MEMORANDUM

In view of decisions of the Supreme Court of the United States the constitutionality of the use of executive agreements entered into by authorization of the Congress of the United States cannot be questioned. An agreement of this nature has never been held invalid by the Supreme Court.

In Altman & Co. vs. United States (1912) 224 U.S. 583, the Court considered whether a tariff rate was dutiable under a reciprocal agreement between the United States and France entered into under the authority of section 3 of the Tariff Act of 1897. The question was raised as to whether this agreement constituted a treaty under the Circuit Court of Appeals Act so that there was a right of appeal to the Supreme Court. The Court said at page 601:

> "* * * While it may be true that this commercial agreement, made under authority of the Tariff Act of 1897, sec. 3, was not a treaty possessing the dignity of one requiring ratification by the Senate of the United States, it was an international compact, negotiated between the representatives of two sovereign nations and made in the name and on behalf of the contracting countries, and dealing with important commercial relations between the two countries, and was proclaimed by the President. If not technically a treaty requiring ratification, nevertheless it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President. * * *"

The opinion of Justice Sutherland in United States v. Curtiss-Wright Export Corp. (1936) 299 U.S. 304, 318, gives as an example of the power of the Executive in the field of foreign relations that the President may enter into such international agreements as do not constitute treaties in the constitutional sense.

In two more recent cases the Supreme Court has held that an executive agreement entered into by the President without Congressional authorization is a "law of the land."

In United States v. Belmont (1937) 301 U.S. 324, the Court, considering the Litvinov assignment stated:

> "Plainly, the external powers of the United States are to be exercised without regard to state laws or policies. The supremacy of the treaty in this respect has been recognized from the beginning. * * * And while this rule in respect of treaties is established by the express language of cl. 2, Art. VI, of the Constitution, the same rule would result in the case of all international compacts and agreements * * *."

In United States v. Pink (1942) 315 U. S. 203, the Court said at page 230:

> "A treaty is a 'Law of the Land' under the supremacy clause (Art. VI, cl. 2) of the Constitution. Such international compacts and agreements as the Litvinov Assignment have a similar dignity."

Obviously, the Court would have reached the same conclusion if the agreement in question had been authorized by Congress.

The Constitution and the decisions of the Supreme Court do not afford any specific criteria for the determination of whether a particular compact should be ratified as a treaty or concluded as an executive agreement. Each situation must, therefore, be examined in the light of the history of America's foreign relations, with particular emphasis upon the attitude of Congress toward the action taken by the executive branch of the Government.

The use of executive agreements is almost as old as the Constitution, the first having been signed in 1792. During the constitutional history of the United States there have been 50 percent more executive agreements entered into than there have been treaties and both types of contracts cover a wide variety of subjects. In general, however, economic matters have been handled more often by executive agreement than by treaty, and political problems have been resolved by treaty more often than by executive agreement.

The earliest executive agreements were concerned with postal problems and there have been many such agreements entered into over a long period of years. There have also been a number of executive agreements dealing with patents and trademarks and with tariff schedules. Many of the tariff agreements have been executed under the Trade Agreements Act of 1934 and the constitutionality of this procedure has been examined by the Congress on several occasions.

Another recent example of the use of executive agreements dealing primarily with economic matters are the lend-lease and reciprocal aid agreements authorized by the Act of March 11, 1941, as amended. Such agreements have been signed with nearly all the United Nations and the mutual benefit resulting from them has met with the complete approval of Congress.

In the monetary and financial field, the use of the executive agreement as the appropriate procedure for the solution of international problems is well established. The terms and conditions of loans made by

the United States to its allies during the First World War; the terms and conditions of reconstruction loans made after the First World War; and the adjustment and extension of time of payment for these loans were all handled by executive agreement. Also, Congress authorized the Secretary of the Treasury, under the Second Liberty Bond Act, to enter into agreements with foreign countries for the purpose of stabilizing exchange rates and obtaining foreign currencies and credits during the war and for two years after its termination. In addition, the moratorium on the war debts, initiated by President Hoover in 1931, was authorized by Congress to be dealt with by executive agreement.

In 1933 the United States entered into an executive agreement with the silver producing and silver consuming countries of the world which related to the purchase and sale of silver and which was designed to stabilize its price throughout the world. This agreement was signed by Senator Key Pittman on behalf of the United States and became binding when the President issued a ratifying proclamation.

Under the provisions of the Gold Reserve Act of 1934 relating to stabilization of the exchange value of the dollar, the United States has entered into a number of executive agreements. These agreements have all been made known to Congress and have in all instances met with its approval. Some of these stabilization agreements are bilateral, such as those with Brazil, China, Mexico, Ecuador, and Iceland. They provide, on a small scale, for exchange transactions and consultation quite similar to that provided for on a multilateral basis by the Articles of Agreement of the International Monetary Fund. Even more striking, however, is the similarity of the Fund proposal to the tripartite arrangement entered into as an executive agreement by the United States, Great Britain, and France in 1936. Within several months, Belgium, The Netherlands, and Switzerland adhered to this arrangement and it became, in effect, a six-country stabilization agreement.

The practice during the First World War of making loans to foreign countries pursuant to executive agreements has been repeated more recently. In 1939 an agreement was entered into with Brazil under which credit was made available for the purpose of aiding Brazil in the relaxation of its exchange restrictions on transactions with the United States, and which also provided credit with which Brazil could develop her transportation facilities and establish a central reserve bank.

A similar agreement was made with China in 1942 pursuant to an act of Congress which authorized the Administration to give financial aid to China in an aggregate of $500 million. In this connection, it is worth noting that the House and Senate reports on the legislation stated that

"It was thought that the Secretary of the Treasury, acting with the approval of the President, should be given the widest possible latitude in arranging for the financial aid to be extended."

There is also precedent for the acceptance of membership in international organizations by executive agreement. In 1934 Congress, by joint resolution, authorized the President to accept membership for the United States in the International Labor Organization, and pursuant to this authorization the United States became a member of that international body. The language of section 2 of S. 540 is practically identical with that used by Congress in the Act of June 19, 1934, in connection with the International Labor Organization.

It is apparent, therefore, that acceptance of membership in the International Monetary Fund and The International Bank for Reconstruction and Development by means of an executive agreement authorized by Congress would not only be constitutional, but, on the basis of past practice, would appear to be the more appropriate method for proceeding.