CHARLES N. BROWER
JOHN B. TEPE, JR.*

The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law?†

Introduction

On December 12, 1974, the twenty-ninth session of the United Nations General Assembly adopted 120-6-10[1] a new and controversial Charter of Economic Rights and Duties of States (the "Charter")[2] over the vigorous objections of the United States[3] and certain other industrialized countries. Such a Charter had been proposed by President Luis Echeverria of Mexico, in 1972, and was drafted under the auspices of the United Nations Conference on Trade and Development ("UNCTAD") with the support and participation of many States. Debate on the Charter will not subside with its adoption, since that debate, reflecting continuing essential differences between developing countries and the industrialized world, is required by the terms of the Charter (Article 34) to be continued at the next session of the General Assembly, commencing in

---

*Mr. Brower, a member of the D.C. and New York Bars and formerly Acting Legal Adviser of the Department of State, and Mr. Tepe, a member of the New York Bar, are Chairman and Secretary, respectively, of the Subcommittee on Economic Rights and Duties of the Section of International Law of the American Bar Association. This article is based on the Report on the Charter approved by the Subcommittee, and, accordingly, the authors wish to express their gratitude to the members of the Subcommittee.

†*See* Documentation section, beginning on page 000 for the Charter itself and relevant supplementary materials.

[1]Negative votes were cast by Belgium, Denmark, the Federal Republic of Germany, Luxembourg, the United Kingdom and the United States. Abstaining were Austria, Canada, France, Ireland, Israel, Italy, Japan, the Netherlands, Norway and Spain. *See* N.Y. Times, Dec. 13, 1974, at 11, col. 1 and 14 INT'L LEG. MAT'LS 265 (1975).

[2]The full text of the Charter is found commencing at page 28 of the Report of the Second Committee U.N. Doc. A/9946 (29 U.N. GAOR Supp.____at____, U.N. Doc. A/____(1974)) and in U.N. Doc. A/RES/3281 (xxix), 29 U.N. GAOR Supp. ____, at ____ (reproduced in 14 INT'L LEG. MAT'LS 251 (1975), and is reproduced in the Documents Section of this issue.

[3]This vote was in accordance with American Bar Association Resolution No. 301 adopted at the Association's Annual Meeting in August 1974, a copy of which is reproduced in the Documents Section of this issue.

September 1975. This article describes the Charter and analyzes its strengths and weaknesses, touching both on its substantive provisions and on its relationship to international law. Inherent in it are recommendations as to the positions and actions which the United States should take in any future proceedings regarding the Charter.

Historical and Procedural Background of the Charter

During the fourteen years the United Nations has been systematically utilized as a forum in the economic campaign of the developing countries, and despite the establishment of the U.N. Capital Development Fund,[4] the First U.N. Development Decade,[5] UNCTAD,[6] the Agreed Conclusions of the Special Committee on Trade Preferences,[7] and the Second U.N. Development Decade,[8] the economic gap between the developing and the developed countries has failed to narrow significantly.[9] Most developing countries have actually suffered relative economic shrinkage.[10] This steadily worsening situation has increasingly led to attempts by the developing countries to obtain a legally binding commitment by the developed countries to certain economic rights and duties favoring the third world economies.

Thus, on April 19, 1972, in an address before the 92nd Plenary Meeting of UNCTAD, the President of Mexico, The Honorable Luis Echeverria Alvarez, suggested that the international economy should be placed on a "firm legal footing"[11] through formulation of a Charter of Economic Rights and Duties of States which might define and protect the economic rights of all countries, particularly the developing ones,[12] and which might contain some of the following principles:

> freedom to dispose of natural resources; the right of every nation to adopt the economic structure it considered most suitable and to treat private property as the public interest required; renunciation of the use of economic pressures; subjection of foreign capital to domestic laws; prohibition of interference by supranational corporations in the internal affairs of States; abolition of trade practices that discriminated against the exports of non-industrial nations; economic advantages proportionate to levels of

---

[4]G.A. Res. 1706, 16 U.N. GAOR Supp. 17, at 13, U.N. Doc. A/5100 (1961).

[5]G.A. Res. 1710, 16 U.N. GAOR Supp. 17, at 17, U.N. Doc. A/5100 (1961).

[6]G.A. Res. 1785, 17 U.N. GAOR Supp. 17, at 14, U.N. Doc. A/5217 (1962); made permanent G.A. Res. 1995, 19 U.N. GAOR Supp. 15, at 1, U.N. Doc. A/5815 (1964).

[7]U.N. Docs. TD/B/329/Add. 5—TD/B/AC.5/36/Add. 5 (1970), 10 UNCTADOR Supp. 6A, U.N. Doc. TD/B/329/Rev. 1—TD/B/AC.5/36/Rev. 1 (1970).

[8]G.A. Res. 2626, 25 U.N. GAOR Supp. 28, at 39, U.N. Doc. A/8028 (1970).

[9]*Id.* at Preamble.

[10]UNCTAD, HANDBOOK OF INTERNATIONAL TRADE AND DEVELOPMENT STATISTICS 155, table 5.5 (1969).

[11]Summary of Address, UNCTAD Proceedings, Third Session, U.N. Doc. TD/180, Vol. 1A, Part 1 at 184, 186 (1972).

[12]U.N. Press Release, TAD/501, 1 Feb. 1973.

development; treaties guaranteeing stable and fair prices for basic products; transfer of technology; and greater economic resources for long-term untied aid.[13]

Taking note of President Echeverria's proposal, UNCTAD resolved on May 18, 1972, in a 90-0-19 vote from which the United States abstained, to establish a Working Group (the "Working Group") to draft the Charter ". . . to protect duly the rights of all countries and in particular the developing States . . ."[14] based on the principles approved by UNCTAD in the final act of its first session, the principles in the Charter of Algiers and the Declaration and Principles of the Action Programme of Lima and relevant United Nations resolutions such as the Strategy for the Second U.N. Development Decade, as well as any suggestions by its third session.[15] The Working Group initially was authorized to meet in two separate sessions in 1973, but due to the difficulty of the rather large task entrusted to it, its mandate was extended on December 6, 1973 to permit it a third and fourth drafting session.[16] The membership of the Working Group was authorized by the General Assembly to encompass 40 States.[17]

At the outset of Working Group meetings, its Chairman, Ambassador Castañeda of Mexico, stated that the purpose of the Charter was to "enunciate authentic economic rights and duties of States in the only way which it is logically possible to do so: as rights and duties of a juridical nature intended to be binding if the draft should become part of the corpus of international law." Therefore the Working Group should "formulate legal, and therefore obligatory, rights and duties" of States. At the same time, he felt the goal of the Working Group was not "to formulate a program of action for the United Nations or the international community," as this function had already been performed by such events as the Strategy for the Second Development Decade. Rather the Charter should contain certain principles of a universal nature found in those instruments insofar as they reflect rights and duties of States.[18] In his view the Charter should strive to create new rules which would respond to the present and future needs of the world community, since merely to codify the existing international economic law "would be tantamount to defending the maintenance of the *status quo*, which has certainly not promoted the welfare of

[13]Summary of Address, *supra* note 11.

[14]UNCTAD Res. 45 (III), UNCTAD Proceedings, Third Session, U.N. Doc. TD/180, Vol. I at 58 (1972).

[15]*Id.*; U.N. Press Release, TAD/501, 1 Feb. 1973.

[16]G.A. Res. 3082, 28 U.N. GAOR Supp. 30, at 40, U.N. Doc. A/9030 (1973).

[17]Australia, Belgium, Bolivia, Brazil, Bulgaria, Canada, Chile, China, Czechoslovakia, Denmark, Egypt, France, the Federal Republic of Germany, Guatemala, Hungary, India, Indonesia, Iraq, Italy, Ivory Coast, Jamaica, Japan, Kenya, Mexico, Morocco, the Netherlands, Nigeria, Pakistan, Peru, the Philippines, Poland, Romania, Spain, Sri Lanka, the USSR, the United Kingdom, the United States, Yugoslavia, Zaire and Zambia. G.A. Res. 3037, 27 U.N. GAOR Supp. 30, at 53, U.N. Doc. A/8730 (1972).

[18]Statement by the Chairman of the Working Group, U.N. Doc. TD/B/AC.12/R.4, at 2.

two-thirds of mankind."[19] Chairman Castañeda acknowledged that for the Charter to be effective, "it should be an instrument fundamentally acceptable to, or at least tolerated by, all the main groups of States."[20] Conscious of the disagreements likely to arise during the creation of new norms and the expansion of the corpus of international law, the Chairman foresaw that the principal function of the Working Group would be to "negotiate opposing views and to find common denominators for divergent national interests."[21] He recognized and encouraged the role of the developing countries as providing the stimulus for change.[22]

At the first session of the Working Group held in Geneva from February 12-23, 1973,[23] the developing countries immediately took the initiative in offering suggestions and four working papers were sponsored by various groups in addition to a consolidated proposal prepared by some of the sponsors of the other working papers, all of which were referred to a subgroup of 18 States which prepared a draft Charter.[24] At its second session, also held in Geneva, from July 13-27, 1973, the Working Group, after considering the comments of 31 States, established two subgroups to draft the Charter through a synthesis of the outline framed at the first session and the comments made at the second session.[25] Based on the texts drafted by these subgroups Chairman Castañeda submitted an informal consolidated draft of the Charter.[26]

Notwithstanding its abstention from voting on the UNCTAD resolution establishing the Working Group, the United States participated as a member of the Working Group. Dr. Henry Kissinger, making his first address to the General Assembly shortly after being installed as Secretary of State in October

---

[19] *Id.*

[20] *Id.* at 3.

[21] *Id.*

[22] *Id.*; *see* Comment, *Charter on Economic Rights and Duties of States: A Solution to the Development Aid Program*, 4 GA. J. INT'L & COMP. L. 441, 451-452 (1974).

[23] Report of the Working Group on the Charter of Economic Rights and Duties of States on its first session, U.N. Doc. TD/B/AC.12/1 (the "First Report").

[24] *Id.* at 15; U.N. Docs. TD/B/AC.12/R.6 and Add. 1, R.8, R.10, and R.11; Comment, *supra* note 22 at 453.

[25] Report of the Working Group on the Charter of Economic Rights and Duties of States on its second session, U.N. Doc. TD/B/AC.12/2 (the "Second Report") at 65 (comments consolidated in U.N. Doc. TD/B/AC.12/2/Add. 1). Subgroup I considered the preamble and Chapters I and III of the Charter and included [emphasis indicates participation in drafting group] *Belgium*, Brazil, Bulgaria, Canada, *China*, Czechoslovakia, Denmark, *Egypt, France*, Federal Republic of Germany, Guatemala, Hungary, *India*, Indonesia, Iraq, *Italy, Jamaica*, Japan, *Kenya, Mexico*, the Netherlands, *Nigeria, Philippines*, Poland, *Romania*, Spain, Sri Lanka, *USSR*, United Kingdom, *United States*, Yugoslavia and Zaire. Subgroup II considered Chapter II of the Charter and included [emphasis indicates participation in drafting group] Australia, Belgium, *Canada, Chile, China*, Czechoslovakia, Denmark, *Egypt, France, Federal Republic of Germany, Guatemala, Hungary*, India, *Indonesia, Iraq*, Italy, Jamaica, *Japan, Kenya, Mexico*, Morocco, the Netherlands, Nigeria, Peru, *Philippines, Poland*, Romania, Spain, *USSR, United Kingdom, United States, Yugoslavia* and *Zaire*.

[26] *Id.* at 45.

1973, just over two months after the Working Group had completed its second session, pledged the United States to "examine seriously" the various Charter proposals and to continue participation in the Working Group. Secretary Kissinger warned, however, that the rights and duties proposed by the Working Group must "reflect the true aspirations of all nations [and] be defined equitably and take into account the concerns of industrialized as well as of developing countries," and that "if [the Charter] is turned into an indictment of one group of countries by another it will accomplish nothing."[27]

The efforts of the two subgroups of the Working Group continued at its third and fourth sessions held in Geneva on February 4-22, 1974 and in Mexico City during June 10-28, 1974. At these sessions further elaboration and refinement of the Charter occurred with the result that the text of only a few significant provisions remained unagreed upon; disagreement on these provisions, however, was fundamental.[28]

After further informal consultations among Working Group Members at United Nations Headquarters in New York and elsewhere a final draft of the Charter was submitted to the Second Committee of the General Assembly at its twenty-ninth session in the Fall of 1974. There debates continued (and remained unresolved) on the text of several key provisions. With a view to gaining time for additional negotiations that might lead to universal acceptance of the Charter a group of nine industrialized States[29] proposed a resolution in the Second Committee requesting further consultations before submission of the Charter to the General Assembly.[30] That resolution was defeated 81-20-15[31] and on December 6, 1974 the Second Committee resolved to submit the Charter to the General Assembly.[32]

The United States voted "with deep regret" against submission of the Charter to the General Assembly in its still unagreed state.[33] The United States pointed out that only a few unagreed provisions remained, but that as a result the draft Charter was imbalanced, failed to encourage harmonious economic relations or much needed development, and, indeed, discouraged rather than encouraged the capital flow which is vital for such development.[34] In conclusion the United

[27]69 DEP'T STATE BULL. 472 (Oct. 15, 1973).

[28]Report of the Working Group on the Charter of Economic Rights and Duties of States on its third session, U.N. Doc. TD/B/AC.12/3 (the "Third Report"), and on its fourth session, U.N. Doc. TD/B/AC.12/4 (the "Fourth Report").

[29]Belgium, Denmark, France, the Federal Republic of Germany, Ireland, Italy, Luxembourg, the Netherlands and the United Kingdom.

[30]Report of the Second Committee, *supra* note 2 at 20.

[31]*Id.* at 21.

[32]*Id.* at 26.

[33]Statement by Senator Charles H. Percy, U.S. Representative in Committee II, Press Release USUN-1920 (74).

[34]*Id.* at 2.

States suggested that it might reconsider its vote in the future if additional negotiations could reach an agreed consensus on those issues vital to "countries whose numbers may be small but whose significance in economic relations and development can hardly be ignored."[35] Notwithstanding the opposition, as noted above (see text at note 1), the Charter was adopted by the General Assembly on December 12, 1974 by the overwhelming vote of 120-6-10.

The Non-Binding Character of the Charter

It was the original intent of the sponsors of the Charter that it be a legally binding document. However, particularly as the divergence of opinion between the developing and developed States on a variety of sensitive and sometimes non-economic issues raised by the developing States became apparent at the first session of the Working Group, some participants grew to oppose the concept of creating in the Charter, legally binding obligations. For example, the United States representative expressed doubt as to the "advisability, possibility or feasibility of making the rights and duties formulated in a draft Charter legally binding on States."[36] He added that "while developed countries were not indifferent to the problems of developing countries, States might not be prepared at present to give up the degree of sovereignty that acceptance of such sweeping juridical commitments might imply."[37]

In order to permit the Working Group to concentrate on its primary function of formulating substantive economic rights and duties of States, it was decided at the first meeting of the second session of the Working Group not to reopen discussion of the legal nature of the final instrument but rather to leave the question of the Charter's legal force to the General Assembly.[38] Nonetheless, indirect reference to its potentially binding nature appeared in the draft Charter presented to the Second Committee of the General Assembly. It was declared in the fourth preambular paragraph that "it is a fundamental purpose of this Charter to *codify* and develop rules for the establishment of the new international economic order . . ."[39] and in the last preambular paragraph that "the General Assembly solemnly adopts the present Charter of Economic Rights and Duties of States as a first step in the *codification* and progressive development of this subject."[40]

Eventually, in apparent recognition of the fact that the Charter was no longer intended necessarily to be a legally binding instrument, the representative of Mexico before the Second Committee, on behalf of the Charter's sponsors,

---

[35]*Id.*
[36]First Report, *supra* note 23 at para. 19.
[37]*Id.* at para. 28.
[38]Second Report, *supra* note 25 at 3.
[39]Report of the Second Committee, *supra* note 2 at 3 (emphasis added).
[40]*Id.* at 5 (emphasis added).

introduced revisions whereby the words "to codify and develop rules for" in the fourth preambular paragraph were replaced by the words "to promote" and whereby the words in the last preambular paragraph reading "as a first step in the codification and progressive development of this subject" were deleted.[41] These revisions were adopted by the Second Committee without negative vote.[42] Similarly, and in apparent further confirmation of the non-binding status of the Charter, the representative of Mexico before the Second Committee, on behalf of the sponsors, offered a revision whereby the reference to "obligations" under the Charter in subparagraph (c) of the fifth preambular paragraph of the draft Charter presented to the Second Committee[43] was modified so that reference would be made instead to the "provisions" of the Charter.[44] This modification, too, was adopted by the Second Committee without opposition.[45]

The transitional language bridging the preamble and Chapter I of the Charter (*i.e.*, "solemnly adopts the present Charter . . .") does not in itself establish any binding legal effect of the Charter, although it might be noted that the United States had suggested as an alternative the even more clearly non-binding phrase "solemnly declares the following principles."[46]

The non-binding nature of the Charter is evidenced by several other facts as well. First, the United States and several major economic powers constituting a very substantial portion of the world economic community voted against the Charter at the time of its adoption; a larger number abstained. Such votes express the unwillingness of those major powers to consent either expressly or by implication to all of the rights and duties set forth in the Charter. Secondly, a General Assembly resolution, which is not a multilateral convention or treaty, will in any event normally have only recommendatory force. Although at least one writer considers General Assembly resolutions to have a moral force that "is in fact a nascent legal force which may enjoy . . . a twilight existence hardly distinguishable from morality and justice until the time when the imprimatur of the world community will attest to its jural quality,"[47] the more commonly accepted opinion is that voiced by Professor Brierly that all the General Assembly can do is discuss and recommend and that the effect of these recommendations is only moral, not legal.[48]

---

[41] *Id.* at 20.
[42] *Id.* at 23, 24.
[43] *Id.* at 4.
[44] *Id.* at 19.
[45] *Id.* at 23.
[46] Second Report, Add. 1, *supra* note 25 at 47; for a discussion of the relative effect of a General Assembly "recommendation" or "declaration" *see* Comment, *supra* note 22 at 460.
[47] Sloane, *The Binding Force of a "Recommendation" of the General Assembly of the United Nations*, 25 BRIT. Y.B. INT'L L. 1 (1948).
[48] J. BRIERLY, THE LAW OF NATIONS 110 (6th ed. 1963); U.N. Charter, Article 10; for additional discussion of this point *see* Comment, *supra* note 22 at 459-460; *but see* J. CASTAÑEDA, LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS (Amoia transl. 1969).

Having established that the Charter is not a legally binding instrument, one might justifiably inquire why the third world States pressed for quick passage of a very broad and groundbreaking statement of principles, when they recognized that such an approach would preclude agreement on the Charter having legal effect. One might equally inquire as to why developed countries evidenced such strong resistance to certain Charter provisions given their lack of direct legal force. The answer is clear on both counts. The strategy behind the Charter came to be a desire to develop in the Charter a statement of principles which, even if not legally binding, could be construed by those States which reject traditional international law as a statement of international law. Certain States which do not accept traditional views of what constitutes international law might indeed go further and express the position, in their municipal courts and possibly elsewhere, that the Charter actually reflects a new standard of international law. At the very least the Charter could serve as a pressure on future international lawmaking. Lacking ability to achieve more favorable binding agreements with developed states through bilateral or multilateral negotiations of a more concrete character, the developing states have resorted to the creation of the Charter as a means of generating an impression of general international support for a movement toward principles not embraced by the current body of traditional international law. Through this procedure, the third world nations evidently hope to upset or at least alter the direction of current specialized and pragmatic negotiations in a variety of fields (*cf.*, GATT, IMF, and the Third U.N. Law of the Sea Conference) which eventually will result in legally binding conclusions.

The Weakening Effect of the Charter on International Law

The most fundamental weakness of the Charter is its overall failure to state clearly that the economic rights and duties of States are subject to international law or at least that international law is pertinent. Indeed, this is the position taken by the American Bar Association in its Resolution No. 301.[49] The initial relevant reference, the citation in paragraph (j) of Chapter I of the Charter of the principle of "fulfillment in good faith of international obligations" as a governing principle in international relations, is unfortunately ambiguous. The term "international obligations" as used in Chapter I is open to the interpretation that it includes only freely accepted contractual obligations rather than international law as a whole. It is unclear, for example, whether the term includes obligations under customary international law. By way of clarification the United States unsuccessfully suggested limiting the reference in Chapter I to

[49]*See* note 3 *supra.*

"good faith fulfillment of obligations assumed by States in accordance with the [U.N.] Charter."[50]

Other references to the "international obligations" of States appear in only three of the 34 articles of the Charter:[51]

> Article 4. In the pursuit of international trade and other forms of economic cooperation, every State is free to chose the forms of organization of its foreign economic relations and to enter into bilateral and multilateral agreements ***consistent with its international obligations*** and with the needs of international economic cooperation.
>
> Article 12(1). States have the right, in agreement with the parties concerned, to participate in subregional, regional and interregional co-operation in the pursuit of their economic and social development. All States engaged in such co-operation have the duty to ensure that the policies of those groupings to which they belong correspond to the provisions of the Charter and are outward-looking, ***consistent with their international obligations*** and with the needs of international economic co-operation and have full regard for the legitimate interests of third countries, especially developing countries.
>
> Article 22(1). All States should respond to the generally recognized or mutually agreed development needs and objectives of developing countries by promoting increased net flows of real resources to the developing countries from all sources, ***taking into account any obligations and commitments undertaken*** by the States concerned, in order to reinforce the efforts of developing countries to accelerate their economic and social development.
>
> Article 22(2). In this context, consistent with the aims and objectives mentioned above and *taking into account any obligations and commitments undertaken* in this regard, it should be their endeavour to increase the net amount of financial flows from official sources to developing countries and to improve the terms and conditions. [emphasis added throughout]

As a whole the other provisions of the Charter are open to the negative inference that *expressio unius est exclusio alterius*, and hence that they are not subject to international law, notwithstanding the reference in Chapter I, paragraph (j) to "international obligations."

The failure of the Charter fundamentally to accord to international law its proper governing role in international relations is compounded by the substantial efforts made in substantive provisions of the Charter to undermine existing rules of international law believed by less developed countries to be insufficiently biased in their direction. For these reasons in particular a

---

[50]Second Report, Add. 1, *supra* note 25 at 47.

[51]Arguably one should include also Article 21:

> Developing countries should endeavor to promote the expansion of their mutual trade and to this end, may, *in accordance with the existing and evolving provisions and procedures of international agreement where applicable,* grant trade preferences to other developing countries without being obliged to extend such preferences to developed countries, provided these arrangements do not constitute an impediment to general trade liberalization and expansion.
>
> [emphasis added]

Its reach, however, limited to "international agreements," would be narrower than "international obligations," assuming the latter encompassed "international law" generally.

coalition of fourteen nations[52] in varying constellations unsuccessfully offered a series of eighteen different amendments to the draft Charter in the Second Committee largely directed to conforming the Charter to their understanding of current international law.

The Battle Over Article 2: Expropriation and Permanent Sovereignty

The highlight of Charter debate, throughout the labors of the Working Group, the informal consultations, and the Second Committee, was, and doubtless will continue to be, Article 2. A more detailed analysis of this Article is merited both because of its substantive importance, and as an instructive example of the relationship of the Charter, non-binding though it may be, to international law.

It long has been common currency that international law provides with respect to expropriation, as set forth in the American Law Institute's Restatement (Second) of Foreign Relations Law of the United States (1965), that:

> § 185. The taking by a state of property of an alien is wrongful under international law if (a) it is not for a public purpose, [or] (b) there is not reasonable provision for the determination and payment of just compensation, as defined in § 187, under the law and practice of the state in effect at the time of taking.
>
> § 187. Just compensation . . . must be (a) adequate in amount . . ., (b) paid with reasonable promptness . . ., and (c) paid in a form that is effectively realizable by the alien, to the fullest extent that the circumstances permit. . . .

These principles were confirmed by the General Assembly itself in 1962 when it adopted G.A. Resolution 1803 (XVII), the Declaration on Permanent Sovereignty Over Natural Resources:

> In such cases [nationalization, expropriation or requisitioning] the owner shall be paid appropriate compensation, in accordance with rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law.[53]

In the full context of adoption of G.A. Resolution 1803 (XVII) the words "appropriate compensation" could only mean prompt, adequate and effective compensation.[54] There is no doubt that this is a mandatory obligation under international law, that such compensation "shall" be paid.[55]

---

[52]Australia, Belgium, Canada, Denmark, France, the Federal Republic of Germany. Greece, Ireland, Italy, Japan, Luxembourg, the Netherlands, the United Kingdom and the United States.

[53]17 U.N. GAOR Supp. 17, at 15, U.N. Doc. A/5217 (1962).

[54]U.S.U.N. Press Release No. 4091 at 6, cited in Schwebel, *The Story of the U.N.'s Declaration on Permanent Sovereignty Over Natural Resources,* 49 A.B.A.J. 463, 465 (1963).

[55]*See* text at note 53; for a discussion of custom as evidenced by arbitration decisions *see* W. Friedmann, O. Lissitzen & R. Pugh, INT'L L. at 807-812 (1969) ("Friedmann").

Article 2(2)(c) of the Charter, however, provides only that "appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent." Thus the only obligation, prefaced with the precatory rather than mandatory "should," is to grant such compensation, if any, as is subjectively thought to be "appropriate," considering only local law and "circumstances" to which international law is not necessarily "pertinent." Nor is there even an intimation that a taking need be for a public purpose.

The utter rejection of international law, both in substance and as a relevant source of governing authority (regardless of content), is underscored by the express provision that:

> [i]n any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.

Clearly this dispenses with international adjudication based on international law, except on a fully negotiated basis, and then possibly only as between States, and not as to any State's dispute with a national of another State.

Starting at the earliest sessions of the Working Group the United States made known that notwithstanding that every State exercises permanent sovereignty over its natural resources and may dispose of them freely and fully it could not accept the provisions of the Charter declaring that nationalization is an expression of sovereign power solely within the jurisdiction of that State. Instead it felt that a State must remain within the framework of international law in the disposition of its natural resources and that appropriate compensation should be provided upon nationalization of foreign property as required by international law.[56]

It has been traditionally thought also that any taking of property of an alien by a State must not be discriminatory in nature, otherwise international law is violated.[57] This is simply a particular application of the broader principles of international law precluding discriminatory treatment of aliens not based on a rational distinction,[58] which is ordinarily reflected in treaties of friendship,

---

[56]Second Report, Add. 1, *supra* note 25 at 48.

[57]Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845 (2d Cir. 1961), *aff'g.*, 193 F. Supp. (S.D.N.Y.); this reasoning was adopted in Banco Nacional de Cuba v. Farr, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 1037 (1968).

[58]*See* ALI, RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES at §§ 165, 166; also Sohn and Baxter, *Draft Convention on the International Responsibility of States for Injuries to Aliens*, 55 A.J.I.L. 545, Arts. 12(1)(b) and 12(4)(2) (1961); FATOUROS, GOVERNMENT GUARANTEE TO FOREIGN INVESTORS 249-51 (1962); S. FRIEDMANN, EXPROPRIATION IN INTERNATIONAL LAW 189-92 (1953); 3 HACKWORTH 555, 654, and 1948 Universal Declaration of Human Rights (adopted 48-0-8), G.A. Res. 217, 3 GAOR, at 71, Art. 17(2), U.N. Doc. A/810 (1948).

commerce and navigation to which the United States is a party.[59] Yet nowhere does Article 2 record, or even make a genuflection toward, this established principle. It is quick to provide, in Article 2(2)(a), that "No State shall be compelled to grant preferential treatment to foreign investment," but fails to include the natural corollary of non-discrimination.

There is also substantial authority to the effect that when a State enters into a concession agreement or other contract, whether with another State or a national of another State, regarding the importation of capital, it is bound to observe it in good faith; in effect it has waived its right of expropriation to the extent such action would be inconsistent with the contractual terms. The essence of claims by less developed countries to "permanent sovereignty" over natural resources, however, is a desire to establish, as a matter of right, the violability of such agreements. The General Assembly itself resolved this conflict in 1962 by confirming, in its Declaration on Permanent Sovereignty Over Natural Resources, that:

> [i]n cases where authorization is granted, the capital imported and the earnings on that capital shall be governed by the terms thereof, by the national legislation in force, and by international law.
>
> Foreign investment agreements freely entered into by, or between, sovereign states shall be observed in good faith.[60]

That Declaration recalled that the General Assembly had specified that "due regard should be paid to the rights and duties of States under international law" in the underlying work of its Commission on Permanent Sovereignty Over Natural Resources.[61]

In respect to inviolability of contracts the Charter is likewise deficient, for Article 2(1), without any deference to international law, boldly proclaims without limitation that:

---

[59] *See* Friedmann, *supra* note 55 at 777, n. 2.

[60] G.A. Res. 1803 (XVII), *supra* note 53 at §§ 3 and 8.

[61] *See also* the International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200, 21 GAOR Supp. 16, at 52, U.N. Doc. A/6316, which provides:

> Article 1(2). All peoples may for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and *international law*. In no case may a people be deprived of its own means of subsistance." [emphasis added]

An identical Article 1 appears in the International Convention on Economic, Social & Cultural Rights of Dec. 16, 1966 (G.A. Res. 2200, 21 GAOR Supp. 16, at 49, U.N. Doc. A/6316). Likewise the Convention on Settlement of International Investment Disputes Between States and Nationals of Other States (17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159) refers to international law for the settlement of disputes:

> Art. 42.(1) The Tribunal shall decide a dispute in accordance with the rules of law as may be agreed by the parties. In the absense of such agreement, the Tribunal shall apply the law of the Contracting State party to the disputes (including its rules on conflict of laws) and such rules of *international law* as may be applicable. [emphasis added]

> Article 2(1). Every state has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.

This failure to honor the traditional sanctity of contract had motivated the United States as early as the second session of the Working Group to propose an alternative text, as follows:

> All States have the right, *within the framework of international law*, freely and fully to dispose of their natural resources in the interests of the economic development and well-being of their peoples.[62] [emphasis added]

The United States also suggested the following text:

> The regulation and control of foreign investment shall be *in accordance with international law.* Due regard shall be given to the benefits for economic development of such investment.[63] [emphasis added]

Even these generalized references, far less specific than the above-cited provisions of the Declaration on Permanent Sovereignty Over Natural Resources, could not achieve acceptance.

The pronounced rejection of international law both in the abstract and in substance plainly evidenced by the text of Article 2 as it was proposed in the Second Committee (and ultimately adopted by the General Assembly) led a group of fourteen industrialized countries,[64] including the United States, to propose a complete substitute for Article 2 embodying a more legal approach. The proposed text was perhaps less specific and forceful than the U.N.'s 1962 Declaration on Permanent Sovereignty Over Natural Resources. That this is so reflected the genuine willingness of these countries to cooperate toward the adoption of a universally accepted Charter. The proposed text was as follows:[65]

> *Article 2*
>
> 1. Every State has permanent sovereignty over its natural wealth and resources and has the inalienable right fully and freely to dispose of them.
>
> 2. Each State has the right:
>
> (a) To enact legislation and promulgate rules and regulations, consistent with its development objectives, to govern the entry and activities within its territory of foreign enterprises;
>
> (b) To enter freely into undertakings relating to the import of foreign capital which shall be observed in good faith;
>
> (c) To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities will comply

---

[62]Second Report, Add. 1, *supra* note 25 at 48.

[63]*Id.* at 50.

[64]Australia, Belguim, Canada, Denmark, France, the Federal Republic of Germany, Greece, Ireland, Italy, Japan, Luxembourg, the Netherlands, the United Kingdom and the United States.

[65]Report of the Second Committee, *supra* note 2 at 16.

fully with its laws, rules and regulations and conform with its economic and social policies. Every State shall ensure that transnational corporations enjoy within its national jurisdiction the same rights and fulfill the same obligations as any other foreign person. Transnational corporations shall not intervene in the internal affairs of a host State. Every State should, with full regard for its sovereign rights, co-operate with other States in the exercise of the right set forth in this subparagraph;

(d) To nationalize, expropriate or requisition foreign property for a public purpose, provided that just compensation in the light of all relevant circumstances shall be paid;

(e) To require that its national jurisdiction be exhausted in any case where the treatment of foreign investment or compensation therefor is in controversy, unless otherwise agreed by the parties;

(f) To settle disputes where so agreed by the parties concerned through negotiation, good offices, inquiry, fact-finding, conciliation, mediation, arbitration or judicial settlement, on the basis of the principles of sovereign equality of States and free choice of means.

3. States taking measures in the exercise of the foregoing rights shall fulfil in good faith their international obligations.

Thus the compromise proposed would specifically require that expropriation be for a public purpose, and that "just compensation in the light of all relevant circumstances shall be paid." Proposed Article 2(2)(c) (second sentence) would have prescribed the principle of non-discrimination, at least among transnational corporations. Further, proposed Article 2(2)(b) would have required that investment agreements with aliens "be observed in good faith." Most critically, proposed Article 2(3) would have subjected the exercise of all rights encompassed by Article 2 to the duty of States to "fulfill in good faith their international obligations." Despite the arguable ambiguity of the phrase "international obligations," adoption of this phrase, amplified by appropriate explanations of vote and other "legislative history," would have gone very far towards making the Charter as a whole justifiably acceptable to the industrialized world.

The crucial vote establishing the high water mark for supporters of international law in the Charter debates occurred with respect to the proposed Article 2(3) on "international obligations." Twenty countries voted for the substitute and 18 more abstained. Seventy-one votes were cast against it.[66] On no other significant amendment seeking to import international law into the Charter, either abstractly or in concrete form, was greater support than this achieved. After the defeat of proposed Article 2(3) the accompanying proposed Articles 2(1) and (2) were rejected 87-19-11.[67] Thus was the stage set for the

[66] *Id.* at 22.
[67] *Id.*

failure of the Charter to achieve the universal acceptance for which its sponsors had originally hoped.[68]

Charter Provisions Expressly Favoring Developing Countries

In a more generalized fashion, many articles in the Charter are devoted to calling upon the international community to favor or give preferences to "developing countries" in various aspects of international economic and trade matters. These provisions reflect the fundamental thrust of the strategy of the developing countries to create through the Charter an international atmosphere more favorable to their cause and to influence international relations and negotiations to their advantage. The attitude of cooperative compromise brought to Charter discussions by the developed countries is evidenced by the fact that most of their objections to these provisions were abandoned during the course of negotiations within the Working Group. Indeed, unless indicated otherwise, the articles discussed below were adopted without negative vote by the Second Committee.

A. *General Provisions Regarding Economic Progress and Accelerated Development*

Article 8, for example, provides that "States should cooperate in facilitating more rational and equitable international economic relations and in encouraging structural changes . . . in harmony with the needs and interests of all countries, especially developing countries. . . ."

Similarly, Article 9 notes the responsibility of States "to cooperate in the economic, social, cultural, scientific and technological fields for the promotion of . . . progress . . . especially that of the developing countries."

In Article 11 all States are urged to cooperate to strengthen, improve and adapt international organizations in order that measures may be implemented "to stimulate the general economic progress of all countries, particularly of developing countries. . . ."

Likewise Article 13 encourages the transfer of technology to the developing countries with proper regard for all legitimate interests including, *inter alia*, the rights and duties of holders, suppliers and recipients of technology. In particular, all States are encouraged to facilitate "the access of developing countries to the achievements of modern science and technology, the transfer of technology and the creation of indigenous technology for the benefit of the developing countries in forms and in accordance with the procedures which are suited to their economies and their needs."

[68]An amendment to Article 30 proposed by eight countries including the United States would have tied the responsibility of States for pollution to "pertinent international norms, regulations and obligations." *Id.* at 18. It was rejected by a vote of 91-22-12. *Id.* at 23.

In Article 17 every State is urged to cooperate with the efforts of developing countries "by extending active assistance to them . . . with strict respect for the sovereign equality of States and free of any conditions derogating from their sovereignty."

A final general provision, Article 24, requires that in the conduct of their mutual economic relations all States "should avoid prejudicing the interests of developing countries."

B. *Provisions Regarding Trade and Tariffs*

Several articles expressly address trade and tariff questions, urging that the general bias toward developing countries which underlies the Charter specifically be applied to such issues. Article 14 of the Charter is particularly forthright in this regard. It broadly urges the "expansion and liberalization of world trade and an improvement in the welfare and living standards of all peoples, in particular those of developing countries." States are encouraged to cooperate "towards the progressive dismantling of obstacles to trade" and towards the solution of the trade problems of all countries "taking into account the specific trade problems of the developing countries." In this connection, States are required "to take measures aimed at securing additional benefits for the international trade of developing countries so as to achieve a substantial increase in their foreign exchange earnings, the diversification of their exports, the acceleration of the rate of growth of their trade, taking into account their development needs, an improvement in the possibilities for these countries to participate in the expansion of world trade and a balance more favorable to developing countries in the sharing of the advantages resulting from this expansion, through, in the largest possible measure, a substantial improvement in the conditions of access for the products of interest to the developing countries and, wherever appropriate, measures designed to attain stable, equitable and remunerative prices for primary products."

The Charter often highlights what its sponsors regard as particular problem areas. Thus the Charter provides in Article 27 that "the role of developing countries in world invisible trade should be enhanced and strengthened . . . , particular attention being paid to the special needs of developing countries," and all States are urged to "cooperate with developing countries in their endeavors to increase their capacity to earn foreign exchange from invisible transactions."

Article 18 more specifically concerns tariffs. It encourages the extension of generalized non-reciprocal and non-discriminatory tariff preferences to the developing countries. Developed countries are also urged to "give serious consideration to the adoption of other differential measures, in areas where this is feasible and appropriate and in ways which will provide special and more

favorable treatment, in order to meet trade and development needs of the developing countries."

The developing countries expanded the concept of such preferential rights in Article 19 by encouraging generalized preferential, non-reciprocal and non-discriminatory "treatment" to the developing countries, rather than just "tariff preferences." The broad scope, and potentially wide-ranging consequences, of such a provision caused fourteen industrialized States to call for the deletion of Article 19 in the Second Committee debates,[69] but their resolution was defeated 102-17-5.[70]

Finally, in Article 21 developing countries are permitted to promote the expansion of their mutual trade through the granting of trade preferences to each other "without being obligated to extend such preferences to developed countries, provided these arrangements do not constitute an impediment to general trade liberalization and expansion." Similarly Article 23 admonishes developing countries to "expand their mutual trade" in order to mobilize their own resources, and urges developed countries to provide appropriate and effective support and cooperation vis-à-vis trade between developing countries.

C. *Special Interest Pleas: The Least Developed Countries and Non-Market Economies*

It is natural in a document which has as its main theme the granting of economic advantage to developing countries that special emphasis be accorded the most disadvantaged of this group. Thus Article 25 requires all countries, and developed countries in particular, to pay special attention to the needs and problems of "the least developed among the developing countries, of land-locked developing countries and also island developing countries."

Two articles appear to be directed to the particular interests of the Soviet Union and its affiliated States. Article 20 urges developing countries to "give due attention to the possibility of expanding their trade with socialist countries" by granting them "conditions for trade not inferior to those granted normally to the developed market economy countries." In Article 26, a duty was imposed on all States to "coexist in tolerance and live together in peace, irrespective of differences in political, economic, social and cultural systems, and to facilitate trade between States having different economic and social systems." The Article 20 call for universal most-favored national treatment, which is an important socialist issue, was reiterated here as well. These two articles were the object of some negative votes and abstentions (Article 20: 110-1-12; Article 26: 105-14-10).[71]

---

[69]Report of the Second Committee, *supra* note 2 at 18.

[70]*Id.* at 23.

[71]*Id.* at 25. These articles represent the only manifestation of a distinct Soviet viewpoint. Otherwise, the Soviet Union and its associates tended simply to support the developing countries.

D. *Development Assistance: The Muted Appeal*

When the proposal for a Charter was first initiated, many developed countries were concerned that it would become an instrument designed to establish the mandatory entitlement of developing countries to direct financial aid. While the Charter urges the international manifestation of a distinct preference for developing countries in economic affairs, it has carefully hewed to this theme, and abjured any pronounced insistence on outright aid. The developing countries have expressed their desires and needs largely in terms of the indirect aid afforded by preferential trade and economic arrangements, uncompensated expropriation and the like. Accordingly, the Article most clearly addressed to aid, Article 22, promotes "increased net flows of real resources to the developing countries," and urges States "to increase the net amount of financial flows from official sources to developing countries" including "economic and technical assistance."

Charter Provisions on Freedom of Choice, Freedom to Participate and Freedom from Coercion

Complementary to the Charter's general theme of preferring the interests of developing countries is that of guaranteeing the freedom of action of developing countries. This theme is most broadly sounded in Article 1 of the Charter, which provides:

> Every state has the sovereign and inalienable right to choose its economic system as well as its political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or threat in any form whatsoever.

This theme is defined with more specificity in succeeding articles in Chapter II of the Charter. For example, Article 4 provides that, "In the pursuit of international trade and other forms of economic cooperation, every State is free to choose the forms of organization of its foreign economic relations,"[72] and in Article 7 each State is reserved "the right and the responsibility to choose its means and goals of development, fully to mobilize and use its resources, to implement progressive economic and social reforms and to ensure the full participation of its people in the process and benefits of development."[73]

Corollary to the freedom of choice is the freedom to participate in international decision making. In this regard Article 10 provides that all States are juridically equal and "have the right to participate fully and effectively in the

[72]This article was the subject of eight negative votes and seven abstentions. Report of the Second Committee, *supra* note 2 at 25.

[73]Because of its failure to include any reference to international law, Article 7 could be interpreted to mean that individual States may assert purely domestic reasons for disregarding their obligations under international law (*see*, U.S. Comment, Second Report, Add. 1, *supra* note 25 at 48).

international decision-making process in the solution of world economic, financial and monetary problems. . . ." Similarly Article 12 recognizes the right of States "to participate in subregional, regional and interregional cooperation in the pursuit of their economic and social development." It is noteworthy here, however, that Article 12(1) also expresses an obligation on the part of such regional groups to conform their policies to the Charter.[74]

Matching the principles of freedom of choice and freedom to participate is a prohibition against coercion. The subject of the legal use of economic and political coercion by States is a current topic of much discussion,[75] however, touched off by events ranging from Chilean expropriations to the Arab oil boycott. New language in the Charter concerning coercion could have raised or rekindled a number of troublesome questions. For example, would the Charter condone coercive steps undertaken in self-defense pursuant to Article 51 of the U.N. Charter or as otherwise permitted under international law? There was some unresolved debate within the Working Group as to whether the term "coercion" would include the withholding of commodities or goods from trade, the withholding or withdrawal of loans, grants, GATT tariff concessions, or most-favored nation treatment, or a State's voting against a loan by an inter-

---

[74]Article 12(2) extends the force of the Charter to any of the groupings mentioned in Article 12 "to which the States concerned have transferred or may transfer certain competences as regards matters that come within the scope of this Charter," but due to a revision in Article 12, apparently proposed to the Second Committee by the sponsors at the behest of those States which are members of the European Economic Community, the Chapter is limited in such cases to be "consistent with the responsibilities of such States as members of such groupings."

[75]*See,* Comment, *The Use of Non-Violent Coercion: A Study in Legality Under Article 2(4) of the Charter of the United Nations,* 122 U. PA. L. REV. 983 (1974). Current resolutions and provisions on coercion are diverse. The Declaration of the Inadmissability of Intervention into the Domestic Affairs of States and the Protection of their Independence and Sovereignty. (G.A. Res. 2131, 20 GAOR Supp. 14, at 11, U.N. Doc. A/6014 (1965) adopted 109-0-1 (U.K. abstaining) provides:

> No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it subordination of the exercise of its sovereign rights or to secure from it advantages of any kind.

In addition, the Implementation of the Declaration on the Strengthening of International Security (G.A. Res. 2993 of December 15, 1972, 27 U.N. GAOR Supp. 30, at 20, U.N. Doc. A/8730 (1972)), prohibits coercion as follows:

> 4. . . . any measure or pressure directed against any State while exercising its sovereign right freely to dispose of its natural resources constitutes a flagrant violation of the principles of self-determination of peoples and non-intervention, as set forth in the [U.N.] Charter, which if pursued, could constitute a threat to international peace and security.

Identical language had been previously adopted by UNCTAD in its Resolution 46(III) of May 18, 1972 (UNCTAD Proceedings, Third Session, U.N. Doc. TD/180, Vol. I at 59 (1972)).

> No State may use or encourage the use of coercive measures of an economic or political characer in order to force the sovereign will of another State and obtain from it advantages of any kind.

This sentiment was restated in 1973 by resolution of the Inter-American Economic and Social Council (CIES/Res./50 (VIII-73)) as follows:

> 10. . . . Coercive measures of any kind are incompatible with the terms of Chapters IV and VII of the Charter of the OAS.

national financial institution. For example, would the Hickenlooper Amendment constitute coercion when it forbids the extension of further foreign aid to States which expropriate U.S. property without taking appropriate steps to provide full compensation therefor? Could the United States invoke the Charter against the Mideast petroleum boycott or other commodity boycotts?

As a result, it was determined that the Charter should not disturb the status quo as set forth in the U.N. Friendly Relations Declaration and the Charter simply repeats language from that Declaration as Article 32:[76]

> No state may use or encourage the use of economic, political or any other type of measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights.

This solution has not answered any of the many hypothetical questions which have been current in recent years regarding coercion, but by simply reiterating a text which has been widely accepted as reflecting international law it at least had the virtue of not giving rise to any new questions.[77]

Charter Provisions Justifying Commodity Cartels

Additional specific expression of the Charter's bias toward developing countries is found in a series of provisions which memorialize the right of developing countries to engage in concerted action in the disposition of their natural resources. The predictable sensitivity of developed countries to the effects of international commodity cartelization, particularly in the wake of the 1973-74 oil embargo, resulted in sharp reaction. Following the dispute over Article 2, this was the second most contested area, resulting in unsuccessful attempts to amend.

For example, Article 5 provides:

> All states have the right to associate in organizations of primary commodity producers in order to develop their national economies to achieve stable financing for their development, and in pursuance of their aims assisting in the promotion of sustained growth of the world economy, in particular accelerating the development of developing countries.

---

[76]Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. 28, at 123, U.N. Doc. A/8028 (1970).

[77]Other references to coercion in the Charter should be noted. Article 5 places on all States the duty to respect the right to form "organizations of primary commodity producers" by refraining from applying "economic and political measures that would limit it." Similarly Article 17 requires that foreign assistance to developing countries be "free of any conditions derogating from their sovereignty." Finally, Article 16 defines as "coercive policies" the following: "colonialism, *apartheid*, racial discrimination, neo-colonialism and all forms of foreign aggression, occupation and domination and the economic and social consequences thereof."

Article 5 reinforces this right by imposing a duty on States outside the cartel to "respect that right by refraining from applying economic and political measures that would limit it," presumably even if the cartel is guilty of coercion under international law, and regardless of whether such "measures" themselves constitute coercion. The last sentence of Article 7 further reinforces this right by imposing on States a duty "to cooperate in order to eliminate obstacles that hinder" the mobilization and use by another State of its resources through the means of its choosing. Eleven countries moved for deletion of Article 5 from the text of the Charter during the Second Committee debates,[78] but their resolution was defeated 98-15-8.[79]

The right to form cartels was further bolstered by Article 6, which promotes the conclusion of long-term multilateral commodity agreements, "taking into account the interests of producers and consumers." The same countries that opposed cartels (less the Netherlands) proposed a text which would have especially encouraged "the regular flow of raw material supplies" and placed contain limitations on long-term multilateral commodity agreements, as follows:[80]

> All States shall be prepared to study and negotiate as appropriate world-wide commodity agreements on a case-by-case basis, which should cover as many producers and consumers as possible and a substantial part of the trade involved. All States should endeavor to promote the regular flow of raw material supplies, including agricultural and industrial raw material supplies, having regard to the particular economic circumstances of individual countries, at stable, remunerative and equitable prices, thus contributing to the development of the world economy while taking into account, in particular, the interests of developing countries.

This amendment was defeated 95-17-10.[81]

The provision in Article 6 that "All states share the responsibility to promote the regular flow and access of all commercial goods traded at stable, remunerative and equitable prices" is also matched by other articles emphasizing the developing countries' desire to maintain the highest price level in order to be able to finance their own imports. Thus Article 14 also emphasizes "stable, equitable and remunerative prices for primary products." Article 28 specifically imposes a duty on all States to achieve "adjustments in the prices of exports of developing countries in relation to prices of their imports. . . ." Here, too, the patience of the developed countries was strained. Nine developed countries

---

[78]Belgium, Denmark, France, the Federal Republic of Germany, Ireland, Italy, Japan, Luxembourg, the Netherlands, the United Kingdom and the United States (but, notably, neither Australia nor Canada, both producers of primary resources for export). Report of the Second Committee, *supra* note 2 at 17.

[79]*Id.* at 22.

[80]*Id.* at 17.

[81]*Id.* at 23.

proposed to the Second Committee that Article 28 be deleted from the Charter,[82] but the move was defeated 101-12-11.[83]

In a final attempt to redress the balance in this area eleven industrialized countries moved to delete the broadly stated Article 31 duty "to contribute to the balanced expansion of the world economy" and in place thereof to insert following Article 14 a new article which would have emphasized the maintenance of a "balance between the interests of raw material producer and consumer countries."[84] This amendment, too, was defeated, 97-15-10.[85]

Miscellaneous Charter Provisions

It is perhaps too much to hope that any multilateral negotiations of the duration and complexity of those in which the Charter gestated could avoid addressing some politically appealing but minimally relevant issues. Inevitably, then, the developing world felt constrained once more to introduce in Article 16 the theory popular with developing countries that there should be restitution for the economic and social consequences of "colonialism, *apartheid*, racial discrimination, neo-colonialism and all forms of foreign aggression, occupation and domination." This provision would patently expand international law, especially in paragraph 2, which provides that, "No State has the right to promote or encourage investments that may constitute an obstacle to the liberation of a territory occupied by force," a provision evidently having its origins in the current situation in southern Africa. Attempts to delete Article 16,[86] largely because of its irrelevance and its potential for fostering the creation of radical new international law without full and proper consideration of all the ramifications, failed.[87]

Disarmament, too, secured a place in the Charter, namely Article 15, which imposes a duty on all States "to promote the achievement of general and complete disarmament under effective international control" and to utilize the resources so freed for economic and social development, especially "for the development needs of developing countries." An attempt was made also to delete this article,[88] and likewise was defeated, although by a smaller majority than generally characterized votes on Charter provisions, *i.e.*, 76-22-24.[89]

---

[82] *Id.* at 18.
[83] *Id.* at 23.
[84] *Id.* at 18.
[85] *Id.* at 23. A discussion of the articles relating to natural resources should not fail to take note of Article 3. It provides, where natural resources are shared by two or more countries, for cooperation and consultations "in order to achieve optimum use of such resources without causing damage to the legitimate interest of others." It attracted an unually high number of negative votes and abstentions, passing 97-7-25 (*Id.* at 25).
[86] *Id.* at 18.
[87] *Id.* at 23.
[88] *Id.* at 18.
[89] *Id.* at 23.

Two other extraneous subjects, law of the sea and environment, were grouped under a separate chapter heading (III), "Common responsibilities towards the international community," without any opposing votes.[90] Article 29 regarding the seabed, the ocean floor and the subsoil thereof does not appear to go beyond Resolution 2749 of the U.N. General Assembly,[91] and is doubtless meant to provide additional ammunition for the developing countries at the Third U.N. Law of the Sea Conference. Article 30 calling for the "protection, preservation and the enhancement of the environment for the present and future generations" is perhaps more troublesome because of its qualifying proviso that "the environmental policies of all States should enhance and not adversely affect the present and future development potential of developing countries."

Final Provisions

Articles 31 and 32, appearing under "Final Provisions" in the Charter, have already been discussed. Article 33 provides that nothing in the Charter shall be construed as impairing or derogating from the provisions of the U.N. Charter[92] "or actions taken in pursuance thereof."[93] Article 34 provides for reconsideration of the Charter at the thirtieth session of the General Assembly in the fall of 1975 and thereafter on the agenda of every fifth session.

Conclusion

The Charter represents one means by which the developing countries, through the use of UNCTAD's and the General Assembly's one-nation-one-vote system, attempt to overcome the divergence of assumptions between developed and developing countries that has frustrated them in GATT, IMF and other fora where developed countries are more predominant. Even if they are able to pass resolutions purportedly imposing duties on developed States, however, it is not realistic for them to do so in view of the dependence of any development program on technology and other outside assistance which must,

---

[90] *Id.* at 25.

[91] Declaration of Principle Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof Beyond the Limits of National Jurisdiction, 25 U.N. GAOR Supp. 28, at 24, U.N. Doc. A/8028 (1970).

[92] In light of the references to international law in the U.N. Charter (*e.g.*, Preamble, paragraph 3 and Article 1, paragraph 1), this provision could serve as the basis for arguing that the Charter of Economic Rights and Duties of States is in fact subject to international law, but it may be questioned whether this is a wholly adequate recognition.

[93] However, it may be unclear what actions are intended to be considered in pursuance of the U.N. Charter. It is clear by way of legislative history that the Working Group rejected (i) texts proposed by Iraq and the Philippines at its third session which would have included specific reference at this point to U.N. resolutions and (ii) a text proposed by Iraq which would have included specific reference to economic sanctions imposed by the U.N. in accordance with its Charter or the right of States to take similar measures individually or collectively in legitimate self-defense according to Article 51 of the U.N. Charter (Third Report, *supra* note 28 at 21).

in the long run, come from the developed countries. There is not sufficient reciprocity of interests to persuade the developed States to be legally bound by all the terms of the Charter.

The developed world must take into consideration the viewpoints of the less developed nations, and their claim to full participation in the international lawmaking process. Experience indicates that even on the apparently obdurate issue of protection of foreign investments, adjustment, compromise, and settlement on mutually acceptable terms will continue to be possible. For their part, the developing States might consider the benefits of the protection and assistance traditionally accorded them through effective international law and organizations.

If the Charter is demonstrative of the likely quality of generalized efforts in the future, the very complex and controversial issues covered by the Charter would continue to be better resolved through specialized and pragmatic negotiations. During the course of negotiations on the Charter, and at the time of its adoption, many parties expressed concern both (1) as to the failure of the Charter to provide that the rights and duties memorialized therein were intended to be subject to international law, and (2) that the Charter had come to represent an attempt by the developing countries to withdraw from existing fora certain issues in which they were particularly interested or to prejudice or infuence such fora in a direction they might not have otherwise taken. Those concerns were expressed, for example, in the resolution of the American Bar Association and in the activities of the ABA Subcommittee on Economic Rights and Duties which took place under such resolution. It was based upon such concerns that the United States voted, with deep regret, against the adoption by the General Assembly of the Charter as a whole.

Such a result is made doubly unfortunate by the fact that agreement was achieved on many broad issues. Perhaps if further time had been taken for the resolution of the few issues which remained in dispute at the time of the adoption of the Charter a universally acceptable Charter could have been achieved. Hopefully, between now and the next formal consideration of the Charter at the thirtieth session of the General Assembly, pursuant to Article 34 of the Charter, informal consultations among the parties concerned can achieve the few, but important, revisions of the Charter necessary to generate universal accord.