purely commercial business.[6] The principle cannot be said to be well established but may be in the process of development, having gained recognition at least in some countries.[7] The importance of limiting sovereign immunity where the state enters the arena of commercial business has only recently begun to assume vital importance. The nationalization of all export and import business by Soviet Russia has now been followed, although to a more limited degree, by the nationalization of certain industries by Great Britain, France, and other countries. The significance of this phenomenon in international life must soon be recognized as one deeply affecting both economic and political relations. The fact that the Supreme Court of the United States has restricted the immunity of State governments to the exercise of essential government functions should not be overlooked in the conduct of our foreign relations. The principle is a corollary to the maintenance of a system of free enterprise.

ARTHUR K. KUHN

THE LEADERS' AGREEMENT OF YALTA

On February 11, 1946, the United States Department of State released the following text of a secret agreement signed at Yalta, in the Crimea, on February 11, 1945:

> The leaders of the three Great Powers—the Soviet Union, the United States of America and Great Britain— have agreed that in two or three months after Germany has surrendered and the war in Europe has terminated the Soviet Union shall enter into the war against Japan on the side of the Allies on condition that:
>
> (1) The *status quo* in Outer Mongolia (the Mongolian People's Republic) shall be preserved;
>
> (2) The former rights of Russia violated by the treacherous attack of Japan in 1904 shall be restored, viz.:
>
> (a) The southern part of Sakhalin as well as all the islands adjacent to it shall be returned to the Soviet Union,
>
> (b) The commercial port of Dairen shall be internationalized, the preëminent interests of the Soviet Union in this port being safeguarded and the lease of Port Arthur as a naval base of the U.S.S.R. restored.
>
> (c) The Chinese Eastern Railroad and the South Manchurian Railroad which provides an outlet to Dairen shall be jointly operated by the establishment of a joint Soviet-Chinese Company, it being understood that the preëminent interests of the Soviet Union shall be safeguarded and that China shall retain full sovereignty in Manchuria;
>
> (3) The Kurile Islands shall be handed over to the Soviet Union.
>
> It is understood that the agreement concerning Outer Mongolia and the ports and railroads referred to above will require concurrence of Generalissimo Chiang Kai-shek. The President will take measures in order to obtain this concurrence on advice from Marshal Stalin.

[6] See the writer's editorial comment in this JOURNAL, Vol. 21 (1927), p. 742.

[7] See editorial comments in this JOURNAL, Vol. 28 (1934), pp. 119–122; Vol. 39 (1945), p. 772. See also Harvard Research in International Law, draft treaty, in Supplement to this JOURNAL, Vol. 26 (1932), p. 455, Arts. 11, 23, 25.

The heads of the three Great Powers have agreed that these claims of the Soviet Union shall be unquestionably fulfilled after Japan has been defeated.

For its part the Soviet Union expresses its readiness to conclude with the National Government of China a pact of friendship and alliance between the U.S.S.R. and China in order to render assistance to China with its armed forces for the purpose of liberating China from the Japanese yoke.

Feb. 11, 1945

J. STALIN
FRANKLIN D. ROOSEVELT
WINSTON S. CHURCHILL[1]

The careless informality and the execrable draftsmanship of this highly important instrument raise interesting questions of a technical nature. Who were the parties to the agreement? Upon whom is it legally binding? Precisely what obligations were assumed by the contracting parties?

The agreement purports to be between the "leaders" or "heads" of "the three great powers" which are identified as "the Soviet Union," the United States of America, and "Great Britain." The characterization of the President as "the leader" of the United States is scarcely a term of art and its precise implications are unknown to United States constitutional law, although the appellation is not unfamiliar to students of Nazi terminology. Similarly lacking in precision is the characterization of the President as "the head" of a "great power." Aside from their designation as "leaders" or "heads," it is nowhere stated in the text of the instrument that the persons who signed acted on behalf of their respective states or that they had the competence or authority to bind their states. The name "Marshal Stalin" appears once as such. The same sentence refers to "The President." Mr. Churchill's name or titles do not appear at all in the text. The signatures appended to the instrument are not followed by any official designations. The only clear expression of an undertaking assumed by a state, as such, is found in the last paragraph, which begins "For its part the Soviet Union expresses its readiness to conclude with the National Government of China a pact of friendship and alliance between the U.S.S.R. and China," although, in the first paragraph, the three "leaders" are stated to "have agreed" that the Soviet Union shall enter the war against Japan at a (fairly)[2] certain time subject to (fairly uncertain) conditions.

The terms in which the conditions are set forth require brief comment before their exact purport is analyzed. It makes sense to state that "the former rights of Russia" shall be "restored" if one thinks of their being restored to "Russia"; but it is difficult to see how southern Sakhalin can be "returned" to the Soviet Union and "the lease of Port Arthur as a naval

[1] *Department of State Bulletin*, Vol. XIV, No. 347 (Feb. 24, 1946), p. 282.

[2] The passage setting forth the agreed date for Soviet entry into the war against Japan—"in two or three months after Germany has surrendered and the war in Europe has terminated"—apparently does not refer to termination of war in a technical sense.

base of the U.S.S.R. restored" when neither has ever been in the possession of the Soviet Union.

Although the phraseology of the first paragraph that "the leaders of the three great powers . . . have agreed that . . . the Soviet Union shall enter into the war against Japan" is qualified by the phrase "on condition that . . . ," it is apparent that the conditions next set forth are not conditions the fulfillment of which is regarded by the signers as necessarily preceding the entry of the Soviet Union into the war against Japan. The agreed date for the entry of that state into the war against Japan is "two or three months after Germany has surrendered and the war in Europe has terminated," but the conditions ("the agreement") concerning Outer Mongolia and the ports and railroads of Manchuria are made dependent upon the "concurrence of Generalissimo Chiang Kai-shek." This deference to the interests of China appears to be somewhat qualified by the next two sentences ("The President will take measures in order to obtain this concurrence on advice from Marshal Stalin" and "The heads of the three great powers have agreed that these claims of the Soviet Union shall be unquestionably fulfilled after Japan has been defeated"), but the nature of the conditions as conditions subsequent to the entry of the Soviet Union into the war against Japan more clearly appears. That they were so regarded by the Soviet Union is shown by her entry into the war against Japan on August 9, 1945, prior to the fulfillment of the conditions. Marshal Stalin, having exacted a stiff price, somewhat at the expense of China, from Messrs. Roosevelt and Churchill, friends of China, delivered the goods at a time most convenient to those leaders. The question remains: What is the nature and extent of the obligations assumed by President Roosevelt?

First, Mr. Roosevelt accepted Marshal Stalin's condition that "the *status quo* in Outer Mongolia (the Mongolian People's Republic) shall be preserved" and agreed that "these claims of the Soviet Union shall be unquestionably fulfilled after Japan has been defeated." What is the meaning of these provisions? If Outer Mongolia is an integral part of the Republic of China,[3] as was recognized by the Union of Soviet Socialist Republics in 1924,[4] the Chinese-Soviet Agreement on Outer Mongolia, concluded by exchange of notes at Moscow on August 14, 1945, would appear to be a modification of the *status quo;* for, by this agreement,

[3] See Louis Nemzer, "The Status of Outer Mongolia in International Law," this JOURNAL, Vol. 33 (1939), pp. 452–464.

[4] The first paragraph of Article V of the Chinese-Soviet Agreement on General Principles signed at Peking on May 31, 1924, reads as follows: "The Government of the Union of Soviet Socialist Republics recognises that Outer Mongolia is an integral part of the Republic of China and respects China's sovereignty therein;" League of Nations Treaty Series, Vol. XXXVII, pp. 176, 178. Nemzer, writing in 1939, stated that, although Soviet Russia has acted upon the assumption that China's jurisdictional authority in Outer Mongolia had varied in recent years, the Soviet Government "has never denied the sovereignty of China in this area;" Nemzer, as cited, p. 458.

> in view of the desire repeatedly expressed by the people of Outer Mongolia for their independence, the Chinese Government declares that, after the defeat of Japan, should a plebiscite of the Outer Mongolian people confirm this desire, the Chinese Government will recognize the independence of Outer Mongolia with the existing boundary as its boundary while the Soviet Government, taking note of the above statement of the Chinese Government, "further states that the Soviet Government will respect the political independence and territorial integrity of the People's Republic of Mongolia (Outer Mongolia)".

Likewise the Soviet Government, taking note of the above statement of the Chinese Government, "declares on its part that it will respect the state of independence and territorial integrity of the Mongolian People's Republic (Outer Mongolia)." [5] If, on the other hand, Outer Mongolia was already an independent state at the time the Leaders' Agreement was signed at Yalta, what obligations were assumed by Mr. Roosevelt with reference to the preservation of the *status quo* in Outer Mongolia? Did he envisage the United States as a perpetual guarantor of the independence of Outer Mongolia, against the Soviet Union as well as against China? Or is it possible that he merely agreed not to oppose future Soviet predominance in this territory over which China claimed sovereignty? Is the obligation executed or does it remain executory?

The second condition accepted by Mr. Roosevelt for Soviet entry into the war against Japan was that "the former rights of Russia violated by the treacherous attack of Japan in 1904 shall be restored," namely, that southern Sakhalin and adjacent islands should be "returned" to the Soviet Union; that the port of Dairen should be internationalized, "the preëminent interests of the Soviet Union in this port being safeguarded"; that the "lease" of Port Arthur as a naval base of the Soviet Union should be "restored"; [6] that the Chinese Eastern and South Manchuria Railroads should be jointly operated by a Soviet-Chinese company, "it being understood that the preeminent interests of the Soviet Union shall be safeguarded and that China shall retain full sovereignty in Manchuria." Since, by the Chinese-Soviet Agreements concluded at Moscow on August 14, 1945, the Soviet Union obtained substantial fulfillment of her claims in Manchuria, the question arises whether these conditions of the Yalta Leaders' Agreement are to be considered as executed or whether Mr. Roosevelt assumed any executory obligations to see that the preëminent interests of the Soviet Union in Manchuria should be safeguarded or "that China shall retain full sovereignty in Manchuria."

Have the conditions that the Kurile Islands and southern Sakhalin should

[5] *Department of State Bulletin*, Vol. XIV, No. 345 (Feb. 10, 1946), pp. 204–5.

[6] By the terms of the Russian-Chinese Convention of March 27, 1898, for the lease of the Liaotung Peninsula to Russia, the lease was to run twenty-five years, and would have expired on March 28, 1923, unless prolonged by mutual consent. See J. V. A. MacMurray, *Treaties and Agreements with and Concerning China, 1894–1919*, pp. 119, 1221.

be handed over to the Soviet Union been fulfilled by the Soviet military occupation of those islands with the consent of the United States authorities? Or does the fulfillment of these conditions agreed to by President Roosevelt require the approval of the United States in the treaty of peace?

Uncertainties revealed by an analysis of the text render even more important the question whether the United States, in contrast possibly to President Roosevelt, was ever legally bound upon signature of the agreement by the latter. In releasing the text of the secret agreement one year after it was signed, Secretary of State James Byrnes referred to it as "the agreement between the President of the United States, Franklin D. Roosevelt, the Prime Minister of Great Britain, Winston Churchill, and Generalissimo Stalin," [7] not as an agreement between the United States, the United Kingdom, and the Union of Soviet Socialist Republics. At the same time Mr. Byrnes stated that it is evident that this agreement was regarded by President Roosevelt, Prime Minister Churchill, and Generalissimo Stalin as a military agreement. He used this characterization of it as a military agreement to justify its being kept secret, even from him, the Secretary of State. Any possible implication that, since it was a military agreement, it was concluded by the President as an executive agreement under his Constitutional powers as Commander-in-Chief, and that it was therefore not necessary to submit it to the Senate as a treaty, appears to be negatived by his reported statements to the press on January 29, 1946. At that time the Secretary, asked whether it would be necessary to have a treaty to formalize the transfer of southern Sakhalin and the Kuriles to the Soviet Union,

> "replied [8] in the affirmative, adding that . . . it was his understanding that any cession of territory must be legalized in a treaty. . . . Asked whether the [secret Yalta] agreement was so phrased that it could be interpreted as an award of those areas to the Soviet Union, or merely that Britain and the United States would support the Soviet Union's claim to it in an eventual peace treaty, the Secretary replied that it was his recollection that the language in one of the agreements was that it should be turned over, but he added that there was not any question about what was intended at Yalta because at Yalta he heard Mr. Roosevelt on at least one or two occasions take the position that as to cession of territory, it was a matter that had to be settled in the peace treaty. He said that that was always Mr. Roosevelt's view and that at Potsdam Mr. Truman took the same position as to the Silesian area, making it plain that it was an agreement, and that at the proper time this Government would support it."

If, paraphrasing the conclusions of the Harvard Research in International Law on the Law of Treaties,[9] we assume (1) that the competence of the

[7] *Department of State Bulletin*, Vol. XIV, No. 347, as cited; *The New York Times*, Feb. 12, 1946.

[8] *Department of State Bulletin*, Vol. XIV, No. 345 (February 10, 1946), pp. 189–90.

[9] Harvard Research in International Law, Law of Treaties, this JOURNAL, Vol. 29 (1935), Supplement, p. 1008.

President to make an executive agreement which will be internationally binding on the United States is determined by United States law, including the Constitution; and (2) that an executive agreement not within his competence under United States law is not binding on the United States under international law, we reach interesting results. There are sufficient precedents to justify the conclusion that the President has the Constitutional competence to conclude internationally binding military agreements without the advice and consent of the Senate. Certainly there is sufficient reason in the circumstances of its signing to regard an agreement for bringing the Soviet Union into the war against Japan at the most strategically desirable time as a military agreement. At the same time, the price exacted by Marshal Stalin made the agreement much more than a military agreement. Its provisions that the claims of the Soviet Union should be unquestionably fulfilled after Japan has been defeated refer to the transfer of Japanese territory and the shackling of Chinese territory and contain commitments of such uncertain meaning and doubtful duration as to raise serious doubts as to the President's Constitutional competence to commit the United States by executive agreement.

There has been considerable controversy as to the duration and binding force of executive agreements.[10] President Theodore Roosevelt's statement that his *modus vivendi* with Santo Domingo was merely "a direction of the Chief Executive which would lapse when that particular executive left office" [11] is certainly not true of the durability of all executive agreements. A large number of executive agreements, made within the sole Constitutional competence of the President, or pursuant to action by Congress within its Constitutional competence, have remained in effect through several administrations.[12] The assumption that the contracting parties had the competence to contract the obligations contracted is implicit in the statement of the Harvard Research in International Law that for the purposes of international law executive agreements are not to be distinguished from treaties.[13] The same assumption is implicit in the view expressed by the Chief of the Treaty Division of the Department of State in 1934 to the effect that:

> Executive agreements with foreign governments entered into under one President continue to remain in force under his successors unless and until the statutes or regulations in pursuance of which they are entered into are repealed or the specified time for their operation has

[10] See Myres S. McDougal and Asher Lans, "Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy," in 54 Yale Law Journal (1945), pp. 181–351, 534–615, especially 318–351; Edwin M. Borchard, "Treaties and Executive Agreements—A Reply," in same, pp. 616–664, especially pp. 637 ff., 657 ff.

[11] Quoted in Green H. Hackworth, *Digest of International Law*, Vol. V, p. 403, from *Theodore Roosevelt: An Autobiography*, 551–552.

[12] See instances cited by McDougal–Lans, pp. 343–345.

[13] Law of Treaties, this JOURNAL, Vol. 29 (1935), Supplement, pp. 667, 1008.

> expired, or notice of a desire to terminate is given by one side or the other.[14]

There is no reason, however, why all executive agreements should be regarded as of equal validity; more especially there is no reason in law—national or international—why a succeeding administration should not treat an executive agreement made outside his competence by a preceding Executive as merely his personal pledge, never binding under international law on the United States. Such a procedure would have the advantage of putting foreign states on notice that not every agreement concluded by the President is binding on the United States.

Whether or not Marshal Stalin was put "on notice" by President Roosevelt as to the latter's Constitutional incompetence to conclude certain international engagements is not entirely clear. However, in his Report on the Crimea Conference, delivered before a joint session of Congress on March 1, 1945, Mr. Roosevelt said:

> As you know, I have always been a believer in the document called the Constitution. I spent a good deal of time in educating two other nations of the world with regard to the Constitution of the United States—that the charter has to be and should be approved by the Senate of the United States under the Constitution. I think the other nations of the world know it now.[15]

In the prepared text of this speech released by the White House prior to its delivery, the following passage appears:

> I am well aware of the Constitutional fact—as are all the United Nations—that this charter must be approved by two thirds of the Senate of the United States—*as will some of the other arrangements made at Yalta* (italics added).[16]

The italicized words do not appear in the report in the *Congressional Record* of the speech as delivered.

In one passage of his statement accompanying the release of the Leaders' Agreement of Yalta, Secretary Byrnes referred to it as "this memorandum." The content, terminology, and form of the agreement, the fact that it contains no provisions for its coming into force or for its termination, as well as the fact that many of its provisions have been executed, suggest that this agreement might well be considered merely as a memorandum recording the personal agreement of the three "leaders." [17] Since the claims of the Soviet

[14] From a letter from the Chief of the Treaty Division, U. S. Department of State, to William Hays Simpson, Dec. 7, 1934, quoted in William Hays Simpson, "Legal Aspects of Executive Agreements," in 24 Iowa Law Review (1938), pp. 67, 86.

[15] *Congressional Record*, Vol. 91, Part 2, p. 1620 (March 1, 1945).

[16] *Department of State Bulletin*, Vol. XII, No. 297 (March 4, 1945), p. 324.

[17] It is not without interest that the Report on the Crimea Conference released Feb. 12, 1945, although signed by Messrs. Churchill, Roosevelt, and Stalin, does not purport to be an "agreement," but is referred to in its text as a "statement" on the results of the conference: *Department of State Bulletin*, Vol. XII, No. 295 (Feb. 18, 1945), pp. 213–6.

Union with reference to Outer Mongolia and Manchuria have already been accepted by China, there would seem to be no reason for the United States to approve or disapprove, by treaty or otherwise. As to Southern Sakhalin and the Kuriles there would seem to be no reason for the United States to withhold its consent to their formal transfer to the Soviet Union in the peace treaty with Japan. This proposal would have the advantage of relegating an agreement of uncertain meaning, doubtful duration, and questionable legal validity to its proper rôle of an historical curiosity and a legal monstrosity.

HERBERT W. BRIGGS

GUATEMALA VS. GREAT BRITAIN: IN RE BELICE

The International Court of Justice, a principal organ of the United Nations, has been constituted through the election of its fifteen Judges. Great Britain has offered to have her 87-year-old dispute with Guatemala, concerning the territory of Belice, decided by this Court. The Belice controversy may constitute the first case before the new Court. It seems, therefore, timely to state the facts and the law involved in this case, without voicing any opinion as to the judgement.

The territory which the British call British Honduras [1] and the Guatemalans Belice, according to its capital, has an area of 8598 square miles, a little larger than Wales, and is situated 600 miles west from Jamaica; it borders in the West on Guatemala, in the East on the Caribbean Sea. It has a population of some 61,000 inhabitants, of whom only 4% are white. It is a British Crown Colony under a Governor, aided by an appointed Executive Council and a partially elected Legislative Council.

The history of Belice goes back to the XVIIth century and forms part of England's struggle against the Empire of Spain. The era of buccaneering [2] led in 1655 under Cromwell to the conquest of Jamaica, and Spain recognized England's title to Jamaica by the Treaty of Madrid of July 18, 1670. The attempts made by England to stop buccaneering [3] had as a consequence that some of the former buccaneers became woodcutters, and woodcutters from Jamaica, attracted by the forests of mahogany, logwood, cedar, and cabinet

[1] For brief information see: *The Statesman's Year Book, 1943*, pp. 271–273; *Pan American Year Book, 1945*, pp. 530–532. British literature: G. Henderson, *An Account of the British Settlements of Honduras*, 1811; *Honduras Almanac*, Belice, 1828; D. Morris, *The Colony of British Honduras*, 1883; A. R. Gibbs, *British Honduras: A historical and descriptive account of the colony from its settlement, 1670*, London, 1883; L. W. Bristowe and P. B. Wright, *Handbook of British Honduras, 1889–1893*; A. B. Dillon, *Geography of British Honduras*, London, 1923; M. S. Metzgen and H. E. C. Cain, *Handbook of British Honduras, 1925*; A. H. Anderson, *Brief Sketch of British Honduras*, London, 1927; Sir J. A. Burdon, *Brief Sketch of British Honduras*, London, 1928; Sir A. Aspinall, *Handbook of the British West Indies, British Guiana and British Honduras, 1929–1930*.

[2] C. H. Haring, *Buccaneers in the West-Indies*, 1910.

[3] *Cambridge History of the British Empire*, Vol. I, p. 246.