TIME FOR A CHANGE : THE U.N. CONFERENCE ON TRADE AND DEVELOPMENT

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« The third world's quest for economic development cannot but affect the structure of the international society and the substance of the rules which govern relations among states » [1].

The 1964 meeting of the United Nations Conference on Trade and Development [2] was fraught with great expectations. With 119 nations represented, a global forum was conceived for the discussion of « ways by which the human and material resources of the world may be harnessed for the abolition of poverty everywhere » and of means to « a better and more effective system of international economic co-operation whereby the division of the world into areas of poverty and plenty may be banished and prosperity achieved by all » [3]. To the breadth of scope and concern explicit in this statement of purpose was added the determination « to lay the foundations of a better world economic order » [4].

To be sure, these goals are not easily achieved and all the world's economic problems were not solved at the close of the meeting. As well, disagreements over substance and method were in evidence at U.N. Conference on Trade and Development I. The consensus reached among the developing countries as manifested in the votes on principles and resolutions and cited as an achievement

[1] FATOUROS, « International Law and the Third World », 50 *Virginia Law Review*, 783, 787 (1964).

[2] Held in Geneva from March 23 through June 16, 1964.

[3] From the Preamble to the Final Act of the Conference, *I Proceedings of the United Nations Conference on Trade and Development* 3 (E/CONF. 46/141, 1964), (hereinafter cited as *Proceedings*).

[4] *Id.* at 4.

of the Conference [6], could be viewed, more critically, as the imprint of but one segment of the international community [7]. However, the question of interest to this author relates to changes in the international order that can be ascribed to the Geneva Conference when an objective rather than partisan viewpoint is adopted [8]. Such an analysis requires an evaluation of the *status quo ante* in order to establish the proper perspective.

I. — A CONTEMPORARY VIEW OF TRADE AND DEVELOPMENT

The subjects of international trade and economic development are difficult to classify in terms of traditional principles and classical international law. One certain result of the Conference was to focus world attention on these matters and their interdependence [9] to an unprecedented degree thus calling for recognition and characterization so sparingly given in the past. In this spirit, an interpolative sampling of authorities would be pertinent by way of a general orientation.

A — *Suggestions on methodology*

C. Wilfred Jenks found little agreement on legal principles in international economic relations beyond matters of bills of lading, marine insurance, etc. [10]. However, he stated that economic, social and technological problems call for uniform regulation on an international basis and represent a growing proportion of the appropriate subject matter for a « common law of mankind » [11]. His sources of law are the familiar veins of international agreement, practice and

[5] WEINTRAUB, « After the U.N. Trade Conference : Lessons and Portents » 43 *Foreign Affairs* 37, 45 (1964). But see Issues Before the Nineteenth General Assembly 136, *International Conciliation*, nº 550, 1964 (hereinafter cited as *Issues*).

[6] *1 Proceedings* at 5.

[7] See BLOCH, *The Challenge of the World Trade Conference* 22-23, 55 (1965); GARDNER, *In Pursuit of World Order* 167-168 (1964); KASDAN, 20 *Bull. Atomic Scientists*, 40, 42-43 (1964); *Issues* at 143.

[8] Some of the discussion after the Conference contains a noticeable, albeit understandable, measure of partisanship, see, *e.g.* GARDNER, « G.A.T.T. and the United Nations Conference on Trade and Development », 18 *International Organization*, 683, 703-704 (1964). In addition to sources cited in this paper, a comprehensive bibliography of commentary on the Conference is to be found in KASDAN, « Toward a Reorganization of International Trade - United Nations Conference on Trade and Development », 19 *Record of N.Y.C.B.A.*, 525, 542 n. 11 (1964).

[9] Note in this regard General Principle Six which states in part : « International trade is one of the most important factors in economic development ». This Principle was adopted by a roll-call vote of 114 to 1 (the United States), with 1 abstention (China). *1 Proceedings* at 19. See also FATOUROS, *supra* note 1, at 806. For an interesting filip on the relationship between trade and development, see GARDNER, *supra* note 8, at 703.

[10] JENKS, *The Common Law of Mankind*, 163 (1958).

[11] *Id.* at 58.

general principles; these being interpreted by judicial precedent and supplemented by natural justice [12]. Jenks would have us utilize these raw materials in a reasonable yet expansive manner in order to make progress toward political and legal evolution [13].

Dr. F. A. Mann has suggested the need for a « commercial law of nations » [14]. The subject matter of such a body would be characterized by its mercantile nature, a predominant economic element and by a similarly to what occurs in private law [15]. The source of such law is the general principles recognized by civilized nations which are to be determined by a process of comparing the « most representative systems of municipal law » [16].

Professor Clive Schmitthoff speaks of the « law of international trade » in terms of international legislation and international custom [17]. He emphasizes the role of international agencies in formulating rules in the form of conventions, model laws, standard conditions and forms of contract, uniform customs and practices and definitions of trade terms [18]. This approach, he feels, is the best hope for an autonomous law of international trade [19].

In contrast with Jenks' traditional bases, Mann's comparative method and Schmitthoff's confidence in the work of international agencies, Professor A.A. Fatouros relies on « express provisions of documents (contracts, licenses, instruments of approval) which relate directly to the particular transaction... rather than on general abstract rules, whether of international or municipal law » in developing standards appropriate for economic relations with developing countries [20]. He finds public international law helpful in providing useful political, economic and judicial institutions as well as applicable methods, techniques and general principles [21]. Hewever, Fatouros states that public international law

[12] JENKS, *The Proper Law of International Organization*, 258 (1962).

[13] *Id.* at 258; JENKS, *op. cit. supra* note 10, at 205.

[14] MANN, « Reflection on a Commercial Law of Nations », 33, *B.Y.B.I.L.*, 20 (1957).

[15] *Id.* at 21-22.

[16] *Id.* at 38, also 34, 36, 39, 48-51.

Ernest Boka uses the expression « international commercial law » for a body of conventional or customary rules which govern commercial exchanges. He finds the main source of this law in the conventions, agreements or treaties entered into by States, as international exchanges are subsumed under the general economic policy of States. BOKA, « The Sources of the Law of International Trade in the Developing Countries of Africa », *in* SCHMITTHOFF (ed.), *The Sources of the Law of International Trade*, 227, 228 (1964).

[17] SCHMITTHOFF, « The Law of International Trade, its Growth, Formulation and Operation », *in* SCHMITTHOFF, *op. cit. supra* note 16, at 16.

[18] *Id.* at 37.

[19] *Ibid.*

[20] FATOUROS, *supra* note 1, at 814.

[21] FATOUROS, « International Economic Development and the Illusion of Legal Certainty », *American Society of International Law Proceedings*, 117, 124 (1963).

can only provide the skeleton within which specific legal rules are to be developed as the result of particular agreements and concrete solutions [22]. An underlying consideration for Fatouros is the conviction that different legal standards should be established for developing countries with respect to commercial questions [23]. His rationale is that a state of emergency exists for the developing nations which, like war under traditional principles, calls for special treatment [24]. Rather than treating this situation as an exception to a general rule, Fatouros recommends the « greater precision and certainty » of a double standard [25]. A synthesis of these thoughts results in the abvocacy of developing « different legal standards... for each of the different groups of states » [26]. Notwithstanding his inclination toward particular arrangements described above, Fatouros does not reject treaty relationships and the practice of international organizations in creating law; he does, however, indicate a skeptical opinion as to the potential of custom in this regard [27].

Professor Wolfgang Friedmann's recent work, *The Changing Structure of International Law,* exemplifies a modern analysis in discussing the questions of characterization raised by the concepts of trade and development. In general terms, Friedmann states that « modern needs and developments have added many new areas expressing the need for positive co-operation which has to be implemented by international treaties and in many cases permanent international organizations » [28]. Important aspects of this international law of co-operation are the legal tenets and the international organizations dealing with international economic development [29]. These have been created by bilateral and multilateral treaties concerning the conditions of public economic aid, industrial investment and the exploitation of natural resources [30]. With reference to trade matters, Friedmann contends that international commercial transactions are increasingly the concern of public international law [31]. He notes that the treaty remains

[22] *Id.* at 123, 124.

[23] FATOUROS, *supra* note 1, at 815.

[24] *Id. at* 812; *supra* note 21, at 120.

[25] *Ibid.* See also MYRDAL, *An International Economy,* 288-289 (1956), to which Fatouros cites for support of the double standard of international trade for developed and developing countries.

[26] FATOUROS, *supra* note 1, at 811.

[27] *Id.* at 822.

[28] FRIEDMANN, *The Changing Structure of International Law,* 61-62 (1964).

[29] *Id.* at 11-12.

[30] *Ibid.* Fatouros also recognizes that an « international law of economic aid » has developed as the result of agreements between States and between States and international organizations and that although it is questionable whether there are any customary rules, many practices have « crystallized », *supra* note 1, at 816.

[31] FRIEDMANN, *op. cit. supra* note 28, at 170. This is said to be a reflection of the change from a system of purely private transactions to one which is on the level of public international relations.

the primary « instrumentality » in this area, yet, a necessary and ample source for new international norms in general principles of law, determined in the manner suggested by Mann [32]. The content of these norms is said to be a blend of elements from public and private law as in the French *contrat d'administration* [33]. Friedmann's prescription is for the development of international law and relations by a series of *ad hoc* compromises from which a general body of principles of international economic law may evolve [34].

B — *Established norms*

The context to which these comments refer lends itself to such independent interpretation. Agreement on the definition of contractual terms, commercial customs and practices is the most likely area for success in that commerce is dependant on an appreciable degree of certainty and mutual understanding [35]. The area beyond these questions requires more complex mechanisms if order is to be achieved. The major instrument, in effect at present [36], seeking to establish a pattern of legal and economic relationships, is the General Agreement on Tariffs and Trade which entered into force on January 1, 1948. It is interesting to note that this treaty which was to be merely a temporary measure on tariff and trade matters until the more comprehensive Havana Charter of 1948 entered into force [37], has developed into a major international organization and has established most of the current standards for international trade.

The Agreement is based on a policy of general most-favored-nation treatment, i.e. « any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties » [38]. Other

[32] *Id.* at 174-175. The application of these principles to international agreements of a public or mixed public-private nature would « fill out the framework of public international law, clothe the dry bones with flesh ».

[33] *Id.* at 172.

[34] *Id.* at 360-361.

[35] See GOLDSTAJN, « International Conventions and Standard Contracts as a Means of Escaping from the Application of Municipal Law », *in* SCHMITTHOFF, *op. cit. supra* note 16, at 103, 117.

[36] For background information on earlier efforts to regulate world trade see METZGER, *International Law, Trade and Finance,* 89-93 (1962); Seyid MUHAMMAD, *The Legal Framework of World Trade,* 1-23 (1958).

[37] The Charter never was effected for reasons including the decision of the President of the United States not to submit it to the Senate for ratification; thus, the planned International Trade Organization was not created. Nor was the draft agreement, in 1954-1955, for an Organization for Trade Cooperation implemented. Seyid MUHAMMAD, *op. cit. supra* note 36, at 20-22, 24; GARDNER, *op. cit. supra* note 7, at 149-150.

[38] Part I, art. 2, par. 1, G.A.T.T., 1 *B.I.S.D.* (rev.) 7 (1955).

principles attributable to G.A.T.T. are : nondiscrimination in trading; tariffs as the exclusive device for protection; limitation on preferences; limitation on quantitative restrictions; application of most-favored-nation treatment to state trading nations; standards for regional arrangements (customs unions and free trade areas), i.e. substantially all inter-member trade must be encompassed, external barriers should not be higher of more restrictive than those of the individual countries before the arrangement was established [39].

In addition to this status as a body of rules for trade, G.A.T.T. is also a forum for negotiation. The current Kennedy Round of trade negotiation is under the auspices of G.A.T.T. [40]. A contracting party may also use the administrative procedures of G.A.T.T. for an investigation of a complaint that it is being disadvantagend by an illegal trade practice of another member state. Consultation with the parties is the first step. If this is not successful a conciliation panel is established which makes a recommendation that may be passed on to the Contracting Parties as a whole for a ruling. The offender may be asked to stop the practice in question or to provide a concession of equivalent value. If this is not done, the complainant may be authorized to withdraw one of its own concessions [41]. Another function of G.A.T.T., most pertinent to the questions at hand, is its role in developing new trade policies and special measures to cope with changing conditions [42]. Under an umbrella Programme for Expansion of International Trade, G.A.T.T. has been studying the obstacles to trade of the developing countries and since 1961 has been embarked on an effort to implement its Declaration on the Promotion of the Trade of Less-Developed Countries [43].

C — *Changing conditions*

The years since 1948 have brought structural changes in world trade both within and without the system envisaged by G.A.T.T. The European Economic

[39] See GARDNER, *op. cit. supra* note 7, at 153-154; METZGER, *op. cit. supra* note 36, at 93-98; Seyid MUHAMMAD, *op. cit. supra* note 36, at 149-169, 226-241, 242-269; FRANK I., « Discrimination, Regionalism and the G.A.T.T. », *American Society of International Law, Proceedings* 178 (1960), METZGER, « Regional Markets and International Law », *ibidem*.

[40] For a discussion of this particular aspect of G.A.T.T. activities and especially the United States position with reference thereto see METZGER, *Trade Agreements and the Kennedy Round* (1964), also GARDNER, *op. cit. supra* note 7, at 141-148, 150-152.

[41] For the operation of this procedure and some examples from practice see GARDNER, *op. cit. supra* note 7, at 154, 155-158.

[42] *Id.* at 159-160.

[43] See G.A.T.T., *B.I.S.D.*, 11th Supp. 168-206 (1963); « The Role of G.A.TT.. in Relation to Trade and Development », 3-47, U.N. Doc. Conference on Trade and Development E/CONF. 46/38 (1964).

For an evaluation of the work of G.A.T.T. with relation to developing countries by the Secretary-General of U.N.C.T.A.D. who might be considered the spokesman for this group see PREBISCH, « Towards a New Trade Policy for Development », 2 *Proceedings*, 5, 7, 17-23.

Community has progressed a long way toward the integration contemplated in the Treaty of Rome. Less comprehensive developments in the same direction are E.F.T.A., L.A.F.T.A. and the plans for an African system. The continuing compliance of these groupings with G.A.T.T. provisions is questionable thus raising a more pervasive query as to the continuing viability of G.A.T.T. principles [44]. The widespread incidence of state trading in particular and the general evolution of trade as an instrument of national policy is another characteristic of the current scene [45]. In such circumstances, exclusive reliance on the lowering of tariff barriers or the most-favored-nation clause to expand trade by opening markets on a non-discriminating basis is illusory [46]. The proliferation of newly-independent and typically under-developed nations is the most profound factor of them all [47]. The « Trade Gap » of these countries is the *raison d'être* of both the Conference and the major effort on other fronts to achieve economic development [48].

That trade problems are but one facet of a larger context was recognized by U.N.C.T.A.D. Secretary-General Prebisch in his statement that the primary objective of the Conference was « to point the way towards a new trade policy for *development* » [49] (emphasis added). The ultimate objective of economic and social advancement of all peoples is enshrined in the Preamble to the U.N. Charter. General Assembly resolutions, *e.g. 1707 (XVI), 1710 (XVI)* have called for assistance by member states to the economic development of nations in need. Large amounts of bilateral and multilateral aid have been given since the end of World War II [50]. International organizations have been

[44] METZGER, *op. cit. supra* note 36, at 96-98.

Note must also be taken of the Council for Mutual Economic Assistance (C.M.E.A.) established by the Soviet bloc. See 2 *Proceedings* at 8.

[45] See FRIEDMANN, *op. cit. supra* note 28, at 341; BOKA, *supra* note 16, at 242, 245; HAZARD, « Commercial Discrimination and International Law », 52 *A.J.I.L.*, 495 (1958).

[46] HAZARD, *supra* note 45, at 495.

State control of purchasing and pricing gives weapons that cannot be controlled by the inclusion of a most-favored-nation clause or a « commercial consideration » provision in a trading agreement. Therefore, such clauses cannot serve as a *quid pro quo* for the granting of most-favored-nation treatment by the free market state to the state trading nation. Rather, specific provisions are needed to assure equal treatment in market entry, access to courts, shipping, etc. *Id.* at 495, 498; also DOMKE and HAZARD, « State Trading and the Most-Favored Nation Clause », 52 *A.J.I.L.*, 55, 67-68 (1958).

[47] The bed-rock concept of free trade and governmental non-interference is challenged as to its normative value for developing countries which are *in extremis* economically. MYRDAL, *op. cit. supra* note 25, at 224.

[48] See PREBISCH, *supra* note 43, at 6; 1 *Proceedings* at 4-9.

[49] 2 *Proceedings* at 4.

[50] Quantitative, and to some extent qualitative, data on the flow of international financial resources to the developing countries is available in such publications as : U.N., *International Flow of Long-Term Capital and Official Donations; World Economic Survey;* O.E.C.D.,

developed with an orientation toward this effort of development assistance, *e.g.* World Bank Group (I.B.R.D., I.D.A., I.F.C.), the Development Assistance Committe (D.A.C.) of the O.E.C.D., Council for Mutual Economic Assistance (C.M.E.A. or COMECON), International Monetary Fund (I.M.F.), Inter-American Development Bank (I.D.B.), the European Development Fund (E.D.F.) of the E.E.C., and the U.N. technical assistance and relief agencies (Special Fund, UNICEF, the regular and expanded programs of technical assistance, the Relief and Works Agency for Palestine Refugees, the High Commission for Refugees, the Fund for the Congo and the Korean Relief Agency). Humanitarian, economic, political and strategic motives may be ascribed to the donors [51]. Whatever the rationale, development aid is a fact of international life and has given rise to principles and procedures [52] which are now an acknowledged part of the corpus of international relations [53].

II — IMPETUS FOR CHANGE

A — *Underlying reasons*

Dissatisfaction with the *status quo* has been the platform of the developing nations. Deteriorating terms of trade, economic malaise, the political content of aid, the motivation to consumate political independence are all factors contributing to the high priority of international economic development for these countries and their strong desire for a better lot [54]. There is resentment against established organizations where their voicie is not controlling, *e.g.*

The Flow of Financial Resources to Developing Countries; Development Assistance Efforts and Policies.

The Columbia University Law School Research Project on Public International Development Financing has analyzed this area on both a country basis and from a broader perspective. Report nº 12 (April 1965) of the Project contains a discussion of policies and experience in international development financing which will be incorporated into a book on that topic soon to be published.

[51] FRIEDMANN, *An Introduction to World Politics,* 335-338 (5th ed. 1965).

[52] These would include the provisions of loan agreements, charters, and operating rules of international organizations on the public side, and economic development agreements (so-called concession agreements) and contracts for services as to private transactions.

Another facet is the policies and methods of aid-giving illustrated by the 1963 D.A.C. Resolution on the Terms and Conditions of Aid. D.A.C. (O.E.C.D.), *Development Assistance Efforts and Policies,* 1964, Review 97-99 (1964).

[53] FRIEDMANN, *op. cit. supra* note 28, at 11; *accord,* FATOUROS, *supra* note 1 at 817, 820; *cf. Issues,* 136, 143.

Strange though it may seem today, less than a decade ago a highly-respected economist was convinced that no substantial aid would be given to the developing countries and no agreement would be reached to improve their trading position so that their only recourse was to a wise national commercial policy. MYRDAL, *op. cit. supra* note 25, at 254.

[54] See BOKA, *supra note* 16, at 254; FATOUROS, *supra* note 1, at 786, 795.

ECOSOC, G.A.T.T., I.M.F. and I.B.R.D. [55]. There is suspicion of the prevailing economic analysis that is challenged as the monopoly of, and too partial to, the point of view of the developed countries [56]. Finally, the developing countries feel that many of the traditional norms of international law are the creation of the Western club, do not serve their own needs and hence, are not and should not be binding on them [57].

This position, however, does not mean that the developing countries want to renounce the present international system *in toto*. Change effected legally and peacefully is favored [58]. The means for change is therefore highly significant.

B — *Outlets*

The relaxation of the requirements for the assumption of international obligations is in the interest of developing nations in facilitating the methods of creating and modifying international law [59]. Thus, greater reliance on international organizations if accompanied by increased recognition of their legislative functioning as creating new law has been suggested [60].

The increasing numerical strength of the developing countries in international organizations combined with the application of the majority principle should lead to their support of the formulation and development of principles by declarations adopted as resolutions [61].

This would apply to the U.N. General Assembly [62] and to the Trade and Development Conference established as an organ of that body [63]. However, the backlash on the part of the developed countries in reaction to the overwhelming majorities achieved by the developing countries is a recent development that cannot be ignored [64]. A novel process of conciliation has been incor-

[55] WEINTRAUB, *supra* note 5, at 43.

[56] MYRDAL, *op. cit. supra* note 25, at 222.

[57] LISSIZTYN, « International Law in a Divided World », 38 *International Cociliation*, n° 542, 1963.

[58] FATOUROS, *supra* note 1, at 791.

[59] CASTANEDA, « The Underdeveloped Nations and the Development of International Law », 15 *International Organization*, 38, 42 (1961).

[60] *Id.* at 43-44; see also JENKS, *op. cit. supra* note 12, at 258-259.

[61] See LISSITZYN, *op. cit. supra* note 57, at 66-67; CASTANEDA, *supra* note 59, at 43-44, 46. 48.

[62] *Ibid.*

[63] See *G.A. Res. 1995 (XIX)*, U.N. Doc n° A/RES/1995 (XIX) (1965).

[64] See WEINTRAUB, *supra* note 5, at 44.

Professor Lissitzyn states that « the influence of the more advanced states may be expected to continue to offset, in some measure, the numerical preponderance of the less developed nations in the General Assembly, thus preventing the appearance of too large a gap between the purported content of the law and the realities of material power ». LISSITZYN, *op. cit. supra* note 57, at 66-67.

porated in the continuing machinery of U.N.C.T.A.D. to cop with this problem [65]. As to the legal effect of resolutions, much has been said on this still open, general question [66] so that the better focus would seem to be on the singular aspects of the Final Act of the Conference [67].

III — RESULTS

A — *A standard for commitment*

The decisions of the Conference are recorded in terms of fifteen « General Principles », thirteen « Special Principles » and fifty-seven « Recommendations » [68]. There appears to be no appreciable difference between the first two categories. Each contains postulates of varying generality and specificity. The third group, while incorporating more of the same, also provides suggested guidelines and requests for action on the part of the participants, the continuing machinery of the Conference and other international bodies. On all of these, votes were taken registering those for, those against and those abstaining.

The question is what to acknowledge as a determination of the Conference ? By the rules of procedure, decisions of the Conference on all matters of substance were to be taken by a two-thirds majority of the representatives

[65] U.N. Doc. nº A/RES/1995 (XIX) at 6-10 (1965); see also « Proposals designed to establish a process of conciliation within the United Nations Conference on Trade and Development », U.N. Doc. nº A/5749 (1964).

This innovation alone, would be sufficient to mark U.N.C.T.A.D. as an important undertaking in international relations.

[66] See, *e.g.* LISSITZYN, *op. cit. supra* note 57, at 66; ASAMOAH, « The Legal Effect of Resolutions of the General Assembly », 3 *Columbia Journal of Transnational Law,* 210 (1965); CASTANEDA, *supra* note 59, at 46; JOHNSON, « The Effect of Resolutions of the General Assembly of the United Nations », 32 *B.Y.B.I.L.* 97 (1955-1956); SLOANE, « The Binding Force of a 'Recommandation' of the General Assembly of the United Nations », 25 *B.Y.B.I.L.* 1 (1948).

An interesting statement is to be found in the report of the Special Committe on conciliation : « The Special Committee on conciliation : « The Special Committee realizes that the legal character of the Conference recommendations adopted after conciliation could be no different from that of other Conference recommendations or recommendations adopted by other United Nations organs », U.N. Doc nº A/5749 at 10 (1964); see also *Id.* at 27.

[67] See *1 Proceedings* at 17-65.

[68] Also a set of « Principles relating to transit trade of land-locked countries » was adopted unanimously along with a recommendation that a convention on this subject be prepared. *1 Proceedings* at 25-26, 62-63.

Each of the five committees of the Conference gave a report including draft recommendations. Little emphasis is given to these sources here as much was modified in a conciliation committee headed by the President of the Conference before final vote in plenary session. See *2 Proceedings* at 546, 553.

present and voting [69]. On this basis, all of the principles and recommandations were adopted. However, this position would ignore the qualitative difference between provisions not receiving and those receiving the support of all or most of the developed countries. The realities of world politics were recognized in the realization that only the latter would « lead to concrete action in the immediate future » [70].

Another criterion might be provided by analogizing to the law of treaties. That is, all states agreeing to the provisions have the rights and obligations therein stated as between themselves. However, the difference between the recognized forms of treaty [71] and the provisions of the Conference under discussion is too great to permit such an analogy.

Rejection of the traditional form of international legislation, *i.e.* treaties, is not surprising considering the circumstances. But by refusing to accept the decisions of the Conference on its own terms, are we not dashing the very hopes of the new nations as to the development of rules by international organizations raised but a few pages previously ? Such would have been the case but for the solution developed by the conferees themselves. The terms of the conciliation procedure provide for a standard uniquely suitable to the question of characterization; certainly, for prospective application.

Matters of procedure, proposals for future study or recommendations and declarations of a general nature not calling for specific action do not require conciliation [72]. Conciliation procedures are appropriate « to provide an adequate basis for the adoption of recommendations with regard to proposals of a specific nature for action substantially affecting the economic or financial interests of particular countries » [73]. Those recommendations which successfully undergo the conciliation procedure would have the imprimatur of the international community and would be declaratory in the first instance, becoming international practice and perhaps custom when implemented .Those failing of agreement may be formulated in terms akin to matters on which conciliation was not deemed suitable, that is, expressing the positions of the

[69] Matters of procedure required a simple majority of the representatives present and voting. The President was to decide whether a matter is one of procedure or substance, subject to the contrary vote of a majority of the representatives, *1 Proceedings* at 366.

[70] PREBISCH, « Report to the Secretary-General of the United Nations by the Secretary-General of the Conference » *in 2 Proceedings* at 550. Note also his statement that : « Obviously no country can legally be obliged to comply with resolutions which affect its interests and on which it has cast a negative vote or abstained », *Id.* at 553.

[71] See generally, BRIERLY, *The Law of Nations,* 317-327 (6th ed. Waldock, 1963).

[72] See *Resolution 1995 (XIX)*, U.N. Doc nº A/RES/1995 (XIX) at 8 (1965).

In a different spirit, no conciliation is required for : « Proposals involving action proposed in pursuance of recommendations which were unanimously adopted by the Conference ».

[73] *Id.* at 6; see also the guidelines set forth at 8.

parties. Such resolutions would be helpful in articulating the respective viewpoints but would be recognized as limited to this function [74].

This formula is not the majority principle, discussed earlier. However, it would give the developing countries the voice they seek and the means for developing new tenets in the area of trade and development. At the same time, the legitimate interests of the developed countries may be vindicated through a diplomatic and legally-recognized process. The applicability of these procedures to other United Nations economic and financial activities has been suggested [75]. If successful in practice, such work would merit greater recognition on the scales of international law [76].

There are obvious difficulties in the retroactive application of this standard. The conciliation procedures, as formulated, were not utilized at U.N. Conference on Trade and Development I [77]. Therefore, in assessing the results of the first meeting an independent judgment must be made as to those proposals for specifie action which substantially affect the interests of particular countries [78], and as to the prospects for agreement [79]. Even though we are robbed of the usual advantages of hindsight by choosing such a yardstick rather than a more mechanical measure, it provides a more weighty basis for proclaiming a new testament for trade and development or for the recognition of change in the old order.

C — *Consensus achieved*

A Recommendation entitled « International Commodity Arrangements and Removal of Obstacles and Expansion of Trade » [80] was adopted without dissent [81]. This provision is a conglomerate of principles, general measures and specific measures concerning the most important area of trade for the developing countries — primary commodities. International commodity arrangements were discussed and recommendations gixen as to objectives, type and scope. Terms of reference were established for a Commission on Commodity Arrangements

[74] See PREBISCH, 2 *Proceedings* at 552-553. It is in this category that we would place the General and Special Principles. *Accord, Issues* at 135.

[75] PREBISCH, 2 *Proceedings* at 552-553.

[76] *Accord,* LISSITZYN, *op. cit. supra* note 57, at 66-67; CASTANEDA, *supra* note 59, at 48; *cf.,* JENKS, *op. cit. supra* note 12, at 258-259; SCHMITHOFF, *supra* note 17, at 37.

[77] There was the conciliation committee chaired by the President of the Conference. See note 68 *supra.*

[78] Under the adopted procedures, conciliation is automatically initiated by either a request from a certain number of members or upon the determination of certain Conference officers. See U.N. Doc. nº A/RES 1995 (XIX) at 7-8 (1965).

[79] In this regard, the recorded votes are relevant.

[80] Final Act, Annex A. II, 1, *1 Proceedings* at 26-30.

[81] *But see* observations noted in *1 Proceedings* at 83.

and Policies which was to be part of the continuing machinery and function in several ways, *i.e.* coordinate the activities of all bodies in the commodity field, prepare studies and reviews, make recommendations for short and long term stabilization measures, and to draft a General Agreement on Commodity Arrangements. The expansion of commodity trade between developing countries and within their regional groupings was also considered.

The main impact of the Recommendation, important as the preceding points may be, was the pattern defined for action on the part of the developed countries. Developed *market economy* nations are to abjure any new or increased tariff or non-tariff barriers against imports of primary products from the developing countries. As well, they are to eliminate, or at least substantially reduce, customs charges, internal charges and revenue duties on primary products, and tariffs on semi-processed and processed forms of primray products (until the elimination of tariffs, tariff-free quotas are to be enlarged). These countries are to eliminate quantitative restrictions; where this is impossible for balance-of-payments reasons, such restrictions are to be applied non-discriminatorily. Also, uneconomic domestic production should not be stimulated. Current preferential arrangements between developed and developing countries which discriminate against other developing countries are to be abolished with the institution of international measures providing at least equivalent benefits for the developing countries enjoying such arrangements.

Developed *centrally-planned* economy countries are to consider the trade needs of the developing countries by fixing their quantitative limits and long-term plans, granting favorable import and consumption levels, abolishing customs duties, and conducting their trade on a multilateral as well as bilateral basis.

For both groups the target date for maximum progress is December 31, 1965. Developed countries of the two economic systems are to avoid subsidization of their own primary product exports which injure or restrict the export opportunities of the developing countries and are to consult where adverse effects are indicated. They are to eliminate mixing regulations and to abide by international criteria in the disposal of surpluses. These benefits are to be granted without requiring reciprocity from the developing countries.

The focus was shifted to the efforts of developing countries in another Recommendation, concerning the promotion of primary commodity trade between these countries [82]. It was proposed that developing countries liberalize and strengthen trade and monetary relations, integrate external trade into national development plans, coordinate their respective plans, cooperate with trade and research centers, encourage the establishment of regional payments

[82] Final Act, Annex A, II, 5, *1 Proceedings* at 31-32.

unions [83], and provide between themselves preferential arrangements and the most advantageous commercial treatment granted to developed countries. Assistance from the developed countries and international institutions was also called for in providing technical assistance and facilitating transportation and methods of payment between developing countries.

A Recommendation on « Competition from Synthetics and Substitutes » [84] was adopted without dissent dealing with an obvious concern of the developing countries. However, reservations were recorded by seven countries [85] complaining of possible incompatibilities with both the Treaty of Rome [86] and « a planned socialist economy » [87].

The other aspect of the trade of developing countries, of more long-term interest and prospectively of more significance, receiving much attention at the Conference is manufactures and semi-manufactures. Three Recommendations were adopted without dissent. The first [88], outlined the measures developing countries should undertake in stimulating the development of industries with an export potential and called upon the developed countries to give particular attention to these industries in their assistance programs.

The second [89], entitled « Guidelines for Tariff and Non-Tariff Policies in Respect of Manufactures and Semi-Manufactures from Developing Countries », illustrates the interplay between the work of U.N.C.T.A.D. and G.A.T.T. [90]. It is stated that the developed countries should not raise existing barriers, nor establish new discriminatory measures that would restrict the market access of manufactures and semi-manufactures from developing countries (under compelling circumstances, consultations should precede any such action), nor continue to impose quantitative restrictions. International organizations should accord high priority to the reduction of duties and other barriers in the course of trade negotiations, to studies of development plans and trade and aid relation-

[83] The U.S. opposed a blanket endorsement of regional payments without regard to their merits. *1 Proceedings* at 82.

[84] Final Act, Annex A, II, 7, *1 Proceedings* at 32-33.

[85] Australia, Belgium, France, Hungary, Luxembourg, U.S.S.R. and U.S.A.

[86] *2 Proceedings* at 69, 73.

[87] *Id.* at 80.

[88] Final Act, Annex A, III, 3, *1 Proceedings* at 36-37. Several countries registered their reservations to the proposed governmental financial, monetary, fiscal and other aids to such industries. *1 Proceedings* at 84.

[89] Final Act, Annex A, III, 4, *1 Proceedings* at 37-39. Although three observations are noted, *i.e.* Australia, France and Japan, only Japan has a doctrinal objection, which itself seems out-of-touch with the spirit of both U.N.C.T.A.D. and G.A.T.T. See *1 Proceedings* at 76, 84.

[90] G.A.T.T. is mentioned specifically and much of the recommended action is suitable for implementation under its auspices, especially as part of the « Kennedy » round of tariff negotiations.

ships, to providing trade information and market research, and to the consideration of channeling assistance through appropriate agencies.

The third Recommendation [91] deals with promoting trade among developing countries. The approach is generally the same as that described above in connection with trade in primary commodities [92]. A significant statement, more explicit than in the other provisions, is :

> « (t)hat rules governing world trade should make provision to accomodate forms of regional and sub-regional co-operation... and taking account of the interests of third countries, and, in particular, permit developing countries to grant each other concessions, not extended to developed countries... » [93].

Another extremely important area was dealt with by the Recommendation on « Guidelines for International Financial Co-operation » [94]. This provision speaks firmly and at length in favor of development planning, multilateral institutions — including regional development bodies, untied procurement [95](a), long-term financing, financing local costs, studying the dangers of suppliers' credits, debt rescheduling [95](b), promoting capital flow to developing countries [95](c) and fostering national or regional credit insurance and export financing systems for developing areas. The support of regional institutions such as the Inter-American Development Bank and the African Development Bank Was again urged in a separate Recommendation on « Regional Development » [96] which also called for further study in consultation with the I.B.R.D. and the regional economic commissions. Other matters discussed in the « Guidelines » Recommendation that were singled-out by later Recommendations on the need for further investigation include suppliers' credits and credit insurance [97], and a compensatory credit system [98].

C — *An evaluation*

These seven Recommendations cover a broad spectrum of trade and aid issues. The burning question of preferences was handled by a Recommen-

[91] Final Act, Annex A, III, 8, *1 Proceedings* at 41-42. Six countries recorded observations. *Id.* at 84.

[92] See note 82 *supra.*

[93] Final Act, Annex A, III, 8, IV (b), *1 Proceedings* at 42. A number of countries noted in their observations that this provision had not been discussed in committee and that some of them were opposed to it. See *1 Proceedings* at 71, 73, 76, 77-78, 79, 83.

[94] Final Act, Annex A, IX, 1, *1 Proceedings* at 42.

[95] (a) (b) (c) The U.S.S.R. and Hungary filed observations on these matters, stating that they were not of concern or not applicable to them. See *1 Proceedings* at 75, 80.

[96] Final Act, Annex A, IV, 10, *1 Proceedings* at 48.

[97] Final Act, Annex A, IV, 14, *1 Proceedings* at 50.

[98] Final Act, Annex A, IV, 17, *1 Proceedings* at 52.

dation [99], also adopted without dissent [100], stating the relative positions on the matter and advocating a committee for further discussion. Recommendations which did not receive the degree of acceptance that distinguishes the seven above but that deserve special mention as being in the « hopeful » category, *i.e.* close enough so that future efforts be fruitful, are those on « Growth and Aid » [101], « Problem of Debt Service in Developing Countries » [102], « Needs of the Public Sector in the Transfer of External Resources to Developing Countries » [103], and « Supplementary Financial Measures » [104]. Although two Recommendations [105] on shipping questions were adopted without dissent, by their terms they indicate that discussion is that an early stage in this area.

As is often the case, the facts when subjected to close analysis yield but grudgingly to the generalities which are so fondly embraced by commentators. On the one hand it is said that « what U.N.C.T.A.D. adopted was a set of principles which does not have general agreement » [106]. On the other is a statement that « (t)he most-favored-nation principle is modified to include the granting of concessions by developed countries to developing countries without reciprocity and without exetending them to other developed countries » [107]. The trouble with these two comments is as to their scope not their correctness. Certainly, many provisions were adopted without concensus but this does not apply to the lot. With regard to commodity trading the point concerning non-reciprocal concessions is correct; this is not clear as to manufactures and semi-manufactures. Furthermore, it is noted that the specific recommendations closely resembled the 1963 G.A.T.T. Programme of Action [108]. A perusal of the documents submitted to the Conference by G.A.T.T. on its role in relation to trade and development [109] confirms this view. However, it is but a part of the picture. The undertakings of G.A.T.T. are more extensive, to the point of writing a new chapter on trade and development for the Agreement, establish-

[99] Final Act, Annex A, III, 5, *1 Proceedings* at 39 .

[100] But with reservations by Switzerland and the U.S. indicating their objections on principle. Switzerland favors « special advantages » that would not infringe the most-favored-nation clause nor expose the international trading system to inordinate risks. The United States supports the extension of concessions under the most-favored-nation principle. See *1 Proceedings* at 79, 82.

[101] Final Act, Annex A, IV, 2, *1 Proceedings* at 43.

[102] Final Act, Annex A, IV, 5, *1 Proceedings* at 46.

[103] Final Act, Annex A, IV, 13, *1 Proceedings* at 50.

[104] Final Act, Annex A, IV, 18, *1 Proceedings* at 52.

[105] Final Act, Annexes A, IV, 21; A, IV, 22. *1 Proceedings* at 54-55.

[106] WEINTRAUB, « After the U.N. Trade Conference : Lessons and Portents », 43 *Foreign Affairs*, 37, 45 (1964).

[107] *Issues* at 135.

[108] *Id.* at 145-146.

[109] U.N. Docs E/CONF. 46/38 (2 March 1964), E/CONF. 46/38/Add. 1 (7 April 1964).

ing trade information and advisory services and assuming an increased role in trade and aid matters [110]. For its part, the Conference recognized the potential of G.A.T.T. and acknowledged its role in one of the Recommendations discussed above [111]. Finally, several writers thoughtfully act as apologists for particular positions on the substantive questions raised by the Conference [112]. Rather than join issue at such an exalted level, we would prefer to cite such work to those who are part of the expanding institutions of U.N.C.T.A.D. and turn our own modest closing remarks.

CONCLUSIONS

The dialogue established at the Conference as well as the statements adopted in one form or another indicate the current position of the parties concerned.

The developing countries, united at least for this effort, want action : speedy, extensive and preferential. They believe that new commitments and institutions, initiated by them, are most likely to bring the desired results.

The developed nations — including some strange bedfellows (Western and Soviet bloc) — are willing to help but would like to contain the aspirations of the developing countries within familiar trade and aid channels.

Compromise is obviously called for unless a standoff is to prevail. Thus, there was agreement on the continuing machinery of U.N.T.A.D. while recognizing the place of existing institutions and the interaction needed to deal with the problems of trade and economic development. In this image, the major subsidiary organ — the Trade and Development Board — was established under a membership selection formula giving proportional representation to the various groupings of nations. As well, the spirit of compromise is the lubricant relied-on to make the all-important conciliation procedure work.

Set against our proposed standard for commitment the Geneva meeting merits a modest score. Many of the areas of agreement were « telegraphed » by developments in other fora. Much of the substance of the Final Act is hortatory in character or lacking the necessary consensus. Even the Recommendations adopted without dissent or reservation which are also specific and direct, remain to be implemented by national and international action. At this point a lawyer could rest his case.

Yet, to consider only the law-making aspect of the Conference is a far too limiting evaluation. The meeting was called for other purposes that must be

[110] *Ibid.*

[111] See note 89 *supra.*

[112] See, *e.g.* STERN, Policies for Trade and Development (*International Conciliation,* nº 548, 1964).

given their due consideration. As a medium for attracting attention to the problems of developing countries, the « spectacular » drew a high rating. As a communications link between nations and groups of nations, the reception was extraordinarily good. As a catalytic environment for constructive thought and creative proposals, the Conference has proven worth; the influence exerted on the work of other organizations is also significant. Finally, as a continuing body with developing organs and procedures, U.N.C.T.A.D. carries the hope and aspirations of all mankind for a future of peace with prosperity. These too, are the harbingers of change and of evolution.