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Dispute Settlement Body
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NEGOTIATIONS ON THE DISPUTE SETTLEMENT UNDERSTANDING

Proposal by the LDC Group

The following communication, dated 19 September 2002, has been received from the Permanent Mission of Zambia on behalf of the LDC Group.

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1. To date, no least-developed country (LDC) Member has sought to resolve a trade dispute through the WTO dispute settlement system (DS). However, this is definitely not because these countries have had no concerns worth referring to the DS, but rather due to the structural and other difficulties that are posed by the system itself. The negotiations on the review of the Dispute Settlement Understanding (DSU) must address these particular difficulties and other concerns by LDCs if the system is to retain their confidence. The negotiations must result in a system that clearly facilitates and supports the full participation of LDCs in the DS.

2. The LDC Membership wishes to highlight some of the key problems that need to be addressed in the review exercise. In doing so, the LDCs are cognizant of the fact that there has been no utilization, by them, of the DS and the issues and clarifications raised herein are done on the basis of the observable operation of the DS. Consequently, LDCs would like to highlight the following:

Textual specificity in taking account of difficulties faced by LDCs – Article 4.10

3. Often, the difficulties faced by LDCs are more debilitating than those faced by the rest of the WTO Membership. As a result, a level of specificity is needed in addressing their concerns within the textual provisions of the DSU. Some of the key provisions conferring rights and containing other structurally fundamental provisions of the DSU need to be made LDC specific. Consequently, Article 4.10 should be amended to read as follows:

> 10. During consultations Members should give special attention to the particular problems and interests of developing countries Members *especially those of least-developed country Members.*

It should be remembered that one of the greatest difficulties that LDCs have to cope with in their participation in the multilateral trading system is an extreme human resource constraint. LDCs are often under-represented or not represented in Geneva. To engage competently in the nature of consultations envisaged under Article 4.10, there may usually arise a need to involve officials from the capitals. Where a LDC is involved in the consultations, due consideration should be given to the possibility of holding such consultations and other meetings in the capitals of LDCs.

The composition of panels – Article 8.10

4. The maxim "Justice must not only be done but also be seen to be done" definitely informed the thinking of Members' in crafting Article 8.10. The confidence of a party to a dispute may be at risk if it appears that that party has no input in the dispute resolution process and is entirely excluded. Ultimately, this may erode the effectiveness of the DS itself. Bearing this in mind, LDCs propose a modification of Article 8.10 to the effect that in any dispute involving a developing country, there must be at least one panelist from a developing country. Therefore, the words "if a developing-country Member so requests" should be deleted from Article 8.10. Article 8.10 should be modified to read as follows:

> 10. When a dispute is between a developing-country Member and a developed-country Member the panel shall include one panelist from a developing-country Member, and if the developing-country Member so requests, there shall be a second panelist from a developing-country Member.
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> 10.b. When a dispute is between a least-developed country Member and a developing or developed country, the panel shall include at least one panelist from a least-developed country Member and if the least-developed country Member so requests, there shall be a second panelist from a least-developed country Member.

The need for dissenting opinions in panel reports

5. A careful reading of the accumulated jurisprudence of the DS system thus far reveals that the interests and perspectives of developing countries have not been adequately taken into account. The panels and the Appellate Body have displayed an excessively sanitized concern with legalisms, often to the detriment of the evolution of a development-friendly jurisprudence. This stifling approach may be attributable to the requirement that every panel or Appellate Body Division should emerge with a single neat report. There is no provision for dissenting judgments in the DSU. This needs some re-thinking given the inadequacies highlighted in the DS jurisprudence. Often, and as demonstrated by judicial practice at the International Court of Justice, and in certain national court systems, dissenting judgments may bring to the fore usually unheard concerns which may in the long run shape the evolution of the system. Dissenting judgments should be allowed in the DS system through a rule that the Members of the panel or Appellate Body should each deliver a judgment and the final decision be taken on the basis of a majority. LDCs understand that this may mean additional resources and work for the Secretariat.

What should be taken account of in panel reports – Article 12.11

6. LDCs wish to point out that Paragraph 1 of the *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* states that Ministerial Declarations and Decisions are part of the corpus of the negotiated results that "form an integral part of" the *Final Act.* The Agreement Establishing the World Trade Organization, which is a part of the Final Act, is included in the "covered agreements" in accordance with Appendix 1 to the DSU. Consequently, and by virtue of Article 12.11, panel reports should explicitly indicate the form in which account has been taken of the relevant provisions on differential and more favorable treatment for developing and least-developed country Members contained in the covered agreements. Ministerial Declarations and Decisions which confer specific rights to developing countries including the *Decision on Measures in Favour of Least-Developed Countries* should have legal force and treated as if they were "covered agreements" within the meaning of the Agreement Establishing the World Trade Organization. It is imperative for there to be a balance between the rights, privileges and obligations of developed and developing countries.

7. LDCs propose that Article 12.11 should be modified to address not only developing countries as a whole but to specifically bear in mind their concerns too. The words "*and least-developed country Members"* should be inserted after the phrase "developing-country Members".

8. In addition, the current requirement in Article 12.11 that the developing-country Member ("or least-developed country Member") needs to highlight any provisions on differential and more favorable treatment in the course of the dispute settlement procedures places an unnecessary additional legal burden on them and falls afoul of the well settled legal principle *jura novit curia* (that the judge or the court is supposed to know the law). The panel or Appellate Body Division presiding over a dispute is vested with the authority to invoke all applicable legal principles. Consequently, LDCs recommend that the phrase "…which have been raised by the developing-country Member in the course of the dispute settlement proceedings" should be deleted from Article 12.11.

Clarity between Article 21.1 and 21.2

9. LDCs agree and are fully supportive of the fact that prompt compliance is a key objective of the DS. However, it is conceivable that there are circumstances when, with the most noble and good faith intentions, prompt compliance may not be possible. In addition, there are conceivable circumstances when the imperative and the urgency of prompt compliance multiplies immensely, for instance, when the lack of prompt compliance is causing misery in an LDC. Matters affecting the interests of developing countries and least-developed countries need to be borne in mind in such a scenario. Hence the qualification to Article 21.1 as introduced by Article 21.2. There is need for absolute clarity, however, that Article 21.2 does indeed qualify Article 21.1. LDCs propose the addition of a footnote to Article 21.2 to that effect.

10. LDCs also propose the insertion of "and least-developed country Members" after the phrase "developing-country Members" in Article 21.2.

11. Article 21.7 should be amended to read as follows:

> 7. If a matter is one that has been raised by a developing-country Member or a least-developed country Member, the DSB *shall take any further [appropriate] action in the circumstances.*
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> Further, Article 21.8 should be amended to read:
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> 8. If the case is one brought by a developing-country Member or a least-developed country Member, in considering what appropriate action *to take*, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy and *the development prospects* of the developing-country Members *or least-developed country Members* concerned.

Improving the DS remedies – Article 22

12. The system of remedies under the DS has been the subject of consistent discussions since the *Bananas* dispute. The Members could not have received a clearer demonstration of the inadequacies of the system than they did in that dispute. The question of little or no utilization of the DS by developing and least-developed country Members has been linked to the inadequacies and structural rigidities of the remedies available to poor countries that successfully litigate a dispute before the DS. This amounts to disenfranchisement. LDCs strongly recommend that changes be effected that will enable LDCs to use the DS meaningfully, should the need arise.

13. In the light of the foregoing, LDCs propose that compensation under Article 22.2 should be made mandatory by the elimination of the phrase "if so requested" in that paragraph. Additionally, a strong case for monetary compensation can be made. This remedy is important for developing and least developed countries, and for any economy that suffers for the time that an offending measure remains in place. There is a need to clarify this provision to the effect that compensation should not take the form of enhanced market access if this will prejudice other Members and that monetary compensation is to be preferred. Such monetary compensation should be equal to the loss or injury suffered and directly arising from the offending measure or foreseeable under the offending measure. The quantification of loss or injury to be compensated should always commence from the date the Member in breach adopted the offending measure. The panels and Appellate Body should be called upon to put to use the substantial experience of the DS system in calculating the level of nullification and impairment in effecting a transition to a monetary compensation system.

14. It is imperative that the full implications of a negative finding against an LDC in a case be fully and properly assessed, in the course of the panel proceedings, and before a final decision is rendered. Such an understanding could be used to inspire the parties to reach a mutually agreed solution, particularly where there is a risk of severe harm to the already fragile economy of the LDC. Consequently, the standard terms of reference of the panels should be re-written to include a mandatory requirement that panels should call for research input on the effects of a negative decision against an LDC. The Development and Economic Research Division of the Secretariat, UNCTAD and UNDP should be consulted for such input.

Collective retaliation

15. The lack of an effective enforcement mechanism and the potential negative impact of retaliatory measures for poor economies is well documented. LDCs are of the view that one solution to this handicap is to adopt a "principle of collective responsibility" akin to its equivalent under the *United Nations Charter*. Under this principle, all WTO Members would collectively have the right and responsibility to enforce the recommendations of the DSB. In the case where a developing or least-developed country Member has been a successful complainant, collective retaliation should be available automatically, as a matter of special and differential treatment. In determining whether to authorize collective retaliation, the DSB should not be constrained by quantification on the basis of the rule on nullification and impairment.

Special procedures involving LDCs – Article 24

16. LDCs attach great importance to the provisions of Article 24 of the DSU. Any revision to their detriment shall be unacceptable.

17. Article 24.1 requires that Members exercise due restraint in matters involving a least-developed country Member. There is a need to clarify how to determine whether such restraint was exercised and what the consequences would be if it is established that such restraint was not exercised. At the outset of a case for instance, panels should have the authority to determine whether a party bringing a complaint against an LDC has a *prima facie* case and whether the complainant exercised due restraint. Restraint in this sense could include a determination whether it would have been better in the circumstances to invoke the assistance of the "good offices of the Director-General", whether due diligence was exercised with the objective of actually settling the dispute and what the outcome was. Article 24.2 should therefore be amended by removing "upon request by a least-developed country Member" to make it incumbent on the complaining party to seek the "good offices" of the Director-General.

18. The paramount objective of the multilateral trading system is the promotion of development through well regulated and predictable trade relations. LDCs are the least endowed and most

disadvantaged partners in the system. They deserve full and benevolent support from the rest of the Membership. The potential negative impact of retaliatory action against an LDC cannot be over-emphasized. Indeed, even a demand for compensation from an LDC may have severe negative consequences. Members should therefore consider the possibility of completely excluding LDCs from these demands. In the alternative it could be recognized "*a least-developed country Member against whom a case has been determined shall be expected to withdraw the offending measure*".

19. In particular, LDCs would like to reiterate that Members should exercise "restraint" in raising matters when an LDC is involved, as provided for under Article 24. No compensation should be sought from an LDC Member. No retaliatory measures should be taken against an LDC Member. LDCs shall be expected to withdraw an offending measure where a case has been established against them through the DS system.

Responsibilities of the Secretariat to the parties in a dispute – Article 27

20. The Secretariat is authorized to provide assistance to the panels by Article 27.1. The spectrum of such assistance is very broad. It ranges from support on the legal, historical and procedural aspects of the case to secretarial and technical support. Often, such support is pernicious and impacts heavily on the outcome of the case, especially when it takes the form of legal research and other internal commentary on matters of procedure. It is the LDCs position that such assistance, particularly the legal research undertaken by the Secretariat and other commentary prepared in the course of and for use in the case, should be provided to the parties. This is important in "completing the picture" as to how exactly a decision was reached and is part of the quest for openness and transparency of the DS.

21. Article 27.2 provides that the Secretariat "shall" avail legal expertise to any developing-country Member that requests for such legal assistance. This is a welcome provision and should be maintained. However, the Article goes on to state that the experts shall provide legal assistance in a manner that ensures the continued impartiality of the Secretariat. LDCs wish to point out that this impartiality requirement unnecessarily constrains the legal experts and may prevent them from offering the full breadth of assistance as envisaged by the Members. It should be understood that during the time an expert is offering legal assistance, he or she should be allowed to discharge such duties without undue impartiality constraints, he or she should be allowed to assume the full role of "counsel" as properly understood. After the tasks for which the expertise was required are completed, they should then resume their role as Secretariat staff.