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"The Impact of the United States Antitrust Laws on Foreign Trade and Investment"

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It is a pleasure to meet with you this afternoon to discuss the foreign trade aspects of our antitrust laws. At the London meeting of the American Bar Association I was privileged to speak on this same general subject with Mr. Arthur Dean of the New York Bar, Professor Kingman Brewster, of Harvard, and Sir Hartley Shawcross, Chairman of the General Council of the Bar of England and Wales. If any of you heard me at that time, you will, I hope, forgive some repetitions.

Our Government has particularly encouraged foreign trade and investment in recent years, and has developed many programs to foster such trade; for example, mutual assistance and technical aid to friendly foreign nations, the guaranty investment program, and the Export-Import Bank. The United States has also worked out reciprocal trade agreements with other nations and has reduced tariff barriers in the interest of an expanded foreign trade. Through treaties of friendship, commerce and navigation, reciprocal rights have been granted to our citizens and to nationals of foreign nations in the interests of promoting foreign investment opportunities abroad. The impact of the antitrust laws upon our trade with other nations, accordingly, has been a subject of much current interest.

The Sherman Act, which has been characterized as a "charter of freedom" prohibits restraints upon and the monopolization of the foreign as well as the domestic commerce of the United States, and in the period of almost seventy years since the passage of this basic antitrust statute in 1890, the United States has shown its great concern with international restrictive business practices affecting that trade. The Wilson Tariff Act of 1894, in effect, repeated the Sherman Act provisions with respect to United States imports. The Clayton Act passed in 1914 also includes foreign as well as domestic commerce. The Webb-Pomerene Export Trade Act of 1918 made some exceptions to the Sherman Act as to cooperation by American companies in export trade, but Congress nevertheless indicated that it intended the Sherman Act to apply to all aspects of foreign trade except those specifically exempted.

In the enforcement of the antitrust laws we seek to remove private artificial barriers to trade with other nations. Occasionally, you may hear the antitrust laws themselves spoken of as "restrictive." To the contrary, the whole purpose of these laws is to free United States interstate and foreign commerce of restrictions imposed by

private parties and to promote the free flow of commerce. As an example of the effect of the antitrust laws in promoting foreign trade, let me cite the SKF Industries antitrust judgment. At the end of a year's operation under that judgment, SKF, the American company, increased its foreign sales thirty-three percent and its backlog of unfilled foreign orders had increased 170% after removal of restrictions imposed by the Swedish parent company. 1/ Conversely, in the ICI case, the British Company, ICI was able to increase its United States imports from a half million dollars to five and a half million in the year following termination, as ordered by the Court in that antitrust suit,of the mutually restrictive agreements with the American duPont Company. 2/ It is not unknown for foreign companies to bring private antitrust suits in our courts to remove restrictions upon

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1/ Timberg, Competition - A Philosophy for Export and Defense Production, 21 G W Law Rev. 692-693 (1953).
2/ U. S. v. ICI, 105 F. Supp. 215, 220 (S.D.N.Y.(1952).

their activities. 3/ Freedom from restraints in our foreign trade is essential to assure the continued growth and development of imports from, and exports to, foreign nations. The protection afforded by these laws is applicable to our own citizens and also to citizens of other nations engaging in trade with us.

Similarly, an equal opportunity to invest capital abroad is insured by the remedial application of the antitrust laws to the practices of restrictive cartels. As the Subcommittee on Foreign Economic Policy of the House Foreign Affairs Committee in 1953 concluded:

> Cartels, monopolies, and other restrictive business arrangements can both impede the flow of investment capital and substantially reduce the benefit of investments that are made. 4/

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3/ See Foundries Services, Inc. v. Beneflux, 110 F. Supp. 857 (S.D. N.Y. 1953), reversed, 206 F2d 214 (2d Cir 1953). A British company also brought a companion suit to U.S. v. Scophony Corp. of America, 333 U. S. 795 (1948).

4/ House Committee on Foreign Affairs, Preliminary Report of the Subcommittee on Foreign Economic Policy, The Mutual Security Act and Overseas Private Investment, 83d Cong., 1st Sess. at 60 (1953).

Other countries besides the United States are concerned also with the problem of monopolies and restraints of trade, although their attitude towards cartels, as well as the methods used in correcting restrictive practice may be quite different from ours. In any event, such legislation in these countries represents a trend toward the same goal: removing artificial private restraints upon trade and commerce. In neighboring Canada, the Canadian Combines Investigation Act provides for investigation of trade combinations and trusts. Another statute forbids certain restraints of trade, such as undue limitation of production or lessening of competition. In Great Britain the "Monopolies and Restrictive Practices Act of 1948," has been reinforced by the Restrictive Business Trade Practices Act of 1956. 5/ Legislation of an anti-monopolistic nature, in varying degrees, has been adopted in many other countries, including Denmark, Belgium, Italy, Netherlands, and Germany. Moreover, Norway, Denmark and Sweden all have statutes requiring registration of all cartel agreements.

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5/ 4 and 5 Eliz. II, c. 68

Congress, in the Thye Amendment to the Mutual Security Act, has emphasized its interest in the encouragement of free enterprise in other nations. The present Act declares that

> 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. 6/

Accordingly, it is declared to be our policy, among other things, "to encourage the efforts of other free nations to increase the flow of international trade, to foster private initiative and competition [and] . . . to discourage monopolistic practices . . ." 7/ In 1955, in the United Nations Economic and Social Council, the United States joined in a resolution affirming continuing concern as to

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6/ 22 U.S.C. §1933 (1952, Supp. IV 1957).
7/ Id.

the harmful effects of restrictive business practices in international trade and urging that governments take individual action to curb such practices. 8/

Today I want to briefly touch on some phases of the impact of the antitrust laws on foreign trade which are of particular current interest. These are: (1) the jurisdictional question of when acts abroad are within the scope of the antitrust laws; (2) antitrust problems connected with foreign licensing; and (3) operations under the Webb-Pomerene Act.

First, as to jurisdiction, the Supreme Court has uniformly held that our antitrust laws were intended to apply to restraints upon the foreign commerce of the United States. One specific exception recognized by the Supreme Court involves situations where the acts of private parties abroad, even though affecting United States foreign commerce, are required or directed by a foreign government. This exception, first expressed in the well-known American Banana case, 9/ and affirmed in later cases, is based upon the generally accepted rule that the acts of a sovereign,

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8/ E/Res (XIX)/14. See Dept. of State Bull. No. 833, 976 n.3 (1955)

9/ American Banana Co. v. United Fruit Co., 213 U.S. 511 (1909)

within its own jurisdiction and concerning its own internal commerce, will be given recognition by other nations.

The Banana case has sometimes been interpreted as meaning that the antitrust laws should be confined in their operation to the geographical limits of the United States. Whether or not such an interpretation is warranted (and I doubt that it is), the Supreme Court thereafter left no doubt that acts abroad could violate the Sherman Act if United States commerce was directly and substantially affected.

In an early landmark case of 1911, the American Tobacco case, 10/ American and British companies had agreed to a division of world territories whereby the American companies would limit their business activities to the United States and the British companies would similarly limit their business to Great Britain, with the rest of the world to be jointly exploited by the American and British interests. The Supreme Court held this combination directly affected United States foreign commerce, and the two British company participants before

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10/ U. S. v. American Tobacco Company, 221 U. S. 106 (1911)

the court were adjudged to have violated the United States antitrust laws.

And, in the Sisal case 11/, the Supreme Court condemned a combination of American and Mexican companies for conspiring to control the sisal supply in Mexico and the importation of sisal into the United States, and thereby to restrain and monopolize United States foreign commerce in sisal. The Court there stated:

> 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 . . . . . 12/

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11/ United States v. Sisal Sales Corporation, 274 U. S. 268 (1927).

12/ 274 U. S. at 276.

It should be borne in mind in this discussion that by definition the foreign commerce of the United States means that it is both United States commerce and also the commerce of another nation or nations. Thus, in the Sisal case, just mentioned, Mexico's exports of sisal were the United States' imports of sisal. Both countries have jurisdiction in such a case and both may enforce their laws with respect thereto. Unless these laws are in actual conflict, no international complications arise. As heretofore stated, United States courts, as a matter of comity, have recognized the acts or requirements of law of a foreign sovereign within its own territory. In Sisal, the acts attacked went far beyond Mexican laws and directly interfered with the commerce of the United States.

The Alcoa case 13/, in addition to the domestic monopoly charge against the United States company, Aluminum Company of America, also involved a cartel agreement between French, Swiss, and British aluminum ingot producers, as well as a Canadian company affiliated with the United States company. These companies, all foreign, agreed to allocate

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13/ United States v. Aluminum Co. of America, 148 F. 2d 416 (2d Cir. 1945).

aluminum, produced on a quota basis, and set the price at which the cartel would purchase any of a shareholder's quota not sold. Although not mentioned in the original agreement, imports into the United States were later expressly included in the quotas. Judge Learned Hand concluded that the agreement was intended to and did in fact affect imports into the United States, and that such quota restrictions had a substantial influence upon prices in the American market. Accordingly, Aluminium Limited, the Canadian company before the court, was held to have violated the United States antitrust laws by entering into and carrying out this cartel arrangement with other companies, even though all were non-nationals of the United States.

The Court, while stating that the Sherman Act should not be read "without regard to the limitations customarily observed by nations upon the exercise of their powers," 14/ founded its finding of liability upon the expressed intent of the parties to affect United States commerce and the injurious effect within the United States which followed.

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14/ 148 F. 2d at 443.

Another more recent case, emphasizing these same principles, was the Incandescent Electric Lamp case, in which a decree was entered in 1953, 15/. Here, agreements made with foreign firms by the principal American defendant, General Electric, contained restrictions upon sales and imports into the United States. The court found these agreements to be part of a scheme whereby the domination of General Electric over the United States market of incandescent electric lamps would be perpetuated. Phillips, a major foreign competitor and a Netherlands national, also was held to have violated the antitrust laws because its agreement with General Electric not to import into the United States "deleteriously affected" United States foreign commerce.

In another important case, the National Lead case, 16/ the District Court found "a conspiracy [in titanium pigments] in the United States affecting American Commerce, by acts done in the United States as well as abroad." The Supreme Court affirmed the decree which, among other things, provided for National Lead's divestiture of foreign companies which had been instruments of the conspiracy.

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15/ United States v. General Electric Co., 82 F. Supp. 753 (D.N.J. 1949); Opinion on remedies, 115 F. Supp. 835 (D.N.J. 1953).

16/ U.S. v. National Lead Co., 63 F. Supp. 513, 525 (S.D.N.Y. 1945) aff'd 332 U.S. 319 (1947)

More recently, the Court affirmed the holding of the lower court in the Timken case 17/ to the effect that

> Nor does the fact that cartel agreements were made on foreign soil relieve defendant from responsibility . . . They had a direct and influencing effect on trade in tapered bearings between the United States and foreign countries. 18/

That case concerned agreements between American Timken and two foreign companies, British Timken and French Timken, to allocate trade territories, fix prices, and protect each other's markets. The trial court found that the foreign parties aided American Timken by participating in foreign cartels to restrict United States imports and exports.

Coming to the second point, the transfer of technology abroad has been encouraged by our Government and is an activity now engaged in by many American companies. The problems connected therewith are quite complex, and I will just try to hit some of the high spots. Let us first consider licensing under patents. While the Ninth Circuit

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17/ U. S. v. Timken Roller Bearing Co., 83 F. Supp. 284, aff'd, 341 U.S. 593 (1951).

18/ Id. at 308.

in a 1954 case 19/ held that a patentee by virtue of a United States patent could place restrictions upon United States imports and exports, the Supreme Court in several antitrust cases which I will mention, has, in my view, held otherwise. This decision was questioned by the Attorney General's National Antitrust Committee "to the extent that it approves an agreement by the licensee not to sell outside the United States." 20/

Initially, it must be recognized that patents of different countries, although covering the same invention, are separate, and that rights under each patent depend solely upon the laws of that country. Rights under a United States patent have no standing in a foreign country and the opposite is also true. 21/

Thus, licensing abroad in the case of patents means licenses under foreign patents. Insofar as an American patentee has a corresponding patent in a foreign country and grants a license under such foreign patent, there are

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19/ Brownell v. Ketchan Wire & Mfg. Co. 211 F2d 121 (9th Cir. 1954).

20/ Report of the Attorney General's National Committee to Study the Antitrust Laws (1955)

21/ Brown v. Duschene, 19 How. 133 (1856); Boesch v. Graff, 133 U. S. 697 (1890).

ordinarily no antitrust questions raised. The American licensor may assert his own United States patent to keep out imports into the United States if he wishes, and the foreign licensee may assert his foreign patent to keep out imports into his country from the United States if he wishes to do so. Let me emphasize the difference here, however, as to asserting rights under the respective patents, on the one hand, and, on the other hand, asserting rights under contractual obligations not to import or export which are unlawful as held by such cases as National Lead. 22/

In the case of trade-marks, there is an entirely different picture. In the Timken case 23/ agreements not to compete between American and foreign companies were held not to be justified by trade-mark licenses. While the Court found that the agreements were not ancillary to licenses under the trade-mark "Timken," as defendant contended, but went far beyond any necessary protection of that name, the Court added that "A trade-mark cannot be legally used as a device for Sherman Act violation." 24/

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22/ United States v. National Lead Co., 63 F. Supp. 513, aff'd 332 U.S. 319 (1947).
23/ U. S. v. Timken Roller Bearing Co., 341 U.S. 593 (1951).
24/ Id. at 599.

In the 1955 Bayer case 25/ in the Southern District of New York, involving the exchange of trade-mark rights on a territorial basis, the court found that the mutual recognition and transfer of trade-marks were incidental to a dominant purpose to divide the world market among the participants, or as the Court graphically expressed it, a "slicing of the world pharmaceutical pie." 26/ Consequently, the entire agreement, including the trade-mark exchange, was held to be illegal.

In connection with trade-marks, it may be of interest that last Fall in the District Court for the Southern District of New York, the Government prevailed in three international trade cases 27/ involving the use by the respective American distributors of Guerlain, Corday and Lanvin perfumes, of Section 526 of the Tariff Act to prevent the importation of such perfumes by others, including purchasers from the French manufacturers. That statute provides that a trade-mark owner may stop at Customs

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25/ United States v. The Bayer Co., Inc., 135 F. Supp. 65 (S.D.N.Y. 1955)
26/ Id. at p.71
27/ United States v. Guerlain, Inc., 155 F. Supp. 77, 114 U.S.P.Q. 223 (S.D.N.Y. 1957)

foreign goods bearing that trade-mark. The court considered that this statute was not intended to cover the situation of a single international enterprise. The lower court held that each of these distributors had attempted to monopolize the perfume for which it was the distributor. Defendants have appealed these cases.

With respect to licensing technology abroad, the courts have held in several antitrust cases, including Timken, that know-how alone is not sufficient to justify restrictive agreements. The court in the Incandescent Lamp case pointed out the difficulty of basing restrictions on such technology, saying that "know-how is a vague term and it is difficult to be certain to what extent it was utilized by General Electric, International General Electric and the foreign licensees." 28/ The courts have made a distinction between mere know-how and secret processes but it is still not clear to what extent, if at all, restrictions may legitimately be attached to a license of a secret process in foreign commerce. 29/

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28/ U. S. v. General Electric Co., 82 F. Supp. 753, 846 (D. N.J. 1949)

29/ See U. S. V. E.I.Dupont deNemours & Co., 118 F. Supp. 41, 219(D. Del. 1954); U.S. v. General Electric Co., 82 F. Supp. 753, 846 (D. N. J. 1949).

The main antitrust foreign trade cases concerning licensing abroad have concerned the cross licensing by United States and foreign manufacturers of their patents, trade-marks and technology, usually for whole industrial fields, and usually accompanied by express restrictive covenants. The result was that each party obtained exclusive rights and protection from competition in his own country and sometimes in particular industrial fields. The courts have uniformly held such arrangements illegal.

Thus, in National Lead, 30/ the court stated:

> "Agreements creating a world-wide patent pool of all present and future patents of the parties, covering an entire industry, and embracing a division of the world into exclusive territories within which each of the parties is to confine its business activities, with respect to patent protected commodities, as well as unpatented, for the purpose and with the effect of suppressing imports into and exports from the United States, are unlawful under the Sherman Act; they constitute an unreasonable restraint of trade." 31/

30/ U.S. v. National Lead Co., 63 F. Supp. 513, aff'd 332 U.S. 319 (1947)
31/ Id. at 527.

I have mentioned the Webb-Pomerene Export Trade Act 32/ as an exception to the Sherman Act. This Act was passed in 1918 for the stated purpose of enabling American businessmen to compete on an equal footing with large foreign cartels and particularly to aid small business. 33/ The Act provides in the main that nothing in the Sherman Act shall be construed as making illegal an association entered into "for the sole purpose of engaging solely in export trade" or activities or agreements in the course of such trade. This exemption does not apply, however, if such activities are either in restraint of trade within the United States or are in restraint of the export trade of any domestic competitor of the association. The Federal Trade Commission is designated as the supervising agency of such associations with specific power of investigation of their activities, and it may make recommendations to an association for the reorganization of its business if it concludes that such restraints exist. In the absence of compliance, the matter may be referred to the Attorney General.

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32/ 15 USC §61-65 (1952).
33/ See 55 Cong. Rec. 3569 (1916).

There are only two cases of importance under this Act, the Alkali, 34/ and Minnesota Mining, 35/ cases, both of which involved the extent of the exemption afforded by the Act in connection with antitrust suits by the Department of Justice. In the Alkali case, the Government attacked a combination of American exporters who had formed a Webb-Pomerene Export Association, alleging certain activities to be in restraint of United States foreign commerce. A preliminary question raised in this case which was taken to the Supreme Court was whether the Federal Trade Commission had exclusive jurisdiction where an export association was concerned. The Supreme Court held that the FTC's powers were only investigatory and that there was no intention to deprive the courts and the Department of Justice of jurisdiction to bring actions under the Sherman Act. The Court further said that "there is no basis for interpreting the statute as though it had been contrived to present hostile action rather than to encourage efficient cooperation between the Commission and the Department of Justice." 36/

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34/ U.S. v. U.S. Alkali Export Ass'n., 58 F. Supp. 785 (S.D.N.Y. 1945) aff'd 325 U.S. 196 (1945); 86 F. Supp. 59 (S.D.N.Y. 1949).

35/ U.S. v. Minn. Mining & Mfg. Co. 92 F. Supp. 947(D.Mass. 1950).

36/ 325 U.S. at 209.

The lower court on the merits subsequently held that the Webb Act was not intended to grant immunity for a world-wide cartel which, among other things, was designed to stabilize the world price of alkalis. The court maintained jurisdiction over the conspiracy, alluding, in passing, to a provision of the Webb Act expressly stating that the Federal Trade Commission Act, a kindred antitrust statute, applies to acts outside of the United States with respect to unfair methods of competition used in United States export trade against competitors in such export trade.

The court in Alkali found a violation of the Sherman Act and summed up the foreign trade cases by pointing out that

> "The decisions under the Sherman Act leave no doubt that all contracts, combinations, and conspiracies aimed at obstructing the foreign commerce of the United States come within the broad prohibitions of the antitrust laws . . ."

The court in this case once again emphasized that

> "The rule of competition, basic in American economic philosophy and approved by express legislative fiat in the Sherman Anti-trust Act, is equally applicable to our export trade as it

is to trade among the several states." 37/

The Minnesota Mining case held that the Webb-Pomerene Act was not a justification when the members of an export association, dominant in the abrasives industry, pursued a course of action whereby the export association gradually ceased to export and, instead, joint foreign manufacturing subsidiaries of the members supplied the foreign markets. It was held to be no excuse for the "united forebearance" of the members from exporting, that supplying foreign customers from foreign factories was more profitable, if such trade was actually possible. The court, however, called for the "ungrudging support" of the policy of the Webb Act when export associations confined their activities to the proper scope of the Act.

The Department of Justice and the Federal Trade Commission have had a close liaison in the past few years on export associations. Each advises the other agency of proposed investigations and actions against such associations and there is complete cooperation in the administration of the Webb-Pomerene Act. The cases have indicated that the provisions of the Webb Act, since they constitute an exception to the basic theory of the Sherman Act, will be strictly construed.

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37/ 86 F. Supp. at 66.

Before closing, I would like to mention two recent consent judgments in major antitrust cases involving foreign trade. The United Fruit judgment 38/ entered in February of this year contains quite drastic provisions designed to restore competition in foreign trade in the banana industry. In addition to extensive injunctive provisions, it requires the creation out of United Fruit Company's assets of a new competitor capable of importing into the United States nine million stems, or about 35% of the total bananas imported last year by United. United is also ordered to divest its stock holdings in International Railways of Central America and to liquidate its company, Banana Selling Corporation. The judgment further bars United Fruit from future acquisitions of banana producers in the American tropics shipping to the United States, of companies importing or distributing bananas in the United States and of companies transporting bananas from the American tropics to the United States. The judgment terminates twenty years after United has disposed of its assets as required by the Court. The judgment against

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38/ United States v. United Fruit Co., Civ. 4560, E.D. La., Final Judgment entered February 4, 1958.

American Smelting and Refining Company, 39/ entered last year, in its foreign trade phases, enjoins that company, among other things, from entering into any agreement with any person engaged in the mining, smelting, refining or sale of primary lead to restrict United States imports or exports or to fix prices for sale in the domestic or foreign commerce of the United States. There is an exception made here which is noteworthy as to acts in a foreign country which American Smelting can show were officially required of it by the government of such country. 40/

Our foreign trade is vital to the United States and our Government is making every effort to encourage it. We in the Department of Justice are charged with the enforcement of the antitrust laws to prevent unlawful restraints from interfering with that trade. We seek to do this with due concern with other policies of our Government and with a consideration of the sovereignty of other nations.

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39/ United States v. American Smelting & Refining Co. and St. Joseph Lead Co. Final Judgment entered against American Smelting and Refining Co., October 11, 1957.

40/ Id. §VI.