S T A T E M E N T

OF

HONORABLE FRANCIS BIDDLE

ATTORNEY GENERAL OF THE UNITED STATES

BEFORE THE

JUDICIARY SUB-COMMITTEE

ON FOREIGN CONTRACTS BILL

AND

SPECIAL COMMITTEE INVESTIGATING

PETROLEUM RESOURCES

OF THE SENATE OF THE UNITED STATES

WASHINGTON, D. C.

MAY 17, 1945

10:30 AM

The proposed Foreign Contracts Act, providing for the public disclosure of restrictive contracts which affect our foreign commerce is an attempt to learn from experience. We have had plenty of experience from which to learn. We must remember this experience now, not for the purpose of criticizing any particular transaction or company, but so that we may take steps to protect ourselves in the future.

It is a matter of public importance when an American company enters into an arrangement with a German company under the terms of which the American company promises to stay out of the Latin-American market and to use its best efforts to keep other American firms out of the Latin American market.

It is important, too, when an American company agrees not to sell aircraft parts in those countries of Europe which the German Government, long before Munich, has decided to make completely dependent upon German supplies.

When an industrial treaty is entered into by the terms of which an American company promises a German company that it will produce no more than 5000 tons of magnesium a year, this is a matter of sufficient importance so that at the very least the American government and the American people ought to know about it.

It may be that no American company will ever again enter into an arrangement with I.G. Farben whereby I. G. Farben can stop some of the developments of synthetic rubber in this country, but now is the best time to take proper steps to make sure that this will not occur again.

And it is quite possible that no American firm will ever again make an arrangement with a Japanese company whereby the secrets of submarine

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propellors being tested by the United States Navy, as well as the results of the tests, will be disclosed.

But we must remember that many of the cartel contracts contained terms under which they were to be revived after the war. The examples are too numerous for comfort.

One such contract contained the provision that "the parties should enter into new negotiations in the spirit of the present agreements and endeavor to adapt their relations to the changed conditions which have so arisen." Later the parties entered into what they termed "complete plans for a modus vivendi which would operate through the term of the war, whether or not the United States came in," possibly, as is also explained in another document, because "technology has to carry on - war or no war . . ."

"Have no fear, whatever I do will be in your interest," telephoned the former head of one American chemical company to the head of I. G. Farben, as the beginning of the war for this country was drawing near.

Many of the arrangements of course concerned the Latin American market where British, American and German companies had joint subsidiaries. A report from the Foreign Relations Department of an American company to its Executive Committee, dated February 9, 1940, stated "The company informed I.G. that they intended to use their good offices after the war to have the I.G. participation restored." A communication from the company to the British Imperial Chemicals Industries later in 1940 stated "I think we have all agreed that

there is a moral commitment, if and when circumstances permit, for these former shareholders to become shareholders again, but the basis on which they may be done will have to be discussed at that time." I. G. was the former shareholder.

It is not that I believe that these particular contracts necessarily will be revived after the war. Many of the companies involved have publicly renounced them, and others are under court injunction declaring the agreements invalid and prohibiting further performance. We happen to know about these agreements; they have been publicly discussed and in some cases court action has been taken. No doubt in some cases these contracts may be open to unfair interpretations, but these known contracts must serve as the examples for the many other cartel contracts of a similar nature which have never been disclosed.

One contract which we do know about contained this interesting provision "the existence, the content, and the details of operation of this agreement have to be kept secret by both parties notwithstanding the possible obligation of disclosing it to public officials." There is no doubt that many agreements which have vitally affected the well being of this country have been successfully kept secret.

And the Department of Justice knows, as a matter of fact, that many cartel arrangements necessarily disrupted during the European phase of the war, are now being resumed. Meetings have been held, plans have been laid, and in some cases agreements already entered into. As to some of these agreements my department will have something to say before long.

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Of course the danger inherent in some of these agreements will be considerably diminished if we can rid Europe and the world of the great German cartel structures which, acting for the German government, entered into these cartel agreements as part of a program to weaken the productive facilities of this country. I hope and believe that we shall do so. At the same time, as we take steps here to protect ourselves, we must seize the opportunity we have won to destroy these German cartels, to open up their patents and industrial research, developed during the war, to all the world, and to place such German industry as is permitted to remain in a position where it can no longer dominate and again control the industry of a considerable portion of Europe. We do not need to be warned by the statement of the manager of Krupp who told an American reporter that he would "be surprised how quickly the plant could be put into operation again."

But we must think of at least fifteen years from now, and further we must remember that it was the Versailles treaty which was circumvented and evaded through the mechanism of secret contracts with American firms. One German company, in connection with a cartel agreement as to which the Department of Justice filed an action only yesterday, explained that through the medium of this agreement, it was able to make the most modern storage batteries available to the German navy. This is how the German company described its success;

In connection with the production of electric storage batteries for submarines of the new German Navy it was very important that the AFA had never left out of sight the technological progress made in the construction of those batteries. In spite of the greatest difficulties, which existed because of the dictate of Versailles, the AFA [the German company] was enabled through its foreign connections, to remain prepared in that field so that presently modern batteries, with all possible improvements, could be made available for the construction of new submarines.

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We look at these agreements today, of course, with the wisdom of hindsight. But we have something more to guide us. We can see the complete pattern of these arrangements in a way which must have been denied all but a few American companies before this. If it had been necessary to make these agreements public, not only would many have not been entered into, but the web of German activities would have been revealed to American companies who would then have known the greater significance of the restrictions upon them which for one reason or another they felt compelled to accept.

I believe that American industry is entitled to have agreements of this nature open to inspection. I do not subscribe to the view that American companies were willing participants in a plan to thwart the development of American foreign trade as a whole or were knowingly engaged in a project to build up the industries of the future enemies of this country. Surely these companies are entitled to the guidance which public disclosure would give to them.

There should have been some compulsion for making public the agreement which existed between an American firm and a Japanese company whereby, as late as 1939, the American company felt obligated to turn over to the Japanese some of the secrets and the industrial know-how for making aviation fuel. Today we know of this agreement pursuant to which an official of the American company later wrote, "the information given to the Japanese representatives was as complete, if not more complete, than any information on these processes which we have supplied

to anyone". An American company which enters into such an agreement should be entitled to say that it hid nothing and that it let the American public know.

The proposed Foreign Contracts Act will provide this mechanism. It is not a far reaching statute. It will not by itself solve the cartel problem. It envisages no change in the principle of free and competitive enterprise. It gives to no government department or bureau the right to pass upon the contracts which are filed or to grant exemptions from the antitrust laws. It is not a cartel immunity or a cartel control bill. Its purpose, as I read it, is simple. It is merely intended to provide a mechanism through which the American public can know the terms of those arrangements which affect not only their foreign trade, but the access to foreign technology. Many of these arrangements are more important than treaties publicly debated and approved or disapproved in the Senate of the United States. These agreements are sufficiently important to be made known, not to some official of some government agency, but to the American people.

For this reason I am particularly happy that the proposed bill does not give to the Attorney General much discretion. The contracts are to be filed with the Department of Justice, and will constitute public records, open to public examination. The Attorney General may not withdraw contracts from public inspection except to the extent that this may be necessary to prevent the disclosure of a trade secret. There can be no quiet conversation with some public official and a go-ahead signal for some secret commitment.

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Because of the lack of discretion conferred upon the administrator of the Act, we must be particularly careful, of course, as to its terms. The Attorney General is not given any power to exempt particular contracts from the requirements of the Act no matter whether the financial interest involved or the public aspect of the transaction is relatively unimportant. There is undoubtedly good reason for this because, as for instance in the case of a patent covering a process which may be the basis for some new medical discovery, it may be difficult to tell what the ultimate importance of a given transaction may be, and the financial standing of the companies involved or the pecuniary value of the particular arrangement may be no guide. The Attorney General likewise is not given any power to add to the list of restrictive provisions which when present in a foreign contract will require registration. For these reasons the precise scope of the sections which will legislate as to the contracts to be covered will have to be carefully examined. As these hearings develop, undoubtedly cases will appear where the present wording may not reach contracts which should be covered or where the public interest may not justify the expense and trouble of registration.

The structure of the bill is fairly simple. Before a contract is filed under the terms of this Act, two requirements must be met. It must be a foreign contract and it must contain restrictive provisions. Foreign contracts include agreements made with foreign companies or which affect the commerce of this country with foreign nations or prevent any domestic person from engaging in trade outside the United States. The restrictive provisions, which make the act operative upon the foreign contracts which contain them, are five in number. I have some question about one of them.

Four of them seem to me to be appropriate. They include prohibitions upon the type or kind of commodity which may be manufactured or purchased or on industrial processes which may be used. They also include divisions of territories and markets.

The additional two provisions concern patents or trade marks, whether licensed or assigned. Inasmuch as every patent or trade mark is a claim to a monopoly grant, I believe it is proper to require registration.

The fifth provision (Sec. 2(d)), however, requires the registration of a foreign contract if it contains "an agreement to form or to use, for the purpose of conducting joint operations or a joint venture, any corporation, partnership, unincorporated association, company, or legal person or entity." I believe I understand the purpose of this provision. It was no doubt put in because so many of the broad sweeping cartel arrangements did provide for the formation of joint companies to be owned by the cartel partners. I should not think, however, that it was intended to require registration of every agreement between two American companies to engage in foreign trade and to form a corporation or to have a joint venture for that purpose. It was probably intended to cover only those foreign contracts made with foreign companies and which provide for the joint operation through some legal entity set up for that purpose. If that is so, this provision must be reworded. I mention it as an example of the kind of care which will have to be taken in reexamining the bill particularly in view of the absence of any power in the Attorney General to grant exemptions.

I believe it is paramount to stress the limited nature of this bill. It will not solve the cartel problem. While the bill necessarily provides

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for the registration of a written account of the terms of unwritten understandings, we will have to expect that many contracts which in practice do contain unwritten restrictive provisions will never be disclosed despite the criminal penalties which are provided. And where agreements are filed, the bill relies on publicity alone. I believe this is the way it should be.

There have been cartel registration statutes all over Europe. Usually they have been the opening wedge to cartel supervision by the government. The European experience is clear. First cartel registration statutes were passed with the result that many formal documents were filed but the cartel abuses continued. Then some government agency, possibly the agency charged with the administration of the registration act, was given the power to prohibit provisions in cartel agreements which were thought to be against public policy. Then the government was given the right to insist that certain provisions be put into agreements whether the parties wanted them or not, and the cartel agreement itself might be made compulsory on non-members. And finally the government having assumed the responsibility took over the active management of the cartel. The final stage of the merger between the government and the cartels was of course reached in Germany.

The cartel road is an easy road to follow. The plea that a particular business, which is always thought to have unique problems, should be permitted to make restrictive arrangements, only of course if the government through some official decides that it is in the public interest, is a very appealing plea. The notion that some government official may not have the wisdom to determine the public impact of an agreement which removes the incentive of competition, may retard the

development of an industry, raise prices, or keep out small enterprise-dies hard. The pattern of history that government supervision of this character inevitably becomes increasingly severe is easily forgotten. It is ironic but it is true that the people who have proposed some form of governmental supervision and control over cartels, which has inevitably lead to a simultaneous strengthening of the cartels and of absolute government management over business, have most frequently been opposed to cartels and have believed in free and competitive enterprise. We must beware of the pessimist who says "I am opposed to cartels, but if this industry could only make its restrictive agreements public, subject of course to the determination of some government official in the public interest, then we will have removed the bad effects of cartels and will have preserved the good." That is the cartel road and it usually begins by providing for the registration of the cartel agreements with some public agency.

Therefore I think a word of warning is appropriate. In some ways the most important provision of this bill is section 7 which provides that registration will confer no immunity whatsoever from the antitrust laws. The antitrust laws apply to foreign commerce. The Sherman Anti-trust Act has grown up by now and this is not a new theory. Not only the wording of the statute but the debates in congress show that the act was intended to prevent restraints of trade on our foreign commerce. Companies which entered into cartel arrangements of world dimensions restricting American imports to whole areas cannot very well say that they did not know what the policy of this country was as to such agree-ments. One may be pardoned for believing that perhaps in these cases the wish was the father to the lack of knowledge.

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I know why most of these companies entered into those arrangements of course. It seemed relatively simple to agree to stay out of some foreign area or to give up the production of some product if in return one could achieve a guaranteed and protected market. The long term effect on our domestic economy and the strength of the nation are easily forgotten in the specific transaction. And this undoubtedly accounts for the willingness, even though reluctant, of some American companies to accept the restrictions placed upon them. I refer, for instance, to the cartel quota system which exists in the electric lamp industry. An official of one American company in writing of this system stated:

> It is perfectly true that we are the second largest lamp manufacturer in the world, but we only have a participation outside of the U.S. and Canada, of approximately 1.2% of the licensed lamp manufacturers' business, which is probably about 0.6% of the world business outside the U.S. and Canada. I agree this is definitely lousy.

But an official of another American company explained it this way:

> . . . you spoke of a possible license from the G.E. to export lamps to certain countries. I don't know whether I explained the situation to you, but the fact is that in the world at large the more important electrical interests, such as the G.E., Siemens of Germany, Philips of Holland, etc., are closely bound together in a cartel with the result that they have entered into binding agreements, apportioning world markets between the respective companies. Accordingly, you can see that if the G.E. broke their agreement and allowed us to export into a foreign country which was assigned under the cartel agreement to a European manufacturer, that European manufacturer would have a claim to enter the American market in competition with us and probably could not be restrained from doing so. This is something which would probably not be to our advantage.

Our foreign commerce will become increasingly important to us. The world has grown smaller with the extraordinary development of air transport during the war. The development of new processes have made it

possible to create new industries. If the barriers to foreign trade can be removed, American industry with its efficiency in mass production will find its way over the entire globe. But the foreign contracts covered by this proposed registration act are even more important to us because they affect American access to foreign research and development and they reach down into the very heart of domestic production. When an American company can't produce magnesium or synthetic rubber, it is not only our foreign commerce which suffers.

There is of course only an artificial line between foreign and domestic commerce. That is why it is most important that we be willing to conduct our foreign commerce in accordance with the American tradition of competition. There has been a good deal of talk about the compulsion American companies are under to enter into foreign cartel arrangements. The truth is that in most cases the cartels cannot survive if the American companies do not participate. And it is a myth to believe that a system can be created which will provide for the polite supervision of American companies entering into cartel arrangements in foreign trade, and not have that same system, whether mild or severe, also applicable to their domestic business.

While there are particular reasons why contracts with foreign companies or affecting our foreign commerce should be publicly disclosed, it is therefore important that the registration act should be regarded solely as an adjunct to the traditional policy of this country in favor of competition. If we view this act as a partner to the Sherman Act, granting no immunity, we can escape the road which looks pleasant to some of polite government supervision leading to government management of powerful cartel business groups.

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This is a first step. Other measures will have to follow. We must reform our patent system which has so frequently been abused and thwarted by these very cartel contracts. We will have to join with other countries as best we can in gaining such measures as will be possible to remove trade barriers all over the world. But joined with a vigilant enforcement of a free and competitive enterprise program, this act should prove helpful to the national security and to the elimination of artificial handicaps to business and trade.