



The Havana Charter is not the model to reform the WTO
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Introduction: Preparation of the Charter and abortion of the ITO

The Havana Charter does not deserve the praise it has received from some economists, of which Jacques Nikonoff¹, François Collart Dutilleul² and UNCTAD in its 2018 annual report, which would have made possible to rethink the regulation of international trade on sustainable and inclusive development. Given the many attacks on the WTO today, of which those of President Donald Trump who wants to paralyse its Dispute Settlement Body (DSB), it is worth taking a look back at the past by analysing the possible lessons to be drawn from the Havana Charter.

It is known that the Charter, although signed by 56 States in March 1948 in Havana, was never ratified by the United States (US) Congress so that the International Trade Organisation (ITO) it wanted to create aborted. On the other hand, the GATT (General Agreement on Tariffs and Trade) was signed on 30 October 1947 in Geneva by 23 countries, of which 11 developing countries, pending the finalisation of the Charter, which was to constitute its Chapter IV on "Trade Policy".

However, it was the US, after consultation with the United Kingdom, that initiated the Charter and it was on the basis of their text, inspired by the Atlantic Charter they had co-signed in 1941, that it was drafted. The US submitted to the United Nations Economic and Social Council in November 1945 a "*Proposal for the Expansion of World Trade and Employment*", and it was on this basis that the United Nations convened its Member States to the Havana Conference. It is therefore insufficient to write that "*The Havana Charter was drafted and negotiated in a UN committee... It was the UN that convened the Havana Conference*" (Jacques Nikonoff).

¹ Jacques Nikonoff, *Contre le libre-échange: la Charte de la Havane* (<http://tiki.societal.org/tiki-index.php?page=CharteLaHavane>); *La Charte de la Havane*, Manières de voir, Le Monde Diplomatique, février 2007.

² François Collart Dutilleul, *La Charte de la Havane, pour une autre mondialisation*, Dalloz, janvier 2018.

The reasons for the non-ratification by the US Congress were due to the other priorities of the time: NATO (North Atlantic Treaty Organization) and the OECD (with the Marshall Plan) in view of the spread of communism in Eastern Europe and instability in Asia, particularly the looming Korean War. In fact, Congress was not even in favour of the GATT that the government negotiated alone under the America's reciprocal trade agreements act, passed in 1934, which was the beginning of the Trade Promotion Authority or Fast Track, according to which Congress can only adopt or reject as a whole trade agreements negotiated by the government without being able to amend them. This 1934 law gave rise to 32 bilateral trade agreements from 1934 to 1945 that included the Most Favoured Nation (MFN) clause. It is because many third countries benefited from this clause without having to make trade concessions to the US that it understood the need for a multilateral agreement. But Congress only accepted a global vote on the GATT in 1947 because it did not interfere with US laws, particularly labour and competition laws, because it allowed agriculture (and not only agriculture) to continue to be protected and subsidized, and because GATT membership had to be renewed every three years.

The main points of the Havana Charter and the ITO on which the above economists' assessments must be challenged include the issue of the ITO's close collaboration with the United Nations and its specialized agencies, mainly the ILO (International Labour Organisation) and FAO (International Food and Agriculture Organisation of the United Nations), and the objective of full employment set out in the Charter.

A first observation is that, in order to enhance the value of those chapters of the Charter that do not deal directly with trade issues, these economists have come to forget that Chapter IV of the Charter on "Trade Policy" is, with a few details, the GATT copy and paste. By criticizing the GATT, they are also unknowingly criticizing the Charter. Moreover, in many respects the Charter is more free trade than GATT, especially since GATT was amended in 1965 with the addition of Part IV on "Trade and Development" (Articles XXXVI to XXXVIII) and in 1979 with the addition of the Enabling Clause as an annex.

I - Assumptions on the ITO's submission to the UN

The relations provided for by the Charter with the United Nations are not absent from the GATT and collaboration with the ILO and FAO was constrained by the primacy given to trade liberalisation.

I.1 - Assumptions about the ILO's close relationship with the United Nations in general

For J. Nikonoff, *"Article 1 of the Havana Charter, which sets out its purpose, is particularly clear: "To achieve the objectives set out in the Charter of the United Nations, particularly the raising of living standards, full employment and conditions for progress and development"* and, for F. Collart Dutilleul, *"The Charter was under the control of the UN, like the ITO it tended to create, unlike the current WTO... independent of the UN... The other important consequence is the objective of full employment that international trade must aim to achieve. We can see the importance that this could have today if the Havana Charter were in force"*.

In fact, the GATT itself does not exclude collaboration with the United Nations as article XXIII states that *"The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organisation in cases where they consider such consultation necessary"*.

Article XXXVI adds: "7. *There is need for appropriate collaboration between the CONTRACTING PARTIES, other intergovernmental bodies and the organs and agencies of the United Nations system, whose activities relate to the trade and economic development of less-developed countries*".

As for the Enabling Clause of 28 November 1979, annexed to GATT, its article 1 provides: "*Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties*".

Above all the ITO objectives on full employment are shared by the preambles of GATT and WTO:

- Preamble of GATT: "*Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods*".

- Preamble of the WTO Agreement: "*The Parties to this Agreement... Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development*".

Another advantage of the Charter that F. Collart Dutilleul highlights is that "*the majority principle (one Member State = one vote) governs the ITO as opposed to the WTO which is paralysed by the requirement of consensus*". To affirm that this decision-making is more democratic than the WTO consensus is debatable since, according to article 78.2.C): "*In selecting the members of the Executive Board, the Conference shall have regard to the objective of ensuring that the Board includes Members of chief economic importance, in the determination of which particular regard shall be paid to their shares in international trade, and that it is representative of the different types of economies or degrees of economic development to be found within the membership of the Organization*". It goes without saying that this would have given overwhelming dominance to the most developed countries in decision-making. It is true, however, that decision-making at the WTO must be improved, but this should be done along the lines of what is done in the EU Council, where the majority of decisions are taken by a double qualified majority, which must include 55% of the Member States and at least 65% of the EU total population. If the same rule were applied at the WTO, it would give a majority to developing countries given their demographic weight, which would be more democratic.

I.2 - ITO's collaboration with the ILO on social standards

Indeed, Article 7.3 of the Charter on "Fair Labour Standards" provides that "*In all matters relating to labour standards that may be referred to the Organization in accordance with the*

provisions of Articles 94 or 95, it shall consult and co-operate with the International Labour Organisation".

But the collaboration with the ILO on respect for "*fair labour standards*" is above all symbolic because nowhere in the Charter is there a hierarchy of rules where respect for fundamental human and social rights takes precedence over the objective of competition and increasing trade openness.

Article 1 of the Charter, relating to its objectives, emphasises that it aims is: "*4. To promote on a reciprocal and mutually advantageous basis the reduction of tariffs and other barriers to trade and the elimination of discriminatory treatment in international commerce. 5. To enable countries, by increasing the opportunities for their trade and economic development, to abstain from measures which would disrupt world commerce, reduce productive employment or retard economic progress*".

For these central commercial objectives of the Charter, the procedure is the one detailed in Chapter V on "*Restrictive business practices*" (Articles 46 to 54), based on "*consultations*" (Article 47), "*complaints*" (Articles 48 and 50) through the ITO, which decides to conduct an "*investigation*" whereby it "*will inform all Member States of its findings and the reasons supporting them*", it shall "*request each interested Member State to take all measures in its power to remedy the situation*", it shall "*may request any interested Member State to send it a full report on the measures it has taken in a particular case to remedy the situation*" and it shall "*inform all Member States of the measures taken by the Member States concerned in each particular case and shall publish this information*". This is discussed in section II.2 on competition.

In the Charter sub-commission charged with preparing the drafting of social standards "*The majority of the Members of the Sub-Commission considered that the issue of non-discrimination in employment could not be adequately and adequately addressed in the charter of an international trade organization*"³.

In addition, the scope of ILO labour standards should not be overestimated, as they do not concern the convergence of wages and social benefits between countries, but compliance with the four fundamental standards on freedom of association, collective bargaining, the prohibition of forced labour and child labour when organised under conditions equivalent to slavery.

I.3 - Regulation of agricultural commodity markets and collaboration with FAO

I.3.1 - Collaboration with FAO on international commodity agreements

The reference in Article 67 of the Charter to FAO is made "*With the object of ensuring appropriate co-operation in matters relating to intergovernmental commodity agreements*".

In doing so, the Charter goes further than GATT 1947 but much further than Articles XXXVI to XXXVIII of Part IV of GATT on "Trade and Development" which was added in 1965:

³ United Nations Conference on Trade and Employment, Reports of Committees and Principal Sub-Committees, ICITO 1/8, September 1948
(<http://sul-derivatives.stanford.edu/derivative?CSNID=90180096&mediaType=application/pdf>).

In doing so, the Charter goes further than GATT 1947 but much less than Articles XXXVI to XXXVIII of Part IV of GATT on "Trade and Development" which was added in 1965:

1- Article XXXVI: "7. *There is need for appropriate collaboration between the CONTRACTING PARTIES, other intergovernmental bodies and the organs and agencies of the United Nations system, whose activities relate to the trade and economic development of less-developed countries*".

2- Article XXXVIII: "2. *In particular, the CONTRACTING PARTIES shall:... (b) seek appropriate collaboration in matters of trade and development policy with the United Nations and its organs and agencies, including any institutions that may be created on the basis of recommendations by the United Nations Conference on Trade and Development*".

Admittedly, Articles 55 to 70 of the Charter are more detailed on the modalities of functioning of commodity agreements, in particular on what the Charter calls "control agreements", defined in Article 61.2: "*(a) a commodity control agreement is an inter-governmental agreement which involves: the regulation of production or the quantitative control of exports or imports of a primary commodity and which has the purpose or might have the effect of reducing, or preventing an increase in, the production of, or trade in, that commodity; or (b) the regulation of prices*".

But these control agreements are designed more for the benefit of consumers in developed importing countries than for producers in exporting developing countries:

- Article 63.a: "*Such agreements shall be designed to assure the availability of supplies adequate at all times for world demand at prices which are in keeping with the provisions of Article 57 (c), and, when practicable, shall provide for measures designed to expand world consumption of the commodity*".

- Article 57.c: "*The Members recognize that inter-governmental commodity agreements are appropriate for the achievement of the following objectives:... c) to prevent or moderate pronounced fluctuations in the price of a primary commodity with a view to achieving a reasonable degree of stability on a basis of such prices as are fair to consumers and provide a reasonable return to producers*".

- Indeed, according to article 63.b, "*Under such agreements, participating countries which are mainly interested in imports of the commodity concerned shall, in decisions on substantive matters, have together a number of votes equal to that of those mainly interested in obtaining export markets for the commodity. Any participating country, which is interested in the commodity but which does not fall precisely under either of the above classes, shall have an appropriate voice within such classes*".

Especially since, according to article 63.c, "*Such agreements shall make appropriate provision to afford increasing opportunities for satisfying national consumption and world market requirements from sources from which such requirements can be supplied in the most effective and economic manner, due regard being had to the need for preventing serious economic and social dislocation and to the position of producing areas suffering from abnormal disabilities*".

In other words, the Charter did not allow commodity agreements between producing countries only and in their sole interest. On the other hand, Article XXXVIII of the GATT, introduced in 1965, does not exclude international commodity agreements between producing countries only; at least it does not say that they must be accepted by consumer countries: "*In particular, the CONTRACTING PARTIES shall: (a) where appropriate, take action, including action through*

international arrangements, to provide improved and acceptable conditions of access to world markets for primary products of particular interest to less-developed contracting parties and to devise measures designed to stabilize and improve conditions of world markets in these products including measures designed to attain stable, equitable and remunerative prices for exports of such products".

Moreover, F. Collart Dutilleul considers that *"While Article 45 of the Charter (and Article XX of the GATT) requires that the measure taken does not disguisedly affect international trade, this condition is replaced in Article 70 by the conformity of the measures taken with the economic, social and environmental objectives assigned to trade in commodities".* In doing so, he forgets to mention the restrictions of Article 70, of which in paragraph 1.b (*"Provided that if, upon complaint by a non-participating Member, the Organization finds that the interests of that Member are seriously prejudiced by the agreement, the agreement shall become subject to such provisions of this Chapter as the Organization may prescribe"*) as in paragraph 1.c (*"provided that such agreement is not used to accomplish results inconsistent with the objectives of Chapter V or Chapter VI"*) and paragraph 1.d (*"if the Organization finds, upon complaint by a non-participating Member, that the interests of that Member are seriously prejudiced by the agreement, the agreement shall become subject to such provisions of this Chapter as the Organization may prescribe"*).

In general, it is difficult to understand the author's comments opposing the Charter to GATT since GATT corresponds to Chapter IV of the Charter, even though GATT 1947 was enriched in 1965 by the addition of Part IV. For example, when he wrote: *"In terms of economic laws, the GATT glorified "belief" in prices as the main criterion of competition in international trade. This was manifested first of all by the reduction of customs tariffs, which distort price adjustment simply by meeting supply and demand and by the prohibition of any discrimination (in particular by the most-favoured-nation clause and the national treatment clause)... The Havana Charter implements a law adjusting resources and needs that makes it possible to build a credible alternative to GATT's primary free trade".* Apparently it forgets both the aforementioned GATT Articles XXXVI to XXXVIII (providing for *"measures to stabilize prices at equitable and remunerative levels"*) and the 1979 Enabling Clause which authorized the Generalized System of Preferences for Developing Countries (implemented by the EU in 1971) and the even more advantageous system for LDCs (least developed countries) implemented since May 2001.

I.3.2 - The issue of food stocks

For François Collart Dutilleul *"The Havana Charter includes an article not included in the GATT. This is Article 32 on the liquidation by a State of stocks accumulated for non-commercial purposes... The issue of stocks pitted India against the United States, particularly during the Bali round of negotiations in December 2013... Basically, such a crisis would not have been appropriate with Article 32 of the Havana Charter, which allowed a country, through the constitution of public stocks, to maintain minimum food sovereignty covering the poor population and the risks of shortage".*

Section 32 of the Charter does indeed provide that *"If a Member holding stocks of any primary commodity accumulated for non-commercial purposes should liquidate such stocks, it shall carry out the liquidation, as far as practicable, in a manner that will avoid serious disturbance to world markets for the commodity concerned".*

But F. Collart Dutilleul ignores several provisions of the WTO Agreement on Agriculture (AoA) and has not taken into account the proposals of the G33 of developing countries, represented by India, since the revised Draft Agricultural Modalities of 6 December 2008.

First, the content of Article 9 of the AoA is close to Article 32 of the Charter: "*1. The following export subsidies are subject to reduction commitments under this Agreement: ... b) the sale or disposal for export by governments or their agencies of non-commercial stocks of agricultural products at a price lower than the comparable price charged for the like product to buyers in the domestic market*".

But above all, footnote 5 of paragraph 3 of Annex 2 of the AoA on "Holding public stocks for food security purposes" must be taken into account: "*For the purposes of paragraph 3 of this Annex, governmental stockholding programmes for food security purposes in developing countries whose operation is transparent and conducted in accordance with officially published objective criteria or guidelines shall be considered to be in conformity with the provisions of this paragraph, including programmes under which stocks of foodstuffs for food security purposes are acquired and released at administered prices, provided that the difference between the acquisition price and the external reference price is accounted for in the AMS*"⁴. In other words, this provision is contrary to the food sovereignty of developing countries as long as products are not exported at a price below the domestic market price. It is also absurd since the reference price in question is the 1986-88 border price⁵.

The G33 countries, represented by India, included in Annex B of the draft agricultural modalities of 6 December 2008 the following sentence at the end of footnote 5 to Article 3 of Annex 2 to the AoA: "*However, acquisition of stocks of foodstuffs by developing country Members with the objective of supporting low-income or resource-poor producers shall not be required to be accounted for in the AMS*".

Unfortunately, developed countries have never accepted this request and it is therefore not the Havana Charter that would have allowed developing countries to retain a minimum food sovereignty. On the other hand, SOL has shown that a strict interpretation of this paragraph 3 should also apply to massive US domestic food aid⁵.

I.3.3 - Other aspects of the issue of agricultural subsidies

On export subsidies for commodities, Jacques Nikonoff is mistaken in stating that "*The "export priority", which is the general slogan of all countries, and particularly of France since the 1982-1983 alignment on neoliberal policies, cannot be an acceptable policy for the ITO*". This is also the case of F. Collart Dutilleul for whom, in the Charter, "*export subsidies are purely and simply prohibited*". This is not true since, according to Article 28 of the Charter on "*Undertaking regarding Stimulation of Exports of Primary Commodities*" "*1. Any Member granting any form of subsidy, which operates directly or indirectly to maintain or increase the*

⁴ Aggregate Measurement of Support or amber box of domestic agricultural supports considered to have trade-distorting effects and subject to reduction.

⁵ SOL's comments on Alan Matthews' evaluation of the EU-Brazil proposal on public stockholding, 29 July 2017, <https://www.sol-asso.fr/wp-content/uploads/2017/01/SOLs-comments-on-Alan-Matthews-evaluation-of-the-EU-and-Brazil-proposal-on-Public-Stockholding-July-29-2017-1.pdf>; *Reconciling the views on a permanent solution to the issue of public stockholding for food security purposes*, October 2017, <https://www.sol-asso.fr/wp-content/uploads/2017/10/Reconciling-the-views-on-a-permanent-solution-to-the-issue-of-public-stockholding-for-food-security-purposes-1.pdf>

export of any primary commodity from its territory, shall not apply the subsidy in such a way as to have the effect of maintaining or acquiring for that Member more than an equitable share of world trade in that commodity". This provision is identical to Article XVI.3 of the GATT, which therefore allows export subsidies.

But the WTO Agreement on Subsidies and Countervailing Measures (ASCM) provides in Article 5.c that *"This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture"* (a similar provision is also in Article 3.1), because Articles 9 to 11 of the AoA effectively authorise export subsidies for agricultural products under certain conditions, even though WTO Member States undertook at the Nairobi Ministerial Conference in December 2015 to abolish them permanently.

But the problem is that no commitment has been made to reduce domestic agricultural subsidies on exported products, even though they have exactly the same dumping effect as explicit export subsidies. This is particularly the case for the EU, which claims that its domestic agricultural subsidies have even less a dumping effect because they are mostly decoupled from the level of prices and production and notified (wrongly) in the WTO's green box.

In fact the EU pretends to ignore Article 13 of the AoA, which states, among other things, that: *"During the implementation period, notwithstanding the provisions of GATT 1994 and the Agreement on Subsidies and Countervailing Measures (referred to in this Article as the "Subsidies Agreement"):* (a) *domestic support measures that conform fully to the provisions of Annex 2 to this Agreement shall be:* (i) *non-actionable subsidies for purposes of countervailing duties*⁶; (ii) *exempt from actions based on Article XVI of GATT 1994 and Part III of the Subsidies Agreement".* As the "implementation period" was the 9-year period from 1995 to 2003, all product-specific subsidies of the AoA Annex 2 could have been sued since 2004 under the ASCM. This is precisely what the United States did by imposing countervailing and anti-dumping duties on its imports of Spanish table olives on 25 July 2015⁷. And while not all decoupled income subsidies in paragraph 6 of Annex 2 are product-specific, in any case they do not meet the 6 conditions for them to exist.

It is true that Article 25 of the Charter on "Subsidies in general" (when Article 26 deals with "Additional Provisions on Export Subsidies") – identical to Section A of Article XVI of the GATT on "Subsidies in General" while Section B deals with "Additional Provisions on Export Subsidies") – provides a very useful argument to challenge the dumping effect of domestic agricultural subsidies that the EU refuses to recognize: *"If any Member grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to maintain or increase exports of any product from, or to reduce, or prevent an increase in, imports of any product into, its territory, the Member shall notify the Organization in writing of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary. In any case in which a Member considers that serious prejudice to its interests is caused or threatened by any such subsidization, the Member granting the subsidy shall, upon request, discuss with the other*

⁶ "Countervailing duties" where referred to in this Article are those covered by Article VI of GATT 1994 and Part V of the Agreement on Subsidies and Countervailing Measures.

⁷ *Alea iacta es: how Spanish olives will force a radical change of the CAP*, SOL, 7 November 2018: <https://www.sol-asso.fr/wp-content/uploads/2017/01/Alea-iacta-es-how-Spanish-olives-will-force-a-radical-change-of-the-CAP-7-November-2018.pdf>

Member or Members concerned, or with the Organization, the possibility of limiting the subsidization".

II - The employment and development objectives of the Charter were subordinate to its trade liberalization objective

II.1 - The employment objectives of the Charter

For Jacques Nikonoff, *"The Havana Charter proposes an approach that is at odds with current conceptions of international trade. For it, this trade can have only one purpose: the development of each country individually, in the context of international relations based on cooperation and not on competition"* and it quotes paragraph 2 of Article 2 of the Charter: *"The Members recognize that, while the avoidance of unemployment or underemployment must depend primarily on internal measures taken by individual countries, such measures should be supplemented by concerted action under the sponsorship of the Economic and Social Council of the United Nations in collaboration with the appropriate inter-governmental organizations"*. In fact, the employment objective of the Charter is subordinated to that of further trade liberalisation, including in articles other than those on Trade Policy.

Article 3, paragraph 2, on *"Maintaining employment within the country"* states that *"Measures to sustain employment, production and demand shall be consistent with the other objectives and provisions of this Charter"*.

While Article 13 (1) lays down the principle that the protection of the economy is possible (*"The Members recognize that special governmental assistance may be required to promote the establishment, development or reconstruction of particular industries or branches of agriculture, and that in appropriate circumstances the grant of such assistance in the form of protective measures is justified"*), it adds immediately: *"At the same time they recognize that an unwise use of such measures would impose undue burdens on their own economies and unwarranted restrictions on international trade, and might increase unnecessarily the difficulties of adjustment for the economics of other countries"*.

Paragraphs 3 to 9 of Article 13 impose very restrictive conditions on the possibilities for a country to increase its level of protection:

- (i) First, this increase must be compatible with the provisions of Chapter IV on trade policy, which is in fact the GATT agreement (paragraph 3).
- (ii) It must then negotiate with all the other Member States or apply directly to the ITO, which may itself authorize the increase only with the agreement of the Member States affected by the increase (paragraph 3).
- (iii) Affected Member States may take trade retaliatory measures: *"Any Member which has a contractual right in respect of the product to which such action relates, and whose trade is materially affected by the action, may suspend the application to the trade of the applicant Member of substantially equivalent obligations or concessions under or pursuant to Chapter IV"* (article 13 paragraph 4.c).

If the increase in protection is not sufficient to limit the disturbances in the national economy resulting from the increase in imports, additional measures may be taken, but *"provided that such measures do not restrict imports more than necessary to offset the increase in imports referred to in this sub-paragraph except in unusual circumstances, such measures shall not*

reduce imports below the level obtaining in the most recent representative period preceding the date on which the Member initiated action under paragraph 3" (Article 13 paragraph 4.a).

Paragraph 6 of the same article 13 specifies that *"If a Member in the interest of its economic development or reconstruction considers it desirable to adopt any non-discriminatory measure affecting imports which would conflict with Chapter IV, but which would not apply to any product in respect of which the Member has assumed an obligation through negotiations with any other Member or Members pursuant to Chapter IV... the Organization shall concur in the proposed measure and grant the necessary release for a specified period... (if) it is established that the measure... is necessary, in view of the possibilities and resources of the applicant Member to promote the establishment or development of a particular industry for the processing of an indigenous primary commodity, or for the processing of a by-product of such industry, which would otherwise be wasted, in order to achieve a fuller and more economic use of the applicant Member's natural resources and manpower and, in the long run, to raise the standard of living within the territory of the applicant Member, and is unlikely to have a harmful effect, in the long run, on international trade; iv) is unlikely to be more restrictive of international trade than any other practicable and reasonable measure permitted under this Charter", knowing that "the Organization shall not concur in any measure under the provisions of (i), (ii) or (iii) above which is likely to cause serious prejudice to exports of a primary commodity on which the economy of another Member country is largely dependent".*

Article 17 of the Charter is more specific than GATT with regard to the objective of reducing import protection: *"1. Each Member shall, upon the request of any other Member or Members, and subject to procedural arrangements established by the Organization, enter into and carry out with such other Member or Members negotiations directed to the substantial reduction of the general levels of tariffs and other charges on imports and exports, and to the elimination of the preferences referred to in paragraph 2 of Article 16 on a reciprocal and mutually advantageous basis".*

Article 18 of the Charter on national treatment is identical to Article III of the GATT, in particular paragraph 4 of these two articles: *"4. The products of any Member country imported into any other Member country shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations, and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use".*

The exception of public procurement to the national treatment clause is worded in the same way in paragraph 8.a of Article III of the GATT and paragraph 8.a of Article 18 of the Charter: *"8. (a) The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale".* Therefore, the right to reserve public procurement for domestic producers is not a specific feature of the Charter that GATT would have abandoned.

II.2 - The competition policy of the Charter

The Charter goes much further than the GATT in promoting competition policy, which the US did not want, since it devotes the whole of Chapter V on *"Restrictive Trade Policies"*.

1- Article 46: *" General Policy towards Restrictive Business practices 1. Each Member shall take appropriate measures and shall co-operate with the Organization to prevent, on the part*

of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any of the other objectives set forth in Article 1".

2- Article 52 : "*Domestic Measures against Restrictive Business Practices- No act or omission to act on the part of the Organization shall preclude any Member from enforcing any national statute or decree directed towards preventing monopoly or restraint of trade*".

3- Article 53: The Charter goes much further than the GATT since this article requires international competition for many services, including those provided by public companies:

"1. The Members recognize that certain services, such as transportation, telecommunications, insurance and the commercial services of banks, are substantial elements of international trade and that any restrictive business practices by enterprises engaged in these activities in international trade may have harmful effects similar to those indicated in paragraph 1 of Article 46... 2. If any Member considers that there exist restrictive business practices in relation to a service referred to in paragraph 1 which have or are about to have such harmful effects, and that its interests are thereby seriously prejudiced, the Member may submit a written statement explaining the situation to the Member or Members whose private or public enterprises are engaged in the services in question".

Most commentators see the Charter as the source of competition policy in regulating international trade, highlighting contradictory perceptions of the Charter's anti-liberal nature:

- "*The Charter nevertheless serves as an important historical example of the international recognition that the potential of trade liberalization and development objectives can be undermined by anti-competitive practices, and of the need to take appropriate measures*"⁸.

- "*The document of the Charter of the International Trade Organization (the Havana Charter) included Chapter V, which deals with restrictive activities of companies such as pricing and market division. Due to the abortion of the Havana Charter, Chapter V fell into limbo*"⁹.

- "*The relationship between competition and trade was recognised in the Havana Charter of 1948, the ambitious proposal on the post-World War II global trading system, which eventually led to the more limited GATT. The original Havana Charter included a chapter setting out rules on "trade restrictive practices," or antitrust principles (as they should have been called instead*"¹⁰.

While the principle of the prohibition of quantitative restrictions is identical in the Charter (Article 20) and GATT (Article XI), the conditions for the derogation allowed for agricultural and fisheries products are much stricter in the Charter than in GATT, so that the assertion that the Charter would have allowed food sovereignty unlike GATT is totally unfounded, particularly in terms of the authorisation of forms of agricultural protection other than customs duties.

For its part, in its 2018 report, UNCTAD states that "*There should be little doubt that using tariffs to mitigate the problems of hyperglobalization will not only fail, but also runs the danger*

⁸ Seema Gaur, *Competition Provisions in Trade Agreements. How to Realise their Potential?* July 2016
/working/CompPrincInRTAs.pdf

⁹ <http://law.wustl.edu/wugslr/issues/volume1/p463Matsushita.pdf>

¹⁰ <http://www.usdoj.gov/atr/public/speeches/0170.htm>

*of adding to them, through a damaging cycle of retaliatory actions, heightened economic uncertainty, added pressure on wage earners and consumers, and eventually slower growth*¹¹.

Martin Khor, then Manager of the Third World Network, wrote in Avril 1999: "*Policy-makers in major developed countries are advocating the introduction of a new agreement on competition policy in the World Trade Organisation so that their big corporations will be better able to take over a larger share of the markets of developing countries. Ironically, competition policy was originally understood as a means to help small companies not to be overwhelmed by the big firms. But it is now sought to be used by the rich countries to help their giant corporations compete with the local firms in the developing countries. By bringing the issue into the WTO, the rich countries plan to make use of the organisation's principle of 'non-discrimination' to argue that local firms cannot be treated more favourably than foreign firms*". Since then, developing countries have maintained their opposition to an international agreement on competition as well as on the other "Singapore themes" (on public procurement, investment, trade facilitation) as Martin Khor analysed again in 2007¹².

While an Agreement on Trade Facilitation was reached at the WTO Ministerial Conference in Bali in December 2013, this agreement will have perverse effects for the poorest developing countries such as those of sub-Saharan Africa, which will have to devote significant financial resources to it to facilitate international trade, while absolute priority should be given to facilitating domestic and regional trade. For example, "*Imported rice remains more affordable in southern urban markets than locally produced (northern) Nigerian rice that faces high internal transportation costs*"¹³. Ken Ukaoha explained the difficulties of transporting goods between ECOWAS countries: "*When I import raw materials like leather from Hamburg in Germany to Lagos in Nigeria, I pay 850 euros [\$986] for a 40-foot container. But the same container transporting our products from Lagos to Tema Port in Ghana costs 1,350 euros [\$1566]*"¹⁴. However, the distance from Lagos to Tema is 218 nautical miles compared to 4,625 miles from Rotterdam (closer than Hamburg) to Lagos!

III - The ITO's allegiance to the IMF and the issue of capital movements

Article 24 of the Charter affirms the same allegiance of the ITO to the IMF as Article XV of the GATT for all exchange rate matters but also for "*quantitative restrictions on trade and other trade measures within the competence of the Organization*", which leaves room for a very broad interpretation: "*1. The Organization shall seek co-operation with the International Monetary Fund to the end that the Organization and the Fund may pursue a co-ordinated policy with regard to exchange questions within the jurisdiction of the Fund and questions of quantitative restrictions and other trade measures within the jurisdiction of the Organization... 2... and shall accept the determination of the Fund whether action by a Member with respect to exchange matters is in accordance with the Articles of Agreement of the International Monetary Fund... 4. Members shall not, by exchange action, frustrate, the intent of the provisions of this Section, nor, by trade action, the intent of the provisions of the Articles of Agreement of the International Monetary Fund*".

¹¹ https://unctad.org/en/PublicationsLibrary/tdr2018_en.pdf

¹² Martin Khor, *The "Singapore Issues" in the WTO: Evolution and Implications for Developing Countries*, 2007,

¹³ USDA, FAS, Nigeria, Grain and Feed Update, 6 December 2018,

https://gain.fas.usda.gov/Recent%20GAIN%20Publications/Grain%20and%20Feed%20Update_Lagos_Nigeria_12-6-2018.pdf

¹⁴ <https://www.un.org/africarenewal/magazine/august-november-2018/infrastructure-key-intra-african-trade>

This subordination to IMF decisions greatly weakens the scope of the attempts to "restore the internal balance of payments balance" stipulated in Article 4 of the Charter, and thus the assessments made by Jacques Nikonoff when he states that "A fundamental principle: that of balance of payments balance. This principle is the most important of the Havana Charter and gives it its framework. It means that no country should be in a structural situation of surplus or deficit in its balance of payments". The Charter is very far from prescribing a balance of trade and balance of payments, at most this is an objective, moreover shared by the GATT in paragraph 3.a of Article XII: "Contracting parties undertake, in carrying out their domestic policies, to pay due regard to the need for maintaining or restoring equilibrium in their balance of payments on a sound and lasting basis".

Similarly, J. Nikonoff ignores the GATT when he claims that the Charter has a different position on the possibilities of increasing protection in the event of a balance of payments imbalance. GATT devotes Articles XII and XVIII to this problem. Article XII, paragraph 1, clearly states that: "Notwithstanding the provisions of paragraph 1 of Article XI, any contracting party, in order to safeguard its external financial position and its balance of payments, may restrict the quantity or value of merchandise permitted to be imported, subject to the provisions of the following paragraphs of this Article".

Although this is a theoretical provision since the IMF must give its opinion on the reality of these difficulties, which it denied, for example, in the panel on India, which was condemned on appeal in 1999, on complaint by the United States, to eliminate its quantitative import restrictions because the IMF had declared its balance of payments deficit to be sustainable.

Jacques Nikonoff finally overestimates the possibilities of controlling capital movements allowed by the Charter, when he states: "When we say today that capital movements must be controlled, frankly, we did not invent anything because 60 years ago, this proposal was already made!". It refers to paragraph 1.c of Article 12 which states: "without prejudice to existing international agreements to which Members are parties, a Member has the right: (i) to take any appropriate safeguards necessary to ensure that foreign investment is not used as a basis for interference in its internal affairs or national policies. (ii) to determine whether and, to what extent and upon what terms it will allow future foreign investment".

But it forgets to specify the limits of the Charter on this right of control of international capital, specified in sub-paragraph b of the same paragraph ("The international flow of capital will be stimulated to the extent that Members afford nationals of other countries opportunities for investment and security for existing and future investments") and in paragraph 2.a ("Members therefore undertake:... i) to provide reasonable opportunities for investments acceptable to them and adequate security for existing and future investments"), failing which foreign investment would be unlikely to take place since it cannot be forced. And the Charter obviously does not provide for the possibility of nationalising foreign investment.

Conclusion

At the end of this analysis, the reader should not misunderstand it. In the aftermath of the Second World War, high hopes were pinned on an international trade organization that would not make trade an end in itself, but would serve global human objectives: raising living standards and reducing inequalities between countries (including through commodity agreements that would ensure decent prices) and within each country through the priority given to employment, social standards and economic development.

The focus on employment and economic development was linked to the conclusions drawn from the protectionist management of the great crisis of the 1930s, which was accused of having led to war, a conclusion too rapid because the main cause was the poor exchange rates management of countries that remained on the gold standard, of which France and Germany, which, because they could not devalue to import less, had to resort to an excessive escalation of customs duties. Hence the idea that the Charter should focus on further trade liberalization as a means of promoting employment and development.

It is not surprising that, during a debate on the Charter on 28 November 1947, the President of the International Chamber of Commerce said: "*Now, gentlemen, you will be the last who will want to create a Charter so complex and so full of exceptions as only in the future to be an object of contention on interpretation between the schoolmen and the lawyers*"¹⁵.

F. Collart Dutilleul himself makes abundant reference to the complexity and even inconsistencies of the Charter: "*The Charter is very complex... The substantive provisions overlap, accumulate, juxtapose, complement each other and are accompanied by procedures, which are also complex... The Charter... oscillates between complexity and coherence*". But his enthusiasm to build a more social and solidarity-based world between developed and developing countries made him take his desires for reality.

The refusal of the US Congress to ratify the Charter is due to two partly contradictory reasons: - on the one hand, it considered that the Charter was too liberal in seeking to impose both "*the regulation of commodity markets, restrictive business practices and the regulation of international investments*"¹⁶. For the International Chamber of Commerce (ICC), "*The growth of multilateral trade and the recovery and expansion of foreign investment are essential prerequisites for successful economic development and a high and effective level of employment and rising living standards*"¹⁷.

- on the other hand, Congress considered that the Charter was not liberal enough by providing too many "*safeguards, exemptions, exceptions, and restrictions, all designed to protect the balance of payments and a variety of domestic social policies*".

In fact, the Congress found that the exceptions were too broad for the rest of the world, especially for developing countries, and that they were not broad enough for the US. Finally, the GATT was largely sufficient for them since it was less liberal than the Charter and provided sufficient safeguards, in particular the possibility of protecting agriculture through quantitative restrictions and subsidizing its exports.

If the Havana Charter and the ITO do not constitute the desirable reference for designing a multilateral trade organisation that promotes sustainable and inclusive development at the global level, there is an urgent need to develop a credible alternative by radically changing WTO rules. This is achievable by subjecting its trade rules to a hierarchy of standards where respect for human, social and environmental rights takes precedence over the objective of competition and increasing trade and financial openness. And, for this hierarchy to be

¹⁵ United Nations Conference on Trade and Employment, *Statement by Arthur Guinness, President of the International Chamber of Commerce*, 28 November 1947, https://www.wto.org/gatt_docs/English/SULPDF/90200347.pdf.

¹⁶ John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, International Organization, Volume 36, Issue 2, International Regimes, Spring 1982, 379-415, www.wto.org/english/forums_e/public_forum_e/ruggie_embedded_liberalism.pdf.

¹⁷ United Nations Conference on Trade and Employment, *Statement by Arthur Guinness, President of the International Chamber of Commerce*, 28 November 1947.

implemented, the composition of the three DSB judges should be modified at first instance (panels) as at the Appellate Body, where one of the three judges would be an expert in international environmental law and human and social rights law.

Indeed, the Doha Round is in agony because the developed countries do not want to change the rules on domestic agricultural subsidies and instead want to establish plurilateral agreements on the so-called Singapore issues – other than the one on trade liberalisation already agreed at the WTO –, and above all impose an agreement on electronic commerce, all of which the developing countries refuse before the Doha Round is finalised. This is at a time when President Donald Trump is trying to paralyse the WTO. A future document will analyse these challenges.