

## ARTICLE XXIX

### THE RELATION OF THIS AGREEMENT TO THE HAVANA CHARTER

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#### I. TEXT OF ARTICLE XXIX AND INTERPRETATIVE NOTE AD ARTICLE XXIX

##### Article XXIX

###### *The Relation of this Agreement to the Havana Charter*

1. The contracting parties undertake to observe to the fullest extent of their executive authority the general principles of Chapters I to VI inclusive and of Chapter IX of the Havana Charter pending their acceptance of it in accordance with their constitutional procedures.\*

2. Part II of this Agreement shall be suspended on the day on which the Havana Charter enters into force.

3. If by September 30, 1949, the Havana Charter has not entered into force, the contracting parties shall meet before December 31, 1949, to agree whether this Agreement shall be amended, supplemented or maintained.

4. If at any time the Havana Charter should cease to be in force, the CONTRACTING PARTIES shall meet as soon as practicable thereafter to agree whether this Agreement shall be supplemented, amended or maintained. Pending such agreement, Part II of this Agreement shall again enter into force; *Provided* that the provisions of Part II other than Article XXIII shall be replaced, *mutatis mutandis*, in the form in which they then appeared in the Havana Charter; and *Provided* further that no contracting party shall be bound by any provisions which did not bind it at the time when the Havana Charter ceased to be in force.

5. If any contracting party has not accepted the Havana Charter by the date upon which it enters into force, the CONTRACTING PARTIES shall confer to agree whether, and if so in what way, this Agreement in so far as it affects relations between such contracting party and other contracting parties, shall be supplemented or amended. Pending such agreement the provisions of Part II of this Agreement shall, notwithstanding the provisions of paragraph 2 of this Article, continue to apply as between such contracting party and other contracting parties.

6. Contracting parties which are Members of the International Trade Organization shall not invoke the provisions of this Agreement so as to prevent the operation of any provision of the Havana Charter. The application of the principle underlying this paragraph to any contracting party which is not a Member of the International Trade Organization shall be the subject of an agreement pursuant to paragraph 5 of this Article.

Interpretative Note *Ad* Article XXIX from Annex I

*Paragraph 1*

Chapters VII and VIII of the Havana Charter have been excluded from paragraph 1 because they generally deal with the organization, functions and procedures of the International Trade Organization.

## II. INTERPRETATION AND APPLICATION OF ARTICLE XXIX

The General Agreement was drafted during the intermediate stages of the negotiation of the ITO Charter. The General Agreement was intended to serve as a framework for tariff concessions negotiated in the first round in 1947, and was intended to continue in existence even after the entry into force of the ITO Charter. The function of Article XXIX was twofold: it determined the relationship between the Charter and the General Agreement, and it provided that after the final version of the rules in Part II of the General Agreement had been negotiated during the Havana Conference, and after the Havana Charter had entered into effect, this version would automatically supersede Part II of the General Agreement. However, the Havana Charter never entered into force.

The present text of Article XXIX dates from the Second Session which met in September 1948 after the Havana Conference. It was drafted by the Working Party on Modifications to the General Agreement, which also considered proposals to amend the General Agreement so that its text would immediately reflect the corresponding articles of the Havana Charter.

### 1. Paragraph 1

See also the material in Section III below on the origins of paragraph 1.

#### (1) *“the general principles of Chapters I-VI inclusive and of Chapter IX of the Havana Charter”*

Chapters I through VI of the Charter dealt with, respectively, Purpose and Objectives, Employment and Economic Activity, Economic Development and Reconstruction, Commercial Policy, Restrictive Business Practices, and Inter-governmental Commodity Agreements. Chapter IX included General Provisions (final provisions).

When Article XXIX was redrafted at the Second Session, Chapters VII and VIII of the Havana Charter, which dealt with the International Trade Organization and Settlement of Differences, were omitted from the reference in Article XXIX “because they generally deal with the organization, functions and procedures of the International Trade Organization”.<sup>1</sup> It was stated then that “by virtue of the Final Act signed at Havana, the contracting parties must regard themselves morally bound not to go back on the principles evolved at Havana. The principle of giving due regard to the economic circumstances mentioned in paragraph 2 of Article 72, as well as those in other articles of the Havana Charter, could not be disregarded even though they were not explicitly included in paragraph 1 of Article XXIX”.<sup>2</sup>

#### (2) *Article XXIX:1 and interpretation of the General Agreement in the light of the Havana Charter*

The Second Session Working Party on Modifications to the General Agreement took a generally conservative approach to amendment of the General Agreement in advance of the anticipated supersession of Part II under Article XXIX:2. In explaining this decision, the Working Party’s report notes that “... if difficulties in application were to arise before the entry into force of the Charter, the CONTRACTING PARTIES would still have the possibility under the terms of Article XXV to settle such cases in the light of the provisions of Article XXIX, paragraph 1”.<sup>3</sup> While declining a proposal to insert Articles 26, 27 and 28 of the Havana Charter (relating to subsidies) into the General Agreement, the Working Party noted that:

<sup>1</sup>Interpretative Note to Article XXIX; see also GATT/CP.2/SR.17, pp. 5-8.

<sup>2</sup>GATT/CP.2/SR.18, p. 2.

<sup>3</sup>GATT/CP.2/22/Rev.1, adopted on 1 and 2 September 1948, II/39, 40. para. 9.

“... It was of course understood that, in the light of Article XXIX, paragraph 1, the CONTRACTING PARTIES undertake to apply the principles of the Havana Charter relating to export subsidies to the full extent of their executive authority”.<sup>4</sup>

Again declining a proposal to insert the interpretative note to Article 33:1 of the Havana Charter on transit into the General Agreement, the Working Party concluded “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. The representative of Pakistan appreciated the justice of this conclusion and agreed to withdraw his proposal on the understanding that the working party would record this statement in its report”.<sup>5</sup>

Many Panel Reports adopted by the CONTRACTING PARTIES have taken account of the drafting history and provisions of the Havana Charter in interpreting corresponding GATT provisions.<sup>6</sup>

The 1984 Panel Report on “Canada - Administration of the Foreign Investment Review Act” addresses the interpretation of Article XXIX:1:

“The Panel considered the Canadian view ... that the word ‘requirements’ in article III:4 of the General Agreement should be interpreted in the light of Article 12 of the Havana Charter, the general principles of which the contracting parties, in Article XXIX of the General Agreement, agreed to observe to the fullest extent of their executive authority. The Panel noted that the deletion of Article XXIX of the General Agreement was proposed in 1955 and accepted by all but one contracting party, and that - although this Article is technically still in force - it refers to an instrument which itself has never been implemented and the acceptance of which is no longer pending as is assumed in Article XXIX. This leaves considerable doubt as to the manner in which its provisions would have been interpreted if they had entered into force. The Panel further noted that paragraph 1(c) of Article 12 of the Charter was to apply ‘without prejudice to existing international agreements to which Members are parties’, and that paragraph 1(a), (b) and (d) as well as paragraphs 2 and 3 of this Article tended to encourage international investments (including international co-operation in this field). It is therefore doubtful whether paragraph 1(c) which reserved the rights of Members to prescribe ‘reasonable requirements’ should by itself be considered as a ‘general principle’ in the sense of Article XXIX:1 of the General Agreement. The wording of this latter provision suggests that it was not the intention of its drafters that contracting parties should ‘undertake to observe to the fullest extent of their executive authority’ what they would in any case judge to be in their own interest, nor that they should invoke the Charter to detract from their obligations under the General Agreement, but rather that they should observe general principles which reinforced or added to these obligations. In the light of the foregoing facts and considerations the Panel could not subscribe to the assumption that the drafters of Article III had intended the term ‘requirements’ to exclude requirements connected with the regulation of international investments and did not find anything in the negotiating history, the wording, the objectives and the subsequent application of Article III which would support such an interpretation”.<sup>7</sup>

See also Article XX(h) and the Interpretative Note thereto, which indirectly (via a reference to ECOSOC Resolution 30 (IV) of 28 March 1947) refer to the principles of the Havana Charter relating to intergovernmental commodity agreements.

## 2. Paragraphs 2 and 4: Supersession of the General Agreement by the Charter

Paragraph 2 provides for supersession of the provisions of Part II of the General Agreement (which were drawn from the Geneva Draft Charter submitted by the Committee to the Conference) by the corresponding provisions to be later negotiated at the Havana Conference. The idea appearing in paragraph 4 that if the Charter should cease to be in force after it had entered into force, Part II of the General Agreement would again enter into force, replaced (except for Article XXIII) by the corresponding Charter provisions, was first proposed by a Sub-

<sup>4</sup>*Ibid.*, II/43, para. 24.

<sup>5</sup>*Ibid.*, II/44, para. 26.

<sup>6</sup>See references to the Havana Charter in the index.

<sup>7</sup>L/5504, adopted on 7 February 1984, 30S/140, 161-162, para. 5.12.

Committee the First Session in March 1948. The Report of this Sub-Committee notes in explanation that “it is considered that the form in which [Article XXIII] appear[s] in the Charter is not suitable for the General Agreement”.<sup>8</sup>

The supersession of the General Agreement by the Charter was limited to the provisions of Part II; thus, even after the Charter went into force the General Agreement (including Parts I and III and the Schedules of concessions) would remain in force coexisting with the Charter. When Article XXIX was revised at the Second Session, the words “and superseded by the corresponding provisions of the Charter” were deleted from paragraph 2 “in order to make it clear that when the Charter enters into force, and so long as it remains in force, the General Agreement would be limited to the provisions of Part I and Part III, including the Annexes in so far as they relate to those two parts”.<sup>9</sup>

### 3. Paragraph 3: “If ... the Havana Charter has not entered into force”

Article XXIX:3 is linked to Article 103:2(b) of the Havana Charter, which provided that if the Charter had not entered into force by 30 September 1949, the Secretary-General of the United Nations was to invite those governments which had deposited instruments of acceptance to enter into consultation to determine whether and on what conditions they desired to bring the Charter into force. The CONTRACTING PARTIES decided on 21 March 1950, when entry into force of the Charter was still pending, that the meeting referred to in Article XIX:3 “shall be held at such time as may subsequently be decided by the CONTRACTING PARTIES.”<sup>10</sup> On 6 December 1950 the United States Department of State issued a statement indicating that the Havana Charter would not be submitted again to the United States Congress. It subsequently became evident that the establishment of the ITO would be indefinitely postponed.<sup>11</sup>

The depositary of the Havana Charter was the Secretary-General of the United Nations. According to the United Nations, “The conditions for entry into force of the Havana Charter, set forth in its article 103, were not fulfilled within the prescribed time-limit. No instrument of accession was deposited with the Secretary-General”.<sup>12</sup>

At their Eighth Session in October 1953, the CONTRACTING PARTIES decided to convene a Session of the CONTRACTING PARTIES in October 1954 to review the operation of the General Agreement and to examine to what extent it would be desirable to amend or supplement the General Agreement. This session was the Ninth, or Review, Session which met from October 1954 to March 1955. The October 1953 decision also provided that “the review referred to in this Decision shall be deemed to fulfil the requirements of paragraph 3 of Article XXIX”.<sup>13</sup>

## III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

There is no Article in the Havana Charter corresponding to Article XXIX of the General Agreement. The initial drafts of the General Agreement did not include any provision in the text of the agreement itself on the relationship with the Charter; this matter was dealt with instead in a proposed protocol of signature. During discussions on the text of the General Agreement in the Tariff Agreement Committee at the Geneva Session of the Preparatory Committee, it was decided to drop the protocol of signature, and to include an undertaking to observe Charter principles as paragraph 1 of Article XXIX.<sup>14</sup>

During the Second Session of the CONTRACTING PARTIES held in September 1948, the Working Party on Modifications to the General Agreement considered which of the changes that had been made to the Charter text at Havana should be brought into the General Agreement, and in this connection also redrafted Article XXIX.

<sup>8</sup>GATT/1/21, p. 3.

<sup>9</sup>II/42, para. 17.

<sup>10</sup>Decision at GATT/CP.4/29, GATT/CP/61 p. 8; adoption at GATT/CP.4/SR.17 p. 7. The Third Session of the Executive Committee of ICITO was similarly postponed in 1949 until a time when the entry into force of the Charter would be imminent; see the chapter on Institutions in this Index.

<sup>11</sup>Sec/36/53. The US announcement of its decision not to resubmit the ITO to Congress appears in GATT/CP/86 dated 7 December 1950.

<sup>12</sup>*Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1992*, UN Doc. ST/LEG/SER.E/11 (1993), p. 326.

<sup>13</sup>Decision of 24 October 1953 on “Arrangements for a Review of the General Agreement”, 2S/28, 30.

<sup>14</sup>EPCT/199.

The Report of the Working Party notes that the re-wording of Article XXIX had been proposed “in order to eliminate certain temporary provisions and to clarify the interpretation of certain points the interpretation of which may give rise to difficulties”. The Working Party Report also notes, “As Article XXIX is contained in Part III of the General Agreement, this text as amended will remain operative after the entry into force of the Havana Charter”.<sup>15</sup> These amendments became effective with the entry into force of the Protocol Modifying Part I and Article XXIX on 24 September 1952, and are the source of the present text of Article XXIX.

During the Review Session of 1954-55, the Review Working Party on Organizational and Functional Questions recommended the deletion of Article XXIX and its interpretative note, and of references to it and the Havana Charter throughout the General Agreement.<sup>16</sup> However, these amendments were included in the 1955 Protocol Amending Part I and Articles XXIX and XXX, which failed to gain the requisite unanimous approval and was abandoned.<sup>17</sup>

#### IV. RELEVANT DOCUMENTS

##### *Geneva*

Discussion: EPCT/TAC/PV/20-22, 24, 25  
 Reports: EPCT/196, 199, 204, 209,  
 214/Add.1/Rev.1  
 Other: EPCT/W/334, 335

Concerning the Protocol of Signature, which was deleted in favour of a reference in Article XXIX:1:

Discussion: EPCT/TAC/SR/4, 5, 18  
 EPCT/TAC/PV/17, 20, 22  
 Reports: EPCT/189, 196, 199  
 Other: EPCT/207  
 EPCT/W/273, 274, 285, 291, 301,  
 312, 313, 332, 333

##### *CONTRACTING PARTIES*

Discussion: GATT/1/SR.2-7, 10, 11  
 GATT/CP.2/SR.4, 6, 15-18  
 GATT/CP.3/SR.42  
 GATT/CP.4/SR.17  
 Reports: GATT/1/21, 23  
 GATT/CP.2/22/Rev.1, 28  
 GATT/CP.4/29  
 GATT/CP/61

##### *Review Session*

Discussion: SR.9/27, 38, 42, 47  
 Reports: W.9/197, W.9/236/Add.3, L/327,  
 3S/231  
 Other: L/189, 273, 275, 276, 284/Rev.1  
 W.9/57, 62  
 Spec/96/55

<sup>15</sup>GATT/CP.2/22/Rev.1, adopted on 1 and 2 September 1948, II/39, 40, para. 6.

<sup>16</sup>L/327, adopted on 28 February, 5 and 7 March 1955, 3S/231, 240, para. 25. The deletion of Article XXIX was linked to the insertion of a new Article I on “Objectives”: see discussion at SR.9/42 p. 4-5.

<sup>17</sup>15S/65.