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JORDAN'S CONTRIBUTIONS TOWARDS THE IMPROVEMENT AND CLARIFICATION OF THE WTO DISPUTE SETTLEMENT UNDERSTANDING

Communication from Jordan

The following communication, dated 24 January 2003, has been received from the Permanent Mission of the Hashemite Kingdom of Jordan.

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1. Dispute settlement is an important part of the World Trade Organisation ("WTO") system, as it provides the mechanism for the enforcement of rights and the observance of obligations prescribed in the WTO agreements. The system created for settlement of disputes in the WTO reveals the fundamental nature of law in achieving economic objectives.

2. At the outset, it should be emphasized that WTO Members should always endeavour to solve their disputes at the earliest possible stage, whether at the consultation stage or even through the recourse to an effective mediation or conciliation system.

3. There are a number of practical steps to improve and clarify the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and given the rapidly shifting global context in which the WTO now functions, adaptability, predictability and flexibility within the DSU will be essential to meet the challenges of this increasingly integrated world. It should be stressed out as well that proposals considered for the development of the DSU should aim at the overall goal of facilitating the amicable resolution of disputes. An analysis of the legal functioning of the system could include a range of questions from general to specific, from theoretical to practical. It could examine the essential nature of international law and it could consider the degree of conflict between notions of globalization and sovereignty.

4. In this respect, below are some suggestions on the improvement and clarification of the DSU, which aim at ensuring the effective functioning of the dispute settlement mechanism:

II. CONCILIATION AND MEDIATION

5. The primary aim of the WTO dispute settlement is to encourage mutually agreed solutions. Article (5) of the DSU indicates that good offices, conciliation and mediation are additional procedures that are available on a voluntary basis. In the WTO context, a major impediment towards achieving the goals of such alternative dispute resolution procedures is the need of consistency with WTO rules, which should always support the ongoing rights and obligations of the interdependent Members. The DSU, in this respect, acknowledges, in Article (3.6), the right of WTO Members to

ensure that any mutually agreed solutions reached by such means be notified to the Dispute Settlement Body (DSB) where other Members would be able to raise their concerns and queries.

6. To enhance this approach, Jordan suggests that recourse to conciliation and mediation should be made mandatory in cases where a developing or a least developed country Member is concerned and should be subject to agreed upon terms of reference and specific time-frames.

7. To supplement the conciliation provisions in the DSU, consideration should also be given to the potential of having a comprehensive mediation system, to operate alongside the panel procedure. The standards stipulated within the TBT and the SPS agreements may be considered a tool that would assist in determining the procedures of such a system, which would be administered by the DSB.

8. Jordan accordingly proposes the following amendments to Article (5) of the DSU:

"Article 5

Good Offices, Conciliation and Mediation

1. Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree. **In disputes involving developing country or least developed country Members, such procedures shall be mandatory.**

2. Proceedings involving good offices, conciliation and mediation, and in particular positions taken by the parties to the dispute during these proceedings, shall be confidential, and without prejudice to the rights of either party in any further proceedings under these procedures.

3. Good offices, conciliation or mediation may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time **and shall be subject to agreed terms of reference. On no account may such procedures exceed a maximum period of 60 days.**

4. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request for the establishment of a panel. **If one of the parties is a developing or a least developed country Member, procedures for good offices, conciliation or mediation shall continue while the panel process proceeds unless both parties agree otherwise.**

~~5. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds.~~

~~4.~~ **5.** When good offices, conciliation or mediation are entered into within 60 days after the date of receipt of a request for consultations, the complaining party must allow a period of 60 days after the date of receipt of the request for consultations before requesting the establishment of a panel. The complaining party may request the establishment of a panel during the 60-day period if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute.

6. The Director-General may, acting in an *ex officio* capacity, offer good offices, conciliation or mediation with the view to assisting Members to settle a dispute.

III. WITHDRAWAL OF REQUESTS OF CONSULTATION

9. The DSU should include a provision enabling a Member to formally withdraw a request of consultations, and that should include a paragraph that addresses the issue of consultations which have

not been followed by a request for the establishment of a panel within a certain time-frame whereby it should be considered formally withdrawn upon the lapse of a specified period.

10. Jordan accordingly proposes that the following new paragraph be inserted as paragraph (12) of Article (4) of the DSU:

> **"A request for consultations may be withdrawn at any point of time and shall be effective from the date of submitting a written notification thereof to the DSB. A request for consultations shall be deemed to have been withdrawn by the complaining party if that Party has not submitted a request for the establishment of a panel within ( ) months after the date of receipt of the request."**

IV. WITHDRAWAL OF REQUEST FOR ESTABLISHMENT OF A PANEL

11. The DSU should include a provision enabling a complaining party in a dispute to formally withdraw a request for establishment of a panel. This right should be exercised within a specific time-frame.

12. Jordan accordingly proposes that the following new paragraph be inserted as paragraph (3) of Article (6) of the DSU:

> **"A request for the establishment of a panel may be withdrawn by the complaining party at any time of the proceedings prior to the second written submissions of the parties to the dispute. The withdrawal shall be effective upon submitting a written request to the DSB."**

V. DISPUTES INVOLVING DEVELOPING AND LEAST DEVELOPED COUNTRY MEMBERS

13. The participation of developing and least developed country Members is increasingly evident in the dispute settlement process and as such, representation of panelists from such countries would provide a further assurance and incentive for effective participation.

14. Jordan accordingly suggests that paragraph (10) of Article (8) of the DSU be amended to read as follows:

> **"In disputes involving developing country Members and/or least developed country Members the following shall be applicable:**
>
> **a. When a dispute is between a developed country Member and a developing country Member the panel shall include one panelist from a developing country Member.**
>
> **b. When a dispute is between a least developed country Member and a developed country Member the panel shall include one panelist from a least developed country Member.**
>
> **c. When a dispute is between a developing country member and a least developed country Member the panel shall include a panelist from a developing country Member and a least developed country Member."**

VI. WORKING PROCEDURES

15. Detailed standard working procedures should be developed for panels similar to the working procedures that were established by the Appellate Body for its proceedings. Currently, panels have only the very general guidelines set out in Appendix (3) to the DSU. As disputes become more complex, both in terms of the number of parties and third parties involved and the number of issues to be examined under the relevant WTO agreements, the fairness and efficiency of the panel process would be greatly facilitated by having standard working procedures.

16. This has been reiterated by the Appellate Body in a number of its recent report whereby it recommended that panels should develop standard working procedures.

17. In the meantime and for the purposes of our current mandate of negotiation, there are a number of additional working procedures that should be addressed, among which are the following:

i. Jordan agrees with Costa Rica that Article 12.1 should be amended to include consultation with third party rights on the issue of deciding on the application of the working procedures as specified in Appendix 3.

Accordingly, Jordan agrees with the following suggested amendments to the wording of Article 12.1:

"Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute. This decision shall not limit the rights of third parties to the dispute unless they have been also consulted."

ii. Jordan agrees with Japan and the EC on the necessity of amending paragraph 3 of Appendix 3 with respect to the issue of the provision of non-confidential summaries of the information contained in the submissions of the parties and third parties. Therefore, we agree with the following suggested amendments to the wording of the above-mentioned paragraph:

a. The deliberations of the panel and the documents submitted to it shall be kept confidential. Nothing in the DSU shall preclude a party or third party to a dispute from disclosing statements of its own positions to the public.
Members shall treat as confidential information submitted by another Member to the panel, which that Member has designated as confidential.

b. Each party and third party to a proceeding shall also, if requested by a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public no later than 15 days after the date of the request, or such other deadline as agreed upon by both, the party and the requesting Member.

iii. Effective participation of third parties would enrich the dispute settlement process by allowing parties to a dispute and Members with interest in the outcome of a certain disputes to fully participate in the proceedings.

In this respect, Jordan suggests that paragraph 6 of Appendix 3 of the DSU be amended to read as follows:

> All third parties which have notified their interest in the dispute to the DSB shall be invited in writing to present their views during ~~a session of the first~~ **all the** substantive meetings of the panel set aside for that purpose. ~~All such third parties may be present during the entirety of this session.~~ **Third parties shall have the right to be present at all stages of the proceedings. In establishing the working procedures to be followed, the panel may take into consideration any special circumstances of the third parties that are closely related to the matter in dispute.**

VII. TIME-FRAME FOR THIRD PARTY PARTICIPATION

18. Past practice has shown that the time-frame available for a third party to notify the DSB of its interest to make written submissions in a dispute before a panel should be 10 days. This practice should be explicitly provided within the ambit of Article 10.2 of the DSU.

19. It should be noted that this short time-frame is necessary since the notification of third parties' interests is a pre-requisite for the composition of a panel since nationals of third parties to a dispute should not be among the appointed panelists.

20. Jordan accordingly proposes the following amendments to paragraph (2) of Article (10) of the DSU:

> "Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB **within 10 from the request of establishing a panel** (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report."

VIII. RELATIONSHIP BETWEEN ARTICLES 21.5 AND 22 OF THE DSU

21. Perplexities have emerged in terms of the relationship between Article 21.5 of implementation and Article 22.6 of retaliation rights. The main question is whether Article 21.5 proceedings must precede Article 22 proceedings. The current drafting of the two provisions lead to some uncertainty.

22. Article 21.5 of the DSU requires a reconvened Panel to complete its work within 90 days of the referral of the matter to it. It does not, however, specify when such proceeding should be initiated presumably because it would depend upon when the responding Member sought to implement the relevant recommendations. Nothing in the express wording of the provision prevents initiation of such a proceeding before or after the expiry of a reasonable period of time for implementation of recommendations and rulings. Article 22.6, on the other hand, states that the DSB shall grant authorization to suspend concessions and other obligations "within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request" or an objection to such request is raised and referred to arbitration. Article 22 thus provides an express time limit for DSB authorization to be requested and granted. Yet Article 21.5 does not have any timetable that can ensure its analysis is completed by that time.

23. In this respect, Jordan agrees with the conclusion that Article 22 can only be utilized when Article 21.5 procedures have been completed. This argument proceeds on the basis that Article 21.5 states that "where there is disagreement as to the existence or consistency with covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including …". In addition Article 22.6 is limited to cases where "the situation described in paragraph 2 occurs". The latter is a reference to

cases where the Member concerned fails to bring the measure found to be inconsistent with the covered agreement into compliance. Where an Article 21.5 procedure is thus pending, the argument is that the conditions for a request for suspension under Article 22.6 cannot be fulfilled. Therefore, where there is disagreement on implementation it is Article 21.5 that must be utilized not Article 22, the contrary would deprive Article 21.5 of its *raison d'étre*.

24. Jordan would be reviewing the legal texts proposed to this effect and will be looking forward to working with delegates to reach a common understanding in connection thereto.

IX. TIME-FRAME OF ARBITRATION UNDER ARTICLE 21.3(C)

25. The time-frame for the completion of arbitration under Article 21.3(c) of the DSU should commence from the date of the appointment of the arbitrator and not from the date of the adoption of the report.

26. Jordan accordingly suggests that sub-paragraph (c) of paragraph (3) of Article (21) of the DSU be amended to read as follows:

> **(c) a period of time determined through binding arbitration. Any party may request such arbitration within 60 days after the date of the adoption of the recommendations and rulings by the DSB. If the parties cannot agree on an arbitrator within 10 days after referring the matter to arbitration, the arbitrator shall be appointed from the Indicative List of Panelists by the Director-General within 10 days, after consulting the parties to a dispute. The arbitrator shall issue its award to the parties within 45 days from the date of its appointment. In such arbitration, a guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of the appointment of the arbitrator. However, that time may be shorter or longer, depending upon the particular circumstances of the dispute.**

X. REMAND AUTHORITY

27. Granting the Appellate Body the power to remand findings or conclusions of facts to the panel is necessary to ensure the efficacy of the two tier system of the dispute settlement, thus preserving one of the main principles that distinguish the WTO dispute settlement mechanism than that of other bodies and tribunals in the international arena.

28. Due to the Appellate Body's limited jurisdiction to questions of law, it is sometimes difficult for same, in situations where it has reversed a legal conclusion of a panel, to decide how to modify the panel's conclusions without remanding a claim to the original panel. Introducing the remand concept, however, would require the extension of the overall time-frames for dispute settlement, and procedures would have to be developed allowing for further consideration by the panel.

29. In the absence of clear guidelines that would regulate the remand power, the Appellate Body would be placed in an invidious position.

30. Moreover, giving the Appellate Body a power to remand would raise certain shortcomings in the WTO system. This may be evidenced by the fact that panelists are not currently permanent judicial officers, thus it would be difficult to reconstitute the initial panel to hear the remanded report.

31. Jordan accordingly suggests the following amendments to paragraph (12) of Article (17) of the DSU:

"The Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding. If the report of the panel or compliance panel does not, however, contain sufficient undisputed factual findings so as to enable the Appellate Body to perform its task, the Appellate Body shall remand the case to the panel or, where appropriate, the compliance panel, with the necessary findings of law and/or directions so as to enable the panel to perform its tasks. A decision to this effect shall be forwarded to the Chair of the DSB."

32. Moreover, the following new Article would need to be added to regulate the issue of remand procedures:

"**Article 17 bis**
Remand Procedure

When the Appellate Body remands a case under paragraph 12 of Article 17, the DSB shall establish a panel, consisting of the members of the original panel, if possible, within 10 days after the request has been forwarded to the Chair of the DSB.

The terms of reference of the panel established under this paragraph shall be as follows:

"To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB under paragraph 12 of Article 17 in document ….. and to make such findings, in accordance with the findings of law and/or guidelines set by the Appellate Body under that provision, as will assist the DSB in making the recommendations or in giving the rulings provided in that/those agreement(s)"."

XI. UNSOLICITED *AMICUS CURIAE* SUBMISSIONS

33. The WTO system has now reached a stage in its development where it makes sense to recognize non-state interests in disputes between Members.

34. Article (17) of the DSU, on its face makes no allowance for *amicus curiae* but is the Appellate Body or the Panels bound only by what is explicitly stated in the DSU? If this were indeed the case, one could end up with rather conflicting outcomes: for example nowhere the DSU mentions that the Appellate Body must make an objective assessment of the "issue" before it. The issue comprises, in any dispute, the facts and the law, as the unambiguous wording of Article (11) of the DSU makes clear. Such an obligation of objective assessment is imposed only on panels pursuant to the said Article (11), but does that preclude the Appellate Body from making an objective assessment of the matter before it. This is certainly not the case. The Appellate Body hence, should be allowed some discretion to conduct procedures before it.

35. The key is that, when exercising their discretion, the panel or the Appellate Body should not undo its implicit duty to respect due process and should ensure that unsolicited briefs do not extend to factual issues and that the parties to the dispute have ample time to react to same. It should always be taken into consideration, that the unsolicited *amicus curiae* briefs will only be used to evaluate arguments made by the parties to the dispute and not to make the case for the complainant or the respondent.

36. Therefore, a provision that clearly regulate the submission of unsolicited *amicus curiae*, or non-state interventions, within the ambit of the DSU would be of assistance to the dispute settlement process. This right of intervention would allow an interested person or group (such as environmental

organizations, competing private sector firms, and citizens) to present evidence and arguments (legal or otherwise) to the panel or Appellate Body which would provide for increased transparency and expert information that would not be presented in Member's submissions.

37. Again, this privilege may be misused in certain circumstances should there not be a clear framework for its application especially when a dispute involves a developing country Member, taking into consideration the financial burdens that may face them in addressing such submissions.

38. Jordan accordingly agrees with the EC's proposal and suggests that a new paragraph be included in the latter's proposal as paragraph (8) which would read as follows:

"Article 13 bis
Amicus Curiae Submissions

8. Panelists and Appellate Body Members shall promptly draw up, in their respective working procedures, rules and procedures as necessary to regulate, opertionalise and define the scope of this Article taking into consideration the interests of developing country Members and least developed country Members to the extent not already provided for in the DSU. Such procedures shall include specific reference to a fund that would be promptly established by relevant WTO Members to assist developing country and least developed country Members in supporting financially the submittal of unsolicited *amicus curiae* briefs, whether submitted by same as a complaining party or as a respondent. The said procedures shall be drawn up in consultation with the Chair of the DSB and the Director-General, and shall be submitted to the DSB for adoption. "

XII. QUESTIONS OF INTERPRETATION

39. There is nothing in the DSU that prevents interpretations from being provided within the ambit of the WTO whether through the Ministerial Conference or the DSB.

40. In keeping with the notion that the WTO is one body in the domain of public international law, Jordan suggests as well that the panels, Appellate Body and/or DSB be granted the power to "seek" advisory opinions from the International Court of Justice (ICJ) on matters of international law. This would entail extending the advisory function of the ICJ to the WTO, as has been done with other specialised bodies. Reference to an independent panel such as the ICJ would attest to the impartiality of the WTO in the resolution of disputes that may emerge as a result of the application and implementation of the WTO agreements.

41. The advisory opinion should be considered as an instrument of interpretation that aims at assisting the relevant bodies in recommending or adopting a report on a certain dispute. The said opinion should be subject to adoption by the Ministerial Conference or the General Council pursuant to Article IX (2) of the Marrakesh Agreement Establishing the WTO.

42. In the meantime and for the purposes of our current mandate of negotiation, Jordan agrees with the African Group's proposal on this issue and suggests that the following wording be included within the ambit of the DSU as Article 5 bis:

"**Article 5 bis**
Questions of Interpretation

1. Parties and third parties to a dispute may at any stage of the proceedings refer questions of interpretation to the General Council in accordance with this Article.

2. Question(s) shall be laid before the General Council by means of a written request containing an exact statement of the queries upon which the interpretation is requested, accompanied by all documents likely to assist in addressing and answering the question(s).

3. The Secretariat shall promptly give notice of the request for an interpretation to other Members who may have a substantial interest in the outcome the reof.

4. Parties to the dispute, third parties and Members with substantial interest, that have presented written statements, shall follow the form, time-frame and other guidelines set by the General Council for this purpose.

5. Decisions of the General Council shall be taken by a three-fourths majority of the vote cast."

XIII. ROLE OF THE SECRETARIAT

43. Pursuant to Article 27 of the DSU, the Secretariat has the responsibility of assisting panelists in a number of aspects. In practice, they do provide legal expertise and assist panelists in a number of ways including drafting certain parts of their recommendations. This may have a diverse impact on the transparency of the process of dispute settlement should there not be a system that ensures that all documents, notes, information or any sort of contribution made available by the Secretariat is promptly provided to the parties and third parties to the dispute.

44. Jordan agrees with India *et al*'s proposal on the necessity of amending Paragraph 10 of Appendix 3 of the DSU and suggests the following:

> "In the interest of full transparency, the presentations, rebuttals and statements referred to in paragraphs 5 to 9 shall be made in the presence of the parties **and third parties**. Moreover, each party or third party's written submissions, including any comments on the descriptive part of the report and responses to questions put by the panel, shall be made available to the other parties or third parties. **Any documents, notes, information and any other sort of contribution, provided by the Secretariat to the panel, shall be promptly forwarded to the parties and third parties to the dispute, whose views on same shall be taken into consideration by the panel.**"

45. Finally, the ability of the DSU to balance trade and legal objectives will continue to be one of its most significant tasks that can be achieved, with some innovation and willingness to change. The focus of this change should be toward greater integration of WTO law and practice with public international law and other trade policy issues.

46. For the development of a more viable international trade regime, it is fundamental to have a dispute settlement mechanism that is fair and just and provide genuine redress for the weak against the strong. Developing countries will need to be prepared to face the challenges in improving and clarifying the dispute settlement mechanism; however, it should always be kept in mind that a legal system that does not encourage the participation of all its members eventually lacks credibility and becomes unsustainable.

47. Jordan reserves its right to amend, modify, reverse, add, cancel any of the above proposals, ideas and suggestions and welcomes any comment or concern that other parties may have on any of the topics addressed above.