INTERNATIONAL LAW AND PROBLEMS OF RAW MATERIALS

The need on the part of industrial states for raw materials continues to have a central place in both technical and popular discussions. There has been some tendency toward over-simplification in terms of "haves" and "have nots", and, on the other hand, occasional suggestion that political demands with respect to raw materials may be but pretexts.[1] Especially since 1935, "the problem of the supply of raw materials, mixed up and confused as it has been in turn with colonial questions, migration questions, trade and monetary problems and considerations of defence and national prestige, has given rise and still gives rise to keen controversy." [2] Not merely a matter of public international discussion, but recently the occasion for popular petition to the Government in Great Britain,[3] an alleged reason for Japan's current military adventure in China and for certain national policies with respect to Spain,[4] and even offered in explanation of Brazil's fears which prompted her much publicized move to lease six over-age destroyers from the United States,[5] the whole subject presents for students of international relations a variety of questions. Included is that of whether international law may figure at all in the solutions.

The question has been raised, in another connection, of whether there is not "a certain futility in interposing the lean and ascetic visage of the law in a situation which first and last is merely a question of power." [6] To some, the problems connected with raw materials might seem to be purely matters of power-prestige politics. Indeed, the silence or non-existence in the past of international law for the control of economic forces that are at the foundation of international relations has sometimes been emphasized.[7] But the mere fact of power is not the negation of law, and new ways of international life may be attended by the adaptation of old rules or the construction of new ones. By a well-known and realistic definition, rules comprising the law of

[1] Eugene Staley, Raw Materials in Peace and War (1937), p. 238: ". . . not all current political demands with respect to raw materials are due to genuine conflicts of interest that could be relieved by changes in the raw material situation. Some demands may be conscious pretexts, others a manifestation of economic and social insecurities, which are projected by an irrational psychological process into the raw material field."

Less technical is the reported statement of Bernard M. Baruch that "The story of access to raw materials is the biggest hokum in the world. What they really want is something for nothing." New York Times, Sept. 7, 1937, p. 14.

[2] Report of M. Komarnicki to the Council of the League of Nations, Official Journal, February, 1937, p. 106.

[3] Manchester Guardian Weekly, July 23, 1937, p. 79.

[4] New York Times, Aug. 15, 1937, IV, 4, 5; Sept. 3, 1937, p. 4. The latter reference is to a report of agreements said to have been drawn up between Italy and Germany, respectively, and General Franco, whereby the latter would pay for war materials and military assistance with certain raw materials.

[5] New York Times, Aug. 8, 1937, I, 12. See also Press Releases, U. S. Department of State, Aug. 21, 1937, pp. 162–163.

[6] Julius L. Goebel, The Struggle for the Falkland Islands (1927), p. 468.

[7] See, for example, E. M. Borchard in Proc. Amer. Soc. Int. Law, 1923, pp. 69–70.

nations are those deduced, as consonant to justice, from the *nature* of the society existing among independent nations.[8] To place upon its present legal system the blame for the failure of the community of nations so far to solve the problems identified with raw materials may be to confuse instrument with will and purpose. If the instrument is inherently incapable of functioning in a subject-matter that requires control, a different situation presents itself.

It is obvious that existing international law might be involved in many specific matters of jurisdiction, diplomatic protection, state responsibility, and the like, but it is proposed here to consider only the larger question of the adaptability of this law in general to the handling of situations claimed to have resulted from unequal distribution of, and denials of access to, raw materials. Phases of the larger question relate to the possibility of having a customary international law on this subject-matter, the possible narrowing of the list of questions "solely within the domestic jurisdiction" so as to take from that category regulations with respect to raw materials under some conditions, and the possible use of treaties on a wider scale authorizing types of international commodity control.

The development of customary rules on such a subject-matter would naturally be a slow process. It might conceivably be given impetus through the substitution of a new initial hypothesis for the theory of consent, with the result of marking out for international law a more pervasive rôle in international relations—particularly economic relations—than it has had under the influence of positivist doctrine. A new emphasis upon duties, which would at least limit states in their imposition of trade or monetary restrictions for the sole or principal purpose of putting pressure upon other states, might be a consequence.[9] Proponents of a new basic theory as a way of escape from what is criticized as an essentially negative legal system, have utilized the doctrine of the abuse of rights.[10] But the application of this would not be without practical difficulties, especially in the absence of a general obligatory jurisdiction. There arises the question of whether a change in fundamental theory would have to precede or follow the effective organization of the will of the larger community. At a time when economic self-sufficiency is widely proclaimed as an ideal, and when the continued existence of the foundations essential for a community of states under law is being questioned,[11] requisites for the putting into effect of the new principle

[8] Henry Wheaton, Elements of International Law (R. H. Dana ed., 1866), p. 23.

[9] See the report referred to in note 21, *infra*. The Committee, while feeling that each country had "first call" on its own resources for the benefit of its domestic industry, did not regard as "proper" the use of a power of prohibition or restriction, irrespective of the actual state of supplies of the commodity, simply for the purpose of putting pressure on another country (pp. 12–14).

[10] H. Lauterpacht, The Function of Law in the International Community (1933), Ch. XIV.

[11] See, for example, W. Friedmann, "The Challenge to International Law", Fortnightly Review, Oct., 1937, pp. 432–440

of community government might not easily be obtained. A system of legal controls operative at the will of less than a unanimity of states might be expected to encounter strong opposition.[12] Effective assertion, for the modern industrial state lacking what it considers adequate natural resources, of a right of development, might be thought to be at variance with other states' right of independence. In any case, it seems unlikely that solution of present problems pertaining to raw materials can be left to await the acceptance of a more logically perfect theory or the development of rules of customary international law.

A second question presented is that of whether there are compartments of economic activity which are permanently shut off from any except national direction. Certain pronouncements of the Permanent Court of International Justice have brought out that a state's assent to outside control of certain matters, for example, certain economic interests, cannot be presumed.[13] But the same court has refused to consider the category of questions "solely within the domestic jurisdiction" as one fixed for all time.[14] There is ever the possibility that, in their own best interests, states may assent to wider than national controls of some sort, however great a change this might be from the prevailing emphasis upon the right of individual state action and economic nationalism.

State policy with respect to minerals affords illustration of how states have regarded these raw materials within their jurisdictions as for the sole benefit of their respective peoples. State control of property in this form has been successfully asserted by metropolitan countries, as against competing private claims or those of outside states, and has sometimes taken the form of ownership.[15] A method of assuring national control of mineral resources in states

[12] One writer on "Imperial Economic Development" has recently commented as follows: "Far-reaching adjustments . . . could only be effected, with any celerity, by some supernational, or perhaps I ought to say some supernatural, body with all nations represented in it; and some international force for promoting collective trade to provide and to police some world trade agreement. The creation of such a body is beyond the bounds of practical politics. Much as we regret the position, we must accept it as a fact if we are realists." B. S. B. Stevens, in International Affairs, XV, No. 6 (Nov.–Dec., 1936), pp. 863, 870.

[13] Publications of the Permanent Court of International Justice, Series A, No. 10 (A/B No. 22), p. 18; Series A/B No. 46, p. 162. These pronouncements can hardly be used to prove that a state may legally do anything that it has not agreed to refrain from doing. See H. Lauterpacht, The Development of International Law by the Permanent Court of International Justice (1934), pp. 103–104.

[14] Publications of the Permanent Court of International Justice, Series B, No. 4 (A/B No. 3), p. 24.

[15] *Cf.* C. K. Leith, World Minerals and World Politics (1931), p. 115: "The present world-wide trend toward nationalization is not entirely new in history, though it has taken on new aspects. In the early small beginnings of the use of minerals it was the rule rather than the exception for the crown to retain ownership of precious metals and stones, and later even of iron, copper, and other metals essential to military preparation. This is true of all the countries of Europe. Later this control became more or less separated from the crown in some countries by dispersion through the noble classes or by leases and concessions. Only in

under liberal government is illustrated in the Leasing Act of the United States, 1920,[16] or the 1936 legislation relating to tin.[17]

This public control does not necessarily preclude all international coöperation in this field, if compensating advantages may come from such coöperation. Minerals are not in their nature, any more than are nationality decrees, outside the category of things to which international legal rights may attach. There has recently gone to the Permanent Court of International Justice a case between Italy and France in which the former state alleges that measures taken in connection with the discovery and working of phosphates in Morocco are inconsistent with the obligations of France under the General Act of Algeciras [18] and the Franco-German Treaty of November 4, 1911,[19] to which Italy has acceded. Involved in this case also are alleged vested rights of an Italian company.

There is, then, the possibility of the use of specific agreements for the purpose of securing adjustments. It is safe to assume that any very wide use of multilateral treaties would be a sequel to some investigation of the general subject-matter, such as was approved in principle by the spokesman for the British Empire before the Assembly of the League of Nations on September 11, 1935,[20] and such as has subsequently gone on under the auspices of the League. The use of multilateral treaties, as well as "autonomous action" or unilateral declarations, is envisaged in the resulting report.[21] Taking a cautious view of its competence, the Committee did not regard as within its function the discussion of distribution of territories from which raw materials were drawn, or the restriction of raw material supplies in order to discourage aggression, or the adjustment of population to geographical and economic conditions, or the armaments policy of any particular state. While finding it impossible to defend "rigid restriction policy", the investigating body conceded that it might be necessary, for political or economic or social reasons,

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England was this carried through to a stage of complete private ownership, and this principle was later the dominant one governing the disposition of mineral resources in all English-speaking countries. The major separation of minerals from state control went on during the period of the industrial revolution. At the same time many countries, particularly in Europe, never departed from the earlier form of control."

[16] 41 Stat. 437–447, especially the provision respecting reciprocity as to aliens, at p. 438. On the latter point, there is also the Convention on Non-Application of the Most-Favored-Nation Clause in Respect of Certain Multilateral Economic Conventions, Sess. Laws, 74th Cong., 2nd Sess., Pt. II, pp. 843–848.

[17] 49 Stat. 1140.

[18] 99 British and Foreign State Papers, p. 141; this JOURNAL, Supp., Vol. 1 (1907), p. 47.

[19] 104 British and Foreign State Papers, p. 948; this JOURNAL, Supp., Vol. 6 (1912), p. 62.

[20] League of Nations Official Journal, Spl. Supp. No. 138 (1935), pp. 43–46. Further action is recorded in *ibid.*, Spl. Supp. No. 157 (1936).

[21] Report of the Committee for the Study of the Problem of Raw Materials, League Doc. A. 27. 1937. II. B., pp. 16, 17, 21. The Committee had the collaboration of experts from the United States, Brazil and Japan, but did not have the assistance of a German expert or the collaboration of an Italian expert.

to reserve certain forms of enterprise to nationals.[22] It found that natural monopolies—such as that of helium gas in the United States—did not constitute real obstacles to the circulation of raw material. The general conclusions offered were that difficulties in regard to supply existed, but were not insuperable, and that difficulties in regard to payments vastly transcended in importance those in regard to supply.[23]

The many-sided nature of the general problem does not require emphasis. The German contention has been that there should be territories under German management and within the German monetary system, and that there can be discussion of other questions, such as "sovereignty, army, police, law, the churches, international collaboration."[24] Assurance of some freedom of movement for the manufactured goods, after the raw materials have been acquired and converted, is properly a matter of concern.[25] More controversial, since it touches upon something traditionally very much within the scope of domestic jurisdiction questions, is the suggestion from a Japanese spokesman that it is of capital importance to have, through pacific means, freedom in the movement of labor and technicians necessary for the exploitation of raw materials.[26] If any treaty arrangement on a multilateral basis were achieved, it seems clear that it would have to involve no abruptly internationalized control of economic activity generally. Even within the bounds of relatively narrow subject-matters, proposals of far-reaching extranational control have found little favor. In the course of the recent discussions, there was a reference to "certain interesting schemes" set on foot at Geneva but later shelved, and to such specific projects as that for an International Agricultural Mortgage Credit Company.[27] Perhaps action taken would look to restriction, not of all policies of states that might be objectionable to their neighbors, but of policies actually found to endanger seriously

[22] Report cited, p. 16. The bad effects of a sudden influx of capital, or of mass immigration, are envisaged. A question may be raised as to the strictly legal significance of the Committee's observation that "It should be recognized that the Governments of countries which are important suppliers, actual or potential, of raw materials have a responsibility not unreasonably to hamper the development of their raw materials," and that such states should take into account "the interdependence of all countries." (*Idem.*, p. 16.)

[23] The Russian expert, in a separate declaration, expressed regret that the Committee had not shown sufficiently how the problem of raw materials was affected by present-day conditions, such as those connected with armaments, aggressive and warlike purposes. (Report, p. 30.)

[24] Hjalmar Schacht, "Germany's Colonial Demands", For. Affairs, XV, No. 2 (Jan., 1937), p. 234. A more detailed statement of Germany's case is in *Völkerbund*, Nr. 192–206 (May/July, 1937). The League Committee found that, if dominions and other self-governing territories be excluded, only about three per cent. of all commercially important raw materials are produced in all colonial territories. (Report, p. 10.)

[25] Remarks of M. Yepes (Colombia), League of Nations Official Journal, Spl. Supp. No. 157, p. 70.

[26] New York Times, June 25, 1937, p. 33.

[27] Remarks of M. Rose (Poland), League of Nations Official Journal, Spl. Supp. No. 157, p. 46. The specific project referred to is in League Doc. C. 375. M. 155. 1931. II. A.

the interests of other countries. Employment of negotiation, investigation and conciliation, and provision of some international jurisdiction with a function which would be interpretive and declaratory, would seem to be necessary features of a control arrangement.

The use of treaties on a narrower scale seems more likely to come, at a time when the general peace is itself threatened. Even bilateral arrangements might prove of considerable psychological value, unless used as weapons against other states. The contents of any agreements concerning commodity control would need to be devised in the light of trends in producing enterprises,[28] and of experience already available through the activity of such a body as the International Tin Committee.[29] Presumably, the principle of access to necessary materials without discrimination because of nationality would have special consideration.[30] From the purely legal point of view, the effects of changing conditions, and the matter of periodic or other kinds of revision, would have importance. The principle of the sanctity of treaty engagements cannot safely be discarded, but a reasonable amount of adjustability should permit the reconciliation of this with the basic right of states to exist and to have some opportunity for development.

Two concluding observations seem pertinent. Some economists have come to believe that the people of the world have no choice but to grapple with the problem of world-wide economic planning.[31] With the soundness of this view, or with the tremendously complicated task of world planning as between states with differing ideologies and with varying degrees of control over their respective internal economies, this brief comment on certain legal aspects has not presumed to deal. It is conceivable that the process of "economic appeasement" which is associated with raw materials might well involve considerable use of the treaty device.[32] But the futility of placing too great faith in the instruments alone, without adequate attention to the will for peace and for essentially just dealing in an ordered world, must be apparent. It is suggested in the words of Sir Thomas More, who wrote more than four

[28] Eugene Staley, *op. cit.*, p. 253: "International trade in raw materials appears to be entering an epoch that will be characterized relatively less by competition between individual producing enterprises within each industry and relatively more by competition between great cartels or combinations or control boards, each striving to promote sales and maintain prices for its commodity."

[29] *Ibid.*, p. 308. See also W. L. Holland, ed., Commodity Control in the Pacific Area (1935), Chs. XII, XIII.

[30] *Cf.* John C. de Wilde, "Raw Materials in World Politics", For. Policy Reports, XII, 162–176 (Sept. 15, 1936), and a pamphlet on "Colonies, Trade and Prosperity", prepared by Maxwell S. Stewart for the Public Affairs Committee (1937). Consideration of the interests of consumers, and the need of publicity, are stressed in the League Committee's Report (p. 18).

[31] See, for example, E. W. Zimmermann, World Resources and Industries (1933), p. 807.

[32] *Cf.* Report of the Economic Committee to the Council of the League of Nations, on the Present Phase of International Economic Relations, League Doc. C. 358. M. 242. 1937. II. B., p. 13 and annex.

hundred years ago of his Utopians that "though treaties were more religiously observed, they would still dislike the custom of making them; since the world has taken up a false maxim upon it, as if there were no tie of nature uniting one nation to another . . . and that all were born in a state of hostility, and so might lawfully do all that mischief to their neighbors against which there is no provision made by treaties. . . ."

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THREE HAGUE CONVENTIONS ON NATIONALITY

The coming into force in 1937 of three of the conventions on nationality signed at The Hague Codification Conference of 1930, is an event of unusual significance in the development of international law.[1] This manifestation of effective coöperation is the more interesting because it occurred in the politically sensitive field of nationality laws and because the past few years have not been notable for evidences of renunciation of sovereign claims.

The conventions have come into force because they have now been ratified or acceded to by ten or more Powers. The principal convention, that relating to certain questions of conflicts of nationality laws, was not signed by the United States Government because its delegates considered it inconsistent with American policy to sign a treaty which recognized that dual nationality might arise out of a grant of naturalization not assented to by the state of origin, that such assent might be deemed necessary to make such naturalization effective, or that "expatriation permits" might be required.[2] But inasmuch as the convention provided for complete liberty of reservations, of which several signatories have taken advantage, it is regrettable that the United States could not find adequate comfort in recourse to that safeguard. The convention, now ratified or acceded to by Norway, Monaco, Brazil, Sweden, Great Britain, Canada, Poland, China, India and The Netherlands, provides for the resolution of some of the principal conflicts of municipal nationality laws.

While admitting the authority of each state to determine who are its nationals, it yet facilitates the freedom of renunciation or waiver in certain cases of dual nationality. For example, Article 5 establishes that in cases of dual nationality, a third state shall recognize exclusively the single nationality of the country in which the person is habitually resident or most closely connected, a principle adopted in the protocol concerning military service presently to be mentioned and likely to become more common. The chapter on the nationality of married women provides for a limitation in the number of cases of dual nationality or statelessness arising through marriage, for example, the loss of the wife's nationality shall be conditional upon her acquiring her husband's nationality; yet naturalization of the husband shall not be

[1] League of Nations: A 6 (a).1937.Annex 1, pp. 71–73.

[2] *Cf.* Convention, this JOURNAL, Supp., Vol. 24 (1930), p. 192; Report of Committee, *ibid.*, p. 215; and Flournoy, this JOURNAL, *ibid.*, p. 467 at 473.