EDITORIAL COMMENT

FOREIGN FUNDS CONTROL AND FOREIGN OWNED PROPERTY

Secretary of State Hull, speaking before the House Foreign Affairs Committee on January 15, 1941, declared one of the aims of our foreign policy to be "the restoration and cultivation of sound economic methods and relations, based on equality of treatment." It is both a policy and an inducement for the restoration and maintenance of world peace. On the other hand, it may be taken as a corollary that economic weapons will be used against those countries which make use of aggressive warfare and conquest, nations which, to use Mr. Hull's phraseology, are guilty of an "overt breach of world order . . . in direct contravention of solemnly accepted conventions under the Covenant of the League of Nations and of the Kellogg-Briand Pact."

Far-reaching economic steps have now been taken in promotion of this branch of the foreign policy of the United States Government. The Executive Orders dated respectively April 10, 1940, June 14, 1941, and July 26, 1941,[1] prohibit from the "effective date" of the orders a wide category of business and financial transactions with a large number of foreign countries and their nationals. This date is stated to be June 14, 1941, for Albania, Austria, Czechoslovakia, Finland, Germany, Italy, Poland, Portugal, Spain, Sweden, Switzerland, the Soviet Union and some others. Earlier dates apply to Belgium, Denmark, France, Greece, The Netherlands, Norway, Rumania and others; while July 26, 1941, is the effective date for China and Japan. These and like orders, now generally known as "freezing orders," are designed, among other things, to prevent the use of the financial facilities and trade of the United States in ways harmful to national defense, to curb subversive activities within the United States, and to prevent the liquidation in the United States of assets which otherwise would be claimed as booty by the conqueror or constitute the profits of duress and spoliation exercised against oppressed minorities for the benefit of aggressor nations to be used as sinews of further aggression and conquest.

Under the order of June 14, 1941, the term "effective date" becomes especially material because of the definition of "national," which is defined as: "Any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of this order" (Sec. 5, E). "A foreign country" refers to the schedule of particular countries named (Sec. 3). Partnerships, corporations and other group-forms are included in the term "national," provided a substantial part of the shares, bonds, or other securities of such organizations is owned or controlled by the foreign country or its nationals. The draft of the order ascribes to the term

[1] Printed in this JOURNAL, Supp., p. 214.

"national" an artificial and much extended meaning so as to include not only persons domiciled in the respective foreign country but even "any person to the extent that such person is, or has been, since such effective date, acting or purporting to act directly or indirectly for the benefit or on behalf of any national of such foreign country"; and also to any other person who there is reasonable cause to believe is a "national" as therein defined (Sec. 5). This is poor legislative drafting.

All transactions mentioned in the order are prohibited, except as specifically authorized by the Secretary of the Treasury, (1) if such transactions are by or on behalf of, or pursuant to the direction of any foreign country designated in the order or any national thereof, or (2) if they involve property in which such foreign country or national has had any interest of any nature whatever since the effective date of the order. The transactions referred to include transfers of credit between any banking institutions within the United States to any banking institutions outside the United States; all foreign-exchange transactions within the United States and all transfers or dealings in any evidences of indebtedness or of the ownership of property by any person within the United States; all dealings in securities containing a stamp or seal of a foreign country designated in the order (Sec. 1); or indeed of any interest in any security or evidence thereof "if the attendant circumstances disclose or indicate that the security or evidence thereof is not physically situated within the United States" (Sec. 2, A(2)).

The wide scope of these regulations may not at first be appreciated. They will undoubtedly reach many transactions of a wholly innocent nature in which foreign nationals, as thus artificially defined, may have only a contingent or tenuous interest. For example, the term "property" and "property interests" include also contingent interests in estates and trusts. It is true that the scope of the regulations has been somewhat modified by general licenses, such as General License No. 30, issued August 14, 1940, which grants authority to any bank or trust company of the United States, or of any State thereof, to make distributive shares of principal or income to persons legally entitled, who are not nationals of the foreign countries designated, or to engage in other transactions arising in the administration of the trust, if no such foreign national is a beneficiary. General License No. 42 issued June 14, 1941, grants a license to individuals who have been domiciled in and residing only in the United States at all times on and since June 17, 1940, or the effective date of the order, if such effective date is subsequent. But the net result is to place a heavy responsibility on trustees and fiduciaries generally.

In addition to these broad provisions of the "freezing" orders, the Secretary of the Treasury has issued regulations further defining certain terms used and requiring reports to be filed under oath, by all persons in the United States directly or indirectly holding or having title to or custody, control, or possession of any property mentioned in the orders, giving information as to

the nature of the property so held; also from every agent or representative in the United States for any foreign country or national thereof having any information with respect to such property. Needless to say the criminal and other penalties for the violation of the provisions of the orders are severe.

It is to be observed that in view of the interrelationship of financial transactions, the control is extended to certain countries not invaded. However, it is intended that through the medium of general licenses, the "freezing" control will be lifted with respect to certain of these countries upon receipt of adequate assurances that the general licenses will not be employed to evade the purposes of the order.

Simultaneously with the issuance of the order of June 14, 1941, the President approved regulations ordering a census of all foreign-owned property in the United States belonging not alone to countries and nationals subject to "freezing" control, but to all other countries as well. The "freezing" control under the order does not apply with the same force to the countries of this hemisphere, but an embargo is accomplished by the Proclaimed List of Certain Blocked Nationals under the order of July 17, 1941,[2] together with General License No. 53, relating to inter-American trade. However, certain obligations still rest upon traders doing business with firms not mentioned in the list.

The orders are based upon the authority vested in the President by Section 5 (b) of the Trading with the Enemy Act of October 6, 1917, as amended,[3] as well as by virtue of "the existence of a period of unlimited national emergency" and of all other authority vested in the President. While not issued in time of war, the orders are quite definitely related to national defense and represent an implementation of "measures short of war" doubtless the most extensive in our history. While resting upon territorial jurisdiction and the right of national defense, their justification is partly based upon the violation of the Kellogg-Briand Pact. Attorney General (now Mr. Justice) Jackson, in his address at Havana on March 27, 1941, before the Inter-American Bar Association, said that "one of the most promising directions for legal development is to supply whatever we may of sanction to make renunciation of war a living principle in our society."

The very flexibility of the orders as extended or relaxed from time to time by amendments and by Treasury licenses, general or specific, are designed to carry out the varying vicissitudes of our defense policies and to curb aggression. Thus the order affecting China was made at the specific request of its government and as a "continuance of this government's policy of assisting China."[4] A similar purpose is to be found in the General License of June 24, 1941, exempting the Soviet Union.

The success of these measures may prove an historic milepost in the struggle against wars of aggression. Their effectiveness is greatly enhanced by a

[2] Printed in this JOURNAL, Supp., p. 222. [3] *Ibid.*, p. 213.

[4] Statement issued from the White House, New York Times, July 26, 1941, p. 1.

correlative policy of extending economic *privileges* to those and only to those nations which contribute to the maintenance of peace. Thus the joint declaration of August 14, 1941, made by President Roosevelt and Prime Minister Churchill announced a policy of economic favor as part of the program envisaged by their respective countries. In the fourth point of their declaration it was announced that these countries "will endeavor, with due respect for their existing obligations, to further the enjoyment by all states, great or small, victor or vanquished, of access on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity." This may be taken to be a corollary to the strong economic measures taken both by the British Commonwealth and by the United States against the Axis nations. Such a peace policy gives force and direction to the measures of non-intercourse and blocking represented by the "freezing" orders and related measures.

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THE SHIFTING BASES OF INTERNATIONAL LAW

Since the object of law is the protection of interests, the constant solicitude of the international jurist should be to note when interests change and how the law must change. Never in all history has there been so profound and so rapid a change in international interests as during the past quarter of a century. It would be beyond the scope of this editorial comment either to summarize the causes of these changes or to attempt their classification. Certain it is that the evolution of international society is swiftly taking the form of a revolution involving cataclysmic changes in social relations. Vast forces of an imponderable nature are at work. We cannot accurately appraise them or calculate their effects. We realize, however, that we poor humans are being swept along by these forces and that we gradually are jettisoning many old accepted political, economic, social, legal, ethical, and spiritual standards of value. About all we can do, as the current carries us along, is to note certain general trends which involve profound changes in the interests of international society, and hence alterations in the principles of law which may be applicable.

First of all, is the amazing political revolution which exalts the state above the individual and announces a new concept of sovereignty, namely, that it does not emanate from the people or from a supreme ruler, but from a political faction which absorbs the state itself. This new form of government might correctly, though paradoxically, be termed a *popular dictatorship*. We are witnessing in many nations a radical change in ideology. Even traditional democracies, such as France, are abandoning cherished ideals of popular sovereignty.

This new political concept completely annihilates systems of law and substitutes arbitrary procedure dictated by motives of expediency. International law, therefore, finds itself almost completely ignored by the devotees