

COPY

April 20, 1944

TO: Mr. Luxford

FROM: E. Arnold

Re: Methods of presenting International Monetary Fund to Congress for approval.

Approval by Congress of participation by the United States in the International Monetary Fund might be sought, in the light of actual precedents, by:

- (1) Presenting the convention as a treaty for ratification by the Senate;
- (2) Seeking the introduction of a resolution or bill authorizing the President to accept the convention as an executive agreement;
- (3) Seeking the introduction of a resolution or bill concurring in the President's execution of the convention as an executive agreement; and
- (4) Seeking the introduction of a resolution or bill to enact the resolution necessary to the effectuation of the convention as an executive agreement.

Each of these methods is discussed below, together with the more theoretical question of the distinction between a treaty and an executive agreement.

Treaty

The convention of the International Monetary Fund undoubtedly could be presented as a treaty. The precedent is so obvious that I have not investigated any cases in detail. The only point which appears to me of interest is that probably the American participation in the fund could not be completely effectuated merely by ratification of the convention in treaty form. Consummation would require appropriation of money and perhaps other legislative acts which, at least by usage, are not effectuated by a treaty itself but must be carried out by ordinary enactment of Congress.^{1/}

^{1/} McClure, International Executive Agreements (1941) pp. 231, et seq., 348.

Resolution or Bill Authorizing Making of
Executive Agreement

In several well-known instances, the execution of executive agreements has been authorized in advance by joint resolution or act of Congress. The oldest example is postal conventions, which were first authorized during the administration of President Washington.^{2/} The practice was confirmed, essentially in the form in which it exists today, by an act in 1872.^{3/} Under this authority, the Postmaster General accepted, without the approval of the Senate, the "treaty" establishing a Universal Postal Union, which was one of the first international organizations of any consequence joined by the United States. The "treaty", which in subsequent revisions has come to be called a convention, elaborately regulates international postal relations.

A similar approach was used regarding the well-known trade agreements for the reduction of tariff barriers.^{4/}

The third outstanding example is the joint resolution of June 19, 1934, authorizing the President to accept membership in the International Labor Organization.^{5/} This example is perhaps more appropriate to the International Stabilization Fund than the others discussed under the present heading since only a single, specific convention was involved.

It must be understood, however, that under this method, acts of Congress to provide the appropriations and other provisions for effectuating the convention would still be needed exactly as in the case of a treaty.

Resolution or Bill Concurring in Execution
of Convention as Executive Agreement

A resolution concurring in the President's execution of an executive agreement was used with respect to the United Nations Relief and Rehabilitation Administration. The President signed the "Agreement"

^{2/} McClure, op. cit. supra, pp. 38-40.

^{3/} Sec. 398 of Rev. Stat. of 1873, as amended (U.S.C. title 5, sec. 372).

^{4/} Act of June 12, 1934, 48 Stat. 943, as amended (U.S.C. title 19, secs. 1351-1354).

^{5/} 48 Stat. 1182.

for the establishment of the Administration on November 9, 1943 and in 1944 there was passed a joint resolution 6/ authorizing the appropriation of such sums as Congress might determine from time to time to be appropriate for participation by the United States in the work of the Administration. The purpose of the authorization was plainly to give Congressional approval to the President's execution of the agreement. I have not found any case in which Congress was asked to adopt a resolution merely approving an agreement without any purported further effect, but undoubtedly it would be entirely feasible as a matter of form to advance a proposed resolution to this effect.

Even here it will be noted that the real effectuation of the agreement would take place only through the actual appropriation of funds by an act of Congress.

Resolution or Bill Enacting Legislation to Effectuate Convention

Although I have not found a definite example of Congressional approval of an executive agreement merely through enactment of legislation to effectuate the agreement, it seems clear that the procedure would be entirely valid. Indeed, it is not sharply distinguishable from the method followed in the case of UNRRA. Since a large amount of legislation will probably be needed to effectuate the fund, it will be important, in any event, to give careful attention to the most effective way of coordinating the details of effectuation with the obtaining of general Congressional approval of the fund. I am inclined to think that it would be desirable to obtain the general approval first through some such procedure as that used in the UNRRA or International Labor Organization cases and then present the detailed legislation in as integrated a fashion as possible, having in mind that it covers a number of steps which are frequently treated separately in ordinary Congressional practice.

Distinction between Treaty and Executive Agreement

The definitional distinction between a treaty and an executive agreement is extremely shadowy.^{7/} Likewise, the distinction in effect is not at all clear.^{8/} For present purposes I think only two questions are important; first, whether any category of international agreements must be regarded as a treaty in the sense that they are ineffective unless ratified by two-thirds of the Senate and, second, whether an

^{6/} Public, No. 267, 78th Congress.

^{7/} Memorandum of October 18, 1943 of Mr. Aarons to Mr. Brenner, covering draft of convention.

^{8/} McClure, op. cit. supra, pp. 5, et seq., 72, 77.

executive agreement approved by Congress is the "law of the land" in the same way as a treaty.

The few decisions which consider the validity of executive agreements might possibly be taken as indicating a view that there are international agreements which can be effective only as treaties ratified by a two-thirds vote of the Senate. Thus, in United States v. Belmont, (1937) 301 U.S. 324, it was said with respect to executive agreements made in connection with the recognition of Russia (p. 330):

"***The assignment and the agreements in connection therewith did not, as in the case of treaties, as that term is used in the treaty making clause of the Constitution (Art. II, § 2), require the advice and consent of the Senate.

"A treaty signifies 'a compact made between two or more independent nations with a view to the public welfare.' Altman & Co. v. United States, 224 U.S. 583, 600. But an international compact, as this was, is not always a treaty which requires the participation of the Senate. There are many such compacts, of which a protocol, a modus vivendi, a postal convention, and agreements like that now under consideration are illustrations.***"9/

McClure, however, takes the position that there is no such distinction and that whatever can be done by treaty can also be accomplished by executive agreement, provided that Congress concurs through an ordinary resolution or bill enacting legislation necessary to effectuate the agreement.^{10/} In any event, the express declaration of the Supreme Court that the International Postal Convention is not a treaty requiring ratification by the Senate seems to offer ample precedent for the execution of the convention of the International Monetary Fund as an executive agreement.^{11/} Whether the Senate would insist that a treaty be used, as it tended to do in the Connally Resolution on international cooperation^{12/} is of course another matter.

9/ See also United States v. Pink, (1942) 315 U.S. 203, 229; Altman & Co. v. United States, (1912) 224 U.S. 583, 600.

10/ McClure, op. cit. supra, p. 363.

11/ United States v. Belmont, supra; United States v. Pink, supra; cf. Gotzhausen v. Nazro, (1883) 107 U.S. 215.

12/ Senate Resolution 192, 89 Cong. Rec., Nov. 5, 1943, at 9329.

There is no doubt today that an executive agreement is the "law of the land" in whatever field is constitutionally open to the operation of executive agreements.^{13/} If Congress is requested to register its approval of the fund's convention, it will not be necessary to inquire what are the limits within which the executive agreement standing by itself may operate as law, since aspects of the agreement which may exceed the limits will be validated by the Congressional enactment.

^{13/} United States v. Pink, supra; United States v. Belmont, supra;
cf. United States v. Curtis Wright Export Corp., (1936) 299 U.S.
304.