Bretton Woods - Legal Memo.
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Sept. 29, 1943

Mr. White

Mr. Luxford

Since the "sovereignty" cliche is being tossed in opposition to every proposal on the part of the United States in the field of post war international cooperation, I have had Brenner of this office prepare a memorandum discussing the matter from a legal point of view.

You may find this of some interest and as background for the issue should it be raised on the Hill at the Secretary's next appearance.

Copies to: Mr. Paul
Mr. O'Connell
Mr. Pehle
Mr. E. M. Bernstein

Attach.

COPY

MEMORANDUM

September 25, 1943

The proposal during recent months of a number of plans designed to improve international relations in the post-war world has resulted in considerable discussion of the nature of the obligations which will be assumed by nations participating in these and similar plans. There is an increasing tendency to attempt a solution of global problems by united action on the part of all the major countries of the world rather than through individual or bilateral action. This approach necessarily assumes that many multilateral treaties will be entered into, each covering a specific matter of universal concern. Some of the proposals envisage the creation of international organizations each charged with the administration of a particular field of international contacts. One example is the proposal for an International Stabilization Fund.

The scope of the proposals, particularly the creation of important international organizations, has raised in the minds of many people the question of whether the execution and performance of the contemplated treaties involves a "surrender of sovereignty" by the participating governments. Since this question is directed at one of the basic principles on which the framework of much post-war work is being built, it is important that it should be carefully analyzed at this time.

The concept of sovereignty has been a troublesome subject in the writings of many publicists in the field of international law. This difficulty is due, in part, to the conflict between the classic definition of sovereignty and the actual practice of nations whose sovereignty is unquestionable. The classic definition of a sovereign nation which has prevailed since the time of Grotius is that it is one whose actions are not subject to the legal control of another. 1/ This statement becomes inadequate when applied to the actual practice of nations unless "legal control of another" means only that control exercised directly by one nation without the consent of the other. Otherwise sovereignty is nothing more than an abstract idea and could exist only in a world where there were no international frictions or collisions of any nature whatsoever. It is from the unreal construction of this definition, which fails to take the essential limitations into consideration, that the concept of the "surrender of sovereignty" has evolved.

1/ Hugo Grotius (1646), De Jure Belli ac Pacis Libri Tres, p. 66.

Obviously, if sovereignty necessarily includes an absolute freedom of action in every field, no nation can handle its international relations through cooperation with other nations, individually or in groups, unless it is willing to surrender a part of its sovereignty. The theory thus embodies an additional concept that sovereignty is divisible. Not only must it be divisible, but it must be capable of being broken into innumerable pieces whose size and importance are extremely varied. 2/

Those who are concerned about the possibility of sovereignty being surrendered overlook the logical conclusion which would follow the attempt of any nation to maintain its sovereignty, in the unlimited classical sense, unimpaired. The treaty as a vehicle for the solution of international problems is not a recent development. It has been used for centuries--practically every nation in the world having entered into such agreements for many purposes--and yet no nation after entering into a treaty of any importance maintains its sovereignty according to the unlimited classic definition. Since a treaty binds it to take a particular course of action, either positive or negative, its freedom to act is circumscribed to the extent of the area covered by the treaty. Nor is this obligation one which a nation may observe or abrogate as it pleases. It is true that there is no power which can enforce the obligations of a treaty which one party decides to abrogate, but this does not mean that there is no legal obligation. The fact that an obligation can not be enforced against a nation without its consent is a matter of procedure and does not affect the legal status of the obligation. 3/ Thus it seems clear that adherance to the unlimited classic definition of sovereignty leads to the inevitable conclusion that sovereignty is constantly and consistently being surrendered by every nation in the world. Such a conclusion is an obvious absurdity and one which has clearly been rejected by the Supreme Court of the United States when, in Steward Machine Co. v. Davis (1937), 301, U.S. 548, 597, it said, "Even sovereigns may contract without derogating from their sovereignty."

To cite all the examples of past and present treaties which would involve a "surrender of sovereignty" in this sense, would be a tedious and useless task. In fact, it is difficult to imagine a treaty of any importance which would not result in one party or both having something less than absolute freedom of action in every field. Accordingly, it should suffice to describe several of the best known classes of treaties. First, there are disarmament treaties which restrict the right of the participants in providing arms for their own defense. Next, there are customs unions which reduce sources of income and prevent the erection of tariff barriers for the protection of domestic producers. Another example is the trade agreement or commercial treaty that, among other things, requires the provision of most-favored-nation treatment. And finally, there are treaties binding the contracting nations not to fortify particular borders,

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2/ W. Sukiennicki (1927), La Souverainete des Etat en Droit International Moderne, p. 87 ff.

3/ Perry v. United States (1935), 294 U.S. 330, 353.

thus restricting the use which each country can make of its own territory. The types chosen have been selected because they are prevalent today and not because they are particularly convincing. However, they do indicate clearly that the existence of treaties is inconsistent with the unlimited classical concept of sovereignty.

All this confusion is unnecessary if a direct approach is taken to the problems involved in international relations. The unlimited classic definition of sovereignty serves no useful purpose. It is not the basis upon which any rules of international conduct are founded and it fails to fit not only the existing status of independent nations but the status which such nations have enjoyed since the doctrine was first expounded. Probably the first man to expound the doctrine was Grotius. First, he stated the rule and then he proceeded to give striking examples of sovereign nations whose status failed to meet the tests of his own definition as it was later interpreted by some students of international law. Grotius not only recognizes that the existence of a treaty between two nations does not diminish or surrender the sovereignty of either nation, but he points out that even in the case of an alliance or treaty which gives one contracting party a permanent advantage over the other, the less favored nation retains its sovereignty so long as it remains independent. According to him, the same rule applies to nations paying tribute. 4/

Some later publicists followed the definition propounded by Grotius, but failed to consider his application of the rule. 5/ A synthesis of the rule and its application would lead to a definition quite different from that which is commonly adopted. A sovereign nation would be defined as a nation which is not subject, without its consent, to direct restraints by other nations upon its activities. Such a definition connotes independence, but does not make impossible the orderly arrangement of international affairs through treaties and other agreements. In addition, it recognizes that the rules of conduct agreed upon in a treaty are not imposed by a higher authority than that of the parties to the

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4/ Hugo Grotius, op. cit. supra, pp. 66-69

5/ Westlake (1894), International Law, p. 87
I Lauterpacht (1937), Oppenheim's International Law, p. 117.
Taylor (1901), International Public Law, p. 423.
Eagleton (1942), Organization of the Community of Nations, 36 American Journal of International Law pp. 229, 234.
Mackenzie (1939), American Contributions to International Law, Proceedings of the American Society of International Law, pp. 104, 105.

treaty but are established by the nations themselves in order to facilitate the conduct of their mutual affairs, and are dependent for their enforcement upon the good faith of the contracting nations. 6/

Defining sovereignty so as to permit the making of international treaties and agreements without giving up any of the attributes of sovereignty, recognizes that the essence of national sovereignty is similar to that of individual liberty. Free men must establish rules governing their conduct or they will find it impossible to live together. Similarly, every nation must conduct its external affairs in the same world in which other nations have important rights and interests. The meaning of individual liberty in all civilized society is liberty exercised in a manner which will not interfere with the liberty of others, with the functioning of a free and orderly society, or with the existence of a strong and effective government. If these qualifications on the concept of liberty are considered as surrenders of liberty, then real freedom would mean anarchy. Similarly, the classic definition of sovereignty would mean world chaos if nations were concerned with the preservation of their sovereignty as so defined.

Having arrived at a definition of sovereignty which adequately covers the existing status of free and independent nations, it is necessary to examine the proposal for an International Stabilization Fund in the light of that definition. In brief, each member country would undertake the following: 7/

(1) To maintain rates of exchange established by the Fund:
(2) To refrain from exchange dealings which would undermine stability of rates established by the Fund:
(3) To abandon restrictions over foreign exchange transactions when, in its own judgment, conditions permit such action;
(4) To refrain from establishing new restrictions on foreign exchange transactions without the Fund's approval;
(5) To keep the holdings of the Fund in its currency free from restrictions;
(6) To cooperate with other member countries in regulating international movements of capital;
(7) To avoid new bilateral clearing arrangements and multiple currency practices;

6/ Taylor v. Morton (1855 C.Ct. Mass.) Fed. Cas. 13, 799;
Whitney v. Robertson (1888) 124 U.S. 190;
The Chinese Exclusion Case (1889) 130 U.S. 581;
The Cherokee Tobacco (1870) 11 Wall. 616;
Rainey v. United States (1914) 232 U.S. 310.

7/ Preliminary Draft Outline of a Proposal for an International Stabilization Fund of the United and Associated Nations, Revised July 10, 1943.

(8) To consider the views of the Fund on policies which affect the balance of payments of other countries;
(9) To furnish the Fund with information and reports; and
(10) To adopt legislation to carry out its undertakings to the Fund.

The last of these requirements is the principle one which has raised doubts in the minds of those who think in terms of sovereignty being surrendered. Can it be inferred from the question that a nation with whom the United States makes a treaty has no right to expect and require its stipulations to be adhered to? If this inference is not justifiable, and it appears to be clearly unsupportable, then the tenth requirement adds nothing to the proposal since each nation would assume the same responsibility even in the absence of an express provision. 8/

As for the other requirements, little discussion is required. Obviously no question would arise if any one of them were embodied in a treaty between the United States and one other nation. Nor would there be any doubt about any one of them appearing in a multilateral treaty to which the United States were a party. Accordingly, there should not be any serious query as to the propriety of all of them being included in an agreement entered into by all of the major nations of the world.

Thus it appears that, applying the real meaning of sovereignty, participation in international organizations, such as the proposed International Stabilization Fund, will not be a "surrender of sovereignty". On the contrary, participation will be the exercise of the sovereign right of every independent nation to bind itself to a given course of action in a specified field of international contacts in order to establish satisfactory international relations.

8/ Taylor v. Morton (C.Ct. Mass. 1855) Fed. Case 13, 799.