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Oct. 23, 1944

Mr. Luxford

E. Arnold

Legislation relating to Fund and Bank

Attached are drafts which Mr. Brenner and I have prepared of (1) a joint resolution authorizing the President to sign the Articles of Agreement of the Fund and the Bank and containing all other legislation which we believe needful to participation of the United States in these institutions; (2) an alternative to the sections of the resolution relating to the appointment of governors and executive directors and the agency to which they shall be responsible; and (3) a bill making appropriations for subscriptions of the United States to the Fund and the Bank.

Resolution and bill

In a very general way the resolution is modeled on those which were used in giving Congressional approval of membership in the International Labor Organization and in UNNRA, as we recommended in our memorandum of June 7, 1944. We have made one conspicuous change in technique in comparison with the UNNRA resolution. The texts of the Agreements are not set forth in the resolutions We consider that the reprinting of such long instruments would serve no useful purpose, but to avoid the possibility of an outcry that the Agreements might be changed before signature, we have specified that the authority of the President is to sign them "as set forth in the Final Act of the United Nations Monetary and Financial Conference". Since the Act is a completed document, the texts to be signed are as effectively identified as if they were set forth in full in the resolution.

Two pieces of legislation have been prepared because we believe that Congressional clearance will be facilitated. As our memorandum of June 7 explains, to embody an appropriation in the basic resolution would raise questions of committee jurisdiction that can be avoided by the dual presentation. The technique which we advocate was in fact followed with respect to UNNRA.

The only other aspect of the resolution which does not seem reasonably self-explanatory is the failure to include a provision on

compensation for alternates of executive directors. The omission corresponds to a gap in the Agreements, which are silent on this matter. We concluded that the question should be settled by meetings of the Fund and Bank rather than by legislation of members.

Alternative

The provisions and alternative concerning the appointment of governors and executive directors and the agency to which they shall be responsible are subject to a large number of variations by rearrangements of their components. As they stand at present, they are drafted under two basic theories. The resolution itself provides that the President shall appoint the officers in question and that they shall be responsible to a committee of which the Secretary of the Treasury shall be Chairman. The alternative is on the theory that the officers shall be appointed by and responsible to the Secretary of the Treasury, who shall merely be advised by the committee. An additional feature of the alternative, which could, of course, be eliminated or be transferred to the resolution, is the provision that members of Congress shall be included on the committee.

Provisions not covered by legislation

In preparing these materials, Mr. Brenner and I have given attention to a number of provisions of the Fund and the Bank on which we ultimately concluded no legislation is necessary. The reasons for our conclusions respecting each provision are set forth below.

(1) Fund-Article IV, Sections 2, 3, and 4. In brief, these sections require that member countries take action to insure that transactions between member currencies shall be within prescribed margins of parity. We consider that no legislation is needed because Section 4 specifies that "a member whose monetary authorities, for the settlement of international transactions, in fact freely buy and sell gold within the limits prescribed by the Fund under Section 2 of this Article shall be deemed to be fulfilling this undertaking". It will be recalled that this provision was advanced at the Conference for the express benefit of the United States. Our operations under Sections 8, 9, and 10 of the Gold Reserve Act of 1934 are such as to fulfill the provision precisely.

(2) Fund-Article 6, Section 1. Under this section the Fund is empowered to request that a member exercise controls to prevent the use of the Fund's resources in meeting a large or sustained outflow of capital. It is so extremely unlikely that the United States would wish to use the Fund's resources to meet an outflow of capital that we feel that this

country may in good faith certify to the Fund, under Article XX, Section 2, that it has taken all steps necessary to enable it to carry out all its obligations under the Agreement without having enacted legislation for the control of capital movements. Moreover, Section 5(b) of the Trading with the enemy Act confers ample authority in a really serious situation. We believe that it would be unfortunate to approach Congress with a request for further authority to control capital transactions.

(3) Fund-Article VII, Section 3. This section provides that when a currency is declared scarce by the Fund, members may temporarily impose limitations on freedom of exchange operations in that currency. As we understand the provision, it is not mandatory and the question of imposing restrictions is entirely within the jurisdiction of the United States. Even if this were not so, it is almost absurd to think that in the measurable future any currency will become so scarce in relation to demand from the United States that this country will find it necessary or even highly desireable to impose restrictions.

(4) Fund-Article IX; Bank-Article VII. In our opinion, these Articles present by far the most serious question of any provisions on which we have concluded it is not necessary to enact legislation. The problem is whether the immunities specified by the Agreements will be "self-executing" upon the United States' acceptance of membership or whether they will be effectual only if specifically recognized by legislation.

Undoubtedly, an executive agreement is the "law of the land" in whatever field is constitutionally open to the operation of such agreements. United States v. Pink, (1942) 315 U.S. 203, 229; United States v. Belmont, (1937) 301 U.S. 324; cf. United States v. Curtis Wright Export Corp., (1936) 299 U.S. 304. In view of the precedents concerning postal unions, the International Labor Organization, and the trade agreements, which are discussed in Arnold's memorandum of April 20, 1944, we feel sure that the Agreements of the Fund and the Bank may properly be effectuated as executive agreements. Moreover, the fact that they will be signed only under the express authorization of Congress should go far to remove any question of their appropriateness.

Accordingly, the serious issue is whether the terms of the Articles on immunities are such that they can be interpreted as being law in themselves, that is "self-executing". Attached is a memorandum of September 29, 1944, prepared by Mrs. Lewis and Mr. Dyer with regard to this issue. Basically, we think the principle which the cases that they discuss have developed is that the language of the agreements must determine whether or not the provisions are self-executing. We consider that the provisions of Sections 1 through 9 of the Articles of the respective Agreements are in self-executing language. Although it is true that the words "shall be"

which appear in these sections are not as free from ambiguity as one might wish, their fair intendment in their whole context is that of present effectiveness. The decisions involving phrases similar to that under consideration are somewhat conflicting and can be resolved only by a general principle such as that which we have suggested. Some rulings, including most of the earlier ones, take a very technical view (see pages 11-14 of Mrs. Lewis' and Mr. Dyer's memorandum), while other adopt a much broader approach (see pages 14-15).

We do not think that our conclusion, if otherwise sound, is vitiated by Section 10 of the respective Articles, which specifies that each member shall take such action as is necessary in its own territory for the purpose of making effective in terms of its own law the provisions of the Article. It seems clear that when under the basic law of a country the operative sections can be effective without special legislation, Section 10 does not require legislation. In its own terms, no action is necessary. Since international agreements can be self-executory under the laws of the United States, we believe that Section 10 does not impose upon this country any obligation to enact legislation.

The only immunity contemplated by the Articles which requires any further consideration, if our general conclusion is sound, is under Section 9 of both Agreements, relating to immunities from taxation, and that only as it involves federal taxation. It has always been maintained by the House of Representatives that the Constitutional provisions relating to revenue bills (Article I, Section 7) prevent a treaty from being self-executory in the revenue field. Although there are no clear precedents in the courts, we believe that it would be unwise to contend that this theory is unfounded. We think, however, that the enactment of a joint resolution, concurred in by the House, which authorizes the President to sign the Agreement, is a sufficient legislative action, particularly in view of the fact that the effect on the revenue is an exclusion from taxation.

The trade agreements offer the nearest precedent on the role of the House of which we are aware. In effect, the Congress authorized the President to make exclusions from the revenues—a stronger action than that covered by the proposed resolution. There appears to be no decision on the constitutionality of the trade agreements act in relation to the position of the House, but in the debates, which are outlined in the attached memorandum of October 23, 1944 by Mrs. Lewis, the opposition strongly urged that the prerogative of the House would be violated. The passage of the bill over the objections seems an affirmation of the soundness of the approach adopted in our suggested resolution.

It should also be borne in mind that it is not necessary to convince the public or the courts that the immunity from federal taxation is effective. Assuming that Congress is content to adopt

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the resolution without objection on the ground that the prerogative of the House is being violated, it only remains for this Department to satisfy its own Bureau of Internal Revenue that it should issue regulations pointing out to the tax collectors the practical consequences of the immunities.

With respect to whether the language of the immunities articles generally is self-executing, we might add that the argument just made concerning the effect of the concurrence of the House appears applicable. Most of the precedents relating to the self-executing nature of international compacts have been in relation to treaties which are, of course, accepted only upon the concurrence of the Senate. If the acceptance is by means of a resolution of both houses, it seems to us that the question of needing special legislation becomes practically meaningless with respect to provisions as definite as those under consideration.

If it is felt that legislation of some sort would be a wise precaution, we suggest the use of a simple section along the following lines:

> Sec. . The provisions of Article IX, Sections 1 through 9, of the Articles of Agreement of the Fund and Article VII, Sections 1 through 9, of the Articles of Agreement of the Bank, are hereby recognized and confirmed as law, effective, respectively, when the United States becomes a member of the Fund and of the Bank.

With regard to taxation the alternative to either relying on the Articles as self-executory or adopting a simple blanket section is the inclusion in the joint resolution of several pages of most detailed amendments to numerous provisions of the Internal Revenue Code. In our opinion, the resolution should be kept as simple as possible and it is highly undesirable to include such material.

EAArnold:dm 10/25/44