

THE WEBB-POMERENE LAW—EXTRATERRITORIAL SCOPE OF THE UNFAIR COMPETITION CLAUSE

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On April 10, 1918, Congress enacted the so-called Webb-Pomerene Law, "An Act to promote export trade, and for other purposes."¹ The primary purpose of the Act is, as its name indicates, the promotion of the export trade of the United States. Under the terms of the Act American businessmen are permitted to combine in the form of "associations" for the purpose of engaging solely in export trade. With certain restrictions such "associations" are exempt from sections 1, 2 and 3 of the Sherman Anti-Trust Act of July 2, 1890.

In order to protect American business interests generally Congress was careful to insert into the law certain safeguards which are to arrest business practices that may prove objectionable, whether done within or without the territorial jurisdiction of the United States.² The principal limitations imposed upon export "associations" are that they shall not enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices, or which substantially lessens competition or restrains trade within the United States.

SECTION 4—EXTRATERRITORIAL JURISDICTION OVER ALL EXPORTERS, INDIVIDUALS AS WELL AS ASSOCIATIONS

As most of the provisions of the Export Trade Act relate to export "associations," their powers, limitations, duties, etc., the Act has in the public mind become identified chiefly with the subject of export trade combinations. In the numerous publications and discussions on the law no account has been taken, up to the present time, of a special feature contained in section 4 of the Act. That section apparently has no direct connection with export "associations." The term "association" is not even mentioned in it. The scope of section 4 is of a wider nature, extending to American export trade in general. It is a significant fact that section 4 established a new principle in our foreign trade policy, viz., the extension of the "unfair competition clause"³ of the Federal Trade Commission Act, so as to make it

¹ 40 Stat. at L. 516.

² Cf. CONG. REC. Sept. 2, 1916, 1583; *ibid.*, June 13, 1917, 3840; also *Report from U. S. Senate Committee on Interstate Commerce*, No. 1056, 64th Cong., 2d sess.; *ibid.*, No. 9, 65th Cong., 1st sess.

³ Federal Trade Commission Act, sec. 5.

apply to acts constituting such unfair methods committed without the territorial jurisdiction of the United States.

Section 4 of the Export Trade Act provides that the prohibition against "unfair methods of competition" and the remedies provided for enforcing said prohibition contained in the act entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914, shall be construed as extending to 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.

The foregoing section of the Act involves a number of interesting points, important from a legal as well as an economic point of view. Under this section the Federal Trade Commission is empowered to issue and serve a complaint containing a notice of a hearing upon any American person, partnership or corporation concerning which it has reason to believe that such party has been or is using any unfair method of competition in export trade against competitors engaged in export trade, even though such acts are done in a foreign country. If the Commission believes, as a result of a hearing, that the method of competition in question is unlawful, it may issue an order "to cease and desist." The Circuit Court of Appeals of the United States, within whose circuit the methods of competition in question are used, where the defendant resides or carries on business, has the power to affirm, enforce, set aside or modify the order of the Commission. Apparently this provision of the Webb-Pomerene Act makes the "unfair competition clause" of the Federal Trade Commission Act a personal statute binding upon the citizens of the United States everywhere. By inserting section 4 into the Webb-Pomerene law, Congress evidently assumed that the United States has the privilege and power to punish its citizens abroad for acts, which if committed within its territory would constitute violations of its statutory law.

SECTION 5—EXTRATERRITORIAL JURISDICTION OVER EXPORT ASSOCIATIONS OR COMBINATIONS

Section 4 is not the only section of the Export Trade Act in which the jurisdiction of the United States is extended to acts done in the course of trade and commerce in a foreign country. A further and similar provision is embodied in section 5. In paragraph 2 of that section of the Act it is provided that the Federal Trade Commission shall have investigatory powers where

"An association, either in the United States or *elsewhere*, has entered into any agreement, understanding, or conspiracy, or done any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such

association, or which substantially lessens competition within the United States, or otherwise restrains trade therein.”

The Act goes on to say that if the Commission concludes that the law has been violated, it may recommend that the association readjust its business, and if not complied with, the Commission is directed to refer its findings and recommendation to the Attorney-General of the United States for such action as he may care to take.

A comparative analysis of the two sections will bring out several points worth noting. Although extraterritorial jurisdiction is provided for both in section 4 and in section 5, there are several differences in the provisions of these two sections. Section 4 provides for extraterritorial jurisdiction over unfair methods of competition used in export trade against competitors in export trade. It is not stated explicitly in this section whether the competitors so to be protected are American or foreign competitors. However, from the debates on the bill in Congress it is quite clear that American competitors are meant.⁴ For Congress to go beyond this and enact legislation for the protection of foreign competitors would be likely to provoke justifiable criticism on constitutional grounds as well as from the point of view of the public interest. Legislation of that kind is a matter for each foreign state to provide for itself, as it deems fit, or for joint action among nations engaged in world trade. A report of a special committee accepted and approved by the Chamber of Commerce of the United States⁵ stated as follows:

“It would not be sound and economically advisable even from a moral standpoint for this Government to assume to protect consumers and producers in other countries where other conditions prevail and where governments exist with full power to act for the benefit of their own citizens from any results, baleful or otherwise, of business combinations in the United States.”

Moreover, no mention is made in section 4 of “associations,” so that as the section stands any American exporter who commits an act of unfair competition abroad against an American competitor becomes amenable to this law. From the debates on the bill in the House of Representatives it appears that the word “association” was omitted advisedly in section 4. This section was to meet the decision of the United States Supreme Court in the case of the *American Banana Company v. United Fruit Company*⁶ and the intent of the law appears to be to hold simple corporations, as well as all individual American exporters, amenable to our laws for violations of the unfair competition statutes committed abroad, not merely combinations or associations of exporters.

⁴ See CONG. REC., *op. cit.*, 16010.

⁵ Report made at the annual meeting in Washington in February, 1915.

⁶ (1909) 213 U. S. 347, 29 Sup. Ct. 511.

In section 5, on the other hand, extraterritorial jurisdiction is asserted specifically over export "associations." Jurisdiction beyond the territorial limits of the United States is here made to cover agreements, understandings, conspiracies or acts resulting in three things, viz., artificial or intentional enhancing or depressing of domestic prices of commodities belonging to the same class as those exported by the defendant association; substantial lessening of domestic competition; and restraint of domestic trade. In a report of the Senate Committee on Interstate Commerce⁷ it was stated that the purpose of section 5 was to safeguard our foreign and domestic commerce against acts performed outside of the United States by means other than by unfair methods of competition. The intent of Congress evidently was to clarify the question as to the jurisdiction of our anti-trust laws over acts committed in foreign countries which if committed within the United States would be in violation of our anti-trust laws, particularly the Sherman Anti-Trust Law.⁸

CONSTITUTIONALITY OF SECTION 4 OF THE WEBB-POMERENE LAW

Naturally the question arises whether Congress has the privilege and power to enact a statute of this scope. In connection therewith the further question presents itself as to the expediency and justice of such action, as well as to the practical operation of such a statute. An examination of the legislation, judicature and the views of some of the leading legal authorities on the subject of offenses committed by nationals in foreign territory and to what extent jurisdiction is actually claimed in such cases, will serve as a proper background against which the full importance of section 4 of the Export Trade Act will stand forth.

Insofar as the constitutional power of Congress is concerned either to extend the unfair competition clause of the Federal Trade Commission Act so as to make it apply to acts committed in foreign territory, or to assert extraterritorial jurisdiction in section 5 of the Export Trade Act over acts in restraint of trade, etc., committed by export "associations" abroad—such power we believe is fully granted in section 8 of the Constitution of the United States. In that section Congress is among other things empowered

"to regulate commerce with foreign nations" . . . "to define and punish offenses against the law of nations" . . . "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."

⁷ Report on H. R. 17350, the Export Trade Act.

⁸ Report No. 1056, 64th Cong., 2d Sess., 3.

Presumably Congress had these provisions of the Constitution in mind when it enacted section 4 of the Export Trade Act. There is no indication either in the Congressional committee hearings or the debates on the Webb-Pomerene bill in both houses that the constitutionality of this section of the bill was ever questioned.

An examination of decisions of the United States Supreme Court explaining the meaning and scope of the phrase "to regulate commerce with foreign nations" will help to make it clear that sections 4 and 5 of the Export Trade Act are clearly within the legislative powers of Congress under the Constitution. In defining the term "commerce" and "regulated" commerce, Chief Justice Marshall held as follows:⁹

"Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

It is clear that in conformity with this opinion of Chief Justice Marshall Congress by giving extraterritorial power to the unfair competition clause of the Federal Trade Commission Act prescribed rules for carrying on commercial intercourse between nations.

In view of the successful and satisfactory operation of the unfair competition clause in domestic trade and commerce, there can be no doubt that the purpose and the end aimed at by sections 4 and 5 of the Webb-Pomerene law is legitimate and beneficial to the people of the United States, and that the extraterritorial powers embodied in those sections come within the legislative discretion of Congress. This is in accordance with another opinion of Chief Justice Marshall:¹⁰

"The sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

Unfair methods of competition in export trade are likely to interfere more or less seriously with free commercial intercourse with foreign nations. In *Northern Securities Company v. United States*¹¹ Justice Harlan held that the power of Congress over commerce embraces devices that may be employed to interfere with freedom in international trade, viz.:

⁹ *Gibbons v. Ogden* (1824, U. S.) 9 Wheat. 1, 189, 6 L. ed. 23.

¹⁰ *McCulloch v. Maryland* (1819, U. S.) 4 Wheat. 316, 421, 4 L. ed. 579.

¹¹ (1904) 193 U. S. 197, 344, 24 Sup. Ct. 119.

"And all, we take it, will agree, as established firmly by the decisions of this court, that the power of Congress over commerce extends to all the instrumentalities of such commerce, and to every device that may be employed to interfere with the freedom of commerce among the States and with foreign nations."

In the same case¹² it was held that

"the constitutional guarantee of liberty of contract does not prevent Congress from prescribing the rule of free competition for those engaged in *interstate and international* commerce."

Elsewhere it was held that by the interstate commerce clause and that clause of the constitution giving Congress power to make all laws necessary and proper to carry that power into effect, the legislature is authorized to give full protection to the commerce of the United States by its criminal jurisprudence.¹³ In the *Passenger Cases*¹⁴ it was held that the power vested by the Constitution in the government extends to every species of commercial intercourse and may be exercised upon persons as well as property.

To sum up, it seems quite clear that Congress acted within its constitutional rights when it extended the Unfair Competition clause of the Federal Trade Commission Act so as to make it embrace unfair methods of competition used in export trade committed outside the territorial jurisdiction of the United States. By enacting section 4 of the Webb-Pomerene law Congress unquestionably "regulated commerce with foreign nations" by "prescribing rules for carrying on that intercourse" and for suppressing devices "that may be employed to interfere with the freedom of commerce with foreign nations."

EXTRATERRITORIAL JURISDICTION OF CRIMINAL LAWS

Section 4 of the Webb-Pomerene law is a penal provision, and that raises the question of whether or not the criminal laws of a nation can justly extend beyond its territory as regards its own citizens. There is considerable difference of opinion among the leading authorities on this subject. An eminent authority on international law sums up the principal theories on this subject as follows:¹⁵ first, the so-called territorial theory of criminal jurisdiction asserts that a criminal statute is limited to the territory for which it was enacted and that any act committed in another country is beyond its influence; the second view holds that the criminal law of any State has jurisdiction not merely over the offenses committed there, but also over those committed by its citizens abroad; the third theory, which recognizes that

¹² *Supra*, 332.

¹³ *Charge to the Grand Jury* (1861, C. C. D. Mass.) 2 Sprague, 279.

¹⁴ (1849, U. S.) 7 How. 283, 12 L. ed. 702.

¹⁵ Bar, *International Law: Private and Criminal* (1883) 626ff.

all crimes committed in the country, and all crimes committed by natives abroad must be punished, proposes to extend criminal law still further, by laying down that the State has a right to protect itself and its subjects from injury, and is therefore privileged to visit any injury with punishment; a fourth view requires, primarily, that all crimes, even if committed abroad, should be punished.

Generally speaking, American and English authorities incline to the territorial theory of crime and concede extraterritorial force and power of the criminal law of a country only in particular places, e. g., barbarous and non-Christian lands, and as a matter of expediency in the case of offenses of a grave character, such as murder. However, as a rule they have in mind extraterritorial jurisdiction over foreigners and not over nationals abroad. A leading exponent¹⁶ of this view holds that

“The system of tying the entire criminal law of a country round the neck of a subject, and of making him liable to its operation, in whatever part of the world he may be, converts the criminal law into a personal statute, and puts it on the same footing as the law respecting civil status. Now the personal statute of one country, in civil matters, is recognized by another, so that there is no conflict of laws. But if the criminal law were a personal statute a foreigner would at the same time be subject to two criminal laws—the criminal law of his own state and that of the state of his domicile. No text-writer and no state disputes the rule that all foreigners in a country are subject to its criminal law.

“The received rule as to the territoriality of criminal law rests on a sound basis. The territorial sovereign has the strongest interest, the greatest facilities, and the most powerful instruments for repressing crimes, whether committed by native-born subjects or by domiciled aliens in his territory. But a sovereign government, which pursues its subjects into foreign countries, and keeps its criminal law suspended over them, attempts a task in which, even if undertaken with earnestness, it is sure to fail; but which will probably be performed in a careless, indifferent, and intermitting manner. A government has no substantial interest in punishing crimes in the territory of another state; it has not on the spot officers of justice to discover and arrest the criminal; the transport of witnesses to a distance is a troublesome and costly operation; the difference of language, law, and customs creates further impediments. A failure of justice, and an acquittal, is therefore likely to occur, even if the utmost diligence is used; but it may be assumed as certain that, unless some special motive exists, little diligence will be used. A government would feel, with respect to offenses committed abroad in a civilized country, that it was, at the best, undertaking a work of supererogation; perhaps that it was interfering in a matter which, as the law of the place provided for it, would most properly be left alone. The experience of this and other countries shows that a criminal law applicable to offenses committed in foreign lands (such as the act of 33 Hen. 8 and 9 Geo. 4)

¹⁶ Lewis, *Foreign Jurisdiction* (1859) 29ff.

is for the most part a brutum fulmen, and that it is rarely carried into execution. The slumber of the law is therefore in practice a sufficient security to the native subject against its oppression. But if a government was to set to work vigorously to execute such a system of foreign criminal law as that which is embodied in the Austrian and Prussian codes, the sense of insecurity would infallibly lead to loud complaints, and the legislature would be urged into the adoption of a less ambitious course. Guilty men might occasionally be brought to justice; but innocent men, charged with the commission of crimes in distant parts of the world, would be almost incapable of defending themselves against the accusation and of proving their innocence. Even an educated person, provided with money and friends, might find it difficult to extricate himself from such a position; but a poor, uneducated, friendless man might be almost at the mercy of a false accuser. Such a law, if a government afforded funds and encouragement for its enforcement, might be a formidable weapon in the hands of unscrupulous malignity.

"It may, therefore, be laid down as a general principle, resting on grounds of the most enlarged expediency, that a criminal law ought to be local; that the sovereign ought to enforce it with respect to all crimes committed within its territory, and in national ships upon the high seas; but should not seek to apply it to crimes committed in the territory or ships of other civilized states."

John Bassett Moore¹⁷ states that "In the United States the territorial principle is the basis of criminal jurisprudence," and furthermore that

"It has been constantly laid down by the Executive Department of the Government of the United States, as a rule of action, that the criminal jurisdiction of a nation is confined to acts committed upon its actual or constructive territory."

Beale claims that¹⁸

"A sovereign exercises a personal jurisdiction based on law over his subject abroad. This personal jurisdiction is limited so long as the subject stays in the territory of a foreign sovereign to the forbidding of acts, or negative commands."

The Institute of International Law at a meeting at Munich in 1883 adopted the following resolution:

"Each state reserves its right to extend its national penal law to acts committed by its citizens abroad."

The decisions of the Supreme Court of the United States furnish but meagre material on the subject. Justice Story briefly touched the question,¹⁹ viz.:

¹⁷ Moore, *Report on Extraterritorial Crime and the Cutting Case* (1887) 56, 113.

¹⁸ Beale, *Treatise on the Conflict of Laws* (1916) 120.

¹⁹ *The Apollon* (1824, U. S.) 9 Wheat. 362, 370, 6 L. ed. 111.

"The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction. And, however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted, in construction, to places and persons, upon whom the Legislature have authority and jurisdiction."

In the following we shall indicate briefly some provisions embodied in the criminal laws of foreign States, as well as of our own country, which relate to offenses committed by native subjects on the territory of foreign States.²⁰

Generally speaking, the legislation of the United States and of Great Britain is reserved with respect to this species of foreign jurisdiction, while the laws of France, Austria and certain other States go much further in this direction. The law of England does not attempt to exercise a criminal jurisdiction with respect to large classes of offenses committed in foreign civilized countries, but there are certain acts committed abroad which fall within its scope. Upon an indictment for high treason, a charge of adhering to the king's enemies would be supported by evidence of acts done abroad. Treasons, misprisions of treasons, or concealments, committed out of England, are tried²¹ in like manner as if they had been committed in the shire where the trial takes place. If a man commits a forgery abroad and utters the forged instrument in England, he is punishable under the statute.²² In the case of murder and bigamy the law of England attempts to exercise a local jurisdiction over the whole world and with regard to every class of British subjects.²³ Under the Merchant Shipping Act of 1894 offenses committed by British subjects on board foreign vessels²⁴ and by British seamen everywhere²⁵ are punishable. British subjects in foreign countries are punishable under the Commissioners for Oaths Act; and under the Slave Trade Act²⁶ the British government claims jurisdiction over British subjects, wheresoever residing or being, whether within the dominions of the British crown or any foreign country, who do any acts in violation of the Slave Trade Act. Under special treaties with certain heathen nations, England also punishes crimes by British subjects in these countries.

English courts have made several very sweeping decisions respecting

²⁰ See 2 Foelix, *Traité du droit international privé* (Paris, 1856) 261ff; Wharton, *Conflict of Laws* (3d ed. 1905) 604ff.

²¹ Under 35 Hen. 8, ch. 2.

²² 24 & 25 Vict. ch. 95, sec. 40.

²³ 24 & 25 Vict. ch. 100, sec. 9, 57.

²⁴ 57 & 58 Vict. ch. 60, sec. 686.

²⁵ *Ibid.*, sec. 687.

²⁶ 6 & 7 Vict. ch. 98.

the extraterritorial force of British laws. In the case of *The Zollverein*²⁷ the court held:

"The laws of Great Britain affect her subjects everywhere—foreigners only within her own jurisdiction."

With regard to the United States, we find a number of instances in the Revised Statutes and Criminal Code where extraterritorial criminal jurisdiction over American citizens is assumed. They relate to: the transportation of explosives on vessels or vehicles carrying passengers between the United States and a foreign country;²⁸ judicial authority of American diplomatic and other representatives in certain non-Christian, uncivilized countries;²⁹ islands having guano deposits discovered by an American citizen;³⁰ murder on the high seas;³¹ citizens voluntarily on board a foreign slave-trade vessel;³² treason;³³ criminal correspondence with foreign governments;³⁴ perjury or forgery committed in connection with an oath, affidavit or deposition administered or taken by an American secretary of legation and consular officer abroad, this being considered indictable extraterritorially.³⁵

Criminal offenses committed by nationals in foreign territory are punishable also under the laws of France,³⁶ Germany,³⁷ Austria,³⁸ Belgium,³⁹ Italy,⁴⁰ and numerous other States. Apparently the most comprehensive provisions for the punishment of crimes committed by nationals in foreign countries are contained in the criminal code of Japan.⁴¹ This code goes so far as to provide that⁴²

"Even though the case may have been adjudicated upon in a foreign country and a final and conclusive judgment rendered in respect to same, this shall be no bar to the institution of entirely new proceedings and the infliction of punishment for the same act (in Japan)."

²⁷ (1857, Eng. Adm.) Swabey, 96; see *Rex v. Sawyer* (1815, Exch.) 2 C. & K. 101.

²⁸ Crim. Code, sec. 232.

²⁹ U. S. Rev. St. secs. 4083-8.

³⁰ U. S. Rev. St. sec. 5576.

³¹ Crim. Code, secs. 272, 273, 275.

³² Crim. Code, sec. 252.

³³ Crim. Code, sec. 1.

³⁴ Crim. Code, sec. 5.

³⁵ U. S. Rev. St. sec. 1750.

³⁶ *Code d' instruction criminelle*, art. 5; *ibid.*, art. 24.

³⁷ Liszt & Delaquis, *Strafgesetzbuch für das Deutsche Reich* (Berlin, 1914) sec. 4, no. 3.

³⁸ Löffler & Lorenz, *Das Strafgesetz* (Vienna, 1912) secs. 36, 235.

³⁹ Law of April 17, 1878, art. 7.

⁴⁰ I Franchi, *Codici e leggi del Regno d' Italia* (Milan, 1908) *Codice Penale*, art. 5.

⁴¹ *Criminal Code of Japan* (transl. by Becker, 1907) Bk. I, ch. I, sec. 3.

⁴² *Ibid.*, sec. 5.

In some countries a distinction is made between a crime and a *délit* which corresponds in a general way to our misdemeanor. For example, according to the French law, a Frenchman may be prosecuted in France for a crime committed in a foreign territory, but for a *délit*, committed outside of France, he may be prosecuted in France only if the act is punishable by the legislation of the country where it was committed. The French Penal Code defines "crime" as an offense punishable with an infamous penalty as death or imprisonment, while a *délit* is an offense subject to correctional penalties such as temporary imprisonment in a house of correction, fines, etc. Under the German law cited above a German who in a foreign country has committed an act defined as a crime or *délit* by the laws of the German Empire, is punishable provided the said act is punishable according to the laws of the place where it was committed. Under the Belgian law, mentioned above, a Belgian having committed a crime or a *délit* against a Belgian in a foreign country may be prosecuted in Belgium. Similar and in some cases slightly varying provisions are contained in the criminal law of Denmark, the Netherlands, Norway, Sweden, Switzerland, etc.

Considering, then, both the positive law and the views of the courts and legal authorities on this subject, it is apparent that American jurisprudence, while inclined on the whole to the territorial view of crime, nevertheless contains a substantial number of instances which indicate that extraterritorial jurisdiction of criminal law over nationals in foreign territory is strongly asserted. Moreover, the enactment of section 4 of the Webb-Pomerene law can be said to constitute a further step in this direction. The tendency in continental European countries has on the whole inclined more towards the extraterritorial theory of criminal law. Broadly speaking, therefore, it can be said that this latter view is in the ascendency. The great changes wrought by the war in matters relating to international commerce and trade, the higher moral and legal standards which are even now crystallizing under our very eyes, lead us to assume that the future development of this phase of criminal jurisprudence will follow along these channels. Some of the economic provisions contained in the covenant of the League of Nations also point in the direction that the principle of extraterritorial jurisdiction will be asserted more generally in the future than in the past.

UNFAIR COMPETITION IN EXPORT TRADE

We now come to the question as to what are "unfair methods of competition in export trade." Section 5 of the Federal Trade Commission Act does not define them but merely provides that "unfair methods of competition in commerce are hereby declared unlawful," and directs the Federal Trade Commission to prevent persons, partner-

ships and corporations, except banks and common carriers, from using such unfair methods. In sections 2 and 3 of the Clayton Act price discriminations and so-called tying contracts the effect of which may be to substantially lessen competition, or which tend to create a monopoly, are declared unlawful. Outside of these two practices declared unfair and unlawful by the Clayton Act the question of what is to be regarded as an unfair practice of competition is a matter for the Federal Trade Commission and the courts to decide. The Commission has thus far held certain practices to be unfair,⁴³ and it remains to be seen in how far it will be upheld by the courts in cases that may be appealed.

A number of practices which are held to be unfair are not unknown in the history of international trade, and it is more than likely that the passing off of goods, dumping, tying contracts, false and misleading labeling and advertising, and similar objectionable practices will become a frequent source of complaints as competition in trade and commerce among the nations of the world increases.

Already section 4 of the Export Trade Act has been invoked by the Federal Trade Commission in a formal complaint.⁴⁴ The complaint alleges that the Company with the effect of acquiring for its product any undue preference which might be given by the purchasing public in Mexico to condensed milk manufactured in Europe, has during the past year adopted and used on its cans labels which mislead Mexican purchasers into believing that the milk is manufactured in Europe, and which wholly conceal the fact that the milk is manufactured in and shipped from the United States.

Another complaint of the Federal Trade Commission⁴⁵ related to "unfair methods of competition in connection with the manufacture and sale of gold leaf by engaging in a concerted movement to unduly enhance the prices of gold leaf and to maintain such prices, through meetings, correspondence, etc., and by pooling their products and selling the same abroad at a less price than such products are being sold

⁴³ The following list covers trade practices in connection with which the Commission has issued orders to cease and desist: false and misleading advertising; urging refusal to accept advertising; bogus independents; bribery; commercial sabotage; exclusive agency contracts; exclusive dealing (full line forcing) contracts; defamation and disparagement; discounts; dumping; bribery of employees; enticement of employees; enticing customers; espionage; false and misleading labeling; license agreement; misbranding; misrepresentations; monopoly; passing off of goods; passing off of names; prosecution and persecution of alleged infringers of patents; price cutting by free goods and premiums; price discrimination; combinations for price enhancement; price fixing conditioned on non-use of competitor's goods; rebates and discounts conditioned on exclusive dealing; resale price fixing; selling certain goods at a loss and recouping on others; tying contracts.

⁴⁴ Complaint issued in June 1919 against Nestle's Food Co., Inc., New York. See *Annual Report of the Federal Trade Commission* (1919).

⁴⁵ Complaint No. 95 against the United States Gold Leaf Manufacturers Ass'n, etc. See *Annual Report of the Federal Trade Commission* (1918) 65.

in the United States at the same time, assessments being made to cover losses on foreign sales when made below cost, the effect being to curtail supply, restrain competition and enhance prices."

In this connection it is worth calling attention to the anti-dumping clause of the law of September 8, 1916.⁴⁶ Section 801 makes it a criminal act to import any article systematically into the United States at a price substantially less than actual market value abroad, *plus* certain charges, with the intention of destroying, injuring, or preventing establishment of an industry in the United States or of restraining or monopolizing the trade in the imported article. In addition to this prohibition of unfair price cutting, the law provides also against the practice known as "full line forcing." While the foregoing provisions relate to the import trade, they, together with the provisions of section 5 of the Webb-Pomerene law, indicate the consistent trend of our new foreign trade policy, which holds dumping, whether in connection with import or export trade, to constitute unfair competition.

However, in the course of commercial intercourse with foreign nations not a few cases of unfair practices arise from time to time which do not involve unfair competition, or regarding which it is very difficult to establish the element of competition. They constitute unfair trade practices rather than unfair practices of competition. It can be conceived very readily how American business, as such, is likely to be injured as the result of unscrupulous operations of individual wrongdoers. Ill-intentioned foreign competitors are likely to exploit cases of that kind to the disadvantage of American trade interests, all the more in the absence of adequate legal power on the part of our government to punish the commercial pirate and give redress to the foreign victim. Additional legislation, perhaps in the form of a compulsory licensing system for exporters, might prove a desirable means for safeguarding the goodwill of American export trade in this respect.

As stated above, the protection against unfair methods of competition effected outside of the United States under section 4 of the Export Trade Act presumably extends to *American* competitors only. But sooner or later the question is likely to come up in a concrete form, whether *foreign* competitors can effectively invoke the power of the Federal Trade Commission in cases involving unfair competition in international trade.

INTERNATIONAL PROTECTION AGAINST UNFAIR COMPETITION

In the circumstances it should be recalled that the United States is a signatory to the agreements of the International Union for the

⁴⁶Title 8, Unfair Competition.

Protection of Industrial Property.⁴⁷ At its meetings,⁴⁸ the Union took action for the protection of patents, trade-marks, trade names and indications of origin on goods. In addition, the agreement reached at the Washington meeting embodies the following two clauses which provide for the suppression of unfair competition:

"The subjects or citizens of each of the contracting countries shall enjoy, in all other countries of the Union, with regard to patents of invention, models of utility, industrial designs or models, trade-marks, trade names, the statements of place of origin, *suppression of unfair competition*, the advantages which the respective laws now grant or may hereafter grant to the citizens of that country. Consequently, they shall have the same protection as the latter and the same legal remedies against any infringements of their rights, provided they comply with the formalities and requirements imposed by the national laws of each state upon its own citizens. Any obligation of domicile or of establishment in the country where the protection is claimed shall not be imposed on the members of the Union."⁴⁹

"All the contracting countries agree to assure to the members of the Union an effective protection against unfair competition."⁵⁰

The term "industrial property" as covered by the agreement of the International Union for the Protection of Industrial Property is defined by the terms of the covenant to mean industrial property in its broadest sense, extending to all production in the domain of agricultural industries, e. g., wines, grains, fruits, animals, etc., and extractives, e. g., minerals, mineral water, etc.

The Washington agreement was signed by the following countries: Germany, Austria, Hungary, Belgium, United States of Brazil, Cuba, Denmark, Dominican Republic, Spain, United States of America, France, Great Britain, Italy, Japan, United States of Mexico, Norway, Netherlands, Portugal, Servia, Sweden, Switzerland, and Tunis. The United States has ratified the articles agreed to at the Washington conference, although it appears that up to the present time not all the signatories have done so.

Similar international agreements for the suppression of unfair competition have been entered into by foreign countries, but the United States is not a party to them, except in the matter of the present Peace Treaty of Versailles which imposes upon Germany the obligation

"to protect the trade of the Allies against unfair competition, and, in particular, to suppress the use of false markings and indications of origin, and, on condition of reciprocity, to respect the laws and judicial decisions of Allied and Associated States in respect of regional appellations of wines and spirits."

⁴⁷ Organized at Paris in 1883.

⁴⁸ Meetings were held at Paris in 1883; at Madrid in 1891; at Brussels in 1900; and at Washington in 1911.

⁴⁹ *Treaty Series* No. 579, art. 2.

⁵⁰ *Ibid.*, art. 10.

In connection with the protection against unfair competition guaranteed by the agreement of the International Union for the Protection of Industrial Property it is worth calling attention to certain provisions in the French and German laws. Section 282 of the German law⁵¹ for the suppression of unfair competition provides as follows:

"Whoever does not possess a principal place of business in the 'Inland' has a claim to the protection of this law only in so far as in the State in which his principal place of business is found, German manufacturers enjoy a corresponding protection, according to an announcement contained in the Imperial Gazette."⁵²

This section was enacted prior to the Washington convention of the International Union for the Protection of Industrial Property, and apparently conflicts with the unfair competition clause of that covenant. According to Finger⁵³ a conflict between domestic laws on the one side and foreign laws and international agreements on the other relative to unfair competition may take place under certain conditions. But Fuld⁵⁴ holds that in such cases the rule applies "*Lex posterior derogat priori*."

France has similar legislation. The French law relative to trademarks contains a provision⁵⁵ according to which foreigners are entitled to protection under that law provided the laws of the country where they are domiciled afford reciprocal protection.⁵⁶

Another French law⁵⁷ allows Frenchmen to invoke the more beneficial provisions of the agreement of the International Union for the Protection of Industrial Property. The law provides as follows:

"Frenchmen may . . . avail themselves to their benefit in France, Algiers and the French colonies of the provisions of the International Union for the Protection of Industrial Property signed at Paris on March 20, 1883, as well as the additional agreements and protocols amending said convention, in every case where those provisions are more favorable than the French law for the protection of industrial property rights and especially in so far as regards priority and exploitation of patents."⁵⁸

⁵¹ Enacted June 7, 1909.

⁵² The term "Inland" comprises the territory of the German Empire, the German protectorates, and the German consular circuits. Baer, *Das Gesetz gegen den unlauteren Wettbewerb* (Berlin, 1913) 399.

⁵³ Finger, *Reichsgesetz gegen den unlauteren Wettbewerb* (Berlin, 1910) 431.

⁵⁴ Fuld, *Das Reichsgesetz gegen den unlauteren Wettbewerb* (Hanover, 1910) 628.

⁵⁵ Enacted June 23, 1857.

⁵⁶ See Pouillet, *Traité des marques de fabrique* (Paris, 1912) 478ff.

⁵⁷ *Journal officiel*, July 4, 1906, 4538.

⁵⁸ (1906) 2 *Revue de droit international privé*, 121ff.

German as well as French courts have recognized the obligations imposed upon them under the agreement of the International Union for the Protection of Industrial Property. A leading case acted upon by the German *Reichsgericht* is *Eagle Oil Company of New York v. Vacuum Oil Company*.⁵⁹ In this case the question came up whether a stock company which had its main establishment in the United States could invoke the protection of the German unfair competition law even though said stock company had no main establishment in the German Empire. The *Reichsgericht* answered this proposition in the affirmative and thereby took the position that a foreign competitor of a German concern can find relief against unfair competition in a German court in compliance with the treaty agreement of the International Union.⁶⁰

Thus far no case has come up in an American court under this agreement. But if a foreign competitor, who is a citizen of a State which has ratified the agreement, should at any time seek protection against an American competitor under this agreement, we entertain no doubt that our government would be bound to afford him the protection provided for in the Washington agreement.⁶¹ Presumably such a foreign complainant might bring suit in an American court. The better procedure to follow seems to be to file a complaint with the Federal Trade Commission which after investigation and having established the facts in the case might issue an order to cease and desist and thus give relief to the foreign competitor.

In concluding I wish to emphasize the fact that the enactment of section 4 of the Webb-Pomerene law represents an important milestone in the annals of American commercial legislation. It marks in a very auspicious manner the entry of the United States as the leading commercial power of the world.

To all appearances trade competition among the leading commercial countries of the world will in the future become much keener than it has been in the past. It is a well known fact that in the past, in the wild scramble for trade, the standards of honest business were being disregarded more and more by all the various rival commercial nations. In the absence of any special regulations or legislation, it appeared as though a silent understanding prevailed in wide circles that export trade was subject to a code of business ethics widely at variance with the rules observed in domestic trade. What was frowned upon as unethical and poor business policy, if not illegal, at home, was condoned and winked at or openly espoused when foreign markets formed the basis of operations and foreigners were the competitors.

⁵⁹ See (1905) 60 *Entscheidungen des Reichsgerichts in Zivilsachen*, 217; (1897) 40 *ibid.*, 61; (1900) 46 *ibid.*, 125.

⁶⁰ The views of the French courts are discussed by Allart in (1906) 2 *Revue de droit international privé*, 121ff.

⁶¹ Art. 2, 10, *bis*

High-minded men of all nations have long observed with concern the growing tendency of modern international trade towards selfish exploitation, concession hunting, cut-throat competition and commercialistic practices of the most sordid type. Time and again in the course of years complaints have been voiced, retaliatory measures threatened, and more than once serious friction has ensued.

Now that the great war has quickened the public conscience the world over as never before with regard to the dangerous effects of commercial friction upon the political relations among nations, the time seems opportune for speeding efforts calculated to establish international trade upon definitely established principles of good faith. In these principles all law of commerce is rooted. In proportion as these principles shall be cultivated and developed in their inexhaustible and rich contents, the institutions of the law of commerce will prosper and give to commerce the humane imprint which shall always constitute the emblem of genuine civilization and enlightenment. On the other hand false standards and objectionable trade practices will inevitably sap the lifeblood of commerce among nations.

The whole subject discussed in the foregoing represents comparatively new ground. The efforts made up to the present time by individual states and by joint action among nations for the suppression of unfair competition in world trade are chiefly of a tentative character. However, the movement has been initiated successfully and it is to be hoped that out of it will develop a firmly established and workable machinery for promoting and safeguarding trade and commerce among the nations of the world.