TREASURY DEPARTMENT

INTER OFFICE COMMUNICATION

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TO Mr. Luxford

FROM Messrs. Minskoff and Brenner

The question has been raised whether there is legal authority for the executive to enter into an agreement pursuant to which the United States will participate in the proposed International Stabilization Fund, and whether the quota of the United States can be contributed to that Fund by a transfer to it of all or part of the inactive $1,800,000,000 of gold presently held in the United States Stabilization Fund.

In order to set the problem in its proper perspective, it might be well to describe the general character and purpose of the International Stabilization Fund and to set forth at length the appropriate provisions of the United States statute which deals with the manner in which, and the purposes for which, the United States Fund may be used.

The International Stabilization Fund has been proposed as an agency whose function will be to deal with international economic and monetary problems with a view toward achieving monetary stability and facilitating the balanced growth of international trade. This Fund will be created by a group of member countries who will participate in the Fund by making payments of gold, currency and Government obligations. The expressed objective of the Fund and its principal raison d'etre will be to stabilize the values of the currencies of member countries with respect to each other. The guiding principle in fixing the rates at which the Fund will buy and sell the currency of one member for that of another will be stability in exchange relationships.

Section 10 of the Gold Reserve Act of 1934, which creates and governs the use of the United States Stabilization Fund, provides in part:

"(a) 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. An annual audit of such fund shall be made and a report thereof submitted to the President.

"(b) To enable the Secretary of the Treasury to carry out the provisions of this section there is hereby appropriated, out of the receipts which are directed to be covered into the Treasury under section 7 hereof, the sum of $2,000,000,000, which sum when available shall be deposited with the Treasurer of the United States in a stabilization fund (hereinafter called the "fund") under the exclusive control of the Secretary of the Treasury, with the approval of the President, whose decisions shall be final and not be subject to review by any other officer of the United States. The fund shall be available for expenditure, under the direction of the Secretary of the Treasury and in his discretion, for any purpose in connection with carrying out the provisions of this section, including the investment and reinvestment in direct obligations of the United States of any portions of the fund which the Secretary of the Treasury, with the approval of the President, may from time to time determine are not currently required for stabilizing the exchange value of the dollar. The proceeds of all sales and investments and all earnings and interest accruing under the operations of this section shall be paid into the fund and shall be available for the purposes of the fund."

At the outset it will be observed that the objective sought to be attained by each of the Stabilization Funds is practically identical. The International Stabilization Fund deals with this objective on a broad and inclusive basis, whereas, the United States Stabilization Fund has been operating in the same field on a less comprehensive scale. Instead of stabilizing the exchange value of the United States dollar with respect to a particular country's currency, the proposed International Stabilization Fund contemplates stabilizing the exchange value of the dollar with respect to the currencies of all member countries.

The authority of the Secretary of the Treasury to enter into international agreements for the purpose of carrying out the objectives of the statute is well established. Agreements designed to stabilize the exchange value of the dollar have been made time and again by the Secretary with individual foreign governments since the statute was originally enacted. Each time that the Congress considered continuing the powers conferred by Section 10 its attention was called to the fact that such agreements had been made.

It will be noted that the statute itself is barren of any reference to the use of such agreements as a vehicle for attaining the expressed objective. Obviously, the Congress in approving the action taken

recognized the inherent right of the Secretary to utilize this medium in the performance of his duties. This is made particularly clear by virtue of the fact that on the occasions when it considered continuing the powers under Section 10, the Congress did not deem it necessary to amend the statute to include the power to execute international agreements.*

It is manifest that the agreement pursuant to which this country participates in the proposed International Stabilization Fund will constitute an international agreement of the type calculated to carry out the purpose of the statute and that, therefore, it is the kind of agreement into which the executive is clearly authorized to enter.

In order to fulfill the obligations of membership in the Fund it will be necessary to pay the quota allotted to the United States. The plenary powers over the U.S. Fund given to the Secretary of the Treasury for the purpose of carrying out the provisions of this section seem fully adequate to enable him to transfer, with the approval of the President, all or any portion of it to the proposed International Stabilization Fund. Although the section is restrictive with regard to the purpose of the Fund, there is clearly no limitation on the methods available for accomplishing that purpose. If the expenditure is for the purpose of stabilizing the exchange value of the dollar, the choice of a particular vehicle to be utilized by the Secretary of the Treasury would appear to be within his discretion.

The language of section 10(b) unambiguously places within the discretion of the Secretary of the Treasury the expenditure of the Fund for the designated purposes. Accordingly, the Secretary can dispose of the assets held in the Stabilization Fund in any manner so long as he does so for the purpose of stabilizing the exchange value of the dollar. That the transfer of such assets to the International Stabilization Fund is a disposition of them for this purpose is too palpable to justify extended discussion. Since the assets could be irretrievably disposed of for this purpose, they can, of course, be made available upon terms looking toward their eventual return.

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* Moreover, it has been stated that the executive power over foreign relations is "delicate, plenary and exclusive". U. S. v. Curtis-Wright Export Corp. (1936) 299 U.S. 304. An example of a similar exercise of this authority may be found in the agreement entered into in 1933, by the principal countries producing and using silver, which obligated them to absorb a part of their own production for a period of four years. The President entered into this agreement to effectuate one of the purposes of Section 43(b)(2) of the Act of May 12, 1933. It is significant that although that Act specifically refers to international agreements, it does so with respect to a purpose other than the one for which this particular agreement was executed.

There is nothing in the foregoing which extends by interpretation the powers that Congress intended should be vested in the Secretary of the Treasury with respect to the operation of the Stabilization Fund. Statements made in the course of the debates concerning the Secretary's authority in administering the stabilization fund reveal that the Congress was fully aware of the almost limitless discretion conferred upon him with respect to the operation of the fund. For example, when the original act was under discussion, Representative Williams said, (1934) 78 Cong. Rec. 1016:

> "The administration of this fund is placed in the hands of the Treasury Department. The manner in which the fund will be used is entirely in the discretion of the Secretary of the Treasury, and the policy necessarily cannot be announced to the world. It is the intention that the fund shall be so used as to stabilize the American dollar in international exchange and protect our commerce from the assaults of like funds in the hands of other nations."

In 1937 a bill to extend the period of operation of Section 10 was under consideration and Representative Hancock made the following observation, (1937) 81 Cong. Rec. 302:

> "There is not much dispute among the committee members as to the desirability of a stabilization fund. There is, however, a very serious disagreement as to the manner of its administration. Those of you who were here 3 years ago will recall that there was very strong opposition to giving one man the vast power this act gives the Secretary of the Treasury by putting $2,000,000,000 entirely within his control, * * *."

When in 1939, the question of understanding this section was again before the Congress, Senator Thomas of Oklahoma remarked, (1939) 84 Cong. Rec. 7208:

> "The third provision in the bill relates to the stabilization fund. Congress heretofore took $2,000,000,000 of the $2,800,000,000 profit made from the former devaluation and created it into a stabilization fund, and placed that fund in the hands of the Secretary of the Treasury for him to use as he sees proper in stabilizing the American dollar in terms of gold."

It is submitted, in view of the foregoing, that there is legal authority for the United States to fulfill its quota entitling it to participation in the International Stabilization Fund by transferring to it all or part of the inactive $1,800,000,000 of gold presently held in the United States Stabilization Fund.

Although there can be little question that there is legal authority in the executive to enter into an agreement of the type described above and to make necessary payments from the United States Stabilization Fund, there are certain caveats which should be indicated with respect to the following provisions contained in the preliminary draft (V*) of the proposal for an International Stabilization Fund:

(1) The obligation not to impose restrictions upon the use of the Fund's dollar currency balances (Part II, paragraph 1). This commits the Government to the maintenance of a particular policy during the entire period of its membership. However, it would appear that the executive is authorized to bind the Government only for the period during which it has been empowered to stabilize the exchange value of the dollar.

(2) The obligation to offer to sell to the Fund all foreign exchange and gold acquired in excess of the amount possessed when the United States joined the Fund (Part II, paragraph 8). This, too, is a commitment which might be operative after the expiration of the authority granted by section 10. However, this objection would appear to be overcome with respect to gold by the existence of authority, permanent in form, to sell gold, at home and abroad, upon such terms and conditions as are deemed most advantageous to the public interest (Section 9 of the Gold Reserve Act of 1934). The problem with regard to sales of foreign exchange would seem to be academic since the United States will no longer be in a position to acquire exchange if its powers to dispose of such exchange expire.

(3) The power of the Fund to levy upon the United States a pro rata share of the expenses of operating the Fund (Part II, paragraph 15). This is a commitment to pay assessments which may be levied after the expiration of Section 10. It may be possible to obviate this difficulty by working out a method of presently earmarking a portion of the United States Stabilization Fund.

(4) The obligation to pay to the Fund the amount by which the value of the United States currency held by the Fund is decreased as a result of a reduction of the weight of the gold content of the dollar. (Part III, paragraphs 2 and 4). This problem does not arise under existing law but may arise in the event that both the devaluation power (Sec. 43(b)(2) of the Act of May 12, 1933, as amended) and the stabilization power are permitted to lapse. Under present law, the executive could refrain from exercising the authority to devalue or, if such authority were exercised by the executive or by Congress, the United States Stabilization Fund

could be used to make the necessary payment. In the absence of both these authorities, the gold content of the dollar might be reduced by Congress and there would be no appropriation available to compensate the Fund. Thus, the United States will have been committed to make a payment which it will be unable to make without further legislation. Although an attempt might be made to earmark a portion of the United States Stabilization Fund for this purpose, as suggested in (3) above, it is almost impossible to make a reasonable estimate of the amount which should be set aside.

(5) The obligation to maintain exchange rates established by the Fund and to alter them only with the consent of the Fund. (Part V, paragraph 1). As in (1) above there is considerable doubt whether the Government can be bound by the executive for a period longer than that during which the executive has been empowered so to act.

(6) The obligation not to impose additional restrictions on foreign exchange transactions (Part V, paragraph 2). See (5) above.

Apart from the question of whether there is authority to enter into such an agreement and whether there is authority to pay the quota of the United States to the Fund, there should also be examined the legal problems which may arise should the powers conferred by section 10 expire after the United States has become a member of the Fund.

It seems quite obvious that the following acts performed prior to the expiration of section 10 will not be affected by a subsequent expiration of the powers contained in that section:

(1) The execution of the agreement pursuant to which the United States became a member of the International Stabilization Fund. (Subject, of course, to the caveats discussed above).

(2) The dealings in gold, foreign exchange, instruments of credit and securities engaged in by the United States with the Fund. (Such dealings are specifically authorized by Section 10.)

(3) The payment of the quota of the United States out of the inactive $1,800,000,000 of gold held in the United States Stabilization Fund. (The amount paid will constitute an expenditure out of an appropriation and the subsequent lapse of the appropriation language can have no effect on expenditures already made.)

However, a more troublesome problem is posed by the effect of the possible expiration of Section 10 on subsequent transactions which the United States will be entitled to engage in with the Fund by reason of its membership.

The principal transactions of this nature are purchases and sales of gold, foreign exchange, Government securities and securities issued by the Fund. It is submitted that such transactions might be accomplished by means of authority contained in other statutes.**

** There is adequate authorization for purchases of gold from, and sales to, the Fund. (Sections 8 and 9 of the Gold Reserve Act of 1934). Ample authority is available also for transactions in Government securities and those issued by the Fund. (Part II, paragraph 16c of the proposed International Stabilization Fund permits sales of such securities to the public or to private institutions if the United States representative consents, and the Fund can purchase such securities through normal channels.) Foreign exchange might be dealt in under section 5(b) of the Trading with the enemy Act, as amended by section 301 of the First War Powers Act, 1941. (Some method might also be worked out for the utilization of an existing or newly created RFC corporation for the purpose of engaging in such transactions with the Fund.)