

# The Charter of Economic Rights and Duties of States and the American Constitutional Tradition: A Bicentennial Perspective on the "New International Economic Order"<sup>†</sup>

A brief Bicentennial query consisting of one (hypothetical) multiple choice question quickly brings our subject into focus. The question is: Who made this indignant statement, and when?

This insolent tract, this abomination of juvenile presumptuousness, reflects such appallingly naive assumptions regarding the world at large as to be incapable of further debasement, even by the impertinent draftsmanship of its ungrateful authors.

The possible answers from which you are to select the most appropriate one are:

- (a) An anonymous middle-aged junior high school principal of the late 1960s when presented by the seventh grade with a pupils' bill of rights.
- (b) King George III of England upon reading the Declaration of Independence signed 200 years ago.
- (c) Former Ambassador Daniel Patrick Moynihan reporting to the President on the United Nations Charter of Economic Rights and Duties of States.
- (d) All of the above.

Clearly, no matter which substantive position one takes with respect to the charter,<sup>1</sup> it is neither a juvenile outburst nor a classic expression rivaling the great documents of our own history. It is neither a tantrum nor the tablets of Moses. In any event, like King George and our anonymous junior high school principal, we have now seen the tumultuous moment pass and have already grown somewhat accustomed to the necessity of dealing with that which has transpired. The charter and its precise relationship to the American constitutional tradition become evident upon a review of the themes recurrent in its provisions.<sup>2</sup>

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<sup>†</sup>This article is adapted from an address by the author to the Philadelphia Conference On The Economic Interdependence of Nations, March 26, 1976.

<sup>1</sup>G.A. Res. 3281, UN Doc. A/RES/3281 (XXIX) (1975) reproduced in 14 INT'L LEG. MAT'LS 251 (1975); text as adopted also contained in REPORT OF THE SECOND COMMITTEE, UN Doc. A/9946 (1974) reproduced in relevant part in 9 INT'L LAWYER 385 (1975).

<sup>2</sup>For a detailed section-by-section analysis see Brower & Tepe, *The Charter of Economic Rights*

First of all, the charter is as much prologue as it is proclamation. It is not just a statement of finally determined substantive rights and duties of states in the economic field. It also is intended to load the negotiating dice in favor of the less-developed world in both bilateral and multilateral negotiations on all subjects. In bilateral negotiations on economic matters with a large industrialized country, and even in broader multilateral negotiations, less developed countries over the years have found themselves naturally limited by the material circumstances of their own individual bargaining positions. They have come to feel, with a certain degree of justification, that their economic weakness and lack of sophistication necessarily have been reflected in the bargains they have struck. In seeking to rectify this imbalance these countries have realized the simple truth that in a world where politics rests on the principle of "one man one vote" their strength is in numbers, and clearly both that principle and their numbers are strongest at the United Nations.

For these reasons the charter embraces substantive provisions quite analogous to our own domestic development in the area broadly described as civil rights. To adopt the domestic vernacular, the charter plumps for equal opportunity, which rapidly is transformed into affirmative action. The charter includes several important provisions to the effect that every state is free to choose its own economic and political, as well as social and cultural system, "without outside interference, coercion or threat in any form whatsoever." (Article 1.) Specifically, the charter propounds the right of every state "to participate fully and effectively in the international decision-making process in the solution of world economic, financial and monetary problems. . . ." (Article 10.) The charter (Article 32) provides expressly that:

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

Beyond this, however, the charter, akin to our own domestic law, at least in its practical application, mandates a distinct bias towards assisting developing countries to be in a better position to take advantage of their equal opportunities. Numerous articles of the charter promoting economic progress and accelerated development, both generally and specifically, express such a bias with language such as "especially developing countries," "especially that of the developing countries," "particularly of developing countries," "for the benefit of the developing countries." (Articles 8, 9, 11 and 13.) Just as our domestic equal opportunity legislation is designed to afford identifiable groups of historically less prosperous citizens an improved position from which to bargain

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*and Duties of States: A Reflection or Rejection of International Law?*, 9 INT'L LAWYER 295 (1975); see also Haight, *The New International Economic Order and the Charter of Economic Rights and Duties of States*, 9 INT'L LAWYER 591 (1975).

in their own daily life and employment, so the charter is intended in large part to change the rules of the game so that the less favored may have a far better chance.

It should be noted that of the 33 articles of the charter fully 20 fall into this broad category of equal opportunity and affirmative action. Only four of these (Articles 4, 19, 20 and 26) were opposed in the final round of negotiations by any of the industrialized states,<sup>3</sup> notwithstanding that some of them were addressed to very precise subjects such as trade, foreign exchange, trade in invisibles, tariffs, and generalized preferences. (Articles 14, 18, 19, 21 and 27.) Thus insofar as the bulk of the charter has been concerned, the industrialized nations in the last analysis have had little substantive objection. In their broad emphasis, both general and specific, on equality of opportunity among nations and on a substantive disposition to assist and bolster the less developed portions of the world, those less developed countries have adhered to the highest moral traditions in confirming as matters of international right and duty those precepts which in the United States have long characterized the governance of a free people.

Where the charter and its sponsors have encountered pronounced opposition is in those substantive areas where they have sought to depart from fundamental provisions of law long embodied in the political and jurisprudential history of the United States and to a large extent in that of the broader industrialized world. Here we are speaking predominantly of two areas, that of international commodity cartels and compensation for expropriation of foreign investment.

Let us turn first to the more novel problem, that of international cartelization. Since the birth of the Sherman Act conspiracies and combinations in restraint of trade have been very severely frowned upon in this country. Perhaps not everyone has forgotten the essential wickedness we attributed to cartelization in the days of Nazi Germany and the prominent emphasis we placed in the post-war administration of Germany on breaking up the cartels and preventing them from ever again rearing their most unlovely countenance.<sup>4</sup> More recently the European Economic Community itself has adopted important rules in this area which have been enforced with a perhaps unexpected vigor.<sup>5</sup> It is among our most elementary rules of law and economics that competition is normally beneficial and that the unreasonable restraint thereof is evil, particularly where the effect is to monopolize.

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<sup>3</sup>Article 4: REPORT OF THE SECOND COMMITTEE, UN Doc. A/9946 (1974) at 25; Article 19: *Id.* at 18; Article 20: *Id.* at 25; Article 26: *Id.*

<sup>4</sup>Protocol of the Berlin (Potsdam) Conference, Aug. 2, 1945, Art. II, § B, ¶ 12, 3 C. BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949 at 1207 (Dep't of State Pub. 8484 (1969)).

<sup>5</sup>Treaty Establishing the European Economic Community, January 1, 1958, Articles 85 and 86, 298 U.N.T.S. 47, 1 CCH COMM. MKT. REP. ¶ 2422 (1972).

Yet among the salient provisions of the charter, embracing its most advertised elements, are articles endorsing the right to form such cartels. Article 5 of the charter reads in pertinent part:

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

Article 5 continues by imposing a duty on non-cartel states to "respect that right by refraining from applying economic and political measures that would limit it," presumably even if the cartel is guilty of coercion as a matter of law, and regardless of whether such defensive "measures" themselves constitute coercion. Eleven nations in the United Nations deliberations moved to delete Article 5 from the charter, but were defeated by 98 votes to 15 with 8 abstentions.<sup>6</sup>

The express right to form cartels was further bolstered by Article 6, which promotes the conclusion of long-term multilateral commodity agreements, "taking into account the interests of producers and consumers." A modified proposal was offered by substantially the same group of industrialized countries, one which would provide for "the regular flow of raw material supplies" and would place limitations on long-term multilateral commodity agreements.<sup>7</sup> This amendment, too, was defeated by a substantial vote, 95 for, 17 against, and 10 abstentions.<sup>8</sup>

The industrialized nations of the West, virtually all of which are very significantly dependent for their production upon raw materials from less developed parts of the world, have reacted with predictable and justified displeasure at what they regard as economic blackmail on the part of the less developed world. They are inclined to feel that the less developed countries have stepped over the line dividing equal opportunity and affirmative action, on the one hand, from extortion on the other hand. The actual practice of some oil producing countries commencing in late 1973 and early 1974 has resulted in major disruption and dislocation within the Western economy, and has provided a very disturbing example of what can happen in the future. The industrialized world, which at least in North America and Western Europe now includes among its major operating premises the principle of substantial unrestrained competition, will not easily tolerate on the part of foreign sovereigns, be they developed or underdeveloped, behavior for which senior American business executives have been jailed.<sup>9</sup>

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<sup>6</sup>REPORT OF THE SECOND COMMITTEE, *supra* note 3 at 17 and 22.

<sup>7</sup>*Id.* at 17.

<sup>8</sup>*Id.* at 23.

<sup>9</sup>A group of twenty cases, known popularly as the "electrical equipment" or "Philadelphia" price-fixing cases because they were tried before the United States District Court in Philadelphia, is

An even more important area of substantive contention between charter advocates and much of the industrialized world is the apparent insistence on the part of the former that they deprive foreign investors of established property rights without appropriate compensation, a principle repugnant to the Due Process Clause of the United States Constitution and civilized standards of international law and behavior which have been accepted for decades.<sup>10</sup> The United States, in conformity with generally accepted international law, has supported the proposition that a country may not expropriate an alien unless the expropriation (a) is for a public purpose,<sup>11</sup> (b) is not discriminatory,<sup>12</sup> and (c) is compensated promptly, adequately and effectively.<sup>13</sup> Indeed, these principles were confirmed by the United Nations General Assembly itself as recently as 1962 when it adopted General Assembly Resolution 1803(XVII), known as the Declaration on Permanent Sovereignty Over Natural Resources:<sup>14</sup>

In such cases the owner shall be paid appropriate compensation, in accordance with rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law.

The negotiating record made it clear that this resolution intended to apply the generally accepted international standard of prompt, adequate and effective compensation.<sup>15</sup>

Increasingly, however, the economically less advantaged areas of the world, and indeed some of the more developed areas of the globe, have come to feel that it is fair to ask foreign capital to invest at its peril. Thus Article 2 of the charter now provides only that "appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent." This provision is precatory, subjective and ungoverned by any international standard whatsoever. In addition, there is no indication that expropriation should be for a public purpose, or that it should be nondiscriminatory. It is wholly out of line with our own historic traditions, and unacceptable as a matter of practical

noteworthy in that, in addition to substantial monetary fines on both companies and individuals, a number of prison sentences were imposed on both guilty and *nolo contendere* pleas. The overall result was seven 30-day sentences, which the officials were required to serve, and twenty-four suspended sentences. 2 CCH TRADE REG. REP. ¶ 8801 (1974).

<sup>10</sup>UNITED STATES CONST. amend. V.

<sup>11</sup>ALI, RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 185.

<sup>12</sup>*Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 868 (2d Cir. 1961), *aff'g.*, 193 F. Supp. 375 (S.D.N.Y.); this reasoning was adopted in *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 183 (2d Cir. 1967), *cert. denied*, 390 US 1037 (1968). It is a particular application of the broader principles of international law precluding discriminatory treatment of aliens not based on a rational distinction (see *Brower & Tepe*, *supra* note 2 at n.58).

<sup>13</sup>RESTATEMENT, *supra* note 11 at §§ 185 and 187.

<sup>14</sup>G.A. Res. 1803, 17 GAOR Supp. 17, at 15, UN Doc. A/5217 (1962).

<sup>15</sup>U.S.U.N. Press Release No. 4091 at 6, cited in Schwebel, *The Story of the U.N.'s Declaration on Permanent Sovereignty Over Natural Resources*, 49 A.B.A.J. 463, 465 (1963).

economics, that one should be expected to invest capital in a foreign country without any assurance against being the next day entirely and arbitrarily stripped of one's property.<sup>16</sup> Nor is it consistent with the jurisprudence of international tribunals which have dealt with the confiscation issue.

To drive the point home, Article 2 further provides that:

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

That is somewhat akin to having a marital dispute adjudicated by one of the mothers-in-law. The thought that the legal standard to be applied in a particular case is going to be determined by one of the parties to the dispute is contrary to civilized notions of fairness. *Nemo unquam judicet in se*.

The biggest and longest battle during the charter debates was over Article 2. A rather moderate compromise was proposed by a group of 14 industrialized countries including the United States.<sup>17</sup> It would have provided that expropriation be for a public purpose and that it be nondiscriminatory, at least among aliens. It would have provided that investment agreements "be observed in good faith" and would have required states to "fulfill in good faith their international obligations." As to compensation, it would have provided simply that there must be "just compensation in the light of all relevant circumstances," a perhaps weak formulation. Notwithstanding that this compromise itself represented a step backward from the resolution passed by the General Assembly in 1962, and would have relied heavily on legislative history for the proposition that it in fact embraced acceptable standards of international law, it was soundly defeated on votes which brought no more than 20 favorable ballots among well over 100.<sup>18</sup> Even an attempt to postpone consideration of the charter in the hope that further efforts would achieve a compromise was defeated by 81 votes to 20 with 15 abstentions.<sup>19</sup>

While the "juvenile presumptuousness" cited at the commencement of this discussion, which took form as equal opportunity and affirmative action, was in the end acceptable, the "appallingly naive assumptions regarding the world at

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<sup>16</sup>Additional evidence of the charter's excessively harsh and unrealistic approach is contained in Article 16 which requires restitution for the economic and social consequences of "colonialism, apartheid, racial discrimination, neo-colonialism and all forms of aggression, occupation and dominion." This provision would patently expand international law, especially in paragraph 2, which provides that "No State has the right to promote or encourage investments that may constitute an obstacle to the liberation of a territory occupied by force."

<sup>17</sup>REPORT OF THE SECOND COMMITTEE, *supra* note 3 at 16.

<sup>18</sup>*Id.* at 22.

<sup>19</sup>*Id.* at 20 and 21.

large” to which reference was also made, and which are reflected in the provisions on cartels and compensation for expropriation, have proven unacceptable to the industrialized world. The most disturbing aspect of the charter, however, is not its evident shortsightedness in the substantive areas we have discussed, but its conceptual rejection of the rule of law. This is its most pervasive and fundamental fault, and the one which reflects the greatest flaw in the perception of the world by the less developed countries.

The charter’s attempted departure from existing provisions of international law has been illustrated in our discussion of compensation for expropriation. That discussion has also demonstrated that apart from their disagreement over the existing international standards, the less developed countries reject the adoption of any international standard and any adjudication by an impartial international tribunal.

This rejection of what the more advanced areas of the world have treasured since time immemorial is virtually endemic in the charter. Even an initial reference to “international obligations”<sup>20</sup> is unfortunately restricted in that this term may well not encompass customary international law. Several articles of the charter (Articles 4, 12 and 22) contain parenthetical phrases arguably importing the standards of international law, but the presence of such references in only those articles gives rise to the possible construction that the remaining 30-odd articles of the charter are not so governed. Amendments by industrialized nations seeking to rectify this situation and to subject all rights and duties described in the charter expressly to the rule of international law were rejected.<sup>21</sup> Largely for these reasons the American Bar Association adopted Resolution 301 in 1974 urging the United States not to support the charter unless it provide “that in the exercise of their economic rights and the fulfillment of their economic duties states must act in accordance with international law.”<sup>22</sup> Largely for these reasons the United States, joined by only five other countries, voted against final adoption of the charter by the General Assembly in December of 1974.<sup>23</sup>

The rejection by the less developed countries of the principle of international law and impartial international adjudication is something like the American Civil Liberties Union rejecting the United States Constitution. The neutrality of the law and the equal administration of justice have ever been the protection of

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<sup>20</sup>Chapter I, paragraph (j).

<sup>21</sup>Brower & Tepe, *supra* note 2 at 303-304.

<sup>22</sup>Text reproduced at 9 INT’L LAWYER 405 (1975).

<sup>23</sup>The General Assembly adopted the charter on December 12, 1974 by a vote of 120-6-10. Negative votes were cast by Belgium, Denmark, the Federal Republic of Germany, Luxembourg, the United Kingdom and the United States. Abstaining were Austria, Canada, France, Ireland, Israel, Italy, Japan, the Netherlands, Norway and Spain. See N.Y. Times, Dec. 13, 1974, at 11, col. 1 and 14 INT’L LEG. MAT’LS 265 (1975).

the weak, the poor and the oppressed. The strong man can defend himself with his strength. The weak man has no strength and must somewhere find it. Rather than seek it in the protection of others to whom he may thereby become subservient, he may under our traditions seek it in the law.

It is true that the less developed nations feel that international law has been developed predominantly by industrialized nations and consequently has been weighted against the less developed world. One can sympathize with this, but to throw the baby out with the bath seems an extraordinarily radical and ultimately defeating remedy. Just as the pen has been mightier than the sword, so are laws superior to legions.

Well, having said all of this, how do things stand today? What has happened since adoption of the charter and to what may we look forward in the future? There are modestly hopeful signs. The tone of international dialogue on the subjects embraced by the charter certainly reached a fever pitch during the final debates on that charter prior to its adoption in December of 1974. It appeared that the fire storm of often bitter debate would be continued at some length, particularly since Article 34 of the charter required that it be inscribed as an agenda item for the very next session of the General Assembly. In the event, however, this was not the case.

At the Seventh Special Session of the General Assembly, held in September of 1975, prior to the regular General Assembly session, the United States was very successful in negotiating a more respectable resolution.<sup>24</sup> While there were preambular references to the Charter of Economic Rights and Duties of States, as well as other related declarations, the substantive provisions of the resolution were very short on rhetoric and very long on the nuts-and-bolts kinds of items of negotiation in world economic affairs for the future. It denoted a distinct lowering of the atmospheric pressure and a redirection of less developed country efforts towards substituting concrete solutions for diplomatic bombast.

Although, as required by the charter itself, there was discussion of the charter at the regular General Assembly meeting, the session was relatively quiet on the subject and contented itself with adopting a rather short, generally confirmatory resolution, mostly limited to requiring the Economic and Social Council to review implementation of the charter and prepare for further General Assembly discussion two years hence.<sup>25</sup> The charter certainly will not go away, and its adverse aspects will always be with us, but one may hope that the tide of rhetorical unrealism may abate, at least ever so slightly, and permit

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<sup>24</sup>G.A. Res. 3362, U.N. Doc. A/RES/3362 (S-VII) (1975); for text of the resolution, adopted by the seventh special session of the U.N. General Assembly on September 16, 1976 see 73 DEP'T STATE BULL. 558 (1975) or 14 INT'L LEG. MAT'LS 1524 (1975).

<sup>25</sup>G.A. Res. 3486, U.N. Doc. A/RES/3486 (XXX) (1976); for text of the resolution adopted by the thirtieth session of the U.N. General Assembly on December 12, 1975 see 15 INT'L LEG. MAT'LS 175 (1976).

practical labors once more to resume. It is perhaps appropriate to suggest that international harmony on these subjects will be achieved, and substantive progress made, in the degree that the developing world, which historically has embraced the principles of Jefferson and Lincoln, respects the precepts of our own constitutional tradition.

