CHARTER ON ECONOMIC RIGHTS AND DUTIES OF STATES: A SOLUTION TO THE DEVELOPMENT AID PROBLEM?

On May 18, 1972, the United Nations Conference on Trade and Development (UNCTAD) approved resolution 45 (III), thereby focusing attention on the international social, economic and political problems stemming from the growing commercial gap between industrialized, developed countries and less-industrialized, developing countries. The resolution called for the establishment of a working group under the auspices of the United Nations and UNCTAD to prepare a draft charter setting out economic rights and duties of states. The United Nations General Assembly will decide the ultimate disposition of the completed draft charter, thus once again making the United Nations the setting for the recurrent clash between opposing economic theories resulting from the frustration felt by the developing nations as they continue to fall short of attaining their goal of a "fair" share in the international economy. Through the proposed charter of economic rights and duties of states the developing countries seek a legally binding commitment that the developed countries will make a good faith effort, measured by the standards of the charter, to assure a more equalized distribution of the profits and rewards from global trade and resource utilization.

To understand the draft charter's emphasis on trade as the means to promote the advancement of the developing countries and the philosophical conflicts between the members of the working group and to be able to draw some conclusions concerning the future of the draft charter, a sketch of one country's past development aid efforts will be helpful. Although development aid in the past has not been able to promote the advancement of the developing countries, a legal and binding commitment to fair share in the world economy is necessary.

1Narrow definitions of the descriptive words used throughout this note are lacking. In keeping with common usage, the descriptions "developed" and "developing" will correspond to the United Nations classifications of Group I and Group II countries. More precise definitions must be agreed upon before a meaningful economic plan based on delineating between developed and developing countries can be effective. See L. Black, THE STRATEGY OF FOREIGN AID 22-28 (1968); U. Kirdar, THE STRUCTURE OF UNITED NATIONS ECONOMIC-AID TO UNDERDEVELOPED COUNTRIES 1 (1966).

2Once again precise definition is impossible. Suffice it to say that, as exhibited by the developing countries' representatives to the working group, the fair share of the world economy due the developing countries has not yet been obtained. See infra note 105.

"Aid" has a multitude of definitions. A sample would include: (1) "[A] transfer of resources from the government or citizens of one country to those of another on terms that, from the point of view of the receivers, are easier than could be obtained on the capital market." E. Mason, FOREIGN AID AND FOREIGN POLICY 12 (1964). (2) "[O]fficial foreign aid [is] a transfer of real resources or immediate claims on resources . . . from one country to another, which would not have taken place as a consequence of the operation of market forces or in the absence of specific official action designed to promote the transfer by the donor country." R. Mikesell, THE ECONOMICS OF FOREIGN AID 194 (1968). (3) "[T]he flow of financial and technical resources from the developed world to the underdeveloped world." L. Black, supra note 1, at 1.

Common to the definition of Mason and Mikesell is the notion that "aid" is something which could not be obtained in the market place. All three definitions, however, permit a wide variety of forms of aid, from loans on terms just slightly better than commercial terms to outright grants.
from a number of sources, aid from the United States has historically been of
great significance because of its magnitude. That country’s past aid programs
have been based on assumptions and philosophies not unlike those underlying
programs of the other donor countries. For those reasons and for the sake of
brevity, the United States’ aid efforts will be utilized in the analysis of the
influence these past programs exert on current attitudes manifested by the
representatives within the working group.

United States Aid

The Marshall Plan marked the beginning of a true foreign assistance experi-
ence for the United States. That Plan provided the foreign exchange needed
by western European countries to replenish their stocks of working capital
which in turn allowed the repair and replacement of production facilities and
the restoration of the flow of trade. As Europe regained its pre-war self-
reliance, the United States was faced with a global situation which necessitated

The lack of a commonly accepted definition of aid has made it very difficult for agreement to be
reached on the amount of aid a donor country is, or should be, sending to developing countries
and on the amount of aid a country’s development needs require. H. Johnson, Economic Policies
Toward Less Developed Countries 24-25 (1967). For purposes of this note, “aid” will be used
in a broad sense, with no attempt to distinguish between forms of aid.

The common philosophy shared by aid donors is that their foreign aid programs should be
shaped with their own interests primarily in mind. E. Mason, supra note 3, at 3.

In some cases, notably France and the United Kingdom, a major motivation has been
a sense of responsibility to, and desire to maintain the political support of, former
colonial territories, on which development assistance has been concentrated. In other cases, such as Germany, the long run commercial and political advantages of the
goodwill obtainable by generosity to the developing nations are regarded as important.
In the case of the United States, broad humanitarianism and the moral obligation of the rich to assist the poor have been inextricably intermingled with the belief in rapid
economic development as a potent strenghtener of resistance to domestic communist
influences and generosity in development assistance as an effective means of command-
ing the political and military support — or at least neutrality — of the less developed
nations.

It appears, however, that the United States may no longer be representative of the attitudes of
the donor countries. H. Johnson, supra note 3, at 7. It is unclear whether the United States is
truly becoming isolated or whether other donors silently support the American resistance to aid
changes while verbally allying with the developing countries’ call for change. Id. at 39.

Although American aid was restricted to Western European countries it was not all originally
so intended. The Soviet Union and countries under its domination were invited to participate in the planning stages of the Marshall Plan but walked out of the early meetings. Subsequently, the
growth of the Cold War prevented any further thought of aid to the eastern European countries.
Private communication with former Secretary of State Dean Rusk, December 14, 1974.

E. Mason, supra note 3, at 38.
the continuation and expansion of its foreign assistance allocations. The new aid recipients, however, were markedly different from most of the Marshall Plan participants. Whereas western Europe possessed all the requirements of recovery and continued development except for foreign exchange, the new aid donees possessed, typically, primary commodity based economies with little or no domestic industrial base. These “developing” countries sought support for their efforts to escape their poverty, generally by attempting to quickly build an industrial base which would lessen their need for imported manufactured products. The programs developed to assist these new aid recipients had three main bases. While one basis for the effort was a profound humanitarian belief in helping others, the other two bases were closely tied to the United States’ perception of its own national interest. The theory of an economic defense against the spread of communism provided a potent rationale for supplying aid to a country in an effort to keep it out of the communist camp. Equally important was the United States’ economic self-interest in seeking to stimulate and expand international trade and development.

A variety of techniques have been developed through the years to dispense American aid. The relative importance of the three above-mentioned policy bases vary from technique to technique but generally American self-interest is the dominant basis. Military assistance programs have claimed a substantial amount of the United States aid and have generally been justified on the grounds of security against communism. However, this paper is concerned with economic development aid and so will concentrate on the non-military components of United States aid.

President Truman in his inaugural speech of January 20, 1949, provided the foundation for American foreign-aid policy. He pledged the resources of the United States in a “... program for making the benefits of [American] scientific advances and industrial progress available for the improvement and

---

1R. MIKESSELL, supra note 3, at 4.
3E. MASON, supra note 3, at 38.
4L. BLACK, supra note 1, at 56-57.
5H. JOHNSON, supra note 3, at 4.
6H. JOHNSON, supra note 3, at 2; R. MIKESSELL, supra note 3, at 5; J. NELSON, AID, INFLUENCE, & Foreign Policy 13 (1968).
7E. MASON, supra note 3. “Humanitarianism as a fundamental motivation has certainly played an important role in the actions of individual Americans, whether under private or public auspices, in the underdeveloped areas of the world.” Id. at 27.
8E. MASON, supra note 3, at 3; R. MIKESSELL, supra note 3, at 4.
9L. BLACK, supra note 1, at 16; E. MASON, supra note 3, at 3; R. MIKESSELL, supra note 3, at 4.
10L. BLACK, supra note 1, at 16.
11R. MIKESSELL, supra note 3, at 5.
12L. BLACK, supra note 1, at 86.
13Id. at 16.
growth of underdeveloped areas." The Korean War drained off most of the foreign aid allocations in the form of military assistance until the mid-1950's when a shift from military aid to economic aid became apparent. The Agricultural Trade Development and Assistance Act of 1954 began the American surplus agricultural commodities program through which developing countries were provided with commodities in exchange either for raw materials needed by United States industries or for foreign currencies which would not adversely affect the recipient country's balance of payments. The main purpose of the 1954 Act, however, was to dispose of surplus commodities acquired by the federal government as a part of the United States domestic price support programs and to expand foreign markets for American agricultural products.

In 1961, the various organizations involved in the United States aid efforts were brought together into the Agency for International Development (AID) within the Department of State. AID now serves as a broker of development assistance and is the only comprehensive aid agency in the world. Paralleling the official outlets of aid, private investment in developing countries has been encouraged by providing government guarantees to protect against loss of investment capital. Private investors, however, tend to focus on potential profits and consequently do not often attribute primary importance to the local economies' development needs which frequently do not result in monetary profits. The United States also routes some of its aid through multilateral agencies and participates in several important organizations.

---

25Inaugural Speech by President Harry S. Truman, January 20, 1949.
26B. Higgins, supra note 24, at 76.
28B. Higgins, supra note 24, at 76.
29The preamble of the Act states its purpose to "... increase the consumption of United States agricultural commodities in foreign countries, to improve the foreign relations of the United States and for other purposes." Act of July 10, 1954, Pub. L. No. 480, 68 Stat. 454. "[O]ne need look no further than the title of the act itself to discover the first, and in the opinion of the committee, the most important tangible benefit [from the act] Congress had in mind: development abroad of new and expanded commercial markets for American agricultural products."

30F. Coffin, Witness for Aid 85 (1964); B. Higgins, supra note 24, at 77-78.

31F. Coffin, supra note 30, at 27.

34Id. at 688.
35See B. Higgins, supra note 24, at 72; R. Mikesell, supra note 3, at 238.
36Some of the multilateral agencies through which American aid flows are:
(1) World Bank Group: In 1944, the International Bank for Reconstruction and Development was founded to provide long term credit for economic development on somewhat better than commercial terms.

As the need for international financing on "softer" terms became apparent, two organs of the
which serve to influence world commerce and world monetary policies.\textsuperscript{37}

As more of the industrialized countries entered the field of foreign aid, various aid coordinating mechanisms developed which were intended to avoid conflicts in aid policies among the donor countries as well as to avoid overlapping aid requests from recipient states.\textsuperscript{38} The largest such mechanism is the permanent Development Assistance Committee, composed of the thirteen most important capital exporting members of the Organization for Economic Cooperation and Development.\textsuperscript{39} Less permanent mechanisms consist of consortia which bring together various aid donors to a particular country in an effort to arrive at a common plan for attacking that country's development problems.\textsuperscript{40} Also, consultative groups afford donor nations some coordination in aid for a specific project or program, while general coordinating mechanisms act as clearinghouses for exchanges of information on aid programs and aid requests.\textsuperscript{41}

World Bank were established. In 1956, the International Finance Corporation began providing capital for ventures too risky to obtain financing from the World Bank, particularly in those situations where the recipient government was unwilling to guarantee the loan. The International Development Association, established in 1960, provides development financing for developing countries on more flexible terms in order to alleviate pressure on the recipient country's balance of payments.

(2) The United Nations Development Program (UNDP) came into existence January 1, 1966, following a General Assembly Decision on November 22, 1965, to merge two existing assistance programs of the United Nations: The Expanded Program of Technical Assistance the United Nations Special Fund. The technical assistance program was established in 1950 to provide developing countries short-term technical advisory services, funding for their nationals to study abroad, and equipment for demonstration and training purposes. The Special Fund, originated nine years later, focused on large-scale pre-investment projects.

The current role of the UNDP is to provide the governments of developing countries with the technical and pre-investment assistance needed to: 1) execute survey and feasibility studies of the economic potential and productive use of natural resources; 2) establish and improve educational institutions; 3) create and expand research centers; and 4) provide technical, training and advisory services to build the infrastructure necessary for development.

(3) Regional financing institutions, such as the Inter-American, African, and Asian Development Banks, although receiving much of their capital and operating funds from developed countries, are designed to provide development capital for designated underdeveloped countries.

\textsuperscript{37}Established at the same time as the World Bank, the International Monetary Fund (IMF) was intended to work with the Bank to prevent a post-war economic crisis and has performed primarily by financing temporary balance of payments deficits.

The General Agreement on Tariffs and Trade (GATT) was designed as a temporary agreement pending the commencement of the International Trade Organization (ITO). The ITO never became a functioning body, however, and the GATT has continued and grown into an organization to promote freer trade among its members. It fosters the growth of tariff and trade policies and advocates certain trade principles of which the most important is the "most favored nations" concept whereby tariff reductions negotiated between any two members apply equally to all other members.

\textsuperscript{38}W. FRIEDMANN, G. KOLMANOFF, R.E. MEAGER, \textit{INTERNATIONAL FINANCIAL AID} 136 (1966) (hereinafter cited as \textit{W. FRIEDMANN}).

\textsuperscript{39}Id.

\textsuperscript{40}Id.

\textsuperscript{41}Id.
REACTION TO AID PROGRAMS

A rising sense of discontent within the developing countries has accompanied their receipt of aid. In large measure this is due to changing philosophies of the donor countries. In line with the general belief that the developing countries could be assisted through the development of import-substituting industries, early aid was in the form of capital transfers and technical assistance and was designed around individual projects. It soon became apparent that this form of aid alone was ineffective and it became common for a donor's aid to a particular country to be unified into one program which would encompass numerous specific projects but which affected all aspects of the donee's economy. Additionally, there was a shift from emphasis on productive industrial projects to social investment projects aimed at benefiting such areas as health, education, and housing. An integral part of this new aid philosophy was donor insistence on a national development plan by which a donee country sets goals and priorities and assesses its manpower and financial requirements in order to assure maximum effect of aid dollars by the donee's domestic mobilization of resources. Basic to the insistence on national development plans is the concept of "self-help", commonly understood to imply a willingness on the part of the recipient countries to invest and direct their own resources toward sensible development goals, to make necessary reforms, and to minimize or eliminate obstacles to development. It is not difficult to see why such a definition of "self-help" has been construed as foreign interference in a country's internal affairs.

Besides complaints about interference in their domestic affairs, donee countries are dissatisfied with other "strings" attached to aid received from developed countries. Many of these strings are designed to directly benefit the donor country itself. For example, United States aid often is "tied" aid, either required to be used for a specific project or to be used to purchase equipment,

---

43H. JOHNSON, supra note 3, at 4-5; R. MIKESSELL, supra note 3, at 22-23.
44H. JOHNSON, supra note 3, at 52; Albert O. Hirschman, Foreign Aid-A Critique and a Proposal at 3, 4 in ESSAYS IN INTERNATIONAL FINANCE no. 69, July 1968.
45Hirschman, supra note 44, at 4.
46Id.
47Id. at 3-4.
49L. BLACK, supra note 1, at 124; W. FRIEDMANN, supra note 38, at 401.
50L. BLACK, supra note 1, at 124.
51Id. at 31; R. MIKESSELL, supra note 3, at 135-37.
52L. BLACK, supra note 1, at 124-125; R. MIKESSELL, supra note 3, at 157.
53L. BLACK, supra note 1, at 125.
54R. MIKESSELL, supra note 3. "The concept that aid will be provided according to the measure of self-help on the part of the recipient, while seemingly a fair proposition to the don becomes fact a threat of withdrawal of aid if policies imposed by the donor are not carried out." Id, at 21-22.
55J. BLACK, supra note 1, at 126.
goods and services from the United States.\textsuperscript{58} Aid tied to a project reduces the donee country's flexibility in managing its financial resources\textsuperscript{59} and aid tied to United States procurement, while benefiting American businesses, lessens the value of the aid dollar to the donee.\textsuperscript{58} Another example of "strings" attached to aid is the prevalence of aid in the form of loans as contrasted to grants which, by requiring repayment of principal plus interest, have burdened developing countries with intolerable debt-services.\textsuperscript{59}

Aid recipients have pushed for fewer strings accompanying their aid.\textsuperscript{60} One possible answer to their demands is the distribution by multilateral organizations of aid contributed by developed countries.\textsuperscript{61} Most recipient countries would prefer that aid be provided by United Nations agencies or by regional agencies largely controlled by developing countries.\textsuperscript{62} At the same time, such a distribution process would have some appeal to the developed countries "... in view of efficiency of staffing and administration of aid projects, equity of distribution of aid among the less developed countries, and maintenance of harmonious relations between the countries supplying and the countries receiving aid ..."\textsuperscript{63} Ironically, at least one observer feels that the multilateral donors are generally able to impose more aid conditions and require a higher standard of performance than are the unilateral donors, all with less complaint from the recipient country.\textsuperscript{64}

The developing countries have also become increasingly critical of the general conditions of world commerce which they feel have hindered their development.\textsuperscript{65} Under present conditions, the developing countries are unable to sell enough of their products in the world markets to reduce their balance of payments deficits.\textsuperscript{66} The developing countries feel that transfers of financial aid alone are insufficient to narrow the development gap and that trade in conjunction with direct aid is the only means by which their economies can become self-sustaining.\textsuperscript{67} This concern with trade has been argued with increasing fervor in the United Nations.

\textsuperscript{58}H. JOHNSON, supra note 3, at 80-81.
\textsuperscript{59}Id. at 81-82.
\textsuperscript{60}Id. at 24-25; W. FRIEDMANN, supra note 38, at 420.
\textsuperscript{61}As discussed supra in footnote 3, "aid" comes in a variety of forms. Some "aid" is not very different from regular commercial loans whereby the developing country not only must repay the face amount of the "aid" but also must pay interest, often at nearly commercial rates. R. MIKESELL, supra note 3, at 122. The effect of such loan-type "aid" is that more and more aid inflow must be diverted by the developing country to pay its then due interest on previous "aid". The result is a decline in the net flow of resources available for development purposes. Id. at 109, fig. 2. See generally id. at 105-126.
\textsuperscript{62}E. MASON, supra note 3, at 41.
\textsuperscript{63}Id. at 23-25.
\textsuperscript{64}R. MIKESELL, supra note 3, at 1-2.
\textsuperscript{65}H. JOHNSON, supra note 3, at 24.
\textsuperscript{66}Private communication with former Secretary of State Dean Rusk, February 22, 1973.
\textsuperscript{68}Id. at 165-168.
\textsuperscript{69}H. JOHNSON, supra note 3, at 5-6.
1961 marked the first year in which the United Nations began to be systematically utilized in the economic struggle of the developing countries. In that year a General Assembly resolution called for the establishment of a United Nations Capital Development Fund to help finance the diversification of the economies of developing countries with due regard to the need for industrial development as a basis for social progress. The Fund was to provide financial assistance to be used as directed by the recipient country without accompanying outside interference in the recipient's internal affairs. The proposal ran counter to the economic and political philosophies behind the aid programs then administered by the developed countries, however, and was insensitive to the desires of the donor countries. Consequently it suffered from lack of operating capital which was to be contributed by developed countries. That same year international trade was recognized as a primary instrument for economic development and the blame for the developing countries' chronic balance of payments problems was placed on unfavorable trade terms with the industrialized countries. The latter were given the responsibility for making "all appropriate efforts to cooperate in accelerating the economic development of the developing and under developed countries." Finally, 1961 saw the commencement of the First United Nations Development Decade, pursuant to a General Assembly resolution. This important resolution related economic and social development to the attainment of international peace and security called for in the United Nations Charter. Member states were urged to aid developing countries gain a place in expanding markets, to ensure them an equitable share of earnings from the extraction and marketing of natural resources, and to pursue policies resulting in the increased flow to them of public and private development resources. Quantitative goals were set which foresaw a 5% annual growth rate in the gross national product of the developing countries financed by the annual contribution by developed countries of 1% of their gross national products.

The following year, the General Assembly endorsed ECOSOC's decision to convene the United Nations Conference on Trade and Development (UNCTAD). UNCTAD, which met in 1964, was the largest and most comprehen-
sive inter-governmental economic conference theretofore held. Its Final Act recognized the deteriorating international trade position of the developing countries and spot-lighted the problems of primary commodity based economies. An increase in industries with export potential within the developing countries was considered essential to the correction of the balance of trade deficits. Perhaps the most significant results of the Conference were the newfound unity among the developing countries, the Group of 77, and the subsequent establishment of UNCTAD as a permanent organ of the General Assembly with its day-to-day business to be conducted by the Trade and Development Board.

The character of UNCTAD's Final Act resulted from the large majority the developing countries enjoyed at the Conference and did not accurately reflect the opinions of the developed countries. However, in 1970 there was a step towards implementation of one of the UNCTAD principles when the Agreed Conclusions of the Special Committee on Trade Preferences was signed by more than 120 countries representing both sides of the development issue. By the terms of the Conclusions, the developed countries are to extend generalized preferential tariff treatment to manufactured and semi-manufactured goods of the under-developed countries. The contemplated result will be lower tariffs by industrialized countries on specified goods from developing countries. The pressure for action on the other UNCTAD principles continued
with the beginning of the Second United Nations Development Decade in 1970. The Strategy for this Decade again called for continuing effort by all governments to promote social and economic progress in developing countries.

**The Formation of the Working Group**

Despite more than ten years of United Nation's resolutions, despite the creation of UNCTAD, and despite the voluntary aid now given by developed countries, the economic and social gap between the developing and developed countries has failed to narrow significantly. Not only has the goal of the First United Nations Development Decade to attain a 5% growth rate for the developing countries not been reached, but most developing countries have actually suffered a relative economic shrinkage. The futility of relying solely on direct transfers of aid to the developing countries had become apparent by 1964 when the Final Act of UNCTAD's first session stressed the importance of trade in the developing countries' struggle to reverse their deteriorating financial situations. Signing of the Agreed Conclusions on Trade Preferences was recognition that trade in addition to aid was to be the new goal but the scheme envisioned by the Agreed Conclusions has not yet been fully implemented.

The steadily worsening situation has led to an attempt by the developing countries to obtain a legally binding commitment by industrialized countries to adhere to generally accepted norms governing international economic relations and thereby assure developing countries the opportunity to partake on a larger scale in the flow of international trade. President Luis Escheverria Alvarez of Mexico proposed to UNCTAD's third session in April, 1972, that an instrument be prepared which would define and protect the economic rights of all countries, particularly the developing ones. This proposal was endorsed by the Conference and a working group was named to prepare a draft charter based on the principles approved by UNCTAD in the Final Act of its first session, plus any suggestions by its third session. In addition, the principles in the Charter of Algiers and the Declaration of Lima plus relevant United

prove to be the weak link in the chain as the present protectionist Congress and powerful labor unions may cause rejection of any plan which would have a detrimental effect on domestic industries. Id. at 117.

\[\text{Id. at para. 19.}\]

\[\text{Id. at para. 19.}\]

\[\text{Preamble, G.A. Res. 2626 (XXV), supra note 86.}\]

\[\text{Handbook, supra note 5, at 155, table 5.5.}\]

\[\text{Proehl, supra note 82.}\]


\[\text{Id. The working group, originally 31 members but later enlarged to include 40 states, consisted of: Australia; Bolivia; Brazil; Bulgaria; Canada; Chile; China; Czechoslovakia; Denmark; Egypt; France; Germany, Federal Republic of; Guatemala; Hungary; India; Indonesia; Iraq; Italy; Ivory Coast; Jamaica; Japan; Kenya; Mexico; Morocco; Netherlands; Nigeria; Pakistan; Peru; Philippines; Poland; Romania; Spain; Sri Lanka; Switzerland; USSR; United Kingdom; United States; Yugoslavia; Zaire; Zambia. Switzerland was replaced by Belgium prior to the first session.}\]
Nations resolutions such as the Strategy for the Second Development Decade will be used for guidance.93

Amplifying President Escheverria's suggestion, Alfonso Garcia Robles of Mexico outlined for the United Nations General Assembly Second Committee (Economic and Financial) some of the principles his government felt should be reflected in the proposed charter: 1) all States have the sovereign right to freely adopt the social and economic system of their choice and to establish laws governing ownership of property in the light of public interest; 2) States should refrain from exerting pressure by economic means; 3) the participation of foreign capital in the disposition of natural resources should be adapted to the economic objectives of the recipient countries and should be in line with national decisions and priorities, and nationalization or expropriation should be justified by notions of public utility; 4) developed countries should accord preferential treatment to developing countries on the basis of non-reciprocity and non-discrimination and should eliminate tariffs or other barriers to the trade and consumption of products of particular interest to developing countries; 5) developed countries should adopt measures to compensate for the effects of substitutes for raw materials and should abolish subsidies for the production of primary commodities competing with essential exports from developing countries.94 The foundations for these principles can be traced to the complaints directed at the current aid programs designed by the developed countries.

Ambassador Casteñada of Mexico, the Chairman of the working group, further expressed the hopes his government had for the charter in a statement on February 12, 1973, to the first session of the group.95 The task of the working group is "to formulate legal, and therefore obligatory, rights and duties" of States.96 Realizing that the General Assembly may decide not to incorporate the draft charter into a formally binding instrument, he nevertheless felt that the "draft, itself, should enunciate authentic economic rights and duties of States in the only way in which it is logically possible to do so: as rights and duties of a judicial nature intended to be binding if the draft should become a part of the corpus of international law."97 At the same time, the working group's goal "is not to formulate a programme of action for the United Nations or the international community."98 This function has already been performed by such documents as the Strategy for the Second Development Decade. Rather, the charter will contain certain principles "of a universal nature" found in those instruments "insofar as they reflect rights and duties of States."99

93Id.
94Id. at 2.
95Id.
96Id.
97Id.
98Id.
99Id.

"Specificity" and "scope" are two potentially insoluble problems with which the working group must contend. Ambassador Casteñada's statement that the charter should be "as specific as is politically feasible," is testimony to the anticipated disagreements on this subject. Equally contentious will be the scope of the charter: should it be limited to codifying rules already accepted as international law or should it strive to create new rules which will respond to the present and future needs of the world community? The Ambassador answers this question by observing that to merely 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 two-thirds of mankind."

The desire to create new norms and to expand the corpus of international law, however, must be tempered by political reality. Ambassador Casteñada acknowledges 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." He foresees the principal function of the working group will be to "negotiate opposing views and to find common denominators for divergent national interests." But, at the same time, the role of the developing countries as providing the stimulus for change is to be recognized and encouraged. As is evident from the above, much of the impetus for the charter has come from Mexico, a spokesman for the developing countries. The optimism and enthusiasm of the Mexican representatives can be expected to be met by conservative reaction among some of the developed countries who will, after all is said and done, be the ones who finance the new economic order.

THE DRAFT OUTLINE: FIRST SESSION

The first session of the working group was held from February 12-23, 1973, in Geneva. The split between the developing and the western developed countries was immediately apparent in the general exchange of views which opened the session. The communist countries played an independent role but a proposal submitted by them generally seemed to support the views of the developing countries. Most of the suggestions, ranging from the general to the specific, were advanced by the developing countries, with occasional input from the developed countries in the form of limitations on the more enthusiastic suggestions of the other members. The United States representative, for

---

100Id.
101Id.
102Id. at 3.
103Id.
104Id.
106Id. at 4-14.
example, only spoke up twice: once to express doubt as to the "advisability, possibility or feasibility of making the rights and duties formulated in a draft charter legally binding on States," 109 and once to suggest that since the charter should be acceptable to all States, it should not include provisions that had been unacceptable in other contexts. 110 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." 111 Despite this warning note, the legally binding nature of the charter was urged by some of the members of the working group. 112

Four working papers were sponsored by various groups of member States, in addition to a consolidated proposal prepared by some of the sponsors of the other working papers. 113 These documents were referred to a sub-group of 18 members which was to prepare the first draft of the charter. 114 The United States representative again sounded a warning that while some of the proposed topics were acceptable, other were outside "the scope of the work of the Group while agreement on many of the topics depended on the final formulation." 115 However, most of the provisions in the draft outline were carried forward into the alternative provisions of the product of the second session several months later.

In brief, the sub-group proposed a charter outline with the following main points: 116

I) Preamble-Affirmation of the principles of the United Nations Charter with the goal of establishing a new world economic and social order which would promote higher standards of living and shared prosperity through the sustained expansion of national economies.

II) Economic Rights and Duties- a) the right to be free from outside interference; b) the right to permanent sovereignty over natural resources; c) the duty to fully mobilize internal resources for the economic, social and cultural development of the citizenry; d) the desirability of a just and rational division of labor; e) the right to an equal voice in arriving at international solutions to economic problems; f) the right to participate in groupings to pursue common economic and social development; g) the right to equal access to scientific and technological advances; h) the duty to ensure all States a fair share in world trade and to co-operate in the development of developing countries; i) the right to control foreign investment, including transnational corporations; j) the duty to aid in general disarmament and to allocate the freed resources to develop-

109Id. at para. 19.
110Id. at para. 28.
111Id.
112Id. at para. 18.
113Id. at 15. (U.N. Docs. TD/B/AC.12/R.6 and Add. 1; R.8; R.9; R.10; & R.11).
114Id.
115Id.
116Id. at 16-24.
ment of developing countries; k) the right of developing countries to receive preferential, non-reciprocal trade treatment; l) the duty of industrialized countries to conduct their mutual economic relations in a manner which does not adversely affect interests of third countries; and m) equal application of the most-favored-nation principle.

III) Implementation-The role of international organizations. The ranking group transmitted this draft outline to governments of members of UNCTAD for their comments and suggestions.

**THE DRAFT CHARTER: SECOND SESSION**

The second session of the working group, meeting from July 13-27, 1973, received comments from thirty-one member States of UNCTAD.117 Two sub-groups were established to compose the provisions of the draft charter based primarily on the outline from the first session together with the provisions suggested by the member States.118 It is important to note that it was decided at the first meeting of the second session not to re-open the discussion of the legal nature of the final instrument but rather to leave the question to the General Assembly.119 By doing this, a guaranteed source of contention was removed and the working group could concentrate on its primary function of determining what are the economic rights and duties of States.

Chairman Casteñada submitted an informal working paper following the second session based on the consolidated alternative provisions in the texts produced by the sub-groups.120 A draft charter was synthesized from this working paper plus all of the other suggestions, outlines, and texts, and was transmitted to the Trade and Development Board which was then to pass it on to the General Assembly.121 The final text of the document,122 divided into paragraphs with alternative provisions in each paragraph, contains certain key points. These are:

1) Preamble: Affirms the need for:

(a) the acceleration of the economic growth of the developing countries in order to narrow or bridge the gap between those countries and developed countries;

(b) the achievement of a more rational system of international division of labor, with one alternate provision calling for structural changes in the world economy;

(c) genuine co-operation among States in order to achieve the just and balanced development of all parts of the world;

---

118 *Id.*
119 *Id.* at 3.
120 *Id.* at 45.
121 *Id.* at 3.
122 U.N. Doc. TD/B/AC.12/2 at 45-63.
(d) two provisions stress the need to strengthen the legal bases for international economic co-operation;

(2) Chapter I
(a) economic as well as political relations among States shall be governed by principles of this charter;

(3) Chapter II
(a) every State has the right to choose its political, social, economic and cultural systems without outside interference;
(b) sovereignty over natural resources — the seven alternative provisions on this point differ mainly in the degree of freedom a State has in disposing of its resources;
(c) every State has the right to engage in international trade without discrimination and to enter into bilateral and multilateral arrangements. Also, the Most-Favored-Nation Principle should be observed by all with exceptions in favor of developing countries;
(d) every State has the duty to promote the development of its people and is free to choose the goals and means of such development;
(e) every State has the right to participate in sub-regional, regional and inter-regional co-operation in the pursuit of its economic and social development;
(f) there is a wide disparity between positions as to whether all States have a right to benefit from advances in science and technology;
(g) every State has the duty to co-operate in ensuring that all share equitably in world trade;
(h) while it appears there is a consensus that every State has the right to regulate and control foreign investment within its jurisdiction some provisions limit such control to the relevant norms of international law;
(i) States have the right to control and regulate transnational corporations within their national jurisdiction;
(j) there exists a duty to promote the achievement of general disarmament and to use the freed resources for economic and social development, particularly of the developing countries;
(k) there is a duty to provide aid for the development of countries;
(l) there is no consensus as to the right of developing countries to receive generalized, preferential, non-reciprocal and non-discriminatory treatment from developed countries in order to meet their trade and development needs;
(m) the developing countries should receive transfers of financial resources. There is no consensus among the alternative provisions as to whether developed States have a duty to make such transfers;
(n) the developing countries should expand their mutual trade and economic co-operation;

(4) Chapter III
(a) the sea-bed, ocean floor, and resources of the sea are the common heritage of mankind, should be used for the benefit of all mankind, and should be used exclusively for peaceful purposes;
(b) the protection and enhancement of the environment is a common responsibility.
Unlike all previous texts, the instrument sent to the Trade and Development Board does not identify the sponsors of the various alternative provisions. However, it is apparent that the final instrument although based primarily on the first session’s outline reflects the increased participation of the developed countries, particularly the United States, during the second session. Most of the suggestions for changes in the draft outline made by the United States seemed designed to impart a more realistic viewpoint that equal prosperity for all may be an unreachable goal and to put on record that a substantial aid program already exists and is functioning. Some of the more important American suggestions are as follows:

1) Preamble
   a) the goal of narrowing the gap between developing and developed countries should be modified by the phrase “to the extent possible”;
   b) while admitting the desirability of a more rational system of international division of labor, the accompanying goal of structural changes in the world economy should be deleted;
   c) while co-operation among States based on joint consideration of and concerted action regarding international economic problems is necessary, it should read “increased” co-operation and “intensification” of joint consideration;

2) that economic relations between States “should” be governed by certain principles, not “shall” be governed;

3) Rights and Duties
   a) the United States cannot accept the provisions declaring that every State exercises permanent sovereignty over its natural resources and may dispose of them freely and fully and that nationalization is an expression of sovereign power solely within the jurisdiction of that State. Instead, it feels that States 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;
   b) while States have the right to engage in international trade and other forms of economic co-operation and thereby enter into bilateral or multilateral arrangements, international obligations must be satisfied;
   c) while some governments feel all States have a right to benefit from scien-

---

123 The United States Government has carefully reviewed the draft outline prepared by the Working Group. The United States considers that the work being done by the group is important and is prepared to contribute to the preparation of a declaration reflecting principles of international economic cooperation.” United States proposal, U.N. Doc. TD/B/AC.12/2/Add. 1 at 45.
125 U.N. Doc. TD/B/AC.12/2/Add. 1 at 47.
126 U.N. Doc. TD/B/AC.12/2/Add. 1 at 5.
127 This choice of words is based on a desire to parallel as closely as possible the language of Article 2 of the U.N. Charter. U.N. Doc. TD/B/AC.12/2/Add. 1 at 47.
128 Id. at 48.
129 Id.
scientific and technological advances, the United States feels that States are merely required to "facilitate" the "widest possible access" to the benefits of these advances.\textsuperscript{130}

d) despite the claim that States have, as a sovereign right, the ability to control foreign investments, the United States suggests that such control is subject to the relevant norms of international law;\textsuperscript{131}

e) the right of States to control transnational corporations within their jurisdictions should be deleted;\textsuperscript{132}

f) developing countries shall receive special consideration of their trade and development needs, but only as "appropriate". Specific American approval is withheld from the claimed right of developing countries to preferential and non-reciprocal trade treatment;\textsuperscript{133}

g) the United States will only agree to "endeavor to facilitate" the transfer of financial and technological resources to developing countries;\textsuperscript{134}

h) developing countries should expand their mutual trade "within the framework of the international organizations concerned";\textsuperscript{135}

4) the United States seeks deletion of the question of the resources of the sea. This is in accord with the view expressed by the American representative in the first session that certain areas were already under consideration in other forums, specifically the law of the sea, and that such areas were outside the scope of the present charter.\textsuperscript{136}

Although the working group was originally supposed to complete its work within the first two sessions\textsuperscript{137} it has received an extension of its mandate to

\textsuperscript{130} "The United States supports the broad expansion of benefits from science and technology, but does not consider that the rights and duties referred to... are established under international law. In the United States view, the attempt to establish such rights and duties would be neither appropriate nor effective in achieving the goals sought." \textit{Id.} at 49.

\textsuperscript{131} \textit{Id.} at 50.

\textsuperscript{132} "Questions concerning the activities of multinational enterprises are under consideration and study in a number of United Nations and other bodies. The United States does not consider it appropriate under international law for States to apply special discriminatory measures of regulation and control to those partially or wholly foreign-owned entities operating within their territory which they may consider 'transnational.'" \textit{Id.}

\textsuperscript{133} "The United States in Part IV of the GATT has recognized certain principles applicable to developing countries, but we do not agree that there is a right to trade preference or an unqualified right to non-reciprocal trade benefits for developing countries." \textit{Id.} It should be noted that the Common Market countries supported the granting of non-reciprocal generalized tariff preferences (U.N. Doc. TD/B/AC.12/2 at 34) in keeping with their grant in 1971 of trade preferences to developing countries pursuant to the Agreed Conclusions on Tariff Preferences. (N.Y. Times, Mar. 31, 1971, at 1, col. 6.) The United States has not implemented the Agreed Conclusions.

\textsuperscript{134} "The United States does not recognize the existence of a right or duty under existing international law to transfer financial resources." U.N. Doc. TD/B/AC.12/2/Add. 1 at 5.

\textsuperscript{135} \textit{Id.}

\textsuperscript{136} U.N. Doc. TD/B/AC.12/1 para. 21. "Because the Law of the Sea Conference will soon deal in full with basic questions relating to this area, including rights and duties and an international regime and machinery, the United States believes that the Working Group should defer to the Conference with respect to issues related to this issue." U.N. Doc. TD/B/AC.12/2/Add. 1 at 52.

\textsuperscript{137} U.N. Doc. TD/B/AC.12/2/Add. 1 at 52.
provide for two further sessions.\textsuperscript{138} The product of these two later sessions will then be sent to the General Assembly at its twenty-ninth session for a decision upon the opportunity and procedure for the adoption of the charter.\textsuperscript{139}

**Prospects for the Charter's Implementation**

After two drafting sessions of the working group with two more sessions to come in 1974, little can be said about the specific provisions likely to be contained in the final charter draft other than that the provisions will almost certainly cover those topics contained in the draft outline of the working group's first session. Technical questions concerning such issues as "What is the dividing line between a developed and developing country?",\textsuperscript{140} "Who will administer and enforce the rights and duties as eventually established?",\textsuperscript{141} and "Will the duties of the charter fall only upon the developed countries?"\textsuperscript{142} will certainly arise and must be dealt with before the charter can begin functioning. However, two fundamental questions must be answered first. What will be the charter's form as decided by the General Assembly and what will its content eventually be? Although these questions are interrelated, some preliminary observations may be made concerning each individually.

The charter, as originally envisioned, was to be a legal, and therefore binding, document.\textsuperscript{143} However, the first major disagreement among the members of the working group at the first session was whether the charter should be legally binding at all.\textsuperscript{144} The ultimate decision on this issue will be made in the General Assembly\textsuperscript{145} and could range from letting the charter die by never taking any action on it, to incorporating the charter in a resolution, either as a


\textsuperscript{139}Id.

\textsuperscript{140}There is no single indicator that satisfactorily differentiates levels of economic development between various countries. The most commonly used indicator is the GNP per capita, although many others are used. L. Black, supra note 1, at 23-26.

\textsuperscript{141}The most logical choice will be either UNCTAD or GATT. Both of these organizations possess the personnel and the expertise to resolve the complexities of an economic scheme based on the draft charter. Unfortunately both organizations have been characterized as favoring one side or the other of the aid dispute. If favoritism is displayed by the organization chosen to administer the rights and duties contained in the charter, the "aggrieved" State may well feel free to cease complying with the charter.

\textsuperscript{142}Thus far the disputes in the working group seem to involve "developed" countries and "developing" countries. However, will the duties imposed by the charter for the benefit of developing states fall upon all countries, at least in relation to relatively less-wealthy countries? This question assumes added significance when oil-rich countries, technically now classified as developing countries, are compared to less fortunate nations with few natural resources. Will one developing country be required to aid in the development of another? Can a country be a "developing" country for one purpose and a "developed" country for another? These questions of classification and attendant rights and duties have not yet been confronted by the working group. It is assumed that the U.N. General Assembly will answer them before attempting to bring the charter into force.

\textsuperscript{143}Supra note 95, at 1-2.

\textsuperscript{144}U.N. Doc. TD/B/AC.12/1 at 5 & 6.

\textsuperscript{145}U.N. Doc. TD/B/AC.12/2 at 3.
recommendation or a declaration, to adopting it as a convention which upon
ratification by States would become effective as part of the *corpus* of interna-
tional law. It is unlikely that the large majority enjoyed by developing countries
in the General Assembly will permit the charter to simply die, unless its final
provisions are so diluted as to be worse than no charter at all in the eyes of
those States which had hoped to benefit from it. On the other hand, if the
General Assembly decides to treat the charter as a convention, reluctance on
the part of developed countries to legally commit themselves may result in only
developing countries becoming signatories. 148 Therefore, even though immedi-
ate legal status can only be attained by a signed convention or treaty, the
Assembly might well decide that a less binding document in the form of a
resolution is the best alternative. It can be anticipated that some countries
which have expressed sympathy with the goals of developing countries may vote
for a U.N. resolution while balking at the signing of a legally binding docu-
ment. If this route is chosen, what will be the effect of the charter in the form
of a resolution?

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," 147 the more commonly accepted opinion is that voiced by Brierly that
all the Assembly can do is discuss and recommend and that the effect of these
recommendations is only moral, not legal. 148 It is hoped by many that in the
future there will be an increase in the weight of resolutions so that gradually
they would come to have a binding effect, particularly when they concern the
interpretation of principles of the United Nations Charter. 149 While it can be
argued that the purpose of the draft charter is to promote world peace and co-
operation through economic development to which member States of the
United Nations are pledged by the U.N. Charter, 150 this was not the primary
motivating force behind the establishment of the working group. 151 Any addi-
tional importance as an interpretation of the U.N. Charter would, therefore,
probably be denied the draft charter in the form of a resolution and the impact
of the document would depend on the prestige of a normal resolution.

---

148 Additionally, for those developed countries which sign the convention, the precise wording of
the convention will have to be to their liking before they undertake a binding commitment to assist
in the development of other nations. The process of negotiating this wording or the composition
of exceptions could be very time consuming.


148 Introduction to the Annual Report of the Secretary-General on the Work of the Organization,
3-4; O. Asamoah, *The Legal Significance of the Declarations of the General Assembly

149 U.N. Charter art. 1, para. 1 & 3.

150 Press Release, supra note 91.
In a 1962 memorandum by the United Nations Office of Legal Affairs concerning the use of the terms "Declaration" and "Recommendation", it was stated that in U.N. practice, "a 'declaration' is a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated." A recommendation is considered less formal although in strict legal practice there is probably no difference between the two. However,

. . . in view of the greater solemnity and significance of a 'declaration', it may be considered to impart, on behalf of the organ adopting it, a strong expectation that Members of the international community will abide by it. Consequently, in so far as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon States.

Because of this recognized distinction, the General Assembly will probably choose to approve the draft charter as a declaration with the hope that it will receive wide-spread compliance so that it will eventually form a part of the corpus of international law.

The content of the charter will be the ultimate factor in determining the effectiveness of the rights and duties enunciated therein. Unless the economic status quo changes radically, the developing countries will be unable to force the developed countries to carry out the principles of the charter. The recent embargo of Arab oil has proved that the supply of at least one natural resource can be manipulated to coerce the industrialized countries. Absent such an economic weapon, however, only public opinion can be brought to bear in the foreseeable future to persuade the developed nations to adhere to the duties embodied in the draft charter. This will be particularly true if the draft charter is not forged into a recognized legal document but rather is expressed as a U.N. resolution.

153Id.
154Id.
155Id. at 1-2.
156This is particularly likely since important developed countries such as the United States have agreed to the drafting of the charter as a declaration. U.N. Doc. TD/B/AC.12/2/Add. 1 at 45.
158The industrialized economies of the developed countries require vast amounts of imported raw materials. See L. BLACK, supra note 1, at 17. While few natural resources are as essential and as localized as oil reserves it is to be expected that developing countries will begin, individually and in groups, to use the developed countries' needs for raw materials as a means to obtain benefits from the developed countries. It would be to the benefit of world peace and prosperity if the developing nations are not forced to resort to such weapons in their struggle for development. Secretary of State Henry Kissinger warns of the dangers of countries attempting to use their resources to "strong-arm" the industrialized countries and predicts the reaction to strong-arm tactics to be the withholding of aid and the endangering of the world economy. Atlanta Constitution, April 16, 1974, at 12D, col. 1.
159J. BRIERLY, supra note 148, at 381.
The United States has been presented throughout this paper as espousing conservative approaches to the development aid problem. That country controls much of the world's established wealth and if it refuses to sign a legally binding document or to comply with the terms of a non-legally binding document, the developing countries will be hard pressed to achieve their economic goals absent a substantial increase in the aid efforts of other donor countries. Therefore, the provisions of the charter must not completely alienate this important State. While a lack of participation by the United States in the first session of the working group indicated that it was disinterested in a charter with which it would not comply, the numerous suggestions made by that government's representative in the second session may be an indication to the contrary. The only provisions which the United States proposed to be deleted concerned the restructuring of the world economic order, the local control of transnational corporations, and the call for general disarmament. Most of the other suggestions were only minor modifications of the provisions suggested by the developing countries, usually in the direction of providing more leeway for the developed countries in the performance of their duties. The only major exception to this is the complete disagreement concerning sovereignty over natural resources and the rights of States to nationalize foreign investment without adequate compensation. It is the author's belief that the suggestions made by the United States are not so conservative as to nullify the purpose of the provisions and that with minor compromises on precise wording, both developed and developing countries could find the draft charter with American suggested provisions acceptable. If this is indeed true, then the United States would be under considerable pressure to comply with the charter which it had largely written. While this adoption of American-sponsored provisions may prove galling to the more militant developing countries, it should be easily recognized that a strongly-worded instrument lacking legal enforceability to which the developed countries will not adhere is of little use to any of the parties concerned.

As mentioned above, the form and content of the charter are directly related. The less confining and restrictive the developed countries find the provisions, the more likely they will enter into a more binding instrument. Conversely, the more militant the provisions of the charter, the less likely the developing countries will be able to attain more than recommendation status for their charter and the more likely that a moral victory will be all that the developing countries can celebrate. This is the time for tempering enthusiasm and idealism with political and economic reality. Hopefully all States will make the compromises that will be needed to give the charter an opportunity to be effective.

160 U.N. Doc. TD/B/AC.12/a/Add. 1 at 17, 19, 26, 41, 42 and 45.
161 Id. at 47.
162 Id. at 50.
163 Id.
164 Id. at 48.
Throughout more than twenty-five years of development aid, the expectations of both donor and donee countries have been battered by failure. Although the goal of the donee countries has always been to achieve a higher standard of living for their citizens, the methods have changed from aid alone to the current mixing of trade plus aid in the draft charter on economic rights and duties of States. Along with the changing types of aid have been changes in the techniques for requesting aid. Originally each donee got whatever aid it could by its own efforts. Then in the 1960's, the developing countries began to group together in the United Nations to demand a change in basic economic policy so that developing countries as a group would receive help from developed countries as a group. UNCTAD was established to pursue this goal but thus far its efforts have resulted only in voluntary programs which fall short of producing the desired effect. In the resultant atmosphere of unrest and frustration, the call for a legally binding instrument which would enunciate the economic rights and duties of all States was immediately acted upon and a working group was established to draft such an instrument. The challenge for the working group is to propose actions which will at least work toward meeting the needs of the developing countries while not frightening the developed countries into believing that their own economies will suffer substantially by assisting their less fortunate neighbors. The United States has made several suggestions in the drafting sub-groups and perhaps has opened the way to acceptance of the compromise charter by both developed and developing countries. The working group will meet at least two more times before the General Assembly receives the finished document. It is hoped that that will provide sufficient time for diplomacy and negotiation to produce a viable document which can be the foundation of the more "just and equitable economic and social order . . ." the charter envisions.

Joseph C. Vanzant