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LOWERING RISKS OF DOING BUSINESS

Tools for Legal Security and Accessibility

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LOWERING RISKS OF DOING BUSINESS

TOOLS FOR LEGAL SECURITY AND ACCESSIBILITY

SUSTAINABLE ACHIEVEMENT OF
BUSINESS EXPANSION AND QUALITY (SABEQ)

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EXECUTIVE SUMMARY

A legal system committed to the rule of law is based on principles of predictability, transparency, and fundamental fairness (due process). Jordan's efforts to strengthen the rule of law have already led to greater transparency in government regulatory procedures. The practical tools for implementing these principles include systematic publication and consultation, which means:

- public access to complete and secure information about government regulatory requirements and decisions, and
- Stakeholder participation in the development of new regulatory requirements.

These tools are important for a business environment that supports investment. Reducing legal uncertainty and regulatory risk enhances business opportunities. Every business evaluates not only potential profits, but also the commercial and legal risks of entering a new market. Such risks might arise from:

The difficulty of being fully aware of the regulatory requirements with which a business must comply. Changes in regulatory requirements without adequate advance notice.

Uncertainty about the regulatory process and the means to comment on and participate in changes to regulatory requirements.

Five Tools for Strengthening the Rule of Law in Jordan

A national government can strengthen the rule of law and increase the legal security of business by using five tools to boost transparency.

A. Publish securely all regulatory requirements of general application. The aspect of regulatory transparency most closely related to the rule of law is having regulatory requirements reliably accessible by the regulated entities

Jordan's practices contain several problems at the Ministerial level:

Under the current legal regime, if a law does not require publication of regulatory requirements – instructions, policy statements, Ministerial decisions, and directives – the Ministry is free to publish the regulatory requirement where it wants, or not to publish it at all. This creates an important gap in legal security.

A large number -- perhaps one-half by some estimates -- of the instructions and other regulatory requirements developed by some Ministries is not made public.

Some Ministries have official internet websites, but many of these do not publish new statutory or regulatory provisions nor do Ministries maintain them in an up-to-date manner.

Recommendations:

Each Ministry should publish in the Official Gazette all regulatory instructions that they adopt. The government should require this in a new law or, preferably, in an amendment to the Constitution to ensure that legal security and transparency is 100 percent respected.

Each Ministry should allocate the staff and financial resources to build and maintain an up-to-date, well-constructed, user-friendly official website.

Each Ministry should publish on its internet website all of its instructions, Ministerial decisions, and other regulatory requirements of general application.

There are other problems with the Official Gazette:

The paper text of new laws and regulations is scanned, not typed, into the Gazette's computer, and therefore an internet user is able to search the Official Gazette online only (1) by volume and date of publication, (2) by law or regulation number, (3) by title of the law or regulation, or (4) by a "subject" word that takes the internet user to the table of contents for the Gazette that contains that word in the title of the item published. In effect, to find a new law or regulation, an internet user searching the Official Gazette must know what the new law or regulation is or its title. This provides very low accessibility for users.

Recommendation:

- A. The Official Gazette should enter the full text of new laws and regulations in a computer database, structure this electronic database to be user friendly, and provide modern computer search engines, indexed by subject and topic.
- B. Provide adequate time for compliance before any new regulatory requirement comes into force. Failure to provide adequate time for compliance – such as by allowing a reasonable period for a regulatory requirement to come into force – reduces both the predictability and the public's sense of fundamental fairness, undercutting the rule of law.¹

Jordan's practices contain problems at the Ministerial level:

New regulations are usually made effective on the date of publication.

Recommendation:

After publication, each Ministry should provide those affected adequate time to come into compliance, generally with a minimum of thirty days.

¹ The principle of delay in effective date is also embodied in the 1947 GATT Treaty and WTO agreements.

- C. *Upon publication, take affirmative steps to communicate the new regulatory requirements to those must comply.* The APEC-OECD Checklist emphasizes the principle that “channels for information dissemination and notification should be widely accessible.”

Recommendation:

Each Ministry, upon publication of a new regulatory requirement, should help those affected find the actual text and understand the content of the new regulatory requirement.

This should not occur *ad hoc*. Each Ministry should develop, in advance, a comprehensive strategy to publicize regulatory changes.

- D. *Create a public registry of all laws, regulations, and instructions of general application readily available to the public.* International best practice requires each government to create and update on a continuing basis public registries of consolidated regulations and business formalities. The goal is to collect and publish in a single site all regulatory requirements, updated often enough so that the registry is reliable.

Jordan does not have a public registry of regulations.

The Official Gazette publishes the official legal record of the “flow” of new law, regulations, and many instructions. The Gazette does not publish the “stock” of existing national regulatory requirements – a publication in a single site of all regulatory requirements currently in force.

Recommendation:

The government should create, update on a continuing basis, and index by topic and subject a public registry of all laws, regulations and other instructions of general application.

- E. *Provide advance notice and seek public comments on all draft laws, regulations, and instructions of general application.* By seeking public comments, the government becomes more transparent, better informed about problems and solutions, and able to develop regulatory requirements that are more effective and lower-cost.

Problem -- Ministerial Level:

There are no predetermined procedures for a Ministry to follow to ensure advance notice and public comment during development of a draft law or regulation.

The Ministries have not established procedures for providing advance notice and seeking public comments on all draft instructions.

Recommendation:

Within a year, each Ministry should develop its own notice and public comment process for draft laws, regulations, and instructions of general application. A detailed framework for a ministerial consultation policy is already developed by SABEQ for the Ministry of Industry and Trade (“Public-Private Partnership in the Ministry of Industry and Trade: Recommendations for a Consultation Program,” SABEQ, June 2007, available on request).

Legislative and Opinion Bureau

The Prime Minister recently announced the creation of a new interactive website that provides advance notice and public comment on draft laws and regulations. At the new internet website at the legislative and Opinion Bureau, draft laws and regulations are to be displayed for ten days for people to express their opinions before the drafts are sent by the Bureau through its own review process.

The process at the Bureau would benefit from a number of specific improvements:

Ministries should aim to construct a more systematic means of early and effective stakeholder dialogue and consultation during policy and regulatory development. Within a year, the consultation function should be transferred to each of the Ministries, because consultation must occur at the earliest stage of regulatory development in order to ensure that views are fully considered in writing the law or regulation. Consultation at a late stage – such as in the Legislative and Opinion Bureau – occurs too late for major changes in the regulatory approach and design. Ministerial consultation should follow the detailed framework designed by SABEQ.

During the time that consultation is maintained in the Bureau, ten days is too short a time period to seek public comments. The comment process should provide the public sufficient time (at least 30 days) to become aware of new proposed draft laws and regulations, and to draft responsible, factually supported well-reasoned comments.

INTRODUCTION

This report (1) assesses the requirements and practices of Jordan with respect to the publication of legal instruments that regulate business behavior, (2) assesses the procedures for giving businesses meaningful access to the processes by which laws, regulations, and instructions are developed and adopted by the Ministries, and (3) compares Jordan’s practices with international good practices, identify gaps, and provides recommendations to enhance the publication process. It evaluates Jordan’s publication and regulatory development procedures against World Trade Organization (WTO) standards and other international good practices. This report develops recommendations to make Jordan’s procedures more transparent and reliable, and identifies ways for Ministries to improve business access to the development of

regulatory requirements and, over time, institutionalize a common set of procedures to do so.

This report focuses on five international best practices relating to the development, publication, and dissemination of regulatory requirements by a Ministry.

- Publish securely all regulatory requirements of general application.
- Provide adequate time for compliance before any new regulatory requirement comes into force.
- Upon publication, take affirmative steps to have those who must comply become aware of the new regulatory requirements.
- Create a public registry of all laws, regulations, and instructions of general application readily available to the public.
- Provide advance notice and seek public comments on all draft laws, regulations, and instructions of general application.

What are regulations in Jordan?

This report refers to laws, regulations, and instructions. In Jordan, a “law” is adopted by the Parliament and approved by the King. A “regulation” is drafted by a Ministry, reviewed by the Office of the Prime Minister, and approved by the King. An “instruction” is any form of legal instrument (other than a law or regulation) issued by a Ministry. An “instruction” may have other names – a Ministerial decision, directive, reporting requirement, or interpretation, among others.

In this report, “regulatory requirement” refers inclusively to any law, regulation, or instruction of general application. “Ministry” refers to any Ministry, regulatory commission, and any other national regulatory agency.

I. TRANSPARENCY AND THE RULE OF LAW: FIVE GOOD PRACTICES

The goals of a legal system committed to the rule of law are predictability and fundamental fairness. National efforts to strengthen the rule of law have led to greater transparency in the development of government regulatory procedures. The goals underlying these efforts to increase transparency include not only predictability, but also:

- Public access to complete and secure information about government regulatory requirements and decisions,
- Stakeholder participation in the development of new regulatory requirements, and
- The accountability to the public of government agencies for their regulatory decisions.

Increasing transparency builds the credibility of agency decisions and reduces the opportunities for corruption as well as reduces the public's perceptions of corruption.

Private individuals and businesses are more likely to accept (or at least not actively oppose) controversial government decisions if they have ready access to all of the existing and newly created regulatory requirements, and believe they can contribute to the regulatory development process. Such public acceptance facilitates government enforcement efforts and those regulated are more likely to comply voluntarily.

These tools are important for a business environment that supports investment. Reducing legal uncertainty and regulatory risk also enhances business opportunities. Every business evaluates not only the potential profits, but also the commercial and legal risks of entering into a new market. Such risks might arise from:

The difficulty of being fully aware of the regulatory requirements with which it must comply.

Changes in regulatory requirements without adequate advance notice.

Uncertainty about the regulatory process and the means to comment on and participate meaningfully in changes to regulatory requirements.

Foreign firms, individuals, and investors seeking access to a market must have complete and secure information about both existing and new regulatory requirements, and the regulatory development process, to permit them to base their decisions on accurate assessments of potential costs, risks, and market opportunities.

A national government is able to strengthen the rule of law through transparency and increase the legal security of business by taking advantage of five tools to strengthen the rule of law through transparency.

PUBLIC NOTIFICATION

A. Publish securely all regulatory requirements of general application.

The aspect of regulatory transparency most closely related to the rule of law is having regulatory requirements accessible by regulated entities.

Placing a regulatory requirement into tangible written form permits all of those affected to know what is expected. In many countries, publication of regulatory requirements is an inescapable building block – a condition for the validity of these regulatory requirements.¹ Gaps in the publication of regulatory requirements increase legal insecurity and potential abuses, such as a request from an inspector for a bribe to ignore what was – to the business that was found not to be in compliance – a regulatory requirement of which it was ignorant.

In this context, it is very important to distinguish between publication of the “flow” of new regulatory requirements, and publication of the existing “stock” of regulations.

Many governments issue a national gazette that provides the “flow” of new regulatory requirements. Such a gazette periodically publishes new laws, regulations, and other

1. See Appendix for a sample of related national laws.

kinds of regulatory instructions of general application. It serves the role of an official newspaper announcing the existence of a new regulatory requirement. A national gazette may not point out what previously issued regulatory requirements are changed or withdrawn, and may only be indexed to identify each new regulatory requirement.

Many governments also issue a registry of existing regulatory requirements that provides the “stock” of regulations. Such a registry includes a collection of all existing regulatory requirements that are in force. A registry provides a single, comprehensive, reliable, unified source of all regulatory requirements. It provides only those provisions of a regulatory requirement in the form it has been amended, and is often indexed by subject or topic to permit a user to identify those provisions of any regulatory requirements pertinent to a specific concern.

National registries are kept up-to-date in printed form by periodic republication. An electronic national registry is updated online at an official website, with each provision changed quickly to reflect the issuance of any new regulatory requirements.

REGULATORY COMPLIANCE

B. Provide adequate time for compliance before any new regulatory requirement comes into force.

Failure to provide adequate time for compliance – such as by having a regulatory requirement come into force immediately upon its publication – reduces both the predictability and the public’s sense of fundamental fairness, undercutting the rule of law.²

Reasonable delay in having a new regulatory requirement immediately go into force affords those affected – the business that must comply – a reasonable time to prepare for the effective date of the regulatory requirement and the opportunity to take any needed action, which the issuance of the new regulatory requirement may cause. The laws of various nations provide two, to three, to four weeks of delay.³ World Trade Organization Uruguay Round Agreements also provide “a reasonable interval” for the delay that are determined depending upon the specific fact situation involved.⁴

A business may have placed great reliance on the previous legal structure. A new regulatory requirement may impose new liability that the business would suffer because of reliance on the previous policy.

Publication of a regulatory requirement before it comes into force helps a Ministry by improving compliance by businesses and easing enforcement by the Ministry. With

2. In specific situations, there may be “considerable harm to the safety and welfare of the public” that justifies avoiding delay in having a regulatory requirement come into force immediately after publication. See South Korea, Annex 2.

3. See Appendix for a sample of related national laws.

4. See Appendix.

both businesses and government inspectors having advance notice of a change in a regulation, both will understand better what should have been done to comply, reducing possible misunderstandings and the need to impose possible penalties.

C. upon publication, take affirmative steps to have those who must comply become aware of the new regulatory requirements.

Publication is only the beginning of a process for ensuring that those potentially affected by the regulatory requirement become aware of it and understand in what ways the regulatory requirement applies to them. To be consistent with international best practices, each Ministry, upon publication of a regulatory requirement, should reach out to the stakeholders and the public at large – identifying those stakeholders likely to be involved, informing them that a regulatory requirement of general application has been published, summarizing the regulatory requirements, and helping the stakeholders and public understand them.

Given the increased diversity of stakeholders, and the number of interest groups and other institutions – both domestic and foreign – a Ministry is not able reasonably to rely on simple publication as adequate to make all of those potentially affected aware of a new regulatory requirement.

Each Ministry should develop a comprehensive strategy to help those involved to find and understand the regulatory requirements that it issues, structured in accord with the nature of both the regulatory requirements and interested parties involved. This effort at notification often includes:

Press releases,
Direct mailings (or email) to those affected,
Mailings (or emails) to the specialized trade associations and the bar association, and
Sponsorship of public meetings to explain and answer questions concerning the new regulatory requirement.

NATIONAL REGISTRY

D. Create a national registry of all laws, regulations, and instructions of general application readily available to the public.

To be consistent with international best practices, a national government should create, update on a continuing basis, and suitably index a public registry of all regulatory standards of general application, including laws, regulations, and instructions of general application. The goal is to collect and publish in a single site all regulatory requirements.

The “centrality” of a registry – that is, the fact that all regulatory requirements and their substantive information are available in a single source – reduces the transaction

costs for those who have to comply. The centrality reduces the costs of searching and comparing different sources. This centrality is also crucial to reduce the costs of updating the registry allowing the applicable regulatory requirements to be maintained up-to-date.

Such a registry ensures the effectiveness of communication by the Ministries, and accessibility of these regulatory requirements to those who are regulated by them. Moreover, the better and more systematic the flow of information about regulatory requirements that is sent to the registry, the less is the possibility of overlap or inconsistency in the regulatory requirements.

A registry facilitates the implementation of a regulatory requirement, by making more consistent and reliable the sharing of information between a Ministry, and affected businesses and individuals. In addition, as a matter of internal government communication, a registry can facilitate the understanding of regulatory requirements and better coordination among Ministries and their departments.

Many countries have established central electronic registries, in which information on laws, regulations, and instructions of general application are available on the Internet.⁵

Finland – Legislative information is found in FINLEX. The database of translations of Finnish acts and decrees contains Finnish Acts of Parliament (mostly in English). The consolidated texts of acts and decrees, in Finnish and Swedish, and the original texts of acts and decrees are in separate databases.

South Korea – All laws and regulations are available at the website for the Ministry of Legislation.⁶ In addition, the Regulatory Reform Committee has compiled a comprehensive register of regulations in force.

Mexico – Maintained are a comprehensive Federal Register of Business Formalities,⁷ and a compendium of all current laws and other major legal regulatory requirements.

With an electronic registry, access to online, up-to-date public documents is available at any time. Computer access reduces the time for obtaining these regulatory requirements by businesses, private individuals, and government officials. User-friendly computer format, explicit publication of all regulatory requirements that are in force and computerized indices and modern search engines further facilitate the use of the electronic registry.

An electronic registry that includes e-mail addresses and the online publication of Ministerial telephone directories facilitates interaction between government officials and private stakeholders. A Ministry is also able to use an electronic registry to carry

5. See "Key Elements and Characteristics of Regulatory eRegistries: A Note for HITROREZ," Cesar Cordova and Scott Jacobs, Jacobs & Associates, Draft, 15 January 2007.

6. See, <http://gwanbo.korea.go.kr/>.

7. See, <http://www.cofemer.gob.mx/portal.asp?seleccionID=9&padreID=6>.

out public consultation, and seek public comments, enhanced by websites, which stakeholders and individuals can use to communicate with Ministry staff.

PUBLIC COMMENT

E. Provide Advance Notice and Seek Public Comments on All Draft Laws, Regulations, and Instructions of General Application.

Consultation is based on transparent and systematic discussions between public officials and stakeholders.⁸ By seeking public comments, the government becomes more transparent, better informed about problems and solutions, and able to develop regulatory requirements that are more effective and lower-cost.

To be consistent with international best practices, each Ministry would begin to seek comments from the public on regulatory laws, regulations, and instructions of general application. Seeking public comments would need to become a systematic process at a Ministry. Each Ministry would need to ask for specific information through a clear process that is routine, mandatory, low-cost, and accessible by stakeholders.

Specific procedures for an advance notice and public comment process include the following:

Publish each draft regulatory law, regulation, and instruction of general application for public comment on the website of the Legislative and Opinion Bureau or the concerned Ministry.⁹

Provide in front of the draft a statement. Include in this statement the background and justification for the draft, the legal authority for issuing it, the way to submit comments, and contact information for a Ministry official from whom to seek clarifying information.

Permit anyone – nationals or non-nationals alike (investors and foreign businesses) – to submit comments.

Set forth a specific time limit to submit comments. This time limit should range from 30 to 90 days, depending on the complexity of the issues involved.

Publish the law, regulation and instruction of general application on the website of the Legislative and Opinion Bureau or the Ministry.

Provide in front of the adopted regulatory requirement a statement of the background and justification for the regulatory requirement, and the legal authority for issuing it.

8. For a more detailed discussion of consultation, see “Public-Private Partnership in the Ministry of Industry and Trade: Recommendations for a Consultation Program,” Scott Jacobs/SABEQ/5 June 2007 (to be referred to as “Public-Private Partnership”).

9. In rare situations, there may – for a particular regulation or instruction of general application – be “considerable harm to the safety and welfare of the public” that justifies avoiding the delay caused by advance notice and public comment. See South Korea, Annex 2.

Include in this statement a summary of the public comments that the Ministry received,¹⁰ and the reasons that the Ministry agreed or disagreed with the comments.

Seeking public comment on a draft law, regulation, or instruction of general application benefits a Ministry. Public comments ensure that a draft regulatory requirement will reflect the needs of the people. A Ministry may not be fully aware of all the applicable facts or situations involved. Receiving public comments will enable the Ministry to ensure that it is able to balance the needs of the competing stakeholders, while, at the same time, achieving its institutional goals.

The justification statement that a Ministry includes with a regulatory requirement provides the public with the reasons for it. By publicly justifying the regulatory requirement and explaining the nature of its institutional goals, a Ministry gains public acceptance for it. A Ministry should make the effort explicitly to indicate how it reacted to the public comments it received to give the public a sense of participation and to encourage the public to make the effort to make comments in the future.

II. INTERNATIONAL SUPPORT: WTO, GATT, AND APEC-OECD

The five international best practices described above are discussed and endorsed in a wide variety of government and academic sources. This report documents the international support for these best practices briefly by referring to two basic sources – a World Trade Organization (WTO) treaty and WTO agreements, and the APEC-OECD Integrated Checklist on Regulatory Reform.¹¹

When Jordan formally became a Member of the WTO on 11 April 2000,¹² it became obligated to pursue new regulatory requirements that comply with the WTO treaty and WTO agreements.¹³ APEC, Asia-Pacific Economic Cooperation, began as an informal dialogue group in 1989, but has since become the premier forum for 21 Member Economies for facilitating economic growth, cooperation, trade and investment in the Asia-Pacific region. OECD, Organization for Economic Co-operation and Development, began in 1961, has 30 Member countries, and provides a setting where governments compare policy experiences, identify good practice, and coordinate domestic and international policies.

10. The Ministry does not need to respond to each comment that it receives from the public. The Ministry, in issuing its public explanation, could group the public comments according to common themes. If the Ministry receives a particularly detailed comment, it could increase transparency to respond to that comment specifically.

11. APEC-OECD Integrated Checklist on Regulatory Reform (Paris, 2005), downloaded from <http://www.oecd.org/dataoecd/41/9/34989455.pdf> on 10 July 2007 (to be referred to as "APEC-OECD Checklist").

13. "Every well functioning rule-making process will have a procedure for examining the proposed regulatory action for legality and compliance with other requirements, such as adherence to WTO obligations." APEC-OECD Checklist, B2.

TRANSPARENCY

In 2005, the 45 Member economies of APEC and OECD, collectively, issued the “APEC-OECD Integrated Checklist on Regulatory Reform.”¹⁴ The 45 Member economies explain their intent to strengthen the rule of law.

Based on the accumulated knowledge of APEC and the OECD, the Checklist highlights key issues that should be considered during the process of development and implementation of regulatory policy, [T]he Checklist ... can provide useful information for those economies interested in (i) moving closer to good international practices; and (ii) reducing the uncertainty regarding the implementation of regulatory reform principles and institutions,¹⁵

The APEC-OECD Checklist emphasizes that transparency and business access to regulatory requirements contribute “positively” to business investment.

Transparent, consistent, comprehensible, and *accessible laws are necessary to ensure compliance and achieve public policy objectives* Among other things, this promotes predictability, fairness and public confidence. *Transparency also contributes positively to the attractiveness of the investment climate.* Both domestic and foreign players require transparency, but it is particularly important to new market entrants as well as SMEs [Small and Medium-size Enterprises].¹⁶

THE PRINCIPLE OF PUBLICATION

The principle of publication of all regulatory requirements of general application, a principle fundamental to the rule of law, is embodied in the 1947 General Agreement on Tariffs and Trade.

Laws, regulations, judicial decisions and administrative rulings of general application ... shall be published promptly in such a manner as to enable governments and traders to become acquainted with them.¹⁷

WTO agreements apply this principle to a wide variety of regulatory requirements, not just to regulations. The WTO Uruguay Round WTO Agreements apply this principle to:

14. The 45 Member economies are listed on the page after the cover page. APEC-OECD Checklist.

15. APEC-OECD Checklist, pages 1 & 2.

16. APEC-OECD Checklist, A6.

17. The General Agreement on Tariffs and Trade (GATT 1947), Article X.1, downloaded from http://www.wto.org/english/docs_e/legal_e/legal_e.htm on 10 July 2007.

“Sanitary and phytosanitary [plant sanitary] regulations [... such as laws, decrees or ordinances which are applicable generally ...]”,

“all technical regulations [which lay[] down product characteristics or their related processes or production methods]”, and

“Conformity assessment procedures [... any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled].”¹⁸

ADEQUATE TIME

The principle of delay in effective date is also embodied in the 1947 GATT Treaty, which states “[l]aws, regulations, judicial decisions and administrative rulings of general application ... shall be published promptly *in such a manner as to enable governments and traders to become acquainted with them*.”¹⁹

Publication of regulatory requirements “of general application ... *in such a manner as to enable governments and traders to become acquainted with them*” includes more than just the act of publication. It means that a Ministry should provide adequate time for those affected to become aware of a new regulatory requirement.

The broad scope of this provision from the 1947 GATT Treaty is demonstrated in several Uruguay Round agreements, which explicitly state that publication of a regulatory requirement should occur before it comes into force.

Publication of “procedures for the submission of applications” is to take place, “whenever practicable, 21 days prior to the effective date of the publication.”

“Except in urgent circumstances, Members shall allow a reasonable interval between ... publication of a sanitary or phytosanitary [plant sanitary] regulation and its entry into force in order to allow time for producers ... to adapt their products and methods of production to the requirements of the importing Member.”

Except in ... urgent circumstances [... safety, health, environmental protection or national security ...], Members shall allow a reasonable interval between the publication of technical regulations [and of ‘conformity assessment procedures’] and their entry into force to allow time for producers in exporting Members ... to adapt their products or methods of production to the requirements of the importing Member.”²⁰

18. See Appendix for pertinent text of applicable WTO agreements.

19. GATT 1947, Article X.1.

20. See Appendix for pertinent text of applicable WTO agreements.

These Uruguay Round agreements make it clear that both the principles of publication of all regulatory standards of general application and delay in effective dates are not limited in scope to “regulations.” It is the substantive content and impact of these regulatory requirements – their “general application” – that requires not only their publication but also the allowance of adequate time for compliance before they come into force. The governmental formalities under which these regulatory requirements are created are not relevant.

The APEC-OECD Checklist also stresses the importance for *all* stakeholders – those regulated and those benefiting from a regulation – to have access to *all forms* of any regulatory instrument – from the basic “laws” to “administrative guidance, documents, directives, [and] interpretation bulletins.”

To build public support for regulatory, competition and market openness policies, consumers, businesses, investors, lenders, and other *stakeholders must be able to ascertain clearly the content of the policies, as well as that of related laws, regulations, guidelines, practices and procedures.* In addition, other types of rules, including ‘soft’ regulation (or ‘grey’ or ‘quasi’ regulation) *should be transparent to those who are affected.* Thus, [soft regulation, e.g.,] administrative guidance, documents, directives, interpretation bulletins or other rules that do not have the force of law but will have a practical impact on stakeholders must also be clear and easily and comprehensively available for domestic and foreign businesses and service suppliers.²¹

BEYOND PUBLICATION: INCREASING REGULATORY AWARENESS AMONG BUSINESSES

As pointed out above, publication of regulatory requirements “of general application ... *in such a manner as to enable governments and traders to become acquainted with them*” includes more than just the act of publication. It also means that a Ministry, upon publication of a new regulatory requirement, should take affirmative steps to have those who must comply become aware of the new regulatory requirements. The APEC-OECD Checklist emphasizes this principle.

Channels for information dissemination and notification should be widely accessible, including those for dissemination and notification to international bodies. The internet has proved to be an invaluable resource for access to laws, government services, electronic filings, and identification of a single inquire points.²²

The APEC-OECD Checklist points out the value of creating and maintaining an up-to-date electronic registry of all regulatory requirements.

*Other approaches such as public registries of all regulations ... can be particularly valuable ...*²³

21. APEC-OECD Checklist, A6.

22. APEC-OECD Checklist, A6,

23. APEC-OECD Checklist, A6.

Similarly, the “OECD Guiding Principles for Regulatory Quality and Performance” state the need for a government to:

*Create and update on a continuing basis public registries of regulations and business formalities, or use other means of ensuring that domestic and foreign businesses can easily identify all requirements applicable to them.*²⁴

The Council of the OECD endorsed this principle on 28 April 2005.

ADVANCE NOTICE AND COMMENT

The APEC-OECD Checklist emphasizes the significance of an advance notice and comment process.

*Regulations should be developed in an open and transparent fashion, with appropriate and well-publicized procedures for effective and timely inputs from interested national and foreign parties, such as affected business, trade unions, wider interest groups such as consumer or environmental organizations, or other levels of government. ... Public notices at various states of rule making and consultation with stakeholders are considered fundamentally important for a well-managed regulatory system. ... Regulators should be held accountable for the consultation and how comments are handled so that the credibility of the consultation process is maintained.*²⁵

The APEC-OECD Checklist provides reasons for advance notice and public comment.

*Transparency must also extend to forthcoming regulatory actions, as this is necessary for stakeholder involvement in regulatory decision making ... and for predictability, an important element in business planning.*²⁶

III. JORDANIAN REGULATORY PRACTICES VIS-À-VIS INTERNATIONAL BEST PRACTICES

This report assesses the publication requirements and practices of Jordan, and the procedures for giving businesses meaningful access to the processes by which regulatory requirements are developed and adopted by the Ministries. This report also identifies problems in the current regulatory system as viewed from the perspective of the five international best practices. This assessment is based upon a review of

24. OECD Guiding Principles for Regulatory Quality and Performance (Paris, 2005), Principle 3, page 5, downloaded from <http://www.oecd.org/dataoecd/19/51/37318586.pdf> on 10 July 2005. The background for the OECD Guiding Principles is found at pages 1 & 2.

25. APEC-OECD Checklist, B5.

26. APEC-OECD Checklist, A6.

pertinent documents – including the Constitution of Jordan,²⁷ and the regulation and law related to the Legislative and Opinion Bureau²⁸ and the Official Gazette²⁹ – and a number of interviews with government officials and private experts.³⁰

THE ISSUANCE OF LAW AND REGULATIONS – CURRENT PROCEDURES AND PRACTICES

When a Ministry wishes to develop a new draft law or regulation, a Minister may designate a group of experts to draft it. The Minister may rely upon staff within the Ministry, may invite outside experts and private attorneys to offer their expertise, may rely on drafts prepared by representatives of private stakeholder, or any other method he chooses.

Problem: There are no predetermined procedures for a Ministry to follow to ensure advance notice and public comment during development of a draft law or regulation. While private experts, stakeholders, and other individuals may be involved, Ministries do not have an established procedure for providing advance notice of the draft to the public or of seeking comments from the public.

Each Ministry and independent commission provides each draft law and regulation (with an explanatory note on need and background) to the Prime Ministry.³¹ Once the Prime Ministry receives the draft law or regulation, the Prime Minister refers it to the Minister of Legal affairs and or legal committee to discuss the draft with the concerned Minister as to content and structure to ensure that the draft is aligned with the strategic approach of the Prime Ministry.

The Prime Ministry then provides a paper copy of the draft law or regulation to the Legislative and Opinion Bureau for review, concerning which the Bureau is to give “its free and independent opinion.”³²

The Bureau is specifically authorized to adjust the terms of any draft law or regulation, and to rewrite it.³³ The Bureau is expected to review the draft for unconstitutionality,

27. See the “Constitution of the Hashemite Kingdom of Jordan,” downloaded from http://www.pm.gov.jo/english/index.php?page_type=pages&part=1&page_id=96 on 10 July 2007 (to be referred to as “Constitution, Article”).

28. Regulation r, the Regulation of the Legislative and Opinion Bureau for 1993, Number 1 on page 88 of the Official Gazette No. 3875, dated 16 January 1993, downloaded from the website for Adaleh, and then translated into English (to be referred to as “Regulation r, Article”).

29. The Law of Official Gazette and its adjustments, number 29 for the year 1949, published on page 140 of the Official Gazette, number 983, dated 16 May 1949, downloaded from the website for Adaleh, and then translated into English (to be referred to as “Law of Official Gazette, Article”).

30. See Annex 3.

31. Regulation r, Article 13.

32. Regulation r, Articles 13 & 14.

inconsistency, and possible contradictions with other laws and regulations, and legal style. The Bureau is also supposed to make certain that the draft will accomplish what the original drafters intend. After making any amendments and completing its review, the Legislative and Opinion Bureau provides a completed draft back to the Prime Ministry.

As illustrated in figure 1, the Prime Ministry transmits the draft to a Legal Committee of Ministers.³⁴ This Legal Committee is supported by the Legal Department in the Prime Ministry. The chairman of the Legal Committee includes on the Legal Committee other Ministers that he designates. The Legal Committee, with its comments, provides the draft law or regulation back to the Prime Minister office.

The Prime Minister presents the draft law or regulation to all the Ministers on the Council, together with the comments and any proposed amendments from the Legal Committee. At a meeting of the Council, Ministers discuss the draft. The chairman of the Legal Committee – along with the Minister responsible for the draft – explains the comments from the Legal Committee.

After the Council makes its decision to accept or amend the draft law or regulation, the Council sends the draft law or regulation back to the Legislative and Opinion Bureau for review – not to review substance but to review any legal wording or style issues. The Bureau sends this draft back to the Prime Ministry.

If it is a draft regulation, the Prime Minister sends it directly to the Royal Court for approval. Once approved, the draft regulation is published in the Official Gazette.³⁵

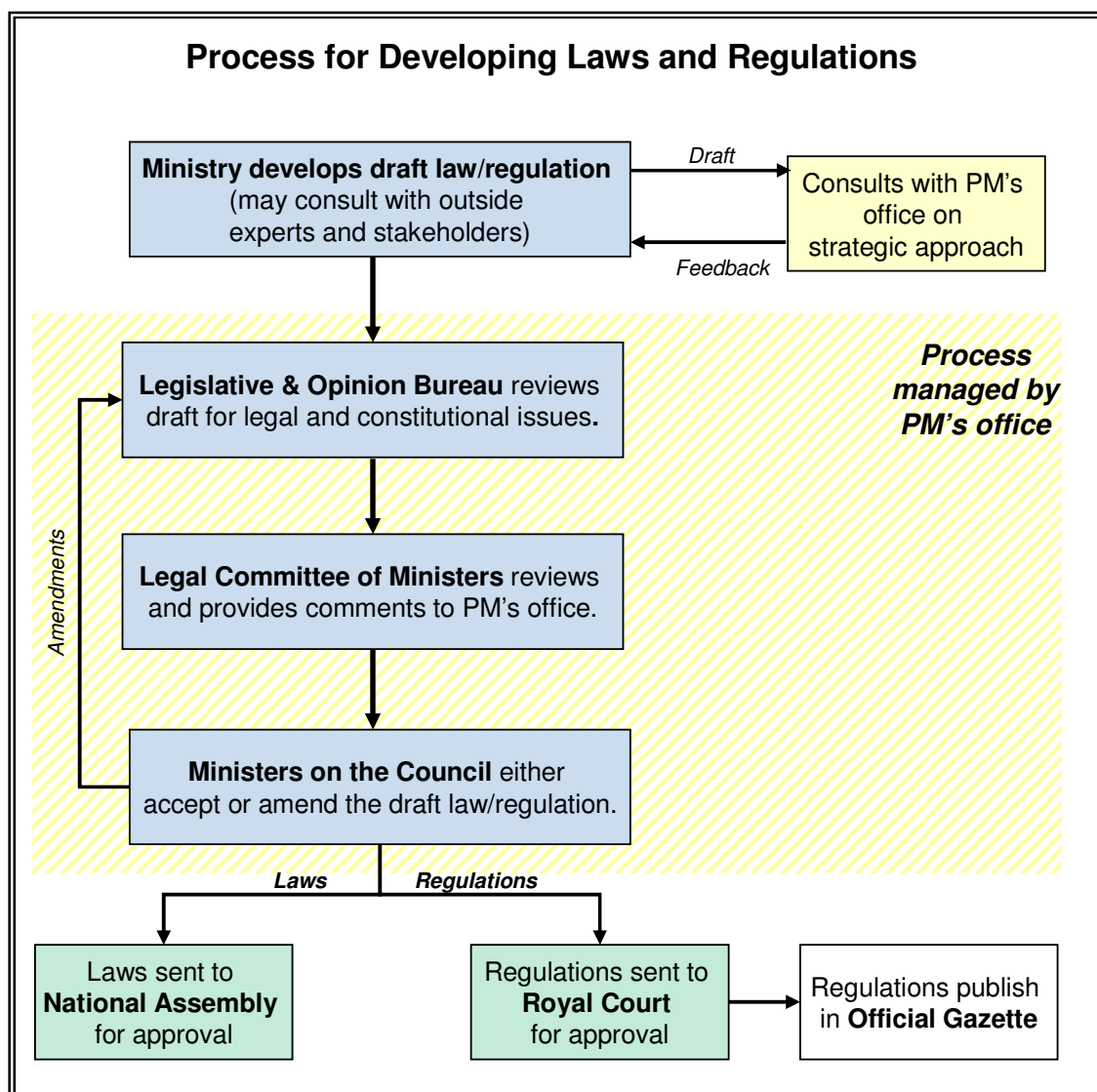
If it is a draft law, the Prime Minister sends it to the Parliament to initiate the parliamentary process for approval.³⁶

33. "The Bureau shall study any project presented to it, audit it, express its opinion, adjusting its terms and rewrit[ing] them." Regulation r, Article 9A.

35. Law of Official Gazette, Article 2.

36. Constitution, Article 91.

Figure 1: Regulatory Process in Jordan



THE LEGISLATIVE AND OPINION BUREAU

When the Legislative and Opinion Bureau receives a draft law or regulation for review, the Director of the Bureau establishes a legal committee. The legal committee is chaired by the Director, and includes legal advisors from the Bureau and a representative from the concerned Ministry. The legal committee discusses the draft law or regulation and the reasons it should be issued.

Depending on the nature of a draft regulation, the Bureau's review generally takes at least a month. If a draft regulation affects finances, the Bureau may send the draft to

the Ministry of Finance for review, which generally takes three to six months. In some cases, a complete review at the Bureau may take over six months.

The Bureau is a “direct link” with the Prime Ministry, and it is “financially and administratively independent.”³⁷ The Bureau has a civil service staff of 35 to 50. Working for the Director are three to four senior consultants, three to four assistant advisors, a number of legal researchers, and administrative staff.

The Bureau is directed to “call representatives from the entities, who are interested in the projects or the matters presented to the Bureau, or invite any specialist or expert to be part of the study....”³⁸ Some have suggested that, in the past, those in the Bureau who review more technical, detail-oriented draft laws or regulations may not have adequate background information and expertise to evaluate fully how the detailed provisions in a new proposal may relate to and affect the existing legal and regulatory structure. On occasion, recently, Ministers may have invited private experts or private attorneys to join them at these meetings.

Problem: The Bureau has not established a public formal procedure to structure its reviews of draft laws and regulations. The Director is able to determine on his own the timing, scope, and direction of any review conducted by any of the Bureau’s legal committees. The Bureau does not maintain public records of its reviews.

Some have suggested that the Bureau should increase its efforts to harmonize each draft law or regulations with the existing base of laws and regulations. Others suggest that the small staff at the Bureau would have neither the specialized knowledge nor the time to engage in a detailed evaluation of how each draft would affect the existing base of laws and regulations. Instead, they suggest such harmonization of laws and regulations is and fundamentally should be the responsibility of the Ministry creating the initial draft.

The Bureau has not as a matter of practice in the past followed any procedure to provide advance public notice or to seek public comments relating to its reviews. This has now changed.

The recently announced advance notice and public comment process.

Recently the Prime Minister announced the creation of a new interactive website that enables the “public and civil society organizations” to comment on draft laws and regulations, as well as to “post their views on all laws currently in force in the Kingdom.”

37. Regulation r, Article 3.

38. Regulation r, Article 12A.

The new internet website at the Legislative and Opinion Bureau is viewed as a step to enhance democracy in the country and to give the executive authority the opportunity to become acquainted with public opinion.

The website reinforces recent governmental measures seeking to enhance good governance and the implementation of a transparent and democratic decision-making process.³⁹

The specific details of this new advance notice and public comment process,⁴⁰ as provided in the article, are:

“[D]raft laws and regulations will be displayed on the website for 10 days for people to express their opinions” before being sent by the Bureau through its own review process.

The interactive website will enable the Bureau “to receive and discuss the public’s comments with concerned governmental institutions” prior to proceeding with the existing procedures for enacting laws and regulations.

The website is set up at the Legislative and Opinion Bureau.

The Director of the Bureau “called for establishing a translation unit at the Bureau for translating laws and regulations from Arabic into English.”

THE OFFICIAL GAZETTE

According to the Official Gazette, all laws and regulations are to be published in the Gazette. As a matter of practice, new laws require any related regulations to be published in the Gazette.

Problem: Under the current legal regime, if a law does not refer to possible publication of other forms of regulatory requirements – instructions, policy statements, Ministerial decisions, directives – the Ministry is free to publish the regulatory requirement where it wants, or, for that matter, not to publish it at all. This creates an important gap in legal security.

The Gazette does not publish all the instructions issued by the Ministries. If a Ministry requests the Gazette to publish an instruction that is not required by law to be published in the Gazette, the Gazette has the authority to decline to publish it.

Problem: Some Ministries have official internet websites, but many of these do not disclose new statutory or regulatory provisions nor do Ministries maintain them in an up-to-date manner.

39. The full story is found in The Jordan Times, Friday-Saturday, July 20-21, 2007, page 3. As of July 21, 2007, for article, see <http://www.jordantimes.com/fri/homenews/homenews4.htm>.

40. The internet website, www.lob.gov.jo, was launched on July 19, 2007.

It takes about twenty days to one month for the Official Gazette to print a law or regulation once the Gazette receives the final text. The Gazette is published twice a month, in Arabic, on the second and sixteen days of the month. In 2006, the Gazette published roughly 5250 pages, with a printed distribution of roughly 1,200 copies. In the year 2006, the Gazette published 63 laws, 75 regulations, 103 instructions, and 10 decisions by the Bureau of Laws Interpretation, as well as other government decrees and announcements.⁴¹

The laws and regulations that the Gazette receives are written on paper. The Gazette scans these papers into its computer in order to print them. Once printed, the Gazette reproduces the text of what is in the Official Gazette, in Arabic, on the government's website, and has done so since 2003.⁴²

Problem: The paper text of new laws and regulations is scanned, not typed, into the Gazette's computer, and therefore an internet user is able to search the Official Gazette online only (1) by volume and date of publication, (2) by law or regulation number, (3) by title of the law or regulation, or (4) by a "subject" word that takes the internet user to the table of contents for the Gazette that contains that word in the title of the item published. In effect, to find a new law or regulation, an internet user searching the Official Gazette must know what the new law or regulation is or its title. This provides very low accessibility for users.

The Publishing Department for the Official Gazette in the Office of the Prime Ministry has five employees. The Army prints the copies of the Gazette. The Ministry of Finance (using about 20 employees) undertakes the distribution of copies and collects subscription fees.

Publication of a new law or regulation in the Official Gazette is considered "legal notice." Each individual in the public as well as any stakeholder is considered to be aware of what was published in the Gazette and to be legally liable for violation of any legal or regulatory standard set forth in such a new law or regulation. Publication by a Ministry of any other regulatory requirement – an instruction, policy statement, Ministerial decision, directive – in some publication other than the Official Gazette does not create the presumption of legal notice. Even so, if a new law or regulation affects the private sector, some Ministries have the practice of placing an article in the newspapers to alert the public about it.

For past copies of the Official Gazette, one can go to the archives of the National Library, either in person or on the internet. The National Library has scanned copies of all of the Gazettes published since 1923 into its public computer database.

Alternative public sources for the laws and regulations of Jordan include the government's National Information System (NIS)⁴³ and the privately created *Adaleh*.

41. In 2005, the Official Gazette published 24 laws, 85 regulations, 107 instructions, and 8 Decisions by the Bureau of Laws Interpretation. In 2004, the Official Gazette published 39 laws, 84 regulations, 76 instructions, and 4 Decisions by the Bureau of Laws Interpretation.

42. See, pm.gov.jo.

43. See, www.nis.gov.jo.

NIS includes secondary legislation that is issued and approved by the Council of Ministers (Council decrees, but not ministerial decrees). Both of these alternate information sources, in Arabic, are entered manually into their online computer databases, thus permitting the use of modern computer search engines. These alternative systems do not provide legal notice nor certainty that the text as typed into a computer is that which appeared in the Official Gazette.

Neither the Official Gazette nor either of these alternative information systems have created topical or subject matter indices, neither on an annual nor on a cumulative basis.

While not “official,” *Adaleh* seeks to serve some of the functions of an electronic registry. *Adaleh* includes footnotes at the end of each legislative or regulatory provision, footnotes that seek to identify previous or amended versions of the same provision. *Adaleh* is widely used at the Ministry of Justice and by the judicial system, and is available for unlimited use to anyone who wants to pay the annual fee.

Public concerns with the Official Gazette – as the official source of Jordanian law – include:

It does not contain all instructions of general applicability.

Its internet website does not permit the use of “normal” modern computer search engines.

The text is not translated into English.

OTHER REGULATORY REQUIREMENTS: MINISTERIAL INSTRUCTIONS, POLICIES, AND DIRECTIVES

Ministries routinely develop regulatory requirements other than laws and regulations – variously referred to as an instruction, policy statement, Ministerial decision, or directive, among others. Such an instruction seeks to detail important specific procedures, time lines, reporting requirements, formalities or technical provisions of law.

Problem: Under the current legal regime, if a law is silent on the need for the Ministry to publish or make the public aware of an instruction or an interpretation of regulatory policy, the Ministry is not obliged to publish it or to make it known to the public generally.

While some instructions are published in the Official Gazette, many are not.

Problem: A large number – perhaps one-half by some estimates -- of the instructions and other regulatory requirements developed by some Ministries is not even made public.

Problem: The Ministries have not established procedures for providing advance notice and seeking public comments on all draft instructions.³

EFFECTIVE DATES FOR NEW LAWS AND REGULATIONS

In practice, the effective dates for new laws may vary. New laws may be put into effect upon publication, thirty to sixty days from publication, or another date set forth in the law. A law that raises nation-wide issues may take ninety days to take effect; generally, the “custom” is a thirty-day delay.⁴⁴

New regulations tend to take effect more quickly than new laws; on occasion, there may be a thirty-day delay in effective date.

Problem: New regulations are usually made effective on the date of publication.

Having a regulation take effect on its date of publication denies those affected a reasonable time after the rule takes effect to comply with it or to take any other action that the issuance of the rule may prompt.

IV. RECOMMENDATIONS

This report recommends ways in which Jordan can improve its regulatory process -- specifically its publication requirements and practices, and procedures for developing and adopting regulatory requirements -- and make them more consistent with well-established international best practices. Adopting these recommendations will make the regulatory process more transparent and reliable, and improve business access to and participation in the regulatory process.

This report begins with the most important, far-reaching recommendations -- recommendations that will have the broadest effects on both the Ministries and the Office of the Prime Minister. These are followed by recommendations intended to

³ The independent Telecommunications Regulatory Commission (TRC) is a noteworthy exception.. The TRC seeks public comments upon its draft instructions. The TRC will announce on its internet website its plan to issue an instruction, and give the public a deadline in which to provide its comment online. If the instruction may raise complex issues, the TRC publishes the complete text of the draft instruction on its website; otherwise, the TRC just describes what the upcoming instruction is intended to do.

In addition, if the draft instruction raised many complex issues -- when the first comment period has passed, and after the TRC has revised its first draft in light of the public comments -- the TRC will republish the revised draft instruction on its website, seeking a second round of public comments.

When the TRC issues this instruction in its final form and publishes the final text on its internet website, it will also place the public comments it has received on the internet website. With each public comment, TRC publishes its reaction and its conclusions as to whether or not the TRC agreed with the comment on its internet website.

The TRC has publicly established its procedures for seeking public comments on draft regulatory instructions. Moreover, the TRC has placed these internal procedures for doing so on its internet website. It is also the practice of the TRC to publish on its website any by-laws and instructions that it is also obligated to publish in the Official Gazette, many of which the TRC presents in English. (See, <http://www.trc.gov.jo>.)

44. See, Constitution, Article 93(ii).

improve the recently announced advanced notice and comment procedure that is being initiated at the Legislative and Opinion Bureau.

A. Publish securely all regulatory requirements of general application.

Recommendation #1: Each Ministry should publish in the Official Gazette **all** regulatory instructions that they adopt. The government should require this in a new law or, preferably, in an amendment to the Constitution to ensure that legal security and transparency is 100 percent respected.

This legal change will address the problem that current underlying Jordanian law is silent on the need for the Ministry to publish or make the public aware of an instruction or an interpretation of regulatory policy, the Ministry is not obliged to publish it or to make it known to the public generally.

An underlying foundation of the rule of law is public knowledge of and access to the laws, regulations, instructions, and other regulatory directives of general application adopted by government authorities. To be consistent with international best practices, Ministries must publish all regulatory requirements – in new laws, regulations, and instructions of general application – making them public and readily accessible as soon as possible after the drafts are adopted.

Recommendation #2: Each Ministry should allocate the staff and financial resources to build and maintain an up-to-date, well-constructed, user-friendly official website.

These websites will address the problem of inconsistent and sometimes insufficient public access to Ministry information. While some Ministries do have official internet websites, many of these do not disclose new statutory or regulatory provisions nor do Ministries maintain them in an up-to-date manner. Some Ministries make active use of their internet website. Some keep their websites up-to-date. The independent Telecommunications Regulatory Commission uses its internet website to seek public comments on draft instructions, and to publish all new by-laws and instructions it may prepare (even if these documents are also published in the Official Gazette).

According to the APEC-OECD Checklist, “The internet has proved to be an invaluable resource for access to laws; government services, electronic filings, and identification of a single inquire points.”⁴⁵ Each Ministry should make its website a source of up-to-date and useful source of the regulatory requirements applicable to those it regulates.

Recommendation #3: Each Ministry should publish on its internet website all of its instructions, Ministerial decisions, and other regulatory requirements of general application. Each Ministry should publish on its internet website not only those instructions to be developed in the future, but also those already existing – both those

45. APEC-OECD Checklist, A6,

that have not yet been written down, and also those that are written down but that have not yet been made public.

Setting up an comprehensive online registry addresses legal gaps: if a law does not refer to possible publication of the other forms of regulatory requirements – instructions, policy statements, Ministerial decisions, directives – the Ministry is free to publish the regulatory requirement where it wants, or, for that matter, not to publish it at all.

Having regulatory requirements accessible by regulated entities is basic to the rule of law. Consistent with international best practices, each Ministry should write down, make publicly available, and publish all regulatory interpretations and other more detailed, technical regulatory guidance of general application already developed and to be developed by the Ministry. Publication by a Ministry on its website permits it to implement such more detailed regulatory guidance more quickly than the publication schedule of the Official Gazette permits.

Recommendation #4: The Official Gazette should enter the full text of new laws and regulations in a computer database, structure the database to be user friendly, and provide modern computer search engines, indexed by subject and topic.

These changes will allow the public much more flexibility in searching the regulatory databases for the laws, regulations and directives affecting to their businesses. The current system is useful only to those who know the publication date, the official number or the title (or subject word) of a law or regulation. In effect, the internet user has to know already what he/she is looking for.

According to the APEC-OECD Checklist, “The internet has proved to be an invaluable resource for access to laws; government services, electronic filings, and identification of a single inquire points.”⁴⁶ Other national gazettes – serving as a source of the “legal record” of new regulatory requirements – are also available on-line, but they have been entered fully into a computer data-base, and provide the internet user with modern computer search engines. In addition, other national gazettes are indexed, within a matter of months or every year, by subject and topic.

B. Provide adequate time for compliance before any new regulatory requirement comes into force.

Recommendation #5: After publication, each Ministry should provide those affected adequate time to come into compliance, generally with a minimum of thirty days.

Currently new Jordanian regulations are usually made effective on the date of publication in the Official Gazette. Having a regulatory requirement come into force immediately upon its publication – reduces both the predictability and the public’s

46. APEC-OECD Checklist, A6,

sense of fundamental fairness, undercutting the rule of law. Having a regulation take effect on the date of publication does not provide adequate time for those affected to come into compliance. Providing such a delay – at least for 30 days after publication – is consistent with the 30-day delay customary for laws, as provided in the Constitution of Jordan.⁴⁷

C. upon publication, take affirmative steps to have those who must comply become aware of the new regulatory requirements.

Recommendation #6: Each Ministry, upon publication of a new regulatory requirement, should help those involved to find the actual text and to understand the significance of the new regulatory requirement as it would apply to them.

The APEC-OECD Checklist emphasizes this principle, in that “Channels for information dissemination and notification should be widely accessible, ...”⁴⁹

This should not occur *ad hoc*. Each Ministry should, in advance, develop a comprehensive strategy to publicize regulatory changes. This would include such actions as:

Press releases,

Direct mailings (or emails) to those affected,

Mailings (or emails) to the specialized trade associations and the bar association, and

Sponsorship of public meetings to explain and answer questions concerning the new regulatory requirement.

D. Create a public registry of all laws, regulations, and instructions of general application readily available to the public.

Recommendation #7: The government should create, update on a continuing basis, and index by topic and subject a single public registry of laws, regulations and other instructions of general application.

The Official Gazette now publishes twice a month all new laws and regulations, and some of the instructions issued by Ministries. The Gazette publishes the “flow” of most of the important national regulatory requirements. The Gazette does not publish the “stock” of existing national regulatory requirements. While the alternate

47. “A law shall come into force after ... the date of its publication in the Official Gazette unless it is specifically provided in that law that it shall come into force on any other date.” Constitution, Article 93(ii).

49. APEC-OECD Checklist, A6,

information sources act as source for this existing “stock” of regulatory laws and regulations, they are not the official, legal record of Jordanian law.

International best practice calls upon each government to create and update on a continuing basis public registries of regulations and business formalities. Once there is a single official source of the “stock” of regulatory laws and regulations, government officials will be able to avoid duplication and overlap, more readily understand the need to coordinate possibly overlapping jurisdiction, and update the “stock” in ways that strengthen it and reinforce related efforts.

E. Provide advance notice and seek public comments on all draft laws, regulations, and instructions of general application.

Recommendation #8: Within a year, each Ministry should develop its own advance notice and public comment process for draft laws, regulations, and instructions of general application. This advance notice and public comment process should be completed before the Ministry provides the draft law or regulation to the Office of the Prime Minister for review.⁵⁰ A detailed framework for a ministerial consultation policy is already developed by SABEQ for the Ministry of Industry and Trade (“Public-Private Partnership in the Ministry of Industry and Trade: Recommendations for a Consultation Program,” SABEQ, June 2007, available on request).

Ministries should aim to construct a more systematic means of early and effective stakeholder dialogue and consultation during policy and regulatory development. Within a year, the consultation function should be transferred to each of the Ministries, because consultation must occur at the earliest stage of regulatory development in order to ensure that views are fully considered in writing the law or regulation. Consultation at a late stage – such as in the Legislative and Opinion Bureau – occurs too late for major changes in the regulatory approach and design. Ministerial consultation should follow the detailed framework designed by SABEQ.

Currently, there are no predetermined procedures for a Ministry to follow to ensure advance notice and public comment during development of a draft law or regulation. While private experts, stakeholders, and other individuals may be involved, Ministries do not have an established procedure for providing advance notice of the draft to the public or of seeking comments from the public.

The APEC-OECD Checklist declares an advance notice and public comment process “fundamentally important.” While the Legislative and Opinion Bureau in the Office of the Prime Minister is to begin implementing the government-wide process for advance notice and public comment, the underlying strategy should be to transfer this process to the Ministries, so each one carries out the advance notice and public comment process on its own behalf.

50. For a more detailed series of recommendations related to public consultation, and establishing a process for advance notice and public consultation in a Ministry, see, Public-Private Partnership.

While the Bureau may now be better staffed and have the resources to begin the recently announced government-wide advance notice and public comment process, the Bureau should work with each Ministry to build the capacity, within each Ministry, to carry out its own advance notice and public comment process.

Each Ministry should obtain the expert staff and receive adequate resources to fulfill this institutional role properly. If there is a need to implement this effort Ministry by Ministry, this effort should start with those Ministries that develop draft laws, regulations, and instructions of general application directly affecting business or individuals.

A Ministry is designed to be the expert institution that can fairly and reasonably implement the legal and regulatory authorities it is given, and is held accountable both by the public and the government for so doing. Each Ministry is responsible, in the first instance, for drafting new laws and regulations pertinent to its jurisdiction. Each Ministry is also responsible for implementing any new law or regulation within its jurisdiction. The Ministry is designed to be the expert institution that can fairly and reasonably implement the legal and regulatory authorities it is given. To that end, the Legislative and Opinion Bureau should be careful not to behave like a Ministry itself.

F. Improve the new advance notice and public comment process at the Legislative and Opinion Bureau.

While the long-term goal should be to transfer this advance notice and public comment process to the Ministries, the new website is now managed by the Legislative and Opinion Bureau. The following recommendations point out how the new advance notice and public comment process at the Bureau will benefit from a number of specific improvements. Evaluating the specific ways in which this new government-wide advance notice and comment process operates will help to inform Ministries how better to structure their own advance notice and comment process.

Under the new process, implicitly, a Ministry will send its draft law or regulation to the Bureau. The Bureau will place the draft on its website for public review. After 10 days, the Bureau could initiate its usual form of review.

Recommendation #9: The new advance notice and public comment process should provide the public with sufficient time (ranging from 30 to 90 days, depending on the complexity of the issues involved) to become aware of proposed draft laws and regulations, and to draft responsible, factually supported, well-reasoned public comments.

Ten days is too short a time period to seek public comments. It may well take longer than 10 days for many individuals to research and demonstrate pertinent facts, and to construct persuasive arguments. Organized business and stakeholder groups are not prepared – neither structurally nor as they are currently staffed – to respond so quickly to new laws or regulations. In discussing possible concerns about the regulatory development and publication process with the Jordan Chamber of Industry and the American Chamber of Commerce in Jordan, these groups – representing many

individual businesses and stakeholders – were asked if they could provide examples of their concerns in writing. They replied that, to do so, they would need to communicate with their members, collect possible examples, and then evaluate them to discern common themes suitable for transmission to government officials. Such an articulation of business concerns with a new draft law or regulation would take more time than 10 days. Faced with a 10-day deadline, they may just not bother to comment.

For an advance notice and public comment process to be perceived to be fair and institutionally useful, it should provide adequate time for comments. Too short a comment period is self-defeating and counter-productive.

The government may have selected a 10-day comment period because it was trying to balance two competing concerns. The first concern is the longer time needed by the public and businesses to prepare carefully reasoned arguments and provide objectively demonstrated new facts of which the government may not be aware. The second concern is that, for some new laws or regulations, the government may have an urgent need to issue the new law or regulation.

In such a specific case, it would be better for the government not to seek public comment, and issue the new law or regulation as quickly as possible. In those cases, at the time the government issues a new law or regulation, the government should accompany the new law or regulation with a statement stating that it had waived the advance notice and public comment process, and explain its reasons why.

Recommendation #10: The advance notice and public comment process should be transparent. To ensure this transparency, each Ministry, when the law or regulation is published, should include a summary of the public comments it received and provide an explanation of the reasons that the Ministry agreed or disagreed with the public comments.⁵¹

This advance notice and public comment process is intended to create government transparency. To ensure this transparency, the Ministry should evaluate these comments, and explain its reaction to these comments.

It is most important, once the law or regulation is published, that the Ministry publish its reaction to the public comments – with explicit statements of agreement or disagreement, and the reasons supporting its conclusions. Such transparency will increase the public credibility for this recently announced advance notice and public comment process by demonstrating that the public is able to contribute to the government's decision-making process.

51. See, Public-Private Partnership, Recommendation 6.

Recommendation #11: The website for the advance notice and public comment process should be expanded to display comments publicly as they are entered into the website.

The article in the Jordan Times said the website would be an “interactive terminal.” Making comments public on the website causes that to happen. Once a public comment is received and disclosed on the website, others would have the opportunity to provide comments that agree or disagree, and to add new factual background that supports or undermines statements in the previous comments.

Both the Ministry and private stakeholders will benefit from such an interactive public discussion. Competing views will be disclosed, and positions refined. New factual background will be disclosed. The Ministry will be able to structure the draft law or regulation more carefully accomplish its intended goals without unintended consequences.

Recommendation #12: The new internet website should request the public for comments and suggestions to make the new website itself even more user-friendly and easy to use.

Individuals, businesses, and stakeholder groups will try to submit comments to this website. In doing so, they may discover difficulties or unanticipated problems. To ensure that this government-wide advance notice and public comment process operates effectively and becomes a success, the website managers need to facilitate public suggestions to help it do so.

Recommendation #13: The instructions and other written material presented on the website need to be translated into English.

In announcing this new initiative, the Director of the Legislative and Opinion Bureau “called for establishing a translation unit at the Bureau for translating laws and regulations from Arabic into English.” Consistent with this approach, the website should have the Arabic text on the new website translated to English. Foreign firms, individuals, and investors seeking access to the market will also benefit from a meaningful opportunity to participate in this new advance notice and public comment process.

Recommendation #14: In the long term, the Official Gazette should have the laws, regulations, and other legal material that it publishes translated into English. The Ministries and other regulatory agencies should also have those instructions and other regulatory requirements that they place on their internet websites translated into English.

For foreign businessmen and investors to consider entering into new markets in Jordan, or expanding their existing operations, it is important to consider translating at least the laws and regulations directly affecting business into English. No one likes to enter into a contract or a large financial transaction if she or he cannot read the words of the agreement and the text of the legal obligations to which she or he is agreeing.

APPENDIX

WTO OBLIGATIONS TO PUBLISH "ADMINISTRATIVE RULES OF GENERAL APPLICATION"

URUGUAY ROUND AGREEMENTS

Members shall ensure that all sanitary and phytosanitary regulations that have been adopted are published promptly in such a manner as to enable interested Members to become acquainted with them. (Uruguay Round, Agreement on the Application of Sanitary and Phytosanitary Measures, Annex B.1).

Sanitary or phytosanitary measure [means] any measure applied:

- (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
- (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
- (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or
- (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labeling requirements directly related to food safety. (Uruguay Round, Agreement on the Application of Sanitary and Phytosanitary Measures, Annex A.1).

Members shall ensure that all technical regulations that have been adopted are published promptly or otherwise made available in such a manner as to enable interested parties in other Members to become acquainted with them. (Uruguay Round, Agreement on Technical Barriers to Trade, 2.11).

Technical regulation [means a] document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal

exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method. (Uruguay Round, Agreement on Technical Barriers to Trade, Annex 1.1)

Members shall ensure that all conformity assessment procedures that have been adopted are published promptly or otherwise made available in such a manner as to enable interested parties in other Members to become acquainted with them. (Uruguay Round, Agreement on Technical Barriers to Trade, 5.8).

Conformity assessment procedures [mean] any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled. (Uruguay Round, Agreement on Technical Barriers to Trade, Annex 1.3).

User Members shall publish promptly all applicable laws and regulations relating to preshipment inspection activities in such a manner as to enable other governments and traders to become acquainted with them. (Uruguay Round, Agreement on Preshipment Inspection, 8).

A SAMPLE OF RELATED NATIONAL LAWS

Latvia

Administrative acts shall be issued in writing, except in cases provided for in Section 69 of this Law [e.g., urgency, direct danger to State security, public order, or the life, health or property of persons, insignificance.] An institution may not base an administrative act upon an internal regulatory enactment. If the institution has applied an internal regulatory enactment, this shall be indicated in the basis part of the administrative act, indicating the issuer, the date of issue, the name of the internal regulatory enactment and the applied norm of law. * * *

If an administrative act is issued in a form other than in writing, ... the addressee has the right to require the institution to formalize it in writing in accordance with the requirements of Section 67 of this Law within a one-month period. The institution shall issue the administrative act in writing within two weeks of the receipt of the relevant request. (Administrative Procedure Law, Sections 67 & 69, Latvia, November 14, 2001)

The Netherlands

Orders which are not addressed to one or more interested parties shall be published by means of a notice of the order or the substance thereof placed in an official publication issued by the authorities or in [a] daily or weekly newspaper or free sheet or in any other suitable way. (General Administrative Law Act of the Netherlands, Section 3:41-42, The Hague, May 1994)

United States of America

Each agency shall separately state and currently publish in the Federal Register for the guidance of the public ... (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and (E) each amendment, revision, or repeal of the foregoing. Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. (Title 5, United States Code, Section 552(a))

WTO OBLIGATIONS TO OBLIGATIONS TO PUBLISH "ADMINISTRATIVE RULINGS OF GENERAL APPLICATION -- AS A GENERAL MATTER -- BEFORE THEY COME INTO FORCE

URUGUAY ROUND AGREEMENTS

The rules and all information concerning procedures for the submission of applications ... shall be published ... in such a manner as to enable governments and traders to become acquainted with them. Such publication shall take place, whenever practicable, 21 days prior to the effective date of the requirement but in all events no later than such effective date. (Uruguay Round, Agreement on Import Licensing Procedures, Article 1, 4(a)).

Except in urgent circumstances, Members shall allow a reasonable interval between the publication of a sanitary or phytosanitary regulation and its entry into force in order to allow time for producers in exporting Members, and particularly in developing country members, to adapt their products and methods of production to the requirements of the importing Member. (Uruguay Round, Agreement on the Application of Sanitary and Phytosanitary Measures, Annex B.2).

Except in those urgent circumstances referred to in paragraph 10 [... safety, health, environmental protection or national security ...], Members shall allow a reasonable interval between the publication of technical regulations and their entry into force to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production to the requirements of the importing Member. (Uruguay Round, Agreement on Technical Barriers to Trade, 2.12).

Except in those urgent circumstances referred to in paragraph 7 [...safety, health, environmental protection or national security ...], Members shall allow a reasonable interval between the publication of requirements concerning conformity assessment procedures and their entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production to the requirements of the importing Member. (Uruguay Round, Agreement on Technical Barriers to Trade, 5.9).

A Sample of Related National Laws

Germany

An administrative act may be issued in written, verbal or other form. A verbal administrative act must be confirmed in writing when there is justified interest that this should be done and the person affected requests this immediately. * * *

An administrative act may be publicly promulgated when notification of those concerned is impracticable.

The public promulgation of an administrative act in writing shall be effected by making known the operative part of the manner normal in the district. The notification shall state where the administrative act and its statement of grounds may be inspected. The administrative act shall be deemed to have been promulgated two weeks after the date of notification by means normal in the district. A general order may fix a different day for this purpose but in no case may this be earlier than the day following notification. (Law on Administrative Proceedings of May 25, 1976, Sections 37(2), & 41(3) & (4))

Republic of Korea (South Korea)

When establishing or enforcing matters falling under the any of he following Sub-Paragraphs in regard to policies, structure, and planning, or when modifying [the same], administrative agencies shall pre-announce the matters. However, when there would be considerable harm to the safety and welfare of the public due to the pre-announcement or in cases when there are other complicated special reasons in the pre-announcement, then the pre-announcement shall be forsaken.

1. Matters of very great influence to the livelihood of citizens
2. Matters of conflicts of the interest between many citizens
3. Matters delegating indisposition and encumbrance to many citizens
4. Other necessary matters of the wide accumulation of opinion from citizens ...

The period of pre-announcement of administration shall be determined taking into consideration the nature, etc. of the contents of the pre-announcement and when no special circumstances arise, then it shall be not less than 20 days. (Administrative Procedures Act, Act No. 5241, Korea, December 31, 1996)

United States of America

The required publication [in the Federal Register] or service of as substantive rule shall be made not less than 30 days before its effective date, except –

- (1) A substantive rule, which grants or recognizes an exemption or relieves a restriction;
- (2) Interpretive rules and statements of policy; or
- (3) As otherwise provided by the agency for good cause found and published with the rule. (Title 5, United States Code, Section 553(d))

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