



International Chamber of Commerce

*The world business organization*

## Policy statement

# ICC proposals for improvements to the WTO Dispute Settlement Understanding

Commission on Trade and Investment Policy, 7 March 2003

## Introduction

ICC strongly supports the decision taken at the 4th Ministerial Conference of the World Trade Organization (WTO) at Doha (Qatar) in November 2001 to continue negotiations "on improvements and clarifications" of the WTO Dispute Settlement Understanding (DSU) and to agree on such proposals by May 2003.

ICC reiterates its strong support for the WTO dispute settlement system as expressed in its policy statement "World business and the multilateral trading system" (6 June 2001). ICC believes that it is of the utmost importance that WTO members strictly respect the role and authority of that system.

ICC notes with satisfaction that the WTO dispute settlement system has efficiently resolved the vast majority of complaints brought in its first seven years of existence. These disputes have involved a broad spectrum of issues brought by WTO members at all levels of economic development.

## The DSU: a cornerstone of the multilateral trading system

The WTO dispute settlement system is a cornerstone of the primacy of the rules-based multilateral trading system; it is also a market-opening tool to guarantee that WTO members respect their commitments and to ensure equal treatment of all WTO members.

The WTO dispute settlement system was set up for the purpose of establishing a multilateral legal framework for the expeditious resolution of trade disputes between WTO member governments in order to ensure the preservation of the rights and obligations of members.

## Suggested improvements

World business is of the view that the WTO dispute settlement system can be improved and that improvements should be made without having to open undesirable negotiations on the basic provisions of the Understanding.

As a constructive contribution by world business to the ongoing WTO negotiations on this key element of the rules-based multilateral trading system, ICC puts forward the following recommendations for improving the WTO dispute settlement process:

- **Composition of panels:** the composition of panels could be enhanced by combining ad hoc panelists chosen according to their expertise with professional full-time panelists, as in the case of some domestic commercial courts. The provision under Article 8(10) of the existing rules, allowing the inclusion of at least one panelist from a developing country in the case of disputes between a developing country member and a developed country member, if the developing country so requests, is particularly important to facilitate and support the full participation of developing countries in the system.
- **Exchange of information:** equality among WTO members, and particularly among parties to a dispute, in the access to available information could be increased through a more effective

## International Chamber of Commerce

38 Cours Albert 1er, 75008 Paris, France

Tel +33 (0)1 49 53 28 28 Fax +33 (0)1 49 53 29 42

E-mail [icc@iccwbo.org](mailto:icc@iccwbo.org) Website [www.iccwbo.org](http://www.iccwbo.org)

exchange of information. This is particularly important for WTO developing country members. Panel findings should be made public promptly and all agreements reached should be notified to all WTO members. ICC also supports a timely general derestriction of documents including timely release of the agenda and minutes of WTO meetings, submissions to panels and the Appellate Body, and interim panel reports. Regarding dispute settlement submissions and reports, ICC believes that unless a panel decides, in consultation with the parties, to designate all or part of a document as confidential, all non-confidential documentation should be unclassified and available to the public. A possible way to implement this recommendation would be for all WTO members to post their submissions -- with the exception of confidential information -- on their government websites; a practice already followed by some WTO members. Parties should furnish the WTO with electronic copies of the non-confidential portions of their submissions for posting on the WTO website. In addition, Appellate Body proceedings should be public, since, unlike the original panels, they deal almost entirely with legal interpretations rather than facts, and the protection of confidential information is not normally necessary.

- **Predictability:** one of the strengths of the WTO dispute settlement system is its contribution to the security and predictability of the multilateral trading system. To ensure and improve performance in this regard, it is vital that panel rulings and recommendations do not add to or diminish the rights and obligations of WTO members as provided under WTO agreements, in compliance with Article 3 of the DSU. Members will be more willing to make the difficult and sensitive concessions necessary to reach agreement in WTO negotiations when they are confident that these concessions will not be enlarged by panels.
- **Duration of proceedings:** another essential feature of the WTO dispute settlement system, and one of the keys to its effectiveness in the view of world business, is its ability to deliver expeditious results. For this reason, ICC strongly recommends that the duration of DSU proceedings be kept as short as possible, realizing however, that the duration of the proceedings is often more a factor of the time necessary for the parties to reach agreement on the various steps of the procedure (i.e. the selection of panelists) rather than of the DSU rules themselves. Currently, there are few incentives to prevent WTO members from "stretching out" the DSU process. Faced with the prospect of three to six years for resolution, members and their interested commercial constituents may resort to other, less desirable options. Proceedings can be expedited by panels disposing of procedural issues before addressing substantive issues.
- **Compliance:** ICC supports clarification of procedures to be used in establishing whether a compliance measure meets the requirements of a dispute panel ruling. ICC expresses strong opposition to any retroactive remedy applied directly to private parties (such as the "Australian leather case").
- **Resources:** given the wide use of the WTO dispute settlement system by WTO members, and the likely growing demands that will be put on the system in the future, ICC recommends that consideration be given to enhancing the resources and support services for the DSU within the WTO Secretariat, as a way to improve the efficiency of the system.
- **Least-developed countries:** with regard to the particular problems and difficulties of least-developed countries (LDCs), improvements to the DSU should seek to facilitate and support LDCs' full participation in the system.

### Implementation rather than compensation/retaliation

ICC notes that implementation of decisions under the DSU is not assured. Losing members can exercise their rights by providing compensation to winners, or accepting retaliation. Retaliation is an unfortunate last resort as it increases rather than reduces the restrictions on trade. Although it has been employed relatively infrequently, threat of retaliation can be destabilizing in cases involving large volumes of trade. ICC believes that members should consider other methods to either encourage implementation of decisions or provide some alternative form of relief to members who are unable to benefit from their victories. Notwithstanding the importance of expeditious results noted above, ICC believes that parties to a dispute should have the right to suspend the process in order to reach a negotiated settlement, thus minimizing instances of retaliation and conserving panel resources.

An undesirable and potential consequence of retaliation is that the proper functioning and the stability of the multilateral trading system could, to some extent, be put at risk due to the substantial economic impact of the authorized retaliatory measures; as such measures also have the potential to distort trade, especially when the retaliation affects a sector other than the one where the dispute occurs.

In cases where a disagreement arises on whether a panel report has been complied with by the parties, this question should be dealt with first (article 21.5 of the WTO DSU) and before recourse is taken to compensation or the revocation of concessions.

It may be useful to create a possibility to request a WTO panel to make an independent estimate - outside the framework of a procedure for the revocation of concessions - of the size of the damage caused by actions of WTO members that are not in conformity with WTO rules. This would facilitate negotiations on compensation and would promote the recourse to compensation instead of retaliation.

With respect to retaliation, ICC proposes the following:

- that consideration be given to the need to protect exporters that would otherwise be harmed by the sudden imposition of retaliation; and
- that a fast-track procedure be created to establish whether a WTO member, after retaliatory measures have been enforced, is in compliance with a panel report.

### Conclusions

A key aim of any improvements and clarifications of the WTO dispute settlement system should therefore be to ensure that when formal adjudications become unavoidable, WTO decisions are implemented fully and expeditiously. WTO members should consider more carefully whether or not to bring a dispute case, and should rely increasingly on mediation and arbitration for dispute resolution.

#### About ICC

ICC is the world business organization, the only representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world. ICC promotes an open international trade and investment system and the market economy. Business leaders and experts drawn from the ICC membership establish the business stance on broad issues of trade and investment policy as well as on vital technical and sectoral subjects. ICC was founded in 1919 and today it groups thousands of member companies and associations from over 140 countries.

