TOWARDS A GLOBAL CHARTER OF ECONOMIC RIGHTS AND DUTIES OF STATES

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PREFACE

The second half of the 20th century has witnessed an awakening of a global interest in the problems of the less developed world. A landmark in the efforts of the world community to grapple with these problems and find lasting solutions to them, has been the initiative taken by the U.N. Conference on Trade and Development for drafting a Charter on Economic Rights and Duties of States.

The subject of Economic Rights and Duties of States is indeed a wide ranging one and it would be too ambitious to attempt to deal with it comprehensively in a few pages. The purpose of this thesis is therefore only to stimulate interest in this all important but hitherto dormant subject.

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I am indebted to the Jawaharlal Nehru University for providing me this opportunity and to the Government of India for having graciously permitted the presentation of this thesis. It is, of course, needless to add that the views and suggestions contained herein do not in any way bind either the Jawaharlal Nehru University or the Government of India.

New Delhi,
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(P.P. Kanthan)

C O N T E N T S

I

INTRODUCTION

Just as the laws of a nation reflect the political, economic and social consciousness of its people, international law reflects such consciousness of the international community. Law, however, can fulfil its function as a permanent instrument of a social order, only if it reflects the needs and aspirations of the changing society. It is not to be conceived as a body of rigid rules inherited from the past and allowing no scope for development but as a body of living principles in the light of which new problems which arise can be solved. We cannot meet the "moral challenge of tomorrow with the intellectual baggage of yesterday."[1] Law has to keep pace with reality and if it snaps its link with the latter, it becomes moribund. This applies equally to international law, for international law is but a facet of the larger scheme of Law.

It is in this context that it has become essential to re-appraise and adjust certain aspects of the traditional international law in the light of the new conditions and new demands of the present international society.[2] The

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1 C. Wilfred Jenks, "Law in a World of Change: An Agenda for a Dialogue" in his Law in the World Community (London, 1967), p.1

2 R.P. Anand, New States and International Law (Delhi, 1972), p.73

traditional international law has essentially been a law of co-existence, aimed at preserving peace by avoiding war. The current international law of economic relations has been chiefly concerned with the rights of private persons and what a State may or may not do with respect to aliens or their property. It reflects the 19th century conception of a liberal State whose chief function consisted in providing adequate protection to these rights. A new focus is now needed to find out the best way in which the international community can best utilise global resources for the benefit of the world population as a whole. This calls for abandonment of concepts incorporating policies no longer appropriate to our era and the articulation of policies appropriate to our times.[3]

An opportunity for doing this in the field of international economic relations is now available in the work taken up by the United Nations Conference on Trade and Development (UNCTAD) for drafting a Charter on Economic Rights and Duties of States. This thesis is concerned with an examination of the need for such a Charter and the possible scope of its contents. Chapter II refers to the adoption by the Third UNCTAD of the Resolution 45(III) on the subject, and gives a brief indication of the work done by the Working Group constituted by the UNCTAD for the purpose. Chapter III sets out the earlier attempts at formulating rights and duties of States including attempts by individuals,

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3 See A.A. Fatoures, "International Law and the Third World", Virginia Law Review, Vol. 50 (1964), p.806

non-governmental organisations, the League of Nations and the United Nations, and points out the inadequate emphasis laid by all these attempts on economic rights and duties of States. Chapter IV brings out the legal and institutional weaknesses of GATT, including its relatively recent Part IV devoted to the trade and development of the "less developed" or developing countries. It also refers to the hopes of the developing countries built around the General Assembly Resolution 1995(XIX) establishing UNCTAD, the different role envisaged for UNCTAD by the developed countries and how in its functioning UNCTAD has not measured upto the expectations of the developing countries.

Chapter V deals with some general considerations bearing upon the general scope of a Charter of Economic Rights and Duties of States. Chapter VI goes into the major issues for coverage by the Charter - commodity trade, trade in manufactures, financing for development, shipping, transfer of technology and trade and economic cooperation among developing countries - and examines the draft outline under consideration by the UNCTAD Working Group. In the final Chapter the possible form the instrument embodying the economic rights and duties of States can take has been discussed and a case has been made out for the drafting of a legally binding Charter on the subject.

II

ADOPTION OF THE PROPOSAL FOR A GLOBAL CHARTER BY UNCTAD

The most outstanding achievement of the third UNCTAD held at Santiago, Chile during April-May, 1972 was that it laid the basis for the adoption of a universal Charter on economic rights and duties of States. The inspiration for the proposal was derived from the address made by Mr. Luis Echeverria, President of Mexico, during the 92nd plenary meeting of the Conference, in which he stated:

> Justice and a stable world cannot be attained until the protection of weak States is ensured by recognised rights and duties. Let us remove economic co-operation from the realm of good-will and root it in the field of law.[4]

Following this address, the representative of Ethiopia introduced a draft Resolution[5] proposing the drawing up of a "Charter of the economic duties and rights of States", on behalf of the "Group of 77".[6] After a discussion in the plenary of the Conference, the proposal was adopted as Resolution 45(III) at the 115th meeting on

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4 For the main points of this Address, see Summary Record of the 92nd plenary meeting, TD/SR.92.

5 TD/L.62

6 This expression refers to the group of developing countries in the UNCTAD.

the 18th May, 1973 by 90 votes to none, with 19 abstentions.[7]

The Resolution noted with concern that the international legal instruments on which the economic relations between States were currently based were precarious and that it was not feasible "to establish a just order and a stable world as long as a Charter duly to protect the rights of all countries, and in particular the developing countries," was not formulated. It further noted the urgency of the "need to establish generally accepted norms to govern international economic relations systematically" and decided to establish a Working Group composed of Government representatives of 31 Member-States[8] to draw up the text of a draft Charter, taking into account -

(a) The general, special and other principles as approved by the conference at its first session;

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7 The Resolution is reproduced in Annexure, infra.

8 Subsequently, pursuant to General Assembly Resolution 3037(XXVII) the Secretary-General UNCTAD appointed 9 States as additional members of the Working Group. The present composition of the Working Group is as follows:

Belgium, Brazil, Canada, China, Czechoslovakia, Denmark, France, Germany, Federal Republic of, Gautemala, Hungary, India, Indonesia, Italy, Ivory Coast, Jamaica, Japan, Kenya, Mexico, Morocco, Netherlands, Nigeria, Pakistan, Peru, Philippines, Poland, Romania, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Yogoslavia and Zaire, Australia, Bolivia, Bulgaria, Chile, Egypt, Iraq, Spain, Sri Lanka, Zambia.

(b) any proposals or suggestions on the subject made during the third session of the Conference;

(c) all documents mentioned in the Resolution and other relevant resolutions adopted within the framework of the United Nations, particularly the International Development Strategy for the Second Development Decade;

(d) the principles contained in the Charter of Algiers and the Declaration of Lima.

The Conference decided that the draft prepared by the Working Group should be sent to member States of the Conference for their suggestions, and called upon the Trade and Development Board to examine the Report of the Working Group as well as the comments and suggestions made by the member States of the Conference and transmit these to the General Assembly, which was in turn invited to decide upon the opportunity and the procedure for the drafting and the adoption of the Charter.

The main thrust of the developing countries' stand during the discussions leading to the adoption of the Resolution was that the principles adopted at the First UNCTAD were not longer sufficient to protect the weaker countries against the foreign economic Powers, and that the principles must be reduced in the form of international legal instruments in order to make it possible for these countries to invoke their rights. The representative of Egypt characterised the proposal to draw up the Charter as

"a decisive step towards filling one of the most important gaps in international law - the absence of legal standards to govern economic relations between States - the Charter of the United Nations being mainly concerned with political questions of international peace and security".[9] The Turkish delegation stated that it voted in favour of this Resolution on the understanding that it referred to a Charter setting forth general norms on the subject, and having the same juridical character as the Universal Declaration of Human Rights adopted by the United Nations General Assembly.[10] The representative of Colombia felt that the Charter could be even more important than the Declaration of Human Rights "because it would defend the interests of mankind, not at the level of the individual, but at the level of whole peoples. Adoption of the proposed Charter would be a step towards the humanisation of human relations".[11] It was the general feeling of the developing countries that the Charter should be a counter-part in the economic field to the Universal Declaration of Human Rights and the Covenants on Fundamental Human Rights.

The developed market economy countries generally welcomed the proposal, though some delegations, such as

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9 TD/SR.109

10 TD/178/Add.1

11 TD/SR.110

Belgium, expressed certain reservations on the ground that -

(1) In order to do useful and lasting work, broad consultations should be held among specialised organisations of an economic character, such as FAO, the ILO and GATT, IBRD, IMF, regional organisations and institutions such as the regional development banks, the regional economic commissions, the European Economic Community, CMEA, OECD, etc.

(2) The resolution should reserve an important role for the Economic and Social Council in the preparaction of the Charter.

(3) The timing proposed in the resolution was much too short.

The Swiss delegation abstained from voting on the Resolution because it considered that so far-reaching a proposal should have been given a more careful consideration, for instance in the Trade and Development Board, before being made the subject of a formal Conference Resolution. The Canadian and the U.K. Delegations, which also abstained, considered the idea behind the Charter as an important one but regretted the lack of sufficient time for the Conference to find a formulation which would command a large measure of support. The United States Delegation, on the other hand, stated that it had serious reservations about a number of

features of the Resolution.[12]

The representatives of the socialist countries of Eastern Europe attached great importance to the proposal to draw up the Charter. The delegation from the Union of Soviet Socialist Republics viewed the draft Resolution of the "Group of 77" as containing principles supplementary to those adopted at Geneva by the first UNCTAD. The delegation felt that the item under discussion opened up a wide field of discussion and hoped that it would lead to the adoption of new principles within the framework of the new progressive trade policy for promoting economic development. The Soviet delegation suggested that some of the provisions in the draft Resolution might first be discussed by special conferences convened under the aegis of the United Nations.

The Working Group established to draw up the text of the draft Charter of Economic Rights and Duties of States held its first session in Geneva from the 12th to the 23rd February, 1973. After a general exchange of views, the Working Group discussed various matters connected with the drafting of the Charter, such as the legal nature, the scope, general characteristics, structure and contents of the Charter etc., and examined various proposals received by it concerning the Charter. The Working Group took note of the draft outline of the Charter which had emerged from the

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12 TD/178/Add.1

discussions of a sub-group established by the Working Group and decided to transmit it to Governments of States members of UNCTAD pursuant to paragraph 3 of Resolution 45(III).[13] The second session of the Group was held in Geneva from the 13th to the 27th July, 1973. During this session the Working Group based its discussions on the draft outline of the Charter, taking into account the suggestions and comments received from Governments as well as the formal proposals made during the session. The Working Group decided to submit the reports on its first and second sessions to the Trade and Development Board at its 13th session. It further decided, in view of the lack of sufficient time to complete its work, to recommend to the Trade and Development Board that the latter should invite the General Assembly to extend the mandate of the Working Group.[14] The discussions in the two sessions of the Working Group will be referred to at appropriate places later.

The movement for the drafting of the Charter of Economic Rights and Duties of States is a culmination of efforts spread over two centuries to adopt a code of rules and regulations aimed at defining the rights and duties of States in general, under international law. The recognition of the need for defining separately, the economic rights

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13 TD/B/AC.12.1

14 TD/B/AC.12.2

and duties of States is of a comparatively recent origin. It is to a historical sketch of these efforts that we shall now turn.

III

EARLIER ATTEMPTS AT THE FORMULATION OF RIGHTS AND DUTIES OF STATES

The question of enumeration of rights and duties of States has engaged the attention of international and national organisations concerned with the development and codification of international law, as well as of international jurists, during the 19th and 20th centuries. Christian Wolff propounded the theory of fundamental rights and duties of States in his Institutiones Juris Naturae et Gentium (1750). This was followed by Abbe Gregoire's Declaration du Droit des Gens (1793) which was presented by him to the French National Convention. Compilations of rights and duties of States form part of the codes prepared by Jeremy Bentham (1827), Pasquale Fiore (1890) and Jerome Internocia (1910). M. Albert de Lapradelle submitted his Declaration of the Rights and Duties of Nations to the Institute of International Law during its sessions in 1920 and 1925. The draft prepared by Mr. Victor M. Maurtua (1931) was transmitted by the Institute of American International Law to the Seventh International Conference of American States at Montevideo in 1933. Dr. Alejandro Alvarez's Declaration of Great Principles of Modern International Law attracted considerable attention of jurists.

Among the non-governmental organisations which

deliberated on the question of rights and duties of States, the Universal Peace Congress was one of the earliest. The Seventh Congress held at Budapest in 1896 adopted the Declaration on Principles of International Law, which sought to lay down briefly the rights of States and contained certain interdictions such as that "no right of conquest exists". The Declaration was concerned with the definition of international personalities and the nature of international personalities and stated: "nations are sovereign and equal". The Inter-Parliamentary Union, an unofficial body, comprising members of parliaments of various States, recommended the preparation of a declaration of rights and duties of States in 1899. The 25th Conference of the Union held in 1928 adopted a Declaration on the subject which postulated:

> The members of the community of States are equal before the law. Each of them possesses within that community only those rights conferred on it by the law of nations.

It further declared that

> It is the duty of States to collaborate in every branch of human activity and especially in those whose aim is to further the general welfare of mankind. The community of States must guarantee for each of them the economic conditions which are absolutely necessary for its existence and for its development.

An important attempt at the enumeration of rights and duties of States was the draft prepared at the initiative of Mr. James Brown Scott and adopted by the American Institute of International Law in 1916 with the title "Declaration of the Rights and Duties of Nations". The Declaration projected on the universal plane the rights sanctioned at the national level by the Declaration of Independence of the United States of America. It emphasised the right to legal equality, the right to property and the right to the enjoyment of these rights and stated that "these fundamental rights, thus universally recognised, create a duty on the part of the peoples of all nations to observe them". It declared that:

> Every nation has the right to exist, and to protect and to conserve its existence; but this right neither implies the right nor justifies the act of the State to protect itself or to conserve its existence by the commission of unlawful acts against innocent and unoffending States.

It further stated:

> Every nation is in law and before law the equal of every other nation belonging to the Society of nations .... Every nation entitled to a right by the law of nations is entitled to have that

> right respected and protected by all other nations, for right and duty are correlative, and the right of one is the duty of all to observe. [15]

The Declaration formed the basis of later declarations on the subject.

An important Latin American initiative, based on the 1916 Declaration was taken when the American Republics met at Montevideo[16] in 1933 to conclude a Convention on Rights and Duties of States. The political climate of the period was conducive to the adoption of the Convention which had been preceded by extensive preparatory work by official as well as non-official agencies. The Convention defined the characteristics of a State and enumerated certain rights fundamental to the existence of a State, the exercise of which had "no other limitations than the exercise of the rights of other States according to the international law". The Convention declared in Article 4 that "States are juridically equal, enjoy the same rights, and have equal capacity in their exercise. The rights of each one do not depend upon the power which it possesses to assure its exercise, but upon the simple fact of its existence as a

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15 See J.B. Scott, The American Law Institute: Its Declaration of the Rights and Duties of Nations (Washington, 1916), pp. 87-88.

16 Seventh International Conference of American States, Montevideo (1933).

person under international law". The Convention, however, dealt with only the basic questions of public international law such as recognition of a State, State intervention, jurisdiction of States and the obligation not to recognise territorial acquisitions or special acquisitions obtained through force. It did not deal with economic rights and duties of States as such.

The rights and duties of States mentioned in the 1933 Convention have been re-affirmed from time to time by a series of inter-American Conferences. Among the more important instruments pertaining to the pre-United Nations period are the Declaration of Principles of Inter-American Solidarity and Cooperation (Buenos Aires, 1936); the Additional Protocol relative to Non-Intervention (ibid); the Declaration of the Principles of the Solidarity of America (Declaration of Lima) and the Declaration of American Principles (Lima, 1938); the Declaration on the Maintenance of Peace and Union among the American Republics (Havana, 1940); the Declaration on Reciprocal Assistance and American Solidarity (Act of Chapultepec) and the Declaration of Mexico (Mexico, 1945). The Charter of the Organisation of American States contains a full chapter (Chapter III) on the subject of rights and duties of States and constitutes a restatement of previous declarations on the subject.

The League of Nations had occasion to discuss the

question of a declaration of rights and duties of States a number of times. During the Ninth Assembly of the League of Nations, Mr. Ferrera of Cuba suggested, in the context of the work of the Assembly concerning the progressive codification of international law, that the work on codification should be prefaced by a declaration concerning the rights and duties of States.[17] Delegates from Belgium, El Salvador, Greece, India and Sweden doubted the expediency of the Cuban proposal. The El Salvador representative thought the Cuban proposal to be a departure from the slow but thorough method of procedure adopted for codification of international law and suggested that the Committee of Experts for the Progressive Codification of International Law be invited to study the question. Mr. Rolin of Belgium, the Rapporteur of the Committee which discussed the question, expressed the view that fundamental rights and duties were, most fortunately, in process at the moment of a marked progressive evolution. A restrictive declaration of rights and duties of States, so far from having a favourable effect, would, he thought, be liable to hinder the work in one of its most vital aspects. The Assembly of the League approved the proposal for referring the matter to the Committee of Experts although the question of a declaration of rights and duties of States faded into the background amidst the emerging

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17 Proceedings of Ninth Assembly, Committee I, (1928), p.17.

political tensions and conflicts of the period that followed.

The question of a declaration on the rights and duties of States was next taken up in right earnest at the United Nations Conference on International Organisation held at San Francisco in 1945. Several participating Governments tabled amendments to the Dumbarton Oaks Proposals, calling for the inclusion of a declaration on rights and duties of States in the Charter of the United Nations. The Mexican Government suggested that a precise statement of the essential principles of international law, in the form of a "Declaration of Rights and Duties of States" and a "Declaration of International Rights and Duties of Man", should be drafted by a Committee of Experts of the United Nations.[18] The Mexican proposal emphasised that the former declaration should include the principles of (1) Respect for territorial integrity and for political independence; (2) Non-intervention in external or internal affairs of another State; and (3) Equality of jurisdiction over nations and aliens. However, the reference to a declaration on rights and duties of States was omitted in a second memorandum submitted by the Mexican Government, "as a concession to expediency". The Netherlands delegation

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18 United Nations Conference on International Organisation, document 2 G/7(c), Vol.3, 23 April, 1945, pp.54-188.

submitted an alternative formulation of the Dumbarton Oaks Proposals providing for a statement setting forth the fundamental rights and duties of States.[19] The delegation pointed out that an express statement setting forth the rights and duties of States would provide the basis for the statement in the Dumbarton Oaks Proposals that one of the purposes of the Organisation was the maintenance of international peace and security. The delegation also felt that such a step would afford some reasonable compensation for the unequal position of permanent and non-permanent members in the Security Council, created by the proposed voting procedure for that body.[20] The Cuban delegation submitted a draft "Declaration of Duties and Rights of Nations", and stated that such a declaration would act as a guide in the maintenance of international peace and security, and serve as a basis for all agreements which might be concluded in accordance with international practice and the enforcement of international law. The delegation of Republic of Panama proposed an amendment to the Dumbarton Oaks Proposals which provided for a Declaration of the Rights and Duties of Nations and the Declaration of Essential Human Rights being made an integral part of the United Nations Charter.[21]

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19 Ibid., pp. 322-330.

20 Ibid., pp. 336-337.

21 Ibid., pp. 495, 256.

Many other delegations submitted amendments, suggesting specific rights and duties of States, essentially similar to those submitted by the delegations mentioned above.

These suggestions by various Governments were submitted to Committee I of Commission I. The Report of the Committee stated:

> The Committee received the idea with sympathy, but decided that the Conference, if only for lack of time, could not proceed to realize such a draft in an international contract. The organisation, once formed, could better proceed to consider the suggestion for such a bill of rights of nations and to deal effectively with it through a special commission or by some other method.[22]

At the first session of the General Assembly (1946), the Cuban delegation proposed the inclusion of the subject in the agenda of the General Assembly. The President, M. Spaak of Belgium, however, felt that the question of the Declaration of Rights and Duties of Nations could form the subject matter of a general debate since United Nations Charter itself constituted an attempt to determine the rights and duties of nations. The Cuban representative, in reply,

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22 United Nations Conference on International Organisation, document 944, I/I/34(I), 13 June, 1945, Vol. 6, p.456.

stated:

> With great respect for what the General Committee has said, we think that, though the Charter contains many of the principles from which are derived the rights and duties of nations, the Charter does not exhaust this subject, and if we are to live in a world of peace, in a world of justice, everlasting peace can only be based on justice and not indefinitely on force. It is absolutely necessary that we have an enumeration of the rights and duties of nations, so that all nations may know what are their rights and what are their obligations.

But on the recommendation of the General Committee, the item was omitted from the agenda for the session.

The delegation of Panama had presented a draft declaration for consideration by the General Assembly during the session. Dr. Alfaro, the representative of Panama in the First Committee, which considered the draft Declaration, stated that:

> It was fitting that the United Nations subscribe to a declaration of the rights and duties of States which would constitute a basis for re-codification of international law.

No agreement was, however, reached during the session on the contents of the draft Declaration. The General Assembly decided to refer the text to all member States of the United Nations for their comments, to refer the said Declaration to the Committee on Codification of International Law, and to include the matter in the agenda for the second Session of the General Assembly. The Committee noted that a very limited number of comments and observations had been received from the member States of the United Nations as well as non-governmental organisations,[23] and that the majority of these comments and observations recommended postponement of the study of the substance of this question. It recommended that the General Assembly entrust further studies concerning the subject to the International Law Commission, which should take into account the draft Declaration presented by Panama.

The subject was taken up by the second Session of the General Assembly in 1947. During the discussions in the Sixth Committee, Dr. Alfaro stated that, while doubts and fears regarding the success of the project of the Declaration on the Rights and Duties of States had been expressed, the delegation of Panama felt that no effort should be spared in proclaiming and promoting the reign of law in international life. He thought it most urgent that

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23 The texts of the comments and observations are appended to Secretary General's document A/CN.4/2 (1948).

the Committee should proceed at once to adopt a declaration of the rights and duties of States, a compressed code of international law governing the vital aspects of international relationship. The General Assembly adopted two Resolutions on the subject 175(II) and 178(II), referring the matter for study to the International Law Commission, instructing the Secretary-General to do the necessary preparatory work, and calling upon the International Law Commission to prepare a draft Declaration on the subject taking as a basis for discussion the draft Declaration presented by Panama, and taking into consideration other documents and drafts on the subject.

The draft Declaration on the Rights and Duties of States submitted by Panama referred in the preambular paragraphs to the need for the co-existence of States in the juridical community being based on "the determination in the most accurate terms possible of the rights which each may exercise and the duties which all must fulfil" and stated:

> Whereas a declaration of the kind set forth hereunder will be a decisive factor in ensuring the reciprocal respect of all rights and the harmonious development of international life, and in strengthening solidarity, co-operation and fellowship among nations and peoples....

The draft Declaration contained 24 articles. In an explanatory note attached to the draft Declaration, Dr. Alfaro had stated that the 1916 draft of the American Institute of International Law, notwithstanding its precision of wording, failed to enumerate all the rights and essential duties of nations, since it comprised only six articles, and omitted many of the great principles of international law. "It is clearly desirable", he stated, "that nations should subscribe to a conventional instrument setting forth the basic principles which constitute, as it were, the foundations on which stands the structure of international law". Though the Montevideo Convention, he stated, had contained 15 articles, of which eleven were normative, among these several of the basic principles of international law were missing. He added:

> The need for a declaration incorporating all the basic principles that are the sources of the rights and duties to which the States should adjust their mutual relations, is hence evident. Such a document may be drafted by extracting from the various declarations, resolutions, public treaties and other multilateral instruments or acts all elements of technical value for the purpose of formulating a precise, concise, harmonious and complete body of doctrine, free

> alike of superabundance and of insufficiency and truly adapted to the purpose of those pronouncements.

In his view, the draft Declaration presented by him "should be a true epitome or syllabus of the basic elements of the law by which the States should govern their mutual relations in the community of nations".

The draft Declaration of Panama was indeed the most comprehensive Declaration till then on the subject, dealing almost with every facet of international law, such as the right to national existence of a State, recognition of a State, the right to independence, to intervention, legal equality, exclusive jurisdiction, diplomatic intervention, peaceful settlement of disputes, and so on. It was for the first time that an article dealing exclusively with international economic matters was incorporated in such a declaration, although there was a faint precedent in the Atlantic Charter (1941) which had stated:

> They will endeavor, with due respect for their existing obligations, to further the enjoyment by all States, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity".

Article 23 of the Declaration stated:

> 23. Equality of Opportunity and Interdependence in the Economic Sphere
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> Every State has the right of access, on equal terms, to the trade, commodities and raw materials of the world which are necessary to its economic prosperity.
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> It is the duty of every State to eliminate from its economic activities every artificial means tending to establish differences in the acquisition of the natural products of the soil of another State, and to refrain from exercising control over means of transport, from restricting trade, or bringing about restrictions in commercial credits and currency of another State.

Pursuant to the mandate given by the General Assembly, the International Law Commission took up the consideration of the subject at its first Session in 1949.[24] The discussions on the draft Declaration were marked by a forthright attack by Mr. Koretsky, representative of the U.S.S.R., who stated that the draft Declaration did not emphasise the liberation of nations which had been enslaved

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24 Year Book of the International Law Commission, 1949, pp.119-120.

and did not discriminate between "those who own colonies and those who did not". Dr. Alfaro in his reply considered Mr. Koretsky's speech as containing "little substance in relation to its length and generally more political than juridical". He felt that Mr. Koretsky apparently wished the Declaration to contain not those legal rights and duties of States which had been recognised and practised for three centuries, but a political version of such rights and duties.

As regards Article 23 of the Panamian draft, the delegations of Greece and India expressed the opinion that the article was out of place in the Declaration. M. Francois felt that the problems raised by the article were not within the Commission's province. Only experts in economic science would be competent to discuss it. The meaning of the article was too vague and too general. All the principles established therein called for restrictions without which its adoption would be exceedingly dangerous and would arouse the opposition of all economists. Mr. Yepes recognised the importance of the principle of economic cooperation and free access to raw materials, but felt that economic questions were not the Commission's business. Moreover, the second part of the article restricting the power of the States to control national economy might constitute a great danger for those countries which still needed to protect new-born industries. He was, therefore, for deleting the whole or at least the last part of the

article. Dr. Alfaro felt that at least the first part of the article should be preserved, since it dealt with the principle of equal access. Mr. Amado, the Rapporteur, did not think that equal access was a principle of international law, as international law "had not yet evolved to that point". The Chairman noted that the consensus of opinion in the Commission appeared to be in favour of the deletion of the article and accordingly Dr. Alfaro withdrew his proposal and the article was thus deleted from the draft Declaration.

In the meantime, an important event had occurred in the realm of international economic relations. The signing of the final Act of the United Nations Conference on Trade and Employment at Havana on the 24th March, 1948 represented a unique attempt to formulate a charter dealing with the complex problems of trade policy, cartels, commodity agreements, employment, economic development and international investment, and the constitution of an international trade organisation. The Charter sought to apply uniform principles of fair dealing to international trade. It made the first attempt, through inter-governmental action, to eliminate the abuses arising from the operations of international monopolies and cartels. It spelt out a code of principles to control the formation and operation of inter-governmental commodity agreements. It recognized the inter-dependence of national policies for the

stablisation of production, and international measures for the liberalisation of World trade. As W.L. Clayton wrote about the Charter:

> The Charter is long and complicated and difficult. .... But we must not lose sight, in all of its detail, of the deeper problems that underlie these mysteries. For the questions with which the Charter is really concerned are whether there is to be economic peace or economic war, whether nations are to be drawn together or torn apart, whether men are to have work or to be idle, whether their families are to eat or go hungry, whether their children are to face the future with confidence or with fear.[25]

The high hopes entertained about the Charter were soon belied. While the purpose of the Charter was unquestionable, it had, in the nature of things, to be a compromise between differing views on the role and organisation of international trade held by surplus and deficient countries and by market economy and planned-economy countries. The Charter, while condemning

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25 Foreword to Clair Wilcox, A Charter for World Trade (New York, 1949).

quantitative restrictions on international trade, reflected at the same time the concern of U.S.A. to continue some of its protectionist policies and of the U.K. to continue the imperial preference arrangements and to use quantitative restrictions to protect the shaky pound sterling. It contained a number of patch works intended to accommodate the views of the countries with U.S.A. at one extreme and the socialist countries at the other. The result was a grotesquely complicated document that included a multitude of detailed compromises and which all too often saw a free-trade principle followed immediately by an exception authorising trade restrictions.[26] The result of the attempt at compromises was that the Charter became too long and too complicated, with the language too vague and too precise, hard to read and difficult to understand.[27] As Herbert Feis has stated:

> Its articles, sections and paragraphs interweave with one another in so many ways as to baffle memory. .... The weight and meaning of each part of the Charter is dependent on the conditions and exceptions contained in many others. Thus the pattern of obligation is so intricate and qualified that summary is hard and certain to

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26 Kenneth W. Dam, The GATT - Law and International Economic Organisation (Chicago, 1970), p.14.

27 Clair Wilcox, A Charter for World Trade (New York, 1949), p.189.

> prove a little wrong. Life exists at the heart of this most involved accord, but only the learned can communicate with it, and then only in code.[28]

A number of fears - some of them wild - were entertained by the U.S. public regarding the Charter. For instance, the argument was put forth that the Charter would require the nation to surrender its domestic economic life to the international trade organisation which would acquire the power to determine its internal policies. It was felt that the Charter would impose exclusive obligations on the United States while granting freedom of action to the other nations. There was also the fear that in the absence of an explicit affirmation of faith in private enterprise, the Charter might engage in global economic planning, allocating production and markets among the nations of the world and subjecting business in every country to the dictates of a socialist bureaucracy. In 1950, the Trueman administration finally decided not to seek the approval of the Congress which was a necessary pre-condition of U.S. acceptance of the Charter. Without U.S. support the Charter was as good as dead.

The opposition to the Charter, however, was not from the U.S.A. alone. The socialist world boycotted the Charter,

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28 Herbert Feis, International Organisation, (February, 1948), p.42.

characterising it as "an instrument in the hands of the United States to enslave the rest of the world".[29] The President of the Karelo-Finnish Republic wrote in Pravda on the 19th February, 1947:

> The Americans have worked out a broad plan creating a 'World trade and currency system' with the help of which powerful American capital can become complete master in the field of international trade and gradually take into its own hands control over the economy of most other nations.

L. Frei wrote in Vneshnyaya Torgovlya, the official magazine of the Soviet Ministry of Foreign Trade in 1947, that the Charter deprived a number of countries of their sovereign rights and bound them to the will of the United States and was designed to secure a monopolistic position for the United States on world commodity markets and was a weapon of the U.S.A. in its struggle for world domination. Many of the other countries, including most of the developing countries which participated in the trade negotiations at Havana maintained that the provisions of the Charter were negative in that they did not cover subjects like promotion of industrial development, stabilisation of employment,

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29 Hoy (the Communist daily in Havana), quoted in Clair Wilcox, op.cit., n. 25, p.187.

maintenance of commodity prices, etc., but merely concerned themselves with reduction of barriers to trade. The developing countries objected to the commitment in the Charter provisions to negotiate for universal reduction of tariffs and to the provision to determine whether this commitment had been fulfilled. They sought freedom to impose quantitative restrictions and other restrictive devices as well as to set up new preferential systems as the exigencies of their development warranted. They demanded that a semi-autonomous economic development committee be established within the International Trade Organisation for the purpose of facilitating these preferential measures. The international atmosphere was accordingly non-too-conducive for the adoption of the Charter, and the Charter met with a still birth.

IV

INADEQUACIES OF EXISTING LEGAL INSTRUMENTS - GATT AND UNCTAD

While the Havana Charter thus became abortive, an attempt had been made at Geneva just prior to the Conference to take out the commercial policy provisions of the Charter and incorporate them into a General Agreement on Tariffs and Trade. The Agreement was signed by 23 countries which had participated in the Tariff negotiations that had accompanied the preparatory work for the Charter at Geneva. The General Agreement covered two-thirds of the trade among the members of the Group and provided for substantial reductions in duties on some products, the binding of low rates of duty on some others, and the binding of duty free entry on still others. It reduced preferences affecting a large part of the trade of the British Commonwealth and eliminated preferences on a number of products imported by the countries of the Commonwealth. The General Agreement provided further that no new preferences could be created and no existing preferences could be increased. There were also provisions in the General Agreement, providing against participating countries undoing the effects of tariff reduction through other forms of restrictions such as quantitative restrictions, quota systems and exchange controls, restrictive methods of customs administration, discriminatory taxes and regulations and the operation of State-trading enterprises. The General

Agreement ensured the application of the principle of most-favoured nation treatment to the tariffs and trade of the participating 'Contracting Parties'.

The GATT, as it ultimately emerged, was a feeble attempt compared to the ambitious programme incorporated in the Havana Charter. While the Charter was being drafted, a controversy had raged between the United States, supported by the United Kingdom, Canada, and other developed countries on the one hand, and the developing countries, supported by Australia, on the other hand. The former took the view that developing countries could further their economic development by participating in a multilateral non-discriminatory system with low tariffs and by the absence of quantitative restrictions. The latter laid great emphasis on economic development and argued that this required the setting up of industries which could flourish only behind tariff walls, supported where necessary, by quantitative restrictions. A compromise position was struck in the Havana Charter which came to contain a chapter on "Economic Development and Reconstruction" (Chapter III). This chapter contained elaborate provisions regarding transfer of capital funds and provision of other facilities for economic development, international investments and preferential agreements among developing countries. This Chapter, however, was not carried over to the General Agreement. So also were omitted in the General Agreement, the chapters in the Havana Charter relating to

"Employment and Economic Activity", "Restrictive Business Practices" (which contained detailed provisions regarding general policy towards such practices, consultations and investigation procedures, studies relating to the subject, obligations of members, cooperative remedial arrangements, supplementary enforcement arrangements, and domestic measures against the restrictive business practices), "Inter-governmental Commodity Agreements"(containing 16 articles on the drafting and administration of commodity agreements), the International Trade Organisation (providing for the setting up of such an Organisation with a Conference, an Executive Board, Commissions, a Tariff Committee, a Director-General and his staff), and "Settlement of Differences" (providing for consultation, arbitration etc.).

The General Agreement as adopted in 1947, thus suffered, apart from a number of substantive weaknesses, a chief institutional handicap as well. The General Agreement did not inherit the organisational structure envisaged in the Havana Charter in the shape of the International Trade Organisation. Its legal status was merely that of a multilateral agreement, which provided in Article XXV for 'Joint Action' by the CONTRACTING PARTIES.[30] This was mainly due to the U.S. approach that in the area of commercial policy,

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30 In case of such Joint Action, the contracting parties are referred to as "CONTRACTING PARTIES" in the General Agreement.

GATT's primary purpose consisted in the application and enforcement of substantive rules of law. The need for an institutional framework within which the countries with differing interests might work out mutually acceptable solutions was not adequately felt. What was felt necessary was just an organisational set up to incorporate and apply the substantive rules of the Agreement. As Secretary of State of the U.S.A., Dean Acheson argued:

> No code of laws is worth very much without an authoritative body to interpret it and administer it.[31]

This handicap was evident in the very early years of the GATT since the joint action involved elaborate procedure for convening sessions of the Contracting Parties, which could not be convened very frequently, while some items of business were such as could not be kept pending till the convening of the formal sessions. In 1955 an attempt was made to remedy this weakness concerning inter-sessional arrangements by the establishment of an Organisation for Trade Cooperation (OTC) with provision for an Assembly, an Executive Committee and a Secretariat. The organisation was to carry out many of the functions entrusted to the Contracting

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31 Dean Acheson, "Economic Policy and the ITO Charter", Department of State Bulletin XX (1949), p.626.

Parties, including the granting of waivers and the nullification or impairment provisions of Article XXIII. The Organisation for Trade Cooperation, however, met with the same fate as the International Trade Organisation, for want of ratification by the U.S. Congress. The inter-sessional work is now looked after by the GATT Council which is "composed of representatives of all contracting parties willing to accept responsibility of membership therein".[32] The Council has got powers "to deal with such other matters with which the CONTRACTING PARTIES may deal at their sessions",[33] but the power to grant waivers under Article XXV:5 has been specifically withheld from the Council.

The General Agreement suffers from a major weakness which has a great bearing on its application. The General Agreement originally consisted of three parts: part I containing two articles dealing with the most favoured nation obligation and tariff bindings; part II containing commercial policy provisions which form the GATT's code of conduct for its contracting parties in regard to trade matters; and part III containing miscellaneous and procedural provisions. When the General Agreement was drafted in 1947 many nations realised that some of their domestic legislation conflicted with certain provisions in Part II of the General Agreement.

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32 Basic Instruments, 9th supplement (1961), pp.7-8.

33 Ibid.

As a concession to the view-point of these countries, and in order to avoid the possibility of rejection of the General Agreement by these countries, a legal device was resorted to by the adoption of the Protocol of Provisional Application, providing that Part II was to be applied "to the fullest extent not inconsistent with existing legislation". The relevant date was fixed as the 30th October, 1947 in respect of the original GATT members, and has since been fixed as the date of accession to the protocol in respect of the countries which have acceded to the General Agreement since then. This device has enabled many countries to retain a number of restrictions under the guise of "Pre-GATT legislation". Several attempts have been made to induce the various contracting parties to report the legislation so saved, but unanimous cooperation in this respect has not been forthcoming.[34] The result has been an unsatisfactory situation in which trade restrictions are often discussed in a legal half-light and practices that are clearly inconsistent with GATT principles can nevertheless be defended as lawful because they have been in effect since pre-GATT days. Those contracting parties which have fully complied with Part II sometimes regard the reliance by other contracting parties on this saving clause as evidence of bad faith.[35]

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34 GATT document L/2375/Add.1 (19 March, 1965)

35 Kenneth W. Dam, op. cit., n.26, p.343

The dispute settlement provisions of the General Agreement are comparatively modest in relation to the provisions originally envisaged in the Havana Charter. The Charter authorised the Conference and the Executive Board to request for advisory opinions of the International Court of Justice on legal questions arising within the scope of the activities of the International Trade Organisation, in accordance with paragraph 2 of Article 96 of the Charter of the United Nations. The General Agreement contains no provision for reference of either actual disputes or questions of interpretation to the International Court of Justice. The GATT, accordingly, lacks a vital power of dispute settlement which is available to the General Assembly or the Security Council of the United Nations. Nor is there any provision in the General Agreement for setting up a tribunal to resolve actual disputes or to give authoritative interpretations on questions requiring interpretation. This function of the tribunal has been taken over by the CONTRACTING PARTIES whose decisions tend to be somewhat political rather than juridical.

The text of the General Agreement suffers from the limitation that while its substantive provisions are drafted in legal terms, providing for numerous prohibitions, the provisions relating to the remedies do not speak in terms of sanctions. The violation by a contracting party of any provision of the General Agreement is not, accordingly, construed as "illegal". The General Agreement is built

consciously on the edifice of a system of reciprocal rights and obligations to be kept in balance. Tariff concessions are to be agreed upon, adjusted or withdrawn on the basis of "reciprocity" and a failure to abide by an agreement in this respect is regarded not as a violation to be punished but rather as an act which gives the injured party the privilege, subject to the approval of the CONTRACTING PARTIES, of suspending reciprocal concessions. Article XXIII merely provides for the CONTRACTING PARTIES authorising affected contracting parties to suspend the application to the offending contracting party "of such concessions or other obligations .... as they determine to be appropriate in the circumstances". The CONTRACTING PARTIES are, accordingly, only to see that a balance of concessions and other obligations among the contracting parties is maintained. This limited role in respect of violation of substantive rules of the General Agreement accorded to the CONTRACTING PARTIES is in striking contrast to the system of sanctions available to national courts to enforce compliance with substantive prohibitions of domestic law, and to the power of the United Nations Security Council to impose sanctions upon member-countries of the United Nations in case of their failure to abide by the principles of the Charter concerning the use of force.

The system of retaliatory withdrawal of tariff concessions may impose a substantial detriment on the

offending contracting party which might find its export prospects curtailed. But such a withdrawal does not confer on the injured contracting party any compensatory benefit. Although an industry of an injured country may receive additional protection as a result of the retaliation, this protection might not be needed by the industry and the consumers of the item in question in that country would have to pay more for the item than before the retaliation. If the item is a raw material or component which goes into export production, the export prospects of the injured contracting party would be further affected. Further, Article XXIII provides for remedies even where no rights exist, despite the common legal dictum that there is no right without a remedy.[36] While paragraph 1(a) of the Article deals with an actual violation of the General Agreement by a contracting party, paragraph 1(b) refers to "an application by another party of any measure whether or not it conflicts with the provisions of this Agreement", and paragraph 1(c) merely speaks of "the existence of any other situation". The right to invoke Article XXIII arises in all the three cases, i.e., whether there has been an actual violation of the General Agreement or not. This equating of "infringing" and "non-infringing" activities is

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36 Kenneth W. Dam, op. cit., n.26, pp.356-358.

a corollary of the fundamental tenet which runs through the General Agreement, namely, that a balance of advantage is always to be maintained among individual contracting parties.

Further, there are obvious limitations on the right of retaliation as incorporated in the General Agreement. Procedurally, a contracting party wishing to invoke Article XXIII should first "make written representations or proposals to the other contracting party or parties which it considers to be concerned". Thereafter "any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it". Only after this and again only "if no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time" can the dispute be referred to the CONTRACTING PARTIES. Apart from this, retaliation may be authorised only where "the circumstances are serious enough to justify such action", and the type as well as the extent of retaliation should be "appropriate in the circumstances". In practice, retaliatory action is resorted to only as a last resort after attempts at conciliation have failed. Inbuilt in this very system is the possibility that an erring Government, faced with strong protectionist pressures at home, delays the lifting of the illegal restriction while the conciliation continues. On top of this, retaliation itself may prove to be a highly inadequate remedy where the affected contracting party is not a major importer for any product of the offending contracting party.

Many developing countries have thus felt powerless to offset the restrictive commercial policies of developed countries, since retaliatory action on the part of the former has often times had little or no effect on the restrictions maintained by the latter.

The basic thinking in GATT circles underwent a partial change in favour of the developing countries with the publication of the Habeler Report on "Trends in International Trade" in 1958. The report was forthright in relating the predicament of the developing countries to the trade policies pursued by the developed countries. The report was instrumental in the GATT adopting a programme for trade expansion of developing countries and the constitution of Committee III which was solely concerned with trade measures affecting exports of developing countries. A further landmark in this direction was the convening of the ministerial meeting of May 1963, which adopted a time-bound Action Programme for the elimination of tariff and non-tariff barriers. It recognised the need for "an adequate legal and institutional framework to enable the Contracting Parties to discharge their responsibilities in connection with the work of expanding the trade of less-developed countries".[37] In February, 1965 at a special session of the GATT, a new part, namely Part IV, was added to the GATT and was applied

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37 Basic Instruments, 12 Supp. (1964), pp. 36, 45.

immediately on a de facto basis, and upon sufficient ratifications forthcoming in June 1966, on a de jure basis. The adoption of Part IV was partly a reflection of the new wave of interest in the GATT for the trade problems of developing countries, as well a response to the institutional challenge that had stemmed from the adoption of the Final Act of the First U.N. Conference on Trade and Development held in Geneva from March-April 1964.

Part IV consists of three Articles: Article XXXVI on "Principles and Objectives" of a preambular nature but containing a provision on non-reciprocity; Article XXXVII on "Commitments" containing a number of qualifications; and Article XXXVIII on "Joint Action" providing a work programme to be administered by the Committee on Trade and Development set up subsequently for the purpose. Article XXXVI is couched in an elegant but indefinite style which has tended to characterize the work of those international organisations where the appearance of action has too often been substituted for action itself.[38] The provision of non-reciprocity is contained in a language which is not mandatory:

> The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of the less-developed contracting parties.

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38 Kenneth W. Dam, op. cit., n.26, p.238.

Article XXXVII on Commitments follows the language of 1963 Action Programme but ironically makes no reference to its terminal dates and replaces the mandatory words in the Action Programme by a drafting device which has tended to dilute the effectiveness of the commitments. Paragraph 1 of the Article qualifies the substantive commitments by the words, "to the fullest extent possible" and by the explanation "that is, except when compelling reasons, which may include legal reasons, make it impossible". The undertaking contained in the Article is to "accord high priority" to the reduction or elimination of trade barriers affecting products of export interest to developing countries. The standstill on introduction or increase of "customs duties or non-tariff import barriers" on the exports of developing countries is also to be implemented only "to the fullest extent possible". As regards the standstill on fiscal measures relating to tropical products, it covers only new fiscal measures but not increase of existing ones. Even here, the commitment is only to "accord high priority" to the "fullest extent possible". The commitment to accord high priority to the reduction of internal taxes is to be effective only in the context of "any adjustments of fiscal policy". The 'Joint Action' provision contained in Article XXXVIII makes a reference to international commodity agreements, the UNCTAD, development plans, the relationship of trade and financial assistance, reviews of the rate of growth of the trade of developing countries,

international harmonization and adjustment of national policies and regulations, and export promotion, but is qualified by a reference to Article XXXVI and is, therefore, limited in scope to the furtherance of the objectives set forth in that Article. These qualifications and the drafting device would appear to take away much of the substance in the statement made by Mr. E. Wyndham White, the erstwhile Director General of GATT, that GATT was a contractual agreement and that Part IV had been incorporated into it with the same treaty status and binding force as the rest of its provisions.[39]

In Part IV there is no mention of preferences in spite of the great interest evinced on this question during the discussion on the draft of Part IV. Specific proposals by India and Chile on preferences were not carried.[40] A U.S. proposal to promote certain regional preference arrangements among the developing countries was also not pursued further.[41] The most-favoured-nation clause therefore remains fully operative, unqualified by Part IV. Nor does Part IV contain any specific commitment in regard to agricultural products. Two alternative draft formulations intended to require developed countries to modify their internal agricultural policies so as to facilitate exports of agriculturalproducts

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39 E. Wyndham White, "Whither GATT?", Press release, GATT/1006 (October, 1967).

40 Document L/2147 (24 February, 1964), p.7.

41 Ibid., pp.16-17.

by developing countries were not accepted,[42] indicating the reluctance of the developed countries to change the essential feature of the GATT system as well as some of their objectionable commercial practices.

Accordingly, the developing countries have looked upon GATT "as a fortress which generated, preserved and enforced the rules and concepts of the existing international economic relations".[43] The birth of UNCTAD could be attributed largely to the feelings of frustration which the developing countries had experienced with GATT as a forum for the solution of their basic problems. We shall examine below how UNCTAD also has not measured up to the expectations of the developing countries, but the point which requires to be stressed here is that the developed countries continue to regard GATT as an old institution, whose serviceability to them has been well-tested, while UNCTAD has been to them an organisation "unpredictable, ideologically repugnant, its key positions mainly staffed by subversive international civil servants and not easily controllable".[44] According to the developed countries, UNCTAD could be the policy forum for intensive, comprehensive and wide-ranging discussions on trade and development, while GATT could undertake more concrete tasks

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42 Document L/2281 (26 October, 1964), pp.2,11.

43 Gosovic, UNCTAD: Conflict and Compromise (Leiden, 1972), p.198.

44 Ibid., p.199

of sponsoring trade negotiations and administration of agreements resulting from the negotiations as well as other operational activities. The UNCTAD's role, in their view, should be confined to launching of ideas but should not extend to the specialised tasks being performed by other bodies.[45] The developing countries, on the other hand, feel that UNCTAD's activities should not be confined to mere passing of recommendations but should cover negotiating and implementing functions as well.

General Assembly resolution 1995(XIX)[46] establishing UNCTAD provides that the Trade and Development Board "shall keep under review and take appropriate action within its competence for the implementation of the recommendations, declarations, resolutions and other decisions of the Conference.....". Soon after the Board started functioning, a controversy arose between the developed and the developing countries about the scope of implementation of the Final Act of the First UNCTAD in pursuance of this provision. The developing countries argued that the passing of the recommendations contained in the Final Act ipso facto signified the acceptance of a corresponding commitment by

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45 For a detailed presentation of the view-point of the developed countries, see "Whither GATT?", press release GATT/1006 (19 October, 1967), and "Reforming the Institutional Machinery of World Trade", GATT, doc. Spec(63) 264 (14 October, 1963), p.15.

46 The Resolution accorded to UNCTAD, the status of an Organ of the General Assembly.

countries to implement them, particularly where the recommendations had been unanimously adopted. However, there was this handicap for them that very few provisions of the Final Act had been adopted unanimously. Of the 15 general principles only one was adopted without dissent; and only two of the 13 special principles were adopted unanimously. Of the 57 substantive recommendations, 29 were adopted unanimously and the rest were passed after voting had been taken. Further, some of the recommendations contained qualifying expressions such as "to the extent possible", which detracted considerably from the commitment to act. The developed countries, accordingly, questioned the binding nature of the recommendations contained in the Final Act.[47] To them, the provisions of the Final Act, unlike multilateral contractual instruments, created only a moral or political obligation, as opposed to legal obligation.[48] In the discussions which followed in the Board on the question, the developing

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47 For instance, the representative of Belgium expressed the view that the Final Act should represent only ideas, suggestions and requests, which were subject to various interpretations. See TD/B/SR.101, p.58

48 See the view expressed by Markus Timmler in "The Future of UNCTAD", Thought, 7 July, 1973, p.12: "One should remember here that UNCTAD as an organ of the UN as well as the latter and its special organisations apply the voluntary principle. This means that no resolution of UNCTAD must be followed, not even by those who voted for it or even introduced it. However, one should also note that increasingly moral obligations brought by the declarations of intent and agreement to resolutions cannot be ignored."

countries wanted to establish an effective machinery and procedure for reviewing the implementation of the Final Act, with powers granted to the Board for holding individual countries responsible for their failure of implementation. The developed countries, however, stoutly opposed this and argued that the Board should not be converted into "an inquisitorial body to carry out a detailed country-by-country examination of the extent to which recommendations adopted by the Conference have been implemented or were being complied with".[49] To them, GATT alone represented the right forum to review the implementation of trade measures.

The resolution finally adopted by the Board at its second session reflected a compromise between the two positions. The resolution required the Secretary General of UNCTAD to prepare an annual report on international trade and economic development, the progress made in the economic development of developing countries, as well as their trade and development needs.[50] The equivocal wording of the resolution left the scope of the implementation still in doubt. The developed countries interpreted the resolution to mean that there could be only a general debate and not a a case-by-case examination of the policy measures taken by

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49 See the comments by the United Kingdom, TD/B/L.63,Add.4, (11 October, 1965), p.14.

50 Board resolution 19(II), TD/B/71.

individual countries. The resolution required that the annual report of the Secretary General should be based, inter alia, on the information furnished by member-States. The developed countries took the stand that individual Governments had the latitude to decide on the nature, form and definition of information that they would offer. They, accordingly, proceeded to supply data of a general nature, which could only be used by the UNCTAD Secretariat to produce an over-all survey of trends and patterns of international trade and development, instead of an evaluation report, which would have indicted individual governments for their lapses in implementation.[51] The developed countries have characterised the reports as not adequately reflecting the progress actually made while the developing countries have objected to the passivity of the developed countries and their platitudinous statements.[52]

The annual implementation reports have thus tended to be very much watered down and far removed from the purpose

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51 The annual report consists of two parts, one on trends in trade and development, and the other on trade policy developments. While the former analyses the data received by the Secretariat, the later is mostly a factual one, without any "teeth" in it.

52 An extreme stand was taken by the representative of Switzerland on the first implementation report, to the effect that member-countries of UNCTAD were not expected to say what practical steps they had taken in order to carry out the policies defined by UNCTAD, since this remained within the domain of their autonomous action. See TD/B/SR.33, p.49.

which the developing countries had originally in view. There is a provision in General Assembly resolution 1995(XIX) that UNCTAD will "initiate action, where appropriate, in cooperation with the competent organs of the UN for the negotiation and adoption of the multilateral legal instruments in the field of trade, with due regard to the adequacy of existing organs of negotiation and without duplicating their activities." Thus, legally, UNCTAD does have the authority for engaging itself in negotiations leading to the adoption of multilateral legal instruments on trade.[53] But this provision, again, has been subject to differing interpretations by the developing and the developed countries. The developing countries insisted at the first UNCTAD that a framework for the negotiations of legal instruments should be set up within the permanent machinery of UNCTAD; the developed countries, on the other hand, argued that UNCTAD was only a body for collective thinking, while actual negotiations leading to adoption of concrete measures should be the function of other competent organisations. At best, according to the developed countries of the West, negotiations in UNCTAD could not go beyond deliberations leading to non-committal resolutions. These

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53 So far the only multilateral legal instrument outside the commodity agreements negotiated under UNCTAD's auspices has been the Convention on Transit Trade of Land-Locked Countries. On the basis of the recommendation of the Final Act, an ad hoc negotiating conference was convened in the summer of 1965. It adopted the Convention, which, having received a required number of ratifications, entered into force in June 1967.

countries criticised the attempt on the part of the developing countries to "legislate" actions through the establishment of new, binding, principles. This attitude has been typically stated by Walter M. Kotschnig thus:

> Attempts are made, by way of resolutions, to 'legislate' action on the part of Member governments, to prescribe new approaches and attitudes, to establish new binding "principles", or rules and regulations of international behaviour. The wording of resolutions is fought over as if a new constitution were being written. Or, what is more serious, by automatic majorities the LDC's vote texts which, in their view, place "obligations" upon important minorities which have made it clear by their negative vote that they are not able or willing to accept them. The "majority" seems to care little that such "obligations" often relate to matters within the domestic jurisdiction of all Members.

As a prize example of such an ill-considered attempt to "legislate", he cites the persistence with which the developing countries insist on the binding nature of various "principles" and recommendations in the Final Act of

UNCTAD:

> These, in their view, put an "obligation", both in terms of domestic legislation and international action, on the very developed countries which opposed and voted against them both in the first UN Conference on Trade and Development and in subsequent meetings of such bodies as the General Assembly and ECOSOC.[54]

Referring to the provisions in General Assembly resolution 1995(XIX) laying down the relative responsibilities of UNCTAD, the General Assembly and the ECOSOC for coordinating trade and development matters, Richard N. Gardner says:

> All of these provisions, written in at the Geneva Conference at the behest of the developed countries, have been largely dead letters. The UNCTAD organs have done just about what they have wanted to do and have occasionally ignored or even sought to displace the coordinating responsibilities of ECOSOC and the General Assembly. This confirms a truism about the UN system which has been underlined in recent

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54 Walter M. Kotschnig, "The United Nations as an Instrument of Economic and Social Development", in Richard N. Gardner and Max F. Millikan, ed., The Global Partnership (Calcutta, 1969), pp.29-30.

> years—that constitutional provisions have about as much vitality as the majority's wish to abide by them.[55]

The question of interpreting the term "negotiation" in the General Assembly resolution 1995(XIX) came up for discussion at the second UNCTAD.[56] The developed countries interpreted the term as meaning "the sum total of talks and contacts" leading to the formulation of recommendations. Their view was that the conference was a deliberative meeting where members could engage themselves in a general discussion. "The Group of 77", on the other hand, had expected that the Conference would be legislative in character and would take decisions committing the developed countries to specific policy measures.

The actual resolutions of the Conference belied much of the expectations of the developing countries as contained in the Charter of Algiers.[57] A typical assessment of the Conference declared that "after four weeks of lengthy, but largely empty, oratory and futile debate - much of it over irrelevant issues - the Conference has closed with next to

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55 Richard N. Gardner, "The United Nations Conference on Trade and Development", in Richard N. Gardner and Max F. Millikan, ed., The Global Partnership (Calcutta, 1969), pp.123-124.

56 Held in New Delhi from the 1st February to the 29th March, 1968.

57 The Charter for instance had called for the urgent adoption of a global strategy for development, but the Conference did not succeed in this.

nothing to show for its efforts".[58]

The third UNCTAD held at Santiago in April-May, 1972 also left much to be desired from the point of view of the developing countries. Referring to the inadequate outcome of the Conference, Mr. Manuel Perez-Guerrero, Secretary General of the UNCTAD, stated:

> The responsibility for this is shared to a degree by all participants, yet the major responsibility cannot but fall on those countries which are dominant in wrold production, trade and finance. While these countries have serious concerns and problems of their own, which cannot be ignored, the question arises as to whether they were really unable in Santiago to give support to new trade and aid measures that could have been of great benefit to the Third World, and which would have only a marginal effect on their own economies.[59]

An assessment by Gustavo Magarinos ran thus:

> If we look up UNCTAD as an instrument to solve

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58 For a short write up on the achievements and failures of the Conference, see P.P. Kanthan, "UNCTAD - Retrospect and Prospect", The Journal of Industry and Trade (November, 1971), pp.60-63.

59 "UNCTAD-III - Elements for an Appraisal" by Manuel Perez-Guerrero, Foreign Trade Review, (Vol. VII, No.3), pp.212.213.

> the problems faced by the poor nations to obtain greater benefits from international trade and promote their economic development, it has undoubtedly been a great failure. Its three conferences have produced very few significant solutions; in particular, the last meeting held this year at Santiago clearly proved that the distance between the conceptual approaches of the industrialised countries and the underdeveloped ones concerning world problems is as large as the so-called development gap.

Giving the reason for this failure, he stated:

> It is the will of the former to really help the latter which is missing whenever cooperation implies sacrifice of their self-interests, no matter how minor these may be in comparison with the problems that are increasingly strangling the Third World.[60]

The author referred to the continued usefulness of UNCTAD to the service of developing countries and commented:

> The risk lies in the possibility that frustration and fatigue resulting from those fruitless verbal marathons override goodwill and bury determinations

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60 Gustavo Magarinos, "UNCTAD-III - No Change at all", Ibid., p.227.

under unaccountable strata of working papers.[61]

Dr. Prebisch, the first Secretary-General of UNCTAD had occasion to refer to the multiplicity of the meetings and deliberations under the aegis of UNCTAD when he stated that 60 per cent of UNCTAD's budget was spent on meetings, much of which might better have been used for studies in depth and for small expert sessions or seminars. He warned that -

> We are on a very dangerous slope....We cannot ignore the fact that in UNCTAD—and I think this applies not only to UNCTAD but also to other United Nations activities—the proliferation of meetings has become so extreme that whenever I talk to representatives of the Governments concerned—and I am referring not only to the Governments of the big industrialised countries but also to the Governments of the developing countries—I find the same concern. ...

Referring to the concensus that the number of meetings should be reduced, Dr. Prebisch stated

> Yet despite this general conviction, and despite the fact that all Governments—for I have never

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61 Ibid.

> found any exceptions—are aware of the situation, the number of meetings continues to increase. This involves a great waste of money, in addition to the unfavourable effects on the Organisation's efficiency and the attainment of its primary objectives....[62]

During the closing stages of the second UNCTAD at New Delhi when interminable discussions appeared to leave the Conference nowhere, one of the delegates, in a mood of frustration, referred to UNCTAD as signifying, "Under No Circumstances Take Any Decisions"! While this remark is obviously not to be taken at its face value, yet it signified a deep sense of disappointment at the way UNCTAD was moving without achieving concrete results. The UNCTAD has obviously not fulfilled the expectation contained in a resolution of the Trade and Development Board that "the task of negotiation, including exploration, consultation, and agreement on solutions, is a single process", and that the "achievement of solutions was and remained the primary objective of UNCTAD".[63]

The foregoing would seem to underscore the concern expressed in resolution 45(III) of the Third UNCTAD, "that the international legal instruments on which the economic

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62 UN Document A/C.2/L.908, 30 November, 1966, pp.14-15.

63 Board resolution 45(III), A/7214, p.93

relations between States are currently based are precarious and that it is not feasible to establish a just order and a stable world as long as the charter to duly protect the rights of all countries and in particular the developing countries is not formulated".

V

THE SCOPE OF THE CHARTER OF ECONOMIC RIGHTS AND DUTIES OF STATES: SOME GENERAL CONSIDERATIONS

It is clear that the Charter of Economic Rights and Duties of States, as and when formulated, should not be a mere repetition of the programmes of action, earlier initiated under the aegis of the GATT or the UNCTAD. Even the most comprehensive programme of action so far launched in relation to international trade and development, namely, the International Strategy for the Second Development Decade, cannot take the place of the Charter not only because it contains many factual narrative and descriptive portions, which have no place in a Charter, but also because of the numerous reservations and qualifications contained in it, as distinct from a clear enumeration of the rights and duties of States.[64]

Secondly, the Charter has to have a universal character, if it is to be effective and is to govern the future course of international economic relations. It should be an instrument fundamentally acceptable to, or at least tolerated by, all the

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64 See the statement by the Chairman of the Working Group on the Charter of the Economic Rights and Duties of States at the first session of the Working Group, TD/B/AC.12/R.4, p.2. See also the views expressed by the representatives of India, Pakistan, the Phillippines, Sri Lanka, Yugoslavia, Romania, Algeria, Egypt, Kenya, Nigeria, Chile, Gautemala, Mexico and Peru, TD/B/AC.12/1, p.6.

main groups of States.[65] The Charter of the United Nations did reflect the interests, the trends and the aspirations of the countries which made up the international community at the time that Charter was drafted. But since then a development of considerable significance has been the mergence of new sovereign States which were under colonial subjugation earlier, and these today form a preponderant section of the international community. The Charter of Economic Rights and Duties of States should accordingly reflect the needs and hopes of the third world.[66] However, while the Charter has to represent a compromise between opposing national views and be a common denominator for divergent national interests,[67] it should not

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65 Ibid., p.3.

66 The representatives of Sri Lanka and Indonesia stressed that the instrument should bring out the political will of the developed world to help the developing world. The need for the universality of the Charter was stated by the representatives of Jamaica, Nigeria, Sri Lanka, Hungary, Poland, Romania, Canada, the Federal Republic of Germany, Japan, the Netherlands and the United Kingdom, ibid., p.7. See also the view of the Australian authorities that the points of view of the major economic groups, namely, the developing countries, the developed countries and the countries with centrally planned economies should be taken into account, and the Canadian view that "The Economic Charter should be universal in character and the principles enunciated should be of universal nature if they are to be firmly based on international law as a part of the structure of international relations", TD/B/AC.12/2/Add.1, pp.3,15.

67 See the views of the Kenyan Government that "In effect, the Charter must attempt to balance the rights of the developing countries in international economic relations and the duties of the developed countries in such relation with a specific purpose of arresting the trend of the widening gap between the developing and the developed States", TD/B/AC.12/2/Add.1, p.25.

be so general and vague that it loses its significance. The Charter should be adequately specific to be effective.

Thirdly, a basic question to be considered in connection with the drafting of the Charter would be whether it should attempt merely to codify the principles which have already been accepted by the international community, or should also contribute to the progressive development of international law, creating new rules which respond to the emerging needs of the international community. This question was debated during the first session of the Working Group of UNCTAD on the subject. The representatives of France stated that the task before the Working Group was essentially one of codification, since many of the rights and duties in question were already defined in existing instruments. The Japanese representative was sceptical about the feasibility of progressive development of international law. The representative of the United Kingdom feared that if the Working Group pursued the course of progressive development rather than that of codification of existing legal rules, it might arrive at an instrument in treaty form which was binding by nature but which, in order to meet with agreement, was at such a level of generality as to make it devoid of content.[68] The representatives of India, Pakistan, the Philippines, Yugoslavia, Romania, Algeria, Kenya, Nigeria, Chile, Mexico and Peru, however, stated that

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68 TD/B/AC.12/1, p.7.

the proposed Charter should go beyond mere codification of existing norms of international law and contribute to the progressive development of international law.[69] It should be stated in this connection that the experience of the United Nations so far has showed that it is difficult to draw a line between the concepts of codification and progressive development of international law. The International Law Commission has, for instance, found it difficult to keep up the distinction between the two processes which have in fact sometimes overlapped.[70] Sir Hersch Lauterpacht has held the view that there is little substantial meaning or practical purpose in the narrow definition of codification as given in Article 15 of the Statute of the International Law Commission. He has envisaged a role for the Commission which would include a striving for agreed unanimous solution where there exists conflict of views and practices.[71] Law is indeed a function of society and should change along with changes in the political, economic, social or technological foundations of society. Law is by its very nature conservative and lags behind the current economic, social and political trends in

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69 Ibid., p.6.

70 A Memorandum submitted by the Secretary General of the U.N. in 1949, entitled "Survey of International Law in Relation to the Work of Codification of International Law Commission", emphasised the legislative aspect of codification and adduced arguments to establish that the function of the Commission by way of codification was not limited to a statement of the existing law by ascertaining the exact measure of existing agreement or disagreement.

71 Sir H. Lauterpacht, "Codification and Development of International Law", American Journal of International Law (1955), p.16.

society. To confine ourselves merely to codifying the existing international economic law would, therefore, tantamount to defending the status quo, which has certainly not promoted the welfare of two-thirds of mankind.[72] As the Secretary General of UNCTAD, addressing the first session of the Working Group on the subject stated:

> In my opinion, therefore, the exercise which is beginning today cannot merely be one of codification. Although we will have to build on earlier achievements and learn from the lessons of the past, we will also have to look ahead with the necessary dynamism and vision to be able to deal with problems different from those which existed in the past - problems which must and can be overcome.[73]

It is in this context that the developing countries view the Charter as an instrument for modifying certain unjust aspects of international economic relations.[74]

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72 Statement by the Chairman of the Working Group, TD/B/AC.12/R.4, p.2. See also the Hungarian view that "If the Charter merely records the status quo in international economic and commercial relations, it will obviously not contribute to the removal of international economic inequality and of the new forms of colonialism and international exploitation", TD/B/AC.12/2/Add.1, p.6.

73 TD/B/AC.12/R.5, p.2.

74 For a detailed exposition of the stand of the newly independent developing States in regard to economic development and international law, see Dr. R.P. Anand, New States and International Law (Delhi, 1972),pp.86-112.

However, the Charter is not to contain a mere catalogue of the rights of the developing countries and the corresponding duties of the developed countries. The concept has now been widely accepted that the attack on global poverty should be a matter of international co-operation, through adoption of convergent measures by both the developed - including the market economy as well as the socialist countries - and the developing countries. It follows that the Charter must prescribe duties in respect of both the developed and the developing countries though, naturally, in the present stage of the world economy, the duties of the developed countries should quantitatively outweigh those of the developing ones.[75]

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75 See the view of Italy that "In order to arrive rapidly at a general consensus, it would be indispensable to formulate the principles in the most general terms possible; in that connection the Italian Government considers that it would not be realistic to draw up a Charter assigning only rights to the developing countries and only duties to the industrialised countries. On the contrary, it appears essential to strike a balance and to refer also to the duties of developing countries regarding the use which they intend to make of financial assistance, economic and commercial co-operation and natural resources, with due respect to their national sovereignty." TD/B/AC.12/2/Add.1, p.22.

VI

MAJOR ISSUES FOR COVERAGE BY THE CHARTER

A global Charter intended to promote international trade and development will have to cover the multifarious facets of both these subjects, but should lay emphasis on the major aspects of trade and development, namely, international trade in primary commodities and manufactures, financing for development, shipping, transfer of technology from the developed to the developing countries as well as trade and economic cooperation among developing countries. We shall now turn to a brief analysis of these aspects.

Commodity Trade

Trade in primary commodities is of considerable importance to developing countries, many of which depend for the bulk of their export earnings on one, two or three commodities. Apart from the relatively slow growth in world demand for primary commodities, the primary commodity trade of the developing countries is seriously affected by the economic and commercial policies pursued by developed countries, such as imposition of tariff and non-tariff barriers, price support measures, production of synthetics and substitutes etc.

As regards tariff barriers, inspite of the call given by the GATT Ministerial meeting of May 1963 as well as the recommendations of the first UNCTAD, the primary export trade

of developing countries is still beset with a number of these barriers. At the second UNCTAD, the developing countries urged that all items of export interest to them, including processed and the semi-processed primary commodities falling in Chapters 1 to 99 of the Brussels Tariff Nomenclature (BTN) should be included within the purview of the Generalised System of Preferances, but this expectation of the developing countries has not been realised in the various offers made by the developed countries under the Generalised System of Preferences. On the other hand, exports of primary commodities by developing countries are affected by differential tariffs which involve considerable escalation in the levels of protection at the early stages of processing (e.g. raw versus refined sugar, raw versus roasted coffee, coco-beans versus coco-paste, oil seeds versus oils etc.).[76]

The non-tariff barriers applied by developed countries on primary commodity imports from developing countries, include quantitative and quota restrictions, monopolies on specific items (unmanufactured tobacco, manganese ore etc.), export subsidies, sanitary regulations, and so on. Measures taken by the developed countries in support of their high cost production of primary commodities have considerably affected the prospects of developing countries in these

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76 See TD/115, Table A.2

commodities.[77] There is an indication that in recent years the level of protection in the developed market economy countries has increased, resulting in a restriction on the quantities and a lowering of the prices of primary commodities imported by developed countries from developing countries. Internal fiscal charges levied by some developed countries on imports of tropical products produced only by developing countries continue to be quite high and provide yet another trade impediment to the exports of primary commodities by developing countries.[78] An important Resolution 73(X) passed by the UNCTAD Trade and Development Board on the subject of access to markets and pricing policy has not led to "concrete and significant results" which were envisaged "early in the 1970's".

A considerable threat to the imports of primary commodities by developing countries arises from synthetics and substitutes produced by developed countries. While research and development efforts are being made in respect

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77 It has been estimated that the removal of such protective measures in all countries in all its forms would bring export gains to the tune of $ 10 billion a year by 1980 to the developing countries. (See "A World Price Equilibrium Model", Projections Research Working Paper No.3 (CCP 71/WP.3, November 1971), prepared jointly by the secretaries of FAO and UNCTAD and forming part of the FAO study, Agricultural Commodity Projections, 1970-1980 (CCP 71/70), Rome, 1971.)

78 TD/115, Para 102

of the commodities which face competition from synthetics and substitutes, no significant progress has been made to curtail the injurious effects of synthetics and substitutes on the corresponding natural products of developing countries.[79]

The second UNCTAD passed a Resolution 16(II) envisaging inter-governmental action and the conclusion of international agreements in respect of a number of commodities of export interest to developing countries. However, barring the international sugar agreement concluded in 1968 and the agreement on cocoa concluded in 1972 after 16 years of negotiations, there is no concrete achievement in regard to the conclusion of commodity agreements. Posing the question "Why is progress so limited", an UNCTAD Secretariat document[80] gives the answer:

> The main reason appears to be a lack of political will on the part of governments, which refuse to regard commodity-by-commodity, or even multi-commodity, negotiations and actions as an integral part of a development strategy.

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79 The commodities which face competition from synthetics and substitutes include mica (which is being replaced by re-constituted mica etc.), jute (which faces competition from poly-propylene, polythene etc.), hides and skins (which face a serious threat from synthetics like corfam, papina etc., and more recently from poromerics which are man-made materials closely resembling leather), sugar (which faces competition from saccharine and cyclomate sweeteners) and oilcakes (which compete with synthetic urea in cattle feed etc.).

80 TD/B/429/Add.1, p.10.

Characterising the progress made by the international community since the beginning of the Second Development Decade on the commodity front as "very alight when viewed against the range of practical actions envisaged in the Strategy", the document concludes:

> Unless this slow rate of progress is speeded up, several decades will be needed to achieve effective international remedial action covering the whole range of 'problem' commodities of export interest to developing countries.[81]

Trade in Manufactures

The exports of manufactures from developing countries also face tariff and non-tariff barriers in the markets of developed countries. An event hailed as one of great significance was the Agreement relating to the Generalised System of Preferences concluded by the UNCTAD in 1970. Of the developed market economy countries which made offers under the System, the United States of America and Canada have yet to implement their respective schemes. The schemes implemented by the other developed market economy countries have been in operation only for a short period,[82] but it has been estimated that had the scheme been in operation in 1970,[83]

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81 Ibid., p.9.

82 The implementation of these schemes started at various times between the 1st July, 1971 and the 1st April, 1972.

83 The last full year preceding the schemes.

roughly only one-fourth of the dutiable imports by these countries from the developing countries would have qualified for the generalised preferences. Even the benefits under the System are qualified by limitations and escape clauses, ceilings or tariff quotas, which take away to a large extent the impact of the benefits under the System. The actual operation of the Generalised System of Preferences has turned out to be a far cry from what was originally envisaged of the System, namely, "unrestricted and duty-free access to the markets of the developed countries for all manufactures and semi-manufactures from all developing countries".[84]

Apart from the tariff barriers, the developed countries have also maintained a number of non-tariff barriers, which have formed the principal tools for restraining imports, since the introduction of the Generalised System of Preferences and the consequent blunting of the edge of tariffs in this regard. New non-tariff barriers have been

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84 See the Algiers Charter, 1967. At the second UNCTAD, the representatives of developing countries, including India, emphasised that preferential treatment should be accorded to all manufactures and semi-manufactures exported by developing countries to developed countries, including processed and semi-processed agricultural and other primary products, falling under chapters 1-99 of the Brussels Tariff Nomenclature (BTN), with a bare minimum of exceptions to be determined on a case-by-case basis. Resolution 21(II) adopted by the Conference merely provided for an institutional machinery to work out the details of the system.

The UNCTAD Secretariat has assessed that "if the GSP remains as limited as it is, its effectiveness in achieving the objectives for which it was originally intended, and on account of which it was to become a corner-stone of the Second Development Decade, will be severely impaired", TD/B/429/Add.1, p.15.

imposed, such as the import surcharges introduced by the United States of America and Denmark in 1971. The Long Term Arrangement on Cotton Textiles (LTA), which was originally intended as an exceptional and transitional arrangement, has been extended periodically and has stood in the way of increased exports of cotton textiles, a major item of manufacture produced by the developing world. It has been estimated that there are well over 100 products or groups of products of export interest to developing countries which are subject to import restrictions by the developed market economy countries.[85]

In addition to erecting tariff and non-tariff barriers, the developed countries also engage in various restrictive business practices which include cartel activities, restrictions in licencing arrangements of patents, trade marks and know-how, as well as restrictions arising from the activities of multinational corporations in both developed and developing countries. Since these restrictive practices are difficult to be controlled by individual nations, the cooperation of the entire international community would be required for their control. The third UNCTAD passed a Resolution 73(III), which recommended that "very effort should be made with a view to alleviating and, where possible, eliminating restrictive business practices

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85 TD/B/429/Add.1, p.15.

adversely affecting the trade and development of developing countries", that developed and developing countries should exchange relevant information and hold consultations so as to "contribute to the alleviation and, where possible, elimination of restrictive business practices adversely affecting both the developed and developing countries"; and that "attention should be paid to the possibility of drawing up guidelines for the consideration of Governments of developed and developing countries" in this connection.[86] The conference called upon the UNCTAD Secretariat to give urgent consideration to formulating the elements of model law or laws for developing countries in regard to restrictive business practices, and established an ad hoc group of experts with the task of identifying all restrictive business practices of multinational corporations and enterprises which adversely affect the trade and development of developing countries.

One way of reducing competitive production of manufactures and semi-manufactures by the developing and the developed countries would be for the latter to undertake measures of adjustment assistance. The Algiers Charter called upon the developed countries to "undertake measures for anticipatory structural readjustments and other measures for bringing about such changes in their production pattern as to eliminate the possibility of resorting to

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86 Ibid., pp.21-22.

restrictive trade policies or escape clause actions on ground of market disruption in relation to products of export interest to developing countries in order to establish a new international division of labour that would be more equitable". Since the share of developing countries in the total supply of manufactures in developed countries is very small, such anticipatory structural adjustment is not likely to constitute a serious problem for the developed countries. In fact a shift in production in the developed countries from their own antiquated, less productive sectors to technologically denser and more capital intensive sectors would be in the interest of their own economies.[87]

Financing for Development

An important resolution[88] of the second UNCTAD stipulated that "each economically advanced country should endeavour to provide annually to developing countries financial resource transfers of a minimum net amount of 1% of its GNP at market prices in terms of actual disbursements". At the third UNCTAD, a related resolution[89] was passed urging

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87 It has been estimated that the gross displacement of labour by such imports represents only 2.5 per cent of the numbers displaced from agriculture and only 0.3 per cent of the increment in the economically active population. See Report by Dr. Raul Prebisch, Secretary General of the UNCTAD entitled Towards a New Trade Policy for Development (1964).

88 Resolution 27(II).

89 Resolution 61(III).

those developed countries which were unable to achieve this target by 1972 to endeavour to attain it not later than 1975 and those which had already attained it, to maintain and increase their net resource transfers to developing countries. The latter resolution further called upon each economically advanced country to increase its official development assistance progressively so as to reach a minimum of 0.7 per cent of its GNP at market prices by the middle of the Second Development Decade.

An analysis of the actual flows of financial resources shows that the ratio of these flows to the GNP of the donor countries has declined in recent years. For the member countries of the Development Assistance Committee (DAC) as a whole, the ratio declined from 0.84 per cent in 1960-61 to 0.73 per cent in 1970-71 and was subject to significant annual fluctuations. The ratio of their official development assistance to their combined GNP fell from 0.53 per cent in 1960-61 to 0.35 per cent in 1970-1971. The overall projected performance of DAC member-countries in this respect is adversely influenced by the expected decrease in the ratio of the largest donor - the United States - from 0.32 per cent in 1971 to 0.24 per cent in 1975.[90] This is likely to affect the investment programmes of developing countries to the extent that these depend on imported equipment or other

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90 TD/B/429/Add.1, pp.32-33.

essential imports and is likely to have an adverse effect on the rate of growth of their GNP.[91]

The third UNCTAD also adopted a resolution[92] which invited the developed countries to take into consideration the views expressed that "(a) on average, interest rates on official development loans should not exceed 2 per cent per annum; (b) maturity periods of such loans should be at least 25 to 40 years and grace periods should be no less than 7 to 10 years; (c) the proportion of grants in total assistance of each developed country should be progressively increased, and countries contributing less than the 1970 Development Assistance Committee average of 63 per cent of their total assistance in the form of grants should reach that level not later than 1975". Some of the developed market economy countries have taken steps to formulate indicative plans for flow of aid to developing countries, but the annual commitments are subject to approval by Parliaments. In the recent past, some developing countries have expressed concern that in certain instances, decisions relating to the flow of development assistance were not taken in the spirit of paragraph 46 of the Strategy for the Second U.N. Development Decade, which states that these flows "should be aimed exclusively at promoting the economic and social progress of developing countries".

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91 Ibid., p.34.

92 Resolution 60(III).

It has been estimated that debt service payments by developing countries increased by 18 per cent from 1969 to 1970 as compared to an average annual increase of 10 per cent for the 1960s.[93] A resolution[94] of the third UNCTAD provided broad guidelines for the debt relief operations, but the resolution was not supported by the developed countries. In the meantime, a study prepared by the UNCTAD Secretariat indicates that the burden of the debt service problem of the developing countries may increase during the 1970s and that a larger number of countries may be faced with difficult situations than in the 1960s. In this connection the resolution[95] of the third UNCTAD Conference regarding a link between special drawing rights (SDRs) and additional development finance becomes relevant, which urges the International Monetary Fund to pursue the proposals for such a link in the context of discussions on international monetary reform, having regard to the primary role of SDRs as a reserve asset.

Shipping

It has been estimated that while the share of the developing countries in the tonnage of world trade was 63.8 per cent of goods loaded and 17.6 per cent of goods unloaded in 1971, their share of global shipping tonnage was

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93 TD/B/429/Add.1, p.36.

94 Resolution 59(III)

95 Resolution 84(III)

only 6.25 per cent in mid-1970 and further came down to 5.32 per cent in July, 1972.[96] The major problem for the developing countries in expanding their shipping tonnage has been inadequate finance and the unfavourable terms and conditions under which finance is available to them from the developed countries. The member countries of the Organisation for Economic Cooperation and Development (OECD) have decided in 1972 to reduce Government assistance for ship export credits, and this is likely to further the difficulties of the developing countries in this regard. The third UNCTAD decided to request the General Assembly to convene in 1973 a conference of pleni-potentiaries to adopt a code of conduct for liner conferences. The code is expected to address itself to the elimination of unfair practices and discrimination by liner conferences. It is disquieting to note in this connection that a large number of increases in freight rates have been announced by liner conferences in 1971, ostensibly to meet the consequences of increasing costs, which could have been curtailed by changes in operational practices and improvements in efficiency. The third UNCTAD recognised[97] the need "to maintain as long as possible a period of stability in freight rates consistent with the needs of shippers", and requested[98] the States members of UNCTAD to urge their shipping lines and liner conferences to

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96 TD/B/429/Add.1, p.40. See also "Shipping in the seventies" (TD/177).

97 Resolution 69(III), TD/B/429/Add.1, pp.42-43.

98 Resolution 67(III), Ibid., p.43.

ensure that benefits of cost saving accruing to shipping lines from port improvements are duly reflected in freight rates. There is, however, as yet no evidence to show that these resolutions which were adopted without dissent have had an effect on the practices of conference lines.

Transfer of Technology

An important factor in economic and social development of the developing countries has been the transfer of technology from the developed to the developing countries. But this has entailed considerable outgo of foreign exchange for the developing countries. It has been calculated that the direct foreign exchange cost of the transfer of technology to developing countries, which includes payments for patents, licences, know-how, trade marks and management and other technical services amounted to $ 1.5 billion in 1968 and would grow by as much as 20 per cent per annum during the 1970s.[99] These direct costs represented 37 per cent of their public debt service payments and 56 per cent of the annual flow of direct private foreign investments (including re-invested earnings).[100] Resolution 39(III) of the third UNCTAD contains concrete recommendations for action by developing countries, developed market economy countries and the socialist countries of Eastern Europe as well as by the

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99 See TD/B/AC.11/10

100 TD/B/429/Add.1, p.56.

international community. At the meeting of the Inter-governmental Group on the Transfer of Technology held in January-February 1973, the Government of Mexico announced the adoption of a law, making obligatory the registration and official approval of contractual transfers of technology and prescribing certain requirements to be met prior to such approval. This legislation has been hailed as a major break-through in tackling many of the complex problems relating to transfer of technology. The Secretary-General of UNCTAD has indicated that the time would appear to be ripe for the international community "to work towards designing an international code of conduct in this field".[101]

Trade and Economic Cooperation among Developing Countries

The developing countries, most of which have emerged politically independent during the last quarter century and are now engaged in serious efforts for economic development, have realised the advantages which could flow to them from their mutual trade and economic cooperation and regional integration, such as a wider market for the commodities, economies of scale, increased production and trade by the matching of their resources and needs etc. However, they have a number of major handicaps which have hindered their efforts in this direction: most of them have balance of

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101 TD/B/429, para 103.

payments difficulties which do not permit them any large scope for lowering of trade barriers; they are naturally reluctant to expose their new industries to competition; further, they have suffered from a colonial heritage which has linked their economies to those of particular developed countries and bequeathed to them a poor infra structure.

The second UNCTAD adopted a "Concerted Declaration"[102] wherein the developing countries agreed to enter into meaningful commitments among themselves, for which the developed market economy countries and the socialist countries of Eastern Europe agreed to provide financial and technical support. A resolution[103] was passed by the third UNCTAD recommending that developed market economy countries accept more binding commitments of support for regional payments arrangements. The resolution also recommended that the socialist countries of Eastern Europe take steps further to multilateralize their payments with developing countries and provide greater support in their individual plans for trade expansion and economic cooperation among developing countries. However, economic cooperation and regional integration among developing countries has not been given adequate attention by the developed market economy countries in their aid policies. The aid programmes of these countries are still mainly geared to the individual national economies

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102 Declaration 23(II).

103 Resolution 48(III).

of the recipient countries, rather than to the requirements of the region or the sub-region in question, and have on occasions led to directly competing investments in neighbouring countries.[104] The support by the socialist countries of the Eastern Europe under the conference resolution has also not progressed beyond the stage of exploratory talks, with the problem of the adjustment of their financial assistance to their convertible currency constraints still remaining to be solved.[105]

The Proposed Charter

The foregoing would indicate some of the major issues which should be covered by the proposed Charter of Economic Rights and Duties of States and the specific problems which should not be omitted from its purview. The draft outline[106] of the Charter, which is under consideration by the UNCTAD Working Group on the subject, does not, however, appear to be elaborate enough to cover all these aspects, and where a particular issue has been covered, the wording is not adequately specific. For instance, there is no provision made in the

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104 TD/B/429/Add.1, p.29

105 Ibid., p.30.

106 See TD/B/AC.12/1. The reference here is only to Chapter II of the draft outline which deals with economic rights and duties. The other portions of the draft outline namely, Preamble, Chapter I (Fundamentals of international economic and social relations), Chapter III (Common responsibility towards the international community), Chapter IV (Implementation) and Chapter V (Final Provisions) have not been dealt with in this write up.

draft outline to put an embargo on tariff and non-tariff barriers. There is no mention of commodity problems at all, nor is there any mention of the specific problems faced by the developing countries in regard to their trade in manufactures and semi-manufactures. The paragraphs dealing with transfer of resources merely says: "Rights and duties concerning the transfer to developing countries of financial and technological resources under favourable terms and conditions", which is rather vague, without any mention of specific rights and duties, such as obligating the developed countries to transfer a specified percentage of their gross national product to the developing countries annually. There is no provision concerning shipping[107] in the draft outline. As regards transfer of technology, the provision merely says:

> Right to benefit from the advances and developments in the fields of science and technology. Duty to facilitate access thereto

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107 There is an Indian suggestion for including a provision on invisibles to read:

> All States have the duty to promote, by national and international action, the earnings of developing countries from invisible trade and to minimize the net outflow of foreign exchange from the countries arising from invisible transactions including shipping.

and transfer thereof.[108]

The provision concerning trade expansion and economic co-operation among developing countries does not spell out the duties of either the developed or the developing countries, but merely says:

> Strengthening and expansion of relations among developing countries with a view to expanding their mutual trade and economic co-operation with the support of the developed countries and international community, including the international

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108 The proposal by Yugoslavia includes the following provision:

> The industrially developed countries have the special duty to provide the developing countries with new technologies on favourable terms and conditions and commensurate with the needs of their rapid industrialization, making available to them, freely and on a non-discriminatory basis, all scientific and technological information relating to their development requirements.

The comparative provision proposed by India reads as follows:-

> Developed countries should, therefore, promote a massive transfer of technology to developing countries on favourable terms and conditions in order to contribute to their rapid industrialisation, making available to developing countries freely and on a non-discriminatory basis all scientific and technological information relating to their development requirements.

organisations concerned.[109]

However, the draft outline incorporates a number of welcome concepts from the point of view of the developing countries. There is a provision concerning the duty to bring about structural changes in the world economy in order to attain a just and rational international division of labour.[110] The right to full participation in the international decision-making process and the duty to cooperate

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109 It is interesting to note that the formulation by the United States highlights the initiative to be taken by the developing countries:

> Developing countries should strengthen their mutual relations with a view to expanding their mutual trade and economic co-operation with the support of the developed countries and the international community, within the framework of the international organisations concerned.

The proposal by Yugoslavia and Mexico emphasise the duty of the developed countries as follows:-

> The developed countries, including the international organisations concerned, have the duty to support the efforts of the developing countries to strengthen and expand their mutual trade and economic cooperation.

110 The Indian suggestion is to add the words "in harmony with the needs and interests of developing countries" at the end of the provision. The proposal by the U.S.A. omits any reference to 'duty' but merely says:

> States recognise the need to encourage a rational division of labour in order to maximise the benefits of world economic activity.

The U.S.S.R. proposal refers to "the removal from international trade and economic relations of all forms of discrimination by means of a complete liquidation of colonialism and its economic consequences, and of the manifestations of neo-colonialism.

in ensuring that all States have a share in world trade commensurate with the needs of their economic and social development, have been mentioned. There is a provision about rights and duties for the regulation and control of foreign investments.[111] A specific right of every State to regulate and control the activities of transnational corporations and the duty of every State to cooperate in order to give effect to this right has been recognised.[112] Yet another duty included in the draft outline is the duty of States "to promote the achievement of general and complete disarmament" and "allocation of a substantial part of the resources freed by any effective disarmament measure to economic and social development, particularly that of the developing countries".[113] There is also a recognition in the

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111 Chile has suggested that this regulation and control should be in accordance with the laws of the States receiving foreign investments, while Japan, United Kingdom, Belgium, Denmark, France, Federal Republic of Germany, Italy, Netherlands and the United States have suggested that the right should be subject to international law.

112 It is interesting to note that while Netherlands, Belgium, Denmark, France, Federal Republic of Germany, Italy, United Kingdom, Japan and United States have proposed the deletion of this provision, Mexico and Philippines have suggested that "the State whose nations or registered transnational corporations invest in other States must ensure that such investors comply fully with the laws, rules and regulations of the State in whose territory the investment is made".

113 Argentina, Yugoslavia and Philippines have proposed that the disarmament be under effective international controls. The U.S.S.R. proposal omits the word "substantial".

draft outline of the right of the developing countries to receive preferential and non-reciprocal treatment to meet their trade and development needs.[114] The draft outline enjoins upon the industrialised countries a duty to conduct their mutual economic relations in a manner which does not adversely affect the interests of third countries.[115] There is a provision about special attention on the part of the international community to the particular needs and problems of the least developed among developing countries, of land-locked countries and of island developing countries, with a view to helping them to overcome their particular difficulties and thus contributing to their sustained growth.[116] There is also a provision in the draft outline about relations among

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114 The United Kingdom proposal refers to "rights and duties in relation to possible preferential or non-reciprocal treatment of developing countries". The U.S. suggestion reads:

> Developing countries shall, as appropriate, receive special consideration of their trade and development needs in their trade relations;

The U.S.S.R. proposal reads:

> States have the duty to co-operate in the promotion of economic growth throughout the world, especially that of the developing countries. The development of the developing countries must receive the support and cooperation of all States.

(Italics supplied)

115 Canada, Denmark, Federal Republic of Germany, Italy, Netherlands, United Kingdom and United States cast the duty on all States to conduct their mutual economic relations in a manner which takes into account the interests of third countries. (Italics supplied)

116 Proposals by United States and Philippines seek to re-word the provision providing for a specific duty on the part of the international community in this regard.

countries with different economic and social systems.

The provisions of the draft outline will require to be examined carefully in the light of the comments and suggestions furnished by the member States of UNCTAD in order to see that the proposed Charter of Economic Rights and Duties of States is a comprehensive one, covering all aspects of trade and development, is no more elaborate than necessary, and is so worded as to confer specific rights and cast specific duties on States.

VII

THE FORM OF THE INSTRUMENT AND A CASE FOR THE CHARTER

Discussions in the UNCTAD Working Group on the subject have revealed a divergence of opinion between the developing countries and the developed market economy countries. During the first session of the Working Group, the representatives of Iraq, Sri Lanka, Egypt, Kenya, Morocco, Nigeria, Zaire, Brazil, Chile, Gautemala, Jamaica, Mexico, Peru and Romania all stated that the proposed Charter should be a legally binding instrument rather than a mere declaration of intent, since such declarations made in the past had often yielded unsatisfactory results.[117] The representatives of Australia, France, Federal Republic of Germany, Italy, Japan, the United Kingdom and the United States of America all expressed doubts about the advisability, possibility or feasibility of making the rights and duties formulated in a draft Charter legally binding on States.[118] The representative of France suggested that the most appropriate form would be a declaration along the lines of the Universal Declaration of Human Rights. The representative of the Netherlands felt that the most appropriate form would be a declaration along the lines of

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117 TD/B/AC.12/1, p.5.

118 Ibid., p.6.

the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[119] This dichotomy was discernible in the comments and suggestions on the draft outline of the Charter furnished by various States also, the developing countries generally standing for a legally binding instrument while the developed market economy countries expressing themselves in favour of a Declaration or Resolution.[120] At the opening meeting of the second session of the Working Group, the Chairman proposed that the Working Group should not reopen discussion of the legal nature of the final instrument, since this was a question to be determined by the General Assembly. The discussion on this issue was therefore not continued in the Working Group.[121]

The reason for the stand of the developed market economy countries on the question could be gleaned from the

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119 Ibid., p.6

120 See for instance, the comments of the Nigerian Government: "It is the view of the Federal Military Government of Nigeria that the Charter of the Economic Rights and Duties of States should be a legally binding document"; and the comments by the United Kingdom: "In particular Her Majesty's Government have made it clear that in their view the most appropriate form for the document in question to take would be that of a declaration or resolution the content of which would be agreed upon by consensus procedures and which could subsequently be adopted unanimously by the General Assembly", TD/B/AC.12/2/Add.1, pp.27, 45.

121 TD/B/AC.12/2, p.3.

statement of the French representative at the first session of the Working Group to the effect that the adoption and the subsequent ratification of a legally binding instrument would take so long that the Charter might well lag behind economic reality by the time it came into effect. This attitude, however, reveals a basic disinclination to enter into legally binding commitments, which does not seem to augur well for the adoption of the Charter. The aim, on the other hand, should be to see that the Charter is adopted early enough and through progressive amendments, as necessary, is made to keep abreast of changing developments. The U.S. delegate gave yet another reason for the reluctance of his delegation to agree to a legally binding Charter. He wondered whether some of the suggestions made, such as an unqualified legal obligation to provide aid, trade and tariff preferences and technology, did not infringe on the sovereign rights of other States. 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. It should, however, be noted here that the Charter of the United Nations itself represents an effort by the members of the international community to surrender part of their sovereignty for the sake of a global arrangement primarily meant to ensure peace. A similar voluntary renouncement of sovereignty for the more positive purpose of economic and

social development of the downtrodden millions of the world should not be impossible.

It is evident that a mere Declaration cannot be binding ipso facto on the member States making the Declaration. The status of a Declaration can at best only be a "source of law". It is interesting to note in this connection that when the draft Declaration of Rights and Duties of States was being discussed in the sixth Committee of the General Assembly,[122] the United States tabled a proposal to treat the draft Declaration "as a valuable source of law and as an important guide to its progressive development". The United Kingdom delegate supported the U.S. proposal on the ground that such a step "would give the Declaration its full value as a source of law and would avoid the difficulties involved in more formal political action". In the case of "Reservations to the Convention on Genocide"[123] Judge Alvarez, referring to the juridical nature of Declarations passed by the United Nations stated:

> These Declarations do not require ratification, and, by reason of their nature, are not susceptible to reservations. They have not yet acquired a binding character, but they may

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122 A/C/6/330. See Official Records of the Fourth Session of the General Assembly (1949), p.166.

123 International Court of Justice Reports, 1961, p.52.

> acquire it if they receive the support of public opinion, which in several cases has condemned an act contrary to a Declaration with more force than if it has been a mere breach of a convention of minor importance.

It is accordingly clear that a Declaration does not in itself contain a legally binding element.

As far as the Resolutions of the General Assembly are concerned, their juridical effect has been the subject of a wide discussion.[124] Blaine Sloan has pointed out that the General Assembly can make binding decisions where institutional questions concerning the Organisation are involved.[125] Judge Lauterpacht has held in the case of "Voting Procedure on Questions Relating to Reports and Petitions Concerning Territory of South-West Africa",[126] that General Assembly Resolutions in general do not "create a legal obligation to comply with them", though in the

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124 For a full treatment of the subject, see Rahmatullah Khan, "The Problem of International Poverty: Is there a legal obligation on the rich countries to help the poor?", in M.S. Rajan, ed. Studies in Politics, pp.176-183.

125 F. Blaine Sloan, "The Binding Force of a 'Recommendation' of the General Assembly of the United Nations", British Year Book of International Law (London), vol.25, p.1.

126 International Court of Justice Reports, 1955, p.67.

context of questions relating to the trusteeship system,

> A Resolution recommending to an Administering State a specific course of action creates some legal obligation which, however rudimentary, elastic and imperfect, is nevertheless a legal obligation and constitutes a measure of supervision. The State in question, while not bound to accept the recommendation, is bound to give it due consideration in good faith....

Further, as D.H.N. Johnson has pointed out:

> There is also nothing to prevent Members incurring binding legal obligations by the act of voting for Resolutions in the General Assembly, provided there is a clear intention to be so bound. 'Recommendation' of the General Assembly addressed to Members who have voted against them have, however, a 'legal effect' only in the sense that they may constitute 'a subsidiary means for the determination of rules of law' capable of being used by an international court.[127]

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127 D.H.N. Johnson, "The Effect of Resolutions of the General Assembly of the United Nations", British Year Book of International Law, Vol. 32, pp.121-122.

The resolutions of the General Assembly concerning economic cooperation have been termed rules in development or in a twilight existence, which have not so far hardened into binding law.[128]

It is obvious therefore that the broad sweep of the scope of the Charter cannot be the subject matter of a Declaration or of a General Assembly Resolution. As the Chairman of the UNCTAD Working Group on the Charter stated, our task is to formulate "legal, and therefore obligatory, rights and duties" and the draft Charter 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 juridical nature intended to be binding if the draft should become a part of the corpus of international law".[129]

It is an established fact that during the past quarter of a century, the world economy has tended to proceed in a direction where the rich countries have become richer and the poor countries have become poorer. Hunger and privation are now more widespread than they were at the end of the Second World War. It was estimated in 1967 that during the preceding ten years the world population had registered an increase of 800 million, about 400 million

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128 See A.A. Fatouros, "International Law and the Third World", Virginia Law Review, vol. 50 (1964), p.806.

129 TD/B/AC.12/R.4, p.2.

of whom had been added to the ranks of the hungry.[130] In the face of this widening disparity, it is ironic that the world is spending almost four times more on arms and death than on health and life.[131] As President Dwight D. Eisenhower of U.S.A. once very tellingly remarked:

> Every gun that is made, every warship launched, every rocket fired signifies - in the final phase - a theft from whose who hunger and are not fed, those who are cold and are not clothed.[132]

Dr. Prebisch once stated, "Prosperity in people as well as in nations tends to form an attitude of detachment if not indifference to the well-being of others". While the wealth of the prosperous thus grows in isolation without providing support to those who need it, poverty corrodes the spirit of the poor and weakens their will to overcome it. Prosperity, like peace, is indivisible and in the present day world where the destinies of all the nations are interlinked, one group of nations can hardly afford to neglect the welfare of others. As the Indian Prime Minister,

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130 See Harrison Brown, "The Political Economic Web: Crisis in Development", Bulletin of the Atomic Scientists (Chicago, Ill.), December 1967, pp.2-7.

131 Rahmatullah Khan, op. cit., n.124, p.174.

132 Statement made in Washington in 1953, quoted in the Special Number "The United Nations 1945-70" of Yojana (New Delhi, 1970), p.11.

inaugurating the second UNCTAD in New Delhi stated, "The question before the advanced nations is not whether they can afford to help the developing nations but whether they can afford not to do so". For, of all the causes of war, the most fundamental are the economic and social ones. Economic and social mal-adjustments are often the diseases of which war is the final, tragic symptom. The danger of allowing the world to drift into two sectors of the rich and the poor was effectively stressed by U Thant when he stated that the "division of the world into rich and poor is much more explosive than the division of the world on ideological grounds".[133] There is, fortunately, a growing realisation in the world community that just as in national communities the welfare of the less developed regions and the less privileged sections of the population is a national responsibility, so also the economic and social advancement of the under-privileged sections of the world population is a global responsibility. In the current efforts of mankind to find a legal breakthrough in its war to banish poverty, the Charter indeed offers a ray of hope.

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133 "Peaceful Change" (Address by U Thant, Seminar on Peaceful Change), Journal of the Institute of Man and Science (Renselaerville, N.Y.), Vol.2, (1966), p.4.

ANNEXURE

RESOLUTION 45(III) - Charter of the Economic Rights and Duties of States

The United Nations Conference on Trade & Development

Recalling that one of its main functions according to paragraph 3(b) of General Assembly resolution 1995(XIX) is "to formulate principles and policies on international trade and related problems of economic development",

Recalling also recommendations A.I.1 and A.I.3 adopted at the first session of the Conference, as well as Conference resolution 22(II),

Taking into account the International Development Strategy for the Second United Nations Development Decade adopted by the General Assembly of the United Nations in its resolution 2626(XXV) of 24 October, 1970, and the statements made by a country or group of countries on the Decade,

Taking note of the relevant principles contained in the Charter of Algiers and the Declaration of Lima

Noting with concern that the international legal instruments on which the economic relations between States are currently based are precarious and that it is not feasible to establish a just order and a stable world as long as the charter to duly protect the rights of all countries and in particular the developing countries is not formulated,

Recalling that the Universal Declaration of Human Rights and the International Covenants on Human Rights make the full exercise of those rights dependent on the existence of a just international order and respect for the principle of self-determination of peoples and of the free disposition of their wealth and natural resources,

Recalling also the general, special and other principles as approved by the Conference in the recommendations adopted at its first session.

Noting the urgency in the international community of a need to establish generally accepted norms to govern international economic relations systematically,

Considering in consequence the importance of further strengthening UNCTAD in accordance with General Assembly resolution 1995(XIX) to ensure the full observance of these norms,

Taking note in this context, of the important suggestion made at the 92nd plenary meeting that it would be desirable to draw up such a charter.

1. Decides to establish a working group composed of Government representatives of thirty-one member States, to draw up the text of a draft charter. The Working Group shall be appointed as soon as possible by the Secretary-General of UNCTAD in consultation with States Members of the Conference,

2. Decides that the Working Group shall use as basic elements in its work:

(a) The general, special and other principles as approved by the conference at its first session;

(b) Any proposals or suggestions on the subject made during the third session of the Conference;

(c) All documents mentioned above and other relevant resolutions adopted within the framework of the United Nations, particularly the International Development Strategy for the Second Development Decade;

(d) The principles contained in the Charter of Algiers and the Declaration of Lima.

3. Further decides that the draft prepared by the Working Group shall be sent to States members of the Conference in order that they can forward their suggestions, it being understood that the Working Group shall reconvene to elaborate the draft charter further in the light of comments and suggestions to be received from Governments of member States;

4. Recommends to the Trade and Development Board, that it examines, as a matter of priority, at its thirteenth session, the report of the above-mentioned Working Group, and the comments and suggestions made by member States of

the Conference and transmit it with its comments to the General Assembly at its twenty-eighth session;

5. Invites the General Assembly, upon receipt of the above-mentioned report of the Trade and Development Board, and the views expressed by Governments during the consideration of the item in the General Assembly, to decide upon the opportunity and procedure for the drafting and adoption of the charter.

115th plenary meeting
18 May 1972

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