CONSTITUTIONALITY OF THE BRETTON WOODS AGREEMENT ACT

Introduction

There is pending before the Senate a bill[1/] to provide for the participation of the United States in the International Monetary Fund (hereinafter called the "Fund") and the International Bank for Reconstruction and Development (hereinafter called the "Bank"). The proposal is in the form of a statute entitled the "Bretton Woods Agreements Act". It would authorize the President to accept membership in the Fund and the Bank provided for in the respective Articles of Agreement therefor contained in the Final Act of the United Nations Monetary and Financial Conference,[2/] and would in substance enact the necessary statutory authority to permit the United States to carry out the obligations to be undertaken by it under these Agreements.

Questions

The question has been raised whether United States participation in the Fund and Bank can be effected by an Act of Congress authorizing the President to sign the Articles of Agreement or whether they are treaties that must be made by the President, by and with the advice and consent of the Senate. An incidental question has also been raised whether participation of the United States in the Fund and Bank will involve an unlawful delegation of

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1/ H. R. 3314, 79th Congress - 1st Session, passed by the House, June 7, 1945.

2/ Held in Bretton Woods, New Hampshire, July 1 - July 22, 1944. The final act is deposited in the archives of the Department of State.

legislative power to the institutions or to foreign countries.

Conclusion

It has been concluded (1) that the approach embodied in the Bretton Woods Agreements Act is authorized under United States constitutional procedure and practices and is in fact preferable in this case to any other form of procedure; and (2) that H. R. 3314 and the Articles of Agreement do not involve an unlawful delegation of legislative power.

I. - Statement of Facts

International Monetary Fund

The International Monetary Fund is open to membership to the forty-five United and Associated Nations which participated in the Conference, and to such other countries as may thereafter be admitted. Provision is made for aggregate subscriptions by the original members of the equivalent of $8,800,000,000 in accordance with a schedule attached to the Articles, which quotas are payable at the time and in the manner set forth in the Agreement. The purposes of the Fund are:

"(i) To promote international monetary cooperation through a permanent institution which provides the machinery for consultation and collaboration on international monetary problems.

"(ii) To facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources

of all members as primary objectives of economic policy.

"(iii) To promote exchange stability, to maintain orderly exchange arrangements among members, and to avoid competitive exchange depreciation.

"(iv) To assist in the establishment of a multilateral system of payments in respect of current transactions between members and in the elimination of foreign exchange restrictions which hamper the growth of world trade.

"(v) To give confidence to members by making the Fund's resources available to them under adequate safeguards, thus providing them with opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity.

"(vi) In accordance with the above, to shorten the duration and lessen the degree of disequilibrium in the international balances of payments of members."3/

The Fund is an integral part of a program to further international trade and to improve general economic conditions with special emphasis upon stability of exchange rates and the avoidance of unilateral and discriminatory exchange practices. Members are required to state the par value of their currency in terms of gold and to agree to restrict their freedom to make changes in exchange rates.4/ A pool of gold and currencies of all members is to be created through the subscriptions of the quotas, which will be available under prescribed conditions to members requiring the currency

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3/ Article I, Articles of Agreement of the Fund.
4/ Article IV, *ibid*.

of other members to meet temporary shortages of exchange.[5/] This pool is to be strengthened through various provisions, including the requirement that members repurchase their own currency from the Fund[6/] and that certain charges be incurred by members using the Fund to acquire foreign exchange.[7/] Special action is authorized in the event that the holdings of the Fund of the currency of any member should become scarce.[8/] Members are required to avoid restrictions on current international payments and discriminatory currency practices.[9/] Provision is made for a Board of Governors, Executive Directors and a Managing Director and staff in whom the organization's powers shall be vested[10/] and for the extension of certain privileges and immunities to the Fund and its officers and employees.[11/] The Fund may require members to furnish it with such information as may be essential to its operations.[12/] The Fund is to deal only with governments or their agencies[13/] and each member shall designate its

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5/ Article V, Section 3, ibid.
6/ Article V, Section 7, ibid.
7/ Article V, Section 8, ibid.
8/ Article VII, ibid.
9/ Article VIII, ibid.
10/ Article XII, ibid.
11/ Article IX, ibid.
12/ Article VIII, Section 5, ibid.
13/ Article V, Section 1, ibid.

central bank or other acceptable institution as a depository for the Fund's holdings of its currency.[14/] Any member may withdraw from the Fund at any time by transmitting a notice in writing to the Fund at its principal office; withdrawal shall become effective on the date such notice is received by the Fund.[15/] Provision is made for amendments to the Articles of Agreement, the acceptance of the United States being required in all cases and the acceptance of all of the members being required in the case of any amendment modifying (a) the right to withdraw from the Fund; (b) the provision that no change in a member's quota shall be made without its consent; and (c) the provision that no change may be made in the par value of a member's currency except on the proposal of that member.[16/] The Agreement is to enter into force when it has been signed on behalf of governments having 65% of the total of the quotas. Each government becoming a member shall at the time of signature deposit an instrument setting forth that it has accepted the Agreement in accordance with its law and has taken all steps necessary to enable it to carry out all of its obligations under the Agreement.[17/] At the time it comes into operation, the

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14/ Article XIII, Section 2, *ibid*.
15/ Article XV, *ibid*.
16/ Article XVII, *ibid*.
17/ Article XX, Sections 1 and 2, *ibid*.

Fund shall request each member to communicate the par value of its currency and the parity must be agreed between the Fund and the members.[18] Provision is made for compulsory arbitration of disputes arising between the Fund and a member which has withdrawn and between the Fund and any member during liquidation of the Fund.[19]

International Bank for Reconstruction and Development

The International Bank for Reconstruction and Development is open to membership only to members of the Fund.[20] It has an authorized capital stock of $10,000,000,000 of which $9,100,000,000 is open for subscription by the countries participating in the Conference.[21] The subscriptions are payable in the manner set forth in the Agreement which provides in effect for the postponement of the payment of 80% of the value of each country's subscription until needed to meet obligations incurred in the operations of the Bank.[22] The purposes of the Bank are as follows:

"(i) To assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including the restoration of economies

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18/ Article XX, Section 4, ibid.
19/ Article XVIII, ibid.
20/ Article II, Section 1, Articles of Agreement of the Bank.
21/ Article II, Section 2, and Schedule A, ibid.
22/ Article II, Sections 3-8, ibid.

destroyed or disrupted by war, the reconversion of productive facilities to peacetime needs and the encouragement of the development of productive facilities and resources in less developed countries.

"(ii) To promote private foreign investment by means of guarantees or participations in loans and other investments made by private investors; and when private capital is not available on reasonable terms, to supplement private investment by providing, on suitable conditions, finance for productive purposes out of its own capital, funds raised by it and its other resources.

"(iii) To promote the long-range balanced growth of international trade and the maintenance of equilibrium in balances of payments by encouraging international investment for the development of the productive resources of members, thereby assisting in raising productivity, the standard of living and conditions of labor in their territories.

"(iv) To arrange the loans made or guaranteed by it in relation to international loans through other channels so that the more useful and urgent projects, large and small alike, will be dealt with first.

"(v) To conduct its operations with due regard to the effect of international investment on business conditions in the territories of members and, in the immediate post-war years, to assist in bringing about a smooth transition from a wartime to a peacetime economy."23/

The Bank is likewise a part of the program to promote world trade and full employment, primarily through encouraging and providing for the international flow of long-term capital. The resources and facilities of the Bank are to be used exclusively for the benefit of members with equitable consideration to projects for development

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23/ Article I, *ibid.*

and projects for reconstruction alike.[24/] The Bank may make or facilitate loans (a) by making or participating in direct loans out of its own funds; (b) by making or participating in direct loans out of funds raised in the market of a member; or (c) by guaranteeing private loans.[25/] However, the Bank may not have outstanding guarantees, participation in loans and direct loans in excess of one hundred percent of the unimpaired subscribed capital, reserves and surplus of the Bank.[26/] Similar provisions are made in the case of the Bank as in the case of the Fund with reference to organization and management,[27/] privileges and immunities,[28/] depositories,[29/] withdrawal,[30/] amendment,[31/] signature of the Agreement[32/] and arbitration of disputes.[33/]

In summary, the purposes of the Fund and the Bank taken together are to facilitate the most rapid return to normal economic conditions after the war; to provide for increased employment and trade through making productive loans to devasted and undeveloped countries; to promote

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24/ Article I, ibid.
25/ Article IV, Section 1, ibid.
26/ Article III, Section 3, ibid.
27/ Article V, ibid.
28/ Article VII, ibid.
29/ Article V, Section 11, ibid.
30/ Article VI, Section 1, ibid.
31/ Article VIII, ibid.
32/ Article XI, ibid.
33/ Article IX, ibid.

exchange stability and thereby to provide against unilateral and discriminatory exchange practices; and in general to facilitate the expansion and growth of international trade. These purposes are closely related to, or are projections of, other measures which the United States Government has taken in recent years, either on its own initiative or in concert with other nations, in the field of international economics and finance. The Tripartite Currency Stabilization Agreement of 1936,[34] the bilateral stabilization agreements with a number of other countries,[35] the Reciprocal Trade Agreements[36] program and the International Silver Agreement of 1936,[37] among others, relate to these purposes. The so-called Lend-Lease Act[38] and the mutual aid agreements entered into under the authority thereof have provided during the war for cooperative action between the allied countries and the pooling of their resources to the utmost extent in the prosecution of the war. Article VII of the mutual aid agree-

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34/ Federal Reserve Bulletin, Oct. 1936, p. 760.
35/ Reports of the Secretary of the Treasury 1938, 1941,1942.
36/ 48 Stat. 943.
37/ U. S. Executive Agreement (63).
38/ U. S. C. title 22, sec. 411-423.

ments[39] recognizes and stresses the necessity of continued cooperation between these allies in the field of international economics to promote high levels of employment and free movement of trade. The United Nations Relief and Rehabilitation Administration[40] has been created as the first step towards the restoration of the economies of the countries which have been devastated during the war; although humanitarian motives have to a large extent dictated our participation in this organization, the economic factor has repeatedly been emphasized as an

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39/ A typical example is the mutual aid agreement with Great Britain (U.S. Executive Agreement Series 241) signed February 23, 1942. Article VII of this agreement provides in part as follows:

"In the final determination of the benefits to be provided to the United States of America by the Government of the United Kingdom in return for aid furnished under the Act of Congress of March 11, 1941, the terms and conditions thereof shall be such as not to burden commerce between the two countries, but to promote mutually advantageous economic relations between them and the betterment of world-wide economic relations. To that end, they shall include provision for agreed action by the United States of America and the United Kingdom, open to participation by all other countries of like mind, directed to the expansion, by appropriate international and domestic measures, of production, employment, and the exchange and consumption of goods, which are the material foundations of the liberty and welfare of all peoples; to the elimination of all forms of discriminatory treatment in international commerce, and to the reduction of tariffs and other trade barriers; and, in general, to the attainment of all the economic objectives set forth in the Joint Declaration made on August 14, 1941, by the President of the United States of America and the Prime Minister of the United Kingdom."

40/ Public Law 267 - 78th Congress, approved March 28, 1944.

important consideration, particularly in determining the large size of the United States' contribution.[41] The Export-Import Bank has in recent years played an important role in furnishing capital to the other American Republics to facilitate sound and productive industrial development in those countries and thereby to increase their economic potential as trading nations; so successful have been its operations that a strong demand has been created for the extension of the lending powers of this Bank as a complement to the activities of the International Bank for Reconstruction and Development.[42]

The United States has taken the lead in the creation of the Fund and the Bank in order to further, through international cooperative action, objectives which this country has been striving to attain for years. It is impossible therefore to consider the pending legislation without taking into account the other steps which have been taken by this country to make this program effective.

41/ See, for example, Hearings before the Committee on Foreign Affairs, House of Representatives on H.J.Res. 192, 78th Congress-1st and 2d Sessions, and especially statement of Herbert H. Lehman, p. 126, that "Economic aid to the liberated countries is essential to the long-term security of all countries. The interdependence of all countries is such that it would imperil the prosperity and security of all if the areas liberated by our armies continued rife with unemployment, unrest, inflation, disease, and other consequences of economic *** disorganization."

42/ See, for example, "America's New Opportunities in World Trade", National Planning Association, Nov. 1944, p. 76. S. 1181 and H. R. 3490, 79th Congress, 1st Session.

II. - Powers of Congress

The subject matter of the pending legislation relates directly to powers which under the Constitution are vested in the Congress. Article I, Section 8, of the Constitution provides that "the Congress shall have power *** to coin money, regulate thevalue thereof, and of foreign coin, and fix the standard of weights and measures". By virtue of this provision, legislative authority in the field of banking and currency and foreign exchange is vested jointly in the House of Representatives and the Senate. The subject of the bill is also directly related to other clauses in Section 8 of Article I of the Constitution, including those which provide that the Congress shall have power "to borrow money on the credit of the United States" and "to regulate commerce with foreign nations".

Under the banking and currency powers of the Congress, a pattern of highly complex and interdependent legislation has been built up during the history of our country which forms the basis of our present national currency and credit structure. A recent article by Myres S. McDougal and Asher Lans[43/] notes this development and states:

> "An intricate network of intermeshing legislation has been built upon the monetary and currency powers of Congress. It haslong been reconized that Congress's monetary powers subsumed control over the relations between domestic and foreign currency."

43/ Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of Foreign Policy (1945) Yale Law Journal 181.

These laws provide, among other things, for the national banking system; the coinage and recoinage of metal; the circulation and redemption of notes; and the powers of the Secretary of the Treasury with reference to these matters.[44] Of particular significance, as related to the pending legislation, is the series of vitally important statutes which have been adopted during the last 35 years to keep pace with the increasingly complex financial problems of the twentieth century and the drastic change of the position of the United States in relation to the rest of the world in matters of industrial development and financial power. The Federal Reserve Act of 1913,[45] the Banking Act of 1933[46]

44/ U.S.C. title 12, sec. 21 *et seq.* and sec. 221 *et seq.*; and title 31, sec. 311 *et seq.* An interesting provision in connection with the general subject of this memorandum is contained in sec. 312 of title 31, as follows:

"International monetary conference commissioners. Whenever the President of the United States shall determine that the United States should be represented at any international conference called by the United States or any other country with a view to securing by international agreement a fixity of relative value between gold and silver as money bey means of a common ratio, between these metals, with free mintage at such ratio, he may appoint five or more commissioners to such international conference; and for compensation of said commissioners, and for all reasonable expenses connected therewith, to be approved by the Secretary of State, including the proportion to be paid by the United States of the joint expenses of any such conference, the sum of $100,000, or so much thereof as may be necessary, is appropriated. (Mar. 3, 1897, c. 376, §1, 29 Stat. 624.)"

Thus it appears that nearly 50 years ago Congress had anticipated the necessity of an international monetary conference to secure "international agreement" with reference to certain of the problems with which we are generally concerned here. The fact that this provision is contained in legislation dealing with the most basic aspects of our domestic currency system is consistent with the thesis herein maintained.

45/ 38 Stat. 251.

46/ 48 Stat. 162.

and the Banking Act of 1935[47/] have been designed to strengthen our national banking structure in the light of present day needs. Flexible powers have been granted to the executive to enable it to deal with financial problems of an emergency nature, including problems of an international character.[48/]

More directly related to the problems with which the current legislation is concerned are a series of financial statutes enacted since 1933. Thus, Title III

47/ 49 Stat. 684

48/ See, for example, Sec. 2 of the Act of March 9, 1933, (48 Stat. 1) providing that: "During time of war or during any period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, transfers of credit between or payment by banking institutions as defined by the President, and export, hoarding, melting, or ear-marking of gold or silver coin or bullion or currency, by any person within the United States or any place subject to the jurisdiction thereof; and the President may require any person engaged in any transaction referred to in this subdivision to furnish under oath, complete information relative thereto, including the production of any books of account, contracts, letters or other papers, in connection therewith in the custody or control of such person, either before or after such transaction is completed." Under these powers, executive orders have been issued relating to the export of gold coin and to transactions in foreign exchange (Executive Orders 6260 and 6560, January 15, 1934) and with respect to the entire wartime system of blocking of credits and regulating foreign exchange transactions (Executive Order 8389, April 10, 1940, as amended).

of the Agricultural Adjustment Act of 1933[49] authorizes the Secretary of the Treasury, in conjunction with the Federal Reserve Banks, to undertake extensive credit operations in the event, among other things, that "The President finds * * * that the foreign commerce of the United States is adversely affected by reason of the depreciation in the value of the currency of any government"; and also, in such event:

> "By proclamation to fix the weight of the gold dollar in grains nine tenths fine and also to fix the weight of the silver dollar in grains nine tenths fine at a definite fixed ratio in relation to the gold dollar at such amounts as he finds necessary from his investigation to stabilize domestic prices or to protect the foreign commerce against the adverse effect of depreciated foreign currencies, and to provide for the unlimited coinage of such gold and silver at the ratio so fixed, or in case the Government of the United States enters into an agreement with any government or governments under the terms of which the ratio between the value of gold and other currency issued by the United States and by any such government or governments is established, the President may fix the weight of the gold dollar in accordance with the ratio so agreed upon. * * * "

The Gold Reserve Act of 1934,[50] as noted below, made further extensive provision with reference to our monetary structure and the foreign exchange value of the dollar.

49/ 48 Stat. 31, 51. These provisions were not affected by the decision of the Supreme Court in United States v. Butler, 297 U.S.1.

50/ 48 Stat. 337.

The Silver Purchase Act of 1934[51/] authorized the Secretary of the Treasury, among other things, to "purchase silver at home or abroad", and "to investigate, regulate or prohibit * * * the importation or exportation of silver". The Act of July 6, 1939[52/] also made important provisions with reference to silver and continued the President's authority under Section 10 of the Gold Reserve Act.

Important provisions with reference to the national credit structure are contained in the Reconstruction Finance Corporation Act,[53/] as subsequently amended, and in the legislation with respect to the Export-Import Bank.[54/] In recent years, the Reconstruction Finance Corporation, in conjunction with the Secretary of the Treasury, has been authorized to finance the operations of other corporations having important foreign activities, including the Defense Supplies Corporation, the Metals Reserve Corporation and the Rubber Reserve Corporation.[55/]

The effect of these statutes on the international economic relations of the United States has been very great. The enormous economic power of the United States results in profound reverberations throughout the economic

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51/ 48 Stat. 1178.
52/ 53 Stat. 998.
53/ 47 Stat. 5.
54/ 49 Stat. 4.
55/ 55 Stat. 248.

and financial world whenever a major change is made in our domestic policy with reference to monetary matters. Since the dollar is today the leading medium in the world for the settlement of international transactions, any action to revalue the dollar in relation to gold, for example, is a matter of the greatest consequence to other nations.

In other words, it is impossible for the Congress to exercise its legislative powers in the field of banking and currency to any important degree without affecting our foreign relations. By the same token, it is impossible for the Congress to legislate on monetary matters in the international field without taking into account the policies enunciated by Congress and the legislation enacted in the domestic field. The two fields are so closely related in fact as to be inseparable. It would be practically out of the question to attempt to draw the line between a purely "domestic" and a purely "foreign" monetary matter. It would likewise be extremely difficult to maintain, it is submitted, that legislation in the monetary field is beyond the scope of the powers of Congress simply because such legislation is related to, or is designed to effectuate, an international agreement in this field.

The Gold Reserve Act of 1934 is a significant landmark in the history of our domestic monetary structure and the reserves behind this country's currency. Elaborate provisions are contained therein with reference to such matters as reserves against deposits and circulating notes; the authority of the Federal Reserve banks with respect to note issues; Federal control over gold reserves; the coinage of gold; and the redemption of circulating notes. But one of the most important sections in this historic Act, which deals with our domestic currency structure, is Section 10 thereof providing that "for the purpose of stabilizing the exchange value of the dollar, the Secretary of the Treasury * * * is authorized * * * to deal in gold and foreign exchange * * * ", and creating a fund of $2,000,000,000 for this purpose.[56]

Under this section, which was enacted pursuant to power of Con ress with reference to monetary matters, the Secretary of the Treasury has carried on extensive stabilization operations through dealings in foreign exchange. With the approval of the President, he has entered into a number of bilateral stabilization agreements.[57]

56/ 48 Stat. 341
57/ Reports of the Secretary of the Treasury 1938, 1941, 1942.

In 1936, acting under this authority, the Secretary of the Treasury entered into a stabilization agreement with the other leading financial nations of the world.[58] This agreement was designed to accomplish many of the purposes of the International Monetary Fund with which we are concerned here. It was an effort to deal through international agreement with monetary problems of pressing domestic concern. It was fully within the power of the executive branch to enter into under the Gold Reserve Act, and no further legislative sanction was required. Congress approved this action by implication when it renewed the authority after its attention had been called to the execution of the agreements. So closely was the 1936 agreement and the stabilization fund created under Section 10 related to the purposes of the proposed International Monetary Fund, that it is proposed to utilize the stabilization fund, to the extent of 90%, to meet in part the expenses of the United States subscriptions under the pending bill. Also compare the International Silver Agreement of 1933, entered into under the authority of Title III of the Agricultural Adjustment Act of 1933.[59]

58/ Federal Reserve Bulletin, Oct. 1936, p. 760.
59/ U.S. Executive Agreements (63).

The Export-Import Bank is a domestic institution created by Congress to further the foreign trade of the United States. It is authorized to "discount notes, drafts, * * * for the purpose of aiding in the financing and facilitating of exports and imports and the exchange of commodities between the United States * * * and any foreign country or nationals thereof, and, with the approval of the Secretary of the Treasury, to borrow money and rediscount notes, drafts, * * * for the purposes aforesaid".[60/] Its principal purpose is in substance to aid United States exporters to obtain access to markets in foreign countries and it performs numerous banking functions to this end. Under its powers it also enters into agreements with other countries. Some of these are primarily of a financial character similar to the operations which the Fund may undertake. An example of this type of operation is the so-called "Hull-Aranha" Agreement of March 8, 1939,[61/] whereby, among other things, the Export-Import Bank agreed to extend acceptance credits to the Banco do Brasil in the amount of approximately $20,000,000 for the specific purpose of increasing trade

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60/ 49 Stat. 4.
61/ Department of State Press Release, March 11, 1939, Vol. XX; No. 493--Publication 1307.

between the United States and Brazil. In this agreement the Export-Import Bank also agreed:

> "to aid in improving Brazil's transportation facilities and the development of her other domestic undertakings designed to increase the productive capacity of the Brazilian nation and her trade with the United States [by cooperating] with American manufacturers and exporters [and through] the extension of credits of a tenor calculated to enable the Government of Brazil and the Banco do Brasil to create the necessary exchange without disrupting normal purchases from the United States, or too rapidly depleting Brazil's supply of foreign exchange."

Under this provision, credits have since been extended to Brazil for these purposes.62/ In this respect, the

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62/ See statement of Warren Lee Pierson, President of Export-Import Bank, before the Subcommittee of the Committee on Appropriations of the House of Representatives, May 12, 1944:

> "The Export-Import Bank of Washington was created in 1934 with broad banking powers to facilitate exports and imports and the exchange of commodities between the United States and the governments, agencies, and nationals of other nations. To further the development of the foreign trade and the expansion of world markets of the United States, the Congress in September 1940 increased the lending authority of the bank in order to enable it to make loans, inter alia, to develop the resources, stabilize the economy, and assist in the orderly marketing of products in the countries of the Western Hemisphere. The bank is authorized to have outstanding at any one time loans or other obligations to it aggregating not in excess of $700,000,000.

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Continuation of footnote 62/:

"* * * As an example, it might be pointed out that under the $45,000,000 credit to the Brazilian steel plant, the bank has opened letters of credit and made individual commitments to cover more than 6,000 orders which have already been placed in the United States. Up to the present time this loan has involved over 5,000 individual disbursements and before the full credit has been utilized there will have been a total of more than 30,000 transactions. Similar situations prevail in many other credits of this type.

"There are at present on the books of the bank 120 loans and commitments involving 28 foreign governments or the agencies or nationals thereof. Also the bank has at present entered into 23 contracts with 31 United States banks pursuant to which letters of credit are opened or disbursements made from time to time as purchases are effected from the United States." (Foreign Economic Administration Appropriation Bill for 1945, Hearings, 78th Congress--2nd Session)

functions of the Export-Import Bank are similar to the operations of the proposed International Bank and are designed, so far as this country is concerned, through the making of productive loans, to stimulate industrial development in foreign countries and thereby to facilitate expansion of United States foreign trade. The Export-Import Bank is therefore a domestic organization, created by domestic legislation, under the powers of Congress, but which has important implications with reference to our foreign relations.

In the pattern of the legislative acts referred to above and international understandings carried out under their authority, the Bretton Woods Agreements and the pending legislation fit as a projection of what has gone before. So far as this country is concerned, the purposes of the Fund are related to and an extension of the fundamental purposes underlying Title III of the Agricultural Adjustment Act, of Section 10 of the Gold Reserve Act, of the bilateral stabilization agreements, and of the Tripartite Stabilization Agreement of 1936 entered into thereunder, as well as of certain of the financial operations of the Export-Import Bank. The purposes of the proposed International Bank are similar in many

respects to those of the Export-Import Bank and the two would in operation complement each other so far as this country is concerned, the Export-Import Bank acting in situations of special interest to the United States. To the extent that the International Bank will provide for assistance in the reconstruction of countries devastated by war, its purposes are also a continuation of the purposes of the Congress in authorizing our participation in the United Nations Relief and Rehabilitation Administration. In fact the proposal for the International Bank is similar in some respects to proposals which were discussed in the House of Representatives during the consideration of the UNRRA legislation, providing for United States participation in foreign loans for reconstruction purposes.[63]

It is true that in one important respect the purposes of the pending legislation are inconsistent with existing law, namely, with the so-called Johnson Act[64] which imposes

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63/ H.J.Res. 226, "To provide for a central reconstruction fund to be used in joint account with foreign governments for rehabilitation, stabilization of currencies, and reconstruction, and for other purposes", 78th Congress-2nd Session, introduced February 1, 1944. The proposal was discussed during the debate on UNRRA, January 20, 1944, 90 Congressional Record 491 *et seq.*

64/ 48 Stat. 574, "An Act to prohibit financial transactions with any government in default on its obligations to the United States."

restrictions upon the power of persons or entities in the United States to lend money to foreign governments in default to the United States. A similar provision is likewise contained in the legislation creating the Export-Import Bank.[65] This fact, however, re-enforces rather than detracts from the argument that the power of Congress is involved in this legislation. The Johnson Act is legislation enacted in this field by Congress under the powers which are involved here. It is so intimately related to the subject matter and purposes of this legislation that its continued existence in unmodified form might raise questions as to the ability of the United States to participate in the Fund. It has important effects upon the foreign relations of the United States in a negative sense, if not in the positive sense that the pending legislation has such effect. It is consequently proposed in this legislation to modify the Johnson Act in the light of present day exigencies and the aims and purposes of the Bretton Woods legislation. Without entering into the frequently debated field of non-self-executing treaties, it is submitted that since the Senate alone is not in a position to modify the policy

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65/ 49 Stat. 4

set forth in the Johnson Act, its existence on the statute books of the United States makes it desirable for the review of this policy as applied to our participation in the Bretton Woods Agreements to be made by the Congress.

With reference to the power of Congress under the commerce clause of the Constitution, it has been noted above that the Bretton Woods Agreements have important effects in this field and on the policies which this Government has pursued for the purpose of promoting the foreign trade of the United States. While it is customary to emphasize the financial aspects of the Fund and the Bank, their importance with reference to American foreign commerce is very great. The provisions of the Fund Agreement relating to the avoidance of restrictions on current payments and discriminatory currency practices, and with respect to convertibility of foreign-held balances, among others, are designed to facilitate commercial intercourse between nations. These are provisions on which the representatives of the United States Government in negotiating the agreements have placed great importance as they did upon the statement to the effect that among the purposes of the Fund is the purpose "to facilitate the expansion and balanced growth of international trade".

Viewed in this sense, therefore, these agreements form an important extension of the underlying purposes of the Trade Agreements Act of 1934[66] and should be considered in conjunction therewith. As stated by President Roosevelt in his message to the Congress recommending the passage of the Bretton Woods legislation:

> "It is time for the United States to take the lead in establishing the principle of economic cooperation as the foundation for expanded world trade. We propose to do this, not by setting up a super-government but by international negotiation and agreement, directed to the improvement of the monetary institutions of the world and of the laws that govern trade. We have done a good deal in those directions in the last 10 years under the Trade Agreements Act of 1934 and through the stabilization fund operated by our Treasury. But our present enemies were powerful in those years too, and they devoted all their efforts not to international collaboration, but to autarchy and economic warfare. When victory is won we must be ready to go forward rapidly on a wide front. We all know very well that this will be a long and complicated business." 67/

In summarizing this point therefore, it is submitted that the Bretton Woods legislation affects importantly powers of Congress in the field of banking and currency and commerce among others. Although it may be argued that any international treaty or agreement may have such effect with respect to existing laws, there are few

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66/ 48 Stat. 943.
67/ 79th Congress - 1st Session - H.R. Document No. 70.

examples of an international agreement which affects so intimately the powers of Congress in such important fields or which so directly affects such a complex pattern of legislation already enacted and Congressional policy already enunciated. For the foregoing reasons it is submitted that unless Section 2 of Article II of the Constitution provides the only method, namely, the treaty power, under which the United States can proceed to enter into international arrangements of this nature, the Bretton Woods Agreements Act may constitutionally and in fact preferably be submitted to Congress in the form presented.

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With this in mind, it is desirable to make a brief examination of instances of foreign negotiations in which apparently the fact that a particular international act affected a legislative power vested in the Congress was deemed to over-ride, or present a preferable alternative method of procedure to, the treaty power. It is important in this connection to note that since the inauguration of our constitutional government, the executive agreement has played a leading part in our international relations. Between 1789 and 1944 nearly 1500 executive agreements

have been effected while, during the same period, the United States entered into only about 850 treaties.[68/]

A few outstanding cases of this nature are as follows:

1. Commerce and Navigation - As early as 1815, the Congress was concerning itself with problems incident to reciprocal rights with reference to commerce and navigation. In that year a statute[69/] was enacted repealing provisions of earlier statutes imposing on ships or goods imported in them duties that were discriminatory as compared with vessels of the United States and their cargo, provided that such repeal should take effect in favor of any foreign nation whenever the President should be satisfied that the discriminatory duty of such foreign nation as applied to the United States had been abolished. These provisions were extended in other closely related acts of Congress.[70/] Under the authority of this legislation the United States completed an arrangement with Austria[71/] providing for equality of treatment for the vessels of each nation in the other's ports.

In 1830 Congress enacted legislation providing for equality of treatment with reference to commerce and

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68/ McClure, International Executive Agreements (1941) 1, Article by Edwin Borchard, Congressional Record (D.I.) March 9, 1945, p. A.1205.
69/ 3 Stat. 224.
70/ 4 Stat. 2 and 4 Stat. 308.
71/ 3 Miller, 521.

navigation between the United States and Great Britain and certain of its colonial possessions72/ under which President Jackson subsequently proclaimed, after negotiations with the British Government, an arrangement in relation to trade between the United States and British possessions.73/ Under this general authority the United States during the years 1884-1888 entered into a series of agreements with Spain for the elimination of discriminatory customs duties and establishment of national treatment of shipping with respect to Cuba, Puerto Rico and other Spanish possessions.74/ Likewise in 1925, the United States and Finland entered into an agreement providing substantially the same matters.75/

2. Postal Treaties - A notable example of the exercise of Congressional power in the foreign field concerns postal arrangements with foreign countries under the power of Congress "to establish post offices and post roads". In 1872 the Congress enacted a statute which provided in part:

> "That for the purpose of making better postal arrangements with foreign countries, or to counteract their adverse measures affecting our postal intercourse with them the Postmaster General, by and with the advice and consent of the President, may negotiate and conclude postal treaties or conventions, and may reduce or increase the rates of postage on mail-matter conveyed between the United States and foreign countries." 76/

72/ 4 Stat. 419
73/ 4 Stat. 417
74/ 2 Malloy, 1680,1681,1683,1684,1685. See McClure, International Executive Agreements (1941) p.60.
75/ U.S. Treaty Series (731).
76/ 17 Stat. 283,304.

Under this authority President Grant in 1874 entered into a "Treaty concerning the formation of a General Postal Union", which provided for an extensive system of regulation of postal rates and transmission of correspondence on a multilateral basis and for the organization of the General Postal Union and of a congress of plenipotentiaries to meet every three years to consider changes in the system of the Union.[77/] Although the "treaty" dealt comprehensively with a vital aspect of our economic and social relations with virtually all of the nations of the world, it was not required to be submitted to the Senate for its advice and consent in view of the specific action of the Congress in authorizing the executive to enter into such treaties. Presumably the reason for this course of action on the part of the Congress was the fact that matters relating to the transmission of mail to and from foreign countries was intimately related to domestic postal matters for which the Congress had made provision under its constitutional powers.[78/] The same practice

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77/ 19 Stat. 577. The name of the organization was later changed to the Universal Postal Union.

78/ See opinion of William H. Taft, Solicitor General of the United States, passing upon the practice followed in entering into "postal treaties" in which he stated: "Foreign mail is so closely connected with a proper system of inland mail as that the power to organize and carry on a general post-office system would seem to imply a power to organize, in connection therewith, a system of foreign mails, and, in the maintenance of such a system, a power to conclude contracts with the post-office departments of other countries". (19 Op. Att. Gen. 513, 520).

has been adhered to practically without exception in connection with our negotiation of postal arrangements with foreign nations. In 1934 the authority granted by the Act of 1872 was renewed and the Postmaster General was authorized:

> "by and with the advice and consent of the President [to] negotiate and conclude postal treaties or conventions and * * * reduce or increase the rates of postage or other charges on mail matter * * * between the United States and foreign countries." 79/

3. Copyrights and Trademarks - With respect to copyrights and trademarks, the Congress has also exercised in the foreign field its power under Article I, Section 8, of the Constitution "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries." In 1891 in a statute making comprehensive provision with respect to copyrights it was provided that the benefits of the Act should:

> "only apply to a citizen or subject of a foreign state or nation when such foreign state or nation permits to citizens of the United States of America the benefit of copyright on substantially the same basis as its own citizens; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States of America may, at its pleasure, become a party to such an agreement."80/

79/ 48 Stat. 943.

80/ 26 Stat. 1106.

Under this legislation, executive agreements on this subject were entered into with Germany in 1892;[81] with Spain in 1895;[82] with Italy in 1915;[83] with Argentina in 1934;[84] and in 1911 with France in relation to rights in China.[85] With respect to trademarks, Congress in 1881 enacted a statute providing that:

> "The owners of trademarks 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 trademarks by complying with" [86]

certain requirements. Under this authority agreements recognizing the existence of the reciprocal requirements were concluded in 1883 with the Netherlands[87] and Switzerland[88] by exchange of diplomatic notes. A similar agreement was concluded in 1889 with Great Britain with respect to reciprocal protection of trademarks in Morocco.[89]

4. Reciprocity with Canada - With further reference to the exercise by Congress of its power to regulate foreign commerce discussed in paragraph 1 above, a notable example of Congressional action in this field is the Act of July 27, 1911[90] in connection with a proposed reciprocity

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81/ 1 Malloy 557.
82/ 2 Malloy 1687.
83/ 3 Malloy 2705.
84/ 160 LNTS 57.
85/ 3 Malloy 2585.
86/ 21 Stat. 502.
87/ 2 Malloy 1265.
88/ 2 Malloy 1769.
89/ 1 Malloy 778.
90/ 37 Stat. 4

arrangement with Canada. It was specifically agreed between the administration of President Taft and the Canadian representatives to enter into certain tariff changes not through a formal treaty but through reciprocal legislation to reduce tariffs in the two countries. 91/ The United States Congress did in fact enact the necessary statute but the proposal was not concluded because of failure of the Canadian Parliament to pass concurrent legislation.

5. World War Debts - An interesting and important example of the exercise of Congressional power with respect to financial arrangements with other countries is found in the history of the debts arising out of the last World War. The First Liberty Loan Act of 1917 92/ authorized the President to enter into arrangements for the purchase of obligations of other governments with the view to establishing credit and providing for the prosecution of the war. Under this authority the United States entered into a series of executive agreements with foreign countries in the form of contracts concluded by the Treasury Department under Presidential authority. 93/ After the conclusion of hositilities the liquidation of these and other credits extended during the war through executive action became

91/ 46 Congressional Record 1516.
92/ 40 Stat. 35.
93/ See (1921) Treas. Dept. Annual Report to Sec'y Treas. 32 et.seq.

an economic problem of major importance in the efforts to reestablish normal intercourse between nations. In 1922 Congress provided for he creation of a World War Foreign Debt Commission consisting of the Secretary of the Treasury and four (later seven) other members to be appointed by the President by and with the advice and consent of the Senate. This Commission was authorized, subject to the approval of the President, "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 * * *" 94/ 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. The agreements were subsequently approved by Acts of Congress.95/ Similarly the moratoria with reference to the debts so funded which were negotiated by President Hoover in 1931 were carried out as executive agreements in conjunction with specific authority conferred by joint resolution of Congress,96/ and were not submitted to the Senate for ratification.

94/ 42 Stat. 365, 1325.
95/ 42 Stat. 1325; 43 Stat. 20, 136, 719, 720; 44 Stat. 329, 376, 377, 378, 385; 45 Stat. 399; 46 Stat. 48.
96/ 47 Stat. 3; TR (1932) Treas. Dept. Annual Report to Sec'y of Treas. 34,286 and 290.

6. Stabilization Agreements in World War I - During the last world war the Congress under the banking and currency power also granted authority to the executive to make arrangements with foreign countries to stabilize foreign exchange and to obtain foreign currencies. This was contained in Section 4 of the Supplement to the Second Liberty Bond Act 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 depositaries 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."97/

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.

7. Stabilization agreements under the Gold Reserve Act - Similarly, under the banking and currency power, Congress authorized the executive branch to conclude

97/ 40 Stat. 965, 966.

stabilization agreements when it enacted Section 10 of the Gold Reserve Act of 1934.[98/] The Secretary of the Treasury is authorized by that Act, with the approval of the President, to deal in gold and foreign exchange for the purpose of stabilizing the exchange value of the dollar. Bilateral agreements to achieve this objective have been concluded with Brazil, China, Mexico, Ecuador and Iceland.[99/] In addition, this legislation was the authority for the execution of the Tripartite Currency Stabilization Agreement of 1936.[100/]

8. Chinese Loan - An interesting example of an international financial agreement entered into by the executive branch pursuant to Congressional authorization under the banking and currency power is the agreement with China of March 21, 1942 providing for the extension of financial aid in the amount of $500,000,000.[101/] This agreement was authorized by the Act of February 7, 1942[102/] which gave the Secretary of the Treasury, with the 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 as the Secretary of the Treasury with

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98/ 48 Stat. 1178.
99/ Reports of the Secretary of the Treasury 1938,1941,1942.
100/ Federal Reserve Bulletin, Oct. 1936, p. 760.
101/ Department of State Bulletin, March 21, 1942, p. 263.
102/ 56 Stat. 83.

the approval of the President shall deem in the interest of the United States."

9. Reciprocal Trade Agreements - Of all the examples of the exercise of Congressional power in the foreign field, one of the most notable is the Trade Agreements Act of 1934 which provides that the President shall have authority "to enter into foreign trade agreements with foreign governments or instrumentalities thereof" for the purpose of expanding foreign markets for the products of the United States.[103/] Under this authority some twenty-seven reciprocal trade agreements have been entered into and promulgated by the President, making provision with reference to customs duties, most-favored-nation treatment and reciprocity. The Act and the agreements negotiated thereunder have constituted during the last ten years the corner-stone of this country's foreign economic policy.

10. Civil Aviation Agreements - Congressional power under the Commerce clause has been exercised in the field of civil aviation to facilitate international negotiations with foreign countries for the extension of reciprocal rights for commercial and other types of airplane travel. These statutory provisions and the negotiations with other countries thereunder are similar in many respects to the developments in connection with maritime navigation discussed above.

103/ 48 Stat. 943.

Section 6 of the Air Commerce Act of 1926,[104] as amended by Section 1107 of the Civil Aeronautics Act of 1938,[105] provides that:

> "If a foreign nation grants a similar privilege in respect of aircraft of the United States and/or airmen serving in connection therewith, the Civil Aeronautics Authority may authorize aircraft registered under the law of the foreign nation and not a part of the armed forces thereof to be navigated in the United States."

Sections 802 and 1102 of the 1938 Act provide respectively:

> "Sec. 802. The Secretary of State shall advise the Authority of, and consult with the Authority concerning, the negotiation of any agreements with foreign governments for the establishment or development of air navigation, including air routes and services."
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> * * *
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> "Sec. 1102. In exercising and performing its powers and duties under this Act, the Authority shall do so consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries, shall take into consideration any applicable laws and requirements of foreign countries and shall not, in exercising and performing its powers and duties with respect to certificates of convenience and necessity, restrict compliance by any air carrier with any obligation, duty, or liability imposed by any foreign country."

Under these statutes the United States has entered into a series of bilateral agreements with foreign countries. By an exchange of notes with Germany in May 1932, each country granted liberty of passage over its territory to the aircraft of the other party, it being understood that "the establishment and operation of regular air routes by an air transport

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104/ 44 Stat. 572
105/52 Stat. 973

company of one of the parties within the territory of the other party * * * shall be subject to the prior consent of the other * * *." 106/ Similar agreements have been entered into with Italy in 1931; Sweden in 1933; Norway in 1933; the Union of South Africa in 1933; Denmark in 1934; Great Britain in 1935; and the Irish Free State in 1937, among others. 107/ One of the most significant of these agreements is the "Agreement for Civil Air Transport" between the United States and Canada dated February 17, 1945, 108/ providing in part that:

> "The Governments grant the rights specified in the annex for establishing the international civil air routes and services described in the Annex, whether such services be inaugurated immediately or at a later date at the option of the Government to whom the rights are granted.
>
> "In order to prevent discriminatory practices and to ensure equality of treatment, the Governments agree that:
>
> "(a) Each of them may impose or permit to be imposed on airlines of the other state just and reasonable charges for the use of public airports and other facilities on its territory provided that these charges shall not be higher than would be paid for the use of such airports and facilities by its national aircraft engaged in similar international services;
>
> "(d) Neither of them will give a preference to its own airlines against the airlines of the other state in the application of its customs, immigration, quarantine and similar regulations or in the use of airports, airways or other facilities.

106/ U.S. Executive Agreement Series 38.
107/ U.S. Executive Agreement Series 24,57,50,54,58,76,110.
108/ State Department Press Release No. 139, February 19, 1945.

"The laws and regulations of each state relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of the other state, and shall be complied with by such aircraft, upon entering or departing from or while within the territory of that state.

"The aircraft operated by United States airlines shall conform at all times with the airworthiness requirements prescribed by the competent aeronautical authorities of the United States of America for aircraft employed in air transportation of the character contemplated by this Agreement.

"The aircraft operated by Canadian airlines shall conform at all times with the airworthiness requirements prescribed by the competent aeronautical authorities of Canada for aircraft employed in air transportation of the character contemplated by this Agreement.

"The services authorized by this Agreement and for which rights are specified in the Annex shall be conducted in accordance with the following provisions:

"(3) Holders of through tickets travelling on a through international service may make stopovers at any point where a landing is made even though such landing is made at a point not otherwise authorized for the pick-up and discharge of traffic;

"(5) The routes specified in the Annex shall be open for operation by properly designated airlines at any time during the life of the Agreement. The rights shall not lapse with any failure to exercise them, or any interruption of such exercise."

Under the authority of these statutes the United States has also entered into multilateral agreements for the reciprocal extension of air transport rights as a result of the International Conference on Civil Aviation.[109/]

109/ International Conference on Civil Aviation, Final Act.

The foregoing and other examples point strongly to a constitutional practice whereunder the power of Congress has been exercised through legislation in a particular field, generally economic, to authorize the executive branch to enter into arrangements with foreign governments, frequently on a multilateral basis, or to effectuate executive agreements of this nature. In each case the subject matter dealt with was one which concerned a function specifically delegated to Congress in the Constitution.

III - Judicial Decisions with reference to Constitutionality of Executive Agreements

It is not proposed in this paper to review in detail the familiar thesis that the Constitution does not require all arrangements with foreign nations to be concluded through the treaty procedure. From the point of view of constitutional law, the validity of executive agreements, whether entered into under the authority of Congress or under the authority of the President, or both, and not subject to the advice and consent of the Senate, is clearly established by precedent and judicial decision. Nor is the line of demarcation between treaties and executive agreements dependent upon whether or not a particular treaty or agreement imposes a binding commitment on the United States; many executive agreements, in fact the vast majority, have imposed such obligations.

With respect to monetary agreements in particular, the comment of McDougal & Lans in their recent article[110/] is striking. They state that:

> "From the legal standpoint the most significant fact about these stabilization agreements is that every one of them was effected by Congressional-Executive agreement. In fact there is not known instance where an international monetary arrangement to which the United States was a party was validated by the treaty process."

It may be noted, however, for the purpose of clarifying the issue, that the use of the term "executive agreement"

110/ Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy; (1945) Yale Law Journal 181.

has contributed to some of the confusion in the thinking on this subject to the extent that it has been used as a generic term, descriptive of all arrangements with foreign governments which are not submitted to the Senate for advice and consent to ratification. Since some opprobium appears to attach to the term "executive agreement" because of the implication that such an instrument necessarily may involve the by-passing of a constitutional prerogative of the Senate, it is essential to point out by way of further definition that there are several varieties of agreements to which the term "executive agreement" is customarily applied or situations in which some procedure other than the treaty procedure has been or may be resorted to. These divide themselves in two general categories, as follows:

1. The classical example of "executive agreement" would appear to be an agreement entered into by the President, irrespective of specific Congressional action, in the exercise of his powers as the principal military and diplomatic officer of the Government. These may either take the form of statements of policy such as the Root-Takahira Agreement of 1908[111/] and the Lansing-Ishii Agreement of 1917[112/] which dealt with the special interests of

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111/ 1 Malloy 1045
112/ 3 Malloy, 3720

the United States and Japan in China; or they may be agreements incidental to the waging of war such as the undertakings with reference to liberated areas and the prosecution of the war entered into at the Crimean Conference in February 1945 [113/] or the transitory provisions of the Act of Chapultepec which specifically contemplate the use of force by this country during the present war and before the final adoption of a treaty. [114/] A closely related form of executive agreement entered into under the power of the President is an agreement which is non-executory and in effect relates to a specific act and imposes no further binding commitments upon this country. Outstanding examples of this type of agreement are the exchange of notes between President Roosevelt and Foreign Commissar Litvinov in 1933 relating to the recognition by the United States of the Soviet Union and the assignment by the latter to the United States of certain claims against United States nationals arising from confiscatory decrees of the Soviet Government; [115/] and the so-called "Hull-Lothian Agreement" of September 1940 by which

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113/ 79th Congress-1st Session, Senate Document No. 8.
114/ 91 Congressional Record p. 2058 et seq. March 12, 1945.
115/ Department of State Publication (528).

the United States transferred to Great Britain 50 destroyers in exchange for the rights for 99 years to military bases in British possessions in the Western Hemisphere.[116/]

2. An entirely different type of constitutional procedure is involved in the case of an agreement with one or more foreign nations which is entered into by the executive branch in conjunction with legislative action by the Congress under one of its delegated powers. While for want of a better term such an agreement is customarily referred to as an "executive agreement," it might with equal correctness be called a "Congressional agreement" since in the nature of this type of instrument its provisions could not be binding upon the United States without legislative action by the Congress. In practice there may be several variations in the interplay of executive and Congressional action with reference to undertakings of this nature. The simplest type of case is an agreement which is entered into by the executive branch under general powers vested therein by previous act of Congress; examples of this type are the International Silver Agreement of 1933[117/] and the International Air Services Transit Agreement

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116/ Department of State Bulletin, August 24, 1940, p. 154.
117/ Federal Reserve Bulletin, October 1936, p. 670.

and the International Air Transport Agreement entered into as a result of the International Conference on Civil Aviation at Chicago in 1944.[118] Secondly, there may be an executive agreement submitted for subsequent approval to Congress such as the debt funding agreements of 1923[119] or for subsequent legislative action to provide for the carrying out of the provisions of the agreement as in the case of the United Nations Relief and Rehabilitation Administration and the subsequent legislation providing for contributions of funds by the United States.[120] Thirdly, there are examples of specific prior Congressional authorization to enter into international agreement as in the case of Trade Agreements Act of 1934[121] and United States membership in the International Labor Organization.[122] In any of these three types of cases the necessity of Congressional sanction is present, and in all of these cases the issues involved from the constitutional aspect are different from those involved in the type of "executive agreement" entered into solely on the authority of the President.

118/ International Conference on Civil Aviation, Final Act.
119/ 42 Stat. 363.
120/ Public Law 267, 78th Congress, March 28, 1944, and Public Law 382, 78th Congress, June 30, 1944.
121/ 48 Stat. 943.
122/ 48 Stat. 1182.

This memorandum is concerned exclusively with the constitutionality of the procedure followed in the executive-legislative approach to international agreements as applied to United States participation in the specific agreements herein dealt with. Nevertheless, since the broad issue of the treaty power is involved in both of these categories of "executive agreements," it is necessary to make reference to judicial decisions of the Supreme Court upholding the power of the executive to enter into agreements with foreign nations other than through the treaty process whether under his own authority or in conjunction with Congressional action. Time and again agreements of these kinds have been upheld; never has their validity been impugned by the Court.[123/] Whether the question of their constitutionality has been presented to the Court on the issue of unlawful delegation of power or on the issue of the avoidance of the treaty process, the decisions have been the same. Summaries of outstanding Supreme Court decisions are set forth below:

1. In B. Altman & Co. v. United States (1912) 224 U.S. 583, there was involved the question of the power of the Supreme Court to review a judgment of the Circuit Court of Appeals in a case involving the interpretation of a reciprocal trade agreement between the United States and

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123/ McClure, International Executive Agreements, 221.

France under the authority vested in the President by Section 3 of the Tariff Act of 1897[124/] which authorized the President to make reciprocal agreements with foreign countries with reference to certain articles. The contention was made that the judgment of the lower court was not reviewable under the provisions of the Circuit Court of Appeals Act of 1891 because the negotiations with France had concluded in an agreement rather than a treaty. The Court rejected this contention and stated as follows:

> "While it may be true that this commercial agreement, made under authority of the Tariff Act of 1897,§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, neogtiated and proclaimed under the authority of its President. We think such a compact is a treaty under the Circuit Court of Appeals Act, and, where its construction is directly involved, as it is here, there is a right of review by direct appeal to this court."

2. One of the leading cases on the subject of the powers of the executive in the field of foreign affairs is United States v. Curtiss-Wright Export Corp. (1936) 299 U.S., 304 which involved an attack upon the constitutionality of a joint resolution of Congress of May 28, 1934,[125/] which provided that:

124/ 30 Stat. 151.
125/ 48 Stat. 811.

> "If the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and if after consultation with the governments of other American Republics and with their cooperation, as well as that of such other governments as he may deem necessary, he makes proclamation to that effect, it shall be unlawful to sell, except under such limitations and exceptions as the President prescribes, any arms or munitions of war in any place in the United States to the countries now engaged in that armed conflict, or to any person, company, or association acting in the interest of either country, until otherwise ordered by the President or by Congress."

Under the authority of this statute the President issued a proclamation prohibiting the sale of arms in the United States to the countries engaged in the Chaco War, namely, Bolivia and Paraguay. The Curtiss-Wright Corp. was indicted for conspiracy to violate the joint resolution and on appeal attacked the constitutionality of the joint resolution on the ground that it constituted an unlawful delegation of legislative power to the executive. Excerpts from the opinion of the Court follow:

> "It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality. Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens (see <u>American Banana Co.</u> v. <u>United Fruit Co.</u>, 213 U.S. 347, 356); and operations of the nation

in such territory must be governed by treaties, international understandings and compacts, and the principles of international law. As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign. The power to acquire territory by discovery and occupation (Jones v. United States, 137 U.S. 202, 212), the power to expel undesirable aliens (Fong Yue Ting v. United States, 149 U.S. 698, 705 et seq.), the power to make such international agreements as do not constitute treaties in the constitutional sense (Altman & Co. v. United States, 224 U.S. 583, 600-601; Crandall, Treaties, Their Making and Enforcement, 2d ed., p. 102 and note 1), none of which is expressly affirmed by the Constitution, nevertheless exist as inherently inseparable from the conception of nationality. * * *

"Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs.

* * *

"The result of holding that the joint resolution here under attack is void and unenforceable as constituting an unlawful delegation of legislative power would be to stamp this multitude of comparable acts and resolutions as likewise invalid. And while this court may not, and should not, hesitate to declare acts of Congress, however many times repeated, to be unconstitutional if beyond all rational doubt it finds them to be so, an impressive array of legislation such as we have just set forth, enacted by nearly every Congress from the beginning of our national existence to the present day, must be given unusual weight in the process of reaching a correct determination of the problem.

> A legislative practice such as we have here, evidenced not by only occasional instances, but marked by the movement of a steady stream for a century and a half of time, goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice, to be found in the origin and history of the power involved, or in its nature, or in both combined."

3. United States v. Belmont (1937) 301 U.S. 324 involved certain aspects of the agreements between President Roosevelt and Foreign Commissar Litvinov in 1933 referred to above. This agreement, among other things, provided for the assignment to the United States of all claims of the Soviet Government against United States nationals arising by virtue of a decree of 1918 of the Soviet Government nationalizing and appropriating certain property, including a sum of money deposited prior to 1918 by a Russian corporation with Belmont. The United States sued to recover the deposit under the assignment. The lower court dismissed the complaint on the ground that a judgment for the United States would be contrary to the controlling public policy of the State of New York. The Supreme Court reversed the decision of the lower court and held that the United States was entitled to recover. In so holding the Court stated:

> "We take judicial notice of the fact that coincident with the assignment set forth in the complaint, the President recognized the Soviet Government, and normal diplomatic relations were established between that government and the Government of the United States, followed by an exchange of ambassadors. The effect of this was to validate, so far as this country is

concerned, all acts of the Soviet Government here involved from the commencement of its existence. The recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between the two governments. That the negotiations, acceptance of the assignment and agreements and understandings in respect thereof were within the competence of the President may not be doubted. Governmental power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government. 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. See 5 Moore, Int. Law Digest, 210-221. The distinction was pointed out by this court in the Altman case, supra, which arose under §3 of the Tariff Act of 1897, authorizing the President to conclude commercial agreements with foreign countries in certain specified matters. We held that although this might not be a treaty requiring ratification by the Senate, it was a compact negotiated and proclaimed under the authority of the President, and as such was a 'treaty' within the meaning of the Circuit Court of Appeals Act, the construction of which might be reviewed upon direct appeal to this court."

4. United States v. Pink, 315 U.S. 203, involved the recognition of the effect in the United States of another decree of the Soviet Government which purported to nationalize the insurance business and all of the

property, wherever situated, of all Russian insurance companies, including the First Russian Insurance Company which had a branch in New York. The United States Government, suing as assignee of the Soviet Government under the Litvinov Assignment, was held entitled to recover the surplus of the New York branch of the Russian insurance company subsequent to its liquidation. In so holding and in reversing the decision of the lower court the Court stated:

> "If the priority had been accorded American claims by treaty with Russia, there would be no doubt as to its validity. Cf. Santovincenzo v. Egan, supra. The same result obtains here. The powers of the President in the conduct of foreign relations included the power, without consent of the Senate, to determine the public policy of the United States with respect to the Russian nationalization decrees. 'What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government.' Guaranty Trust Co. v. United States, supra, 304 U.S. at p. 137. That authority is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition. Objections to the underlying policy as well as objections to recognition are to be addressed to the political department and not to the courts. See Guaranty Trust Co. v. United States, supra, p. 138; Kenneth v. Chambers, 14 How. 38, 50-51. As we have noted, this Court in the Belmont case recognized that the Litvinov Assignment was an international compact which did not require the participation of the Senate. It stated (301 U.S. pp. 330-331): 'There are many such compacts, of which a protocol, a modus vivendi, a postal convention, and agreements like that now under consideration are illustrations.'"

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While in none of these cases did the circumstances of the litigation involve the question of the use of the "executive agreement" procedure as an instrument for bringing about United States membership in an international organization similar to those which we are concerned herewith, they establish conclusively that the treaty process is not the only constitutional method for concluding arrangements with other countries.

IV - Use of Executive Agreements to Authorize United States Participation in International Organizations and Multilateral Agreements

During the last seventy-five years there have been repeated and important instances of the use of the "executive agreement" procedure to bring about United States membership in international organizations or United States participation in multilateral agreements with other nations. In general, two factors are common in all of these instances, whatever other differences may exist between them: (1) the action of the executive branch in joining the particular international organization or entering into the particular multilateral agreement was carried out in conjunction with legislative action by Congress in one of the fields of Congressional authority; and (2) the subject matter with which the particular organization or agreement was concerned was "economic" as distinguished from political or military. It is also significant that, with a few exceptions, our participation therein resulted in the imposition upon this country of commitments of a substantial and continuing nature.[126/] While during this same period the United States became a member in other international organizations through action under the treaty process, it is submitted that the cases enumerated

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126/ See statement of Manley O. Hudson, The United States in the International Labor Organization, 28 Am. Jour. Int. Law 674, October 1934:

> "On numerous occasions in the past, the United States has accepted membership in international organizations by action taken by the President with the authorization of Congress, and it can hardly be questioned that obligations may be assumed by the United States in consequence of such membership."

below clearly establish that the "executive agreement" procedure coupled with legislative action in a field of delegated Congressional power is a well recognized method of bringing about United States participation in international arrangements in certain fields. A brief summary of certain of these instances follows:

1. Postal Organization - Reference has been made above to United States membership in the Universal Postal Union pursuant to specific authorization by the Congress to the executive to "negotiate and conclude postal treaties or conventions" and to "reduce or increase the rates of postage on mail matter conveyed between the United States and foreign countries."[127/] While international cooperation in the postal field has been taken for granted for many years because of its fundamental effect upon the lives of individual citizens, the existence of orderly arrangements with foreign countries for the transmission of the mails forms the basis of international trade and financial transactions and indeed of almost all intercourse between nations. For this reason, it is of the utmost importance to examine with care the nature of certain of the provisions of the 1874 treaty which was entered into on behalf of this country "by and with the advice and consent of the President" pursuant to the specific Congressional authorization contained in a vastly comprehensive statute dealing with

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127/ 17 Stat. 283; see also 48 Stat. 943.

all domestic aspects of the postal service.[128/] There are set forth below certain of the provisions of the treaty:

"ARTICLE III.

"The general Union rate of postage is fixed at 25 centimes for a single prepaid letter.

"The charge on unpaid letters shall be double the rate levied in the country of destination on prepaid letters.

"ARTICLE V.

"Every registered packet must be prepaid.

"The postage payable on registered articles is the same as that on articles not registered.

"The charge to be made for registration and for return receipts must not exceed that made in the interior of the country of origin.

"In case of the loss of a registered article, except in the case of vis major, there shall be paid an indemnity of 50 francs to the sender, or, at his request, to the addressee, by the Administration of the country in the territory or in the maritime service of which the loss has occurred--that is to say, where the trace of the article has been lost,--unless, according to the legislation of such country, the Administration is not responsible for the loss of registered articles sent through its interior post.

"ARTICLE X.

"The right of transit is guaranteed throughout the entire territory of the Union.

"Consequently, there shall be full and entire liberty of exchange, the several Postal Administrations of the Union being able to send reciprocally, in transit through intermediate countries, closed mails as well as correspondence in open mails, according to the requirements of trade and the exigencies of the postal service.

128/ Section 167 of the Act of June 8, 1872, entitled "An Act to Revise, Consolidate and Amend the statutes relating to the Post Office Department"; 17 Stat. 283.

"Closed mails and correspondence sent in open mails must always be forwarded by the most rapid routes at the command of the Postal Administrations concerned.

"ARTICLE XV.

"There shall be organized, under the name of the International Office of the General Postal Union, a central office, which shall be conducted under the surveillance of a Postal Administration to be chosen by the Congress, and the expenses of which shall be borne by all the Administrations of the contracting States.

"This office shall be charged with the duty of collecting, publishing, and distributing information of every kind which concerns the international postal service; of giving, at the request of the parties concerned, an opinion upon questions in dispute; of making known proposals for modifying the detailed regulations; of giving notice of alterations adopted; of facilitating operations relating to international accounts, especially in the cases referred to in Article 10 foregoing; and in general of considering and working out all questions in the interest of the Postal Union.

" ARTICLE XVI.

"In case of disagreement between two or more members of the Union as to the interpretation of the present treaty, the question in dispute shall be decided by arbitration. To that end, each of the Administrations concerned shall choose another member of the Union not interested in the affair.

"The decision of the arbitrators shall be given by an absolute majority of votes.

"In case of an equality of votes the arbitrators shall choose, with the view of settling the difference, another Administration equally disinterested in the question in dispute.

"ARTICLE XVIII.

"Every three years at least, a Congress of plenipotentiaries of the countries participating in the treaty shall be held with a view of perfecting

the system of the Union, of introducing into it improvements found necessary, and of discussing common affairs.

"Each country has one vote.

"ARTICLE XIX.

"It is concluded for three years from that date. When that term shall have passed, it shall be considered as indefinitely prolonged, but each contracting party shall have the right to withdraw from the Union on giving notice one year in advance.

Since the date of the "treaty," and under subsequent legislative authority, the United States has become a party to numerous other "treaties" with foreign nations dealing with postal matters.[129/] Almost without exception the same constitutional procedure has been followed to bring about United States adherence to such "treaties."

2. Pan-American Union - The Pan-American Union has for many years formed the cornerstone of our Inter-American policy in fields ranging from the political and the military to specific functions such as sanitation and health. It is significant that our membership in the Union was brought about by executive action implemented consistently by Congressional action to appropriate funds for administration expenses, in accordance with the provisions of Article XVI of the Constitution of the Union adopted in 1910 that: "The American Republics bind themselves to continue to

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129/ See 25 Stat. 1339; 28 Stat. 1078; 30 Stat. 1629; 35 Stat. 1639; 42 Stat. 1971; 44 Stat. Part 3, 2221; 46 Stat. 2523; 49 Stat. 2741.

support the Pan-American Union * * * and to pay annually into the Treasury of the Pan-American Union their respective quotas."[130/] The 1910 Constitution of the Pan-American Union (originally known as the Commerce Bureau of the American Republics) traces its beginning to the first International Conference of American States held in 1889-1890. At that Conference, a resolution was adopted recommending the establishment of a Bureau for the collection and publication of information on commerce and the laws relating to it in the several American nations. Thereafter, a committee of the Conference was instructed to prepare a detailed plan setting forth the purposes and functions of the International Bureau. This plan, when completed, was submitted to the various governments. In the case of the United States the plan was then presented to the Congress by the President, and the Congress, in an appropriation act, provided the necessary funds in the following terms:

> "For the organization and establishment under the direction of the Secretary of State of 'The International Union of American Republics for the prompt collection and distribution of commercial information.'"[131/]

3. International Labor Organization - One of the most important international organizations to which this country belongs is the International Labor Organization

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130/ Fourth International Conference of American States, 1910; Report of U.S. Del.; 61st Congress-3rd Session-Senate Document No. 744.
131/ 26 Stat. 275.

which during the last twenty-five years has assumed a vital and dynamic role in labor affairs. This organization is primarily a recommendatory and fact-finding organization, its activities consisting to a large extent in recommending for adoption by the member governments draft conventions on a variety of subjects within its competence. Nevertheless, it is of some interest to examine the Constitution of that organization which includes the following provisions:

"ARTICLE 22.

"Each of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request. The Direction shall lay a summary of these reports before the next meeting of the Conference.

"ARTICLE 25.

"1. Any of the Members shall have the right to file a complaint with the International Labour Office if it is not satisfied that any other Member is securing the effective observance of any convention which both have ratified in accordance with the foregoing Articles.

"2. The Governing Body may, if it thinks fit before referring such a complaint to a Commission of Enquiry, as hereinafter provided for, communicate with the Government in question in the manner described in Article 23.

"ARTICLE 28.

"1. When the Commission of Enquiry has fully considered the complaint, it shall prepare a report embodying its findings on all questions of fact relevant to determining the issue between the parties and containing such recommendations as it may think proper as to the steps which should be taken to meet the complaint and the time within which they should be taken.

"2. It shall also indicate in this report the measures, if any, of an economic character against a defaulting Government which it considers to be appropriate, and which it considers other Governments would be justified in adopting.

"ARTICLE 30.

"In the event of any Member failing to take the action required by Article 19, with regard to a recommendation or draft convention, any other Member shall be entitled to refer the matter to the Permanent Court of International Justice.

"ARTICLE 31.

"The decision of the Permanent Court of International Justice in regard to a complaint or matter which has been referred to it in pursuance of Article 29 or Article 30 shall be final.

"ARTICLE 32.

"The Permanent Court of International Justice may affirm, vary or reverse any of the findings or recommendations of the Commission of Enquiry, if any, and shall in its decisions indicate the measures, if any, of an economic character which it considers to be appropriate, and which other Governments would be justified in adopting against a defaulting Government.

"ARTICLE 35.

"1. The Members engage to apply conventions which they have ratified in accordance with the provisions of this Part of the present Treaty to their colonies, protectorates and possessions which are not fully self-governing:

(1) Except where owing to the local conditions the convention is inapplicable; or
(2) Subject to such modifications as may be necessary to adapt the convention to local conditions.

"2. And each of the Members shall notify to the International Labour Office the action taken in respect of each of its colonies, protectorates and possessions which are not fully self-governing.

"ARTICLE 37.

> "Any question or dispute relating to the interpretation of this Part of the present Treaty or of any subsequent convention concluded by the Members in pursuance of the provisions of this Part of the present Treaty shall be referred for decision to the Permanent Court of International Justice."

The Constitution of the International Labor Organization was originally promulgated as Part XIII of the Treaty of Versailles and payment of its expenses, with certain exceptions, was 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.132/

After the adoption of this resolution of Congress, the Organization invited the United States to accept membership therein, it being understood that the United States should not thereby assume any obligations under the Covenant of the League of Nations. The statement also authorized the Organization's Governing Body to settle with the Government of the United States the question of the latter's financial

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132/ 48 Stat. 1182.

contribution. Pursuant to this invitation the President, under the previous Congressional authorization, accepted the invitation and his acceptance was transmitted to the Director of the International Labor Office at Geneva by a letter from the American Consul at Geneva.[133]

4. Intergovernmental Committee on Refugees - In response to public demand in this and other countries for effective collective action between nations to alleviate the plight of victims of religious persecution in Germany, the United States Government convened the so-called Evian Conference in July 1938 which resulted in the creation of the Intergovernmental Committee on Refugees consisting of representatives of thirty-one nations. Membership in the organization involved no specific obligation on the part of the member nations except as they might feel morally obliged to contribute funds and personnel to make its work effective. It is briefly referred to here merely as an example of the exercise of leadership by the United States to act in concert with other nations in a field of primarily humanitarian concern where pooling of effort could be reasonably expected to be more effective than separate unilateral efforts of the different governments. The Congress has since appropriated funds to effectuate United States participation in the Committee.[134]

133/ Department of State Press Release, August 25, 1934.
134/ See Hearings before the Committee on Foreign Affairs, House of Representatives, November 26, 1943, on H. Res. 350 and H. Res. 352, 78th Congress-1st Session, *passim*; see also Intergovernmental Committee on Refugees, *Report* of the Fourth Plenary Session, August 15-17, 1944, issued by American Resident Representative of the Committee, *passim*.

5. UNRRA - A similar example on a far larger scale is furnished by the proceedings to bring about United States membership in the United Nations Relief and Rehabilitation Administration. After consultation over a period of several months with members of the Senate and House of Representatives, the President on November 9, 1943, signed an agreement creating the Administration, providing in part as follows:

> "In so far as its appropriate constitutional bodies shall authorize, each member government will contribute to the support of the Administration in order to accomplish the purposes of Article I, paragraph 2 (a). The amount and character of the contributions of each member government under this provision shall be determined from time to time by its appropriate constitutional bodies."

After the signature of the agreement and the conclusion of the First Session of the Council of the Administration, the Congress by joint resolution authorized appropriations to the President of "such sums not to exceed $1,350,000,000 in the aggregate, as the Congress may determine from time to time to be appropriate for participation by the United States * * * in the work of the United Nations Relief and Rehabilitation Administration, established by an agreement concluded * * * on November 9, 1943, reading as follows * * *".[135] Subsequently the Congress appropriated funds for the work of the Administration in accordance with this authorization.[136]

135/ Public Law 267 - 78th Congress, approved March 28, 1944.
136/ Public Law 382 - 78th Congress, approved June 30, 1944.

While the agreement creating the Administration did not impose specific commitments on the United States and by its terms left the question of contributions to the discretion of the member governments, the Congress subsequently adopted as the basis of appropriations the Financial Plan adopted by the Council at its First Session.[137/] Although one of the principal sponsors of UNRRA in the Senate has repeatedly stated that the UNRRA proceedings are of limited value as a precedent in the field of "executive agreements,"[138/] they, nevertheless, represent a striking example of interdependent action between the executive and legislative branches to effectuate an important step in United States foreign policy through multilateral action.

6. International Silver Agreement - A significant multilateral agreement from the legal point of view which the United States has entered into in recent years in the economic field was the Memorandum of Agreement between the United States, Austrália, Canada, China, India, Mexico, Peru, and Spain, with reference to the world price of silver which was negotiated at the Monetary and Economic

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137/ First Session of the Council of UNRRA, Resolution No. 14.

138/ See statement of Senator Vandenberg (a member of the subcommittee of the Committee on Foreign Relations) during the consideration of the authorization resolution, 90 Congressional Record p. 1743 et seq., February 16, 1944; and also during Hearings before a subcommittee of the Committee on Commerce on S. 1385, 78th Congress - 2nd Session, pp. 184 and 203, November 28, 1944.

Conference held in London in July 1933 and was signed on behalf of the United States by Senator Key Pittman, then Chairman of the Committee on Foreign Relations of the Senate who was a delegate to the Conference.[139] The agreement was based upon a proposal submitted by the United States delgation to the Conference designed to provide permanent measures with respect to the use of silver for monetary purposes which would give necessary assurances both to the silver mining countries and to countries using silver as a basis for their currency. Significant portions of the agreement are as follows:

"Now, therefore, it is agreed between the parties hereto:

"1. (a) That the Government of India shall not dispose by sale of more than one hundred and forty million fine ounces of silver during a period of four years, commencing with January 1st, 1934. The disposals during each calendar year of the said four year period shall be based on an average of thirty five million fine ounces per year, it being understood, however, that, if in any year, the Government of India shall not dispose of thirty five million fine ounces, the difference between the amount actually disposed of and thirty five million fine ounces may be added as additional disposals in subsequent years. Provided further that the maximum amount disposed of in any year shall be limited to fifty million fine ounces.

"(b) Notwithstanding anything previously stated in this Article, it is understood that if the Government of India should after the date of this agreement sell silver to any Government for the purpose of transfer to the United States Government in payment of war debts such silver shall be excluded from the scope of this agreement.

139/ U.S. Executive Agreements (63).

"2. That the Governments of Australia, Canada, the United States, Mexico and Peru, during the existence of this agreement, shall not sell any silver, and shall also in the aggregate purchase, or otherwise arrange for withdrawing from the market, thirty five million fine ounces of silver from the mine production of such countries in each calendar year for a period of four years commencing with the calendar year 1934. The said Governments undertake to settle by agreement the share in the said thirty five million fine ounces which each of them shall purchase or cause to be withdrawn.

"3. That the silver purchased or withdrawn in accordance with Article 2 above shall be used for currency purposes (either for coinage or for currency reserves), or to be otherwise retained from sale during said period of four years.

"8. That this memorandum of agreement is subject to ratification by the Governments concerned. The instruments of ratification shall be deposited not later than the 1st April, 1934, with the Government of the United States. It shall come into force as soon as the ratifications of all the Governments concerned are received provided that all the ratifications are received before the 1st April 1934. A notice by any Government that the affirmative action necessary to carry out the purposes of this agreement has been taken will be accepted as an instrument of ratification."

A supplementary undertaking dealing with matters of detail was entered into by each of the signatory governments. Excerpts from the supplementary undertaking signed by the United States are as follows:

"In connection with the attached memorandum of agreement entered into by the Delegates of India, China and Spain as holders of large stocks or users of silver, and of Australia, Canada, the United States, Mexico and Peru, as principal purchasers of silver, it is understood that the Government of the United States shall purchase or otherwise arrange for

withdrawing from the market, as in the attached memorandum of agreement provided, twenty-four million, four hundred and twenty-one thousand, four hundred and ten, fine ounces of silver in each calendar year beginning with the calendar year 1934.

"This understanding is conditioned upon similar undertakings being entered into by the Governments of Australia, Canada, Mexico and Peru whereby those Governments agree to purchase or otherwise arrange for withdrawing from the market of amounts of fine ounces of silver which, with the obligation hereby entered into, will make in the aggregate thirty-five million fine ounces of silver annually.

"It is understood that this agreement and the similar agreements to be entered into by the Delegates of the Governments of Australia, Canada, Mexico, and Peru, are subject to the following general provisions:

"1. That every provision of this agreement shall terminate on January 1, 1938.

"2. That the absorption of silver referred to in this agreement means current mine production.

"3. That when the Government of India shall have sold, transferred or otherwise disposed of Government stocks of silver to the net amount of one hundred and seventy-five million fine ounces, as provided in paragraph (c) of Article 1 of the attached memorandum of agreement, the obligations of governments to purchase under this contract shall cease.

"4. That this memorandum is subject to ratification by the proper governmental authorities of the United States whose delegate has executed this agreement, and the undersigned delegate undertakes to use his good offices to secure such action at the earliest possible date."

The United States gave the necessary notice of affirmative action on December 21, 1933.[140] The

140/ Department of State Press Release (Dec. 30, 1933) 365.

commitments under taken by the United States under this agreement were in harmony with, and could be carried out under, the legislative authority conferred upon the President by virtue of Title III of the Agricultural Adjustment Act of 1933.[141/] The agreement was not submitted for ratification to the Senate. On December 21, 1933, the President of the United States issued a proclamation under the foregoing provision of law directing the appropriate agencies of this Government to carry out the provisions of the agreement so far as they concerned the United States.[142/]

The International Silver Agreement of 1933 represented an effort on a smaller scale to cope through international cooperative action with some aspects of the international financial problems with which the Bretton Woods Agreements are generally concerned. The Congressional enactment and the subsequent executive action constituted an early recognition of the evils of unilateral action by nations in respect of currency manipulation. The statutory authority on the basis of which the Agreement was entered into by this country specifically contemplated that "agreements"

141/ 48 Stat. 31. Also relevant in this connection are the provisions of the Silver Purchase Act of 1934, 48 Stat. 1178 and the Gold Reserve Act of 1934.

142/ 48 Stat. (Part II) 1723.

would be entered into with foreign countries in order to "protect the foreign commerce of the United States." The basic purposes of the Silver Agreement and the constitutional procedures involved in bringing it into force as to the United States are very similar to those in respect of the Bretton Woods Agreements.

7. International Wheat Agreement - Another significant development of the Monetary and Economic Conference of 1933 was the calling of a conference in London in August 1933 which resulted in the signing of the International Wheat Agreement, 1933, between some twenty of the nations of the world most intimately concerned with the problem of international trade in wheat.[143/] Important commitments were imposed upon the United States by virtue of the following provisions of the Agreement:

> "ARTICLE 1.
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> "The Governments of Argentina, Australia, Canada and the United States of America agree that the exports of wheat from their several countries during the crop year August 1, 1933, to July 31st, 1934, shall be adjusted, taking into consideration the exports of other countries by the acceptance of export maxima fixed on the assumption that world import demand for wheat which will amount during this period to 560,000,000 bushels.
>
> "ARTICLE 2.
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> "They further agree to limit their export of wheat during the crop year August 1st, 1935, to maximum figures of 15% less in the case of each

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143/ State Department Treaty Information Bulletin No. 48, September 1933.

country than the average out-turn on the average acreage sown during the period 1931-1933 inclusive after deducting normal domestic requirements.

"The difference between the effective world demand for wheat in the crop year 1934-5 and the quantity of new wheat from the 1934 crop available for export will be shared between Canada and the United States of America as a supplementary export allocation with a view to the proportionate reduction of their respective carry-overs.

"ARTICLE 4.

"They further agree that their combined exports of wheat during the crop year 1934-35 will not exceed a total of fifty million bushels and recognise that the acceptance of this export allocation will not allow of any extension of the acreage sown to wheat.

"ARTICLE 6.

"The Governments of the wheat importing countries in signing this instrument:--

"(I) Agree henceforth not to encourage any extension of the area sown to wheat and not to take any governmental measures, the effect of which would be to increase the domestic production of wheat.

"(II) Agree to adopt every possible measure to increase the consumption of wheat and are prepared to bring about the progressive removal of measures which tend to lower the quality of breadstuffs and thereby decrease the human consumption of wheat.

"(III) Agree that a substantial improvement in the price of wheat should have as its consequence a lowering of customs tariffs, and are prepared to begin such adjustment of customs tariffs when the international price of wheat reaches and maintains for a specified period an average price to be fixed. It is understood that the rate of duty necessary to assure remunerative prices may vary for different countries, but will not be sufficiently high to encourage their farmers to expand wheat acreage.

"Appendix A contains the agreed definitions relating to the technical points mentioned in this paragraph.

"(IV) Agree that in order to restore more normal conditions in world trade in wheat the reduction of customs tariffs would have to be accompanied by modification of the general regime of quantitative restriction of wheat imports and accept in principle the desirability of such a modification. The exporting countries for their part agree that it may not be possible to make substantial progress in these modifications in 1933-4, but the importing countries are prepared to make effective alterations in 1934-35 if world prices have taken a definitely upward turn from the average price of the first 6 months of the calendar year 1933. The objective of these relaxations of the various forms of quantitative restrictions will be to restore a more normal balance between total consumption and imports, and thereby to increase the volume of international trade in wheat. It is understood that this undertaking is consistent with maintaining the home market for domestic wheat grown on an area no greater than at present. It is obvious that fluctuations in the quantity and quality of the wheat harvest resulting from weather conditions may bring about wide variations in the ratio of imports to total consumption from season to season."

The countries participating in the conference agreed to set up a Wheat Advisory Committee to watch over the "work and application of this agreement."

This agreement imposed binding and continuing obligations upon the United States. Like the Silver Agreement, however, it was not necessary to submit it to the Senate for ratification in view of the fact that ample legislative authority already existed to carry out the provisions of the agreement so far as this country was concerned by virtue

of the provisions of the Agricultural Adjustment Act.[144/] This then is another example of the use by the executive branch of authority vested in it by an act of Congress to bring about international agreement and action in an economic field which is irrevocably aligned to domestic problems in the same field. The Agricultural Adjustment Act and subsequent legislation in the same field has been aimed primarily to control burdensome surpluses of particular farm commodities and to provide for the orderly marketing thereof. This is a domestic problem but its solution depends upon the disposition of these surpluses in foreign markets and, therefore, to the action of other countries producing the same commodities. The Congress acting under its power to regulate interstate and foreign commerce is the organ which determines our country's policies in these matters. The Wheat Agreement was part of a program to effectuate through international action the purposes and policies established by Congress. Although various difficulties prevented the execution of the agreement in accordance with its terms, it is nevertheless pertinent to this study as an example of international agreement reached through the exercise of a combination of legislative and executive authority.

144/ 48 Stat. 31.

8. Tripartite Stabilization Agreement of 1936 - A further and more important effort to bring about international cooperative action in the monetary field was the Tripartite Stabilization Agreement of September 25, 1936, which was brought about by simultaneous and identical declarations issued on that date by the governments of Great Britain, France and the United States, to which Belgium, The Netherlands and Switzerland adhered shortly thereafter. The declaration of the United States was as follows:

"1. The Government of the United States, after consultation with the British Government and the French Government, joins with them in affirming a common desire to foster those conditions which safeguard peace and will best contribute to the restoration of order in international economic relations and to pursue a policy which will tend to promote prosperity in the world and to improve the standard of living of peoples.

"2. The Government of the United States must, of course, in its policy towards international monetary relations take into full account the requirements of internal prosperity, as corresponding considerations will be taken into account by the Governments of France and Great Britain; it welcomes this opportunity to reaffirm its purpose to continue the policy which it has pursued in the course of recent years, one constant object of which is to maintain the greatest possible equilibrium in the system of international exchange and to avoid to the utmost extent the creation of any disturbance of that system by American monetary action. The Government of the United States shares with the Governments of France and Great Britain the conviction that the continuation of this twofold policy will serve the general purpose which all the Governments should pursue.

"3. The French Government informs the United States Government that, judging that the desired stability of the principal currencies cannot be insured on a solid basis except after the re-establishment of a lasting equilibrium between the various economic systems, it has decided with this object to propose to its Parliament the readjustment of its currency. The Government of the United States, as also the British Government, has welcomed this decision in the hope that it will establish more solid foundations for the stability of international economic relations. The United States Government, as also the British and French Governments, declare its intention to continue to use appropriate available resources so as to avoid as far as possible any disturbance of the basis of international exchange resulting from the proposed readjustment. It will arrange for such consultation for this purpose as may prove necessary with the other two Governments and their authorized agencies.

"4. The Government of the United States is moreover convinced, as are also the Governments of France and Great Britain, that the success of the policy set forth above is linked with the development of international trade. In particular it attaches the greatest importance to action being taken without delay to relax progressively the present system of quotas and exchange controls with a view to their abolition.

"5. The Government of the United States, in common with the Governments of France and Great Britain, desires and invites the cooperation of other nations to realize the policy laid down in the present declaration. It trusts that no country will attempt to obtain an unreasonable competitive exchange advantage and thereby hamper the effort to restore more stable economic relations which it is the aim of the three Governments to promote." 145/

This agreement so far as the United States is concerned was entered into under the authority of Section 10 of the Gold Reserve Act of 1934 providing as follows:

145/ Federal Reserve Bulletin, October 1936, p. 760.

"Sec. 10. (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."146/

146/ 48 Stat. 337, 341. In addition to the 1936 Agreement, stabilization agreements have been entered into by the Secretary of the Treasury under these powers with the Governments of Brazil ((1938) - Rep. Sec'y. Treas. 21); China ((1941) Rep. Sec'y. Treas. 52); Mexico ((1942) Rep. Sec'y Treas. 42); Ecuador (Ibid); and Iceland (Ibid). The powers contained in Section 10 were renewed in 1937 (50 Stat. 4), 1939 (53 Stat. 998); 1941 (55 Stat. 395); and 1943 (57 Stat. 68). At the time of each extension, the attention of Congress was called to the fact that these stabilization agreements had been made.

More strikingly than any other act which the United States has ever taken in the international field, the Tripartite Stabilization Agreement of 1936 was a direct forerunner of the Bretton Woods Agreements. The Gold Reserve Act and the Stabilization Agreement recognized the fact that there can be no domestic prosperity in this country unless healthy conditions exist in the international field and that the soundness of our domestic currency structure is irrevocably linked to the exchange value of the United States dollar in relation to other currencies. As in the case of the Wheat and Silver Agreements, the statutory basis for the action of the executive in entering into the Stabilization Agreement lay in what is essentially a domestic statute, dealing in this case with the reserves behind our currency. As in the case of those agreements, it would not have been possible for the United States to carry out their terms without such statutory authority.

9. Aviation Agreements - A recent example of multilateral international agreement entered into by the United States under the authority of existing legislation is furnished by the results of the International Civil Aviation Conference held in Chicago, November-December 1944. This Conference concluded in the preparation of four multilateral agreements, namely, an Interim Agreement

on Civil Aviation, a Convention on International Civil Aviation, an International Air Services Transit Agreement and an International Air Transport Agreement.[147/]

The Interim Agreement provides, among other things, for the creation of a provisional International Civil Aviation Organization to conduct certain research and recommendatory functions relating to standards and procedures in the field of civil aviation and to perform related services; for the adherence by signatories of the Agreement to certain principles relating to flight over the territory of members and with respect to such matters as documents carried by aircraft, certificates of airworthiness, and licenses of personnel; and for certain undertakings whereby members agree to file copies of contracts with the Organization and to apply provisionally certain recommendations with respect to aviation practices. All of these matters are within the power of the executive branch of this Government to perform under provisions of the Air Commerce Act of 1926[148/] and the Civil Aeronautics Act of 1938;[149/] consequently, this agreement has been accepted by this Government as an "executive agreement" subject to compliance with the constitutional processes of the United States in respect of the contribution of funds for administrative expenses of the Organization.[150/]

147/ International Conference on Civil Aviation, Final Act (Part I). The original of the final act is deposited in the archives of the Department of State.
148/ 44 Stat. 572.
149/ 52 Stat. 973.
150/ State Department Press Release No. 101, February 9, 1945.

The other two agreements, commonly referred to as the "Two-Freedoms" and "Five-Freedoms" agreements, provide primarily for the reciprocal granting by each signatory country to the other signatories of certain privileges in respect of scheduled international air services; in the first case, the privilege to fly across its territory without landing and to land for non-traffic purposes, and, in the second case, the same privileges plus the privileges to carry passengers, mail and cargo to and from each signatory country and intermediate points. In view of the provisions of existing law with reference to the granting of commercial right to foreign aircraft,[151/] these agreements are within the power of the executive to carry out without additional legislative authority and consequently they have been accepted as "executive agreements."

The Convention has been submitted to the Senate as a treaty.[152/]

10. Other International Organizations - Other international organizations in which the United States participates pursuant to specific Congressional authorization are as follows:

(a) International Hydrographic Bureau - The State Department appropriation act of 1921 provided, in part,

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151/ 44 Stat. 572 and 52 Stat. 973.
152/ 79th Congress, 1st Session, Executive A.

for appropriations "to enable the United States to become a member of the International Hydrographic Bureau, and for the first annual contribution of the United States toward the creation and maintenance of such bureau."[153/]

(b) International Statistical Bureau - A joint resolution of Congress in 1924 authorized appropriations "to enable the United States to maintain membership" in the Bureau.[154/]

(c) Permanent Association of International Road Congresses - A joint resolution of Congress in 1924 authorized appropriations "to enable the United States to accept membership" in the Association.[155/]

(d) American International Institute for the Protection of Childhood - A joint resolution of Congress in 1928 authorized appropriations "for the contribution of the United States toward the support of the institution."[156/]

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The cases enumerated above constitute some of the most notable as well as some of the most successful specific acts of the United States Government in the field of foreign affairs during recent years in respect of international cooperation on a multilateral basis. While in

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153/ 41 Stat. 1215.
154/ 43 Stat. 112.
155/ 44 Stat. 754.
156/ 45 Stat. 487.

none of these cases has the constitutionality of the action been passed upon by the Supreme Court, it is of perhaps greater significance that the method employed to bring about United States participation therein has never been questioned. It is submitted, therefore, that unless there are special circumstances in connection with the Bretton Woods Agreements to differentiate them in this respect from examples such as the multilateral postal treaties and the International Silver Agreement, the United States may become a party to the Bretton Woods Agreements through executive action in conjunction with legislation by Congress as has been proposed.

Two considerations have been of predominant importance in the preparation of the Bretton Woods legislation.

The first, which is basic to the entire study of the legal and constitutional problems here involved, is that under the Articles of Agreement of both the Fund and the Bank, any member may withdraw from either institution at any time by transmitting a notice in writing to the institution, and withdrawal shall become effective on the date the notice is received.[157/] These provisions have a most vital effect upon the nature of the commitments imposed by the Agreements and make it particularly

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157/ Article XV, Section 1, Articles of Agreement of the Fund; Article VI, Section 1, Articles of Agreement of the Bank.

appropriate for our participation in these organizations to be brought about by legislation. Like any other phase of our national monetary and economic policy, our active membership in the Fund and the Bank will be subject to the policies laid down in this field from time to time by the Congress. The right of withdrawal, therefore, has an important effect upon the legislative approach to this problem.

The second consideration relates to the provisions of the respective Agreements with reference to the signature thereof. These are to the effect that each government signing each Agreement shall deposit with the depository government an instrument setting forth that the government has accepted the Agreement "in accordance with its law and has taken all steps necessary to enable it to carry out all of its obligations" thereunder.[158] This provision requires each government to adopt certain domestic legislation in order to become an active participant in the institutions. The pending bill would provide the necessary domestic legislation, in the case of the United States, in addition to that which exists under previously enacted laws, to enable this country to adhere to these Agreements in accordance with their respective terms, and, incidentally,

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158/ Article XX, Section 2, Articles of Agfeement of the Fund; Article XI, Sgction 2, Articles of Agreement of the Bank.

to permit the making of the required certification upon the signature of the Agreements on behalf of the United States. In other words, if a particular provision of either Agreement would require certain action of a member and the existing legislation of the United States does not provide the legal basis or authority for such action, additional legislative authority is required and would be provided under this bill.

As has been exhaustively discussed above, the Bretton Woods Agreements are within the general framework of legislation previously enacted and policies adopted by the Congress in the field of banking and currency and foreign exchange. Some of the undertakings in the Agreements are consistent with existing legislation and consequently may be carried out by the executive without further authority from Congress. In these cases, therefore, no provision has been included in the pending bill.

In a few instances, modifications of existing laws are required to carry out the purposes of the Agreements. Thus the provisions of the Gold Reserve Act of 1934 relating to the stabilization fund would be extended to permit the use of the resources of that fund in connection with our participation in the International Monetary Fund. The purposes of the two funds are substantially similar and no change in legislative policy would be involved in this

amendment. Secondly, the Johnson Act would be modified to the extent necessary to permit the Bank to operate within the framework of our laws. Such a modification would be an essential consequence of the major policy decision to participate in these institutions.

If the pending bill is enacted into law, the President will be in a position to sign the agreements in accordance with their terms and to make the necessary certification with reference to the action taken by this Government to give effect to them. All of the legislative action required to place the President in this position is within the delegated powers of Congress under the Constitution.

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The foregoing extended discussion may be briefly summarized as follows:

1. The pending legislation affects powers which under the Constitution are vested in the Congress.

2. The Agreements and legislation are closely related to existing statutes enacted under these powers and are similar in purpose to previous attempts under such legislation to provide for joint action between nations in the field of international economic and financial affairs.

3. The Agreements and legislation are so closely related to our domestic banking and currency structure as

provided for under existing laws that they can best be considered through the same procedure as required for the enactment of domestic legislation in these fields.

4. Throughout this country's history Congress has exercised its delegated powers in matters affecting our foreign relations.

5. In particular, Congress has on numerous occasions exercised such powers to authorize or effectuate the participation of the United States in international organizations or agreements on a multilateral basis.

6. The Supreme Court has recognized the validity of agreements entered into with foreign nations by the executive either with or without Congressional action, and without resort to the treaty procedure. The Court has never held that an executive agreement was invalid.

7. The supplementary legislative authority necessary to enable the executive branch to carry out the Bretton Woods Agreements, in addition to the authority vested in the executive under existing legislation, is entirely within the scope of the delegated powers of Congress.

8. The Bretton Woods Agreements Act is, therefore, a valid constitutional approach to the effectuation of United States participation in these institutions.

V. DELEGATION OF POWERS

In addition to the considerations above there are several other points that should be discussed in connection with the incidental question that has been raised of whether H.R. 3314 and the Articles of Agreement of the Fund and Bank involve an unconstitutional delegation of legislative power to the international organizations or to foreign countries. A careful study of the bill and the Agreements leads to the conclusion that no such delegation is involved but that the proposed legislation and the creation of the institutions is an effective and appropriate means to bring about the purposes underlying the Agreements.159/

The powers conferred upon the executive branch of the Government are so limited that no question can be raised that such powers involve an unconstitutional delegation of

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159/ It has always been recognized that Congress has substantial discretion in selecting the manner of effectuating its purposes. As stated by the Supreme Court in McCulloch v. Maryland (1819) 4 Wheat. (17 U.S.) 315 at p. 405, in connection with the establishment of a United States Bank:

> "* * * a government, instrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution. The power being given, it is the intent of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention to clog and embarrass its execution, by withholding the most appropriate means."

Chief Justice Marshall added at p. 420:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the constitution are constitutional."

the legislative functinn. This is particularly true in view of the broader scope for delegation to the Executive in the field of foreign relations.[160/]

Provisions of the legislation and the Articles of Agreement which are pertinent to the authority granted to the Fund ad the Bank and to foreign countries will be considered in the following three categories: (1) those provisions conferring upon the Fund and Bank a legal status and certain privileges and immunities; (2) those provisions relating to the payment of the subscriptions of the United States; and (3) those provisions which commit the United States to refrain from specified actions while it is a member of the international organizations.

Status, privileges and immunities.

To enable the Fund and Bank to carry out their functions properly, the United States and the other member countries are required to grant them a series of privileges and immunities which are set forth in the Agreements, in addition to granting them status as legal entities. Both

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160/ U.S. v. Curtiss-Wright Export Corp. (1936) 299 U.S. 304. See also Field v. Clark (1892) 143 U.S. 649.

Moreover, the purposes and standards set forth in the Bretton Woods Agreements and the Act are sufficiently precise so that there can be no question of "the purpose which the Congress seeks to accomplish and the standards by which that purpose is b be worked out". (United States v. Ruch Royal Cooperative, Inc. (1939) 307 U.S. 533, 574). Accordingly, the standards set forth in Supreme Court cases to determine whether the Congress has fulfilled its legislative function would be met. See J.W.Hampton Jr. & Co. v. United States, (1928) 276 U.S. 394; N.Y. Central Securities Corp. v. United States (1932) 287 U.S. 12; Opp. Cotton Mills v. Administrator (1941) 312 U.S. 126; Yakus v. United States (1944) 321 U. S. 414.

institutions must be treated as having the capacity to make contracts, to acquire and dispose of property, and to bring suit in our courts.[161/] The Fund will be immune from suit except when it consents to be sued and, although the Bank will be subject to a suit, it will be protected against having its property attached in advance of judgment.[162/] Both the Fund and Bank must be protected against searches, requisitions, confiscation, etc., and the archives must be fully protected against interference.[163/] Their property will be kept free of restrictions and controls to the extent necessary to carry out their operations and their communications will be treated in the same manner as those of foreign governments.[164/] The organizations themselves will be tax immune, their employees will be protected against double taxation on their incomes, and securities of the organizations will be protected against discriminatory taxation.[165/] Persons connected with the institutions will be immune from legal process with respect to their official acts, and so far as immigration, alien registration and conscription laws are concerned, they will be treated as diplomats.[166/]

It is intended that in many respects member countries should treat the Fund and Bank in the same way that they

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161/ Articles of Agreement of the Fund, Article IX, Section 2.
162/ Ibid, Article IX, Section 3 and Articles of Agreement of the Bank, Article VII, Section 3.
163/ Fund, Article IX, Section 4; Bank, Article VII, Section 4.
164/ Fund, Article IX, Sections 5 & 6; Bank, Article VII, Sections 5 & 6.
165/ Fund, Article IX, Section 9; Bank Article VII, Section 9.
166/ Fund, Article IX, Section 8; Bank, Article VII, Section 8.

treat foreign governments. The effort in this direction is limited, however, to the minimum necessary for the institutions to function properly. The privileges and immunities granted to the Fund and the Bank are those customarily granted by the United States to foreign governments and their employees.[167/] Moreover, some privileges and immunities of citizens of the United States have even been granted by commercial treaties to citizens of foreign countries who do not have diplomatic status.[168/]

167/ See: The Schooner Exchange (1812) 7 Cranch 116 (sovereign immunity of foreign governments generally); R.S. 4063, U.S.C. title 22, sec. 252 (immunity from suit of foreign ambassadors, public ministers and their "domestics"); Compania Espanola v. Navemar (1938) 303 U.S. 68 and Betizzi Bros. Co. v. The Pesaro (1926) 271 U.S. 562 (vessels of a foreign government immune from suit); Act of Feb. 15, 1938, U.S.C. title 22, sec. 255a (prohibiting interference with the duties of foreign diplomatic representatives) Section 116(c) Internal Revenue Code, U.S.C. title 26, sec. 116(c) (exemption of income of foreign governments from income tax) Section 116(h) Internal Revenue Code, U.S.C. title 26, sec. 116(h) (compensation of employees of foreign governments exempted from income tax under certain conditions.)

168/ See, for example, in two of the more recent treaties, Article I of the Treaty with Liberia (1938) Dept. of State Treaty Series, No. 956 and the following provision from Article I of the Treaty with Siam (1938) Dept. of State Treaty Series No. 940:

> "The nationals of each of the High Contracting Parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to nationals of the State of residence on their submitting themselves to the conditions imposed upon nationals of the State of residence. They shall also enjoy in this respect that degree of protection and security that is required by international law. Their property shall not be taken without due process of law or without payment of just compensation."

Accordingly, the action of Congress in specifically granting privileges and immunities to the Fund and Bank will be the repitition of a practice which Congress has followed consistently in the past. Legislative action of this nature is customary in the conduct of our foreign relations.

Payment of subscriptions.

The Articles of Agreement of the Fund prescribe the quota of the United States, and the Articles of Agreement of the Bank allocate a fixed number of shares of stock to be subscribed by the United States. H. R. 3114 contains the provisions necessary to enable the United States subscription to be paid.[169/]

There is nothing unusual involved in the Congress appropriating money for payment to international institutions. We have done this many times in the past. Notable examples are the United Nations Relief and Rehabilitation Administration,[170/] the Pan-American Union[171/] and the International Labor Organization.[172/] The appropriation of funds to be contributed or subscribed to international organizations has never been held to be an unconstitutional delegation of legislative power.

Justice Story effectively answered any contention to the contrary in his dissenting opinion (the majority did

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169/ Section 8.
170/ 58 Stat. 122.
171/ See for example 43 Stat. 1620; 44 Stat. 1186, 57 Stat. 278.
172/ See for example, 57 Stat 30; 57 Stat. 278. For other appropriations to be paid to international organizations see Chapter 7 of Title 22 of the United States Code.

not disagree on this point), in the case of The Proprietors of the Charles River Bridge v. The Proprietor of the Warren Bridge et. al.[173/] In answering the contention that the charter to The Proprietors of the Charles River Bridge was a restriction upon legislative power he said at p. 603:

> "This charter is not * * * any restriction upon the legislative power; unless it be true, that because the legislature cannot grant again, what it has already granted, the legislative power is restricted. If so, then every grant of the public land is a restriction upon that power; a doctrine, that has never yet been established, nor (as far as I know) ever contended for. Every grant of a franchise is, so far as that grant extends, necessarily exclusive; and cannot be resumed, or interfered with. * * * But the legislative power remains unrestricted. The subject matter only (I repeat it) has passed from the hands of the government. If the legislature should order a government debt to be paid by a sale of the public stock, and it so paid, the legislative power over the funds of the government remains unrestricted, although it has ceased over the particular stock, which has been thus sold."

Commitments of the United States Restricting Its Future Action.

The only pertinent portions of the Articles of Agreement which remain for consideration are the policy commitments which the United States is required to make in accepting membership in the Fund and Bank. All of these commitments merely limit the action which the United States would otherwise take while a member of the two institutions.

Many treaties and international agreements entered into by the United States have been characterized by similar negative commitments. In order to obtain the agreement of

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173/ (1837) 11 Peters (36 U.S.) 420.

a foreign government to restrict its actions in certain respects deemed desirable by this Government, the United States in turn agrees to circumscribe its actions in the same field.

In 1794 the United States entered into the Jay Treaty[174/] with Great Britain which provided that the citizens of the United States and Canada as well as the Indian tribes could not have their ability to pass and repass freely between the respective territories restricted by either nation. This provision was never held to be unlawful as restricting the power granted by the Constitution to Congress "to regulate Commerce with foreign Nations".

An exchange of notes in 1817 consummated an executive agreement between the United States and England[175/] limiting the Naval Forces on the Great Lakes. Another limitation upon the right to build the number of naval vessels which the participants might otherwise desire to build was contained in the 1936 treaty limiting naval armaments.[176/] It has not been contended that either of these agreements constituted an unconstitutional delegation of the power of the legislature "to provide and maintain a Navy".

The Constitution grants to the Congress the power "to lay and collect Taxes, Duties, Imposts and Excises". However, Congress has not felt that it was unlawfully restricting its power in this respect by authorizing the

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174/ 1 Malloy 590, 592.
175/ 1 Malloy 628.
176/ 4 Malloy 5548.

executive to enter into reciprocal income tax exemption agreements with foreign governments.[177/] This is another instance in which Congress has agreed not to exercise its powers in return for a corresponding forbearance on the part of other governments.

In the field of multilateral agreements, the United States entered into the Hague Convention Respecting the Laws and Customs of War on Land[178/] which impliedly obligated the United States not to take any inconsistent action with respect to the armed forces of the United States while the Convention was in effect. It has never been contended that this action constituted an unconstitutional delegation of the power of Congress "to make Rules for the Government and Regulation of the land and naval forces."

In the case of the Bretton Woods Agreements and in the examples discussed above the principle is the same. Each participating country agrees to give up its right to act in a particular manner in return for the corresponding commitment of one or more other countries. The only commitment contained in the Bank Agreement, aside from the privileges and immunities and the subscription, is that the United States and other countries agree not to restrict the use

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177/ See for example the agreement with Canada, Dept. of State Executive Agreement Series No. 4 (1926), The legislative authorization is contained in the Revenue Act of 1921 (42 Stat. 227, 239) and subsequent Revenue Acts.

178/ (1907) 2 Malloy 2269.

that a borrower can make of their respective currencies borrowed from or through the Bank.[179/] Similarly the United States and other countries, while members of the Fund, may not restrict the use of their respective currencies acquired from the Fund.[180/] In the case of the Fund Agreement the United States and other member countries are also committed not to buy and sell gold beyond a range based upon the par value of their currency;[181/] not to change the value of their currency except as provided in the Agreement;[182/] not to permit exchange transactions at rates beyond the prescribed range[183/] (this commitment will be fulfilled by the United States if it continues the present policy of buying and selling gold freely for the settlement of international transactions); not to impose restrictions on current international transactions;[184/] and not to engage in discriminatory currency arrangements or multiple currency practices.[185/]

No question has ever been raised that treaties and agreements containing a commitment not to take certain specified actions involve an unconstitutional delegation of legislative power. In fact, if treaties and agreements of this kind were so construed, the United States would

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179/ Article IV, Sections 1 & 2.
180/ Schedule D, 6, and Schedule E, 8.
181/ Article IV, Section 2.
182/ Article IV, Section 5.
183/ Article IV, Section 4.
184/ Article VIII, Section 2.
185/ Article VIII, Section 3.

be gravely hampered in its negotiations with other countries, as it is difficult to imagine an international compact of any importance that would not involve at least a commitment of the United States not to engage in activities inconsistent with the treaty or agreement in question.

It is equally clear that nothing in the Fund Agreement, the Bank Agreement, or H.R. 3314 will give the Fund, or the Bank, or any foreign country any power over the value of the dollar or any power over the foreign commerce of the United States. With respect to the power of Congress over the value of the dollar, two things must be considered. First, Congress can affect exchange rates only by changing the value of the dollar. Other countries are free, in the absence of an international agreement, to change the values of their own currencies and thus affect dollar exchange rates. Under the provisions of the Articles of Agreement[186/] and H. R. 3314,[187/] no change can be made in the value of the dollar without authorization by Congress. Thus, the power of Congress to coin money and regulate the value thereof will remain in Congress and neither the Fund nor foreign countries will have any power in this respect. Secondly, the reference in the Constitution to the power of Congress to regulate the value of foreign coin can relate only to physical coins which may be in circulation in the United States. Obviously, it was not intended to do the impossible by conferring upon Congress power to regulate the value of another country's money.

186/ Article IV, Section 5(b)
187/ Sections 5 and 6.

So far as the Bank is concerned, its only effect on our foreign commerce will result from the loans it makes and guarantees. If these are made in dollars our commerce will be affected. But Congress will not have made this possible by giving up its power over foreign commerce. It will have accomplished this through the exercise of its own power to appropriate the funds which the Bank may lend or use as a reserve for its guarantees, and by exercising its power to authorize international agreements limiting the right of the United States to impose restrictions on the use of dollars borrowed from or through the Bank.

Similarly, the Fund will have no power which can interfere with the exercise by Congress of its right to regulate the foreign commerce of the United States. As indicated above the limitations on the freedom of action of the United States, including those relating to scarce currencies, are imposed by virtue of the agreement itself and are not powers conferred upon the Fund. For example, when the United States is a member of the Fund it can sell gold only within the prescribed range. It will comply only because it is obligated by an international agreement to do so and not because the Fund has required the United States to do it. The Fund itself has no such authority. The same thing is true of all the other commitments which the United States makes by accepting the Fund Agreement. With

respect to the effect on our foreign commerce of the use of dollars acquired by foreign countries from the Fund, the principle involved is the same as that involved in the loans made by and through the Bank. Our commerce will be affected by the use of the dollars, and these effects will result from the exercise by Congress of its power to appropriate funds and the exercise of its power to authorize an international agreement limiting the right of the United States to restrict the use of dollars so acquired.

It has been suggested that the provisions of Article VII, dealing with scarce currencies, will permit foreign countries to regulate American exports if the dollar becomes a scarce currency. It is alleged, therefore, that there is involved in the Fund Agreement a delegation to the Fund and to foreign countries of the power of Congress over the foreign commerce of the United States. There is no foundation in fact for this suggestion or for this allegation. At the present time all foreign countries have the right at any time and for any reason to impose restrictions upon the freedom of exchange transations between their own currencies and the dollar. Their right in this respect can be limited by international arrangement but not by Congressional action. The most that Congress can do is to enact legislation designed to minimize the effect of restrictions which other nations may impose. It should be kept in mind that foreign countries can exercise this power whether the dollar is a

scarce currency or not. Under the Fund Agreement foreign countries do not acquire any additional power with respect to imposing restrictions on dollar transactions, and in fact their power is limited by the Fund Agreement. If the Fund declares the dollar to be a scarce currency foreign countries will be permitted to impose limitations on the freedom of exchange transactions in dollars, but the limitations can be no more restrictive than is necessary to limit the demand for dollars to the supply held by and accruing to the country imposing the restrictions, and they must be relaxed and removed as rapidly as conditions permit.[188/] It is apparent, therefore, that the power of foreign countries to restrict transactions between their currencies and the dollar is not acquired by delegation from the Congress of the United States, but is a power which they have today and which will be limited rather than increased by the Fund Agreement.

Section 5 of Article VII commits the United States not to invoke any prior international arrangements in a manner which will prevent the operation of the scarce currency provisions. Obviously this is not a delegation of legislative power to the Fund but is an agreement by the United States to restrict its right to insist upon compliance with earlier arrangements with other countries

188/ Article VII, Section 3(b)

which are inconsistent with the Articles of Agreement. Even if the extreme view were taken that some agreements to which the United States is a party would, in effect, be revoked by this provision, it still would not involve an unlawful delegation since its effect would merely be to terminate the existing international arrangements.

The conclusion necessarily follows that the Articles of Agreement and H. R. 3314 do not involve an unlawful delegation of legislative power to the Fund, to the Bank, or to foreign countries.