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A CONTRACT APPROACH TO INTERNATIONAL LAW*

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The dominant factors in the relations among nations today are the twin concepts of nationhood and territorial sovereignty. These conceptions began evolving into their present prevailing position at least a thousand years ago, achieved prominence as long as five hundred years ago, and ever since have steadily advanced to their present preeminence. Just this year three areas have newly emerged as nations — The Sudan, Tunisia, and Morocco.

Toynbee has stated that in the long sweep of history, this system of nation-states may be regarded as temporary, and even now as outmoded. Be that as it may, there can be little doubt about its vitality now and in the immediate future.

The system emerged, like other institutions, in response to the felt needs of people, material and psychological. It grew because it succeeded in providing answers to those needs which people regarded as more satisfactory, or less dissatisfying, than other alternatives which they could imagine. Increasing mastery over nature, larger common markets within a territorial area, increasing protection against internal, and some external, marauders were some of the material needs which the system met in a generally satisfactory manner or in a manner less dissatisfying than others they knew of might have.

The difficulties of the nation-state system, however, soon became apparent. Among the most important of the difficulties was the fact that the larger interests and appetites of the nations collided with each other with ever-growing power and intensity.

International law has been one of the techniques for regulating the relations among nations in order to prevent these conflicts from arising and ameliorating their effects when they occur. Without benefit of legal clergy in the form of a court of

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compulsory jurisdiction, complete with marshal and militia to enforce law, or legislature to enact it, it has slowly created rules which operate to restrict the freedom of nations to do as they choose. Operating almost entirely on what we recognize as the tort theory — that a man's freedom to swing his arm stops at the end of another man's nose — there has evolved a number of valuable "can't do's" applicable to a nation's conduct. With few exceptions, however, these are aimed at certain acts of nations performed outside their borders — such as seizing ships of non-warring countries on the high seas, excluding others from the high seas, overflying the territory of others without consent, and the like.

It is natural that this should have been so. In days when distance had not been annihilated, when countries could hardly produce enough for their own markets and foreign trade was negligible, when nations were preoccupied with consolidating their own territories, when foreign contacts were rudimentary, and when wars, even one hundred year wars, were not a holocaust, the needs were different. The world could better afford to await the slow process of tort rule-making by a process akin to osmosis — the gradual and almost universal conformity to particular standards of conduct and their subsequent enunciation as rules of law. The achievement of this conformity was aided in part by the gradual accretion of bilateral treaties — covering in similar manner the particular subject, by *ad hoc* arbitrations, and by courts whose jurisdiction was based on consent but whose pronouncements had wider influence to the extent that they were persuasive. This slow and painful process is still going on. It is clearly a gain over no rules at all. But just as clearly, in my opinion, it has become less and less satisfying even as a partial answer to the growing needs of nations and peoples today.

Under the nation-state system a country can buy what it wants from anyone, or discriminate among foreigners in what it buys and in how it treats the goods at the border; it can exclude foreigners from entering the country for any purpose, including investment purposes; it can sell its goods abroad at any time in any manner, and at any price; it can manipulate its currency any way it pleases; it can maintain exchange controls, quotas, and any other device it chooses under any circumstances; it can broadcast over the entire spectrum at any strength regardless of interference with other countries' radio stations and lis-

teners. These and many other things which in the modern world can result in serious injury to others can be done without trenching upon the customary rules which international law has evolved from days when the problems were different from those which now beset us. The fast pace which the industrial revolution has set in creating more complicated economic arrangements, to speak of only one segment, has created more problems of a complex character than could possibly be coped with by the old tort technique of international law.

What to do? The statutory technique, which was the principal domestic addition to the common law in order to respond to the industrial revolution, was not available because there was no legislature to enact statutes. And there was not even a court of general compulsory jurisdiction to perform the ancillary functions of interpretation and application. The nations did the best they could with the only available techniques. For centuries they had made many contracts with each other on extremely general and sometimes specific matters. These contracts or treaties established rules of behavior of a limited or general type as between signatories. They were flexible instruments, able to be filled with high-sounding protestations of friendship, or detailed rules regarding customs formalities, or both. They came into increasing use for both purposes. During the past one hundred years, and especially during the past fifty years, it is fair to say that contract rules — or treaty law as it is sometimes called — have far overshadowed customary international law rules, from the viewpoint of coping with the main problems of modern international relations.

The technique has undergone changes. There are now multi-lateral contracts as well as bilateral ones, and international bodies to administer and interpret the contract rules. There are now contract rules of broad application affecting trade, monetary matters, tariffs, postal matters, radio, aviation, shipping, safety at sea, public loans for economic development, labor conditions, wheat, sugar, tin, collective security, health, meteorology, and other matters which are equally important.

This shift of emphasis has had many and varied effects. So far as lawyers in a country's foreign office are concerned, to start at a very low level, it has made the burden of their work counselling. Their job of counselling takes many forms: draft-

ing domestic legislation; appearing before the Congress to seek its enactment, whether it be a trade agreements act, an act to authorize membership of the United States in the Organization for Trade Cooperation, or a Mutual Security Act to provide military and economic assistance to foreign nations; the negotiation of trade agreements, treaties of friendship, commerce and navigation, mutual security agreements, base agreements for use of United States military forces, and agreements relating to the status of those forces within foreign jurisdictions; and the interpretation and application of such legislation and agreements. This is by no means a catalog, but it indicates that "policy" and "law" in foreign relations, as in domestic law, are simply aspects of problems, and it is necessary for the lawyer to become aware of, and, at the very least, knowledgeable concerning all aspects of a problem if he is to be effective in his own job.

For the people of a country it means much more. For in any effort to solve or at least ameliorate international problems, their interests, material and otherwise, are affected.

One example of the effects of this technique is the trade agreements program. Under customary international law a country is able to erect unscalable tariff barriers to foreign goods of any description, on a discriminatory or non-discriminatory manner, or, if it chooses, to regulate imports of foreign goods by quantitative restrictions, or quotas, on a discriminatory or non-discriminatory basis.

The untrammelled exercise of such freedom would make no difference in a world which was made up of small communities which were uninterested in whether and in what amounts goods were interchanged. The modern world is different. Every country produces some good excess to its own consumption. All countries find that foreign disposal of the excess of such production is necessary. Many could not exist at a tolerable level with their present populations without it. Some could not exist at all. Likewise, no country is self-sufficient. All must import some goods. Some must import to live at all with present populations. In short, foreign trade is important to all countries, and vital to many.

This being so, it becomes intolerable to all countries that there can be no expectation of fair treatment of their exports and im-

ports. Non-tariff trade barriers, like excessively high tariffs, act as a clog on and a potent discouragement to foreign trade. Discriminatory treatment not only penalizes the most efficient producer of goods and distorts production and distribution of goods generally, but brings with it retaliation and counter-retaliation, and the deterioration of relations among the nations, if not actual conflict.

This state of affairs, if not actually reached, was not far in the offing when the Congress enacted the Trade Agreements Act in 1934. High tariff barriers were everywhere apparent, preference systems were growing, import quotas, discriminatory and non-discriminatory, were employed in a large part of the trading world, exchange controls were being utilized to aid and abet economic distortions, sanitary standards were cloaks for restricting markets, and so forth. World trade had dropped to incredibly low levels along with the world's general economy. For the past twenty-two years the American people, through their representatives in the legislative and executive branches of their government, have decided to remedy and improve the situation thus created by expanding, not contracting, foreign markets for American exports on a reciprocal basis, involving the expansion of the American market for imports.

This is the purpose of the Trade Agreements program. From 1934 until 1947 twenty-nine bilateral and reciprocal trade agreements were made by the United States with its trading partners. These agreements were intended by the Congress of the United States to do, and they did, two things: (1) to reduce tariffs on products to the reciprocal and mutual advantage of the United States and foreign countries (the original act authorized 50% reductions from the rates established in our last general tariff Act — the 1930 Smoot-Hawley Act), and (2) to protect those concessions from nullification or impairment by prescribing a code of fair trade practices. It would do little good, for example, if the United States secured from Ruritania a 50% reduction in the tariff on widget A if Ruritania was free the following week to impose a 50% internal tax on the distribution of imported American widget A's which was not imposed on widget A's produced in Ruritania. The expectation which induced the United States to reduce the rate on a Ruritanian product would have been frustrated. The concession on widget A would have been nullified. The way to avoid this result was to provide against it.

Consequently, in all bilateral trade agreements to which the United States became a party, the United States and its trading partner agreed that imported products would receive the same treatment as similar domestic products in all matters relating to internal taxation, sale, distribution or use.

Of course, the fact that countries make commitments does not necessarily mean that they will, under all circumstances, live up to them, any more than all contracts between private persons are kept. I daresay, however, that there are relatively fewer breaches internationally than privately. Nations, having generally wider interests, value their reputations rather more than do all persons, and have more rather than less to fear from retaliation than do all persons, since all persons have less rather than greater power to retaliate.

In 1947 many of these trading partners, the United States, and others entered into a wider agreement, the General Agreement on Tariffs and Trade, which today is the principal instrument of United States trade policy. There are thirty-five countries which are now signatory to that Agreement. The General Agreement, like the bilateral trade agreements, contains schedules of tariff concessions and a set of trading rules designed to protect the concessions and otherwise remove or moderate non-tariff trade barriers. Unconditional most-favored nation tariff treatment, which has been United States policy since 1923, and law since 1934, is the general rule of the Agreement. National treatment so far as internal taxation and distribution of imported products are concerned is also the rule of the General Agreement. The most important single change in rule in the General Agreement over that which obtained in the earlier bilateral trade agreements is the prohibition against import quotas, with certain stated exceptions. It was the aim of the United States to secure the substantial elimination of this device, which had been utilized most extensively by foreign countries. Unfortunately the financial position of foreign countries in 1947 did not permit them to agree unconditionally to the removal of import quotas. They found it necessary to use quotas to protect their balance of payments. The Agreement reflects this by providing that balance of payments quotas may be employed while need persists. But the importance of the rule against quotas is apparent despite this and other exceptions. For, as conditions im-

prove, there is pressure against the exception. That this pressure can be applied successfully can be judged from experience to date: As their balance of payments position improved, and after United States representations based upon the General Agreement had been made, both Belgium and Germany relaxed restrictions against the importation of American coal. Last year's significant increase in coal exports followed this relaxation.

Eight years' experience under the General Agreement has demonstrated its importance to the expansion of markets for United States products. The contracting parties have considered complaints of infringements of the trade rules, and of nullifications and impairments, at their annual sessions, and have assisted in resolving those which bilateral discussions had not succeeded in solving. Mutually advantageous negotiations for reduction of tariff barriers have been undertaken by governments under the aegis of the contracting parties to the General Agreement, the latest negotiations having been completed in May 1956 among twenty-five countries in Geneva.

Undoubtedly, the most important barrier to expanding markets for American exports which remains is the balance-of-payments quota restriction. Constant vigilance is necessary to see to it that countries relax such restrictions against American exports as their financial conditions improve. The Organization for Trade Cooperation which was negotiated at the 1954-1955 Review Session of the Contracting Parties to the General Agreement, for the purpose of administering the Agreement and facilitating intergovernmental cooperation in the field of trade, will, when and if it enters into force, enable the member countries to convene whenever a trade complaint arises, without waiting from year to year, and to follow through to a satisfactory resolution more promptly and more effectively. The Organization governments will be able to review balance of payments restrictions on annual and biennial bases, and, generally, strengthen the administration of the trade rules to the benefit of American exports.

Whether the Organization for Trade Cooperation comes into being depends upon United States adherence, since by its terms adherence by countries parties to the General Agreement totaling 85% of the total trade of such countries is required, and the United States has over 20% of such trade. Whether the United

States becomes a member, and therefore whether the Organization comes into being, depends on the fate of H.R. 5550, the bill which would authorize United States membership. The Ways and Means Committee of the House of Representatives has voted favorably to report the bill to the House, by a 17-7 vote.

There is no doubt that if the Organization comes into being, the stability of the fair trading rules of the General Agreement will be enhanced. It is equally clear that a failure to bring the Organization into being will be taken as an indication that the trading rules have less vitality, that the direction in which the countries of the world have been moving — toward higher levels of foreign trade — has been altered.

The countries of the world do not wish to return to the days when they were perfectly free, so far as committing "legal wrongs" under customary international law was concerned, to practice discrimination. For some years they have struggled earnestly, often in the face of severe domestic pressures, to create a law of international trade which serves the interest of expanding that trade, and, as a corollary, the interests of their inhabitants as a whole. This effort has not been without success in meeting those needs. But, like all other institutions, this system of law will either grow in order to continue to meet growing needs, or more and more exceptions will be made to meet a downward spiraling of conduct, or what may be the saddest fate of all may be in store — a set of fine principles will remain, whose virtue and irrelevance will be proclaimed in the degree to which nations act habitually in disregard of them. Which it will be depends upon what nations will do, and especially what the United States will do to strengthen the system of law it played such a large part in creating.

The contract approach to international law is thus nothing more than an effort to meet concrete problems by creating those standards of behavior which the contracting governments are willing to have bind them in order that they may secure the benefit of other countries' conforming to the same standards. They are, if you like, rules of law created by the will of nations acting together now rather than rules created by the conformance of conduct over centuries to common standards. They are addressed to particular but in most cases most important and pressing problems. Akin to legislation, akin to contracts as we know them

in domestic law, this technique of meeting the problems facing nations has become of increasing importance in the work that lawyers do. Bilateral and multilateral international contracts have assumed major importance as working international law to deal with the major areas of international dealing because they more nearly meet present needs than do other available methods. Until something better appears on the horizon which can also stand the test of practicability, it may be expected that this method will be utilized as the major tool for establishing standards of tolerable conduct among nations for a long time to come.