
Negotiating Group on Trade Facilitation

ARTICLE V OF GATT 1994 – SCOPE AND APPLICATION

Note by the Secretariat

This document has been prepared under the Secretariat's own responsibility and without prejudice to the positions of Members and to their rights and obligations under the WTO

I. INTRODUCTION

1. The following paper updates an earlier Secretariat document on the same topic¹, as part of an effort to stay abreast of latest developments regarding the regulatory framework under consideration in the current Trade Facilitation negotiations. It maintains the factual approach of its predecessor, limiting the examination to a legal analysis of the Article's provisions with no judgement on possible room for clarification and improvement.
2. Two related publications on the other relevant GATT provisions are also being revised in the course of the same exercise.
3. With there not having been any changes to the Article, and still no jurisprudence being available on its interpretation, the update largely limits itself to modifications on the editing side, while at the same time offering some additional information on a few points.

II. STRUCTURE OF THE PAPER

4. The paper largely keeps the sequencing of its previous version by first introducing the text of the Article and its negotiating history, before then entering into a legal analysis of the provision's coverage and the basic obligations deriving therefrom. In light of the continued absence of any panel findings in this area, the document still cannot offer the review of GATT/WTO jurisprudence contained in the other two Secretariat notes. It will, however, briefly mention some of the incidences where violations of Article V have been claimed in the past, to give a flavour of the kind of debates on this subject that emerged in practice.

¹ G/C/W/408, 10 September 2002.

III. TEXT OF THE PROVISION

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 party² when the passage across such territory, with or without trans-shipment, 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 with respect to 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.

² See also the Explanatory Notes 2 (a) and (b) of GATT 1994.

IV. NEGOTIATING HISTORY

5. In negotiating Article V, the contracting parties considered a covenant known as the Barcelona Convention³, regulating the conditions a Member could apply to goods of another Member passing through its territory to a third destination. Parts⁴ of Article V were effectively drawn from corresponding provisions of that Convention.

6. An even higher degree of correspondence can be found with respect to the draft Havana (or ITO) Charter⁵, whose Article 33 is a nearly verbatim copy of GATT Article V. The relationship between the two treaties is of particular relevance as the GATT 1947 was (for the most part)⁶ originally only meant to be applied until the Havana Charter's entry into force.⁷ The Havana text was reviewed and partly modified at the 1948 Conference of the same name, with many GATT provisions being linked to its outcome, on the understanding that, once the ITO treaty would come into force, changes in the GATT would occur automatically.

7. The fact that the Havana Charter never actually entered into force, raises the question as to what extent the 1948 modifications and the ITO preparatory work are of relevance when analyzing the GATT. An answer is complicated by the fact that not all GATT Articles have been drawn from a particular ITO draft and that some alterations of Havana provisions were not carried into the GATT, on the belief that such modifications would automatically override differing GATT provisions, once the Havana Charter entered into force.⁸ For many parties, the assumed short life-expectancy of GATT simply did not seem to merit the administrative efforts of a change, particularly if the result was to become binding in the framework of the ITO Charter anyway. Therefore, while the *travaux préparatoires* for the ITO will be relevant for an analysis of the GATT in most cases, one will have to take a look at the respective situation for each and every Article, as there may be some exceptions.

8. In the case of Article V, the original 1947 version was never altered, whereas the corresponding article of the Havana Charter underwent several – partly substantial – modifications. These alterations were not brought into the GATT when Members negotiated the 1948 protocols that amended some of its provisions in order to achieve conformity with the Havana Charter.

9. A comparison of the Havana Charter with the GATT therefore shows several differences. The Havana Charter does not include the interpretative note contained in the GATT, but comprises three different interpretative notes to its Article 33⁹, which were not carried into the General Agreement. Furthermore, the GATT lacks a provision inviting the organization to "...undertake studies, make recommendations and promote international agreement relating to the simplification of customs regulations concerning traffic in transit, the equitable use of facilities required for such transit and other measures designed to promote the objectives of this Article. Members shall cooperate with each

³ Convention and Statute on Freedom of Transit, Barcelona, 29 April 1921. For some background on specific positions of Members in the preparatory deliberations see U.N. Doc. E/PC/T/C.II/54/Rev.1.

⁴ Paragraph 1 as well as the last sentence of paragraph 2 are based on the Barcelona Convention.

⁵ The *Havana-Charter for an International Trade Organization*, designed to set up a forerunner of the WTO, never entered into force.

⁶ Article XXIX of the GATT 1947: "*Part II of this Agreement shall be suspended on the day on which the Havana Charter enters into force*".

⁷ In expecting a replacement by the (far more comprehensive) Havana Charter in 1948, the contracting parties refrained from ratifying GATT and agreed on its temporary application instead. (See *Protocol of temporary application*).

⁸ This led various parties to withdraw proposals for amendments of the GATT as they considered them to be realized in the framework of the Havana treaty.

⁹ Those notes were annexed to the Havana Charter.

other directly and through the Organization to this end".¹⁰ This provision had been added to the Havana Charter at the Havana Conference *"in the view of the great importance of this matter to many countries, particularly those countries which have no access to the sea"*.¹¹

10. Despite those differences, the preparatory work on the Havana Charter is nevertheless of importance, as it appears from the process that the parties expected to see Article V interpreted in the light of the ensuing Havana Conference deliberations.¹²

V. COVERAGE

A. GENERAL

11. Article V addresses traffic in transit. It regulates the conditions a Member may impose on goods transported through its territory by another party to a foreign destination. The basic objective is to allow for freedom of transit through the territory of each Member for transports to or from the territory of other Members. To achieve this freedom, Article V prescribes two main obligations:

- (i) not to hinder traffic in transit by imposing unnecessary delays or restrictions or by imposing unreasonable charges; and
- (ii) to accord Most-Favoured-Nation (MFN) treatment to transiting goods of all Members.

B. PARAGRAPH 1

12. Paragraph 1 determines traffic in transit. It defines transit as *"transit across the territory of a contracting party when the passage across such territory, with or without trans-shipment, 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"*. Whether freedom of transit should also extend to goods consigned to a country in bond without a final destination, was the subject of discussion within the Working Group of the Preparatory Committee at its Geneva session. The Group could not come to an agreement and decided not to pursue the matter any further.¹³ What was agreed in the subsequent Havana Conference was 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"*.¹⁴

13. Only goods (including baggage), vessels and other means of transport are considered to constitute traffic within the meaning of paragraph 1. An initial proposal to include persons as well, was turned down by the Drafting Committee on the grounds that *"transit of persons was considered not to be*

¹⁰ Article 33 (6) of the Havana Charter. It consequently also lacks the interpretative note related to this Article, which held that *"If, as a result of negotiations in accordance with paragraph 6, a Member grants to a country which has no direct access to the sea more ample facilities than those already provided for in other paragraphs to Article 33, such special facilities may be limited to the land-locked 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."*

¹¹ Havana Reports, U.N. Doc. ICITO/1/8, p. 3, para. 16.

¹² In the case of one new introduction – the addition of an interpretative note for paragraph 2 of ITO Charter Article 33, it was expressly noted that GATT rules were to be seen in the light of the ensuing Havana Conference decisions (GATT, 2 BISD 44, 1952). It appears from the overall preparatory deliberations that the parties wanted to apply the same principle for all parts of GATT Article V.

¹³ U.N. Doc. E/PC/T/A/SR.20 p. 3; U.N. Doc. E/PC/T/109.

¹⁴ Havana Reports, U.N. Doc. ICITO/1/8, p. 71, para. 10.

*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".*¹⁵

14. On the other hand, the negotiating parties decided to keep paragraph 1's reference to various means of transportation ("*other means of transport*"), despite an earlier agreement in the preparatory process to generally exclude transportation and shipment from both the GATT and the ITO Charter.¹⁶

15. The preparatory work further suggests that the coverage of paragraph 1 extends to the assembly and disassembly of vehicles and mobile machinery, if solely undertaken for convenience of transport. The contracting parties' intention in this respect was expressly laid down in an interpretative note added to paragraph 1's corresponding Havana Charter provision at the Havana Conference.¹⁷ This note, although not carried into the General Agreement in the course of its 1948 revision, is nevertheless of relevance for GATT Article V, as the only reason for its non-inclusion was the parties' conviction that such insertion was not necessary, since the Havana Charter text tallied with that of GATT's Article V:1, so that "*the CONTRACTING PARTIES, who all signed the Final Act of the conference of Havana, could not interpret these provisions in any way other than laid down in the note Ad Article 33 of the Charter*".¹⁸

16. Finally, the preparatory discussions also suggest that Article V:1 should be read as to exclude grazing livestock.¹⁹

C. PARAGRAPH 2

17. Paragraph 2 prescribes freedom of transit. It requires each Member to allow free transition through its territory for traffic in transit to or from the territory of another Member. Such transit shall be granted "*via the routes most convenient for international transit*". This is an important restriction, as it means that the duty to grant free transit does not extend to all routes.

18. Parties are required not to make any distinction based on:

- a. the flag of vessels;
- b. the place of origin;
- c. departure;
- d. entry;
- e. exit;
- f. destination; or
- g. any circumstances relating to the ownership of goods, of vessels or of other means of transport.

19. A proposal to amend the corresponding Article of the Havana Charter so as to allow for special agreements among neighboring countries to regulate transit arising from mutual trade, was not approved. The Havana reports indicate that the refusal was based on the grounds that "*such agreements are clearly permissible under the terms of the Article if they do not prejudice the interests of other*

¹⁵ New York Report, U.N. Doc. E/PC/T/34, p. 12.

¹⁶ U.N. Doc. E/PC/T/A/PV.9, p. 25.

¹⁷ "*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.*" Havana Reports, U.N. Doc. ICITO/1/8, p. 71, para. 9.

¹⁸ GATT/CP.2/22/Rev.1, adopted in September 1948, II/39, p. 44, para. 26.

¹⁹ It is noted in the Minutes of the discussions of the Sub-Committee C of the Third Committee at the Havana Conference that "*In the opinion of the Sub-Committee the case of grazing livestock ... was not considered as coming within the ambit of this Article.*"

*Members in violation of the most-favoured-nation provisions of the Charter, and if they do not limit freedom of transit for other Members".*²⁰

20. Similarly, there was no approval of the suggestion to allow a contracting party to divert traffic in transit from the most convenient route, if a situation such as famine called for the reservation of that route for other operations. The report on the corresponding Havana Charter Article by the Rapporteur of the Preparatory Committee held that *"It would seem that Article 32(b) and (e) [identical with 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".*²¹

D. PARAGRAPHS 3 – 5

21. Paragraph 3 states the right of every Member to require traffic in transit through its territory to enter at the proper custom house. It further determines that, except in cases of failure to comply with applicable customs laws and regulations, such traffic coming from or passing through the territory of another Member *"shall not be subject to any unnecessary delays or restrictions"*. The text also requires this traffic to be exempt from customs duties and from all transit duties or other charges imposed in respect of transit, except for *"charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered"*.

22. According to paragraph 4, all charges and regulations imposed by a Member on traffic in transit to or from the territories of another Member, shall be *"reasonable, having regard to the conditions of the traffic"*. The report of the Technical Sub-Committee states that *"...the word 'charges' includes charges for transportation by Government-owned railroads or Government-owned modes of transportation"*.²²

23. Paragraph 5 calls for most-favoured-nation treatment of traffic in transit with respect to all charges, regulations and formalities in connection with transit. Interpretative issues arise with respect to the treatment of transportation charges. An interpretative note to this paragraph states that *"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"*.²³ While this clearly implies that transportation charges are covered by this provision, a note to the corresponding Article in the Havana Charter holds that *"The word 'charges' as used in the English text of paragraphs 3, 4 and 5 shall not be deemed to include transportation charges"*.²⁴ This would mean that transportation charges would not have to be reasonable. And one might question to what extent a Member is required to grant most-favoured-nation treatment with respect to such charges.

24. Additional questions may arise from the fact that the Havana Reports evidence the parties' agreement *"that transportation charges on traffic and transit did not come within the purview of Article 32 [Art. V of the GATT], but were subject to the provisions of paragraph 2 of Article 18 [Article III of the GATT]..."*.²⁵ Article III, which requires national treatment for internal taxation and regulation, addresses *imported* products, raising the question of its applicability to goods in transit.

²⁰ Havana Reports, U.N. Doc.ICITO/1/8, p. 72, para. 12.

²¹ U.N. Doc. E/PC/T/C.II/W.11 p. 1.

²² U.N. Doc. E/PC/T/C.II/54/Rev.1, p. 10.

²³ Annex I of the GATT, Ad Art. V, para. 5.

²⁴ Annex P of the Havana Charter, Ad Article 33. paras. 3, 4 and 5.

²⁵ Havana Reports, U.N. Doc.ICITO/1/8, p. 72.

E. PARAGRAPH 6

25. Paragraph 6 requires each party to treat products, which have been in transit through the territory of another Member, no less favourably than products transported from their place of origin to their destination without going through the territory of such other Member. The text might be read to imply that a country V would have to treat goods transported through its territory from country X with a destination in country Z, after having already been carried through country Y, in the same manner that it would treat goods passing through its territory from X directly to Z, without having passed through Y. It may be open to discussion, however, whether paragraph 6's equal treatment requirement only covers products passing through a party's territory after having already passed through another country, or whether it extends to products, which, having passed through a country, enter another party's territory to remain there as their final destination. In other words, it may be debatable whether paragraph 6 applies only to cases where the goods are shipped from X through Y and V to Z, or whether it also covers goods coming from X through Y to V (without continuing to Z).

26. The report of the Technical Sub-Committee held that while "*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 a third country**, (...) paragraph 6 covers the treatment to be given by a member country to products cleared from customs within its territory **after transit through any other member country**".²⁶ (emphasis added)*

27. An exception is made for certain direct consignment requirements existing "*on the date of this Agreement*", to the extent that they are a condition for the eligibility for goods to enjoy preferential duty rates or relate to a party's prescribed method of valuation for duty purposes. The inclusion of this provision was considered necessary as several countries required the direct shipment to their territory from the country of origin as a condition for being eligible to enjoy certain preferences. The "*date of the Agreement*" is 30 October 1947²⁷ for the original contracting parties²⁸, and the date of the accession protocol (or the date of the declaration on provisional accession) for parties who acceded at a later stage.

F. PARAGRAPH 7

Paragraph 7 exempts the operation of aircraft in transit from the application of Article V. The Preparatory Committee of the Havana Conference reports that "*... it was generally felt that air traffic should be exempted as a matter which is being dealt with by the International Civil Air Organization*".²⁹ Air transit of goods (including baggage), on the other hand, does fall within the scope of Article V.

Interpretative Note

Annex I contains an interpretative note to paragraph 5. It specifies that, with respect to transportation charges, the MFN principle refers to like products being transported on the same route under like conditions.

²⁶ U.N. Doc. E/PC/T/C.II/54/Rev.1, p. 11.

²⁷ See Article XXVI:1 GATT.

²⁸ It also includes the former territories of the original contracting parties which, having gained independence or commercial autonomy, succeeded to contracting party status under Article XXVI:5 (c). Chile is also covered.

²⁹ Report of the Technical Sub-Committee of the Preparatory Committee of the International Conference on Trade and Employment, E/PC/T/C.II/54/Rev.1, p. 7.

VI. BASIC OBLIGATIONS

28. Article V calls on parties to allow for freedom of transit by requiring them to comply with a number of specific obligations.

29. Paragraph 2 sets out the basic requirement of freedom of transit and further requires that "*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*". Paragraph 3 allows parties to require in-transit traffic to enter at the proper custom house, while at the same time stipulating the obligation not to impose "*any unnecessary delays or restrictions*" on it.

30. Obligations regarding the nature of charges or regulations a Member may legitimately impose, are set out in paragraphs 3–5. As a general rule, traffic in transit shall be exempt from customs duties. Furthermore, such traffic is to be exempted 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*". (Paragraph 3)

31. This means that there are only two kinds of charges a Member may legitimately impose on traffic in transit: charges for (i) transportation and for (ii) administrative expenses caused by transit or services rendered. And even here (as well as in the case of other permitted formalities and regulations), such charges have to be reasonable³⁰ (paragraph 4) and non-discriminatory (paragraph 5). The general principle therefore is that transit traffic shall not be a source of fiscal revenue.

32. Finally, Members are required to treat products which have been in transit through the territory of another party no less favourably than they would have treated them had they been transported from their origin to their destination without passing through the territory of such other party (paragraph 6).

VII. INTERPRETATION AND APPLICATION

33. Article V has never been applied in dispute settlement proceedings of the GATT or the WTO. Violations of its provisions have been asserted several times, without any of these cases ever leading to the issuing of a panel report. A brief look at some of these disputes may nevertheless be of interest, as they reflect the kind of questions known to arise on occasion.

34. An early incident raising questions related to the interpretation of freedom of transit as granted by paragraph 2, arose in 1989/90. Austria's announcement to limit traffic of certain heavy trucks (of all nationalities) on some of its roads during night hours was followed by the introduction of a German ban of specific Austrian vans, which were forbidden to circulate anywhere in Germany during night hours. Austria considered the German measure to violate Article V due to its exclusive targeting at trucks of Austrian origin, and requested consultations under Article XXII:1.³¹ The case was settled by mutual agreement.³²

35. A violation of Article V was also claimed in 1996, when the European Communities asserted that Article 6005 (b) of the United States' Cuban Democracy Act of 1992 denied goods and vessels of

³⁰ On the interpretative question with respect to transportation charges, see the section on paragraphs 3-5.

³¹ "*Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding such representations as may be made by another party with respect to any matter affecting the operation of this Agreement.*"

³² DS14/1, C/M/241, p. 29.

the Communities transit through US ports.³³ It was alleged that the provision in question prohibited³⁴ (i) vessels carrying goods or passengers to or from Cuba, or carrying goods, in which Cuba or a Cuban national has any interest, from entering any United States port, as well as (ii) vessels, which have entered a Cuban port for trade in goods or services, from loading or unloading freight in US ports within 180 days following departure from the Cuban port. A panel was established but suspended its work following a request by the EC. The panel's authority subsequently lapsed pursuant to Article 12.12 of the DSU.

36. Violations of Article V were also claimed with respect to measures imposed by the Slovak Republic concerning the transit of cattle.³⁵ Cattle, as well as swine and grain, were also the subject of another dispute, in which Canada alleged that certain measures imposed by the United States, prohibiting entry or transit to Canadian trucks carrying these products, violated Article V (as well as some other provisions).³⁶

37. Another dispute, leading to a request for the establishment of a panel, arose in 2000. The European Communities claimed that a Chilean prohibition³⁷ on unloading swordfish in Chilean ports (either to land them for warehousing or to transship them onto other vessels) violated Article V's paragraphs 1-3 by making transit through its ports impossible for swordfish.³⁸ By forcing Community vessels to land or transship their catches in the ports of other countries, the Chilean interdiction would cause damage to the Community industry due to the inflicted loss of competitiveness.³⁹ Following a provisional arrangement between the two parties (circulated in a communication of 6 April 2001), Chile and the European Communities agreed to suspend the process for the constitution of the panel.⁴⁰

38. Finally, in February 2002, Slovenia brought to the attention of the Council for Trade in Goods a ban imposed by Croatia on road transit of oil and oil products through Croatian territory which it argued violated Article V, particularly paragraphs 2, 4 and 6 of that Article.⁴¹ The concern was later expanded to also include additional measures subsequently introduced by Croatia, covering oil and oil products as well as several chemical products (internationally classified as dangerous goods), and referring to road transit and international road carriage. Slovenia asserts that those measures are in direct conflict with Article V (as well as with some other provisions).⁴² Croatia held that the road transit ban with respect to oil and oil products had been only temporary and that the subsequently introduced measures referred to by Croatia were in conformity with the requirements of Article V.⁴³ The matter was finally settled in bilateral consultations.

³³ See WT/DS38/2, 8 October 1996.

³⁴ An exception from this prohibition is only made in the case of a special license from the US Treasury Department.

³⁵ WT/DS133.

³⁶ WT/DS144.

³⁷ Article 165 of the Chilean Fishery Law (Ley General de Pesca y Acuicultura), as consolidated by Presidential Supreme Decree 430 dated 28 September 1991, and extended by Decree 598 dated 15 October 1999.

³⁸ WT/DS193/2, 7 November 2000.

³⁹ ET/DS193/1, G/L/367, 26 April 2000.

⁴⁰ See WT/DS193/3 and WT/DS193/3/Add.1.

⁴¹ For details see G/C/W/346, 5 February 2002. The description of this case limits itself to a factual outline of the Article V-related aspects, as the only elements of relevance for this section.

⁴² For details see G/C/W/346/Add.1, 1 March 2002.

⁴³ For details see G/C/W/360, 18 March 2002.