

ARTICLE V
FREEDOM OF TRANSIT

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I. TEXT OF ARTICLE V AND INTERPRETATIVE NOTE AD ARTICLE V

Article V

Freedom of Transit

1. Goods (including baggage), and also vessels and other means of transport, shall be deemed to be in transit across the territory of a contracting party when the passage across such territory, with or without transshipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes. Traffic of this nature is termed in this article “traffic in transit”.

2. There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.

3. Any contracting party may require that traffic in transit through its territory be entered at the proper custom house, but, except in cases of failure to comply with applicable customs laws and regulations, such traffic coming from or going to the territory of other contracting parties shall not be subject to any unnecessary delays or restrictions and shall be exempt from customs duties and from all transit duties or other charges imposed in respect of transit, except charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered.

4. All charges and regulations imposed by contracting parties on traffic in transit to or from the territories of other contracting parties shall be reasonable, having regard to the conditions of the traffic.

5. With respect to all charges, regulations and formalities in connection with transit, each contracting party shall accord to traffic in transit to or from the territory of any other contracting party treatment no less favourable than the treatment accorded to traffic in transit to or from any third country.*

6. Each contracting party shall accord to products which have been in transit through the territory of any other contracting party treatment no less favourable than that which would have been accorded to such products had they been transported from their place of origin to their destination without going through the territory of such other contracting party. Any contracting party shall, however, be free to maintain its requirements of direct consignment existing on the date of this Agreement, in respect of any goods in regard to which such direct consignment is a requisite condition of eligibility for entry of the goods at preferential rates of duty or has relation to the contracting party's prescribed method of valuation for duty purposes.

7. The provisions of this Article shall not apply to the operation of aircraft in transit, but shall apply to air transit of goods (including baggage).

Interpretative Note *Ad* Article V from Annex I

Paragraph 5

With regard to transportation charges, the principle laid down in paragraph 5 refers to like products being transported on the same route under like conditions.

II. INTERPRETATION AND APPLICATION OF ARTICLE V

A. SCOPE AND APPLICATION OF ARTICLE V

Paragraph 1 and the last sentence of paragraph 2 were based on the text of the Barcelona Convention and Statute on Freedom of Transit of 20 April 1921. Notes to the New York Draft Charter 16 (which corresponds to Article V) state that there is no apparent inconsistency between that Article and the Barcelona Convention.¹ As of 31 December 1994, the Barcelona Convention was still in force and had 46 parties.²

1. Scope of Article V

The Report of the New York Drafting Committee on Article 16 of the New York Draft Charter (which corresponded to Article V) states:

“The original text referred in general to persons, goods and means of transport. The text recommended by the Drafting Committee refers to goods and means of transport only, since the transit of persons was considered not to be within the scope of the Charter, and since traffic of persons is subject to immigration laws and may properly be the concern of an international agency other than the organization.”³

The operation of aircraft in transit was exempted as a subject that would be dealt with by the International Civil Aviation Organization (ICAO), but air transit of goods, including baggage, is covered by paragraph 7.⁴ A working party at the Geneva session of the Preparatory Committee discussed whether the principle of freedom of transit applied to goods consigned to a country in bond without a final destination. There was some difference of opinion and the working party did not pursue the matter.⁵ Minutes of the discussions of Sub-Committee C of the Third Committee at the Havana Conference note that: “In the opinion of the Sub-Committee the case of grazing livestock ... was not considered as coming within the ambit of this Article.”⁶

¹7 LNTS 11; see comment p. 12 of New York Report, which notes also that “Should the question of a new transit convention be raised, the Committee felt that the Organization might wish to co-operate.” See also EPCT/C.II/W.11 (comparison of the Statute Annex to the Barcelona Convention and Article 10 of the Proposed Charter); EPCT/34/Rev.1, p. 12; EPCT/C.II/PV.2, p. 63; EPCT/C.II/PV.10, p. 3.

²*Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1994*, UN Doc. ST/LEG/SER.E/13 (1995).

³New York Report, p. 12; similar statement appears at EPCT/C.II/54/Rev.1, p. 8.

⁴EPCT/C.II/54/Rev.1, p. 7.

⁵EPCT/A/SR.20, p. 3; EPCT/109.

⁶E/CONF.2/C.3/C/W.5 p. 1 (transit facilities for grazing livestock; exemption for “seasonal nomads”).

2. Paragraph 1: “traffic in transit”

At the Havana Conference it was agreed to add an interpretative note to paragraph 1 of Article 33 of the Havana Charter, as follows: “The assembly of vehicles and mobile machinery arriving in a knocked-down condition or the disassembly (or disassembly and subsequent reassembly) of bulky articles shall not be held to render the passage of such goods outside the scope of ‘traffic in transit,’ provided that any such operation is undertaken solely for convenience of transport”.⁷ The 1948 Working Party Report on “Modifications to the General Agreement” notes that while the working party considered a proposal for the insertion into the General Agreement of this interpretative note, the working party “came to the conclusion that such insertion was not necessary, since the text of Article 33, paragraph 1, of the Charter tallied with that of Article V, paragraph 1, of the General Agreement, and the CONTRACTING PARTIES, who all signed the Final Act of the conference of Havana, could not interpret these provisions in any way other than that laid down in the note Ad Article 33 of the Charter”.⁸

Also at Havana, Sub-Committee C of the Third Committee on Articles 32-39 “agreed to state in its report that a movement between two points in the same country passing through another country was clearly ‘in transit’ through the other country within the meaning of paragraph 1”.⁹

2. Paragraph 2

(1) *Freedom of transit*

At the Forty-fifth Session Austria informed the CONTRACTING PARTIES that with effect from 1 December 1989, Austria had limited traffic of certain heavy trucks during night hours on certain Austrian roads. This measure applied to trucks of all nationalities, including Austrian trucks. On 28 February 1990 Austria requested consultations under Article XXII:1 with respect to a measure by the Federal Republic of Germany banning the circulation of 212,000 Austrian lorries during night hours in the entire territory of the Federal Republic. The German measure applied only against Austrian trucks, and, in the view of Austria, was inconsistent with, *inter alia*, Article V.¹⁰

See also the reference to freedom of transit and Article V in the Working Party Report on “Accession of the United Arab Republic”.¹¹

(2) *Neighbouring countries*

At Havana, a proposal to append a note to the corresponding paragraph of the Charter article on transit “to the effect that this Article does not preclude agreements between neighbouring countries for the regulation of transit in respect of their own trade was not approved because such agreements are clearly permissible under the terms of the Article if they do not prejudice the interests of other members in violation of the most-favoured-nation provisions of the Charter, and if they do not limit freedom of transit for other Members”.¹² See also under Article XXIV:3(a).

The Interpretative Note *Ad* Paragraph 6 of Article 33 of the Charter provided: “If, as a result of negotiations in accordance with paragraph 6 [not included in the GATT], a member grants to a country which has not direct access to the sea more ample facilities than those already provided for in other paragraphs of Article 33 [V], such special facilities may be limited to the landlocked country concerned unless the Organization finds, on the complaint of any other member, that the withholding of the special facilities from the complaining member contravenes the most-favoured-nation provisions of this Charter”.

⁷Havana Reports, p. 71, para. 9.

⁸GATT/CP.2/22/Rev.1, adopted on 1 and 2 September 1948, II/39, 44, para. 26.

⁹Havana Reports, p. 71, para. 10.

¹⁰DS14/1, C/M/241 p. 29.

¹¹L/3362, adopted on 27 February 1970, 17S/33, 41, para. 27.

¹²Havana Reports, p.72, para. 12.

4. Paragraphs 3, 4 and 5: “charges”

It was stated by one delegation during the London session of the Preparatory Committee that “the words ‘or similar charges’ should not be held to imply that traffic in transit shall be exempted from the charges imposed alike on domestic and in transit traffic”.¹³ The Report of the Technical Subcommittee which considered the general commercial provisions of the draft Charter during discussions at London stated:

“It is understood that the word ‘charges’ in [paragraph 4] includes charges for transportation by Government-owned railroads or Government-owned modes of transportation. Since this paragraph only provides that such charges shall be ‘reasonable’, it is believed that the question of preferential rail rates comes under paragraph 5”.¹⁴

The Interpretative Note *Ad* Paragraphs 3, 4 and 5 of Article 33 of the Havana Charter stated: “The word ‘charges’ as used in the English text of paragraph(s) 3, 4 and 5 shall not be deemed to include transportation charges”. It was agreed during discussion of this provision “that transportation charges on traffic in transit did not come within the purview of Article 32 [V], but were subject to the provisions of paragraph 2 of Article 18 [III] ...”.¹⁵

See also the reference to internal transportation charges in Article III:4, as well as the Interpretative Note *Ad* Article V:5.

5. Paragraph 6

(1) “products which have been in transit”

The Report of the Technical Subcommittee which examined the general commercial provisions of the draft Charter during the discussions at London states that “... it is understood that paragraphs 2-5 of this Article cover the treatment to be given by a member country to products in transit through its territory between any other member country and any third country, and paragraph 6 covers the treatment to be given by a member country to product cleared from customs within its territory after transit through any other member country”.¹⁶

(2) “date of this Agreement”

The proviso for direct consignment requirements existing on the “date of this Agreement” was added in order to provide for the difficulties of certain countries which required that goods benefiting from historical preferences accorded by them be shipped directly to them from the country of origin.¹⁷ See also the last sentence of Article II:1(c) and the material on it in this volume.

Article XXVI:1 provides that “The date of this Agreement shall be 30 October 1947”. This date applies for the obligations under Article V:6 of the original contracting parties; of the former territories of the original contracting parties which, after attaining independence or commercial autonomy, succeeded to contracting party status under Article XXVI:5(c); and of Chile. When the modalities of accession to the General Agreement were first considered, at the Third Session in Annecy in 1949, the Working Party decided to draft the Annecy Protocol of Terms of Accession using instead the date of the Havana Final Act, 24 March 1948, and this approach was followed for the next group of accessions in the Torquay Protocol of 1951.¹⁸ Since the next accession thereafter, which was the accession of Japan in 1955, the standard terms in accession protocols have provided that the “date of this Agreement” for the purposes of Article V:6 shall be the date of

¹³EPCT/C.II/54/Rev.1, p. 10.

¹⁴EPCT/C.II/54/Rev.1 p. 10.

¹⁵Havana Reports p. 72, para. 13.

¹⁶EPCT/C.II/54/Rev.1 p. 11.

¹⁷EPCT/C.II/42 p. 5-6; EPCT/C.II/54/Rev.1 p. 11.

¹⁸Annecy Protocol, dated 10 October 1949, I/79, 81, para. 5(b); Torquay Protocol, dated 21 April 1951, I/86, 88, para. 5(b).

the protocol of accession or (where the acceding government had previously acceded provisionally) the date of the declaration on provisional accession.¹⁹

B. EXCEPTIONS AND DEROGATIONS

See Article V:7. With regard to frontier traffic, see also Article XXIV:3.

The Rapporteurs' Report on the Charter Article corresponding to Article V during the London session of the Preparatory Committee notes, in response to a suggestion that a member be permitted to divert in-transit traffic from the most convenient route if conditions such as a famine required reservation of that route for other use: "It would seem that Article 32(b) and (e) [GATT Articles XX(b) and XXI(b)(iii)] afford ample protection for cases in which transit must be suspended or diverted for humanitarian or security reasons."²⁰

III. PREPARATORY WORK

Article V of the GATT corresponds to Article 33 of the Havana Charter. Relevant provisions in the US-UK *Proposals* appear in Chapter III-2. The corresponding Article in the US Draft is Article 10, in the New York Draft Article 16 and in the Geneva Draft Article 32.

The Interpretative Note in the General Agreement does not appear in the Havana Charter. On the other hand, the General Agreement does not include paragraph 6 of Article 33 of the Charter, a provision inserted at the Havana Conference "in view of the great importance of this matter to many countries, particularly to those countries which have no access to the sea"²¹, nor does it include three interpretative notes annexed to Article 33 of the Havana Charter. These provisions were not picked up in 1948 when the Working Party on Modifications to the General Agreement in the Second Session considered which of the changes made at Havana should be taken into the General Agreement. Article V has never been amended.

IV. RELEVANT DOCUMENTS

See below at the end of Article X.

¹⁹E.g. Protocol for the Accession of Bolivia, L/6562, 37S/5.

²⁰EPCT/C.II/W.11 p. 1.

²¹Havana Reports, p. 3, para. 16.