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FOREIGN TRADE FUNCTIONS OF TRADE ASSOCIATIONS: THE LEGAL ASPECTS*

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The far-reaching effect of the unprecedented rapid expansion, in number and size, of foreign industrial and commercial combinations, involves problems which are exerting a profound influence on American anti-trust policy. It is reflected in such diverse fields as court proceedings,¹ proposed statutory modifications of the anti-trust laws,² administrative policies of the Department of Justice,³ the Federal Trade Commission⁴ and the Department of Commerce, and co-operative enterprises in foreign trade by private business interests.

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¹U. S. v. Sisal Sales Corp., 274 U. S. 268 (1927) (Sisal case); U. S. v. Deutsches Kalisyndikat Gesellschaft, Southern District of New York, In Equity, No. 42-124 (Potash case); U. S. v. N. V. Amsterdamsche Chininefabriek, Southern District of New York, In Equity, No. 44-384 (Quinine case). Criminal and forfeiture proceedings are also pending in this matter.

²*Newton Bill*, H. R. 8927, which failed of passage in the House. See 69 CONG. REC. 6217, 6282 (1928).

³*Cf.* addresses of Col. William J. Donovan, Assistant to the Attorney General, at the annual convention of the National Paint, Oil and Varnish Association, Inc., at Atlantic City, New Jersey, October 28, 1927, and before American Chemical Industry Conference, February 16, 1928, entitled *Foreign Cartels and American Industry*. See U. S. DAILY, October 29, 1927 and February 17, 1928.

⁴Letter of the Federal Trade Commission to the Committee of Silver Producers of the United States, dated July 31, 1924.

An inquirer who seeks to limit the investigation to the legal aspects of the questions arising in this field, must nevertheless pursue a wide range of research into varied and diffused sources for information to guide his course.

Adjudicated cases to be found in the law reports, dealing directly with this subject, are exceedingly meager. Only a handful of court decisions have as their subject matter the legality of co-operative activities on the part of American business men in export and import trade, or the legal status of foreign combinations under the anti-trust laws. A reference to annotations under such statutes as the *Wilson Tariff Act*⁵ reveals that although originally enacted in 1894 and amended in 1913, the law was not construed by the Supreme Court until the *Sisal* case in 1927.⁶ Nor does the *Webb-Pomerene Act*,⁷ although already in operation for a decade, appear to have been construed by the Supreme Court or indeed in any reported federal case.⁸

“Legal advice today, regarding this subject, must be based for the most part on departmental precedents, analogies and reasoning that lie outside and far beyond any cases yet passed upon by the courts or by the Commission.”⁹

In addition to the *Sisal* case, decided at the last term of the Supreme Court,¹⁰ various court proceedings are now pending¹¹ which present intricate legal issues, both novel and far-reaching in scope, and never heretofore authoritatively settled.

⁵ 28 STAT. 570 (1894); 37 STAT. 667 (1913), U. S. C. (1925) TIT. XV, §§ 8 *et seq.*

⁶ *Supra* note 1.

⁷ 40 STAT. 516 (1918), U. S. C. (1925) TIT. XV, §§ 61 *et seq.*

⁸ *Cf.* reference to *Webb-Pomerene Act* in U. S. v. United States Steel Corp., 251 U. S. 417, 453 (1920). There is to be noted, further, the Brazilian Coffee Valorization case which was instituted in the United States District Court, Southern District of New York, in 1912, but which was discontinued in 1913. This case is discussed in NOTZ AND HARVEY, AMERICAN FOREIGN TRADE (1921) 172. See also ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES (1912) 19. Note also opinion of Attorney General Wickersham, with reference to Potash syndicate, 31 OPIN. ATTY. GEN. 545 (1910).

⁹ Montague, *Anti-Trust Laws and the Federal Trade Commission*, 1914-1927, (1927) 27 COL. L. REV. 650, 676.

¹⁰ *Supra* note 1.

¹¹ Potash and Quinine cases, *supra* note 1.

The circumstances which gave rise to the enactment of the *Webb-Pomerene Act*, which was designed to promote and foster American foreign trade, have been exhaustively recorded in such comprehensive sources of information as Notz and Harvey, *American Foreign Trade*,¹² and the *Report of the Federal Trade Commission on Co-operation in American Export Trade*.¹³ These volumes contain such a wealth of interesting and instructive material with respect to economic and legal developments up to a few years ago, that the present problem is rather to supplement these studies and to consider the problems as they now arise, rather than to retrace the ground which has been so definitively traversed.

It is of interest to note that the general tendency toward co-operation in business enterprise, which has been one of the outstanding characteristics of the post-war trade association movement in this country, was preceded in point of time by the co-operative movement in export trade. The same reasons which invoked legislative aid to American exporters a decade ago, in the *Webb-Pomerene Act*,¹⁴ are present today, but to a greater degree and with a more pronounced emphasis.

Since the necessity for protective relief in foreign trade activities has arisen from European economic and legal conditions, which have directly influenced the American attitude with regard to the degree of protective measures to be accorded American foreign traders, a reference to the salient features of recent European economic and legal tendencies must be sketched. It must be borne in mind, at the outset, that the legislative, judicial, and administrative policy of European governments is divergent and varies from country to country.¹⁵ It depends, in great measure, upon historical and political, as well as economic, considerations. But it is important to note that a more tolerant attitude than that

¹² *Supra* note 8.

¹³ Government Printing Office (1916).

¹⁴ *Supra* note 7.

¹⁵ "It indicates on the one hand that cartelization is not of equal importance in various national economies, and on the other hand that the actual status of cartel organization differs considerably because of economic conditions." Lammers (1927) 134 ANN. AMER. ACAD. POL. AND SOC. SCIENCE (No. 223) 144.

evidenced by the American anti-trust policy is manifested by all of the governments of foreign countries.

The underlying considerations must therefore be traced to such varied factors as post-war European economic conditions, the legislative attitude toward the combination movement, the legal status of co-operative and combined business activity, the judicial decisions, and the administrative policy of enforcement of the statutes, of the several foreign countries.

It is sufficient for this discussion merely to note that in foreign countries, the governmental attitude is more tolerant, if not, in every case, more favorable, toward industrial co-ordination and combination. There are at present in no European country restrictive legal provisions which embody the regulations and contain the drastic penalties of the American anti-trust laws.

The prevailing American view has been stated by Mr. Justice Stone in the *Trenton Potteries* case:¹⁶

“Whatever difference of opinion there may be among economists as to the social and economic desirability of an unrestrained competitive system, it cannot be doubted that the Sherman Law and the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition.”

Thus, the underlying basis of foreign combinations, to reduce competition and control production and prices, is at variance with the fundamental conceptions of our anti-trust enforcement policy. Arrangements which are at the very foundation of European rapprochements, such as agreements controlling production and prices, allocating markets, and apportioning business, have all been definitely adjudicated by our courts to be violative of our federal anti-trust laws.

It does not require further citation of authority than the decision in the *Trenton Potteries* case, to establish that under federal law agreements to fix prices are illegal as a matter of law, irrespective of the fact that the resulting prices are reasonable and not excessive.

¹⁶ U. S. v. Trenton Potteries Co., 273 U. S. 392, 397 (1927).

The attitudes of the various European countries with respect to the status of foreign combinations, have been summarized in an excellent article entitled *The Control of Industrial Combinations from the Social Standpoint*.¹⁷ The limits of this paper do not permit a more extensive survey than reference to developments in England and Germany, in both of which important movements have occurred.

As regards the developments in England, it has been stated:

"It remains to summarize briefly the result of the foregoing investigations. England, the home of free trade and capitalistic individualism, has, it must be admitted, become overrun with quasi-monopolist organizations. The movement has proceeded with remarkable momentum, and has taken two related forms—simple association and actual amalgamation."¹⁸

"British trade associations are mostly identified with the control of selling prices and the supply of credit information."¹⁹

"Under the British system, price control is tolerated by the law, and tends to overshadow all other association activities."²⁰

"In recent years, particularly since the beginning of the century, and more especially during the Great War, a great change has taken place in the United Kingdom with respect to the conduct of trade, and there is an increasing tendency to form trade associations and combinations having as their objects the restriction of competition and the control of prices."²¹

There is no legislation, in England, of a restrictive character, with respect to combinations in restraint of trade, containing

¹⁷ Hoffherr, *The Control of Industrial Combinations from the Social Standpoint* (1928) 17 INTERNATIONAL LABOUR REV. 1. For the law in various countries note also LAMMERS, REVIEW OF LEGISLATION ON CARTELS AND TRUSTS (Geneva, 1927); Notz, *Recent Developments in Foreign Anti-Trust Legislation* (1924) 34 YALE L. J. 159; Simpson, *How Far Does the Law of England Forbid Monopoly?* (1925) 41 L. Q. REV. 393; Martin, *The On-Coming Wave of Foreign Combinations*, PRO. 14TH NAT. FOREIGN TRADE CONVENTION 469.

¹⁸ FITZGERALD, INDUSTRIAL COMBINATION IN ENGLAND (London, 1927) 198.

¹⁹ Elbourne, *Trade Association Statistics* (1927) 90 J. ROYAL STAT. SOC. (N. S.) Part IV, 637.

²⁰ *Ibid.* at 648.

²¹ SANDERSON, RESTRAINT OF TRADE (London, 1926) 102.

criminal or civil remedial provisions such as appear in the *Sherman Anti-Trust Act*.²² In addition, the English conception of the doctrines of restraint of trade and monopoly, depends more on the facts in individual cases and less on definite rules of law, than is the case in the United States.

As stated by the Lord Chancellor, Viscount Haldane, in *North Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.*:²³

“Unquestionably the combination in question was one the purpose of which was to regulate supply and keep up prices. But an ill-regulated supply and unremunerative prices may, in point of fact, be disadvantageous to the public. Such a state of things may, if it is not controlled, drive manufacturers out of business, or lower wages, and so cause unemployment and labour disturbance. It must always be a question of circumstances whether a combination of manufacturers in a particular trade is an evil from a public point of view. The same thing is true of a supposed monopoly.”

Similarly, the decision of the Privy Council, construing the *New Zealand Commercial Trusts Act, Crown Milling Co., Ltd. v. The King*,²⁴ and the oft-quoted opinion of Lord Parker of Waddington in the decision of the Privy Council in *Attorney General of Australia v. Adelaide Steamship Co., Ltd.*,²⁵ construing the *Australian Industries Preservation Act*, are to be noted:

“It can never, in their Lordships’ opinion, be of real benefit to the consumers of coal that colliery proprietors should carry on their business at a loss, or that any profit they make should depend on the miners’ wages being reduced to a minimum. Where these conditions prevail, the less remunerative collieries will be closed down, there will be great loss of capital, miners will be thrown out of employment, less coal will be produced, and prices will consequently rise until it becomes possible to reopen the closed collieries or open other seams. The consumers of coal will lose in the long

²² This statement is not applicable to Australia, New Zealand, or Canada. For the *Sherman Act* see 26 STAT. 209 (1890), U. S. C. (1925) TR. XV, c. 1.

²³ [1914] A. C. 461, 469.

²⁴ [1927] A. C. 394. For the Act see No. 32 of 1910, N. Z.

²⁵ [1913] A. C. 781, 809. For the Act see Commonwealth of Australia, No. 9 of 1906, amended No. 5 of 1908; No. 26 of 1909.

run if the colliery proprietors do not make fair profits or the miners do not receive fair wages. There is in this respect a solidarity of interest between all members of the public. The Crown, therefore, cannot, in their Lordships' opinion, rely on the mere intention to raise prices as proving an intention to injure the public. To prove an intention to injure the public by raising prices the intention to charge excessive or unreasonable prices must be apparent."

It must be borne in mind, furthermore, that in England, agreements which are illegal, as being in restraint of trade, are so only in the sense that they are not enforceable in legal proceedings between the parties.

In Germany, the tendency toward industrial and commercial concentration and a high degree of business organization, had been a familiar economic phenomenon for several decades prior to the World War. A great number of cartels had flourished under a governmental system which fostered their growth. The terms cartel, and syndicate or selling cartel, though not defined precisely in the same way by authoritative writers, resemble, in a general way, the pools which were familiar in American industry and trade in the 70's and 80's of the last century. They deal, in general, with centralized controls upon such matters as production schedules, prices, allocation of territories and sales quotas, and the distribution of profits. The various forms of cartels are set forth in *German Trade Associations: the Coal Kartell*, by Archibald H. Stockder.²⁶ They have been described as having as their final goal the control of the market.²⁷

With respect to the more recent German national policy concerning cartels, it is of the utmost importance to note the passage, in 1923, of what is referred to as the *Cartel Decree*. In substance, this measure embodies a comprehensive governmental regulation of industrial and commercial combinations. Based upon the assumption of the advantages of monopolistic enterprise, when subject to governmental supervision, this legislation seeks to control abuses of economic power in the special cases under investi-

²⁶ (New York, 1924) Introduction, *passim* and at xxviii. See also Notz, *International Cartels and Industrial Combinations*, COMMERCE REPORTS, April 30, 1928.

²⁷ WIEDENFELD, *CARTELS AND COMBINES* (Geneva, 1927) 5.

gation. A consideration of the scope and application of this measure can be found in a series of recent monographs.²⁸

These economic and governmental problems have been considered in a series of memoranda and reports submitted to the World Economic Conference at Geneva in May, 1927,²⁹ and in a great number of papers in economic and business literature. Within the confines of an article, merely a summary can be made of the conclusions of these internationally recognized authorities, and suggestive analyses describing the remarkable growth of the European combination movement can be noted. To enumerate the causes in detail would require an exhaustive research into the complex forces underlying the post-war European rehabilitation.

The marked tendency toward concentration and combination arose from the economic mobilization following post-war conditions.

"The change is due to a few separate causes. The war enforced a good deal of cooperation, since the Governments had to deal with producers as a group in their industries. In some industries it led to constructions which the market could not afterwards carry at their capacity, and combination is a method of regulating excess of capacity. In some cases Governments have, because of special national interests, been a party to the formation of large combines. All this influences opinion. But most important of all, as the Geneva documents show, has been the reaction upon national ideas of the international industrial proposals. The formation of the International Steel Agreement was a powerful influence in this direction. There were two special reasons for this—its semi-official support by the political

²⁸ The nature and workings of this decree are contained in LAMMERS, *supra* note 17 at 22 *et seq.*, and in HIRSCH, NATIONAL AND INTERNATIONAL MONOPOLIES FROM THE POINT OF VIEW OF LABOUR, THE CONSUMING PUBLIC, AND RATIONALIZATION (Geneva, 1926) 17. An extract from the *Cartel Decree* is set forth in HIRSCH at 35 *et seq.*

²⁹ MACGREGOR, INTERNATIONAL CARTELS (Geneva, 1927); ROUSIERS, CARTELS AND TRUSTS AND THEIR DEVELOPMENT (Geneva, 1927); HIRSCH, *supra* note 28; WIEDENFELD, CARTELS AND COMBINES (Geneva, 1927); GROSSMAN, METHODS OF ECONOMIC RAPPROCHEMENT (Geneva, 1926); CASSEL, RECENT MONOPOLISTIC TENDENCIES IN INDUSTRY AND TRADE (Geneva, 1927). All of the foregoing brochures have been published under the auspices of the League of Nations. Cf. a critical review of some of these reports and other papers in MacGregor, *Recent Papers on Cartels* (1927) 37 ECONOMIC JOURNAL, June, No. 146, 247. See also, FINAL REPORT OF THE WORLD ECONOMIC CONFERENCE (Geneva, 1927) *infra* note 32.

governments involved, and, above all, the fact that it could be presented as a form of pacification between Germany and some of her former enemies, especially France.”³⁰

Thus, the readjustment to the demands of industry and commerce in times of peace necessitated a revival of industries which, for more than four years, had been preoccupied with war-time activities. Immediately following the termination of the World War, as was but natural with the existent extreme nationalistic point of view, which the armed conflict had engendered, national controls and barriers were erected, including such generic discriminatory governmental measures as tariffs, import and export regulations, and commercial treaties. Furthermore, particularly in Germany, the tendency toward the extension of governmental control had exerted a deep influence upon the entire organization and management of industrial and commercial affairs.

“In view of the difficulty experienced by Governments—compelled as they are to consider a variety of interests not only economic but political—in making the least improvement in international economic relations, it is quite natural that the idea should have arisen that economic circles would do better to rely on themselves and to try to arrive at an understanding in order to check unlimited competition, and that they should only appeal to the State for assistance when such a step is absolutely necessary.”³¹

The great increase in the productive capacity during the war, coupled with the lack of capital, had dictated an added efficiency by means of improvement in technical methods. The logical outcome from such endeavors, at first applied to single national

³⁰ MacGregor, *Rationalization of Industry* (1927) 37 ECONOMIC JOURNAL December, No. 148, 523.

³¹ GROSSMAN, *supra* note 29 at 26. “This condition (political obstructions such as trade barriers and inadequate commercial treaties), in turn, gave rise to the thought of private international agreements in order to attain, through economic effort, that which for the time being could not be attained politically. Executive heads of various industries urged on, in part, by prominent financiers, met to discuss the situation. They recalled that even before the war modern development had made international co-operation desirable, and had partly called it forth. Economic thinking not infrequently overcame political obstacles to which people in general were still exposed.” Lammers, *supra* note 15 at 147.

industries, developed into the movement known in Europe as "rationalization."

"The first of these problems is that of rationalization, by which we understand the methods of technique and of organization designed to secure the minimum waste of either effort or material. It includes the scientific organization of labor, standardization both of materials and of products, simplification of processes and improvements in the system of transport and marketing."³²

The term "rationalization," employed first in Germany, is not used to any great extent in this country, although a memorandum was submitted by the Hon. David Houston to the Geneva Conference, entitled *Rationalization in the United States*,³³ where it is stated:

"The term rationalization as used in Europe today, includes, I take it, the three elements of stabilization, standardization, and simplification of industry or of individual enterprises."

The basic idea, however, of a systematic, methodical, intelligent, and scientific organization and direction of business enterprise, in conformity with the American legal doctrines of restraint of trade and monopoly, has gained wide acceptance in actual practice, within the United States.³⁴

The benefits arising from the stabilization of price levels, arising from the operation of economic laws, and the elimination of industrial waste and inefficiency by the application of scientific and intelligent principles to business enterprise have been recognized by the Supreme Court. These subjects have been treated in greater detail elsewhere.³⁵

³² FINAL REPORT OF WORLD ECONOMIC CONFERENCE (Geneva, 1927) C. E. I. 44 (1) at 38.

³³ (Geneva, 1926) at 1.

³⁴ "The incentive to pursue such objectives is given to no small degree by America, which because of its certainty of objective and in harmony with the public opinion of the country largely serves as a model." Lammers, *supra* note 15 at 148.

³⁵ Kirsh, *Trade Association Statistics: The Legal Aspects* (1928) 14 AM. B. A. J. 133; Kirsh, *Uniform Cost Accounting Methods of Trade Associations: The Legal Aspects* (1928) 45 JOUR. OF ACCOUNTANCY 321; Podell and Kirsh,

As was stated further by Mr. Justice Stone in the *Maple Flooring* case: ³⁶

"The defendants have engaged in many activities to which no exception is taken by the Government and which are admittedly beneficial to the industry and to consumers; such as . . . the standardization and improvement of the product."

Growing apace, in European countries, with these economic measures, which, as we have seen, had begun to supersede political arrangements, there developed, on a scale theretofore unknown, the tendency toward international agreements. It was not, strictly speaking, an entirely new movement. But one of its conspicuous features is the size and scope of the operations.

"The fundamental trend toward international combines is rooted much more deeply. The movement towards international combination is the natural and inevitable outcome of the movement towards concentration and national combination in general." ³⁷

It has already been carried on to an extent greater than at any time in history. It marks the reaction from the extreme economic nationalization evidenced, as we have seen, by discriminatory tariffs, commercial treaties, and other governmental controls and a return to the "tendency toward international solidarity, so evident prior to the outbreak of the world struggle." ³⁸ The importance of this gigantic growth, from our point of view, lies in its relation to the legal aspects of American public policy in foreign trade and commerce.

It is highly significant that the movement toward international combination in European industry and commerce has been considered, by leading authorities, to be only in its beginnings.

The Problem of Trade Association Law (1927) 2 ST. JOHN'S L. REV. 1, reprinted in (1928) 62 AM. L. REV. 94.

³⁶ *Maple Flooring Association v. U. S.*, 268 U. S. 563, 566 (1925).

³⁷ Schumpeter, *International Cartels and Their Relation to World Trade* (1928) 12 PRO. ACAD. POL. SCIENCE (No. 4) 110, 112.

³⁸ Domeratzky, *The Continental Steel Cartel* (1927) 12 PRO. ACAD. POL. SCIENCE (No. 4) 96.

Thus, it has been said, in discussing the recent formation of the continental steel cartel, that it was

“the general assumption that the new combination (continental steel cartel) represented the beginning of the movement toward international industrial agreements which, according to the prognostications of their chief exponents, Loucheur among them, are destined to replace to a considerable extent the politico-economic arrangements, like tariffs, commercial treaties etc., in the post-war economy of nations.”³⁹

As stated by Professor Liefmann, one of the most eminent students of the problem of industrial combination, “We stand very probably at the present only at the beginning of this movement.”⁴⁰

In view of such a tendency toward international organization, American exporters and importers are being confronted by the great increase in co-ordinated and centralized activity on the part of European combinations. The underlying motive of these international agreements may be, in the main, the elimination of post-war abnormalities, and not primarily, offensive, aggressive marketing campaigns against the United States; but this purpose may ultimately develop as a necessary consequence.

We can therefore appreciate the force of the observation of the Assistant to the Attorney General, Col. William J. Donovan, that the American anti-trust laws are being “subjected to a severe test in determining whether these cartels, by setting up exclusive agencies in this country, financially sustained here, shall be permitted to operate in a manner which is forbidden to our own citizens.”⁴¹ Perhaps it would be helpful to examine some fea-

³⁹ *Ibid.*

⁴⁰ Liefmann, *International Cartels* (1927) 5 HARV. BUS. REV. 129. Cf. Klein, *International Cartels* (1928) 6 FOREIGN AFFAIRS 448.

⁴¹ Address of Col. William J. Donovan before National Oil, Paint and Varnish Association, Inc., *supra* note 3. Cf. address of Hon. George W. Wickersham, entitled *Development of the Sherman Anti-Trust Act since 1916*, delivered at the Association of the Bar of the City of New York, January 12, 1928, in which it is said: “The *Webb-Pomerene Act* is a step in the right direction. It recognizes the fact that when American enterprise goes abroad, if it would succeed, it must be enabled to meet local conditions on reasonably equal terms. In many countries combination, not competition is the national policy. To compete with a well-organized ‘cartel’ or other trade combination in a foreign

tures of American foreign trade policy as a guide to an investigation of these important problems.

The *Webb-Pomerene Act*⁴² was primarily a constructive measure, having as its purpose aid to American exporters in foreign markets, and designed to permit American exporters to meet on more equal terms the aggressive competition of the more powerful combinations in foreign countries. In general, the effect of the enactment of this legislation was to legalize, subject to certain safeguards contained in the law, agreements among American exporters in the matter of prices, sales, terms, division of territory, and other similar activities which, it was believed, were forbidden by the anti-trust laws in the United States.

For many years before the outbreak of the World War, foreign governments had, either by statute, decision, or governmental administrative policy, sanctioned, either actively or by acquiescence, agreements among their nationals, entered into with a view to fixing prices, allocating territory and the like, which in the United States had been declared to be contrary to legal doctrine embodied in the anti-trust laws. The mobilization of production and distribution processes in response to the exigencies of the war, revealed in striking fashion to the nations of the world the advantages of co-ordination and consolidation in industry. As a result, export trade associations and combinations in foreign countries increased greatly both in numbers and in strength, aided and encouraged, and often participated in by the respective foreign governments, which recognized the prime importance of export trade co-operation in achieving economic rehabilitation.

In the United States, due to the restrictive provisions of the anti-trust laws, the legal status of co-operation among American exporters was in doubt, and such activities as were engaged in seem to have been carried on with the utmost secrecy.⁴³ Although

country, the nationals of another country must have power to combine and present a united front, if they are to succeed. This was recognized by Congress when they passed the *Webb-Pomerene Law*. To be sure, the authority granted is very circumscribed, but it is the beginning, and experience doubtless will suggest and ultimately secure desirable modifications in the law."

⁴² *Supra* note 7.

⁴³ NOTZ AND HARVEY, *supra* note 8 at 144.

the largest manufacturers had the resources and the power to establish and keep in operation their own efficient individual export organizations, the moderate sized manufacturer found himself at a distinct disadvantage in dealing with the well-organized combinations of foreign buyers, and in competing with government-aided foreign rivals who were further assisted by discrimination against our goods by foreign steamship lines.⁴⁴

By a pooling of the resources of the various members of an export sales association for joint development of foreign markets, moderate sized exporters would be enabled to unite in foreign trade promotion campaigns through the establishment of a foreign organization service. By this means, furthermore, they would be in a position to offer a diversified line of products to foreign buyers who desired to obtain their whole supply from the same source, and secure numerous economies of distribution and standardization of product which accrued to large scale enterprise. It was imperative, therefore, that remedial legislation be enacted, in order to achieve for American exporters, through exemption from the provisions of the anti-trust laws, equality of opportunity in their efforts to extend their sales in foreign markets.

In 1916, the Federal Trade Commission, after an extensive investigation of the effect of foreign competition upon our export trade, reported to Congress⁴⁵ that foreign nations, because of superior facilities and more effective organization, permitted or encouraged by their respective laws, had distinct advantages over this country in their foreign trade, and that fear of the *Sherman Law*⁴⁶ prevented American exporters, even of non-competing goods, from developing equally effective organizations.

The report pointed out that if American foodstuffs and raw materials were to be sold at profitable prices abroad, and if our manufactured goods were to gain their share of foreign markets, strong co-operative selling organizations, freed from the shackling

⁴⁴ For a further discussion see JONES, *THE TRUST PROBLEM IN THE UNITED STATES* 375-378.

⁴⁵ REPORT OF FEDERAL TRADE COMMISSION ON CO-OPERATION IN AMERICAN EXPORT TRADE, Part I, Summary and Report, June 30, 1916.

⁴⁶ *Supra* note 22.

inhibitions of the anti-trust laws, must be given the sanction of permissive legislation. The commission therefore advocated the enactment of a law which would exempt export sales combinations and agreements fixing prices and allocating territory in export trade, from the provisions of the *Sherman Law*, while yet assuring through statutory provision and administrative safeguards, that the legalized associations would not use their powers either to exploit home markets or to work to the detriment of other American exporters.

The Commission's recommendations led to the introduction of the *Webb-Pomerene Bill*. It was strongly endorsed by President Wilson, Secretary of Commerce Redfield, the Chamber of Commerce of the United States, the Foreign Trade Council, and other representative trade and commercial organizations. The bill was finally passed, and approved by President Wilson on April 10, 1918.

In its final form, the *Webb-Pomerene Law*⁴⁷ provided for the exemption from the anti-trust laws, of any "association" engaged solely in export trade, and of "any agreement made or act done in the course of export trade by such association," provided, however, that such association, agreement or act did not restrain domestic trade or the export trade of a domestic competitor, and provided further, that the association would not agree or conspire to do any act which would "*artificially or intentionally*" enhance or depress prices within the United States of commodities of the class exported by the association.⁴⁸ The word "Association" was given a broad meaning by the Act. It was defined as including "any corporation or combination by contract or otherwise of two or more persons, partnerships or corporations."⁴⁹ In order to reassure those who feared that the Act did not grant exemption from Section 7 of the *Clayton Act*,⁵⁰ the *Webb Law* expressly provided⁵¹ that nothing contained in that section should be construed as forbidding the acquisition or own-

⁴⁷ *Supra* note 7.

⁴⁸ 40 STAT. 517 § 2 (1918), U. S. C. (1925) TIT. XV, § 62. Italics ours.

⁴⁹ 40 STAT. 516 § 1 (1918), U. S. C. (1925) TIT. XV, § 61.

⁵⁰ 38 STAT. 731 § 7 (1914), U. S. C. (1925) TIT. XV, § 18.

⁵¹ 40 STAT. 517 § 3 (1918), U. S. C. (1925) TIT. XV, § 63.

ership by any corporation, of the whole or any part of the stock or other capital of corporations organized solely for the purpose of, and actually engaged in, export trade, unless the effect would be to restrain trade or substantially lessen competition within the United States.

Every association engaged in export trade was required to file with the Commission, under penalty of fine and loss of the benefits of the Act, first, a statement setting forth the names and addresses of its members or stockholders, and a copy of its articles of association or incorporation. Thereafter, on January 1st of each year, it must submit a report setting forth any changes, and such further information regarding organization, business, conduct, practices and relations with other associations, as the Commission might require. The Commission was given adequate powers of supervision and the discretion to recommend, after investigation of any export trade association, readjustment of its business in conformity with the law. Should the association fail to comply with their recommendations, the Commission was required to refer its findings and recommendations to the Attorney General for prosecution under the Act.⁵²

A provision of the *Webb Act*, unique in the field of trade regulation, extended the Federal Trade Commission's powers under the *Federal Trade Commission Act*,⁵³ to include investigation and suppression of "unfair methods of competition used in export trade against competitors engaged in export trade, *even though the acts constituting such unfair methods are done without the territorial jurisdiction of the United States.*"⁵⁴ This seems to be the first enactment whereby a nation seeks to control the competitive practices of its nationals outside of its territorial jurisdiction, and has suggested to some, the possibility of an international accord condemning unfair trade practices and providing for the punishment of offenders.

On July 31, 1924, the Commission replied to certain questions propounded in a communication to Secretary of Commerce

⁵² 40 STAT. 517 §5 (1918), U. S. C. (1925) TIT. XV. § 65.

⁵³ 38 STAT. 717 (1914), U. S. C. (1925) TIT. XV, c. 2.

⁵⁴ 40 STAT. 517 § 4 (1918), U. S. C. (1925) TIT. XV, § 64. Italics ours.

Hoover, by the Silver Producers' Committee which had been considering for some time the formation of a Silver Export Trade Association. Like many other groups, the silver producers had been uncertain regarding the interpretation which the Commission would place upon certain provisions of the *Webb-Pomerene Law*, as well as its general attitude, and, in consequence, they had failed to avail themselves of the benefits of this legislation.

After stating that the Commission's power was "corrective of action taken, rather than a limitation upon the entry into action," and that the preliminary assent of the Commission was not required for the organization of an export trade association, it indicated its willingness, when called upon in advance of the formation of an association to express its opinion whether a course of conduct would, if executed, "invite the corrective attention of the Commission." It added, however, that since "the test of legality lies in result in most instances, rather than in the form or method pursued," it could not assume the results of an indicated course of conduct.

The Commission pointed out that under the settled policy of the *Sherman Law*,⁵⁵ an "incidental or inconsequential effect upon domestic prices," due to the export activities of the association, would not be unlawful, since otherwise "the statute might become a nullity."

Of great significance was its statement that an association may co-operate with a foreign corporation "for the sole purpose of operation in foreign markets." As has been pointed out, this pronouncement of the Commission should lead to the formation of associations in industries where there were none heretofore, "in order that these export associations in behalf of their respective American industries may be in a position to bargain for the markets of the world."⁵⁶ "The only test of legality in such an arrangement," said the Commission, "would be the effect upon domestic conditions within the United States."

By stating further that aliens who were residents of the United States were nevertheless eligible for membership in an

⁵⁵ *Supra* note 22.

⁵⁶ MONTAGUE, PROCEEDINGS OF NATIONAL FOREIGN TRADE CONVENTION (1927) 411.

export association under the Act, the scope of an association's possible membership was broadened to a considerable degree.

In answer to the question whether imported products originating outside the United States and thereafter exported directly from our ports, might be exported by an association under the Act, the Commission took the view that it assumed "export" to include only domestic products; and that only products exported from the United States, and not goods which belonged to a member of the association, shipped from one foreign port to another, would come within the purview of the Act.

The Commission further declared that "an association may, without involving conflict with the act, engage in allotting export orders among its members and in fixing prices at which the individual members shall sell in export trade," provided however, that it meets two tests:

"One, that the conduct shall be in export or in the course of export. The second, that the conduct shall not be in restraint of trade within the United States, shall not restrain the export trade of any domestic competitor, and shall not artificially enhance prices or lessen competition within the United States, or otherwise restrain trade therein."

The most constructive conclusion of the Commission, however, was its declaration that "an export association complies with the act if it is solely engaged in allotting export orders among its members, or in fixing the prices at which its individual members shall sell in export trade," and that it was unnecessary for it to "perform all the operations of selling its members' product to the foreign combination."

As has been stated by an eminent authority, who has had wide experience in these matters:⁵⁷

"The importance of the Commission's conclusions on this point can hardly be over-estimated, for it confirms the view long held by those most familiar with the *Webb Act* that the purpose and intent of the Act was to enable American manufacturers and American producers, each of whom maintains and desires to continue to maintain its own indi-

⁵⁷ *Ibid.*

vidual export department, to avail of the provisions of the Act to legalize agreements with one another as to the prices which each manufacturer and producer shall charge in foreign markets, and as to the division of orders and territory in foreign markets, so that each manufacturer and producer may continue through its own individual export department to carry on its export trade in conformity with these agreements regarding prices, orders and territory."

This change in attitude of the Commission has stimulated the formation of several new associations under the *Webb Act*.

The advantages of export trade associations have been summarized in a report issued by the Federal Trade Commission as follows:⁵⁸

"Export associations report many advantages derived from operation under the act. Through co-operation of the member companies, selling costs have been reduced; grades, contract terms and sales practices have been standardized; the quality of products sold has been improved; prices have been stabilized, and cut-throat competition in the export trade eliminated. Joint advertising, consolidation of shipments in order to reduce transportation expense, co-operative inspection service, and facilities for handling claims by the association, have resulted in economy in operation. In some industries sales on consignment have been eliminated, in others the policy of selling direct to foreign consumers has made it possible to obtain a reasonable profit on export business.

"The expense of developing new markets, and of collecting trade and credit information, may be divided among a number of member companies without heavy tax on any one. The association is in a position to bid on and secure large orders for shipments over a long period, which one company could not handle; and it may fill orders for a variety of grades, styles, and dimensions by allocating among the member companies."

A difficulty encountered under the *Webb-Pomerene Act* arises from the provision, intended as a safeguard for domestic

⁵⁸ ANNUAL REPORT OF FEDERAL TRADE COMMISSION for year ending June, 1927, at 23. A list of the organizations in operation under the *Webb-Pomerene Act*, as of July 1, 1927, is contained at 21 of the report.

trade, which declares, in effect, that goods sold by combinations in export trade may not be resold within the United States.⁵⁹ In the event of cancellation of orders by foreign customers after shipment from this country, it becomes necessary to sell these goods at whatever price they will bring, irrespective of the loss entailed. This problem is further complicated by the existence of anti-dumping laws in foreign countries, which may prevent the sale of foreign goods at a price below cost or below the American sales price. In this way, the transaction of the export association may result in a total loss. In addition, although exporters of raw materials have recognized the value of the Act by adopting it in practice through export trade associations, manufacturers of trade-marked or branded goods have shown a reluctance to give up their own particular brands for the purpose of achieving greater efficiency through the use of a common export trade association label.

“It will be observed that the bulk of the commodities availing themselves of the privileges of the Act, were raw materials whose standardized bulk character made them readily susceptible to such consolidated handling. They seemed to fit more easily into the scheme through the convenience of establishing uniform standardized documents, accounting methods, inspection and grading, allocation of costs and prorating of goodwill and other intangible assets.”⁶⁰

Under the present law, an export association's collective activities under its statutory exemptions seem to be limited exclusively to exporting, and it is therefore questionable whether these associations are able, by its present wording, to achieve the full measure of their potentialities in international trade.

Following the increasing development of government-controlled foreign monopolies in essential raw materials with their resulting threat of dominating American industries which depended upon them as sources of supply, there arose demands for the enactment of legislation which would permit co-operative buying of raw materials abroad through common purchasing

⁵⁹ *Supra* note 49.

⁶⁰ Klein, U. S. DAILY, May 9, 1928.

agencies and exemption from the restrictive operation of the *Sherman Law*.⁶¹ The *Newton Bill*, which was introduced in the House,⁶² provided for the amendment of the *Webb-Pomerene Act*, to permit common-purchasing agencies among importers of potash, rubber, sisal and such other commodities as from time to time would be granted certificates of necessity by the Secretary of Commerce.

Like the *Webb-Pomerene Act*, the *Newton Bill* contained various safeguards against a possible abuse of privileges by the proposed associations. They were therefore forbidden to enter into any agreement, understanding or conspiracy for the purpose or with the effect of artificially or intentionally enhancing prices within the United States, of commodities of the class imported, or of substantially lessening competition or restraining domestic trade. It provided further, that the associations must not discriminate in the sale of, or refuse to sell to, anyone who desired to use, for manufacturing purposes within the United States, an imported commodity which they offered for sale. Finally, the bill declared to be illegal the accumulation and withholding from sale of unreasonable stocks of commodities imported by associations when its purpose was to artificially or intentionally enhance prices. The powers of the Federal Trade Commission, under the *Webb Act*, were extended to include import associations.

Among the proponents of the measure were Secretary of Commerce Hoover, Secretary of Agriculture Jardine, the Department of Justice, and various trade organizations. The effect of rubber restrictions imposed by the British Colonial Ministry in the British rubber-producing colonies since 1922, causing a rise in the price of crude rubber imported into the United States, was indicated as showing the need for legalizing collective purchasing activity by American importers. It was further maintained that sisal and potash, both used widely by American farmers, have cost more because of foreign governmental control of the supply.

⁶¹ *Supra* note 22.

⁶² *Supra* note 2.

Secretary of Commerce Hoover, an ardent advocate of the measure, stated before the House Committee on the Judiciary: ⁶³

"For the past five years there has been a development of foreign monopolies in raw commodities. These are either government-owned or under the direction of the government. In effect, the development has amounted to the consolidation of the selling power of great commodities with which the American buyers have had to deal individually.

"The result has been wide fluctuation in prices, and in many cases panic prices, due not only to the restriction of production exercised by the monopolies but to the competitive bidding of American buyers."

Secretary Jardine stated before the same committee: ⁶⁴

"Both from the standpoint of the commercial and agricultural interests of the country the proposed legislation seems based upon sound principles.

"It proceeds from the correct assumption that there exists a constantly growing menace of trade domination in certain commodities by foreign monopolies and recognizes the necessity of removing any possible legal barrier inherent in the anti-trust laws to the employment of certain appropriate weapons against this domination, which in certain instances has been made effective."

In a minority report, the bill was attacked on the ground that its real purpose was to create a monopoly by the powerful members of the buying pools which would be sanctioned by the proposed act, and that it would cause a rise in the retail price of rubber despite the safeguards provided in the bill. ⁶⁵

It so happened that on April 4th, on the eve of the debates on the *Newton Bill* in the House of Representatives, it was stated by the British Prime Minister in the House of Commons that the British rubber restrictions would be removed on November 1st. ⁶⁶ This deprived the supporters of the *Newton Bill* of one of their

⁶⁴ *Ibid.*

⁶⁵ U. S. DAILY, February 17, 1928.

⁶⁶ NEW YORK TIMES, January 20, 1928.

⁶⁸ U. S. DAILY, April 5, 1928.

most potent arguments.⁶⁷ For a variety of reasons,⁶⁸ the measure was rejected on April 6th by the House of Representatives.

The *Webb-Pomerene Act* is only one of a series of governmental aids designed to promote and increase foreign trade. It was preceded by the *Shipping Board Act*⁶⁹ of 1916, providing for exemption from the anti-trust laws of pooling, rate and other agreements among carriers by water, which have been approved by the United States Shipping Board; and has been supplemented by the *Edge Act*⁷⁰ of 1919, which makes available new financial facilities for foreign trade promotion; and the *Merchant Marine Act*⁷¹ of 1920 which exempts from the *Clayton Act*⁷² associations, pools or combinations of marine insurance and reinsurance companies doing business in the United States and in foreign countries.

Of utmost importance in the development of our foreign trade, has been the important work of the Department of Commerce, which, through its Bureau of Foreign and Domestic Commerce, collects and disseminates regular, timely, and useful foreign trade information. The Department of Commerce has stated in one of its publications:⁷³

"The collection and dissemination of timely information is the chief purpose of the Bureau of Foreign and Domestic Commerce."

Its service in assisting American business enterprises, which require investigation of trade conditions, trade possibilities, and commercial laws in the farthest corners of the globe, makes the Department of inestimable value to American exporters.

The effect of the work of the Department in assisting the small exporter who obviously cannot own a highly organized

⁶⁷ See debates in House of Representatives, *supra* note 2 and (1928) 22 RUBBER AGE 529, which says: "If the restriction act were abolished or a definite retirement date decided upon, the chief reason for enacting the *Newton Bill* would disappear."

⁶⁸ See debates in House, *supra* note 2.

⁶⁹ 39 STAT. 733 § 15 (1916), U. S. C. (1925) TIT. XLVI, § 814.

⁷⁰ 41 STAT. 378 (1919), U. S. C. (1925) TIT. XII, §§ 611-631.

⁷¹ 41 STAT. 1000 (1920), U. S. C. (1925) TIT. XLVI, § 885.

⁷² *Supra* note 50.

⁷³ FOREIGN TRADE BULLETINS (Government Printing Office, 1927) I.

information service such as is maintained by the large export corporations, is set forth in the following statement by the Chief of the Bureau of Foreign and Domestic Commerce:⁷⁴

"Today, on the other hand, we have a multitude of small manufacturers and dealers prosperously engaged in export, which would be an impossible field for them unless they had at their disposal the impartial, fact-finding services of Government agencies. These small or moderately sized establishments are now the backbone of our overseas trade effort. They are largely responsible for the astonishing increase in the number of requests for trade information received by the Department of Commerce, which have risen from about 700 a day early in 1921 to more than 9,000 a day at present."

The Department publishes important publications, periodicals, and monographs written by its own experts dealing with various aspects of foreign trade and making important suggestions and recommendations for the future conduct of business in certain localities. Among these, the following may be noted here:

Commerce Reports, a weekly journal of over sixty pages;

Monthly Summary of the Foreign Commerce of the United States;

Commerce Year Book, an annual survey of foreign trade;

Foreign Commerce and Navigation in the United States;

A Series of special bulletines, more particularly noted on pages two to five of *Foreign Trade Bulletins*, July, 1927, which is a valuable catalogue of publications of the Bureau of Foreign and Domestic Commerce.

The foreign trade of the United States involves so many ramifications that it has become a subject of importance in the functions of several government departments.

The State Department, through its diplomatic and consular service; the War Department, through its geographical explorations and harbor improvements; the Department of Agriculture,

⁷⁴ Dr. Julius Klein, U. S. DAILY, January 3, 1928.

in its studies of the effect of foreign economic and trade conditions upon the raising and marketing of American farm products abroad; the Federal Trade Commission; the Federal Reserve Board; and the Shipping Board; represent important trade promotive agencies of American foreign trade.

In addition to these purely governmental services must be mentioned the important foreign trade promotion activities by business organizations, such as the Foreign Service Bureau of the Chamber of Commerce of the United States,⁷⁵ National Foreign Trade Council, American Exporters' and Importers' Association, American Manufacturers' Export Association, National Council of American Importers and Traders, and various commercial museums.⁷⁶ Besides their function of achieving a harmony of interest among the various participants in American foreign trade, their investigation and advisory activities are frequently utilized by members for the solution of their special problems, and also by the organizations, as such, on broader matters of policy, in presenting to the appropriate legislative bodies the fact-bases for beneficial foreign trade legislation.

A promising field for future export trade activity lies in the trade association which, through the establishment of export trade bureaus for the sale of the surplus of domestic manufactures, should obtain for its members in foreign trade the advantages accruing from its domestic activities in standardization, simplification, credit information, uniform cost accounting and statistical services, in addition to the benefits derived from the *Webb-Pomerene Act*,⁷⁷ noted above.

The recent decision of the Supreme Court of the United States in the *Sisal* case⁷⁸ is the first pronouncement by the Supreme Court of the United States with respect to the application

⁷⁵ For a comprehensive review of the foreign trade promotion activities of the Chamber of Commerce and kindred bodies, see FOREIGN TRADE PROMOTION BY CHAMBERS OF COMMERCE AND TRADE ASSOCIATIONS (1927), Foreign Commerce Department, Chamber of Commerce of the United States.

⁷⁶ For a review of foreign trade promotion organizations in the United States and their major activities, see LITMAN, ESSENTIALS OF INTERNATIONAL TRADE (1927) c. 15.

⁷⁷ *Supra* note 7.

⁷⁸ *Supra* note 1.

of the *Wilson Tariff Act*⁷⁹ to combinations in restraint of trade. This was a proceeding in equity, instituted by the filing of a bill by the United States to prevent the defendants from engaging in activities alleged to be prohibited by the *Sherman Law*⁸⁰ and the *Wilson Tariff Act*. The District Court, upon the authority of *American Banana Co. v. United Fruit Co.*,⁸¹ dismissed the proceedings upon the motion of the defendants, and the Government thereupon appealed from the decree of dismissal, to the Supreme Court of the United States.

The defendants included three banking corporations, doing business in New York and New Orleans; two American corporations organized to deal in sisal; a Mexican corporation which bought sisal from the producers; certain officers and agents of these corporations; and some brokers. The product which was alleged to be monopolized is a fibre of a Mexican plant from which is fabricated more than 80 per cent of the binder twine used in harvesting American grain crops. It was only from Yucatan, in Mexico, that quantities sufficient for the annual American requirements could be obtained. The supply of sisal was often in excess of market demands.

It was alleged that prior to 1919, the defendant banks advanced large sums of money to parties endeavoring to monopolize the importation and sale of sisal in the United States. The Mexican corporation was alleged to be utilized as an instrumentality in connection with the purchases, and favorable legislation in Mexico and Yucatan had been secured. The complaint further alleged that various plans had been used by the defendant banks, operating within the United States, with the intent of controlling the sisal market and for the ultimate purpose of securing large profits.

It was set forth in the Government's bill that the defendants, as a result of their arrangements and acts in connection therewith, had secured a monopoly of interstate and foreign commerce; that the Mexican corporation had become the sole purchaser of sisal

⁷⁹ *Supra* note 5.

⁸⁰ *Supra* note 22.

⁸¹ 213 U. S. 347 (1909).

from producers; and that the Sisal Sales Corporation was the sole importer of sisal in the United States. It was further alleged that there was no longer any competition in commerce in sisal and that excessive prices had been arbitrarily exacted.

It was claimed by the United States that, by means of the favorable, discriminatory, and advantageous legislation, claimed to have been passed by the governments of both Mexico and Yucatan at the instance of the defendants, other buyers had been forced out of the market. It is to be observed that various overt acts, in alleged pursuance of an unlawful conspiracy to monopolize commerce in sisal, had been committed within the territorial jurisdiction of the United States. The Supreme Court distinguished the case at bar from the *American Banana* case, saying: ⁸²

“The Banana Company sued for treble damages under the Sherman Act, basing its claim upon acts done outside the United States and not unlawful by the law of the place.”

In discussing the *Banana* case, the Court referred ⁸³ to the basis of the holding in that case:

“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.”

The Court then quoted ⁸⁴ the language of its holding in that case, in which it had said:

“A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law.”

Distinguishing, however, the situation in the *Banana* case from the case before it, the court pointed out ⁸⁵ that in the *Sisal* case, the defendants were

⁸² Sisal case, *supra* note 1 at 275.

⁸³ *Ibid.* at 276.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.* Italics ours.

“engaged in importing articles from a *foreign country* and have become parties to a contract, combination and conspiracy intended to *restrain trade in those articles and to increase the market price within the United States*. Such an arrangement was plainly denounced by Section 73 of the *Wilson Tariff Act*, as amended.”

The substance of the ruling of the Supreme Court is contained in the following excerpt from the opinion of Mr. Justice McReynolds.⁸⁶

“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 the forbidden results within the United States. *They are within the jurisdiction of our courts and may be punished for offenses under our laws.*”

The importance of this decision lies in the fact that it has clarified the law with respect to acts committed within the jurisdiction of the United States. It becomes immaterial, therefore, that the acts are lawful in foreign jurisdictions, if acts are committed within United States territory which are prohibited by our anti-trust laws. Indeed, even though foreign governments aid foreign combinations, outside of the United States, by discriminatory legislation, that fact cannot be relied upon as a defense for committing acts within the territorial jurisdiction of the United States, which our anti-trust statute proscribes.⁸⁷

⁸⁶ *Ibid.* Italics ours.

⁸⁷ Earlier cases which involved this point, but not proceedings under the *Wilson Tariff Act*, were *U. S. v. Pacific and Arctic*, 228 U. S. 87 (1913), and *Thomsen v. Cayser*, 243 U. S. 66 (1917). However, neither of these cases had construed the *Wilson Tariff Act*. Cf. consent decree in *International Aluminum Cartel*, entered in District Court of the United States, Western District of Pennsylvania, June 7, 1912, and decree entered in *International Thread Com-*

What is the legal situation if the foreign combination, instead of being aided by discriminatory legislation in foreign countries, has, as an active, financially-interested participant in its enterprise within the territorial jurisdiction of the United States, a foreign sovereign government? This is the important question which is being raised in at least one case now pending undetermined in the courts.

We have seen that the growth of the combination movement in Europe, and especially the expansion of national and international combinations, and their entry into American markets, makes this problem one of outstanding importance. It is this problem to which we must briefly advert in the light of the economic situation presented today.

Bearing in mind the decisions of the Supreme Court of the United States in such cases as *Sloan Shipyards v. United States Fleet Corporation*,⁸⁸ dealing with suability of a corporation whose stock was owned by the United States Government, or where the stock is held by a state,⁸⁹ the general distinction between governmental and proprietary or quasi-private functions has become recognized in the law as regards tests of suability. But these cases do not involve a claim of immunity by a friendly foreign sovereign power. Where the stock of the corporation is owned, controlled, or possessed in part, by a foreign sovereign government, the question of suability is presented, which has never been passed upon by our courts.

The contention has been advanced that where a friendly foreign sovereign has appropriated or devoted an instrumentality to a use which the foreign sovereign deems to be a governmental function, such as the public purpose of advancing the trade of its people or providing revenue for its treasury, it thereby becomes immune from all process in the American courts. A different degree of immunity is therefore urged to be accorded to an in-

bination case in the District Court of the United States for the State of New Jersey, June 2, 1914. These cases are discussed in NOTZ AND HARVEY, *supra* note 8 at 377.

⁸⁸ 258 U. S. 549 (1922).

⁸⁹ *The Bank of the United States v. The Planters' Bank of Georgia*, 9 Wheat. 904 (U. S. 1824).

strumentality of a friendly sovereign government than to similar instrumentalities of the United States or of any of the states.

The substance of this position embodies the argument, that it necessarily follows from the decision of the Supreme Court in *Berizzi Bros. Co. v. Pesaro*,⁹⁰ and by reason of the holdings in such federal cases as *The Adriatic*,⁹¹ and *The Maipo*,⁹² that the question of what is considered to be a governmental, as distinguished from purely business, function, is not to be adjudged either by the American courts or by any executive branch of the American government, but is rather to be finally determined by the view of what the foreign sovereign considers to be an instrumentality of government.

The immunity from suit of the foreign sovereign and its instrumentalities of government is said to be absolute, irrespective of the form of the action or the subject matter, or whether the party plaintiff is a private individual or the United States. Apparently no controlling authority can be found, which directly disposes of the legal issue here considered. Varying distinctions can be drawn from the cases.⁹³ To review the arguments critically would entail an analysis of legal decisions which branch out into complex doctrines of comity between sovereign nations, about which the courts and authoritative commentators are in disagreement, and intricate problems of international law far beyond the scope of this paper.

If one may venture a view at this early stage, it would seem that the expression of Chief Justice Marshall in *The Bank of the United States v. The Planters' Bank of Georgia*,⁹⁴ while applied in that case to the suability of a banking corporation whose stock was owned by the State of Georgia, and concededly merely *obiter dictum* when sought to be applied to a foreign sovereign, embodies

⁹⁰ 271 U. S. 562 (1926).

⁹¹ 258 Fed. 902 (C. C. A. 3d, 1919).

⁹² 259 Fed. 367 (S. D. N. Y. 1919).

⁹³ For example, in *Berizzi Bros. Co. v. Pesaro*, *supra* note 93, it is to be noted that Mr. Justice Van Devanter says, at 570: "The single question presented for decision by us is whether a ship owned and possessed by a foreign government, and operated by it in the carriage of merchandise for hire, is immune from arrest under process based on a libel *in rem* by a *private* suitor in a federal district court exercising *admiralty* jurisdiction." Italics ours.

⁹⁴ *Supra* note 89.

a doctrine which is most likely ultimately to prevail in the problem of the suability of a foreign sovereign under the anti-trust laws, when it is engaged in ordinary commercial ventures, and where the United States has instituted the proceedings.

The following quotation from the *Planters' Bank* case indicates that in some cases, at least, there is a distinction between the public and private functions of a sovereign government.

"It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogative, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is being transacted."⁹⁵

Of great persuasive force also is the communication of the Secretary of State to the Department of Justice, under date of July 7, 1927, representing as it does the official view of the executive branch of the government to which has been delegated the determination of matters of a diplomatic nature:⁹⁶

". . . The Société Commerciale des Potasses d'Alsace, to which you refer, does not, of course, have any diplomatic or consular status in this country.

". . . I have to inform you that it has long been the view of the Department of State that agencies of foreign governments engaged in ordinary commercial transactions in the United States enjoy no privileges or immunities not

⁹⁵ *Supra* note 89 at 907. Cf. also the language of Chief Justice Marshall in *Schooner Exchange v. McFadden*, 7 Cranch 116, 145 (U. S. 1812), that there is "a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power and maintains the dignity and the independence of a nation. A prince by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince and assuming the character of a private individual." It is to be noted that the court in this case was considering the effect of a seizure of a public vessel of war of a foreign friendly sovereign.

⁹⁶ *U. S. v. Deutsches Kalisyndikat Gesellschaft*, *supra* note 1, Government's brief on motion to vacate process, at 65, quoted in Donovan and Webster, *Rationalization: The Basis of Economic Rapprochement* (1928) 6 HARV. BUS. REV. 173.

appertaining to other foreign corporations, agencies, and individuals doing business here, and should conform to the laws of this country governing such transactions."

Furthermore, although it can at most be merely persuasive, and of course not binding upon American courts, the state of opinion as expressed in the resolutions in the final report of the world economic conference is indicative of expert world opinion on this subject.⁹⁷

In its practical consequences, the question as to whether the agencies of a friendly foreign sovereign government may enter into the territorial jurisdiction of the United States and engage in practices which, if pursued by private American interests, would be violative of the civil and criminal laws of the United States, is fraught with possibilities. As has been stated by the Assistant to the Attorney General, Col. William J. Donovan:

"If this contention be sustained, then we will find the curious situation that the limitations placed upon our corporations operating in this country shall not be applicable to a corporation which is asserted to be an instrumentality of a foreign government. Once that principle is recognized, all foreign corporations will seek the status of government instrumentalities".⁹⁸

It would seem that considerations of American national policy, dealing with the foreign trade of its citizens, considered in historical perspective and in the light of underlying economic factors, will exert a compelling influence. These factors must be taken into account along with strictly legal analogies to be drawn

⁹⁷ In the FINAL REPORT OF WORLD ECONOMIC CONFERENCE (Publication of the League of Nations, C. E. I, 44, 1927) 21, it is recommended: "That, when a Government carries on or controls any commercial, industrial, banking, maritime transport or other enterprise, it shall not, in its character as such and in so far as it participates in enterprises of this kind, be treated as entitled to any sovereign rights, privileges or immunities from taxation or from other liabilities to which similar privately-owned undertakings are subject, it being clearly understood that this recommendation only applies to ordinary commercial enterprises in time of peace."

⁹⁸ Address by Col. William J. Donovan before National Paint, Oil, and Varnish Association Convention, *supra* note 3.

from adjudicated cases, in admiralty or other fields of law with far different historical and economic backgrounds, and based upon conceptions of public policy not necessarily governing the proper scope or administration of the anti-trust acts. The conclusions warranted from such a comprehensive approach will play an important role in shaping the ultimate views with respect to this outstanding problem. This observation goes beyond, of course, the strictly legal issues raised by pending cases, and would seem to dictate the necessity for statutory modification of the anti-trust laws, should the Supreme Court ultimately resolve the questions of law against the contention of the Government. For it appears manifest that an anomaly would result if the American public policy, expressed by means of the *Webb-Pomerene Act*,⁹⁹ the *Edge Act*,¹⁰⁰ and the diverse trade promotion services of the Department of Commerce and of the Federal Trade Commission, which have as their purpose, aid and protection to the American exporter in equalizing competitive conditions abroad, should permit American commerce to suffer marked disadvantages, in the domestic American market, when compelled to cope with a foreign combination in which a foreign government participates.

In addition, it would seem to portray an inconsistency in American foreign trade policy thus to devitalize the prohibitions of the *Wilson Tariff Act*¹⁰¹ against illegal activities in import trade especially at a time when there is the probable prospect of increasing competition from European combinations, arising from their pursuit of programs of rationalization in production, together with the co-ordination and centralization of market export agencies.¹⁰² Add to this the tendency toward international trade agreements on the part of European combinations in which foreign governments will participate to a greater extent, and it can be seen that American industry is likely to be increasingly confronted with intense competition from these foreign combinations,

⁹⁹ *Supra* note 7.

¹⁰⁰ *Supra* note 70.

¹⁰¹ *Supra* note 5.

¹⁰² Cf. also the American anti-dumping statutes, 39 STAT. 798 (1916), U. S. C. (1925) TIT. XV, §§ 71-77; 42 STAT. 11 (1921), U. S. C. (1925) TIT. XIX, §§ 160, 161; 42 STAT. 943 (1922), U. S. C. (1925) TIT. XIX, §§ 174-180.

whose combined resources will be exerted in the American markets.

The logic of economic events cannot but lead to the conclusion that such effectively organized foreign combinations must not, by an inconsistent American legal policy in matters of foreign trade, gain such an advantage which the success of a plea of absolute immunity would afford, at the expense of domestic industry, which is subject to an anti-trust policy far less tolerant to combinations than that of any other country.

The future will witness three concurrent further developments of particular interest to students of the legal phases of these matters. Each will contribute important and necessary elements of an effective and complete plan to equalize, as nearly as is practicable, the competitive conditions between foreign and domestic business organizations. First, the trade association movement within the United States which has taken such rapid strides in the post-war developments in this country, will be a contributing factor in aiding American industry and commerce to cope with foreign competitors. These trade organizations have as their aim, and are accomplishing in practical results, the introduction of economies in production and distribution, the improvement of quality, and the lowering of prices of products, and are promoting the standards of competitive conduct. Their activities contribute to the general adoption of intelligence and stability in the processes of manufacturing and marketing. Secondly, the fostering and aiding, to a greater extent, of the foreign trade of American citizens, by means of taking advantage of the co-operative features of the *Webb-Pomerene Act*¹⁰³ in its present form and probably as it will be amended or further clarified in the future so as to effectuate the general purposes for which it was enacted; and utilizing to greater extent the useful and helpful trade promotive activities of the Department of Commerce, the Federal Trade Commission, and other governmental agencies. Thirdly, a vigorous enforcement of the *Sherman Anti-Trust Act*¹⁰⁴ and the

¹⁰³ *Supra* note 7.

¹⁰⁴ *Supra* note 22.

Wilson Tariff Act,¹⁰⁵ where foreign combinations are engaged in illegal activities within the territorial jurisdiction of the United States.

The discussion must needs be restricted to these three general phases because they are of particular interest to lawyers and observers who are interested in legal developments. The next decade promises to resolve, in great measure, to an authoritative solution, many of the perplexing questions which are now being debated.

¹⁰⁵ *Supra* note 5.