SECRETARIAT NOTE ON THE DISCUSSION
AT THE MEETINGS OF THE GROUP ON 1 AND 9 DECEMBER 1966

1. At the twenty-third session the CONTRACTING PARTIES adopted a decision on procedures under Article XXIII aimed at facilitating more effective use of the provisions of this Article in the interests of the trade and economic development of less-developed contracting parties and agreed that work should be continued on the two outstanding issues mentioned in paragraph 46 of the Committee Report L/2614. The Committee on Trade and Development agreed at its last meeting that the Group on Legal Amendments should be convened to resume examination of the outstanding issues, taking into account any new proposals circulated in advance by interested delegations.

2. The Group met on 1 and 9 December 1966 to discuss a joint proposal by the delegations of Brazil and Uruguay for a supplementary decision on procedures under Article XXIII, which had been circulated in document COM.ID/F/W/7.

3. Some members of the Group recalled that the decision on procedures under Article XXIII had been adopted only nine months ago. They felt that, unless there were very good reasons to the contrary, it would be preferable to await practical experience on the use made of procedures set out in the decision before any alterations were contemplated. Others felt that not only had the proposal little to add to what was already provided under Article XXIII, but adoption of such a proposal would complicate the existing procedures and limit the choice of solutions which could be worked out in any given case. One member indicated that his government would have difficulty in accepting the proposal. Some members pointed out that the Group had been given a mandate by the Committee on Trade and Development following the clear understandings reached at the twenty-third session that these issues would be further examined, and that the item appeared on the agreed provisional agenda for the next meeting of the Committee to be held in January 1967.

4. The Group proceeded to a preliminary exchange of views, in the course of which the sponsors of the proposal provided clarification on various points. The sponsors affirmed that the intentions behind the present proposal were the
same as those which had motivated their earlier proposals set out in COM.ID/F/W/4, and recalled the views which they had expressed at the previous Group meeting and to the Committee as noted in COM.ID/F/4 and L/2614. The present proposal represented a modified version of the original proposals and the modifications had been made to meet the objections and take account of the views which had been expressed by some developed contracting parties.

5. Several members pointed out that the first sentence of paragraph 1 of the proposal appeared to make mandatory a panel recommendation that any measure complained of be eliminated, without regard for the nature of the measure, the compatibility of the measures with the General Agreement, or the merit of the complaint. The sponsors explained that such mandatory character was not intended and they would have no difficulty in accepting a change in the text to make this clear. On the other hand, "measures complained of" should be taken to be applicable to any measure that caused nullification or impairment, whether or not it conflicted with the provisions of the General Agreement. Some members recalled past discussions on the meaning and significance of the term "nullification and impairment of any benefit accruing directly or indirectly under the Agreement" in the sense of Article XXIII, and stressed the view that it would be going beyond the provisions of the GATT to require a contracting party to remove measures which were not inconsistent with the Agreement.

6. Some members observed that the phrase "where this should not prove possible" in the third line of paragraph 1 of the proposal was ambiguous and capable of several interpretations since it was not clear as to whether the judgment as to whether the measure could or could not be removed was that of the contracting party to whom the recommendation was addressed or some other body. The point of time at which this judgment could be reached was also not clear from the phrase. It was also pointed out that the phrase "with the agreement of the two parties" may also have the effect of limiting the Decision of 5 April 1966 as the Panel would be able in all cases to make recommendations only when participants were in agreement. The sponsors explained that it was their intention that paragraph 1 of their proposal would be invoked only in cases where the contracting party causing damage had found it impossible to remove the measures complained of and consequently would relate to situations where all the possibilities offered in the Decision of 5 April 1966 had been exhausted without satisfactory settlement.

7. Some members of the Group enquired whether the term "other measures of a commercial policy or other character" employed in paragraph 1 of the proposal meant financial compensation. They drew attention to the statement made by them on this question in previous meetings of the Group concerning the difficulties this would pose for their governments. The sponsors replied that the intention of the proposal was to enable the Panel to recommend any particular method which would adequately offset the damage suffered: financial compensation would be one of the many possibilities but would not be recommended, except where the party concerned was in a position to provide it.
8. The sponsors also explained that it was intended that the offsetting measures which may be agreed upon under paragraph 1 of their proposal would apply retroactively in order to cover the whole period during which a developing country suffered damage as a result of measures applied by a developed country. The term "economic prospects" appearing in paragraph 1 of the proposal was meant to cover situations where the projections or assumptions made in the context of development plans of developing countries were upset by harmful measures applied by developed countries.

9. Some members felt that paragraph 2 of the proposal, by providing for the suspension of obligations by the developing contracting party prior to the consideration of the recommendation of the CONTRACTING PARTIES by the developed country concerned, would make the eventual satisfactory adjustment more rather than less difficult. The sponsors recalled their views and intentions on this point which were fully reflected in the records of previous discussions of the Group. In their view governments should have no difficulty in accepting paragraph 2 since sufficient guarantees were provided to ensure that the country suspending concession or other obligations under the General Agreement could not act in an arbitrary manner. One member of the Group noted that any provisional suspension of concessions authorized under paragraph 2 would presumably be applicable only to the contracting party causing the damage. Another member enquired whether the provisions of paragraphs 2 and 3 of the proposal would only apply in cases where paragraph 1 was not invoked. The sponsors replied that paragraphs 1 and 2 were to be independent of each other.

10. One member of the Group suggested that the phrase "take account of the circumstances" at the end of paragraph 2 be changed to "which they deem to be appropriate in the circumstances" so as to make it clear that the CONTRACTING PARTIES and Council would also be free to modify the scope of a requested suspension before approving it.

11. One member of the Group suggested that since the purpose of the present exercise was to find ways and means of ensuring that the developed countries carried out their obligations vis-à-vis the developing countries, governments of developed countries might wish to give consideration to the possibilities of suspending or removing duties on items of export interest to developing countries which were subjected to quantitative restrictions. Several representatives, while indicating that they would report the suggestion to their governments, considered that the Group was not the proper forum to raise such a matter. Certain other members gave preliminary views on some of the difficulties which this proposal would present to their governments.

12. The Group agreed to adjourn in order to facilitate informal consultations and to enable delegations to receive further instructions from their governments. The Brazilian and Uruguayan delegations agreed to make available a modified text of their proposal which would take account, as far as possible, of any modifications which delegations might wish to suggest to them. The Chairman would reconvene the Group at an appropriate date to be determined in the light of circumstances.
PROPOSED SUPPLEMENTARY DECISION ON PROCEDURES UNDER ARTICLE XXIII

Joint Proposal by the Delegations of Brazil and Uruguay

With reference to paragraph 16 of COM.TD/30, the delegations of Brazil and Uruguay proposed the following text of a decision to be taken by the CONTRACTING PARTIES to supplement their Decision of 5 April 1966 on this subject (BISD, Fourteenth Supplement, pages 18-20) as amplified by the understanding recorded in the note to paragraph 47 of the report contained in L/2614 (ibid., pages 140-141):

1. The CONTRACTING PARTIES agree that the recommendations made to them in accordance with paragraph 7 of the aforesaid Decision should cover the elimination of the measures complained of and, where this should not prove possible, may, with the agreement of the two parties, provide for other measures of a commercial policy or other character as would adequately offset the damage caused to the trade or economic prospects of the less-developed contracting party concerned by the measure in question.

2. The CONTRACTING PARTIES also agree that where, in the judgment of the panel, as reported in the findings and recommendations referred to in paragraph 7 of the aforesaid Decision, the import capacity of the less-developed contracting party is being impaired by the adoption of measures by the developed contracting party which violate the provisions of the General Agreement, the CONTRACTING PARTIES or the Council may, on request of the aggrieved contracting party, authorize it to suspend on a provisional basis, pending the outcome of the proceedings mentioned in paragraphs 8 and 9 of the aforesaid Decision, in regard to the contracting party causing the damage, any concession or other obligation under the General Agreement taking account of the circumstances.

3. The CONTRACTING PARTIES further agree that such provisional suspension of concessions or obligations would be reviewed in accordance with the procedures outlined in paragraph 9 of the aforesaid Decision with a view to its being modified, rescinded or confirmed.

Except for two minor drafting changes this is the same text as originally circulated in COM.TD/F/W/7. The delegations of Brazil and Uruguay have requested that the text be reproduced as it now stands. It has not taken into account certain changes proposed during the discussion.