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22 March 1955

MEMORANDUM FOR: DEPUTY DIRECTOR (INTELLIGENCE)

SUBJECT: Memorandum for the NSC, Subject: "Anti-Trust Laws Affecting Activities Outside the U.S.," enclosing report prepared by the Attorney General, dated 16 March 1955.

The subject report has been reviewed by the Clandestine Services and there are no comments to offer.

STAT

FRANK G. WISNER
Deputy Director (Plans)

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EXECUTIVE OFFICE OF THE PRESIDENT
NATIONAL SECURITY COUNCIL
WASHINGTON

March 16, 1955

MEMORANDUM FOR THE NATIONAL SECURITY COUNCIL

SUBJECT: Anti-Trust Laws Affecting Activities Outside the U. S.

REFERENCES: A. NSC Actions Nos. 766-c, 1200 and 1263
B. Memo for NSC from Executive Secretary, same subject, dated November 1, 1954

The enclosed report on the subject, prepared by the Attorney General pursuant to NSC Action No. 1263-b, is transmitted herewith for consideration by the Council at its meeting on March 24, 1955.

[redacted]

JAMES S. LAY, JR.
Executive Secretary

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Mar Memo

cc: The Secretary of the Treasury
The Attorney General
The Director, Bureau of the Budget
The Chairman, Joint Chiefs of Staff
The Director of Central Intelligence

Noted by DCI 3/24/55

25 Mar 55 Gen Counsel "no comment"

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CHAPTER II

"Trade or Commerce * * * With Foreign Nations" [1]

We emphasize at the outset that antitrust is but one of several interrelated governmental policies touching on the foreign trade and na-

[1] In addition to the Sherman Act (15 U. S. C. §§ 1 and 2 [1952]), other antitrust statutes include provisions relating to foreign commerce. "Unfair methods of competition" in Section 5 of the Federal Trade Commission Act (15 U. S. C. § 44 [1952]), embracing potential as well as full blown Sherman Act violations, applies to "commerce * * * with foreign nations or * * * between * * * any state * * * or foreign nation." 15 U. S. C. § 44 [1952]). Section 1 of the Clayton Act (15 U. S. C. § 12 [1952]) defines "commerce" to include "commerce with foreign nations." Section 2 (a) of the Robinson-Patman Act (15 U. S. C. § 12 [1952]) amendment to the Clayton Act and Section 3 of the Clayton Act apply only when the transactions there covered involve "use, consumption or resale within the United States or any territory or place under its jurisdiction." But Sections 2 (c), (d) and (e) of the Robinson-Patman Act apparently apply also to goods sold for export. (*Baysoy* v. *Jessop Steel Co.*, 90 F. Supp. 303 [W. D. Pa. 1950]). Section 7 of the Clayton Act as amended (15 U. S. C. § 7 [1952]) applies to the acquisition by a corporation engaged in commerce of the whole or part of the capital, stock or assets of another corporation also engaged in commerce. As yet there is no judicial precedent for its application to foreign commerce but the Act appears to cover mergers of American and foreign companies where there is the specified effect within the United States.

The Wilson Tariff Act (15 U. S. C. § 8 et seq. [1952]) in effect applies the Sherman Act to importers. Section 73 of this Act (*Id.* at § 8) declares that "Every combination, conspiracy, trust, agreement, or contract" made by or between two or more persons, "either of whom * * * is engaged in importing any article from any foreign country into the United States" is illegal and void, when intended to operate in restraint of lawful trade or to increase the market price of any imported articles in any part of the United States, "or of any manufacture into which such article enters or is intended to enter." Section 76 of the Act, seldom invoked, provides for seizure of articles "imported into and being within" the United States, "owned under any contract or by any combination, or pursuant to any conspiracy" in restraint of trade (15 U. S. C. § 11 [1952]). This follows a similar provision contained in Section 6 of the Sherman Act (15 U. S. C. § 6 [1952]), but in the latter section, the property must be "in the course of transportation" from one state to another, or to a foreign country.

The Panama Canal Act (15 U. S. C. § 31 [1952]) forbids any vessels from passing through the canal if owned, chartered or doing business in violation of the Sherman or Wilson Tariff Acts. Other Acts relating to foreign trade which have antitrust provisions include the Shipping Act of 1916 (46 U. S. C. § 801 [1952]); Tariff Act of 1930 (46 U. S. C. § 1337 [1952]); Revenue Act of 1916 ("antidumping provisions") (15 U. S. C. § 71 et seq. [1952]); Marine Insurance Association Act (46 U. S. C. § 885 [1952]).

tional security programs of the United States. Accordingly, while we do not treat directly these other programs, we recognize the need for their coordination with antitrust in order to avoid or minimize any policy conflict.[2] We caution that resolution of possible conflict in any given case may go beyond the range of discretion of the Attorney General, the Federal Trade Commission or other agencies charged with administration and enforcement of the antitrust laws.

As in other parts of this report, this Committee has made no independent factual study to provide any basis for determining whether our antitrust laws have helped or hindered the foreign commerce of the United States or for generalizing about the effect of antitrust on any related governmental policy. Accordingly, we reject any proposal for blanket exemption of foreign commerce from the antitrust laws. We, therefore, focus largely on clarification and improvement of the criteria for interpreting existing statutory standards. The Committee, in any event, believes that the generality of the Sherman Act standards provides the desired flexibility for adaptation, consistent with antitrust objectives, to any special problems of foreign commerce. Thus we do not favor their substantial revision to define specifically legal and illegal conduct in foreign commerce transactions.

First, we analyze jurisdiction under the antitrust laws over persons or conduct beyond the territorial limits of the United States. Second, we treat the content of the words, "trade of commerce * * * with foreign nations" in the Sherman Act. Third, we discuss the inquiries relevant to the legal tests for determining injury to foreign trade or commerce. Finally, we consider procedures for coordinating antitrust with related government policies as well as exemptions provided by Congress to promote such policies.

A. EXTRATERRITORIAL JURISDICTION

The foreign commerce clause of the Sherman Act was first before the Supreme Court in *American Banana Co.* v. *United Fruit Co.*[3]

[2] See *infra* for discussion of this aspect.

[3] 213 U. S. 347 (1909). Cf. *United States* v. *Nord Deutscher Lloyd*, 223 U. S. 512 (1912). There a steamship company was indicted under the Immigration Act of 1907 for forcing security and return passage money from aliens prior to transporting them here. The trial court sustained a demurrer to the indictment on the ground that the money was paid and received in Germany. The Supreme Court, reversing, said: "The Statute, of course, has no extraterritorial operation, and the defendant cannot be indicted here for what he did in a foreign country. *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347. But the parties in Germany could make a contract which would be of force in the United States. When therefore, in Bremen the alien paid and the defendant received the 150 rubles for a return passage, they created a condition which was operative in New York. * * * Retention of the money [in New York], with * * * intent [to secure payment of their passage to Bremen] was an affirmative violation of the statute." *Id.* at 517–518.

The Court there affirmed dismissal of the plaintiff's cause as not within the Sherman Act. American Banana, a competitior of United, charged that United, as part of its larger plan for monopoly, "instigated" [4] the government of Costa Rica to seize plaintiff's plantation, banana supplies and its railroad link to the coast. The Court explained that "The substance of the complaint is that, the plantation being within the *de facto* jurisdiction of Costa Rica, that state took and keeps possession of it by virtue of its sovereign power. But a seizure by a state is not a thing that can be complained of elsewhere in the courts." [5]

The "fundamental reason," the Court continued, "is that it is a contradiction in terms to say that, within its jurisdiction, it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper." [6] Generally, the Court observed "It is surprising to hear it argued" that the Sherman Act should apply when "the acts causing the damage were done * * * outside the jurisdiction of the United States, and within that of other states." [7] And the Court deemed "it entirely plain that what the defendant did in Panama or Costa Rica is not within the scope of the statute so far as the present suit is concerned." [8]

A few years later, however, the Court in *United States* v. *American Tobacco Co.*[9] struck down under the Sherman Act an agreement "executed in England" [10] between an American combination and its British competitor, Imperial. According to that plan, allegedly legal under British law, Imperial agreed "to limit its business to the United Kingdom * * * [and] the American companies * * * [to] limit their business to the United States, its dependencies and Cuba." [11] Immediately preceding that agreement, vigorous competition, described by the Court as a "trade war," prevailed between American and Imperial. This substantial impact of the agreement on competition in American commerce apparently brought the "assailed combination in all its aspects * * * including the foreign corporations insofar as by the contracts made by them they become co-operators * * * within the prohibitions of the 1st and 2nd sections of the antitrust act." [12]

Similarly emphasizing "forbidden results within the United States," the Court in *United States* v. *Sisal Sales Corp.*,[13] held illegal a

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[4] 213 U. S. 347, 354.
[5] *Id.* at 357.
[6] *Id.* at 358.
[7] *Id.* at 355.
[8] *Id.* at 357.
[9] 221 U. S. 106 (1911).
[10] *Id.* at 172.
[11] *Ibid.*
[12] *Id.* at 184.
[13] 274 U. S. 268, 276 (1927).

conspiracy to monopolize our foreign commerce in sisal. Three American banks, two American corporations organized to deal in sisal, their Mexican buying outlet, and an American sisal broker were joined as defendants. The complaint alleged that the American banks organized and financed an American company that, in turn, established Mexican sales agents. The Court noted that laws favorable to the Mexican agents "were solicited and secured from the governments of Mexico and Yucatan. Under them, and by the use of large sums supplied by the banks, that corporation and its agents soon became everywhere the dominant factors in the sisal trade * * *. [As a result of] discriminatory legislation * * * all other buyers were forced out of the markets." [14] By such means as well as "constant manipulation of the markets," defendants "destroyed all competition." [15]

The Court reversed dismissal of the complaint. Distinguishing the *Banana* case, the Court explained: "Here we have a contract, combination and conspiracy entered into by parties within the United States and made effective by acts done therein. The fundamental object was control of both importation and sale of sisal and complete monopoly of both internal and external trade and commerce therein. The United States complain of a violation of their laws within their own territory by parties subject to their jurisdiction, not merely of something done by another government at the instigation of private parties. True, the conspirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States." [16]

To the same effect, the Court in *United States* v. *Pacific and Arctic Railway & Navigation Co.*,[17] noted that failure to apply the Sherman Act would put an important "transportation route * * * [from the United States to Yukon River points] out of control of * * * the United States." [18] Accordingly, it struck down a conspiracy between an American rail company and British Columbian and Canadian rail and boat lines. By granting discriminatory through rates to those who shunned competitors of the group, the complaint charged that defendants sought to monopolize transportation between the United States and Alaska. The defendants contended that the combination was not illegal because our "'laws relating to interstate and foreign commerce were not intended to have any effect upon the carriage by foreign roads in foreign countries, and * * * it is equally clear that our laws cannot be extended to control or affect the foreign car-

[14] *Id.* at 273.
[15] *Id.* at 274.
[16] *Id.* at 276.
[17] 228 U. S. 87 (1913).
[18] *Id.* at 106.

riage.'"[19] Rejecting this claim, the Court concluded that defendants sought "*control to be exercised over transportation in the United States*, and, so far, is within the jurisdiction of the laws of the United States, criminal and civil. If we may not control foreign citizens or corporations operating in foreign territory, we certainly may control such citizens and corporations operating in our territory, as we undoubtedly may control our own citizens and our own corporations."[20]

From these early cases, it seems clear that the Sherman Act may apply, not only to conduct in this country, but also to acts abroad, performed by an American firm acting alone or in concert with foreign firms with such substantial effects upon American foreign commerce as to amount to unreasonable restraints. Similarly, later cases in which violations involving acts abroad were found, emphasize proof of anticompetitive effects on American trade in finding "undue limitations on competitive conditions" in our foreign commerce.

National Lead,[21] for example, involved an American company's participation "in a so-called international cartel * * * constituting a combination or conspiracy in restraint of trade."[22] Pursuant to this plan the District Court found a "conspiracy was entered into, in the United States, to restrain and control the commerce of the world, *including the foreign commerce of the United States.* * * * [In short] the object of the government's attack is a *conspiracy in the United States affecting American commerce*, by acts done in the United States as well as abroad."[23] In like tenor, after analysis of the patterns of the titanium trade, the court concluded that "Clearly this combination affects the interstate and foreign commerce of the United States."[24]

Similarly, the Court in *Timken*[25] struck down arrangements between American Timken and its important foreign competitors, British and French Timken, limiting their competition in the American and world markets. The "fact that the cartel arrangements were made on foreign soil" does not, the court reasoned, "relieve defendant from responsibility. * * * [For] they had a direct and influencing effect on trade in tapered bearings between the United States and foreign

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[19] *Id.* at 105–106.

[20] *Id.* at 106 [emphasis added]. Similarly, note *Thomsen et al.* v. *Cayser et al.*, 243 U. S. 66, 88 (1917).

[21] *United States* v. *National Lead Co.*, 63 F. Supp. 513 (S. D. N. Y. 1945), aff'd 332 U. S. 319 (1947). We later consider that case in connection with permissible and illegal use of patent rights in foreign commerce.

[22] 332 U. S. 319, 325 (1947).

[23] 63 F. Supp. 513, 523–525 (S. D. N. Y. 1945). [Emphasis added.]

[24] *Id.* at 522.

[25] *United States* v. *Timken Roller Bearing Co.*, 83 F. Supp. 284 (N. D. Ohio 1949), *aff'd* 341 U. S. 593 (1951). Conspiracy aspects of this case are discussed in "A Policy Against Undue Limitations on Competitive Conditions," pages 31–32. Certain other dicta are analyzed later in this section of the Report.

countries. * * * [Clearly] defendant's territory was affected." And in the *Incandescent Lamp* case,[26] where arrangements were made abroad between foreign nationals in which American companies participated, the court found that competition in the American domestic market was "deleteriously affected" and "aborted." [27]

Beyond these cases involving arrangements joined by American firms, the Sherman Act may cover certain acts by foreign combinations alone. The *Alcoa* case,[28] for example, treated a cartel agreement between French, Swiss, and British ingot producers as well as a Canadian competitor wholly owned by Alcoa.[29] In 1931, these firms formed a Swiss company "Alliance" and subscribed to its stock in proportion to their ingot capacities. They agreed in addition to allocate aluminum to be produced on a quota basis and to set a price at which the "Alliance" would purchase any of a shareholder's quota not sold. The court found that ingot "imports into the United States were not included in the quotas." [30] By a 1936 agreement, however, required progressive royalty payments above each shareholder's fixed free allotment were substituted for the 1931 unconditional quotas. The court found that all the shareholders agreed that United States "imports should be included in the quotas." [31]

The court held that these agreements violated Section 1. It framed the essential question as "whether Congress chose to attach liability to the conduct outside the United States of persons not in allegiance to it." [32] Determining this intent, the court warned that "we are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their

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[26] *United States* v. *General Electric Co.*, 82 F. Supp. 753 (D. N. J. 1949).

[27] *Id.* at 891.

[28] *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (2d Cir. 1945).

[29] Despite this stock ownership, the court concluded that Alcoa "was not a party to the Alliance, and did not join in any violation of § 1 of the Act, so far as concerned foreign commerce." (Id. at 442.) In reaching this conclusion, the court initially analyzed the course of transactions between Limited, the Canadian subsidiary, and Alcoa. On the basis of these dealings, the court concluded, contrary to the Government's contention, that Limited was not "organized only as a creature of Alcoa." (Id. at 440.) In addition to these transactions, the court considered "whether 'Alcoa' should be charged with the 'Alliance' because a majority of its shareholders were also a majority of 'Limited' shareholders; or whether that would be true even though there were a group common to both, less than a majority, but large enough for practical purposes to control each." The court reasoned that Alcoa "would not be bound unless those who held the majority of its shares had been authorized by the group as a whole to enter into the 'Alliance'; and considering the fact that, as we shall show, it was an illegal arrangement, such an authority ought convincingly to appear. It does not appear at all." (Id. at 441–442.)

[30] *Id.* at 442–443.

[31] *Id.* at 443.

[32] *Id.* at 443.

powers. * * * We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States." The court noted, however, that "it is settled law * * * that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends." [33]

Considering these guides, the court reasoned that "Two situations are possible. There may be agreements made beyond our borders not intended to affect imports, which do affect them, or which affect exports. Almost any limitation of the supply of goods in Europe, for example, or in South America, may have repercussions in the United States if there is trade between the two. * * * Such agreements may on the other hand, intend to include imports into the United States, and yet it may appear that they have had no effect upon them." [34]

Because of the "international complications likely to arise" from including such arrangements, however, the court concluded "it is safe to assume that Congress certainly did not intend the Act to cover them." [35] Further, the court assumed that "the Act does not cover agreements, even though intended to affect imports or exports, unless the quota restrictions had sufficient "influence upon them." [36] Applying this construction to its view of the facts, the Court found that the quota restrictions had sufficient influence upon prices in the American market to warrant violation.[37]

A like construction was applied in *United States* v. *General Electric Co.*[38] After a "review of all the facts and circumstances," the court there concluded that the foreign defendant, Philips, knew or "should have known" its activities "were a substantial contribution to the scheme whereby the domination of General Electric over the United States market of incandescent electric lamps would be perpetuated and competition thwarted." [39] Having found the requisite intent, the court then turned to what it viewed as "the second requirement for the finding of a violation on the part of Philips, that its activities must have had a direct and substantial effect upon trade." [40] Here the Court found that "Even though there is no showing as to the extent of commerce restrained," Philips' activities "deleteriously affected commerce" [41] and, as a result, "Competition was aborted." [42]

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[33] *Id.* at 443.
[34] *Id.* at 443.
[35] *Id.* at 443.
[36] *Id.* at 444–445.
[37] *Id.* at 445.
[38] 82 F. Supp. 753 (D. N. J. 1949). (Incandescent lamps.)
[39] *Id.* at 891.
[40] *Id.* at 891.
[41] *Ibid.*
[42] *Ibid.*

The consideration of "international complications" deemed relevant in the *Alcoa* and *General Electric* cases to determining the extent of Sherman Act jurisdiction, likewise may limit both the gathering of evidence and provisions in antitrust judgments. In the recent *Oil Cartel* Grand Jury investigation, for example, defendants moved to quash or modify the Government *subpoena duces tecum* on grounds, among others, that it called for the production of documents that are "privileged and compliance might violate foreign law." [43] At the outset, the court recognized that due to "strife and unrest in the mid-East where these movements have major business operations under way," it would "proceed forward in an extremely cautious manner." [44] To "circumvent any harsh consequences," the court accordingly asked defendants to prove by expert or other proper evidence that "there is a true objection by the foreign sovereign and not a permature expectation by the movant party." [45] And the court granted Anglo-Iranian's motion to quash on the basis of a record showing that it was "indistinguishable from the government of Great Britain" and therefore entitled to foreign immunity from criminal suit.[46]

Jurisdictional problems may also arise in formulation of decree provisions. In *United States* v. *Imperial Chemical Industries*,[47] for example, the court held that duPont, other American corporations, individuals and British I. C. I. had conspired to restrain trade in chemical products by dividing world markets and so curtailing trade to and from this country. To "establish competitive conditions," the decree required "compulsory licensing of all patents which were

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[43] In re *Investigation of World Arrangements with Relation to the Production, Transportation, Refining and Distribution of Petroleum*, 13 F. R. D. 280, 282 (D. D. C. 1952).

[44] *Id.* at 283.

[45] *Id.* at 286. Compare *In re Investigation of World Arrangements with Relation to the Production, Transportation, Refining and Distribution of Petroleum*, 13 F. R. D. 280 (D. D. C. 1952) with *In re Grand Jury Subpoena Duces Tecum Addressed to Canadian International Paper Co., et al.*, 72 F. Supp. 1013 (S. D. N. Y. 1947). Certain officers of International there moved to quash on the grounds "that they do not have control of the books and records of Canadian since a quorum of the Board of Directors of Canadian, all residents of Canada, passed a resolution in Montreal * * * to the effect that the records of Canadian shall be maintained in the custody of the board of directors. * * * and should in no case be allowed to be taken outside of Canada." (*Id.* at 1020.) After detailed review of Canadian's extensive business here, the Court concluded "The papers are so far as appears now in the possession of the corporation. The corporation may not evade complying with the subpoena by a resolution of this character." (*Id.* at 1020.) But see The Business Records Protection Act (1 Rev. Stat. of Ontario 1950, Ch. 44) which now prohibits removal of business records from Ontario unless such removal is authorized by "Act of Ontario or of the Parliament of Canada."

[46] *Id.* at 290.

[47] 100 F. Supp. 504 (S. D. N. Y. 1951), decree 105 F. Supp. 215 (S. D. N. Y. 1952).

licensed among the conspirators and which were put to use in the production of products," [48] trade in which the defendants had restrained. This ended the arrangement which "kept the patented products manufactured in the United States out of the markets of Great Britain, and the like products manufactured in Great Britain out of the United States." [49]

To rectify the conspirators' acts during the pendency of the antitrust suit aimed at thwarting the court's anticipated judgment, the final decree ordered I. C. I. to reassign to duPont the British nylon patents under which Nylon Spinners held an exclusive license from I. C. I. The court concluded that B. N. S. did not hold its existing licenses as an "innocent party" and "its rights were wholly subject to the inherent vices of the agreements through which they were acquired." [50] Under such circumstances, the court deemed it not "presumptuous * * * to make a direction to a foreign defendant corporation over which it has jurisdiction to take steps to remedy and correct a situation, which is unlawful both here and in the foreign jurisdiction in which it is domiciled." [51] In any event, the Court felt that what "credit may be given to such an injunctive provision by the courts of Great Britain in a suit brought by B. N. S. * * * we do not venture to predict. We feel that the possibility that English courts in an equity suit will not give effect to such a provision or decree should not deter us from including it." [52]

As the I. C. I. opinion foreshadowed, B. N. S. promptly sought and obtained an interlocutory injunction in England restraining I. C. I. from complying with the American decree.[53] The English court reasoned that, "broadly speaking," the challenged I. C. I.-B. N. S. agreement being "an English contract made between English nationals and to be performed in England, the right which the plaintiff company has may be described as its right under the contract to have it performed and, if necessary, to have an order made by the courts of this country for its specific performance." [54] That being so, the Court continued, "plaintiff company has, at least, established a *prima facie* case for saying that it is not competent for the courts of the United States * * * to interfere with those rights or make orders, the observance of which by our courts would require that our courts

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[48] 105 F. Supp. 215, 226 (S. D. N. Y. 1952).
[49] *Id.* at 225.
[50] *Id.* at 231.
[51] *Id.* at 229.
[52] *Id.* at 231.
[53] *British Nylon Spinners, Ltd.* v. *Imperial Chemical Industries, Ltd.*, All Eng. L. Rep. Vol. 2, p. 780, 784 (1952). Final judgment holding that "the plaintiff company was entitled to specific performance of the I. C. I. contract was had in *British Nylon Spinners* v. *I. C. I., Ltd.* (1954), 3 All E. R. 88."
[54] *Id.* at 783.

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should not exercise the jurisdiction which they have and which it is their duty to exercise in regard to those rights." [55]

However, as one concurring opinion of the British court construed the judgment of the United States District Court, "there is a saving clause which prevents any conflict, because, although the defendant company has been ordered to do certain acts by the United States court, nevertheless there is a provision which says that nothing in the judgment shall operate against the company for action taken in complying with the law of a foreign government or instrumentality thereof to which the defendant company is for the time being subject. In view of that saving clause, I hope that there will be no conflict between the orders." [56]

A like saving clause was emphasized in the recent *General Electric* decree.[57] As we have explained, Philips, a Dutch corporation, was adjudged part of that cartel conspiracy. Accordingly, the decree enjoined Philips from contracting to refrain from exporting or producing lamps in the United States or exporting lamps produced by it here.[58] The decree was careful to specify, however, that "Philips shall not be in contempt of this Judgment for doing anything outside of the United States which is required or for not doing anything outside of the United States which is unlawful under the laws of the government, province, country or state in which Philips or any other subsidiaries may be incorporated, chartered or organized or in the territory of which Philips or any such subsidiaries may be doing business." The court explained this provision "as a safeguard" to protect Philips "from being caught between the jaws of this judgment and the operation of laws in foreign countries where it does its business." [59]

These cases suggest guides this Committee deems important to assure that the Sherman Act remains within its Congressionally intended application to persons and activities abroad. We feel that the Sherman Act applies only to those arrangements between Americans alone, or in concert with foreign firms, which have such substantial anticompetitive effects on this country's "trade or commerce * * * with foreign nations" as to constitute unreasonable restraints. Where a United States court holds a contract between an American and foreign company illegal under our antitrust laws, and the foreign party attempts to enforce that contract under foreign law, United States

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[55] *Ibid.*

[56] *Id.* at 784.

[57] *United States* v. *General Electric Co. et al.*, 82 F. Supp. 753 (D. N. J. 1949) (incandescent lamps). Opinion on remedies, 115 F. Supp. 835 (D. N. J. 1953).

[58] 115 F. Supp. 835, 860 (D. N. J. 1953).

[59] *Id.* at 878.

agencies, including the State Department, should endeavor to protect the United States party.

We believe that conspiracies between foreign competitors alone should come within the Sherman Act only where they are intended to, and actually do, result in substantial anticompetitive effects on our foreign commerce. The "international complications likely to arise" from any contrary view convince us, as they did the Court in *Alcoa* "that Congress certainly did not intend the Act to cover" such arrangements when they have no restrictive purpose and effect on our commerce.[60]

Finally, in formulating decree provisions, sound judicial discretion requires, in the language of the *General Electric* case, inclusion of "safeguards" to protect any defendant "from being caught between the jaws of * * * [any] judgment and the operations of law in foreign countries where it does its business." [61] For we must assume, as *Alcoa* suggests, that Congress did not intend the "general words" of the Sherman Act to be read "without regard to the limitations customarily observed by nations upon the exercise of their powers." [62]

B. SCOPE AND CONTENT OF "TRADE OR COMMERCE WITH FOREIGN NATIONS"

Determining jurisdiction also requires consideration of the scope and content in the Sherman Act of "trade and commerce * * * with foreign nations." There has been some indication, at least by way of dicta, that these words may be limited to the export-import product trade of the United States and to services ancillary to its flow. This implication, which we disapprove, persists despite the fact that the same words in the same statute when applied to interstate commerce include finance, investment, and indeed the entire range of economic activity.

Timken Roller Bearing Co. v. *United States*,[63] arising under Section 1 involved an agreement eliminating competition between an American firm producing between 70 and 80 percent of this country's tapered roller bearings and a major British rival.[64] As a result, the British

[60] See Sections 1 and 2 of the Sherman Act Generally for the types of situations where market analysis is necessary to determine when restraints create "undue limitations" on competitive conditions in the foreign commerce of the United States. Cf. *United States* v. *Aluminum Company of America*, 148 F. 2d 416, 433 (2d Cir. 1945); *United States* v. *General Electric Co. et al.*, 82 F. Supp. 753, 891 (D. N. J. 1949) (incandescent lamps).

[61] *United States* v. *General Electric Co. et al.*, 82 F. Supp. 753, 878 (D. N. J. 1949) (incandescent lamps).

[62] *United States* v. *Aluminum Company of America*, 148 F. 2d 416, 433 (2d Cir. 1945).

[63] 341 U. S. 593 (1951).

[64] *Id.* at 603–604.

and American interests jointly controlled the leading British and French Timken companies. These interests ended their competition by allocating trade territories, fixing prices on products of one which might be sold in markets of the other, and participating through the foreign companies in cartels to restrict imports to and exports from the United States. Among other defenses, the argument was advanced that foreign trade and exchange restrictions made it necessary for the defendant to operate abroad "through the ownership of stock in companies organized and manufacturing there." [65] It would have been sufficient, and correct, to answer this argument by pointing out that, even in its own terms, it did not justify illegal combination with a major competitor abroad. In addition, however, the Court observed "that the provisions in the Sherman Act against restraints of foreign trade are based on the assumption, and reflect the policy, that export and import trade in commodities is both possible and desirable. These provisions of the Act are wholly inconsistent with appellant's argument that American business must be left free to participate in international cartels, that the free foreign commerce in goods must be sacrificed in order to foster export of American dollars for investment in foreign factories which sell abroad." This contention, the Court said, "would make the Sherman Act a dead letter. * * * If such a drastic change is to be made in the statute Congress is the one to do it." [66] This statement was not necessary to answer the defense argument—if the case is viewed as one of combination between an American company and its British competitor. Nonetheless, its possible implication that any American investment for production abroad involves *pro tanto* a restraint on actual or potential American exports deserves careful consideration.

This doubtful construction of the *Timken* dictum is supported by certain language in *United States* v. *Minnesota Mining and Mfg. Co.*[67] That case held illegal under Section 1 an arrangement through which four American competitors and their associates, who had formerly done over 86 percent of the American export business in the relevant market, combined to establish jointly owned factories in England, Canada, and Germany. For its conclusion, the court advanced two reasons: The combination of major American competitors in the ownership of a foreign subsidiary unduly restrains the foreign commerce of the United States through its effect on American exports; and the court noted that the association of American competitors abroad develops habits in restraint of trade which would adversely affect their competion at home.

The Court continued, however, that [68]

[65] *Id.* at 599.
[66] *Ibid.*
[67] 92 F. Supp. 947 (D. Mass., 1950).
[68] *Id.* at 962.

> It is no excuse for the violations of the Sherman Act that supplying foreign customers from foreign factories is more profitable and in that sense is, as defendants argue, "In the interest of American enterprise" (Def. Rep. Br. 31). Financial advantage is a legitimate consideration for an individual nonmonopolistic enterprise. It is irrelevant where the action is taken by a combination and the effect, while it may redound to the avantage of American finance, restricts American commerce. For Congress in the Sherman Act has condemned whatever unreasonably restrains American commerce regardless of how it fattens profits of certain stockholders. Congress has preferred to protect American competitors, consumers and workmen."

At another point, the Court said that any factory established abroad by a single American company would "be a restraint upon American commerce with foreign nations," although not accomplished by combination or conspiracy, and hence not in violation of Section 1.[69]

Insofar as *Minnesota Mining* holds the Sherman Act applicable to combinations between a group of major American competitors, and *Timken* to combinations between a major American company and a major chief foreign competitor, their basic reasoning seems correct. However, these dicta, taken out of context, should not develop into a mercantilist policy of discouraging American investment abroad in the name of protecting American manufacturing. To avoid such a result, the basic aims of the Sherman Act policy against "undue limitations on competitive conditions" require that the words "trade and commerce" have the same scope in their application to foreign as to domestic commerce. The Sherman Act is not, of course, intended to protect foreign consumers against monopoly in their home markets. Instead its operative hypothesis should be to encourage the competitive allocation of American resources to investment either at home or abroad, depending on the usual indicia of profit, in the interest of maximizing the long-run economic welfare of the United States. This may involve the export and import of goods or the receipt of dividends, interest, and profits on foreign investments. Both types of transactions have a place in the balance of payments of the United States and may affect the well being of the American people. It would be a paradox indeed to interpret the Sherman Act as preventing the advantages of an economic international division of labor and other resources. Now, the United States devotes a major diplomatic effort, backed by unprecedented grants and loans, to restoring a flexible world economy sustainable once more by private capital movements. Today a restrictive construction of the Act could seriously limit its effectiveness as a factor in economic policy.

[69] *Id.* at 962.

On this aspect, the Committee therefore concludes that the words "trade and commerce * * * with foreign nations" should be construed broadly to include not only the import and export flow of finished products, their component parts and adjunct services, but also, as in domestic commerce, capital investment and financing. So interpreted, foreign commerce would also comprehend all types of industrial property rights in patents, trade-marks, trade secrets and know-how and other confidential technological information. In the absence of requisite effects on this country's "trade or commerce * * * with foreign nations," however, it is clear that the mere financing by Americans of manufacturing, mining or other local activities abroad does not come within the Sherman Act.

C. INQUIRIES RELEVANT TO DETERMINING "UNDUE LIMITATIONS ON COMPETITIVE CONDITIONS" IN FOREIGN COMMERCE

Here, as in our discussion of *Sections 1 and 2 of the Sherman Act Generally*, our starting point is, in the words of Chief Justice Hughes, that the "restrictions the [Sherman] Act imposes are not mechanical or artificial. Its general phrases interpreted to attain its fundamental objects, set up the essential standard of reasonableness." [70] This standard provides the measure for determining in foreign and domestic commerce alike "whether in a given case a particular act had or had not brought about the wrong against which the statute provided." [71] In all cases, then, inquiry centers on market factors relevant to the basic concepts of restraint of trade and monopoly, "both parts of the dominant policy against undue limitations of competitive conditions."

This identity of general standards, however, must not obscure the fact that the essential inquiry into the purpose and effect of the challenged conduct is governed by factors relevant to each market situation. Thus, certain conduct may, in foreign as in domestic commerce, be more quickly adjudged illegal. Agreements among competitors to fix market price or control production are, for example, "conclusively presumed to be illegal by reason of their nature or their necessary effect." [72] In such cases inquiry under the Rule of Reason ends once a court decides that the conduct under review in fact constitutes market price fixing or production control. In others, more detailed economic analysis is required to ascertain the purpose or competitive consequences of the particular conduct.

In all cases, however, the nature and effect of the challenged con-

[70] *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 360 (1933).
[71] *Standard Oil Co. of New Jersey* v. *United States*, 221 U. S. 1, 60 (1911).
[72] See this Report, Sections 1 and 2 of the Sherman Act generally.

duct may be determined only in the context of a particular market. Thus, the inquiry required by the Rule of Reason may in some foreign commerce cases involve consideration of market factors not operative in domestic commerce. As one dissenting Justice put it in the *Timken* case, "the circumstances of foreign trade may alter the incidence of what in the setting of domestic commerce would be a clear case of unreasonable restraint." [73] The possibility of such differences should be recognized by the Department of Justice and the Federal Trade Commission as well as the courts.

One relevant distinction is marked out in *United States* v. *Minnesota Mining & Manufacturing Co.*[74] There major American manufacturers of coated abrasives, controlling four-fifths of our export trade, were enjoined from agreeing not to ship to England, Canada, and Germany but instead doing business there through jointly owned foreign subsidiaries. Defendants urged "that they took these joint steps to preserve and expand their foreign markets which were disappearing in the face of foreign countries' tariffs, quotas, import controls, dollar shortages, foreign exchange restrictions, local preference campaigns and like nationalistic measures." [75] Accordingly, their contention was that their conduct "did not and could not substantially affect" and indeed "had no motive or purpose to affect" American foreign commerce.[76] They further argued that they ceased substantial exports from the United States since "they cannot do so profitably because of the economic and political barriers that others have erected."

Analyzing these contentions, the Court conceded that "With part of the defendants' argument there can be no legitimate quarrel. It is axiomatic that if over a sufficiently long period American enterprises, as a result of political or economic barriers, cannot export directly or indirectly from the United States to a particular foreign country at a profit, then any private action taken to secure or interfere solely with business in that area, whatever else it may do, does not restrain foreign commerce in that area in violation of the Sherman Act. For, the very hypothesis is that there is not and could not be any American foreign commerce in that area which could be restrained or monopolized.

Since there is no offense against the foreign commerce clause of the Sherman Act if political or economic conditions meet the conditions of the hypothesis just stated, it is legitimate for defendants to show such political and economic conditions, if they exist." [77]

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[73] *Timken Co.* v. *United States*, 341 U. S. 593, 605 (1951).

[74] 92 F. Supp. 947 (D. Mass. 1950).

[75] *Id.* at 958.

[76] *Ibid.*

[77] *Id.* at 958.

Evidence proffered to prove such assertions must, of course, be weighed. As the court observed in *Minnesota Mining*, "the nub of the case is not whether defendants' political and economic exhibits are admissible but whether they, taken together with the other evidence in the case, prove that defendants could not have profitably exported from the United States a substantial volume of coated abrasives to the areas supplied by their jointly owned factories located in England, Canada and Germany. To answer this factual question it is necessary to examine the situation in some of the principal areas so supplied." [78]

After an examination of the evidence adduced in support of these contentions, the court found, "as an ultimate fact that defendants' decline in exports to the United Kingdom is attributable less to import and currency restrictions of that nation and to the preferential treatment afforded to British goods by British customers than to defendants' desire to sell their British-made goods at a large profit rather than their American-made goods at a smaller profit and in a somewhat (but not drastically) reduced volume." [79] Similarly, the court found no evidence that, without jointly owned foreign subsidiaries, defendants could not have exported a substantial amount of their products to all other foreign countries where these subsidiaries had been established.

Having made this "ultimate finding of fact," the Court commented that "there is not much left to this case." [80] Thus, the Court explained: "It is not claimed that the United Kingdom imposed a legal ban upon imports of abrasives. Nor is it asserted that economically no American coated abrasives could be profitably exported to the British market. The precise contention is that it was economically *impractical* to continue to export to Britain a *large* volume of such abrasives. Stated another way this means * * * only that it was more profitable to make abrasives in Britain than to export them to Britain." [81] As a result, defendants' activities were held a violation of the Sherman Act.

Support for that reasoning may be found in a dissent in the *Timken* case. One Justice said there: "Of course, it was not for this Court to formulate economic policy as to foreign commerce. But the conditions controlling foreign commerce may be relevant here. When as a matter of cold fact the legal, financial and governmental policies deny opportunity for exportation from this country and importation into it,

[78] *Id.* at 959.

[79] *Id.* at 960. This analysis of injury to our foreign commerce in part rests on the view, disapproved by this Committee, that "trade or commerce * * * with foreign nations" does not include import and export of capital. See our discussion in section B of this chapter.

[80] *Id.* at 961.

[81] *Id.* at 959.

arrangements that afford such opportunities to American enterprise may not fall under a ban of a fair construction of the Sherman Law because comparable arrangements regarding domestic commerce come within its condemnation." [82]

Generally we emphasize, as a dissenting Justice put it in *Timken*, that "the circumstances of foreign trade may alter the incidence of what in the setting of domestic commerce would be a clear case of unreasonable restraint." [83] Thus, we approve, for example, judicial recognition that, under the Rule of Reason, defendants may proffer evidence that their activities abroad constitute no undue restraint on our foreign commerce since, even absent the challenged conduct, trade in a particular foreign area would be virtually impossible. We believe that defendants should be allowed to show that, due to foreign economic or political barriers, their conduct at bar was prerequisite to trade in a foreign country. Similarly, we believe that should, for example, the laws of another country require uniform noncompetitive prices by companies doing business there, then compliance with that law should constitute a defense in this country to an antitrust charge of price-fixing solely in that country. On the other hand, we feel that the Rule of Reason cannot be used to justify concert of action among competitors by showing that, despite a primary purpose to fix market prices, control production, divide markets or allocate customers, foreign trade conditions made such restraints a more profitable way of doing business.

Within the framework of these general guides, we now consider particular foreign trade problems involving (1) use of patents and trade-marks, (2) foreign subsidiaries and (3) joint activities abroad.

1. *Patents*

At the outset, we make clear that, except as otherwise specified, the analysis and recommendations in the Patent Section of this report, where relevant, apply here. We now merely deal with additional considerations in foreign commerce transactions.

Initially, we caution that adjudicated cases shed little light upon the permissible limits under the antitrust laws of restrictive provisions in transactions involving patented inventions. The same is true of unpatented inventions, trade-marks, and trade secret rights in know-how or other technological confidential information, all within the

[82] *Timken Co.* v. *United States*, 341 U. S. 593, 605-606 (1951).
[83] *Id.* at 605.

scope of "trade and commerce * * * with foreign nations." In most cases thus far, there was either misuse of patent rights in violation of the patent laws or their use toward an illegal object or to implement some means unlawful under the antitrust laws. We therefore caution against reading these cases without distinguishing between the use of patent rights to buttress such violations and the use of patent rights wholly within the scope of the exclusiveness accorded patent rights under the Constitution and Patent Code.

Basic to this distinction is recognition that valid patent rights may provide a lawful main purpose to which restrictions may be ancillary and therefore legal. This is the key to accommodation of the normal and legitimate transactions involving the sale, assignment, licensing and exchange of patent rights (including know-how and other secret technological information) to the prohibitions of the antitrust laws. As the Supreme Court stated it: [84]

> Of course, patents and patent rights cannot be made a cover for a violation of law, as we said in *Standard Sanitary Manufacturing Co.* v. *United States*, 226 U. S. 20. But patents are not so used when the rights conferred upon them by law are only exercised.

In accord with this principle, courts have held antitrust violation when patent rights were found to be ancillary to an illegal object. These should not be confused, however, with a *bona fide* lawful main purpose to which reasonable restrictive covenants accompanying lawful patent rights are truly ancillary.

Illustrative of the illicit uses of patents is *National Lead.* There the Court noted:

> The system of territorial allocation and suppression of trans-Atlantic traffic in titanium compounds and pigments cannot be justified as ancillary to the grant of a license under a patent. True, the network of agreements did involve cross-licensing of patents—but it was not limited thereto. The agreements applied to patents not yet issued and to inventions not yet imagined. They applied to commerce beyond the scope of any patents. They extended to a time beyond the duration of any then-existing patent. * * * They embraced acknowledgment of patent validity with respect to patents not yet issued, nor applied for, and concerning inventions not yet conceived. * * * They extended to countries, such as China, where no system of patent monopolies exists. * * * They regulated the disposition of the products after sale by the licensees. * * * [85]

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[84] *Virtue* v. *Creamery Package Mfg. Co.*, 227 U. S. 8, 32–33 (1913).

[85] *United States* v. *National Lead Co.*, 63 F. Supp. 513, 523–524 (S. D. N. Y. 1945).

Similarly, in *Imperial Chemical Industries*, the patents and processes agreements were held to be instruments for effectuating a conspiracy to divide markets. The court concluded: [86]

> These agreements, irrespective of their *per se* legality, were instruments designed and intended to accomplish the world-wide allocation of markets; their object was to achieve an unlawful purpose—an illegal restraint of trade prohibited by Section 1 of the Sherman Act. The agreements are unlawful because they provided a means for the accomplishment of this purpose and objective. We have also found that these agreements did, in operation, result in restraints of United States trade.

And in the *General Electric* (lamp) case, the court held that territorial restraints created by General Electric in foreign patent licenses and agreements were part of a plan to organize a foreign cartel to protect the domestic market from competition and hence could not be sustained as reasonable restraints ancillary to a lawful purpose. The court observed: [87]

> It has been all too evident that the primary purpose of the foreign licenses was to restrict competition in the United States by dividing markets in the foreign countries, all geared to the Phoebus agreement and domestic licenses to reduce interest of potential foreign competition in United States trade. There is in the foreign licenses a striking similarity to the situation interdicted in *United States* v. *National Lead Co.* * * *

Finally, the main agreement in the *Carboloy* case was found to be "not really a cross-license at all but more a naked division of markets among two former competitors." [88]

The Committee believes that such "international cartel" arrangements must be distinguished from cases where further inquiry is needed to determine when restraints, within the scope of the claims of valid patented inventions, are reasonably ancillary to a lawful main purpose. Private American investment abroad may often be dependent upon opportunities for capitalizing upon patent rights and "know-how" through sale, exchange or licensing of such rights in transactions with foreign companies. Available capital and production facilities abroad may also interest foreign firms in utilizing Ameri-

[86] *United States* v. *Imperial Chemical Industries, Ltd.*, 100 F. Supp. 504, 592 (S. D. N. Y. 1951).

[87] *United States* v. *General Electric Co.*, 82 F. Supp. 753, 847 (D. N. J. 1949).

[88] *United States* v. *General Electric Co.*, 80 F. Supp. 989, 1009 (S. D. N. Y. 1948).

can equipment and technology. This reciprocal interest would normally involve the safeguarding of the investment of each of the participants in the markets at home and abroad where their resources are used to develop such markets. Out of such situations evolves a principle favoring transactions where the resource of patents or "know-how" is used with the primary purpose of increasing the inflow and outflow of commerce and enhancing the well-being of the economies of the United States and friendly foreign countries.

Unfortunately needed clarification is not yet found in the existing judicial decisions. As we have indicated, the foreign commerce cases have typically involved such an integration of patent rights with an overall unlawful purpose and the use of unlawful means that the courts have had little occasion to adjudicate the legality of patent practices as separable conduct. The Committee, therefore, can only suggest here a few general principles as sound guides for enforcement agencies and the courts.

(1) Initially to be determined, as our *Patents* chapter suggests, is whether there is a lawful main purpose to which the challenged use of patent rights is reasonably ancillary.

(2) In appraising the reasonableness of any restrictions accompanying the transactions in patent rights, we suggest that the *Patents* chapter of this Report provides a framework for evaluating legally permissible limitations within the patent grant, as demarcated from limitations beyond the patent's scope, limitations to be tested by antitrust standards as in any nonpatent case.

We point out, however, that a patent is a grant from the sovereign and therefore has no force beyond that sovereign's territorial limits.[89] Thus, a United States patent creates rights coextensive only with United States laws. Similarly, a British patent, covering the same invention as an American patent, is governed by British law coextensive with British territory. This means that patent rights in the same invention may differ in scope and effect in the respective territorial limits of the country of issuance.

Unlike patents, trade-mark rights in the United States do not derive from an express constitutional provision granting Congress the power to create a limited-time monopoly in trade-marks. Legal protection of the good will symbolized in trade-marks stems from the common law doctrine of priority of adoption and use and the public interest in preventing use by another which is likely to cause confusion of purchasers. Moreover the Federal Trade-Mark Act of 1946 (Lanham Act)[90] gives the owner of a registered trade-mark

[89] *Boesch* v. *Graff*, 133 U. S. 697 (1890).

[90] 15 U. S. C. §§ 1051–1127 (1952).

certain procedural and substantive safeguards to strengthen protection against infringement and unfair competition.

As in the domestic field, trade-marks conflict with antitrust objectives only when they are used for the object, or to buttress the means, of effectuating unreasonable restraints of trade or monopolization, or as attempts to monopolize. Thus, in the *Timken* case, the central finding of a conspiracy among American, British and French Timken to divide world markets in anti-friction tapered bearings destroyed the defense that the arrangement was only "ancillary" to valid trade-mark licensing agreements. The majority of the Court thus declared that

> * * * A trade-mark cannot be legally used as a device for Sherman Act violation. Indeed, the Trade-Mark Act of 1946 itself penalizes use of a mark "to violate the antitrust laws of the United States." [91]

This statement was preceded by the observation that, according to the lower court's finding, "the trade-mark provision [in the agreements] were subsidiary and secondary to the central purpose of allocating trade territory." The *Timken* case, therefore, does not cast any cloud upon restrictions in trade-mark licenses as such. This Committee believes that as in the case of patents, valid trade-mark rights may provide a lawful main purpose to which reasonable restrictions on competition may be properly ancillary and therefore legal.[92] We also believe that unpatented inventions, know-how, or other trade secret information may give rise to a lawful purpose [93] to which restrictions on competition may be reasonably ancillary.[94]

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[91] *Timken Co.* v. *United States*, 341 U. S. 593, 599 (1951). Similarly, an overriding illegal purpose has been found in other cases involving trade-mark abuses in foreign commerce. Cf: particularly, *United States* v. *S. K. F. Industries*, Consent Decree, Civil No. 9862 (E. D. Pa. 1950), CCH Trade Cases No. 62,708 (1950–51); *United States* v. *Permutit Co.*, Consent Decree, Civil No. 32–394 (S. D. N. Y. 1951), CCH Trade Reg. Rep. No. 62, 888 (1950–51); *United States* v. *Bayer Co.*, Consent Decree, Civil No. 15–364 (S. D. N. Y. 1941) CCH Trade Reg. Rep., Supp. No. 52, 651 (1941–43); *United States* v. *Merck & Co., Inc.*, Consent Decree, Civil No. 3159 (D. N. J. 1943) CCH Trade Cases No. 57, 416 (1944–45), and *United States* v. *General Electric Co.*, 82 F. Supp. 753 (D. N. J. 1949).

[92] Trade-mark licensing finds express Congressional approval in Sections 5 and 45 of the Trade-Mark Act of 1946, which authorize the use of trademarks by related companies, provided such companies, be they subsidiaries or licensees, are under the supervision and control of the trade-mark owner with regard "to the nature and quality of the goods or services in connection with which the mark is used."

[93] See *Foundry Services, Inc.*, v. *Beneflux Corp.*, 110 F. Supp. 857 (S. D. N. Y. 1952), reversed on other grounds; 206 F. 2d 214 (2d Cir. 1953); *United States* v. *E. I. duPont de Nemours & Co.*, 118 F. Supp. 41, 220 (D. Del. 1953).

[94] Consideration is reserved regarding the relation to antitrust of recordation of trade-mark registrations to prevent importation.

2. *Foreign Subsidiaries*

Here we extend our discussion of "intra-enterprise conspiracy" in *Sections 1 and 2 of the Sherman Act Generally*—equally applicable at this point—to consider a few special problems stemming from use of subsidiaries in foreign commerce. Many feared that *Timken* [95] made unlawful the action of a parent company in establishing prices for its subsidiaries or dividing markets between members of its corporate family—actions that a single company not bent on undue restraints of trade or monopoly might take with impunity. *Timken*, we believe, should not be so read.

It is clear that in the *Timken* case, British Timken and French Timken were not *wholly owned subsidiaries* of American Timken. Rather, as the District Court found: [96]

> The facts are that defendant did not build plants in Europe or *purchase subsidiaries abroad.* It simply acquired substantial interests in a dominant manufacturer of bearings in England, participated in the formation of and invested in the stock of a potential competitor in France." [Italics supplied.]

In addition the concurring opinion in *Timken* recognizes that, so long as there were outside interests in British and French Timken, the agreement had to be treated as though it was between American Timken and those outside interests. That is apparently why the concurring Justices felt forced to say that "any other conclusion would open wide the doors for violation of the Sherman Act at home and in foreign fields."

The dissenting opinion of Justice Jackson, contrary to the fact, regarded the foreign subsidiaries as wholly owned and apparently accentuated the fear that the mere existence of two or more corporate entities in the parent and wholly owned subsidiaries would be sufficient to lay the basis for a charge of conspiracy under Section 1 of the Sherman Act. The paragraphs which evoked this feeling of concern are as follows:

> I doubt that it should be regarded as an unreasonable restraint of trade for an American industrial concern to organize foreign subsidiaries, each limited to serving a particular market area. If so, it seems to preclude the only practical means of reaching foreign markets by many American industries.
>
> The fundamental issue here concerns a severely technical application to foreign commerce of the concept of conspiracy.

[95] *United States* v. *Timken Roller Bearing Co.*, 83 F. Supp. 284 (N. D. Ohio 1949).

[96] *Id.* at 312.

> It is admitted that if Timken had, within its own corporate organization, set up separate departments to operate plants in France and Great Britain, as well as in the United States, "that would not be a conspiracy; we must have two entities to have a conspiracy." Thus, although a single American producer, of course, would not compete with itself, either abroad or at home, and could determine prices and allot territories with the same effect as here, that would not be a violation of the Act, because a corporation cannot conspire with itself. Government counsel answered affirmatively the question of the Chief Justice: "Your theory is that if you have a separate corporation, that makes the difference?" Thus, the Court applies the well-established conspiracy doctrine that what it would not be illegal for Timken to do alone may be illegal as a conspiracy when done by two legally separate persons. The doctrine now applied to foreign commerce is that foreign subsidiaries organized by an American corporation are "separate persons," and any arrangement between them and the parent corporation to do that which is legal for the parent alone is an unlawful conspiracy. I think that result places too much weight on labels.[97]

If read literally, these paragraphs may imply that the Supreme Court is actually tending in the direction of holding as an unlawful conspiracy action between a parent and wholly owned foreign subsidiaries which would be lawful if engaged in by independent concerns. We reject this inference. Justice Jackson was critical of the majority opinion on the ground that it might logically lead to such a conclusion, but as previously shown, neither the facts of the case nor the majority opinion need do so. Moreover, Justice Jackson did not express as his own opinion that conduct otherwise legal would violate the Sherman Act as a conspiracy when the arrangement is between the parent and wholly owned foreign subsidiary. On the contrary, his language indicates that he repudiates that doctrine as placing "too much weight on labels."

We also take note that organization by an American company of wholly owned foreign subsidiaries may require incorporation abroad in compliance with the requirements of the laws of the particular foreign country. Thus, we believe that where the foreign law requires that a few qualifying shares be owned by foreign residents or nationals, or where minority foreign stockholders are not competitors, but mere investors, a foreign corporation may still be deemed a subsidiary of its American parent.

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[97] *Timken Co.* v. *United States*, 341 U. S. 593, 606–607 (1951).

3. *Joint Activities Abroad*

Manufacturing or distribution activities carried on abroad jointly by American firms alone, or combined with foreign competitors, should be upheld unless they create unreasonable restraints on the commerce of the United States. Such activities may encourage trade by affording means for sharing risks of sometimes hazardous foreign operations. They should thus be deemed beyond the reach of our antitrust laws if they involve no restrictions on American imports or exports of goods or capital and do not unreasonably restrain competition in American domestic markets. As was true in *Minnesota Mining*,[98] defendants should have the opportunity to proffer evidence to show that the joint foreign enterprise has no actual restraining effects upon the foreign or domestic commerce of the United States.

Nothing contrary appears in *Minnesota Mining* or *Imperial Chemical Industries*.[99] In *Minnesota Mining*, the court held that the Sherman Act was violated where a combination of American manufacturers controlling four-fifths of export trade in coated abrasives established jointly owned factories abroad to manufacture and sell but refrained thereafter from exporting such articles to the countries in which the products of the foreign owned plants could be sold more profitably. The court held that

> * * * The restraint has consisted in the effect of defendants' jointly owned foreign factories' precluding their American competitors from receiving business they might otherwise have received from the markets served by these jointly owned foreign factories.[100]

In *Imperial Chemical Industries* the court affirmed the principle that absent a purpose or effect to restrain trade or to monopolize, "there is nothing *per se* unlawful in the association or combination of a single local concern of a foreign country in a jointly owned manufacturing or commercial company to develop a foreign local market." In that case, however, certain foreign manufacturing concerns jointly organized by duPont and Imperial Chemical Industries were held in violation of the Sherman Act. The court's reasoning was as follows:[101]

> * * * the proof here shows an American concern, already established in a foreign local market, and a British concern,

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[98] *United States* v. *Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (D. Mass. 1950).

[99] *United States* v. *Imperial Chemical Industries*, 100 F. Supp. 504, (S. D. N. Y. 1951).

[100] 92 F. Supp. 947, 961 (D. Mass. 1950).

[101] *United States* v. *Imperial Chemical Industries*, 100 F. Supp. 504, 557 (S. D. N. Y. 1951).

> which has a foothold in the same foreign local market, combining to form a jointly owned company to the end that the same foreign market may be developed for their mutual benefit and profits divided on an agreed basis. To this, and as an incident to the formation of the foreign company, we find added by agreement not only joint contribution of capital investment but a pooling of patents and processes owned by the parent companies. That a foreign company created under such conditions by concerted action of actual or potential competitors meets the tests of *per se* legality is open to serious question. But, with a dubious nod, we assume that it does; we find, however, that the very purpose with which the foreign companies here involved were conceived and the circumstances under which they were born place them under the bar.

It is clear that any American company, acting independently in establishing manufacturing or distribution facilities abroad, would not run afoul of Section 1 nor itself be suspect under Section 2 of the Sherman Act. Thus the court in the *Minnesota Mining* case gave assurance for legitimate individual operation of foreign facilities:[102]

> Nor is it any excuse that American export trade might have been equally adversely affected if there had been—or if there should now be—established plants in Great Britain, Canada and Germany by one or more of the manufacturing defendants acting independently. Such supposititious individual action would, it is true, be a restraint upon American commerce with foreign nations. But such a restraint would not be the result of a combination or conspiracy. Hence it would not run afoul of § 1 of the Sherman Act. Nor would it, so far as now appears, have the purpose or effect of promoting one company's monopoly in violation of § 2 of the Sherman Act. Indeed the decree to be entered in this case will expressly contemplate allowing just such individual operation of foreign factories. For nothing in this opinion can properly be read as a prohibition against an American manufacturer seeking to make larger profits through the mere ownership and operation of a branch factory abroad which is not conducted as part of a combination, conspiracy or monopoly.

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[102] *United States* v. *Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947, 962, 963 (D. Mass. 1950).

D. RELATION OF ANTITRUST TO UNITED STATES PROGRAMS ABROAD

In addition to marking out the limits of antitrust policy, we consider its coordination with our programs for national security and promoting foreign trade, as well as our relations with other countries. Antitrust proceedings involving activities abroad by American or foreign firms may, of course, affect a variety of related Government programs. In such situations, the Committee recognizes that the Attorney General and the Federal Trade Commission, charged with enforcing our antitrust laws, cannot resolve all complex interrelations of our national interest. Decisions of a delicate nature may be involved beyond the authority of antitrust enforcement agencies alone to make.

As stated at the outset, this Committee is not charged with evaluating the wide range of American foreign programs. Nor do we generalize about the effect of antitrust on any particular Government program abroad. Pursuant to our liaison procedures, however, we have consulted officials of the Department of State, Defense and Commerce, as well as the Foreign Operations Administration, to secure their views regarding the relation of antitrust to their foreign programs. We first set forth the position of these Government agencies. After considering their views, we recommend means consistent with our constitutional framework and antitrust statutory scheme for coordinating antitrust with these related policies.

The Department of Defense stated:

> We find that in certain cases, adherence to the principles contained in the antitrust laws has inconvenienced and perhaps to some extent delayed Defense Department procurement activities abroad, particularly in areas where cartel arrangements are the rule rather than the exception. However, it is believed that the long term benefit to be derived from opposing combinations in restraint of trade, a policy now expressed in the Mutual Security Act, counterbalances any advantages which this Department might derive from a less stringent application of antitrust principles to our foreign procurement.

That agency also noted that "On the other hand it seems highly probable that any major antitrust action involving the foreign operations of large American or United States controlled corporations might have a serious impact on the programs of the Department of Defense." Therefore, "a procedure should be adopted which will provide for advance notification by the Department of Justice of any contemplated antitrust action having foreign implications, and for the withholding of action pending study and recommendations by the interested

Government departments." It was suggested that the "National Security Council Planning Board might appropriately be designated as the focal point for receiving from the Department of Justice notice of such contemplated antitrust actions, and for appraising the probable impact of such actions upon major areas of national interest."

The Department of State summed up its views as follows:

> One of our most important interests of the Department in this field arises from the adverse effects of restrictive business practices in international trade and in foreign countries on economic progress in the free world. Such practices are of serious concern to us because they hold back the growth abroad of greater production and productivity and of higher standards of living. This in turn weakens the fabric of free world defense by retarding the development of economic strength and lowering resistance to Communist ideology.
>
> Restrictive business practices also are one of the factors that impede the elimination of structural imbalances in international trade. The lack of a philosophy of competitive enterprise, together with restraints on production and markets, inhibits the efforts of many countries to achieve an export volume that can support their import needs.
>
> In addition to these broad aspects, restrictive business practices also present recurring problems because of their injurious effects on our own industry and economic life through impeding our foreign trade and investment and adversely affecting our access to foreign goods. For example, foreign cartel control of the production, marketing and price of important raw materials can interfere with the efficient development of our industry and can hamper defense production or raise its cost.
>
> These are some of the considerations which have led this Government to adopt a policy of encouraging the strengthening of free competitive enterprises in other parts of the free world. Such a policy has been pursued by the Department and has been expressed by the Congress in the so-called Thye Amendment of the Mutual Security Act (Section 516 (a) as amended.)[103]

[103] This Amendment reads: The Congress recognizes the vital role of free enterprise in achieving rising levels of production and standards of living essential to the economic progress and defensive strength of the free world. Accordingly, it is declared to be the policy of the United States, in furtherance of the objectives of this Act, to encourage the efforts of other free countries in fostering private initiative and competition, in discouraging monopolistic practices, in improving the technical efficiency of their industries, agriculture and commerce, and in the strengthening of free labor unions; and to encourage American enterprise in contributing to the economic strength of other free countries through private investment abroad and the exchange of ideas and technical information on matters covered by this subsection.

The Department of State further stated that some of the same considerations which have led to the adoption of our national antitrust policy

> also indicate the desirability of developing some means of international cooperation in dealing with restrictive practices affecting international trade. While it is not yet clear what form such cooperation might best take, progress along these lines is important because other countries, which are smaller than the United States and more dependent upon international trade, cannot take effective action in curbing restrictive business practices unless countries with whom their trade is tied do likewise. It is also important because no country by itself has jurisdiction to deal with these practices in their entirety. International cooperation in dealing with them would avoid frictions and harm to business interests that may flow from the unilateral action of any single country.

Regarding possible conflicts of policies, that Department said:

> With respect to the administration of the United States antitrust laws, there have been circumstances under which the institution of a particular suit, or some aspect of its prosecution, has presented problems from the standpoint of our foreign relations or national security interests. It is believed, however, that the recently adopted practice of the Department of Justice of consulting with this Department before bringing cases that are international in character and of working closely with the Department in resolving any potential foreign policy conflicts has provided a flexible solution to this problem.

The Department of Commerce reported its interest in expansion of international trade and American private investment abroad. It quoted the President's statement that:

> An increased flow of United States investment abroad could contribute significantly to the needed expansion of international trade. It also could help in the high level of economic activities and employment in the United States. Further, such investment contributes to the development abroad of primary resources needed to meet our own ever-increasing needs even while it helps to strengthen economies of foreign countries.

Its views were then summarized as follows:

> (1) We favor present United States foreign policy to discourage, by all practicable means, restrictive business practices in other countries;

(2) We oppose any general exemption from antitrust law for foreign commerce;

(3) We are very much concerned with the problem of uncertainty or lack of clarity as to the scope and applicability of the law, and to that end, we suggest:

(*a*) The Attorney General should prepare and publish a clear and complete summary of the current interpretation of the law in foreign field; and

(*b*) He should strengthen and encourage wider use of the conference and consultative facilities of the Antitrust Division.

(4) Finally, we believe that consideration should be given to authorizing another administrative agency, such as the Commerce Department or the Federal Trade Commission, to grant limited exemption from the antitrust laws for private foreign investment arrangements. Carefully limited exemptions tailored to the needs of each case might be helpful in coping with problems in a particular foreign country or in special international comity, trade or investment situations, and still not do violence to accepted principles and purposes of our antitrust laws. Precedent and experience for this suggestion may be found in our war-production practice and in current activities under the Defense Production Act to assist programs for preserving the supply of critical and strategic materials from abroad.

We refer also to the Commission on Foreign Economic Policy which found that one uncertainty in the policies of the United States affecting foreign investment

> relates to the application of United States antitrust laws to operations abroad. United States antitrust policy should be restated in a manner which would clearly acknowledge the right of each country to regulate trade within its own borders. At the same time it should be made clear that foreign laws or established business practices which encourage restrictive price, production, or marketing arrangements would limit the willingness of United States businessmen to invest abroad and will reduce the benefits of investments abroad to the economies of the host countries.

While the Department of State and the Foreign Operations Administration emphasize the importance of promoting private investment abroad, they recognize that foreign investment surrounded by restrictions prohibited under the antitrust laws would generally lack benefits normally expected to flow from United States overseas investment. Such restricted investment might be likely to create barriers

to the accomplishment of other United States policy objectives, for example, the creation of restraints on the availability from foreign areas of raw materials important to the United States industries.

The Foreign Operations Administration stated that it attached "the greatest significance, in administering FOA programs, to the objective of reducing restraints on trade in and between foreign countries. The opportunity to further this objective presents itself in our technical assistance programs, in foreign currency lending activities, and in the negotiation of statements of principle in international agreements with respect to the aid programs." This agency stated that "we do not feel that the application of the antitrust laws to foreign commerce has operated to the detriment of the FOA programs in any significant way, and it may have contributed to these objectives in many instances." On the other hand, the Foreign Operations Administration invited attention to uncertainties in antitrust application involved in its efforts "to encourage specific investment proposals which are believed to carry economic benefit to the countries of investment by means of guaranties against specific risks of doing business abroad which require the Government as insurer to scrutinize in some detail the terms of proposed investments."

Referring to the concern that the antitrust laws have had a deterrent effect on private United States investment abroad, the Foreign Operations Administration made the following comments:

> The only direct evidence we have in support of this assertion is in connection with guaranty applications based on proposed agreements for the license of patented or secret manufacturing processes, which we consider a highly desirable method of applying American technology and managerial techniques to the task of increasing productivity abroad. It is apparent from a review of these agreements that it is the prevailing practice, particularly among concerns with relatively little foreign investment experience, to confine the license to production and sales in certain countries and parts of the world. In attempting to modify such provisions to accord with our understanding of the antitrust laws, we are constantly up against the question of whether there is any satisfactory basis for an American company to furnish technical assistance and information to a foreign concern without exposing itself or other licensees to the risk of loss of their established markets either at home or abroad. It is quite apparent that, if the answer is flatly negative, there is a very limited opportunity to increase the flow of technology to foreign countries through private channels. It is equally apparent that, if the application of the antitrust laws is uncertain, many of the smaller American businesses which

> have recently become interested in foreign markets through the medium of licensing will not undertake the complications and attendant expense of exploring prospective licensing arrangements in the face of the possibility of antitrust litigation or even of United States Government disapproval.

The Foreign Operations Administration suggested, on the basis of their experience, "there is need for some procedure whereby prospective investors abroad may be advised on a determination under all relevant Government policies that their plans are either approved or disapproved." "Such a review procedure," they went on, "is not likely to be effective unless favorable Governmental findings can be made useful whether as a degree of protection against antitrust litigation on the facts thus reviewed or at least as an admissible part of the record of any such litigation."

The Department of State submitted the following summary of its views on the relation of the antitrust laws to promotion of foreign private investment.

> It is recognized also that foreign investment is subject to some uncertainties as a result of applicability of the United States antitrust laws and that some investment may be discouraged as a result. The Department is keenly interested in encouraging American foreign investment. At the same time, it is recognized that investment surrounded by restrictions illegal under the antitrust laws would generally lack the benefits normally expected to flow from United States overseas investment and would be likely to create barriers to the accomplishment of other United States policy objectives. For example, one result could be the creation of restraints on the availability from foreign areas of raw materials important to United States industry. In addition, a United States policy of permitting foreign investment on this basis would hamper our efforts to encourage foreign countries in developing more competitive economic conditions since it would tend to give support to foreign justifications of cartels as instruments of internal and international trade. The Department believes, however, that a clarifying statement concerning the application of antitrust policy to foreign investment would be a constructive means of removing existing uncertainties in the minds of potential investors.

These views support our conclusion of the need for advance discussion with affected agencies concerning projected antitrust proceedings seriously involving any of the Government's foreign programs. We recognize, of course, that such liaison on an informal basis already exists; and pursuant to existing procedures, the Department of Justice has consulted with the Departments of State and Defense as well as

the National Security Council before and after bringing a suit. Our recommendation, in essence, urges that this type of procedure be formalized.

Information so gathered may at a minimum give the Attorney General or the Federal Trade Commission another informed agency's view of those facts abroad which may constitute the substance of an antitrust charge. In addition, such liaison might yield added data relevant to deciding the form a suit takes, remedies deemed appropriate, as well as the timing of any proceeding. All these matters lie within the discretion vested in our antitrust enforcement agencies. Beyond this discretion, resolution of any policy conflict may involve consultation with the President—at least until such divergence can be brought to the attention of Congress for legislative reconciliation.

Beyond these general problems, this Committee also considers limited exemptions provided for certain activities by (1) the Defense Production Act of 1950, as amended,[104] as well as the Webb-Pomerene Act.[105]

Since the enforcement of the Sherman Act with respect to foreign trade can deal at best with few of the restraints which international cartels impose upon the American economy, a minority of members believe the Committee should recommend that the Government support, negotiate and sign, and the Congress by appropriate procedures ratify, an international treaty or convention against restraints of trade and monopolistic practices.[106]

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[104] 50 U. S. C. App. § 2061 *et seq.*, as amended, June 30, 1953.

[105] 15 U. S. C. § 61.

[106] This Committee Minority reasons as follows: in the international sphere, arrangements for limiting competition, either by dividing world markets or restricting competition within markets, are not uncommon. Generically known as international cartels, such plans are often legal under the laws of other countries. Several countries have recently adopted new laws, or revised older laws, dealing with monopolies, restraints of trade and restrictive business practices. These laws differ widely in theory and in approach. One common feature seems to be that they do not apply to international cartels, except insofar as such organizations may exercise a restrictive influence on competition within their respective home markets. International cartels and business practices restricting competition may have far-reaching effects on the economy of the United States. In addition, such restraints may cramp the business freedom of American firms operating abroad. In most instances, American antitrust laws, no matter how vigorously enforced, cannot deal with such conduct. While some of the more obvious cases may come within reach, the Sherman Act enforcement can touch only a small percentage of international restrictive arrangements adversely affecting Americans.

In addition, two Committee members comment as follows:

"The underlying fact is that while monopolies, cartels, and restrictive business

1. *Defense Production Act*

That Act authorizes Government officials to consult with business and other officials in order to encourage voluntary action to carry out national defense objectives. Under this statute, the President may request members of an industry to enter into a voluntary agreement or program, upon finding that it is vital to the national defense.

In practice, the President has delegated his power to request voluntary agreements principally to the Office of Defense Mobilization (ODM). Under the Act, all requests for voluntary agreements are conditioned upon the approval of the Attorney General. Now the Attorney General, upon submission by ODM, considers such proposed agreements and, prior to approval, seeks to have the parties conform them to the antitrust laws, having in mind the objectives of the particular agreement or program. The Attorney General has recognized, of course, that some activities, otherwise illegal, such as those involving cooperation between competitors in defense projects, have been necessary to accomplish the purposes of the Act. The Department of Justice informed us that approximately seventy voluntary agreements or programs have been thus approved. In only one or two cases has approval been withheld, and in these cases alternative plans were worked out.

The Defense Production Act has been extended from time to time and will expire in June 1955. We recognize that our Government must promote exploitation and stockpiling of certain strategic raw materials obtained from foreign sources. Toward that end, it may be necessary in some instances to except certain activities from the antitrust laws. Accordingly, the Committee recommends that, at least with respect to programs for preserving the supply of critical and strategic materials from abroad, it should be further extended.

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practices affecting world trade are a matter of international concern, the present state of the law in different countries, and of the differing economic policies and philosophies on the subject which prevail in capitalist countries, makes international cooperation, rather than international adjudication, the soundest available procedure for tackling the problem. Facing this fact, we have three alternative courses before us: (1) to accept the inevitability of foreign cartels, and to allow American companies operating abroad to participate in them; this course would require amendment of the antitrust laws, which we should oppose; (2) to continue our present course, of partial, inadequate and generally unsatisfactory enforcement of our law against those offenders whom we happen to catch—a course which inevitably produces undesirable and unnecessary intergovernmental friction; or (3) to move, with other governments, by means of the procedures of international cooperation, towards an agreed solution of the problems which restrictive arrangements pose for the American economy. We favor the third course, realizing fully that it will take many years of cooperation in dealing with these problems before the law of other capitalist countries develops enough to provide the American people with adequate protection against exploitation by foreign monopolies, cartels or restrictive business practices beyond the reach of our law."

We recommend in addition that for a designated period beyond the Act's expiration, conduct requested or approved by the President shall not be subject to antitrust. Acts authorized by the President may require committing large funds for long periods of time that may stretch beyond the Act's short extension. To protect such investments, antitrust immunity should, by separate statute, in some instances, be extended beyond that Act's termination.

However, such immunity should be conditioned upon express findings when the conduct was undertaken: first, that national defense required its duration beyond the expiration of the Defense Production Act; and second, that before granting the immunity, consideration was given to the possibility of accomplishing the same defense objectives by alternative methods involving less restrictions on competition. The amendment should also contain a provision for termination upon adequate notice if the President finds that such an agreement is no longer in the national interest.

2. *Webb-Pomerene Act* [107]

To help American firms compete in foreign markets with more powerful rivals as well as bargain on equal footing with European

[107] The Webb-Pomerene Act of 1918 (15 U. S. C., §§ 62, 63, 65 [1952]) in relevant part provides as follows:

SEC. 2 * * *

Nothing contained in the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety, shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association, provided such association, agreement or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association: *Provided further*, That such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein.

SEC. 3 * * * Nothing contained in section seven of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October fifteenth, nineteen hundred and fourteen, shall be construed to forbid the acquisition or ownership by any corporation of the whole or any part of the stock or other capital of any corporation organized solely for the purpose of engaging in export trade, and actually engaged solely in such export trade, unless the effect of such acquisition or ownership may be to restrain trade or substantially lessen competition within the United States.

* * * * * * *

SEC. 5 * * *

Whenever the Federal Trade Commission shall have reason to believe that an association or any agreement made or act done by such association is in restraint of trade within the United States or in restraint of the export trade of any

buying cartels,[108] the Webb-Pomerene Act of 1918[109] exempts from antitrust all "association[s] entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade" or "agreement[s] made * * * in the course of export trade by such association."[110] To be eligible, however, the association or agreement must not be "in restraint of trade within the United States" or restrain "the export trade of any domestic competitor." The Act further provides that no such association may "artificially or intentionally" enhance or depress "prices within the United States."[111] When an association falls short of these standards the Federal Trade Commission may "make to such association recommendations for the readjustment of its business in order that it may thereafter maintain its organization and management and conduct its business in accordance with law."[112]

In the first proceeding under this section in 1940, the Federal Trade Commission made "Recommendations for the Readjustment of the Business of Pacific Forest Industries and Export Trade Association."[113] That case involved contracts requiring members to sell all their products exclusively through the Association. The Commission found that such agreements ran afoul of the Webb-Pomerene Act by restraining the trade of other domestic competitors. Similarly, the Commission in the *Export Screw Association* proceeding restrained activities aimed at buying out foreign competitors to seal off American "home markets."[114] The Commission noted that any agreement be-

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domestic competitor of such association, or that an association either in the United States or elsewhere has entered into any agreement, understanding, or conspiracy, or done any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein, it shall summon such association, its officers, and agents to appear before it, and thereafter conduct an investigation into the alleged violations of law. Upon investigation, if it shall conclude that the law has been violated, it may make to such association recommendations for the readjustment of its business, in order that it may thereafter maintain its organization and management and conduct its business in accordance with law. If such association fails to comply with the recommendations of the Federal Trade Commission, said commission shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper.

[108] See, for example, statements by Webb-Pomerene sponsors at 53 Cong. Rec. 13,359, 13,701 (1916); and 56 Cong. Rec. 181 (1917).

[109] 15 U. S. C. (1952) §§ 61–65.

[110] 15 U. S. C. (1952) § 62.

[111] *Id.*

[112] 15 U. S. C. (1952) § 65.

[113] 40 F. T. C. D. (1945). Prior to this Commission proceeding, the Webb-Pomerene Act was obliquely involved in *American Export Door* v. *Gauger*, 283 Pac. 462 Wash. (1929). See also ex parte Lamar, 274 Fed. 160 (2d Cir. 1921).

[114] 43 F. T. C. 980–1074 (1947).

tween American and foreign competitors "which restricts imports into the United States or which excludes foreign manufacturers from the domestic market, or which has the capacity and tendency to do so, effects restraints which are prohibited by the antitrust laws, particularly as the activities and agreements of export trade associations are circumscribed by the provisos of the Webb-Pomerene law." [115] Finally, even where activities apparently sanctioned by Webb-Pomerene are involved, the Commission has prohibited combination with other than Association members.

The first court decision treating the liability of Webb-Pomerene associations under the antitrust laws is *United States* v. *United States Alkali Export Association.*[116] There the district court held, and the Supreme Court affirmed, that Section 1 of the Sherman Act was violated by agreements by major American producers of alkali products with foreign associations and companies dividing world alkali markets, assigning international quotas and fixing prices in certain territories. The court noted that "Whatever exemptions the Webb Act did bestow upon associations organized thereunder, it affirmatively appears upon the face of the statute that Congress did not intend thereby to abandon the rule of competition as applied to our export trade." [117] A "reading of the Webb Act in its entirety," the court continued, "must therefore lead to the rejection of the claim that the cartel agreements involved herein are sanctioned under the Act," [118] since they were not agreements in the course of export trade which the Webb Act places beyond the reach of the Sherman Law. Accordingly, the court concluded that "There can be no question that imposing upon the domestic market restraints which ban all imports of a given commodity into this country is conduct expressly made subject to the antitrust laws" by these provisos of the Webb-Pomerene Act which "withdraw all immunities afforded by the Act from associations that enter into any agreement, understanding or conspiracy 'which substantially lessens competition within the United States or otherwise restrains trade therein,' or which is 'in restraint of trade within the United States.'" [119] Finally, *Alkali* held illegal the use of an export association to stabilize domestic prices by removing surplus products of its members from the domestic market in order to maintain the current price.[120]

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[115] *Id.* at 1075. Similarly, note Phosphate Export Association, 40 F. T. C. 865 (1946); General Milk Co., Inc. Dkt. No. 202–7, Sept. 10, 1947, F. T. C. Annual Rep. 85 (1948); Sulphur Export Corporation, 43 F. T. C. 978 (1947).

[116] See *e. g.*, Recommendations for Readjustment of Carbon Black Export, Inc., 46 F. T. C. 1146 (1949). See also Recommendation for Readjustment of the Pipe Fittings and Valve Export Association, 45 F. T. C. 917, 1061 (1948).

[117] 86 F. Supp. 59, 67 (S. D. N. Y. 1949).

[118] 86 F. Supp. 59, 68 (S. D. N. Y. 1949).

[119] *Id.* at 68.

[120] *Id.* at 74.

Just as *Alkali* delineates conduct beyond the Congressionally intended exemption,[121] so *Minnesota Mining* marks out areas of allowable conduct under the Webb-Pomerene Act. That case held illegal an arrangement by four American competitors and their associates, who had formerly done over 86 percent of American export business in the relevant market, to establish jointly owned factories in England, Canada, and Germany. The decree required termination of joint control over the foreign companies.

In addition, however, the Government urged that the Export Company formed under the Webb-Pomerene Act be dissolved. The contention was "that it is unlawful for four-fifths of the American export trade to combine to export exclusively through one corporation, not available to others and from which they cannot withdraw at will, and for that corporation to fix the quotas within which and prices at which it will buy from its members and the prices at which foreign distributors sell its members' products, to require its distributors to refrain from handling abrasives made by foreign (or before 1947 by foreign and domestic) distributors, and to charge higher prices to American exporters than to foreign distributors." [122]

Rejecting this contention, in part, the court noted, "Now it may very well be that every successful export company does inevitably affect adversely the foreign commerce of those not in the joint enterprise and does bring the members of the enterprise so closely together as to affect adversely the members' competition in domestic commerce. Thus every export company may be a restraint. But if there are only those inevitable consequences an export association is not an unlawful restraint. The Webb-Pomerene Act is an expression of Congressional will that such a restraint shall be permitted. And the courts are required to give as ungrudging support to the policy of the Webb-Pomerene as to the policy of the Sherman Act." [123]

Therefore, the court concluded, "The recruitment of four-fifths of an industry into one export unit was foreseen by Congress, * * *" and, accordingly, exempt.[124] It also concluded that "The assignment of stock in an export association according to quotas, if not foreseen, has at least been silently acquiesced in." [125] Furthermore, the court held that an association which comprises almost the entire industry may lawfully fix export prices. Finally the court noted that the agreement among the members of the export association to export only through the association would be lawful provided that the provision binding

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[121] *Id.* at 77–80.

[122] *United States* v. *Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947, 964–65 (D. Mass. 1950).

[123] *Id.* at 965.

[124] *Ibid.*

[125] *Ibid.*

members for a period of 10 years was replaced "by a reasonable withdrawal allowance." [126]

We recognize that Webb-Pomerene has been criticized as an unwarranted spur to international cartel arrangements. Accordingly, some have urged its repeal.

On the other hand, Webb-Pomerene export associations may include small as well as large companies and thus possibly help small business to deal with combinations authorized under foreign law. In addition, the practical significance of the Webb-Pomerene exemption may easily be exaggerated. The Federal Trade Commission informs us that as of 1954 only 44 export associations were registered. Moreover, since Webb-Pomerene's passage, 104 export associations have been dissolved. The percentage of American exports handled by Webb-Pomerene associations has exceeded ten percent in only three years. Indeed, today, exports of Webb-Pomerene associations account for less than six percent of United States export trade. Finally, *Alkali* and *Minnesota Mining* suggest judicial alertness to confine export associations activities within Congressionally intended exemptions. Abuses of these exemptions, we note, may be deterred by the Federal Trade Commission's special statutory investigatory powers under Webb-Pomerene [127] as well as Department of Justice proceedings against Webb Act associations. It will be in *United States Alkali Association* v. *United States*,[128] recalled that the Supreme Court held that Federal Trade Commission investigation under the Webb-Pomerene Act is not prerequisite to suit by the United States against an export association to restrain violations of the Sherman Act. The Court noted that in enacting the Webb-Pomerene Act, "there was no thought of depriving the Attorney General of any of his powers to prosecute antitrust suits." [129]

On balance then, this Committee feels that the Act may well be retained until facts are adduced to show some change in the present pattern abroad of state controlled buying agencies, state monopolies,

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[126] *Ibid.*

[127] 15 U. S. C. § 65 (1952). In addition, we note, that the Federal Trade Commission is authorized by Section 6 of the Federal Trade Commission Act to "investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable" (15 U. S. C. § 46 [1952]). This seldom used power, we recommend, may frequently be constructively utilized, especially so when considered with the Commission's power to investigate the effectiveness of existing decrees as well as aid in the formulation of remedial provisions (15 U. S. C. § 46 [1952]).

[128] 325 U. S. 196 (1944).

[129] *Id.* at 211.

and other combinations now part of the cartel policy prevalent in many parts of the world.

We believe that *Alkali*, which allows independent action of the Department of Justice, underscores the importance of the Supreme Court's admonition: "And there is no basis for interpreting the [Webb-Pomerene] statute as though it had been contrived to prevent hostile action rather than to encourage efficient cooperation between the Commission and the Department of Justice." [130] Accordingly, we recommend, on this phase of enforcement by these agencies, that they fellow the procedures for "efficient cooperation" set forth in this Report's chapter on *Antitrust Administration and Enforcement* under the topic "*Related Jurisdiction of the Department of Justice and the Federal Trade Commission.*"

[130] *Id.* at 209.

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