

TO:

1/12/45

Mr. White

This is a very good memorandum on the practice of entering into financial and economic arrangements through executive agreements rather than by treaties. I think it will be most helpful for you to read it before our meeting with Acheson.

MR. LUXFORD

January 11, 1945.

MEMORANDUM

A preliminary but major decision to be made in bringing about the participation of the United States in the International Monetary Fund and the Bank for Reconstruction and Development is the method of obtaining the approval of Congress. In view of statements of the President and the Secretary of the Treasury, the alternatives available are to submit the Bretton Woods Agreement as a treaty for ratification by two-thirds of the Senate or to obtain in a joint resolution authorization for the President to enter the Fund and the Bank by executive agreement. As will be shown, there is adequate authority for the President to accept the Fund and Bank agreements pursuant to a joint resolution of Congress.

Since the inauguration of our Constitutional government, the executive agreement has played a leading role in our international relations. Between 1789 and 1939 the Executive entered into and put into force more than 1,200 executive agreements with foreign countries without obtaining the advice and consent of two-thirds of the Senate. During the same period the United States entered into only about 200 treaties, under the Treaty power. The use of the executive agreement as a method of concluding international compacts has been upheld by the Supreme Court. Moreover, the Court has never held an executive agreement unconstitutional.

The executive arm of the Government has administratively interpreted its powers to include authority to effect executive agreements by actually exercising this authority more frequently than it has exercised its authority to conclude treaties with the consent of two-thirds of the Senate. This interpretation by the Executive of its powers, which has been confirmed by judicial pronouncements of the Supreme Court, has also been recognized by repeated Acts of Congress, giving the Executive antecedent authority to effect executive agreements.

The history of our economic relations with other countries discloses that ever since the Washington Administration, economic compacts have been concluded through the medium of the executive agreement. In

1/ McClure, International Executive Agreements (1941) 1.

2/ Ibid.

3/ United States v. Belmont, (1937) 301 U.S. 321; United States v. Pink, (1942) 315 U.S. 203; see U.S. v. Curtiss-Wright Corp., (1936) 299 U.S. 304, 310.

4/ McClure, International Executive Agreements, 221.

5/ Many of the instances where Congress has specifically authorized the Executive to enter into executive agreements are shown infra.

later years the emergence of executive agreements relating to financial and monetary problems has become increasingly noticeable. In fact, the executive agreement appears to have been the chief instrumentality for effecting compacts involving these subjects.^{6/} Consequently, if the participation of the United States in the Fund and the Bank is consummated by an executive agreement, it will not only have the support of tradition, but will be a continuation of established policy.

The history of some of the more important executive agreements relating to the international economic policies of the United States will be given in some detail in the following pages. Particular attention will be given to those of such agreements which relate to financial and monetary problems. It is believed that this history will demonstrate conclusively the validity of the executive agreement as the means for effecting participation of the United States in the Fund and the Bank.

I. Economic Agreements in General

The first use of the executive agreement as a method of economic cooperation with other countries, which appears to have been made since the Constitution went into effect, was the conclusion in 1792 of a postal agreement with Canada by Postmaster General Pickering of the Washington cabinet, pursuant to authority conferred by Act of Congress.^{7/} Since the conclusion of this first international postal agreement, the United States has entered more than three hundred postal arrangements with other nations, all of which were executive agreements, with the exception of three which were in the form of treaties.^{8/}

Another relatively early illustration of the use of the executive agreement in furtherance of the Government's international economic policies is the agreements negotiated with respect to trademarks pursuant to the Act of March 3, 1881,^{9/} wherein Congress enacted that "owners of trade marks used in commerce with foreign nations, or with the Indian tribes, provided such owners shall be domiciled in the United States, or located in any foreign country or tribes which by treaty, convention or law, affords similar privileges to citizens of the United States, may obtain registration of such trade marks" by complying with certain requirements. As a consequence of this Act, executive agreements in which the

^{6/} According to McClure, "the executive agreement has from the beginning played its part, in the aggregate, perhaps the leading part, in giving effect to the country's international economic policy." McClure, International Executive Agreements, 5.

^{7/} 1 Stat. 232, 239.

^{8/} McClure, International Executive Agreements, 6.

^{9/} 21 Stat. 502.

United States recognized the existence of the reciprocal conditions required by the statute were concluded with the Netherlands^{10/} and Switzerland^{11/} by exchange of diplomatic notes. Another illustration of an executive agreement with respect to trademarks is the agreement concluded with Great Britain in 1899 whereby it was stipulated that trademarks of British citizens registered in the United States would be protected against infringement by persons coming under the jurisdiction of the United States Consular Courts of Morocco and that similar protection would be given in the British Consular Courts of Morocco to trademarks of United States citizens registered in Great Britain.^{12/} This executive agreement was extended to patents by a subsequent executive agreement in 1907.^{13/}

A more modern example of the role which the executive agreement has assumed in the development of the international economic policies of the United States is the trade agreements effected under authority of the Trade Agreements Act of 1934. That Act provided in part:

"For the purpose of expanding foreign markets for the products of the United States * * * by regulating the admission of foreign goods into the United States in accordance with the characteristics and needs of various branches of American production so that foreign markets will be made available to those branches of American production which require and are capable of developing such outlets by affording corresponding market opportunities for foreign products in the United States, the President, whenever he finds as a fact that any existing duties or other import restrictions of the United States or any foreign country are unduly burdening and restricting the foreign trade of the United States and that the purpose above declared will be promoted by the means hereinafter specified, is authorized from time to time--

"(1) To enter into foreign trade agreements with foreign governments or instrumentalities thereof;"^{14/}

Under the authority conferred by the Act, the executive branch of the Government entered into reciprocal trade agreements of the type authorized thereby with at least twenty-seven foreign countries.^{15/}

^{10/} 2 Malloy, Treaties, Conventions, International Acts, Protocols and Agreements, (1910) 1265.

^{11/} Id. at 1769.

^{12/} Id. at 778.

^{13/} 1 Id. at 808.

^{14/} 48 Stat. 943.

^{15/} As an illustration, see the first trade agreement with Canada, Department of State, Executive Agreement Series No. 91, (1936).

These agreements were signed by Secretary of State Hull or other officials of the State Department, and were announced by the President in Presidential Proclamations. The most prominent feature of these agreements related to Customs duties on the exports of the parties to the agreements. Not only were there provisions for most-favored-nation treatment with respect to Customs duties on certain articles exported from one of the contracting countries to the other, but also for reciprocal treatment. The reciprocity provisions were generally to the effect that duties in excess of those specified in schedules annexed to the agreements would not be levied upon the articles listed in such schedules. These trade agreements constitute one of the leading historical precedents for the employment of the executive agreement pursuant to congressional authority and are called by McClure "the most notable example of high policy expressly conceived and designed to be executed by means of" such agreements.^{16/}

The present proposal to procure acceptance by the United States of membership in the Fund and the Bank by an executive agreement sponsored by prior authorization of Congress has for one of its most effective precedents the method by which the United States accepted membership in the International Labor Organization.

Part XIII of the Treaty of Versailles provided for the creation of an international labor organization composed of those countries having membership in the League of Nations. Part XIII of the Treaty was to operate as the Constitution of the organization created thereby.^{17/} One of the leading functions of the organization, as expressed in its Constitution, is to recommend to its members that they enact national legislation or that they ratify draft international conventions, with respect to the improvement of labor conditions. Another is the collection and distribution of information relating to conditions of labor and methods of improving them. Payment of the expenses of the organization, with the exception of traveling and subsistence expenses, is to be made from the general funds of the League of Nations. Although the United States was not originally a member of the International Labor Organization, since it was not a member of the League of Nations, Congress, by Joint Resolution of June 19, 1934, enacted that:

"* * * the President is hereby authorized to accept membership for the Government of the United States of America in the International Labor Organization, which, through its general conference of representatives of its members and through its International Labor Office, collects information concerning labor throughout the world and prepares international conventions for the consideration of member governments with a view to improving conditions of labor."^{18/}

^{16/} McClure, International Executive Agreements, 179.

^{17/} 4 Malloy, 5532.

^{18/} 48 Stat. 1182.

The International Labor Organization responded to the Joint Resolution by issuing through its conference a statement to the effect that the action of Congress was heartily welcomed and that the United States was thereby invited to accept membership in the organization, it being understood that the United States should not assume any obligations under the Covenant of the League of Nations. The statement further authorized the organization's governing body to settle with the Government of the United States the question of the latter's financial contribution.^{19/}

Pursuant to this invitation from the International Labor Organization, the President, under the authority previously delegated to him by Congress, accepted the invitation and his acceptance was transmitted to the Director of the International Labor Office (an adjunct of the International Labor Organization) at Geneva by a letter from the American Consul at Geneva.^{20/}

It will be noted that entry of the United States into the International Labor Organization by means of an executive agreement is an especially significant precedent for entry by the United States into the Fund and Bank by the same means, for two reasons: (1) a foundation of congressional authorization was laid for the agreement, and (2) the agreement effected participation by the United States in an international body composed of many member countries. An agreement whereby the United States accepts membership in the Fund and the Bank will be identical with the agreement relative to the International Labor Organization in these respects.

Striking examples of the use of executive agreements are the lend-lease and reciprocal aid agreements which were authorized under the Act of March 11, 1941, as amended.^{21/} Pursuant to that Act, agreements have been consummated with a majority of the United Nations and the mutual benefit which has resulted therefrom has been amply demonstrated.

These agreements are designed to give practical application to the desire of the United Nations to cooperate fully in the prosecution of the war. Similarly, the Fund and Bank agreements are designed to carry out, in a field which has long been the subject of executive agreements, the need for close cooperation among the United Nations when the war is over.

^{19/} Dept. of State Release, August 25, 1934.

^{20/} Ibid.

^{21/} U.S.C. title 22, sec. 411-423.

The most recent example of the use of the executive agreement as a means of cooperation with the United Nations in war and post-war problems was the execution, on November 9, 1943, of the agreement creating the United Nations Relief and Rehabilitation Administration.^{22/}

II. Financial and Monetary Agreements

The World War gave rise to numerous executive agreements in the financial field. Loans were made to the governments of allied countries under the authority of the First Liberty Bond Act of 1917.^{23/} That Act provided that "for the purpose of more effectively providing for the national security and defense and prosecuting the war by establishing credits in the United States for foreign governments", the Secretary of the Treasury, with the approval of the President, might purchase certain obligations of Allied governments and enter arrangements for establishing such credits and purchasing such obligations. The amount and manner of consummation of the intergovernmental loans are stated by McClure as follows:

"The series of war and reconstruction loans thus started eventually reached a principal sum of approximately nine and one-half billions of dollars. Their consummation was effected through a long series of executive agreements in the form of contracts concluded by the Treasury Department under presidential authority."^{24/}

The Congress also granted authority to make arrangements with foreign countries to stabilize foreign exchange and to obtain foreign currencies in Section 4 of the Supplement to the Second Liberty Bond Act,^{25/} which provided:

"That the Secretary of the Treasury may, during the war and for two years after its termination make arrangements in or with foreign countries to stabilize the foreign exchanges and to obtain foreign currencies and credits in such currencies, and he may use any such credits and foreign currencies for the purpose of stabilizing or rectifying the foreign exchanges, and he may designate depositories in the foreign countries with which may be deposited as he may determine all or any part of the avails of any foreign credits or foreign currencies."

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- ^{22/} Dept. of State, Executive Agreement Series, No. 352 (1943)
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- ^{23/} 40 Stat. 35.
- ^{24/} McClure, International Executive Agreements, 105; see also (1921) Rep. Sec'y. Treas. 32 et seq.
- ^{25/} 40 Stat. 965, 966.

Several such stabilization agreements, including agreements with Argentina, Bolivia and Peru, were negotiated by the Treasury Department under the authority of this Act and were consummated by exchanges of notes between the State Department and the representatives in the United States of those governments.

Even before the enactment of the Supplement to the Second Liberty Bond Act, agreements had been entered into with the Spanish Government and with two Spanish banks by Mr. Norman H. Davis as "United States Special Financial Delegate", which provided for obtaining exchange of that country and for deferment of payment therefor until dollars were available.

The executive agreements establishing the loans to Allied governments during the World War were followed after the close of the war by executive agreements for the adjustment, and the extension of time of payment, of the loans. Congress authorized the executive branch of the Government to enter the appropriate agreements by the Act of February 9, 1922 which provided for the creation of the World War Foreign Debt Commission, consisting of the Secretary of the Treasury and four (later seven) other members to be appointed by the President with the advice and consent of the Senate. This Act empowered the commission, subject to Presidential approval, "to refund or convert, and to extend the time of payment of the principal or the interest, or both, of any obligation of any foreign government now held by the United States of America, or any obligation of any foreign government hereafter received . . . arising out of the World War, into bonds or other obligations of such foreign government in substitution for the bonds or other obligations of such government now or hereafter held by the United States of America, in such form and of such terms, . . . date or dates of maturity, and rate or rates of interest, and with such security, if any, as shall be deemed for the best interests of the United States of America . . ." ^{26/} As a consequence of this legislation, executive agreements were effected with thirteen foreign countries providing for various adjustments and extensions of maturity of the debts of those countries to the United States. ^{27/} These agreements were subsequently approved by Acts of Congress. ^{28/}

A further use of the executive agreement in relation to the World War loans was made in the Hoover Administration. Confronted with the international economic depression, President Hoover on June 20, 1931, proposed a one-year moratorium on inter-governmental World War debts owing to the United States. ^{29/} This proposal had been accepted by all

^{26/} 42 Stat. 363. This statute was amended by the Act of February 28, 1923, 42 Stat. 1325.

^{27/} See, for example, the agreement with France. Combined Annual Reports of the World War Foreign Debt Commission (1927) 257.

^{28/} 42 Stat. 1325; 43 Stat. 20, 136, 719, 720; 44 Stat. 329, 376, 377, 378, 385, 386; 45 Stat. 399; 46 Stat. 48.

^{29/} Dept. of State Release, June 27, 1931.

of the important creditor nations by July 6, 1931.^{30/} Congress later by Joint Resolution^{31/} authorized the Secretary of the Treasury, with the approval of the President, to make agreements on behalf of the United States with the governments of nations indebted to the United States for the postponement of payments due from those countries during the fiscal year beginning July 1, 1931, and the negotiation of the authorized executive agreements followed.^{32/}

One of the first executive agreements of the present Administration which involved international financial and monetary arrangements was the Silver Agreement of 1933, which was entered into by the United States, India, China, Spain, Mexico, Australia, Canada and Peru.^{33/} This agreement was drawn up pursuant to the recommendations of a sub-commission of the Monetary and Financial Commission of the Monetary and Economic Conference held in London in July, 1933. It provided for the purchase of, and restrictions on the sale of, silver by the signatory powers, and its purpose was to stabilize the price of silver throughout the world. This agreement was signed by Senator Pitman on behalf of the United States and it became binding on the United States when the President issued a ratifying proclamation released on December 21, 1933.^{34/}

One of the closest analogies to the Fund Agreement exists in the Tripartite Agreement, declared by the United States, Great Britain and France, on September 25, 1936, which had for its purpose the maintenance of equilibrium in international exchange and the avoidance of the creation of any disturbance by action of any one of the participants.^{35/} In connection with that agreement, the United States also announced on October 13, 1936 that it would "sell gold for immediate export to, or earmark for the account of, the Exchange Equalization or Stabilization Funds of those countries whose funds likewise are offering to sell gold to the United States."^{36/} On the same day, the Secretary of the Treasury announced that Great Britain and France had complied with those conditions.^{37/} On November 24, 1936 the Secretary of the Treasury announced the adherence of Belgium, the Netherlands and Switzerland to the Tripartite Agreement^{38/} and named them as having complied with the conditions specified in the press release of October 13, 1936, as supplemented, for the purchase of gold from the United States.^{39/}

^{30/} Dept. of State Release, July 11, 1931.

^{31/} 47 Stat. 3.

^{32/} McClure, International Executive Agreements, 120.

^{33/} Dept. of State, Executive Agreement Series No. 63 (1934).

^{34/} Dept. of State Release, December 30, 1933.

^{35/} Bank for International Settlements, Annual Report, 7th, April 1, 1936--March 31, 1937, Annex vii.

^{36/} Treasury Dept. Release No. 8-66, Oct. 13, 1936.

^{37/} Treasury Dept. Release No. 8-67, Oct. 13, 1936.

^{38/} Treasury Dept. Release No. 8-93, Nov. 24, 1936.

^{39/} Treasury Dept. Release No. 8-95, Nov. 24, 1936.

In addition to the Tripartite Agreement referred to above, individual stabilization agreements have been entered into at various times with the Governments of Brazil,⁴⁰ China,⁴¹ Mexico,⁴² Ecuador⁴³ and Iceland.⁴⁴ These agreements have been signed with the approval of the President by the Secretary of the Treasury.

The authority of the Secretary of the Treasury, with the approval of the President, to execute the Tripartite and other stabilization agreements was contained in Section 10(a) of the Gold Reserve Act of 1934, which provided in pertinent part:

"For the purpose of stabilizing the exchange value of the dollar, the Secretary of the Treasury, with the approval of the President, directly or through such agencies as he may designate, is authorized for the account of the Fund established in this section, to deal in gold and foreign exchange and such other instruments of credit and securities as he may deem necessary to carry out the purpose of this section * * *."⁴⁵

The powers contained in Section 10 were renewed in 1937,⁴⁶ 1939,⁴⁷ 1941⁴⁸ and 1943.⁴⁹ Each time the Act was up for renewal, the attention of Congress was called to the fact that stabilization agreements had been made, and Congress by renewing the powers, approved the execution of the agreements.

One of the more recent international economic and financial arrangements effected by executive agreement was the agreement with Brazil evidenced by an exchange of notes on March 8 and 9, 1939 between the Brazilian Minister of Foreign Affairs on the one hand and the Secretary of State, the Secretary of the Treasury and the President of the Export-Import Bank on the other.⁵⁰ The pertinent portions of this executive agreement provided for (1) the establishment by the Export-Import Bank of acceptance credits for Banco de Brasil in order to assist the Brazilian government in the discontinuance of official control over foreign exchange transactions in so far as such control affected commercial relations between the United States and Brazil; (2) the extension of credits by the Export-Import Bank to enable the Brazilian government and Banco de Brasil to acquire exchange for the purchase in the United States of supplies

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- ⁴⁰/ (1938) Rep. Sec'y Treas. 21.
 - ⁴¹/ *Ibid.*; (1941) Rep. Sec'y Treas. 52.
 - ⁴²/ (1942) Rep. Sec'y Treas. 42.
 - ⁴³/ *Ibid.*
 - ⁴⁴/ *Ibid.*
 - ⁴⁵/ 48 Stat. 341.
 - ⁴⁶/ 50 Stat. 4.
 - ⁴⁷/ 53 Stat. 998.
 - ⁴⁸/ 55 Stat. 395.
 - ⁴⁹/ 57 Stat. 68.
 - ⁵⁰/ Dept. of State Release, Mar. 11, 1939.

necessary to the development of Brazil's transportation facilities and "her other domestic undertakings designed to increase the productive capacity of the Brazilian nation and her trade with the United States"; (3) the establishment by Brazil of a Central Reserve Bank and the extension by the United States of advisory and credit facilities in connection with such establishment; and (4) the loan of experts to Brazil to assist in development of the latter's agriculture.

Another recent example of an international financial agreement entered into by the Executive Department under congressional authorization is the \$500,000,000 financial aid agreement with China of March 21, 1942. This Agreement was authorized by the Act of February 7, 1942, ⁵¹ which gave the Secretary of the Treasury, with approval of the President, broad authority to "loan or extend credit or give other financial aid to China in an amount not to exceed in the aggregate \$500,000,000 at such time or times and upon such terms and conditions as the Secretary of the Treasury with the approval of the President shall deem in the interest of the United States."

Both the House and Senate reports ⁵² state:

"It was thought desirable 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."

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Thus it may be concluded that economic agreements in general and financial and monetary agreements in particular, have customarily been concluded by executive agreement. Accordingly, the most appropriate method for accepting membership in the Fund and the Bank is by executive agreement pursuant to authority conferred upon the President by Congress.

⁵¹ 56 Stat. 83.
⁵² H.R. 1739; S. 1016, 77th Cong.