

## CONTRACTS BETWEEN CITIZENS OF THE UNITED STATES AND FOREIGN STATES

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During the past few years public attention has been increasingly focused upon the economic relations of American citizens, banks, and corporations with foreign governments. It is beyond dispute that America's entry into the World War in 1917 was deeply influenced by great loans and private credits to the Allied Powers. The basic contractual relations which our immense investment abroad presupposes may well, as forcibly illustrated in the recent Ethiopian-Standard Oil concession, present involvements of a political character, place a heavy burden upon diplomatic relations, or present a serious obstacle to the unhampered carrying out of a sound foreign policy. It becomes then of definite importance to weigh thoroughly some of the legal considerations which must govern the contractual relations of citizens of this country and foreign states, and to investigate from the standpoints of both national policy and national law the soundness of popular assumptions as to the validity and propriety of these relationships.

The Constitution is silent upon the subject of the contract of a citizen of the United States with a foreign state. Under its provisions, the whole intercourse of the United States with foreign states is entrusted exclusively to the Federal Government. The treaty-making power embraces the regulation of all matters affecting the political and commercial relations of this country and foreign powers. It is axiomatic that "one nation treats with the citizens of another, only through their Government."<sup>1</sup> The President of the United States alone can conduct that intercourse on behalf of the government or people of this nation. Within the limits of its delegated powers to regulate commerce and navigation with foreign nations, Congress has an admitted authority to enter into legislative compacts with them. It has, moreover, Constitutional authority to interpose between a state of the Union and a foreign state and prohibit, or consent to, any compact or agreement contemplated between them.<sup>2</sup> From these powers important conclusions are to be deduced as to the supposed right of a citizen to enter into contract with a foreign sovereign or governmental power.

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1. *United States v. Diekelman*, 92 U. S. 520, 524 (1875).

2. U. S. CONST. Art. I, § 10.

From earliest periods in our history our citizens have freely gone abroad and entered into contracts with all foreign governments;<sup>3</sup> yet this freedom of intercourse and of compact with foreign sovereigns is essentially, and in principle, repugnant to the powers mentioned, powers expressly granted or necessarily to be implied in the federal government in respect to intercourse, commerce, and navigation with foreign sovereigns, peoples, or states. Whatever be this liberty of contract of a citizen of this country, however inherent such alleged right, whatever be its limitations, it is seriously to be questioned whether, without transcending his duties under the Constitution and towards the authorities which it establishes, he may compact validly with a foreign sovereign, except in so far only as the laws or treaties of the United States may warrant the contract, or the consent of Congress is evidenced, or clearly to be presumed, and then only through authorized channels of intercourse with foreign governments. Extreme as this view may appear to be, it is the only one compatible with the sum total of authority on the subject.

The existence of a right in the individual by reason of his state citizenship to enter freely and independently of these limitations into compact with foreign governmental power would presuppose a higher right than that possessed under the Constitution by his state sovereignty, or, indeed, by all the people of the state of his citizenship. The Constitution expressly prohibits the states from the making of treaties. It forbids a state from entering into any compact or agreement with a foreign state without the consent of Congress. Chief Justice Taney declared that this provision was introduced for the special purpose of cutting off all intercourse between the states, or between state officers and foreign states.<sup>4</sup> Earliest decisions upon the compact power of the states indicate conclusively that a state compact, validly entered into, is the act of all the people of the state in their sovereign capacity.<sup>5</sup> *A fortiori*, no higher power can be exercised by the citizen of a state than may be exercised constitutionally by his state sovereignty: any higher right in the individual to compact with foreign sovereign power, if it exists at all, must be traced up to his United States citizenship. As such, it is opposed by an unlimited power in the Federal Government, not alone to regulate such compacts, but absolutely to prohibit their making. The existence of this power, as expressly granted or necessarily to be implied, repels the idea that the citizen, whether by reason of his state or national citizenship, has any inherent or granted right to enter upon contract or agreement with a foreign sovereign without the concurrence of appropriate authorities of the government of the United States. What-

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3. See 6 MOORE, INTERNATIONAL LAW DIGEST (1906) 709 (letter of Mr. Buchanan, Secretary of State, to Mr. Ten Eyck, August 28, 1848).

4. *Holmes v. Jennison*, 14 Pet. 540, 572 (U. S. 1840).

5. *Washington, J.*, in *Green v. Biddle*, 8 Wheat. 1, 88 (U. S. 1823).

ever his right, if any, may be, it must be conditional and limited by the operation of principles of public law; it should not be exercised without the cognizance and consent of his government.

Treaties made under the authority of the United States bind all the people, individually and collectively. Such a treaty acts directly upon the citizen: "It is his own personal compact. . . . And he can do no act, nor enter into any agreement contravening the law it gives."<sup>6</sup> It is not to be supposed that a state of the United States may compact with a foreign state upon the subject matter of a treaty, except in pursuance of some right it confers and not at all in such manner as to contravene its obligation or to act or to stipulate upon the law of nations. These limitations pertain to the compact power of the states.<sup>7</sup> They must apply, *mutatis mutandis*, to the compact of the citizen with foreign governmental power. Moreover, the power of Congress to give or withhold its consent to the compacts of the states suffers no limitation by reason of the fact that a state compact may touch powers which are not granted to the United States, but are reserved to the states or to the people. The latitude of this power negatives the idea of inherent or inalienable right in the individual to go abroad and enter into contract with foreign governments in any way binding upon his own country, constraining upon its policies, or frustrative of its justice. Coupled with the treaty-making power and executive authority respecting intercourse with foreign sovereigns, this power in Congress forecloses all transaction of the states of the United States with foreign states. The existence of these powers and authorities imports the invalidity under American law of any contract of the citizen, whether individual or corporate, with foreign sovereign power, except when made conformably with the Constitution and the supreme law of the land. It argues a full and plenary authority in Congress, adequate to the setting up of a supervision and control over such contracts, and coextensive with the subject matter of its ordinary legislative powers and its constitutional authority in the domain of state compact.

It is pertinent to inquire whether any right in the citizen to contract with foreign sovereign power is to be deduced from existing treaties. The typical treaties of amity, commerce, and navigation between the United States and foreign states, which in form and terms have varied almost not at all in over a century, stipulate either for full liberty in the citizens of one high contracting party to trade with the citizens of the other and to manage their own affairs within the territory of the other; or for a degree of liberty in these matters in the citizens or subjects of the one sovereign equal to that which is enjoyed by the citizens or subjects of the other; or equal

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6. Taney, C. J., in *Kennett v. Chambers*, 14 How. 38, 50 (U. S. 1852). The principle appears to have been first affirmed by Iredell, J., in *Ware v. Hylton*, 3 Dall. 198, 261 (U. S. 1796).

7. See *Holmes v. Jennison*, 14 Pet. 540, 572 (U. S. 1840).

to that enjoyed by the citizens of the most favored nation; or, finally, by the citizens of *any* nation.

Neither early American treaties nor any of those more recently made stipulate expressly for any right in the individual citizen of one signatory to compact with the government of the other. Whether fortuitously, inadvertently, or intentionally omitted, such substantive right is not directly or expressly stipulated for or guaranteed; and it most certainly strains the language of these treaties to attempt to deduce this right from such of their provisions as prohibit unequal, nonreciprocal or discriminatory treatment of the citizens of the one sovereign party by the government of the other. It is apparent, that only upon the ground that the citizens of a foreign country possess under its laws the right to contract with their own sovereign, or that the citizens or subjects of the most favored, or indeed any nation, enjoy such a right under the laws of that country, can such right be deduced from these treaties in favor of United States citizens. The question then remains whether such claim can be advanced except upon principles of the most perfect reciprocity, that is, when it can be asserted factually that citizens of a foreign country, signatory, possess rights equal to those of our own citizens to enter into executory or executed contracts with the United States, sue upon them and enforce their provisions. Much would have to be rewritten in existing federal legislation and *opinio prudentum* modified to satisfy these conditions and to vindicate by reference to subsisting treaties of this country any such liberty of contract in the alien in this country or a reciprocal or coextensive right in the American citizen abroad. The disabilities of alienage in these matters will be found to be yet deeply rooted in our public law. The treaty right in question, which appears to have been generally assumed, can be little more than a privilege or license which sovereign power may confer upon the alien for its own purposes and essentially in the exercise of its own *imperium*. To constitute a bare right in the citizen, it must rest on the agreement or consent of his own government with the foreign sovereign concerned. It would then be claimable of right in his behalf. Admittedly no such characteristic is attached by the government of the United States to such supposed privilege, however fervently the hope be expressed in its diplomatic correspondence that it may be enjoyed by American citizens in foreign parts, in common with other aliens. The acts done by the citizen abroad in pursuance of it are done at his own peril. Upon settled authority, the United States has no means of compelling a foreign sovereign to the performance of the contract that may flow from it; nor have its courts the power to make a foreign sovereign, party thereto, amenable to their process.<sup>8</sup> Our treaties, then, give no perfect right in favor of the citizen of this country or the citizen or subject of any foreign treaty power.

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8. See *Kawananakoa v. Polyblank*, 205 U. S. 349, 353 (1906).

From a very early period in our history, contracts between citizens of this country and foreign governments have served to create extreme difficulties for the diplomatic branch of our Government. John Quincy Adams, Secretary of State, wrote in 1823: "With regard to the contracts of an individual, born in one country, with the Government of another, most especially when the individual contracting is domiciliated in the country with whose Government he contracts, and formed the contract voluntarily, for his own private emolument and *without the privity of the nation under whose protection he has been born*, he has no claim whatsoever to call upon the Government of his nativity to espouse his *claim, this Government having no right to compel that with which he voluntarily contracted to the performance of that contract.*"<sup>9</sup> From this pronouncement may be said to date the reluctance of the State Department to interpose other than good offices in all but very exceptional cases of breach of such contracts by foreign governments or controversies growing out of them. Innumerable precedents may be cited where this government has declined to espouse contract claims of American citizens against foreign sovereigns.<sup>10</sup>

Distinctions have been made by eminent writers between, on the one hand, diplomatic claims arising out of ordinary contracts between the nationals of one country and the government of another, and, on the other, those referable to the default of foreign governments upon the bonds of their public debt held abroad by nationals of other states. However valid these distinctions and however persuasive as to the propriety, in the one instance, of diplomatic interposition and reclamation, or, in the other, as to the want of just reason therefor, they fail to disclose the solid ground upon which the contract of a citizen of the United States and a foreign state must rest to be properly cognizable by the courts of the United States in a case or controversy over which the Constitution and the laws give jurisdiction. It is submitted that the fact upon which depends the only validity and obligation of such contracts is that of the privity of the United States in their making; *i. e.*, the consent of the Congress thereto, whether expressly given, or to be implied in law, or conclusively to be presumed from acquiescence in their making where not in fact repugnant to the public law or public policy.

Within the past two decades there has arisen a situation very different from that contemplated by Adams in his statement above quoted; it is one which learned authorities have failed to anticipate or adequately examine. The enormous expansion of the sphere of contract between American citizens, or corporations, and foreign governments, the consequent direct and eventful reaction upon the economic life of the nation, the fact that many

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9. 6 MOORE, *op. cit. supra* note 2, at 708.

10. *Id.* § 995.

contracts are made to be executed within our own borders, and that they bear indisputably upon treaty relations and upon the conduct of foreign affairs are matters too generally understood to require enlargement. Such transactions have created difficulties, brought in their train terrific economic loss to the whole people, embarrassed national policy, and are directly traceable to the amazing assumption that the right to contract with foreign sovereign power is something inherent in the citizen in all its possible latitude and without limitation of law; in fact, that it is a right above and beyond the law or the remedial justice of our courts. This assumption supposedly has been consonant with "a general usage of nations", if it may be so called, more apparent than real. It would be difficult to adduce proof that any general practice of nations, supporting such a right in a national exists or has been incorporated into public law in this country; and much less, that it has vitiated powers and authorities vested by the Constitution in the Government of the United States, or has rendered impotent Congressional power. The national interest cannot be confused with private profit in the conduct of foreign policies.

On the contrary, it will be found on examination that the practices of foreign nations in respect to overseas investment, direct or portfolio, arising upon private contract with foreign sovereign power, has for many decades been under the strictest governmental supervision, controlled and indeed dictated by the particular interests and settled foreign policies of the investor's own government or foreign office.

Certain qualifications may be made to the foregoing general observations. The consent of Congress to the compact of a state of the United States with a foreign state may well make the compact a tripartite agreement of legislative character. Nor would this aspect be changed by the fact that a citizen, and not a state of the Union, is a party, Congress consenting to the contract. There is in both instances a privity of contract so far as the United States is concerned. The validity and obligation of the contract must then be referred to principles of public law common to both sovereigns. A clash of these principles might well operate to the disadvantage of one or both. This view of the matter is vital to the construction and interpretation of the contract, whether it be submitted to the law of the contracting foreign sovereign or to the domiciliary law of the citizen with whom the contract has been made, which may well be the case, especially in foreign bond contracts. While grants, franchises, and contracts for the performance of services or work, made or entered into by foreign sovereign power with citizens of this country, generally are assumed to be governed by the *lex situs* or *lex locus contractus* and our courts have assumed that the law of borrowing sovereigns governs the contracts they make with underwriters in this country for the flotation of issues of their external debt on the American market, yet the construction of these contracts, their special stipulations

as to the *lex locus contractus*, and the relationships which they may purport to create, may compel quite different conclusions. The consent of Congress in such compacts necessarily implies that they are compatible with public law and public policy; if repugnant thereto they must be void from inception. Again, by reason of the privity of the United States and of the legislative character of those contracts of its citizens in which the consent of Congress may reasonably be presumed, or is expressly given before or even after their making, it is suggested that the contract is raised to higher ground and that its breach involves a denial of justice, not only prejudicial to the citizen, but one as to which the United States may justly complain.

The assumption that these contracts can be entered into without the privity of the United States and yet furnish a basis (conditionally) for suit in its courts has led to conclusions not wholly satisfactory. Thus we have the anomaly of a contract wholly unenforceable in our courts against a foreign sovereign, party thereto, which does not consent to be sued; and at the same time, the agreement is within the protection of the federal judicial power and enforceable in the courts of the United States against its citizens, party or parties to the contract, when sued upon by such foreign state. The judicial power is plainly extended to the cognizance of such suits, the foreign sovereign contracting invoking its aid, or submitting to the jurisdiction of the courts of the United States. By Article III, Section 2, of the Constitution, the judicial power extends unequivocally to controversies between a state and citizens thereof and foreign states, citizens, or subjects thereof. Assuming that this clause authorizes suits upon contract by foreign states, it is notably upon contract entered into by the individual as a citizen of a state of the Union, and not in his capacity or character as a citizen of the United States. Having no right higher than that of his state sovereignty, the question of the validity of his compact with a foreign state must turn, then, upon proof of Congressional consent.

Suits by foreign sovereigns against citizens of the states were not unknown to American practice prior to the Constitution. The Supreme Court of Pennsylvania, apparently under the Confederation, is said to have sustained its own jurisdiction over an action instituted in that court by Louis XVI against one Robert Morris.<sup>11</sup> The first Chief Justice of the United States Supreme Court, John Jay, found that the extension of the judicial power to this category of cases lay in the principle of the responsibility of every nation for the conduct of its citizens or subjects towards foreign nations, commenting significantly: “. . . all questions touching the justice due to foreign nations or people, ought to be ascertained by and depend on national authority.”<sup>12</sup>

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11. Case cited in *Georgia v. Brailsford*, 2 Dall. 402, 407 (U. S. 1792), but apparently not otherwise reported.

12. *Chisholm v. Georgia*, 2 Dall. 419, 476 (U. S. 1793), and see *id.* at 474.

What, then, shall be said of contracts of American citizens with foreign governmental powers which tend or have tended to debauch public law or policy, undermine the economic stability of foreign states, and to despoil the public wealth and natural resources of nations in amity with the United States? Is not the wisdom of the framers in seeking to cut off compact of states, and hence of their citizens, fully vindicated? Conversely, must it not be admitted that a government responsible, upon principle, to foreign sovereigns in amity for the peaceful performance by the states and by the people of their obligations to the foreign state under the law of nations, and supplied with ample judicial power to secure foreign governments in such justice, must be no less competent, and must be under a clear mandate of duty, to insure the people of the United States from spoliations of the national wealth brought about by contractual relations of some citizens of this country with foreign governmental power?<sup>13</sup>

The Supreme Court of the United States, referring to appropriate diplomatic action in case of default by a foreign government on its obligations held in this country has declared: "It rests with the foreign sovereign against whom the demand is made to determine for himself what he will do with respect to it. He may pay it or reject it; he may submit to arbitration, open his own courts to suit, or consent to be tried in the courts of another nation. All depends upon himself."<sup>14</sup> But is this entirely true if the United States is privy to the contract?

Our lower courts have held that in suits between citizens of the United States growing out of conflicting rights under loan contracts with foreign governments, the remedy must be sought in the courts of that country, or through such diplomatic action as may comport with international usage and established precedent. They have gone farther and held that the courts of this country will not adjudicate the validity of the acts of a foreign nation performed in its sovereign capacity within its own territory, nor will persons involved with such government in the performance of such acts be subjected to a liability therefor.<sup>15</sup> The questions result: May the courts of the United States disregard the validity of the acts of interested citizens of this country in the light of the necessary privity of the United States in the contract? May a foreign sovereign enter, without breach of its obligations to the United States, into any contract with a citizen of this country without the privity of the United States, or upon a compact which is frustrative of the justice of this country as between its citizens, or which operates to prejudice fraudulently or inequitably their rights? May such

13. In *The Sapphire*, 11 Wall. 164, 167 (U. S. 1870), the jurisdiction is definitely sustained "without reference to the subject matter of the controversy." See also *Columbia v. Cauca Co.*, 190 U. S. 524, 529 (1902), and opinion of Taney, C. J., in *Gordon v. United States*, 117 U. S. 697, 698 (1864), as well as the British authorities cited therein.

14. *United States v. Diekelman*, 92 U. S. 520, 524 (1875).

15. *Hewitt v. Speyer*, 250 Fed. 367 (C. C. A. 2d, 1918).



government rightfully come into the money markets of the United States and shield itself or its agents or fiduciaries, citizens of this country, behind some supposed sovereign immunity from suit; or does it, as Marshall suggested,<sup>16</sup> lay down "the character of the prince" in such interrelated transactions with citizens of this country and assume the character of a private individual? The further question may arise: Does not the privity of the United States, whether to be deduced from positive act of Congress or its acquiescence in the supervision of such contracts by the executive arm of the Government and the latter's "No objection" thereto, postulated upon some assumption of the compatibility of the contract with national policy, import that the United States must be a party to any suit which may arise on the contract in the courts of the United States, whether it be sued upon by the foreign sovereign concerned, whether he consent to be sued thereon in the original jurisdiction of the Supreme Court of the United States, or, indeed, whether the suit be between citizens of this country, who have been prejudiced by such contract or whose rights have been fraudulently or inequitably invaded in consequence thereof?

These are considerations very material not alone to the exercise by the Supreme Court of its so-called international jurisdictions, but to the application of its appellate jurisdiction under the Constitution and the laws. They are vital to the proper conduct of foreign relations. They are peculiarly pertinent to the proper exercise of powers clearly vested in Congress. The insistent pressure of these compacts upon the economic life of the nation and of foreign peoples in amity, their open threat to the settlement of obligations of foreign states to the United States itself, their deprivations upon large classes of our own citizens are matters of momentous public concern. They are to be challenged upon Coke's principle, "*Conventio privatorum non potest publico juri derogare.*"<sup>17</sup> They have been surrounded with secrecy. A privilege has been asserted as to the correspondence of American citizens with foreign governments, upon which the making of these compacts has proceeded, wholly without warrant in law. These compacts may shield most powerful private interests in collusive and fraudulent machinations against both the people and the government of this country; they may thwart the right of a citizen to defend his own interests in his own courts against fellow citizens, parties to the performance of such contracts, unless and until it be clearly seen and authoritatively admitted that the United States must of necessity be privy to the contract, that the consent of Congress is the essential element in the lawful obligation of such contracts, and that foreign governmental power is bound to respect these constitu-

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16. *The Schooner Exchange v. McFaddon*, 7 Cranch 116, 145 (U. S. 1812).

17. Co. Litt. \*254, and note Coke's language concerning limitations where contract is "against public wealth or common right". See also Christiancy, J., in *Jaquith v. Hudson*, 5 Mich. 123, 133-134 (1858); 13 C. J. (1917) 848, n. 80; BURRILL, 1 LAW DICTIONARY (2d ed. 1870) 374; WINGATE, MAXIMS (1658) 746, no. 201; D. 50.17-45.1.

tional limitations in entering into agreements with American citizens. For citizens of the United States to disregard them constitutes nothing short of a fraud upon the law of nations, treason to the Constitution. The anarchy of this peculiarly lawless form of contract should be ended in the interest of the peace of nations and the justice due all. Congress must declare what the policy of the nation shall be as to their future making.

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