

PART III

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APPRAISAL OF THE HAVANA CHARTER



## CHAPTER 17

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### COMMITMENTS AND ESCAPES

THE many international conferences that dealt with problems of commercial policy between the two world wars confined themselves, in the main, to adopting resolutions and making recommendations that had no binding force on governments. The *Havana Charter*, by contrast, contains a long series of specific commitments affecting national policies. Most of these commitments and many of the exceptions and possible exemptions which accompany them have been described in some detail in the foregoing chapters. But it would be well, at this stage, to review the total balance of commitments and escapes in order to appraise the frequent charge that commitments outweigh escapes for the United States while escapes outweigh commitments for every country other than the United States. Is the *Charter* really as hard on us and as easy on everybody else as some of its critics would have us believe?

#### COMMITMENTS AS TO COMMERCIAL POLICY

With respect to the reduction or elimination of restrictive or discriminatory measures imposed on international trade by governments, countries joining the ITO will commit themselves, save where specific exceptions are contained in the *Charter* or specific exemptions may be granted by the Organization, to do or to refrain from doing the following:

1. To enter into and carry out negotiations directed toward the substantial reduction of tariffs and the elimination of preferences (17).

2. To introduce no new preferences and to increase no old preferences (16).
3. To give effect, at the earliest practicable date, to common definitions and procedures for determining the value of imported goods when value is the base upon which customs duties are levied (35).
4. To reduce the number and diversity of other customs fees and charges and to limit them, in amount, to the value of services rendered (36).
5. To reduce and simplify import and export formalities and documentation requirements (36).
6. To eliminate unnecessary marking requirements and reduce the burden of complying with such requirements as are retained (37).
7. Not to impose on imported goods internal taxes higher than those imposed on like domestic goods (18).
8. Not to impose on the distribution or use of imported goods laws, regulations, or requirements more onerous than those imposed on the distribution or use of like domestic goods (18).
9. In all these matters, to accord to each other member country in the ITO treatment no less favorable than that accorded to any third country (16).
10. To prevent the use of trade names in such a manner as to misrepresent the true origin of a product (37).
11. To confine anti-dumping and countervailing duties to cases of actual injury and to limit them, in amount, to the margin of dumping or the value of the bounty or subsidy they are designed to offset (34).
12. To afford freedom of transit to goods moving across their territories, without discrimination as to ownership, origin, destination, or means of transportation (33).
13. Not to impose any new requirement that any specified amount or proportion of any product must be supplied from domestic sources and to include the reduction or elimination of existing mixing regulations in international trade negotiations (18).
14. Not to discriminate against the distribution or exhibition of imported motion-picture films by any means other than requiring that a certain amount of screen time be reserved for the exhibition of domestic films and to include the reduction or elimination of such screen quotas in international trade negotiations (19).
15. Not to allocate imported products affected by domestic mixing requirements or screen quotas among foreign sources of supply (18, 19).
16. In all cases other than those specifically excepted by the

*Charter* or exempted through approval by the ITO, to abandon the use of licenses, quotas, or other quantitative restrictions on exports or imports (20).

17. In those cases and at those times when quantitative restrictions may be used, so to administer them as to avoid discrimination between other member countries (22).

18. To join the International Monetary Fund or to enter into a special exchange agreement with the ITO (24).

19. Not to evade the *Charter's* rules on quantitative restrictions by using exchange controls and not to evade the Fund's rules on exchange controls by using quantitative restrictions (24).

20. In the case of a state monopoly of import trade, to enter into and carry out negotiations directed toward the limitation or reduction of any competitive advantage that may be afforded to domestic producers, the relaxation of restrictions on imports, and the satisfaction of the full domestic demand for the imported product (31).

21. In the case of a state monopoly of export trade, to enter into and carry out negotiations directed toward the limitation or reduction of any competitive advantage that may be afforded to domestic users of the monopolized product and toward assurance that the product will be exported in adequate quantities at reasonable prices (31).

22. In any state-trading operation, to act solely in accordance with commercial considerations and to afford the enterprises of other member countries adequate opportunity, in accordance with customary business practice, to compete for participation in sales or purchases (29).

23. To publish, fully and promptly, statistics, laws, regulations, judicial decisions, administrative rulings, and international agreements affecting world trade (38, 39).

24. To administer trade regulations uniformly and impartially and to afford traders suitable facilities for consultation with administrative authorities (38).

25. To maintain or establish independent tribunals or procedures for the prompt review and correction of administrative action (38).

In the main, these are commitments either to do things which the United States is already doing and intends to continue doing, or to refrain from doing things which the United States is not doing and does not desire or intend to do. At the same time, they are commitments to do things which many other countries are not doing and

would not otherwise undertake to do, or to refrain from doing things which many other countries are doing and, in the absence of these commitments, will certainly continue to do.

#### THE BALANCE OF OBLIGATIONS

In the United States, the commercial policy commitments in the *Charter* would require only minor adjustments in legislation and administration. We should have to modify our methods of customs valuation, in certain respects, and make some changes in our marking requirements. We should have to amend our tariff law so that the use of countervailing duties would depend, as does the use of anti-dumping duties, upon a finding of injury. We should have to discontinue our discriminatory internal tax on oleomargarine and abandon our prohibition against the exportation of tobacco seed. We should have to make certain changes in our trade arrangements with the Philippines, either eliminating a preference given the Philippines in our internal tax on coconut oil or converting it into a preference in our tariff, and either abandoning a number of absolute quotas on imports from the Philippines or converting them into tariff quotas beyond which higher rates of duty would apply. We might have to rely, in part, upon duties rather than import quotas to prevent a backflow of primary commodities where exportation had been subsidized. None of these changes would necessitate a serious departure from existing practice or a major redirection of established policy.

In most other countries, the adjustments required to bring legislation and administration into harmony with the commercial policy provisions of the *Charter* will be far more numerous and more important than those required in the United States. Our country has been committed since 1934, under the Reciprocal Trade Agreements Act, to negotiate for the reduction of tariffs and other barriers to trade; under the *Charter*, other countries will assume a similar commitment. The United States has adhered to the principle of unconditional most-favored-nation treatment since 1922; it has forbidden misrepresentation of the origin of goods as an unfair method of competition, under the Federal Trade Commission Act, since 1914; many other countries have never adopted such policies. The United States has made comparatively little use of preferences, discrimina-

tory internal taxes or regulations, quantitative restrictions, exchange controls, or state trading; many other countries are making extensive use of these devices. The United States is the predominant exporter of motion-picture films; all other countries are importers; their commitment to abandon discriminatory practices is of interest, primarily, to the American industry. The United States is already a member of the International Monetary Fund; the *Charter* will require non-members of the Fund to accept its obligations. The United States has always given publicity to trade statistics, regulations, and agreements; certain other countries shroud these matters in secrecy; under the *Charter*, publicity will be required. The United States has a Court of Customs Appeals; many other countries, lacking equivalent procedure, will be obliged to provide it. For most of the other members of the ITO, all around the world, the commercial policy commitments in the *Charter* will require major changes in practice and in policy.

#### COMMITMENTS AS TO CARTEL PRACTICES

With respect to the elimination of restrictive business practices by public or private commercial enterprises possessing monopoly power in international trade or conspiring to restrain international trade, each country joining the ITO will commit itself:

1. To "take appropriate measures . . . to prevent" such practices whenever they "have harmful effects on the expansion of production or trade" (46).

2. To "take all possible measures, by legislation or otherwise . . . to ensure, within its jurisdiction, that private and public commercial enterprises do not engage in practices" which have such effects (50).

3. To "take full account of each request, decision, and recommendation" made by the ITO and "take in the particular case the action it considers appropriate having regard to its obligations" under these articles (50).

These commitments are consistent with the policy embodied by the Congress of the United States in the Sherman Anti-trust Act of 1890 as interpreted, under the rule of reason, by the Supreme Court. For most other countries, however, they represent a radical departure from established policy.

## COMMITMENTS AS TO COMMODITY AGREEMENTS

With respect to intergovernmental agreements to regulate the production, exportation, importation, or prices of primary commodities, countries joining the ITO will commit themselves:

1. Not to enter into any such agreement unless the industry in question displays a number of specific economic characteristics that are to be found in combination only in the cases of certain agricultural staples and of a few minerals that are produced in isolated regions (62).
2. Not to adhere to any such agreement unless its duration is limited to five years or less and to formulate and adopt, during the life of the agreement, a program of domestic economic adjustment designed to render its extension unnecessary (63, 65).
3. Not to adhere to any such agreement unless it contains specified provisions designed to safeguard the interests of consumers, including an equal vote for producer and consumer interests and full publicity (60, 63).
4. To modify or withdraw from any agreement that the ITO finds to be inconsistent with these requirements (65, 68).

These limitations upon the freedom of nations to enter into commodity agreements were included in the *Charter* upon the sole initiative of the United States. In their absence, other nations would continue to be free, as they now are free, to enter into such agreements in any field, for any period of time, without making any provision to safeguard the interests of consumers.

## COMMITMENTS AS TO SUBSIDIES

With respect to subsidies affecting international trade, each country joining the ITO will commit itself:

1. Not to subsidize the exportation of any commodity other than a primary commodity (26).
2. Not to subsidize the exportation of any primary commodity to an extent that would maintain or acquire for itself more than an equitable share of world trade in that commodity (28).
3. Upon request, to discuss with the ITO or its members the possibility of limiting any subsidy that operates, directly or indirectly, to maintain or increase exports or to reduce or limit imports (25).



The limitation upon the freedom to subsidize primary commodities is admittedly weak. Many other countries would have preferred to make it much stronger. The United States was unwilling to do so.

#### COMMITMENTS AS TO LABOR AND EMPLOYMENT

With respect to the relationship between conditions of labor and competition in international trade, each country joining the ITO will commit itself to "take whatever action may be appropriate and feasible to eliminate" unfair conditions of labor within its territory (7). Since the United States already has the highest standards of labor on earth, this commitment imposes a far heavier obligation on other countries than it does upon our own.

With respect to the relationship between international trade policy and domestic programs for the stabilization of industrial activity, each country joining the ITO will commit itself to "take action designed to achieve and maintain full and productive employment and large and steadily growing demand within its own territory through measures appropriate to its political, economic, and social institutions" (3). This commitment gives expression to a policy that would have been pursued by the United States if the *Charter* had never been written. It leaves us completely free, without regard to the opinion of the ITO or any of its members, to choose whatever form of action we prefer. And it does not require us to guarantee that the action taken will produce the effect for which it was designed.

If pronounced imbalance in international trade persists, a member continuing to have a heavy export balance commits itself to "make its full contribution, while appropriate action shall be taken by the other Members concerned, toward correcting the situation" (4). This is the only commitment in the *Charter* that points its finger toward the United States. It emphasizes the predominant position that we now occupy in international economic life. It recognizes an inescapable fact: that we cannot continue indefinitely to sell far more than we buy, while the rest of the world goes on buying far more than it sells. If this situation were to persist, we should be compelled, in one way or another, *Charter* or no *Charter*, to contribute to its correction. Under the *Charter*, the character of our contribu-

tion is for us alone to decide. And appropriate action by other countries is also required.

#### COMMITMENTS AS TO ECONOMIC DEVELOPMENT

With respect to economic development, countries joining the ITO will commit themselves:

1. To take action designed to develop their resources and to raise standards of productivity (9).
2. Not to impose "unreasonable or unjustifiable impediments" that would prevent other members from obtaining facilities for their development (11).
3. To cooperate with the ITO and with other intergovernmental organizations in promoting and facilitating economic development (10).

The United States stands to gain from the development of backward areas all around the world. It does not intend to place unreasonable obstacles in the way of enterprises which desire to export facilities for development. But it will assume no obligation, under the *Charter*, to insure that such facilities will be forthcoming.

#### COMMITMENTS AS TO INTERNATIONAL INVESTMENT

With respect to the treatment of private foreign investment, countries joining the ITO will commit themselves:

1. Not to take "unreasonable or unjustifiable action . . . injurious to the rights or interests of nationals of other Members in the enterprises, skills, capital, arts, or technology which they have supplied" (11).
2. To provide "adequate security for existing and future investments" (12).
3. To impose no requirements as to the ownership of investments that are not "just" and no other requirements with respect to investments that are not "reasonable" (12).
4. To "enter into consultation or to participate in negotiations directed toward the conclusion" of "bilateral or multilateral agreements relating to . . . opportunities and security for investment" (12).

The value of these commitments to American investors will depend, of course, upon the interpretation that is given to such words as "ade-

quate," "just," and "reasonable" by the ITO and by the International Court of Justice and upon the character of such detailed agreements as may be concluded under the commitment to negotiate.

#### CAN THESE COMMITMENTS BE ENFORCED?

If any one of these forty-five commitments is not kept, the United States or any other member of the ITO can complain, under the provisions of Chapter VIII of the *Charter*, that benefits promised it have been nullified or impaired and may be authorized, on a compensatory basis, to withhold or withdraw from the delinquent member tariff concessions or other benefits. If it chooses to do so, it may request an advisory opinion on any legal question from the International Court of Justice and such an opinion, when delivered, will be binding on the ITO.

#### THOSE ESCAPE CLAUSES

If the *Charter* were confined to statements giving recognition to abstract principles, there would be no need for the inclusion of escapes. But since it sets forth a long series of specific commitments, these are accompanied, of necessity, by a number of detailed exceptions and by provisions for possible exemptions from its general rules. It has been said, in criticism of the *Charter*, that these escapes are so numerous and so sweeping that little of value will remain. It is desirable, therefore, that they be enumerated and their importance assessed.

The exceptions and possible exceptions to the rules contained in the *Charter* fall into the following general categories: (1) definitions of jurisdiction which except matters covered in other parts of the *Charter*, by other international agreements, or by other intergovernmental organizations, (2) routine exceptions copied from previous commercial treaties and trade agreements, (3) temporary exceptions, limited to the postwar transition or to the duration of some other period of emergency, (4) exceptions permitting the retention of certain existing restrictions but making them subject to reduction or elimination through negotiation, (5) other exceptions of minor importance which are designed, in most cases, to permit a single

country to continue a particular measure which would otherwise be outlawed by the general rules of the *Charter*, and (6) four open escapes and four controlled escapes of major importance. Each of these categories will be examined in turn.

#### JURISDICTIONAL EXCEPTIONS

Exceptions which are, for the most part, little more than cross-references to other articles, agreements, or agencies are contained in the following articles and paragraphs of the *Charter*:

1. Commodity agreements are exempt from Chapter IV because they fall under Chapter VI (45*a*, ix) and state trading is exempt from Chapter VI because it falls under Chapter IV (70-1*a*).
2. Agreements relating to the conservation of fisheries, wildlife, and exhaustible natural resources and to the distribution of commodities in short supply are outside the *Charter* (45*a-x*, 70).
3. Complaints concerning restrictive practices in transport, communications, and other services will be transferred by ITO to the appropriate agencies (53).
4. The *Charter* will not override the provisions of peace treaties or settlements resulting from the Second World War (99).
5. Measures taken directly in connection with a political matter brought before the United Nations fall within the scope of the United Nations and are not subject to the ITO *Charter* (86-3).

The last of these provisions may be important, since it might exempt a boycott employed in the course of a political dispute from the general rule against quantitative restrictions. But it was the judgment of the delegates at Havana that the ITO should confine itself to economic matters, leaving to the United Nations the settlement of political differences.

#### ROUTINE EXCEPTIONS

Technical and routine exceptions to general rules, similar to those contained in all commercial treaties and trade agreements, are found in the following articles and paragraphs:

1. The rule against discriminatory internal regulations does not require railroads or other common carriers to revise their rate structures (18-4).

2. Quantitative restrictions may be used in enforcing the classification and grading of commodities (20-2*b*).

3. The commercial policy commitments do not apply to measures relating to the products of prison labor, the movement of gold or silver, or the protection of national treasures of artistic or historic value, or to measures required for public safety or necessary to the enforcement of domestic laws not inconsistent with the *Charter* (45*a*).

4. Neither the commercial policy commitments nor the commodity agreement commitments apply to measures necessary to protect public morals or human, animal or plant life or health (45*a*, 70-1*c*).

5. Members need not divulge confidential information which would impede law enforcement or prejudice the legitimate commercial interests of any enterprise (38-1, 50-3).

#### TEMPORARY EXCEPTIONS

Some of the temporary exceptions are limited to the postwar transition period; others to the time required to bring existing practices into conformity with the new rules; others to some future period of particular emergency:

1. The commercial policy commitments do not apply, during a transition period to be terminated by the ITO, to measures essential to the distribution of products in short supply, the control of prices, and the liquidation of war surpluses and industries (45*b*).

2. Some latitude for discrimination in the administration of import quotas is permitted a country in balance-of-payments difficulties during a transition period to be terminated by the International Monetary Fund (23).

3. Any subsidy on exports may be continued for two years (26-3) and a discriminatory internal tax may be retained until the completion of negotiations permitting its conversion into a customs duty (18-3).

4. Export restrictions may be employed for the period necessary to prevent or relieve critical shortages of foodstuffs or other essential goods (20-2*a*).

5. A country in balance-of-payments difficulty may temporarily discriminate in administering import quotas on a small part of its trade if the benefits derived substantially outweigh any injury that might be caused (23-2).

## NEGOTIABLE EXCEPTIONS

Certain forms of restriction or discrimination, while not forbidden by the *Charter*, are to be included, as is the case with tariffs, in negotiations for the reduction of barriers to trade. This is true of existing mixing regulations (18-6), screen quotas (19*d*), and preferences surviving the negotiations that were held in Geneva in the summer of 1947 (16-2).

## OTHER MINOR EXCEPTIONS

A half-dozen exceptions, though written in general terms, were included in the *Charter* at the insistence of a single country in order to permit the continuance or adoption of a particular measure that would otherwise be in violation of its general rules. These exceptions permit continuance of a foreign screen quota in Czechoslovakia (19*c*), a livestock control plan in Norway (20-2*c*-iii), a stabilization system in Australia (34-7, 37-1), certain restrictions on the exportation of raw materials in New Zealand (45*a*-xi), a direct-consignment requirement in Canada (33-7) and the institution of export controls in connection with domestic conservation measures in the United States (45*a*-viii). Of these, only the last one would have any material effect on the total volume of international trade.

The remaining exceptions of minor importance make possible the use of quotas to enforce permitted exchange controls (24-8*b*), the use of subsidies to offset subsidies paid by non-members of the ITO (26-4), and certain departures from the general rules governing commodity agreements, if approved by the Organization and all of the participants thereto (56-3, 61-6, 63*c*).

## THE OPEN ESCAPES

Of the escape clauses that have real significance in relation to the commitments contained in the *Charter*, there are only eight. All of these are defined with precision and safeguarded in some detail by their terms. Four of them come into operation without any sort of finding or approval by the ITO or any other international agency. The other four do not come into operation unless a finding is made or approval obtained. The first four were included in the *Charter*

at the instance of the United States. The last four were included to meet the problem of countries in balance-of-payments difficulties and at the instance of countries whose economies are in the process of economic development.

The exceptions which the United States regarded as prerequisite to its acceptance of the *Charter* are these:

1. Tariff concessions may be suspended or withdrawn if increased imports cause or threaten serious injury to domestic producers (40).
2. Quotas may be imposed on imports of agricultural products when domestic prices are maintained at levels higher than world prices through measures which restrict domestic production or marketing (20-2c).
3. Exports of agricultural products may be subsidized (27-3, 5).
4. Measures adopted and agreements entered into for the protection of essential security interests are exempt, in general, from the provisions of the *Charter* (99-1).

These are not the provisions which the critics of the *Charter*, in the United States, have had in mind when they have complained that the document is riddled with escapes. The clauses toward which their attention is directed thus narrow down to four.

#### THE CONTROLLED ESCAPES

The serious escapes, from the point of view of American opinion, are those which make possible, in individual cases and for limited periods of time, departure from the *Charter's* rules against new preferences, mixing regulations and import quotas. It is the purpose of these escapes to enable countries that are in financial difficulties, as is now the case in western Europe, to protect their monetary reserves and reestablish equilibrium in their balances of payments; to facilitate the enlargement of markets through the gradual development of customs unions and free trade areas; and to assist relatively undeveloped countries in the establishment of new industries. The four escapes in question are these:

1. Import quotas may be imposed by a country that is found by the International Monetary Fund to be in balance-of-payments difficulty, during the period and to the extent necessary "to fore-

stall the imminent threat of, or to stop, a serious decline in its monetary reserves," or "to achieve a reasonable rate of increase in its reserves" (21).

2. Exceptions to the most-favored-nation rule may be granted by the ITO, under specified conditions, where they are incidental to the gradual establishment of a customs union or free trade area (44).

3. New preferences may be permitted by the ITO, for fixed periods, between two of its members, if they satisfy a number of specific criteria and are found to be necessary to promote the economic development of the countries concerned (15).

4. New non-discriminatory measures affecting imports (import quotas and mixing regulations) may be employed to promote economic development if various conditions are fulfilled, procedures followed, and permissions obtained (13).

These four articles are reprinted in the Appendix and are discussed in some detail in Chapters 6, 8, and 14 of this book. In text, they are long, technical, and difficult to understand. But this very fact demonstrates how carefully these possible exceptions are circumscribed. A wide-open escape could have been written in four words: "This does not apply." A controlled exception requires more type; and these exceptions are controlled. They set up a number of obstacles that must be surmounted: conditions to be fulfilled, criteria to be satisfied, procedures to be followed, and permissions to be obtained. Once this has been done, they impose a whole series of additional obligations that must be assumed. And finally, they provide in one way or another for the limitation of the period during which the exception may be enjoyed.

#### HOW SERIOUS ARE THE ESCAPES?

Any conclusion as to the possible seriousness of the major escape clauses must rest upon a judgment as to how they are likely to be administered. In the case of the balance-of-payments escape, the broadest of the four, the ITO must accept the determination of the International Monetary Fund and the interest of the United States will be safeguarded by the heavy weight of its vote in the Fund. In the cases of the economic-development escapes, the United States will have a permanent seat on the Executive Board of the ITO and half of the seats on the Board are likely to be held by industrial



powers. If issues are appealed to the Conference of the ITO, the undeveloped countries will unquestionably be in a position to outvote the industrial states. If they were to vote as a bloc on each application, the breach made by these exceptions would be wide. But they are unlikely to do so. Experience has shown that the economic interests of undeveloped countries differ sharply and that their votes are likely to be split. When a particular country applies for permission to impose a restriction on imports of a particular product, every exporter of the product is likely to vote against the application. And when any two countries apply for permission to establish new preferences, every country that would suffer is likely to vote in the negative. The risk of an unfavorable vote is one that the undeveloped as well as the developed countries will have to take.

There is some virtue in the fact that the important exceptions in the *Charter* are plainly labeled as exceptions to general principles whose validity every signatory of the document must recognize. Their legal status is that of releases granted from obligations that have been voluntarily assumed. They do not condone unauthorized departures from general rules; they do permit departures with international sanction, under international control.

It should be emphasized that the escapes provided in the *Charter* will not enable any country to do anything that it is not already free to do. It is true that the commitments in the *Charter*, when qualified by the escapes, have less value than they would have if they stood alone. But it is equally true that the commitments, together with the escapes, give far greater assurance as to the future direction of national commercial policies than would exist if the *Charter* were not approved.

The *Charter* offers to the United States an opportunity to obtain a considerable measure of influence with respect to future commercial policies all around the world. We can obtain this influence without taking any commitments that would be inconsistent with our own established policies. The question that we must answer is whether we shall throw this opportunity away because the measure of influence it offers is not as large as we had hoped, or retain the considerable measure of influence that we already have within our grasp.