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Dispute Settlement Body
Special Session

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CONTRIBUTION BY JAMAICA TO THE DOHA MANDATED REVIEW OF THE DISPUTE SETTLEMENT UNDERSTANDING (DSU)

Communication from Jamaica

The following communication, dated 8 October 2002, has been received from the Permanent Mission of Jamaica.

Jamaica agrees that the dispute settlement mechanism is essential to the effective functioning of the multilateral trading system. The Doha mandate to improve and clarify the DSU should result in wider and more effective participation of developing countries.

Jamaica, therefore, wishes to put forward the following proposals for consideration:

1. Consultations

Article 3.7 of the DSU states that "the aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is to be preferred". Article 4.5 also states that in the course of consultations, "before resorting to further action under this Understanding, Members should attempt to obtain satisfactory adjustment of the matter".

Jamaica would wish to see the consultative process strengthened as Members have committed to do in Article 4.1. This would contribute to achieving the objective set out in Article 3.7. A strengthened consultative process would allow developing countries to use more frequently the dispute settlement mechanism if a dispute could be resolved without resort to the panel process which can be very costly and time consuming.

As paragraphs 3 and 4 of Article 5 (Good Offices, Conciliation, and Mediation) are clearly linked to Article 4, Members should be urged to make more frequent use of the facilities provided and every opportunity to do so should be given to them particularly in the case of developing countries.

Jamaica is also of the view that there should be a written report from the consultations prepared and submitted to the DSB by the party requesting the consultations. This report would be factual and concise and would indicate whether or not a mutually agreed solution was achieved. From a systemic point of view, a report would contribute to the more orderly and efficient functioning of the dispute settlement mechanism. It might also encourage parties to make more effective use of the consultative process. If the dispute is referred to a panel, the consultation report should be available to the panel.

2. Legal Representation

Although technical assistance is currently provided by the WTO in accordance with Article 27.2, such assistance has proven to be inadequate in assisting developing countries to take advantage of the Dispute Settlement Mechanism.

(a) Legal Assistance from the WTO Secretariat and other WTO Members

The services of legal consultants are facilitated under Article 27.2. However, these consultants operate on a part-time basis, and this has proven to be problematic for developing-country Members who need the services of advisors on a full time basis. The current system in which legal consultants only offer advice and do not assist in the preparation of comprehensive arguments and submissions is totally inadequate to meet the needs of developing countries advocating their case in DSU proceedings. Although the independent WTO Law Advisory Centre has been established to assist developing-country Members, the cost of membership still prohibits some developing countries from accessing its facilities. Additional independent mechanisms need to be developed to ensure that developing countries not only obtain general legal advice, but can also obtain assistance in arguing their case before a panel at a cost, which these countries can afford.

(b) Right to Representation

Jamaica welcomes the decision of the Appellate Body in the Bananas case to allow the participation of private lawyers. This appears to have become an accepted practice in subsequent cases to include private lawyers in delegations at both the panel and appellate stages. We wish to see the right of countries to constitute their delegations according to their wishes, both in panel and appellate proceedings, recognized in the DSU text. This would be consistent with the right of States in international law.

3. Consideration of Procedural Issues

Prior to presentation of substantive arguments in a dispute, the Panel should convene a special preliminary hearing to address any procedural issues which may arise: for example, the *locus standi* of a party, technical points related to the drafting of the request for the establishment of the Panel (e.g. whether the summary of the legal basis of the complaint is adequate). A decision on procedural matters should be rendered by the panel immediately following the hearing in the interest of transparency rather than waiting until the final report is issued much later in order to learn of the decision of the Panel on these matters.

4. Substantial Interest vs Substantial Trade Interest

Article 4.11 speaks to both "substantial trade interest" and "substantial interest" with respect to the participation of third parties in consultations. There is a need for clarification as to which interest is required. In Jamaica's view, third party participation in consultations should require "substantial interest".

Regarding the section of Article 4.11 which allows the Member to whom the request for consultations was made, to refuse a third party request to join in the consultations, Jamaica is concerned that the absence of clear guidelines on which to base a refusal could give rise to an arbitrary refusal of third party requests. In this respect therefore, Members should collectively agree on appropriate guidelines for making such a determination.

5. Participation of Third Parties

Under both the GATT and WTO, there have been cases in which third parties have been granted enhanced participation in panel proceedings on a case-by-case basis. Third parties, which have a "substantial trade interest" in the matter before a panel and which may even be more adversely affected by its decision than the immediate parties themselves, should have increased established rights of participation in panel and appellate proceedings.

To accomplish this, factors used by panels in both the GATT and WTO cases, such as agreement of parties to give enhanced rights, trade share of third parties, contribution to the economy, and existing legally binding agreements, should be developed into a set of guidelines, which can be applied in each case, in a transparent manner, when a Member applies for enhanced third party status. Having regard to the need to ensure that DSU proceedings are completed expeditiously, there would be no automatic right to enhanced third party status. Members applying would indicate in their written request their substantial trade interest and the impact or potential impact of the case on their economies as well as the implications for their rights and obligations under the WTO.

Enhanced status, once granted, should allow third parties to receive the submissions of the parties, to be present at all panel hearings and to be able to make oral and written submissions to the panel and to receive the decision at the same time as parties to the dispute. The submissions of the enhanced third party participant should be considered by the panels even if similar submissions were not made by the parties to the proceedings.

6. Assessment of the Economic and Social Impact of Dispute Measures on Developing Countries

It is noted that Article 21.8 states that regarding implementation of the panel rulings in a case brought by a developing-country Member, the DSB shall take account of not only the trade coverage of measures complained of but also their impact on the economy of the developing-country Member concerned. Methods for effectively implementing this provision need to be examined. One approach would be to require the panels and Appellate Body to consider these issues in making their rulings. This approach will be in keeping with the recognition, by Parties to the Agreement Establishing the WTO, of the need for positive efforts to ensure that developing countries secure a share in the growth of international trade commensurate with the needs of their economic development and to raise their standard of living. Furthermore, the meaning of Article 21.8 needs to be clarified with respect to the role of the DSB, particularly in light of its decision making functions.

Jamaica also proposes that this provision be amended to apply to cases brought by and against developing-country Members.

7. Legal Costs

Jamaica proposes that as a S&D measure in disputes involving developed and developing-country Members, especially where the dispute was initiated by the developed country, the developed country should pay the costs of the developing country if the latter is successful in a dispute before a panel. This step will assist in reducing the enormous costs of sustaining legal proceedings before a panel. In addition, payment of costs would enable a developing country with a strong case to pursue dispute settlement proceedings against a developed country where this would otherwise not be possible because of the burden of legal costs. The payment of these costs would be for the panel as well as appellate proceedings. Each would be separate, so that even if the developing country which had succeeded at the panel stage, were not entirely successful before the Appellate Body, costs awarded by the panel would still be applicable. No costs would be awarded at the appellate stage. However, if the Appellate Body overturned the ruling of the panel in its entirety, no cost would be

awarded at either stage of the proceedings. The costs to be covered would include attorneys' fees as well as fees for experts used to assist in the preparation of the legal arguments.

8. Procedures under Articles 21.5 and 22 (the sequencing issue)

Since the Banana Panels, it appears to have become accepted practice in panel cases, where implementation of the rulings has become an issue, that the procedure set out in of Article 21.5 must precede resort to the provisions of Article 22.

Jamaica agrees that there is a need in the DSU Review to clarify the language of the DSU to ensure legal certainty and predictability in the procedures.

Jamaica would wish the sequence to be: (i) consultations as envisaged in Article 4 or resort to the dispute settlement procedures of Article 5; (ii) request for a panel including resort to the original panel; (iii) the right to appeal; and subsequently, (iv) resort to Article 22.

9. Compensation

There is a need to develop another approach to deal with the issue of compensation claims particularly with regard to developing-country Members. Compensation, at the request of the successful developing-country Member, should also be available in forms other than increasing tariffs on imported products. Increased market access in agreed sectors of the developed-country Member is an example of this. While recognizing that compensation is temporary, it must also be agreed that compensating measures should only be withdrawn at the same time as the non-conforming measure identified by the panel and/or Appellate Body.

10. Development of Negotiating History

One aspect of transparency in the DSU process which needs attention is the development of an agreed negotiating history. In following the Doha mandate for the Review of the DSU, there must be kept a clear and precise record of negotiations and discussions, whether formal or informal, which will result in the revised DSU. This record, thereafter, would constitute the negotiating history which the panels and Appellate Body would resort to in rendering decisions in accordance with international law in general and, particularly, the Vienna Convention on the Law of Treaties.

11. Technical Assistance

Article 27.3 of the DSU requires the WTO Secretariat to conduct special training courses for interested Members. Jamaica acknowledges with appreciation the Secretariat’s efforts in this regard and urges that this process continues and be expanded as much as possible.