could maximise the benefits of capacity building.

Regional seminars as a means of enhancing developing countries' knowledge should be chosen on the basis of economic criteria (market access) and not on political criteria. Training programs for officials from developing countries should include knowledge of corporate aspirations for and the benefits of the development of trade and investment in a global economy as well as dialogue meetings with civil society, including business.

The suggested streamlining of notification requirements and their transparency is strongly supported by European business as well as the rationalisation of WTO meetings and committees.

c) Measures to improve Ministerial meetings and the General Council

European business acknowledges the need for improvements in the preparation and organisation of WTO Ministerials. On the basis of the Seattle experience European business supports a clear limitation of the role of the host country during the organisation of a WTO Ministerial and the meeting itself.

European business agrees with the need to set a clear structure for negotiations to be able to spend the time negotiating on substantive issues and not on preparations. Senior official level meetings before the Ministerial starts could be instrumental in bringing about these improvements. Where possible pre-negotiation phases should be organised at the General Council level and they should focus on consensus building. European business supports the introduction of yearly Ministerials and an enhancement of the role of the General Council, especially its oversight role.

One of the main reasons for the failure of the Seattle Ministerial Conference was the lack of a common basis for the discussions. It is of crucial importance that the Ministerial Declaration is well prepared and is substantially agreed upon before the Ministerial Conference starts.

2. Enhanced external transparency

a) Availability of documents

The external transparency of the WTO has already improved considerably during the past five years. The WTO secretariat has an excellent website on which most official documents are made public. Ensuring immediate derestriction of most WTO documents is key to increasing the legitimacy of the WTO towards the general public. The WTO secretariat should consider to publish documents as soon as they are available in one of the three official WTO languages. Currently, documents are only published when they are available in all three official WTO languages.

b) Consultations with Civil Society

External Transparency on WTO issues has to be achieved first and foremost at national level. Dialogue with representatives of civil society, whilst not aimed at finding consensus, at least increases awareness of the various stakeholders concerned, provided their active participation in the process. It also contributes to alleviating concerns expressed on globalisation and further liberalisation of trade and investment.

Enhancing contacts and exchange of information between the WTO Secretariat and NGO's, ensuring more regular forms of informal dialogue with civil society and holding an annual open meeting of the WTO are all measures supported by European business to bring about the required level of transparency. Priority should be given to discussion in issue specific workshops rather than in wide open meetings where complex issues are difficult to handle.

The European Commission has also suggested an initiation of a review of existing WTO guidelines in order to strengthen procedures for consultations with NGO's. In this connection, consideration has been given to the possibility of establishing a formal accreditation system allowing NGOs to participate in WTO Ministerial Conferences and in specific meetings as observers. European business would accept such formal NGO accreditation system within the WTO context based on some basic criteria in terms of representativity, efficiency of internal decision-making structures and financial transparency and independence of public authority. The issue of participation in other WTO meetings as observer needs to be discussed further as the preferred democratic channel for NGO input is to their respective governments which meet in the WTO or through issue group meetings of the type organised by DG Trade. Industry is reluctant to call for a fully operational observer status in WTO since such status would necessitate participation in all meetings. It might be preferable to start this external transparency exercise with a limited number of open meetings.

3. Transparency in Dispute Settlement Proceedings System

Industry considers the Dispute Settlement System as one of the major achievements of the Uruguay Round. However, the Dispute Settlement System of the WTO is widely perceived as not being transparent. Greater public insight and awareness of the issues surrounding particular dispute settlement cases could generate additional incentives for governments to bring about compliance. European business suggests the following to increase transparency of the Dispute Settlement System.

a) Panel proceedings

Panel proceedings should not be public because they contain an element of “solution finding”. Making panel proceedings public would not only politicise the process and could lead to attempts to unduly influence the process but also contradicts the nature of panel proceedings, namely to adjudicate the case only if no bilateral compromise can be found.

The Panel report should be published as soon as it is available in one of the official WTO languages. No delay should be accepted if the official translations are not available.

It often occurs that a panel report becomes public at the interim review stage (Art. 15 DSU, before the disputing parties have submitted their comments), leaving no alternative but to publish the draft panel report. This should be avoided, given the fact that the interim review process is a means to settle the dispute before it is fully adjudicated. The WTO members themselves need to honour this commitment in order to make this part of the procedure effective. In its position paper on Dispute Settlement UNICE expressed the view that the element of solution finding is of utmost importance within the dispute settlement system. The parties to the dispute should therefore be given all possibilities to settle the dispute without interference from outside.

European business fully supports the view already established in Art. 13 DSU that “each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate.” Given the technical nature of many disputes European industry is prepared to give such advice.

b) Appeal proceedings

At the appellate stage of the dispute, where issues of law are decided, there is no reason to limit transparency. European business therefore supports the introduction of public appellate stage proceedings as it would enhance the legitimacy of the process.

However, individual briefs of the parties to the dispute in the appeal stage should not be made public. This should be left to the discretion of a WTO Member State.

European industry strongly supports the idea of an amicus curiae brief at the appellate stage of the proceedings. In the shrimps turtle case the WTO Appellate Body decided that a government in a dispute can add an amicus curiae brief of an NGO to its depositions, thereby making the amicus curiae brief part of the proceedings.

In the asbestos case the Appellate Body adopted an additional procedure to apply for leave to file a written brief in the appeal. The WTO membership heavily criticised the Appellate Body for having adopted this special procedure. European business would nevertheless encourage the Appellate Body to accept amicus curiae briefs, also at the appellate stage, but would further suggest that the DSU be amended to provide explicitly for amicus curiae at the appellate stage. The WTO needs to demonstrate that it is an open organisation.
