

GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

COM.TD/F/W.1
27 April 1965

Limited Distribution

Committee on Trade and Development

Ad Hoc Group on Legal Amendments to the
General Agreement

PROPOSALS FOR AMENDMENTS TO THE GENERAL AGREEMENT

Note by the Secretariat

At the last meeting of the Committee on Trade and Development, it was agreed that an Ad Hoc Group on Legal Amendments to the GATT should examine the specific proposals submitted earlier by contracting parties, and any other proposals which might be put forward concerning the review and amendment of Articles XVIII and XXIII of the General Agreement, including the proposal relating to the use of import surcharges by less-developed countries for balance-of-payments reasons. The proposals so far received have already been circulated in document COM.TD/W.4. To facilitate the task of the Group the secretariat wishes to draw attention to the following:

I. A tabular statement on pages 2/3-11 giving the Australian proposal originally circulated in document L/2195/Rev.1 for an amendment of Article XVIII side by side with the text of the existing Article XVIII. The Australian text is underlined or an indication given in square brackets or footnotes wherever it differs from the existing Article XVIII. The third column of this statement contains comments by the Australian delegation on its proposed texts taken from an explanatory key which had been prepared by the Australian delegation and circulated originally in document L/2165.

II. A draft text on page 12/13 relating to the use of surcharges to safeguard the balance of payments of less-developed countries, which was annexed to the report of the Committee on the Legal and Institutional Framework of the GATT document L/2281/Add.1 for insertion in the text of Article XVIII.

III. The text of a proposal by Brazil and Uruguay on page 14 relating to the amendment of Article XXIII originally circulated as Annex IV to document L/2195/Rev.1, together with a statement made by the delegation of Brazil when the proposal was first introduced.

IV. A summary on page 20 of the main points concerning the application of Article XXIII which had been brought out in the secretariat note COM.TD/5 regarding compensation to less-developed countries for loss of trading opportunities resulting from the application of residual restrictions.

EXISTING ARTICLE XVIII

AUSTRALIAN PROPOSAL

COMMENTS BY THE AUSTRALIAN DELEGATION

ARTICLE XVIII

Governmental Assistance to Economic Development

1. The contracting parties recognize that the attainment of the objectives of this Agreement will be facilitated by the progressive development of their economies, particularly of those contracting parties the economies of which can only support low standards of living and are in the early stages of development.

2. The contracting parties recognize further that it may be necessary for those contracting parties, in order to implement programmes and policies of economic development designed to raise the general standard of living of their people, to take protective or other measures affecting imports, and that such measures are justified in so far as they facilitate the attainment of the objectives of this Agreement. They agree, therefore, that those contracting parties should enjoy additional facilities to enable them (a) to maintain sufficient flexibility in their tariff structure to be able to grant the tariff protection required for the establishment of a particular industry and (b) to apply quantitative restrictions for balance of payments purposes in a manner which takes full account of the continued high level of demand for imports likely to be generated by their programmes of economic development.

3. The contracting parties recognize finally that with those additional facilities which are provided for in Sections A and B of this Article, the provisions of this Agreement would normally be sufficient to enable contracting parties to meet the requirements of their economic development. They agree, however, that there may be circumstances where no measure consistent with those provisions is practicable to permit a contracting party in the process of economic development to grant the governmental assistance required to promote the establishment of particular industries with a view to raising the general standard of living of its people. Special procedures are laid down in Sections C and D of this Article to deal with those cases.

4. (a) Consequently, a contracting party the economy of which can only support low standards of living and is in the early stages of development shall be free to deviate temporarily from the provisions of the other Articles of this Agreement, as provided in Sections A, B and C of this Article.

(b) A contracting party the economy of which is in the process of development but which does not come within the scope of sub-paragraph (a) above, may submit applications to the CONTRACTING PARTIES under Section D of this Article.

✓The first paragraph of existing Article XVIII has been omitted.✓

Covered in paragraph I of new text.

I. Measures to assist less-developed contracting parties

1. The CONTRACTING PARTIES recognize that it may be necessary for less-developed contracting parties, in order to implement programmes and policies of economic development designed to raise the general standard of living of their people, to take protective or other measures affecting imports, and that such measures are justified in so far as they facilitate the attainment of the objectives set out in this Chapter. The CONTRACTING PARTIES recognize further that less-developed contracting parties tend, when they are in rapid process of development, to experience balance-of-payments difficulties arising mainly from efforts to expand their internal markets as well as from instability in their terms of trade.¹ They agree therefore that those contracting parties should enjoy the additional facilities provided in Section II of this Article to enable them:

- (a) to maintain sufficient flexibility in their tariff structure to be able to grant the tariff protection required for the establishment or development of a particular industry;
- (b) to apply quantitative restrictions or import surcharges for balance-of-payments purposes in a manner which takes full account of the continued high level of demand for imports likely to be generated by their programmes of economic development.

✓The first sentence of existing paragraph 3 has been omitted.✓

2. The CONTRACTING PARTIES further agree that there may be circumstances where no measure consistent with this Agreement, including the provisions of Section II of this Article, is practicable to permit a less-developed contracting party to grant the governmental assistance required to promote the establishment or development of particular industries with a view to raising the general standard of living of its people. Special procedures are laid down in Section III of this Article to deal with those cases.

✓Existing paragraph 4 has been omitted.✓

¹ Paragraph 8 of the existing text has been transferred here to form this sentence.

EXISTING ARTICLE XVIII

AUSTRALIAN PROPOSAL

COMMENTS BY THE AUSTRALIAN DELEGATION

5. The contracting parties recognize that the export earnings of contracting parties the economies of which are of the type described in paragraph 4 (a) and (b) above, and which depend on exports of a small number of primary commodities may be seriously reduced by a decline in the sale of such commodities. Accordingly, when the exports of primary commodities by such a contracting party are seriously affected by measures taken by another contracting party, it may have resort to the consultation provisions of Article XXII of this Agreement.

6. The CONTRACTING PARTIES shall review annually all measures applied pursuant to the provisions of Sections C and D of this Article.

3. The CONTRACTING PARTIES further recognize that the export earnings of less-developed contracting parties which depend on the export of a small number of primary products may be seriously reduced by a decline in the sale of such commodities. Accordingly, when the exports of primary commodities by such a contracting party are seriously affected by measures taken by another contracting party, it may have to resort to the consultation provisions of Article XXII of this Agreement.¹

~~Existing paragraph 6 has been omitted, presumably because the original proposal had envisaged the incorporation of Article XVIII into a Chapter on Trade and Development. This paragraph was to have been taken up elsewhere in the Chapter.~~⁷

¹

See also paragraph 23 below.

Section A

7. (a) If a contracting party coming within the scope of paragraph 4 (a) of this Article considers it desirable, in order to promote the establishment of a particular industry with a view to raising the general standard of living of its people, to modify or withdraw a concession included in the appropriate Schedule annexed to this Agreement, it shall notify the CONTRACTING PARTIES to this effect and enter into negotiations with any contracting party with which such concession was initially negotiated, and with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest therein. If agreement is reached between such contracting parties concerned, they shall be free to modify or withdraw concessions under the appropriate Schedules to this Agreement in order to give effect to such agreement, including any compensatory adjustments involved.

(b) If agreement is not reached within sixty days after the notification provided for in sub-paragraph (a) above, the contracting party which proposes to modify or withdraw the concession may refer the matter to the CONTRACTING PARTIES, which shall promptly examine it. If they find that the contracting party which proposes to modify or withdraw the concession has made every effort to reach an agreement and that the compensatory adjustment offered by it is adequate, that contracting party shall be free to modify or withdraw the concession if at the same time, it gives effect to the compensatory adjustment. If the CONTRACTING PARTIES do not find that the compensation offered by a contracting party proposing to modify or withdraw the concession is adequate, but find that it has made every reasonable effort to offer adequate compensation, that contracting party shall be free to proceed with such modification or withdrawal. If such action is taken, any other contracting party referred to in sub-paragraph (a) above shall be free to modify or withdraw substantially equivalent concessions initially negotiated with the contracting party which has taken the action.

II. Duties and other trade regulations of less-developed contracting parties

4. If a less-developed contracting party considers it desirable, in order to promote the establishment or development of a particular industry with a view to raising the general standard of living of its people, to modify or withdraw a concession included in the appropriate Schedule annexed to this Agreement, it shall notify the CONTRACTING PARTIES to this effect and enter into negotiations with any contracting party with which such concession was initially negotiated, and with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest therein. If agreement is reached between such contracting parties, they shall be free to modify or withdraw concessions under the appropriate Schedules to this Agreement in order to give effect to such agreement, including any compensatory adjustments involved.

5. If agreement is not reached within sixty days after the notification provided for in paragraph 4 above, the contracting party which proposes to modify or withdraw the concession may refer the matter to the CONTRACTING PARTIES which shall promptly examine it. If they find that the contracting party which proposes to modify or withdraw the concession has made every reasonable effort to offer adequate compensation and reach an agreement, that contracting party shall be free to modify or withdraw the concession if at the same time it gives effect to the compensation offered.¹

Re the addition of the words "or development" see note to paragraphs 2, 3, 7, 13 and 22 ad Article XVIII in Annex I to the text of the General Agreement.

The new text recognizes that less-developed countries may not be able to offer adequate compensation and it deletes the provision for the retaliatory withdrawal of equivalent concessions.

¹
The last two sentences of existing paragraph 7 (b) have been omitted.

EXISTING ARTICLE XVIII

AUSTRALIAN PROPOSAL

COMMENTS BY THE AUSTRALIAN DELEGATION

Section B

8. The contracting parties recognize that contracting parties coming within the scope of paragraph 4(a) of this Article tend, when they are in rapid process of development, to experience balance of payments difficulties arising mainly from efforts to expand their internal markets as well as from the instability in their terms of trade.

9. In order to safeguard its external financial position and to ensure a level of reserves adequate for the implementation of its programme of economic development, a contracting party coming within the scope of paragraph 4(a) of this Article may, subject to the provisions of paragraphs 10 to 12, control the general level of its imports by restricting the quantity or value of merchandise permitted to be imported; Provided that the import restrictions instituted, maintained or intensified shall not exceed those necessary:

- (a) to forestall the threat of, or to stop, a serious decline in its monetary reserves, or
- (b) in the case of a contracting party with inadequate monetary reserves, to achieve a reasonable rate of increase in its reserves.

Due regard shall be paid in either case to any special factors which may be affecting the reserves of the contracting party or its need for reserves, including where special external credits or other resources are available to it, the need to provide for the appropriate use of such credits or resources.

10. In applying these restrictions, the contracting party may determine their incidence on imports of different products or classes of products in such a way as to give priority to the importation of those products which are more essential in the light of its policy of economic development; Provided that the restrictions are so applied as to avoid unnecessary damage to the commercial or economic interests of any other contracting party and not to prevent unreasonably the importation of any description of goods in minimum commercial quantities the exclusion of which would impair regular channels of trade; and Provided further that the restrictions are not so applied as to prevent the importation of commercial samples or to prevent compliance with patent, trademark, copyright or similar procedures.

11. In carrying out its domestic policies, the contracting party concerned shall pay due regard to the need for restoring equilibrium in its balance of payments on a sound and lasting basis and to the desirability of assuring an economic employment of productive resources. It shall progressively relax any restrictions applied under this Section as conditions improve, maintaining them only to the extent necessary under the terms of paragraph 9 of this Article and shall eliminate them when conditions no longer justify such maintenance; Provided that no contracting party shall be required to withdraw or modify restrictions on the ground that a change in its development policy would render unnecessary the restrictions which it is applying under this Section.

Existing paragraph 8 has been transferred to form part of the proposed paragraph 1/

6. In order to safeguard its external financial position and to ensure a level of reserves adequate for the implementation of its programme of economic development, a less-developed contracting party may, subject to the provision of paragraphs 7 to 14 of this Article, control the general level of its imports by restricting the quantity or value of merchandise permitted to be imported; Provided that the import restriction instituted, maintained or intensified, shall not exceed those necessary:

- (a) to forestall the threat of, or to stop, a serious decline in its monetary reserves; or
- (b) in the case of a less-developed contracting party with inadequate monetary reserves, to achieve a reasonable rate of increase in its reserves.

Due regard shall be paid in either case to any special factors which may be affecting the reserves¹, including, where special external credits or other resources are available to it, the need to provide for the appropriate use of such credits or resources.

7. In applying these restrictions, the contracting party may determine their incidence on imports of different products or classes of products in such a way as to give priority to the importation of those products which are more essential in the light of its policy of economic development; Provided that the restrictions are so applied as to avoid unnecessary damage to the commercial or economic interests of any other contracting party and not to prevent unreasonably the importation of any description of goods in minimum commercial quantities the exclusion of which would impair regular channels of trade; and Provided further that the restrictions are not so applied as to prevent the importation of commercial samples or to prevent compliance with patent, trademark, copyright or similar procedures.

8. In carrying out its domestic policies, the contracting party concerned shall pay due regard to the need for restoring equilibrium in its balance of payments on a sound and lasting basis and to the desirability of assuring an economic employment of productive resources. It shall progressively relax any restrictions applied under this Section as conditions improve, maintaining them only to the extent necessary under the terms of paragraph 6 of this Article and shall eliminate them when conditions no longer justify such maintenance; Provided that no contracting party shall be required to withdraw or modify restrictions on the ground that a change in its development policy would render unnecessary the restrictions which it is applying under this Section.

¹

The words "or its need for reserves" has been omitted.

EXISTING ARTICLE XVIII

AUSTRALIAN PROPOSAL

COMMENTS BY THE AUSTRALIAN DELEGATION

12. (a) Any contracting party applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures applied under this Section, shall immediately after instituting or intensifying such restrictions (or, in circumstances in which prior consultation is practicable, before doing so) consult with the CONTRACTING PARTIES as to the nature of its balance-of-payments difficulties, alternative corrective measures which may be available, and the possible effect of the restrictions on the economies of other contracting parties.

(b) On a date to be determined by them the CONTRACTING PARTIES shall review all restrictions still applied under this Section on that date. Beginning two years after that date, contracting parties applying restrictions under this Section shall enter into consultations of the type provided for in sub-paragraph (a) above with the CONTRACTING PARTIES at intervals of approximately, but not less than two years according to a programme to be drawn up each year by the CONTRACTING PARTIES; Provided that no consultation under this sub-paragraph shall take place within two years after the conclusion of a consultation of a general nature under any other provision of this paragraph.

(c) (i) If, in the course of consultations with a contracting party under sub-paragraph (a) or (b) of this paragraph, the CONTRACTING PARTIES find that the restrictions are not consistent with the provisions of this Section or with those of Article XIII (subject to the provisions of Article XIV), they shall indicate the nature of the inconsistency and may advise that the restrictions be suitably modified.

(ii) If, however, as a result of the consultations, the CONTRACTING PARTIES determine that the restrictions are being applied in a manner involving an inconsistency of a serious nature with the provisions of this Section or with those of Article XIII (subject to the provisions of Article XIV) and that damage to the trade of any contracting party is caused or threatened thereby, they shall so inform the contracting party applying the restrictions and shall make appropriate recommendations for securing conformity with such provisions within a specified period. If such contracting party does not comply with these recommendations within the specified period, the CONTRACTING PARTIES may release any contracting party the trade of which is adversely affected by the restrictions from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances.

9. Any contracting party applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures applied under this Section shall immediately after instituting or intensifying such restrictions (or, in circumstances in which prior consultation is practicable, before doing so) consult with the CONTRACTING PARTIES as to the nature of its balance-of-payments difficulties, alternative corrective measures which may be available, and the possible effect of the restrictions on the economies of other contracting parties. The consultations shall cover all basic elements in the trade and development problems of the less-developed contracting party concerned, including consideration of structural factors which may limit the possibility of expanding its exports or maximizing its export returns. The CONTRACTING PARTIES shall endeavour to devise and suggest remedial measures to overcome the problems identified in the course of such consultations.

10. ¹Contracting parties applying restrictions under this Section shall enter into consultations of the type provided for in paragraph 9 above with the CONTRACTING PARTIES at intervals of approximately, but not less than, two years according to a programme to be drawn up each year by the CONTRACTING PARTIES; Provided that no consultation under this sub-paragraph shall take place within two years after the conclusion of a consultation of a general nature under any other provision of this Section. In drawing up a programme of consultations under this paragraph, the CONTRACTING PARTIES shall make provision for early consultation with any less-developed contracting party which accedes to this Agreement and which, at the time of its accession, is applying restrictions.

Existing paragraph 12(c)(i) has been omitted.

The first sentence of existing paragraph 12(c)(ii) with modifications appears as paragraph 12 on the next page.

The first sentence of existing paragraph 12(b) has been amended since the programme of consultations with less-developed countries has now commenced.

By placing existing paragraph 12(d) i.e. new paragraph 11 below, ahead of existing paragraph 12(c) i.e. new paragraph 12, new paragraph 12 serves as a replacement of both existing paragraph 12(c) and the last two sentences of existing paragraph 12(d). The new paragraph 12 also takes the consultation procedures to the point of recommendation by the CONTRACTING PARTIES but as in new paragraph 5 the possibility of retaliatory action has not been retained.

¹
The first sentence and part of the second sentence of existing paragraph 12(b) have been omitted.

(d) The CONTRACTING PARTIES shall invite any contracting party which is applying restrictions under this Section to enter into consultations with them at the request of any contracting party which can establish a prima facie case that the restrictions are inconsistent with the provisions of this Section or with those of Article XIII (subject to the provisions of Article XIV) and that its trade is adversely affected thereby. However, no such invitation shall be issued unless the CONTRACTING PARTIES have ascertained that direct discussions between the contracting parties concerned have not been successful. If, as a result of the consultations with the CONTRACTING PARTIES no agreement is reached and they determine that the restrictions are being applied inconsistently with such provisions, and that damage to the trade of the contracting party initiating the procedure is caused or threatened thereby, they shall recommend the withdrawal or modification of the restrictions. If the restrictions are not withdrawn or modified within such time as the CONTRACTING PARTIES may prescribe, they may release the contracting party initiating the procedure from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances.

(e) If a contracting party against which action has been taken in accordance with the last sentence of sub-paragraph (c)(ii) or (d) of this paragraph, finds that the release of obligations authorized by the CONTRACTING PARTIES adversely affects the operation of its programme and policy of economic development, it shall be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary to the CONTRACTING PARTIES of its intention to withdraw from this Agreement and such withdrawal shall take effect on the sixtieth day following the day on which the notice is received by him.

(f) In proceeding under this paragraph, the CONTRACTING PARTIES shall have due regard to the factors referred to in paragraph 2 of this Article. Determinations under this paragraph shall be rendered expeditiously and, if possible, within sixty days of the initiation of the consultations.

11. The CONTRACTING PARTIES shall also invite any contracting party which is applying restrictions under this Section to enter into consultations with them at the request of any contracting party which can establish a prima facie case that the restrictions are inconsistent with the provisions of this Section or with those of Article XIII (subject to the provisions of Article XIV) and that its trade is adversely affected thereby. However, no such invitation shall be issued unless the CONTRACTING PARTIES have ascertained that direct discussions between the contracting parties concerned have not been successful.¹

12. ²If as a result of consultations with a contracting party under paragraphs 9, 10, or 11, the CONTRACTING PARTIES determine that the restrictions are being applied in a manner involving an inconsistency of a serious nature with the provisions of this Section or with those of Article XIII (subject to the provisions of Article XIV) and that serious damage to the trade of another contracting party is caused or threatened thereby, they shall recommend the withdrawal or modification of the restrictions.³

[Existing paragraph 12(c) has been omitted]

Omitted consequent upon the deletion of the last part of existing paragraph 12(d).

13. In consultations under this Section, the CONTRACTING PARTIES shall have due regard to the factors referred to in paragraph 1 of this Article. Determinations under paragraph 12 shall be rendered expeditiously and, if possible, within sixty days of the initiation of the consultations.

14. A contracting party may apply, as an alternative or as an addition to import restrictions applied under this Section, import surcharges affecting products which are the subject of concessions included in the appropriate Schedule annexed to this Agreement. The application of such import surcharges shall, however, be subject to the conditions and procedures laid down in this Section in relation to the application of import restrictions.⁴

¹ The last two sentences of existing paragraph 12(d) have been omitted.

² See existing paragraph 12(c)(ii).

³ The second sentence of existing paragraph 12(c)(ii) has been omitted.

⁴ This paragraph is a new addition. See also the other proposal on use of the import surcharges on page 12/13.

EXISTING ARTICLE XVIII

AUSTRALIAN PROPOSAL

COMMENTS BY THE AUSTRALIAN DELEGATION

Section C

13. If a contracting party coming within the scope of paragraph 4(a) of this Article finds that governmental assistance is required to promote the establishment of a particular industry with a view to raising the general standard of living of its people, but that no measure consistent with the other provisions of this Agreement is practicable to achieve that objective, it may have recourse to the provisions and procedures set out in this Section.

14. The contracting party concerned shall notify the CONTRACTING PARTIES of the special difficulties which it meets in the achievement of the objective outlined in paragraph 13 of this Article and shall indicate the specific measure affecting imports which it proposes to introduce in order to remedy these difficulties. It shall not introduce that measure before the expiration of the time-limit laid down in paragraph 15 or 17, as the case may be, or if the measure affects imports of a product which is the subject of a concession included in the appropriate Schedule annexed to this Agreement, unless it has secured the concurrence of the CONTRACTING PARTIES in accordance with the provisions of paragraph 18; Provided that, if the industry receiving assistance has already started production, the contracting party may, after informing the CONTRACTING PARTIES, take such measures as may be necessary to prevent, during that period, imports of the product or products concerned from increasing substantially above a normal level.

15. If, within thirty days of the notification of the measure, the CONTRACTING PARTIES do not request the contracting party concerned to consult with them, that contracting party shall be free to deviate from the relevant provisions of the other Articles of this Agreement to the extent necessary to apply the proposed measure.

16. If it is requested by the CONTRACTING PARTIES to do so, the contracting party concerned shall consult with them as to the purpose of the proposed measure, as to alternative measures which may be available under this Agreement, and as to the possible effect of the measure proposed on the commercial and economic interests of other contracting parties. If, as a result of such consultation, the CONTRACTING PARTIES agree that there is no measure consistent with the other provisions of this Agreement which is practicable in order to achieve the objective outlined in paragraph 13 of this Article, and concur in the proposed measure, the contracting party concerned shall be released from its obligations under the relevant provisions of the other Articles of this Agreement to the extent necessary to apply that measure.

17. If, within ninety days after the date of the notification of the proposed measure under paragraph 14 of this Article, the CONTRACTING PARTIES have not concurred in such measure, the contracting party concerned may introduce the measure proposed after informing the CONTRACTING PARTIES.

18. If the proposed measure affects a product which is the subject of a concession included in the appropriate Schedule annexed to this Agreement, the contracting party concerned shall enter into consultations with any other contracting party with which the concession was initially negotiated, and with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest therein. The CONTRACTING PARTIES shall concur in the measure if they agree that there is no measure consistent with the other provisions of this Agreement which is practicable in order to achieve the objective set forth in paragraph 13 of this Article, and if they are satisfied:

III. Additional facilities to enable less-developed contracting parties to promote their economic development

15. If a less-developed contracting party finds that governmental assistance is required to promote the establishment or development of a particular industry with a view to raising the general standard of living of its people, but that no measure consistent with the other provisions of this Agreement is practicable to achieve that objective, it may have recourse to the provisions and procedures set out in this Section.

16. The contracting party concerned shall notify the CONTRACTING PARTIES of the special difficulties which it meets in the achievement of the objective outlined in paragraph 15 of this Article and shall indicate the specific measure affecting imports which it proposes to introduce in order to remedy these difficulties. It shall not introduce that measure before the expiration of the time-limit laid down in paragraph 17 or 19, as the case may be, or if the measure affects imports of a product which is the subject of a concession included in the appropriate schedule annexed to this Agreement, unless it has secured the concurrence of the CONTRACTING PARTIES in accordance with the provisions of paragraph 20; Provided that, if the industry receiving assistance has already started production, the contracting party may, after informing the CONTRACTING PARTIES, take such measures as may be necessary to prevent, during that period, imports of the product or products concerned from increasing substantially above a normal level.

17. If, within thirty days of the notification of the measure, the CONTRACTING PARTIES do not request the contracting party concerned to consult with them, that contracting party shall be free to deviate from the relevant provisions of the other Articles of this Agreement to the extent necessary to apply the proposed measure.

18. If it is requested by the CONTRACTING PARTIES to do so, the contracting party concerned shall consult with them as to the purpose of the proposed measure, as to alternative measures which may be available under this Agreement, and as to the possible effect of the measure proposed on the commercial and economic interests of other contracting parties. If, as a result of such consultation, the CONTRACTING PARTIES agree that there is no measure consistent with the other provisions of this Agreement which is practicable in order to achieve the objective outlined in paragraph 15 of this Article, and concur in the proposed measure, the contracting party concerned shall be released from its obligations under the relevant provisions of the other Articles of this Agreement to the extent necessary to apply that measure.

19. If, within ninety days after the date of the notification of the proposed measure under paragraph 16 of this Article, the CONTRACTING PARTIES have not concurred in such measure, the contracting party concerned may introduce the measure proposed after informing the CONTRACTING PARTIES.

20. If the proposed measure affects a product which is the subject of a concession included in the appropriate Schedule annexed to this Agreement, the contracting party shall enter into consultations with any other contracting party with which the concession was initially negotiated, and with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest therein. The CONTRACTING PARTIES shall concur in the measure if they agree that there is no measure consistent with the other provisions of this Agreement which is practicable in order to achieve the objective set forth in paragraph 15 of this Article, and if they are satisfied:

EXISTING ARTICLE XVIII

AUSTRALIAN PROPOSAL

COMMENTS BY THE AUSTRALIAN DELEGATION

- (a) that agreement has been reached with such other contracting parties as a result of the consultations referred to above, or
- (b) if no such agreement has been reached within sixty days after the notification provided for in paragraph 14 has been received by the CONTRACTING PARTIES, that the contracting party having recourse to this Section has made all reasonable efforts to reach an agreement and that the interests of other contracting parties are adequately safeguarded.

The contracting party having recourse to this Section shall thereupon be released from its obligations under the relevant provisions of the other Articles of this Agreement to the extent necessary to permit it to apply the measure.

19. If a proposed measure of the type described in paragraph 13 of this Article concerns an industry the establishment of which has in the initial period been facilitated by incidental protection afforded by restrictions imposed by the contracting party concerned for balance of payments purposes under the relevant provisions of this Agreement, that contracting party may resort to the provisions and procedures of this Section; Provided that it shall not apply the proposed measure without the concurrence of the CONTRACTING PARTIES.

20. Nothing in the preceding paragraphs of this Section shall authorize any deviation from the provisions of Articles I, II and XIII of this Agreement. The provisos to paragraph 10 of this Article shall also be applicable to any restriction under this Section.

21. At any time while a measure is being applied under paragraph 17 of this Article any contracting party substantially affected by it may suspend the application to the trade of the contracting party having recourse to this Section of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove; Provided that sixty days' notice of such suspension is given to the CONTRACTING PARTIES not later than six months after the measure has been introduced or changed substantially to the detriment of the contracting party affected. Any such contracting party shall afford adequate opportunity for consultation in accordance with the provisions of Article XXII of this Agreement.

- (a) that agreement has been reached with such other contracting parties as a result of the consultations referred to above, or
- (b) If no such agreement has been reached within sixty days after notification provided for in paragraph 16 has been received by the CONTRACTING PARTIES, that the contracting party having recourse to this Section, has made all reasonable efforts to reach an agreement and that the interests of other contracting parties are adequately safeguarded.

The contracting party having recourse to this Section shall thereupon be released from its obligations under the relevant provisions of the other Articles of this Agreement to the extent necessary to permit it to apply the measure.

Existing paragraph 19 has been omitted.

21. Nothing in the preceding paragraphs of this Section shall authorize any deviation from the provisions of Articles I, II, and XIII of this Agreement. The provisos to paragraph 7 of this Article shall also be applicable to any restriction under this Section.

Existing paragraph 21 has been omitted.

Existing paragraph 19 is felt to be redundant in view of the addition of the words "or development" in new paragraphs 4 and 15.

Deleted consistently with the deletion of other provisions for retaliatory action.

EXISTING ARTICLE XVIII

AUSTRALIAN PROPOSAL

COMMENTS BY THE AUSTRALIAN DELEGATION

Section D

22. A contracting party coming within the scope of sub-paragraph 4(b) of this Article desiring, in the interest of the development of its economy, to introduce a measure of the type described in paragraph 13 of this Article in respect of the establishment of a particular industry may apply to the CONTRACTING PARTIES for approval of such measure. The CONTRACTING PARTIES shall promptly consult with such contracting party and shall, in making their decision, be guided by the considerations set out in paragraph 16. If the CONTRACTING PARTIES concur in the proposed measure the contracting party concerned shall be released from its obligations under the relevant provisions of the other Articles of this Agreement to the extent necessary to permit it to apply the measure. If the proposed measure affects a product which is the subject of a concession included in the appropriate Schedule annexed to this Agreement, the provisions of paragraph 18 shall apply.

23. Any measure applied under this Section shall comply with the provisions of paragraph 20 of this Article.

IV. The application of the provisions of Section III to other contracting parties in the process of development

22. A contracting party which is not a less-developed contracting party but the economy of which is nevertheless still in the process of development and which is dependent in large measure on a relatively small number of primary commodities for its export earnings desiring, in the interest of the development of its economy, to introduce a measure of the type described in paragraph 15 of this Article in respect of the establishment or development of a particular industry may apply to the CONTRACTING PARTIES for approval of such measure. The CONTRACTING PARTIES shall promptly consult with such contracting party and shall, in making their decision, be guided by the considerations set out in paragraph 18 of this Article. If the CONTRACTING PARTIES concur in the proposed measure the contracting party concerned shall be released from its obligations under the relevant provisions of the other Articles of this Agreement to the extent necessary to permit it to apply the measure. If the proposed measure affects a product which is the subject of a concession included in the appropriate Schedule annexed to this Agreement, the provisions of paragraph 20 shall apply. Any measure applied under this paragraph shall comply with the provisions of paragraph 21 of this Article.

Existing paragraph 23 has been added to paragraph 22 above.⁷

23. A contracting party to which the provisions of the preceding paragraph apply may have resort to the consultation provisions of Article XXIII of this Agreement when the exports of primary commodities by such contracting party are seriously affected by measures taken by another contracting party.¹

In connexion with the criterion of substantial dependence on exports of primary products added here, see existing paragraph 5 and the second note to Article XXVIII, paragraph 4 in Annex I to the text of the General Agreement.

¹

This paragraph is a new addition.

II.

USE OF TEMPORARY IMPORT SURCHARGES TO SAFEGUARD THE
BALANCE OF PAYMENTS OF LESS-DEVELOPED COUNTRIES

Amendment to Article XVIII to Permit Developing Countries
to Use Temporary Import Surcharges to Safeguard
the Balance of Payments

Add paragraph 12 bis at the end of Section B of Article XVIII, as follows:

"12

bis A contracting party which is entitled under the terms of paragraph 9 of this Article to control the general level of its imports and which chooses to effect such control through the imposition of temporary surcharges on imports may, notwithstanding the provisions of paragraph 1 of Article II, apply such surcharges to imports of products described in the appropriate Schedule of concessions annexed to the Agreement and in excess of the rates set forth and provided for therein. The application of such temporary surcharges shall be subject to the criteria and procedures laid down in this Section in relation to the application of import restrictions. The term 'restrictions' as used in this Section shall accordingly be deemed to include such surcharges."

N.B. In connexion with the above proposal, reference might be made to certain observations which were made in the report of the Legal Drafting Group (L/2297, paragraph 6) which was set up to examine the draft text of the new Part IV. The Drafting Group had noted that the above text had not been closely examined by the Legal Committee, and it had appeared to the Group that there were problems of interpretation and implementation which were beyond their competence to resolve.

III

PROPOSAL BY BRAZIL AND URUGUAY RELATING TO
THE AMENDMENT OF ARTICLE XXIII

ARTICLE XXIII

1. In situations provided for by Article XXIII of this Agreement, involving contracting parties recognized as under-developed countries, the CONTRACTING PARTIES shall take prompt action on any representation or proposal made by a contracting party recognized as an under-developed country, delegating the necessary powers to a permanent organ of arbitration of ad hoc composition, and shall immediately take the necessary measures in the light of the decisions or recommendations of the said organ of arbitration.
2. In examining the case referred to it, the organ of arbitration shall take due account of:
 - (a) The damage incurred through the incidence of the measures complained of upon the growth of the export earnings and economic effort of the contracting party recognized as an under-developed country;
 - (b) The means available to the contracting party whose measures are complained of to make good the damage inflicted by their application;
 - (c) The relative effects of such remedial measures as the injured contracting party may take in relation to the contracting party whose measures have nullified or impaired the benefits deriving from the Agreement which the former contracting party is entitled to enjoy.
3. If the measures complained of have been applied by a contracting party recognized as a developed country, the organ of arbitration may recommend, in particular, suitable financial compensation.
4. If, when the question is under examination, the CONTRACTING PARTIES fail to make an appropriate recommendation within a period of...months after the initial representation was made, or if the contracting party to which the representation was addressed - on the ground that benefits deriving from the Agreement have been nullified or impaired - fails to comply, within a period to be fixed by the CONTRACTING PARTIES but not to exceed...months, with the recommendation adopted the injured contracting party - recognized as an under-developed country - shall be automatically released from its obligations under the Agreement towards the contracting parties whose action was the subject of the recommendation, and may take all such measures as it deems appropriate to secure due compensation for the damage sustained.

5. In the event that measures are adopted by developed countries such as to contravene the provisions of the General Agreement and seriously to impair the import capacity of a less-developed country, the latter shall be released from its obligations under the General Agreement, towards the contracting party acting contrary to the provisions of the General Agreement, for the purpose of taking appropriate remedial or retaliatory measures pending the examination of the case of the CONTRACTING PARTIES.

6. Without prejudice to the provisions of the preceding paragraph, in the event that a recommendation by the CONTRACTING PARTIES is not applied within the prescribed time-limit of...months, the CONTRACTING PARTIES shall decide what collective measures shall be taken to ensure compliance with the Agreement.

STATEMENT BY THE REPRESENTATIVE OF BRAZIL
ON ARTICLE XXIII

1. Mr. Chairman, I will try not to be too long on this problem; the analysis of Article XXIII might take hours. I would refer to some of the basic ideas contained in the report of the Panel on the Uruguayan Recourse to Article XXIII which is document L/1923 of 15 November 1962. This contains a practical interpretation of Article XXIII as it is applied now. On that occasion Brazil had the opportunity of making before the CONTRACTING PARTIES some remarks which were circulated as document L/1940 and which contained the basic reasoning behind the proposal we are making now. Article XXIII, as we all know, should be the main protection of the contracting parties in the case of the nullification or impairment of the benefits it is supposed to receive under the General Agreement. It is a very wide Article because it covers not only the question of non-fulfilment of commitments under the Agreement, and the question of measures fully inconsistent with the Agreement, but it also covers the possibility of other actions that might hurt a contracting party - cause economic damage to it - and which nevertheless are consistent with the General Agreement. We do not intend to change the definition of Article XXIII or to tamper with its spirit. We only wish to make the procedure easier to follow, less cumbersome, and to transfer to paper some of the procedures that have been established in practice but which are not very clear. We have taken into special consideration the question of nullification or impairment of the benefits accruing to a less-developed contracting party. We are dealing with a chapter for the benefit of less-developed contracting parties. We believe that Article XXIII as it is drafted now can answer very well the needs of mutual compensation among the developed contracting parties for any action causing nullification or impairment. The developed contracting parties are more or less equal even though equality is not exact. They can deal with each other and they have bargaining power that is more or less comparable, so they can avail themselves of Article XXIII and can protect their rights in using its provisions. Now, the less-developed contracting parties do not have the same freedom of action. It is not a de jure problem, it is a practical problem. This is why Article XXIII has not been a very popular Article for the less-developed countries. There are very few cases in which this Article has been used. The latest case is that of Uruguay, and it has not been quite solved yet. The CONTRACTING PARTIES have not reached the ultimate limit of all the measures contemplated in the Article.

2. Now what do we intend to do in this? In our first paragraph we introduce the expression "prompt attention". We believe that in the case of nullification or impairment of benefits accruing to a less-developed contracting party, this should receive priority and we should give prompt attention to any representation or proposal. There should be, perhaps, an amendment to this text because when I say "CONTRACTING PARTIES" here I mean the CONTRACTING PARTIES directly or through the Council. We do not know how one should express it, but whenever contracting parties are meant they should be able to delegate action to the Council to act when they are not in session. Contracting parties shall give prompt attention to all representations and proposals formulated by contracting parties, recognized as being less-developed, and delegate the necessary powers to a permanent arbitration body. We have the present procedure of setting up a panel to take care of any practical case. We propose to make the panel permanent, that is, it should exist on paper. We do not mean to have some people locked up in a room waiting for a request to come up. It should be in our opinion something like the Arbitration Court established by the international treaties of the Hague in 1899; i.e., a list of people available to take part in any panel. Perhaps this could be solved by a later decision of the CONTRACTING PARTIES. The list of the representatives accredited to the Council might take the place of such a list and any country requesting action by the CONTRACTING PARTIES would request that a panel be set up and would nominate a number of representatives. Perhaps each party to the dispute might be able to nominate two members of the panel and these two would choose the chairman. This is the regular procedure in the Court of the Hague. If they did not agree on the chairman each of them might designate another member and those two would agree on the chairman. This is something to be solved later. What is important is the fact that an arbitration body should be available at all times, the composition of which would be appropriate for each case. This arbitration body would take the necessary measures by delegation of CONTRACTING PARTIES and make rulings or recommendations. Any decision, or the rulings or recommendations of this arbitration body should take into consideration the fact that the contracting party suffering the damage is a "less-developed" contracting party. Measures that cause a loss of a million dollars to a less-developed contracting party would mean something to its economy. On the other hand retaliatory action taken by this less-developed contracting party that might diminish the import capacity of a large developed country by one million dollars would mean less than a mosquito bite. There is a distinct difference in their bargaining power and in the possibility of taking any action, therefore the arbitration body would take into consideration the importance of the damage to the gross export receipts and the development efforts of the contracting parties. Some of the measures undertaken that result in nullification or impairment of benefits accruing to a less-developed contracting party might take place at a certain moment when its development efforts were concentrated on some very important projects, and the adoption of these measures might result in the cancellation of this project and enormous damage to its development effort. This should be duly taken into consideration. The panel would also take into consideration - see paragraph (b) - the means available for the contracting party to overcome the damage.

The said contracting party might not have anything to do to find compensation or protection. Some measures that might not present prima facie evidence of causing great damage, might actually cause this damage because there would be no means available to compensate for it. Under (c) we would consider the relative effects of any compensatory measures on the developed contracting party that caused the damage. Under Article XXIII we have to consider the appropriateness of the compensatory measures taken by the less-developed contracting party that suffered nullification or impairment. If, as we pointed out, the retaliatory action was exactly the same as the initial action, it might not have any effect on the economy of the country that caused the damage. Therefore the effects of any measures adopted by the less-developed contracting party on the economy of the country that caused the damage, should also be considered. What we mean to say under (a), (b) and (c) is that the difference in economic structure and economic power between two countries that are parties to the dispute should be weighed both in regard to the measure that caused nullification or impairment, or to the retaliatory or compensatory action taken by the party that was hurt. We also include the new idea of financial compensation. We know that the recommendations of the panel may start by the recommendation (1) of the withdrawal of the measure; and then by the provision of (2) adequate compensation, and finally by authorization of retaliatory measures. In this last we include the possibility that some adequate financial compensation might represent something equivalent to the initial damage that caused nullification or impairment. A country that was hurt by a trade measure might be compensated by a soft loan, for instance. We do not actually say that compensation should take this form but we have to leave open this possibility. In the last paragraph of this page we provide for a time period for the examination of the matter. This is a very important problem. The procedures under Article XXIII may drag on for so long that they may lose all interest. This is why, perhaps, most less-developed countries have never had recourse to Article XXIII. We say that, after an examination of the matter, contracting parties have to adopt a recommendation within a period of.... We leave open the number of months, but we believe it should be three months - after the initial representation. When the initial representation comes in, the first time period starts running, so the CONTRACTING PARTIES have to take action within it. If they do not take action within that period the less-developed contracting party is liberated of its obligations under the Agreement. If the CONTRACTING PARTIES do take action and there is a recommendation by the arbitration panel, the second time period comes into effect. If the country affected by the recommendation does not take action within a number of months, the less-developed contracting party is also

liberated of its obligations under the Agreement in order to take compensatory or retaliatory action. This is mere justice, because the CONTRACTING PARTIES cannot force a country to adhere to the letter of the Agreement when benefits accruing to it are not being respected. What this Article means is that in order to restore the bargaining power of the country suffering from nullification or impairment, and in order to permit it to protect itself we have to liberate it from obligations arising from its membership of the General Agreement toward the country who caused the damage. This is the last possible measure, when everything else has failed. If the CONTRACTING PARTIES do not act within the specified period, or if the country that caused the damage does not obey the recommendations, the least that the CONTRACTING PARTIES can do is to liberate the victim from its obligations so that it can act in its own defence.

3. In the next paragraph, we provide for a more specific case of nullification or impairment, where measures taken by developed countries are contrary to the provisions of the General Agreement and seriously inhibit the import opportunities of a less-developed country. This does not cover the full extent of Article XXIII and it does not provide for the "other situations". This would be the case of "prima facie" flouting of the General Agreement and adoption of measures that are inconsistent with it. In that case, when such measures actually result in serious damage to the import opportunities of a less-developed country, the urgent need for this country to take protective action should be recognized by liberating it from the provisions of the General Agreement in order to take compensatory or retaliatory action whilst awaiting the examination of the matter by the CONTRACTING PARTIES. A country would not be judge in its own case - we only intend to expedite the compensatory or retaliatory action while awaiting final decision by the arbitration panel and the CONTRACTING PARTIES. If the time periods are adhered to, this should be a matter of only a few months. This is nothing more than an extension to Article XXIII of the procedure of Article XIX in which, under special situations, a country is liberated from some of the commitments of the General Agreement in order to protect itself, when imports are increased under such conditions as to cause, or threaten, serious injury to domestic producers. This means that a country should be able to take action whilst awaiting judgment.

4. The last paragraph covers the case for collective action. Article XXIII is not restricted to individual action that does not conflict with the spirit of the General Agreement; there may or may not be such a conflict. Nevertheless, the compensatory or retaliatory action taken by the less-developed contracting party that suffered the damage is not enough to restore its economic situation. It may need collective action, it may need to resort to CONTRACTING PARTIES in order to ask for authorization to adopt the surcharges,

or something similar, or it may ask that some special recommendation be made collectively in order to restore the balance that was destroyed by the action causing nullification or impairment. We believe the question of Article XXIII should be part of a section of the Model Chapter and it should apply to nullification or impairment caused by developed contracting parties to less-developed contracting parties.

IV

COMPENSATION TO LESS-DEVELOPED CONTRACTING PARTIES
FOR LOSS OF TRADING OPPORTUNITIES RESULTING
FROM THE APPLICATION OF RESIDUAL RESTRICTIONS

The following points which have a bearing on the application of Article XXIII were brought out in document COM.TD/5:

(i) Where any consultations in respect of residual restrictions applied to exports of less-developed contracting parties, have already taken place in the Committee on Trade and Development, it should be possible to invoke paragraph 2 of Article XXIII without resort to the consultation procedures of Article XXII or paragraph 1 of Article XXIII.

(ii) Under paragraph 1 of Article XXIII it is open to a contracting party to propose the adoption of compensatory measures by the contracting party maintaining the residual restrictions, with a view to offsetting the loss of trading opportunities caused by these restrictions. Where a proposal for compensation has been made it is also open to the CONTRACTING PARTIES under paragraph 2 of Article XXIII to make an assessment of the loss suffered by the contracting party affected by the restrictions and to recommend the establishment of appropriate compensatory concessions.

(iii) Such a recommendation cannot however have a binding character, if it is not accepted by the contracting party to whom it is addressed and the final sanction in such circumstances must remain the authority in Article XXIII for withdrawal of concessions. Also the precise nature of the compensatory concessions to be offered must be a matter for negotiation between the contracting parties concerned.