Note on the main differences between Section C of the revised draft Article XVIII as suggested by the Secretariat and the present text of Sections B and C of Article XVIII.

1. Apart from the differences in the general approach of the suggested re-draft as a whole which have been explained to Working Parties I and II by the Executive Secretary, and which bear on the need to relate the special provisions of Article XVIII directly to the specific problems raised by the economic development of countries which have a low standard of living and which are under exceptional pressure to develop their economies, the main differences between Section C of the new draft and Sections B and C of the present Article are as follows.

2. In the course of consultations with the Authorities in under-developed countries, it appeared that the compromise reached in Havana did not enable the governments of those countries to get any support for their public opinions for an agreement which, on the face of it, made the achievement of their legitimate development projects dependent on decisions which would be taken by governments the interests of whose trade would be affected in the short run by the commercial policy measures required for the application of that programme. The political and psychological factors involved were of such a serious nature that it appeared necessary to seek for another solution which, while offering substantially the same degree of protection to interests of third countries as prior approval while avoiding the political odium attached to the concept of prior approval.

3. The choice between the present Article XVIII and the suggested re-draft of Section C would clearly depend on the decision taken in principle regarding the approach to the public. If prior approval is retained, then the suggested re-draft by the secretariat is of little usefulness. On the other hand, if prior approval is not retained, then some other system will have to be considered and the secretariat draft which was drafted in order to find such an alternative system might be considered as a useful basis for discussion.

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4. All the other differences between the two texts are in effect consequential.

5. If prior approval were not maintained, the system which appears the most appropriate is that of prior consultation. The difference between the two procedures is that under the prior approval procedure, if the CONTRACTING PARTIES do not concur in the measures proposed, the applicant country cannot introduce the measure, whereas it is free to apply it under the prior consultation procedure. The object of the consultation is to arrive at an agreement between the applicant country and the other contracting parties concerned; as a result of a full and frank discussion of the problems involved. If the CONTRACTING PARTIES are convinced by the applicant country that there is no other possibility consistent with the Agreement to meet the requirements of paragraph 2, i.e. that special governmental assistance through commercial policy measures is necessary "to promote the establishment of a particular industry in order to raise the general standard of living of the population", they would have to concur in the proposed measure. If, on the other hand, the CONTRACTING PARTIES are able to convince the applicant country that the measure is unnecessary because there are other remedies in the Agreement, and the applicant country withdraws the proposed measure, no problem arises. If, however, the consultation is not conclusive a procedure would have to be devised to enable the contracting parties affected by the measure to restore the balance of concessions which would be upset by the introduction of the measure considered.

6. One of the basic principles of the Agreement is that, if by unilateral action permitted under the Agreement, the balance of concessions and benefits is modified, the contracting parties affected have the right to restore the balance without asking for specific authority from the CONTRACTING PARTIES. The only way in which the CONTRACTING PARTIES can intervene is in satisfying themselves that the unilateral withdrawal of concessions or benefits does not go beyond what is necessary to restore the balance and does not take the form of reprisals. This principle has been embodied in the proposed re-draft of Article XVIII and the actual wording is taken from Article XIX paragraph 3(a).

7. The introduction of a new machinery of prior consultation and the provision of specific authority for unilateral redress appeared to make it unnecessary to provide for separate procedures to cover different cases. Under the present Article XVIII, there are three separate procedures: the most complicated one is the one embodied in Section B, which applies to the imposition of quantitative
restrictions or similar measures on bound items; the second, the so-called "automatic approval" is the easiest, but applies only to four specific cases (paragraph 7 of the Article); the third one, which is composed of two alternative procedures, applies to all other cases (paragraph 8). Furthermore, an emergency procedure is contained in paragraph 9 of the Article.

8. The secretariat's draft combines all these procedures into one. It is recognized that the suggested unification is not only procedural. The conditions to be met would be lighter in the case of paragraphs 5 and 8, but would, in theory, be more onerous in the case of paragraphs 7 and 9. It appeared on balance that the advantages of unifying the procedure outweighed the advantages of maintaining different procedures.

9. In the case of paragraph 5, the result would be that the applicant country could introduce a quantitative restriction or a similar measure on a bound item and therefore impair the value of the tariff concession without the consent of the contracting parties concerned. It appears, however, that, on balance, the protection contained in paragraph 13 of the new draft would be similar if not more effective than the protection afforded by the present agreement in the case of nullification or impairment of the concession, i.e. the Article XIII procedure.

10. In the case of paragraph 8, the difference is not very substantial since that paragraph does not limit in any way the freedom of action of the CONTRACTING PARTIES since no criteria are laid down. If anything, paragraph 12 of the new draft which defines the scope of prior consultation is more definite, since the decision of the Organization is based on a finding that there is no measure consistent with the other provisions of the Agreement which is feasible or practicable in order to enable the applicant government to give the assistance required to promote the establishment of a particular industry in order to raise the general standard of living of its population. It would seem that the provisions of paragraph 12 offer a better protection to the applicant country, as well as to the other countries concerned.

11. As regards paragraph 7, the difference between the facilities offered under that procedure and those under the new draft is a matter to be examined in the light of an assessment of value of the so-called "automatic approval". A careful
examination of the wording of paragraph 7, will show that the automatic nature of that procedure is qualified by a number of subjective tests, and that the cases covered by that procedure either refer to cases which are related to the post-war transitional period, or to marginal cases. The last case described in sub-paragraph (iv) is not sufficiently definite to guarantee that approval could be obtained without protracted discussions on all aspects of the measure.

12. On reflection, it appeared to the secretariat that the need for emergency action pending a decision by the CONTRACTING PARTIES was not of major importance, in view of the very nature of the problems covered by Article XVIII, i.e. the establishment of a new industry or a new line of production which will, in any case, require a lengthy technical consideration at the governmental level. On the other hand, the guarantee given in the text that, in any case, the applicant country would be free, if it so chooses, to introduce the measure not later than 90 days after notification appeared to give a valuable protection to the applicant country, since no decision of the CONTRACTING PARTIES will have the effect of blocking the introduction of the measure.

13. The simplification of procedures resulting from the new approach is not limited only to the unification of the various systems. It applies also to the other aspect of the consultation. First of all, the discussion of all cases is conducted at the same place, i.e. with the CONTRACTING PARTIES. Under the present procedure, in certain cases the discussions have to take place either with the CONTRACTING PARTIES, or with some interested parties. In other cases, the discussions with the CONTRACTING PARTIES have to be preceded by negotiations with individual contracting parties. Experience has shown that the existence of alternative procedures tends to confuse the issue and to delay the proceedings unduly. Under the new draft, the scope of the discussion is always the same. It deals with three aspects clearly defined under paragraph 12, and is designed to lead to a finding on a specific point.

14. Another important procedural difference between the new draft and the present Article XVIII is that prior consultation is required only when the Organization is satisfied that it is necessary. If no contrasting party wishes to have such a consultation, the proposed measure is deemed to have been approved after thirty days have elapsed. On the other hand, if consultation is requested, this consultation
will have to be completed within 90 days. When that time-limit has expired, the applicant country may take action. If the Organization has concurred, the applicant country is protected against counter-measures from other contracting parties; if, on the other hand, the CONTRACTING PARTIES are not in agreement with the measure, or have not been able to make up their minds one way or the other, the applicant country may act after assessing the advantages and disadvantages of such an action which might lead to measures taken by affected contracting parties to reduce the balance.

15. In principle, the time-limit of ninety days is the same as in the present Article. The only difference is that, in the new draft, ninety days is an absolute time-limit, whereas, in the present Article, the CONTRACTING PARTIES have the right to extend the time-limit under certain conditions. It should be noted, moreover, that there is no time-limit in the present Article for the completion of consultations and negotiations under paragraph 5 of the present text.

16. It might be useful to add that, even if the time-limit is the same under the new draft and the present Article, the difference of approach has an important bearing on the disadvantages of the delays involved. Finally, paragraph 14 of the new draft introduces another piece of machinery, namely an annual review of all measures applied under Section C. At present, no action is required either from the CONTRACTING PARTIES or from the applicant country so long as a release has been granted. In the opinion of the Secretariat, the annual review would be a useful addition to the present procedures because it would enable the contracting parties to discuss in a friendly manner with the countries having had resort to Section C the actual effects which those measures have had on their trade, and to consider whether, for instance, the administration of those measures could not be improved so as to minimize their effects on trade, or whether conditions would not allow the substitution of measures consistent with the Agreement for the measures taken under Section C of Article XVIII.