4 Making the World Safe for Competition

Despite the retreat from antitrust prosecution during the war, the U.S. government did not abandon the fight against international cartels. Once Allied victories in 1942 and 1943 made total victory seem probable, Washington began to think seriously about the shape of the peace settlement, a process that involved economic as well as political issues. Among other matters, Washington sought to prohibit or at least limit international cartels, negotiating with other governments for restrictions on these organizations even while petitioning American courts to outlaw them unilaterally.

A Divided Consensus

Although the cartel issue failed to excite the public as a whole, vigorous debate on the matter did proceed within a more limited circle. Interest centered among New Dealers who hoped that the subject would revive their political fortunes and business groups that presumed to speak for private industry as a whole. All claimed to oppose cartels, but they justified their positions in very different ways.

After Arnold's departure from the Antitrust Division, his staff continued their missionary work against international cartels, an activity facilitated by the suspension of many of the bureau's other labors for the duration of the war. Wendell Berge published *Cartels: Challenge to a Free World*; Corwin Edwards drafted a broadly circulated Senate report on the subject; and Jo-

seph Borkin and Charles Welsh wrote *Germany's Master Plan*, perhaps the most-cited book on international cartels.[1] The division also provided many of the witnesses for two sets of widely publicized Senate hearings on international cartels.[2] Although the emphasis differed from person to person, all members of the Antitrust Division would have agreed with Borkin and Welsh that "during the past twenty years, this cartel device has been the first line of German assault. Not all cartels were controlled by German concerns. Yet, because restrictions in other countries served the interests of Germany, every Dutch, English, or American monopolist who signed a contract or instituted a policy limiting his output added to German power."[3]

New Dealers seized on the issue. Most disapproved of Roosevelt's wartime rapprochement with business and disliked the way large companies had identified themselves with mobilization. Cartels offered a way to tie the American business community to the fascist enemy and to identify economic reform with the Allied cause. In 1942, the *New Republic* reported, "While the American people were moving toward an alliance with the democracies, great sectors of American industry were strengthening their ties with fascist Germany" through cartel agreements. These accords, the magazine argued, meant that "American industry believes that either the Axis will triumph or there will be a negotiated peace." The situation was particularly disturbing because "sooner or later businessmen who ally themselves with fascism become fascists; and once fascism captures economic control, then a fascist coup must follow to seize political power."[4] Two years later, when Allied victory seemed more certain, the *New Republic* commented, "We are at war with the fascist international. But when we have finally achieved victory, we shall still have to face the big Corporate International of cartels."[5] Vice President Henry Wallace declared, "The international monopolists should be conspicuous by their absence at the peace table."[6] Columnist I. F. Stone of *The Nation* described the domestic implications that he saw in the spread of cartels: "The cartel at home means the limitation of production. Limitations on production means limitations of jobs, and without full employment there will be rich soil for fascism after the war. No doubt these same big producers will cultivate it."[7]

Comparable sentiments echoed in liberal papers in the provinces. The *Boston Globe* asserted that "the cartel is neither more nor less than economic totalitarianism."[8] Josephus Daniels—an old Progressive Era reformer, editor of the *News and Observer* of Raleigh, North Carolina, and a friend of the president—wrote to Roosevelt, "I think unless we can destroy monopoly,

monopoly will destroy democracy. The first thing to do is to destroy the power of the German trusts."[9] The *Capital Times*, published in Madison, Wisconsin, asserted, "There is no longer any serious disagreement about the nature of the cartel system, how, in order to preserve its power and control over world resources, it found itself in open partnership with Hitler's totalitarianism; how it backed him in his rise to power; how it helped him prepare Germany for war and paralyze the industrial capacity of potential enemies such as the United States."[10]

Next to these shrill attacks on the political implications on cartels stood indictments of their economic effects. Corwin Edwards was perhaps the most diligent critic in this field. He wrote, "The typical purpose and effect of cartelization is to set prices higher than would prevail under competition, to reduce them as seldom as possible, and to raise them further wherever opportunity permits."[11] Cartels inevitably gouged consumers, limiting overall consumption, output, and employment. By keeping prices high and guaranteeing market share, they reduced incentives for efficiency and permitted high-cost producers to survive. Overall, cartels kept society from fully developing its economic resources.

Business groups not only failed to rebut attacks on international cartels but in many cases seconded them. The National Association of Manufacturers, a relentless critic of the New Deal, declared that it "stands squarely against cartels of every description, both private and governmental." This statement did contain an important reservation, urging, "Until the government of the United States is able to make such anti-cartel agreements [with other countries], United States foreign traders should be encouraged by government to operate in other countries in accordance with the internal laws and business practices of such countries, and thus to participate in world trade on the same basis as nationals of other countries, without harassment from their own government."[12] Because most other governments condoned cartels, this was a major loophole. The National Association of Manufacturers' attack on cartels represented, in part, a public-relations ploy. The association's 1945 annual report crowed, "At a time when professional business baiters in and out of government were using the world 'cartel' as a shibboleth, NAM's announcement of its opposition to cartels won for industrial management wide public approval."[13] Because most American firms did little business abroad and had no dealings with international cartels, denunciations of these organizations cost little while generating good publicity and blunting a line of attack against industry.

Yet most American businessmen did have genuine objections to cartels. These organizations, they believed, provided avenues through which government could interfere in the affairs of private firms. Certainly that was the lesson they took from the National Recovery Act of 1933. Although businessmen wanted stable markets and prices, they refused to subordinate themselves to Washington to achieve these ends—at least not as long as Franklin Roosevelt was president. Businessmen reserved their particular ire for government-sponsored cartels. Jasper Crane, a vice president at DuPont, a firm deeply involved in international cartels, declared, "The worst type of cartel is a government cartel because private cartels in time destroy themselves, but there is no means for eradicating the government variety. Its manifestations, too, are much worse than private arrangements, for they often involve manipulated exchanges, subsidies, embargoes, excessive tariffs."[14] A 1944 convention of businessmen devoted to foreign trade and sponsored in part by NAM resolved, "Intergovernmental commodity agreements in our foreign trade [cartels] would require a degree of internal control and regimentation which would threaten the preservation of our competitive system even in domestic commerce."[15]

In contrast, New Dealers believed that government-sponsored cartels could serve useful purposes. Thurman Arnold himself wrote, "The market must be free from the *private* seizure of power. *Public* seizure of power over the market by various groups will always be a matter for debate in particular cases. Responsible economists will point out that this or that organization needs special protection. Other economists will heatedly contest. However, no one contends that private persons, without running the gamut of our system of checks and balances, should seize power over the market in a *sub rosa* manner."[16]

Distinguishing between government and private cartels was easier in theory than in practice, however. Ostensibly private cartels, such as that for steel, operated with the implicit support of many governments. Strictly private groups could manipulate government programs for their own ends. Cartels tended to create tight relationships between business and government. Public officials naturally wanted to know what major cartels were doing, and cartelists desired government support for their plans. The situation encouraged each to take the other's concerns into account when setting policy. In the aftermath of the New Deal, however, the American business community and government lacked the mutual confidence on which such cooperation must rest.

The presumption against cartels demonstrates how dissenters from the antitrust compromise balanced out each other. A lot of businessmen were at least willing to overlook private cartels, and in many circumstances reformers would tolerate the government-sponsored variety. Reformers, however, opposed private cartels and could utilize the broad public suspicion of these organizations to block them, whereas business groups could do the same against government cartels.

A few Americans resisted the anticartel clamor, but they were the proverbial "exceptions that prove the rule." Ervin Hexner, who taught economics at the University of North Carolina at Chapel Hill, wrote two books on the subject: a study of the steel cartel and a general survey of international cartels. In both he concluded that cartels, although open to abuse, could work to the benefit of society as well as members.[17] A professor at the Harvard Business School, Anton de Haas, issued a pamphlet defending cartels in the terms used by Europeans before the war, asserting that they promoted economic stability and offered a mechanism for industry-wide planning.[18] Gilbert Montague, one of the country's leading corporate lawyers, contended that attacks on cartels ignored the realities of international commerce, as well as the practices of the United States itself, which tolerated many deviations from the ideal of competition. He asked whether Washington was going "to coerce Great Britain, Soviet Russia, China and all the rest of the world to adopt the competitive system of the United States, with all the refinements added by successive [antitrust] decisions of the Supreme Court?"[19] Hexner was a Czech émigré who had represented his country's steel producers in cartel talks before fleeing the Nazis; de Haas was a Dutchman who had extensive experience with international shipping cartels; and Montague had devoted his professional life to defending companies from antitrust prosecutions and had helped draft the NRA and several of its codes. Little in these men's experience spoke to the average American, or even to the average government official or corporate executive.

Broad-based enthusiasm for cartels did exist abroad. Britain, the chief ally of the United States, was the main conduit through which Americans received these sentiments. A State Department analysis noted in 1943, "Most British governments in the 'twenties and 'thirties actively encouraged the formation of private monopolistic combinations and associations." "Competition," the report continued, "no longer serves as the supreme regulatory economic force in the United Kingdom, for monopoly shares a condominium with it."[20] This had occurred chiefly under Conservative governments,

but the opposition Labour Party thought not in terms of antitrust but of nationalization and government planning. In conversations with British officials, Americans "found little interest or concern over the cartel problem. In fact [John Maynard] Keynes stated that such firms as Imperial Chemicals had worked to increase volume at lower cost and that the most backward industries were those in which they had hundreds of small and independent operators, as in the textile and mining fields."[21] At another meeting, a British official told his American counterpart, "He believed a certain number of cartels to be inevitable and that the United States would be forced to accept them as our economy ceased expanding."[22] Privately, some in London dismissed U.S. attacks on international cartels as a "general witch-hunt."[23]

British industrialists aggressively defended cartels as a positive good. A paper entitled "A National Policy of Industry," signed by 120 leading businessmen, concluded, "Where similar products are manufactured in different countries, these international agreements [cartels] . . . are essential to keep production equitably allocated between countries and companies, in tune with the maximum world demand attainable. They exercise a stabilizing influence against violent fluctuations and dislocating shifts of the currents of trade, and thus have an essential part to play in postwar reconstruction."[24] The strongest support for cartels came from Imperial Chemical, a firm deeply involved in them. Lord McGowan, its chairman, wrote in 1943, "The era of unrestricted competition was one of strife. It meant certainly the survival of the fittest, but there were too many weak who went to the wall. The element of competition must be present in every healthy economy, but there are few today who would recommend a return to unrestricted competition as a *basis* for our economy." He continued, "If the principle of agreement is desirable at home, it is essential in a world market where all the ordinary problems of supply and demand, prices and raw materials, are complicated by national jealousies, currency fluctuations, political changes, and tariff barriers."[25]

These arguments generated little enthusiasm among American businessmen. In 1943, McGowan said to Eric Johnson, the president of the U.S. Chamber of Commerce, who was then touring Britain, "I see no hope for collaboration between British and American business unless the United States repeals its Sherman anti-trust act."[26] It immediately became clear that the Briton's usually sharp diplomatic skills had deserted him, for the surprised Johnson replied, "No American can intelligently and sincerely promise you any cooperation in any system of worldwide cartels."[27] Johnson's

answer in part reflected political realities—Congress simply was not going to repeal the Sherman Act—but it was also in accord with the opinions of most American businessmen. DuPont had extensive ties with ICI, and its top officers liked and respected McGowan, but their private correspondence indicates that they did not agree with him on this subject. One told McGowan, "If we remove the element of competition as it applies to large companies and combines, I am wondering if there is left to the public sufficient protection against high prices which might result either from high costs or high profits on the one hand, and, on the other, I am wondering if there is left to those large companies and combines that spur to great efficiency and effectiveness in their efforts which is furnished so well by the fury of the competitive storm and the profit motive."[28] These sentiments may seem bizarre in light of DuPont's extensive involvement in international cartels, but they are presumably sincere, because they appear in private correspondence. Throughout the 1930s, American businessmen had based their opposition to New Deal reforms on appeals to competition and the free market, which they claimed made government regulation unnecessary. Most of them had internalized these arguments. Although DuPont's executives could rationalize their own involvement in cartels, they could not bring themselves to defend these organizations in principle.

The differences between American and British business on this subject reflected experience as well as ideology. In Britain, government and business had cooperated fairly smoothly in the 1930s, often through cartels, whereas in the United States, the two had been in conflict over the New Deal. The impressive expansion of the American economy during the war gave U.S. businessmen confidence that peace would bring further opportunities. Cartels, most often the product of hard times, did not seem that useful to them. In contrast, the war cost Britain dearly in foreign markets and investments, and its businessmen were less sanguine about the future than their American counterparts. Cartels might help British industry hold its own in a difficult environment.

The Antitrust Revival

At the start of 1943, the antitrust drive seemed dead. The military had forced the Justice Department to suspend most cases, and the president had removed Thurman Arnold, the head of the Antitrust Division, sending him to the federal appeals bench. The subject appeared destined for an extended

period of neglect, as had been the case during and after World War I. Antitrust prosecution, however, enjoyed a remarkable revival over the next few years—a revival centered, in part, on international cartels.

External factors contributed greatly to the change. When Washington had suspended prosecutions during early 1942, the Axis powers were advancing on every front. Mobilization had absolute priority. Two years later, the situation was different. In 1944, the Allies won a series of extraordinary victories—successfully landing armies in Normandy; liberating France, Rome, White Russia, and the Balkans (obliterating several German armies in the process); crippling the German Luftwaffe in air campaigns; and destroying Japanese naval power in a string of encounters in the Pacific. Victory seemed only a matter of time, and so military considerations weighed less heavily on decision makers.

The 1944 presidential election changed matters as well. President Franklin D. Roosevelt, running for a fourth term, sought to mobilize the New Deal coalition that had given him victory thrice before; suspicion of big business was one of the issues that held this coalition together. Attacks on international cartels allowed the president to emphasize his enduring commitment to New Deal reform. In his 1944 State of the Union address, Roosevelt enumerated an eight-point economic "bill of rights" that included "the right of every businessman, large and small, to trade in atmosphere of freedom from unfair competition and domination by monopolies at home or abroad."[29] In a September 1944 letter, addressed to Secretary of State Cordell Hull but intended for public consumption, the president declared, "Unfortunately, a number of foreign countries, particularly in continental Europe, do not possess . . . a tradition against cartels. On the contrary, cartels have received encouragement from some of these governments. Especially is this true with respect to Germany. Moreover, cartels were utilized by the Nazis as government instrumentalities to achieve political ends. The history of the use of the IG Farben trust by the Nazis reads like a detective story. . . . Cartel practices which restrict the free flow of goods in foreign commerce have to be curbed."[30] While campaigning, the president assured audiences that "small business will continue to be protected from selfish, cold-blooded monopolies and cartels. Beware of that profound enemy of the free enterprise system who pays lip-service to free competition—but also labels every antitrust prosecution as 'persecution.'"[31]

The Antitrust Division and its leader, Wendell Berge, ably seized on the available opportunities. Berge took over the bureau in the fall of 1943, after the brief tenure of Tom Clark, who moved on to head the more prestigious

Criminal Division of the Justice Department. Berge, a veteran of antitrust prosecution who had worked on the division's staff for over a decade, contrasted sharply with the dramatic, irreverent Thurman Arnold. Low-key and thoroughly conventional in his manner, he neither made the impression nor aroused the ire that Arnold had. Still, he was perhaps a better litigator, possessing the tenacity and mastery of detail needed to fight and win complex antitrust cases, which often involved thousands of documents and dozens of witnesses. Moreover, by 1943, Arnold had made himself unpopular in Washington, and so Berge's mild manner probably benefited his cause. Like Arnold, Berge was from west of the Mississippi—in this case Nebraska, where Berge's father had been a leader of the populist wing of the Democratic Party, even running (unsuccessfully) for governor. Wendell inherited his father's dislike of big business, which both believed had reduced Nebraska to an economic colony of the Northeast. This view shaped Wendell Berge's understanding of international as well as domestic conditions. Over and over again he denounced international cartels as devices of economic imperialism.

A suit against DuPont and Imperial Chemical Industries of Britain marked the resurgence of the Antitrust Division. DuPont and ICI had a broad alliance dating back decades. As early as the 1890s, the American firm, then almost solely a producer of explosives, had agreements with Nobel Explosives, one of ICI's forerunners, dividing markets and exchanging patents. As the firms expanded during and immediately after World War I, branching into new lines of business, they systematically broadened their alliance, a process that culminated in the 1929 Patents and Processes Agreement. This ten-year accord, which the signatories renewed in 1939, effectively eliminated competition between the two firms. Under it DuPont received exclusive rights to almost all of ICI's patents in the United States, and ICI to almost all DuPont's patents in the British Empire.[32] At regular intervals the two firms would calculate the value of the exchanges and, if they did not balance out, arrange compensation. Because the accord rested on patent rights, DuPont's attorneys believed it would survive an antitrust challenge. In third markets where both firms did business, the two operated through jointly owned subsidiaries, the most important of which were Canadian Industries Limited, Duperial of Argentina, and Duperial of Brazil. The Patents and Processes Agreement, however, did more than simply restrict competition. In the 1920s, ICI and DuPont were relative newcomers to many fields of the chemical industry, fearful of resurgent German com-

petition personified in IG Farben. Because Farben's unmatched research establishment constituted its foremost competitive weapon, DuPont and ICI hoped by pooling their patents to put themselves in a better position to deal with the Germans.

By the early 1940s, the Antitrust Division had turned its attention to these arrangements, which it found distinctly sinister. DuPont had always been something of a bête noire among the foes of monopoly, who were suspicious of the firm's size, its extensive domestic and international contacts (which included a predominant stake in General Motors), and the strongly anti–New Deal politics of the DuPont family. Two members of the Antitrust Division described the company as "the nearest facsimile of economic feudalism in this country." [33] A 1942 Justice Department memo asserted that DuPont "has been steadily engaged in building up a series of alliances on a worldwide basis, the logical conclusion of which would be to destroy commercial competition, not only among the great chemical companies, but likewise among the industries directly dependent upon these companies for supplies." DuPont's agreements with ICI "constitute market-sharing arrangements masquerading as arrangements for cooperation in scientific research." Moreover, the accord was merely one part of a larger chain of alliances. "When Imperial Chemical Industries makes an agreement with IG Farben, Anglo-Persian [Oil] or Solvay [Chemical of Belgium]," the memo noted, "it must introduce into this agreement restrictions which adequately recognize and protect its commitments to DuPont."[34] As another memo put it, "Through its relationship with ICI, DuPont has been bound indirectly to other cartels in which ICI is a member"—and Imperial Chemical was party to about eight hundred agreements.[35]

The Justice Department filed suit against ICI and DuPont on January 6, 1944, seeking to terminate their alliance. Wendell Berge stated publicly, "The cartel system which has plagued us with shortages of critical material, lack of know-how and industrial skills during war, and unemployment and idle plants during peace, must not be disregarded in this country." ICI and DuPont, he claimed, "combined to control the operations of the chemical industry throughout the world for their special purposes. They treated the world as a kind of colonial empire to be divided up between them and cooperated to eliminate the competition of small manufacturers." He concluded, "The antitrust laws are going to be enforced wherever these arrangements restrict or affect American trade and commerce. I hope that the bring-

ing of this case will serve as a warning to American and foreign monopolies."[36]

DuPont and ICI denied the allegations. Walter S. Carpenter, DuPont's president, engaged in the sort of semantic quibbling common among firms accused of cartel ties, declaring, "The DuPont Company denies that it is now or ever has been party to any cartel arrangement using the term cartel in its very generally accepted sense. The DuPont Company has for years had an agreement with Imperial Chemical Industries providing for a mutual opportunity to acquire patent licenses and technical and scientific information relating to the chemical industry." He "asserted unequivocally that this agreement has been of the greatest public benefit in giving to the American public products and processes which have materially raised the standard of living. Even more importantly in connection with the present war effort, the knowledge resulting from this agreement and the products made available as a result of it have been of inestimable value." Carpenter concluded trenchantly, "The existence of the agreements which are the subject of the present attack have never been concealed. Copies have been in the possession of Government agencies for approximately ten years. . . . With the government having had full possession of these agreements over a considerable period of time, the action of the Department of Justice at this particular time in our war effort is difficult to understand."[37]

ICI made a far angrier response. Although American businessmen were accustomed to attacks from government officials, their British counterparts were not. Lord Harry McGowan, ICI's chairman, issued a statement "denying utterly and totally any suggestion that any action of ours during the war and indeed before the war was of any other character than designed to assist both the British and Allied governments by any means within our power."[38] To colleagues within ICI he sent an emotional letter pointing out that, while serving in the British military against Germany, one of his sons had been seriously wounded, a son-in-law captured, and another son-in-law killed.[39]

The Antitrust Division nevertheless won the publicity battle. Just two days after filing the suit, Berge wrote to friends, "We hit the jackpot with this DuPont–ICI case. Front page clippings are rolling in from everywhere."[40] A few were critical. The *Philadelphia Inquirer* noted that DuPont and ICI were "deeply involved in war production, busily turning out millions upon millions of dollars worth of arms and ammunition for an Allied victory. On what strange principle are the labors of the heads of these companies now to be

diverted from the job of helping to win the war to a defense against charges of promoting industrial monopolies?"[41] More typical, however, was a piece in the *Lincoln* (Nebraska) *Star.* It declared that the cartel "has no place in Nebraska's 'way of life.' It should have no place in the 'way of life' of the American people, the British, the French, the Germans, or any other race."[42]

The suit enjoyed a less enthusiastic reception on the other side of the Atlantic. ICI was Britain's largest war contractor, and the prosecution naturally concerned the government there. London did not share the Justice Department's aversion to cartels, and it feared that the case might damage relations with the United States. A memo from the British Foreign Office to the embassy in Washington noted, "We realize that the statement of the Assistant Attorney General [Berge] in advance of legal proceedings is normal American practice with a political object. None the less, we think it would be salutary if you could draw to the attention of Mr. [Secretary of State Cordell] Hull or the Attorney-General [Francis Biddle] to the effects upon ourselves of Mr. Berge's public allegations which we believe to be unfounded as far as ICI are concerned, that they have traded with the enemy or hindered the war effort. . . . A measure of the mud thrown at cartels will certainly stick to us, for even the friendly *Chicago Sun* has now contrasted the British commercial system ridiculously alleged to be founded upon cartels, unfavorably with the American. We feel that as a partner of the United States in a common effort we should be spared statements by the Administration that provoke this mud-slinging."[43]

ICI and DuPont had different strategies for dealing with the suit. The American firm was inclined to fight. Although the company could make a strong case for delaying prosecution for the duration of the war because of its extensive defense work, a report by Lord Halifax, the British ambassador, noted, "DuPont are [*sic*] anxious that no steps should be taken by anyone to postpone hearings of suit at this moment. . . . They want to answer the charges before court and at the bar of public opinion rather than sheltering behind delaying actions." Halifax also noted, "They are not mentioning the word cartel in any of their publicity and are most anxious that ICI's publicity should be on similar lines."[44]

In contrast, ICI sought delay. Restrictions on travel made it difficult to send officers to the United States. As a wartime security measure, the U.S. government read all cable traffic into and out of the country, raising the possibility that the Justice Department might have access to communications between ICI and its lawyers. Manpower, however, constituted the chief prob-

lem. Lord McGowan noted in April 1944, "DuPonts [*sic*] . . . has had fifty people working on this answer [to the antitrust charges] and nothing else for the last few months. It was impossible for ICI to adopt the same procedures. Very many of their staff had been loaned to Government Departments and the whole burden of the work would have been thrown upon key men, who were already fully engaged in war work."[45] ICI wanted to postpone not only the trial but also the formal answer to the charges, which the defendant would normally file soon after the indictment. The British government supported ICI, asking Washington to postpone both the trial and the formal answer until the war was over.[46]

The American service departments soon intervened, invoking their authority to postpone antitrust cases. They acted both out of deference to the British and to protect DuPont, a vital supplier of munitions. In April 1944, Secretary of War Henry Stimson wrote to Attorney General Francis Biddle, "As of November 30, 1943, DuPont and its subsidiary Remington had prime contracts with the Army totaling $1,431,966,504. In addition, it was operating for the government nine ordnance plants, which were constructed at a cost of $580,000,000. . . . It seems clear that interference with the war effort would be the inescapable result of trial of this case at this time." Stimson requested the Justice Department to delay not only the trial but also the formal answers by the defendants to the charges against them. "Counsel for the defendants," he wrote, "are positive in stating that the preparation of an answer will consume an additional three or four months, in consultation with key personnel of the defendant organizations."[47] The navy supported Stimson's request. James Forrestal, the acting navy secretary, stated the case for ICI, noting that it "is the largest supplier to the [British] government or to government contractors of military explosives, small arms ammunitions and components, high octane aviation fuel," and other vital materials; "that all its plants are operating to full capacity on direct war work or essential civilian requirements; and that apart from its own plants it has constructed and is now operating for the [British] government a series of agency factories, construction of which has involved an expenditure of over £60,000,000." Even more than DuPont, ICI was stretched thin and could not afford the time that a trial, or even making a formal answer, would consume.[48]

The case quickly became the subject of government infighting. According to its 1942 agreement with the military, the Justice Department had no choice but to postpone the trial. It had specifically ceded this authority to

the service chiefs, who had exercised it on several previous occasions. The answer was another matter, however. This subject had not come up before. Although the antitrust laws allowed the Justice Department to file cases in either criminal or civil court, it usually went through the criminal courts because conviction there involved more severe penalties. The suit against ICI and DuPont, however, was a civil one—perhaps in deference to a foreign defendant or because the patent issues involved were convoluted. Yet the formal answer to charges in a civil case is far more important than in a criminal one. In the latter, the answer consists of a simple denial, whereas in a civil action it must squarely address the charges, giving reasons why they lack merit. If the presiding judge considers the answer in a civil case unsatisfactory, the bench may issue a summary judgment for the plaintiff. The 1942 agreement between the military and the Justice Department allowed the former to suspend "investigations, suits, and prosecutions," but heretofore the secretaries of war and the navy had intervened only to postpone actual trials, not answers.[49] But as one American official noted, "Previous cases stayed had all been criminal."[50] The Justice Department had no doubt about the matter. Attorney General Biddle wrote to Stimson, "I do not believe that our arrangement . . . is correctly applicable to pleadings on motions."[51]

The responsibility for mediation fell on President Roosevelt, who was already overworked. The war was entering a critical phase with the Normandy invasion at hand. He also had to plan his upcoming reelection campaign, and his health was poor. Both sides lobbied the president hard. Biddle told Roosevelt, "The preparation of pleadings and motions consumes the time of private counsel. It does not consume the time of executives and employees who might be engaged in war production." He could not "see how it is possible to determine whether a trial of this case will seriously interfere with the war effort until the nature of the defense is known. It may be, for instance, that after the defendants have filed their answers we may be able to dispose of the case on summary judgement."[52] Biddle also assured the president privately that he had intelligence that DuPont and ICI had almost finished their answers.[53]

Partisans of the companies denied Biddle's arguments. Lord Halifax stated, "It is obvious that the answer will have to be considered with the greatest care, since the judgement might alone depend on these pleadings. I am informed that as many as 100,000 documents may have to be examined in the preparation of the answer, and that some of the matters complained

of go back as far as 1897; that the territory concerned comprises a large part of the world; and that the problems involved include the most complex questions of patent law, thus going far beyond the Sherman Act. To unravel the true facts of the case will thus be a gargantuan task, involving months of labor. Imperial Chemical Industries obviously cannot afford to let these matters go by default, and yet so many of their staff have been lent to government departments, that the whole burden will be thrown upon key men who are already engaged on vital war work."[54]

In May, the president tried to refer the matter to James Byrnes, his "mobilization czar." Byrnes hesitated, however, reminding Roosevelt, "At the cabinet meeting last Thursday you advised Biddle and Stimson that you had decided the case in favor of Biddle. . . . I suggest that, having decided it, the best thing to do is to let your decision stand."[55] The president did not follow this advice—he apparently refused to consider as binding what seems to have been a snap decision. Nevertheless, he knew that only he could reverse himself. Roosevelt did extract an opinion from Byrnes, who when pressed supported the companies and the military. Byrnes wrote, "The lawyers must get from the executives the facts upon which to base an answer. . . . Even allowing for exaggeration, it seems to me, in the case of each company, lawyers would require the constant assistance of executives in order to explain documents and transactions referred to in such documents." Moreover, Byrnes pointed out that DuPont was deeply involved in the atomic bomb project, code-named S-1.[56] Another, unsigned memo transmitted to Roosevelt reported that the head of the project, General Leslie Groves, "states work of DuPont's executives is key to the success of the S-1 and any diversion of their time would be disastrous."[57]

Roosevelt finally resolved the matter in mid-June. He wrote to Lord Halifax, "It seems to me that the Attorney General's view is appropriate and I have accordingly so advised him." He did order Biddle to extend the deadline for filing the answers to July 31, 1944, and to permit the defendants to amend their answers later if they so desired, which protected the companies against a summary judgment.[58] The motives for Roosevelt's decision are unclear. He may have agreed with Biddle that by delaying the filing of an answer, the government would set a bad precedent. He may have concluded that, with the success of the Normandy landing on June 6, the needs of mobilization no longer overrode the antitrust laws. The positive public reaction to the announcement of the suit in January could have convinced Roosevelt, a thoroughly political creature, that the case was good politics.

The president may have seen the suit as a way to strike back at the DuPonts, who had been particularly fierce critics of him and the New Deal. Or he may simply have concluded that, after so many defeats, the Antitrust Division deserved a victory. In any event, though it caused inconvenience, the preparation of answers does not seem to have seriously hampered DuPont's or ICI's contributions to the war effort.

President Roosevelt's decision had consequences far beyond the filing of a few documents in court. His show of support heartened the Antitrust Division and made it clear that prosecutions would indeed resume after the war. A few days after Roosevelt's decision in the ICI/DuPont case, Attorney General Biddle asked for permission to proceed with trials in two other cases involving international cartels. The first concerned an agreement among ICI, DuPont, Rohm & Haas of Philadelphia, and IG Farben governing the production and sale of certain plastics, and the second sought to overturn accords between Bendix and European firms involving the rights to various aviation instruments. Biddle insisted that in both suits the prosecution would need only a couple of weeks to present its case. The attorney general argued that, in the plastics case, the war had not ended but had merely suspended agreements, and these "would require that Rohm & Haas and DuPont withdraw and stay out of the important Latin American market upon the termination of the war." It was necessary, therefore, to invalidate them as soon as possible. In the Bendix case restrictions had actually continued in force during the war, although because the U.S. government purchased the entire output of the aircraft industry they had little impact. Nevertheless Biddle wanted to act before the end of hostilities to free "this industry now of artificial, uneconomic and unlawful limitations in order to insure efficient preparation for the postwar development of the aircraft industry in this country." In both instances, the president gave the Justice Department authority to proceed.[59] The cases themselves were not that important—in fact, the courts eventually decided against the Justice Department in the plastics suit[60]—but they offered more proof that the vigorous prosecution of cartels would proceed.

The Antitrust Division also went after Webb-Pomerene corporations. These organizations, authorized in 1918 by Congress, allowed American firms to cooperate in export markets. During the 1920s and 1930s, U.S. companies had often negotiated with international cartels through Webb-Pomerene corporations, a practice that the Federal Trade Commission, the regulator of these organizations, had tolerated. In March 1944, however, the Justice Department filed suit against the American Alkali Export Association

(Alkasso), the California Alkali Export Association (Calkex), and Imperial Chemical. The two American organizations were Webb-Pomerene companies that, between them, managed almost all exports of synthetic alkali from the United States. They had agreements with ICI that allocated each certain foreign markets and divided others according to a fixed ratio, providing for joint sales agencies in shared markets. As was the case with the alliance between DuPont and ICI, this accord formed part of a larger cartel structure. ICI had agreements with most of the world's other producers of alkali, of which the Belgian firm Solvay was the most important, dividing export markets. Invariably these accords took into account the interests of Alkasso and Calkex.

The defendants contended that these arrangements did not violate the law because they did not affect the American market. According to the FTC's "silver letter," which defined policy toward Webb-Pomerene corporations, these organizations could legally enter into cartels apportioning foreign markets as long as the agreements did not affect conditions at home.[61]

The Justice Department responded in two ways. Relying on information gathered by the Federal Trade Commission, it claimed that the alkali agreements *did* affect the American market. The accords, it claimed, implicitly banned imports. Shipments of foreign alkali to the United States were virtually nil despite good prices and a tariff that was not prohibitive. Moreover, Alkasso and Calkex allegedly stabilized prices in the United States by disposing of surplus alkali abroad. Alkali (bicarbonate soda, soda ash, and caustic soda) is a basic industrial commodity used to produce soap, glass, textiles, and much more, and the price of such commodities usually fluctuates with the business cycle. A special factor ought to have made alkali prices particularly volatile. Many American firms manufactured alkali through the electrolytic process. Alkali, however, was merely a by-product of this process—the chief output was chlorine. To a large degree, the output of alkali depended on the demand for chlorine, a situation that made it difficult for producers to adjust output to demand. Despite these factors, alkali prices had changed little since 1931. The Justice Department attributed the situation to Alkasso and Calkex. Both sold abroad for prices lower than those in the United States, often much lower, and would at times maintain stocks far larger than ongoing business required. The Antitrust Division argued that Alkasso and Calkex siphoned off "excess" supplies of alkali to keep domestic prices stable.[62]

More important, the Antitrust Division asserted that Webb-Pomerene associations could not legally take part in foreign cartels, even if they did not

touch the American market. Wendell Berge argued, "The Webb Act was intended to strengthen American competition against foreign cartels. It was enacted by Congress in the belief that it would provide a means of assistance to American business in combating the power of foreign cartels dominating world markets."[63] The FTC's "silver letter" was simply wrong. To support its position, the Antitrust Division extensively investigated the legislative history of the Webb-Pomerene Act, finding much to support its claims.[64] Berge reported that Senator Pomerene had stated in floor debate on the measure that "there is nothing in this bill authorizing the division of territory abroad."[65] The Antitrust Division's case threatened not just Alkasso and Calkex but any Webb-Pomerene company that participated in an international cartel.

This argument seemed to challenge the Federal Trade Commission. The FTC had authority over Webb-Pomerene companies, and it had actually provided the Antitrust Division with much of the information on which the alkali suit rested. Yet the FTC had no role in the prosecution, a fact that according to some sources irritated the commission.[66] The Antitrust Division also failed to check with the FTC before challenging the "silver letter." Although the Antitrust Division may simply have been overeager, it could have been trying to push the FTC out of antitrust enforcement. Because both agencies had authority in the field, rivalry was natural. The permissive attitude displayed by the commission during the 1920s and 1930s toward Webb-Pomerene associations may also have convinced the Antitrust Division that the FTC was "soft" on international cartels. The commission had few ways to respond to the challenge, but in the summer of 1944 it did, on its own authority, launch a series of studies of international cartels that eventually yielded several substantial monographs that in some cases would shape antitrust policy.[67]

The alkali case itself, like most other antitrust prosecutions during the war, remained in limbo until the conflict ended. Yet just by filing it, the Antitrust Division raised doubts about Webb-Pomerene associations. Companies preparing for the postwar era were unlikely to adopt plans involving such organizations until the courts resolved these legal questions.

The Cartel Committee and Postwar Economic Planning

The attack on cartels also advanced under the banner of free trade. Political and economic considerations led the U.S. government to support measures to promote international trade after the war by cutting restrictions

like tariffs. Cartels, which limited and channeled trade, became an object of this program. Washington sought a worldwide agreement regulating trade practices, including the operations of cartels.

Although the United States had followed a policy of protection since at least the Civil War, by 1940 there existed an influential group centered around the State Department committed to reducing tariffs and other obstacles to international trade sharply. Various sentiments motivated these people. Most economists believed that rising protection had contributed mightily to the Great Depression, which had destabilized world politics and greatly facilitated the rise of the German Nazis and Japanese militarists to power. The experience led the State Department to conclude that peace required prosperity and that prosperity required healthy international trade. American officials were also reacting against Nazi Germany's strict regulation of foreign trade, which had aimed to secure maximum political and economic advantage. Washington wanted to ban such discriminatory practices in the future. Alongside these calculations, however, existed an almost mystical belief that trade mitigated conflict and promoted peace. This faith had led President Woodrow Wilson to make free trade one of the famous "Fourteen Points" on which he hoped to base the peace settlement after World War I. Driven by the same creed, in the 1930s, Secretary of State Cordell Hull had negotiated a series of bilateral accords reducing tariffs and other trade restrictions between the United States and several of its trading partners. When the war started in Europe in 1939, the State Department drew up a projected peace settlement that included reductions in trade barriers. After the attack on Pearl Harbor, Washington began to plan for a substantial liberalization of trade throughout the world.[68]

The British viewed the American program warily. Although London had abandoned its traditional policy of free trade in the interwar years, it had done so reluctantly. The United Kingdom was still the world's largest trading nation, importing food and raw materials and exporting manufactured goods; before 1939, British subjects had also dominated international shipping and related services like insurance. The island nation might benefit handsomely from the reduction of barriers to international exchange. Yet good reasons for caution existed. It was clear that when the war ended and American aid ceased Britain would face a huge payments deficit that would require strict control over foreign exchange for several years. London had also enshrined full employment as its chief postwar economic aim, and many in Britain feared that the country could not achieve this goal without regulating inter-

national trade and capital flows.[69] Finally, in the 1930s, the British Empire and Commonwealth had developed a system of "imperial preference" under which members awarded one another preferential (lower) tariffs. Few Britons thought of their empire as a self-sufficient economic block, but most did believe that preferences made it more cohesive and prosperous. Yet American policy makers made little secret of their desire to dismantle this system, which they believed distorted trade—not to mention put U.S. firms at a disadvantage in empire markets. Despite these concerns, London cautiously embraced the liberalization of trade, in part because it elected to follow its hopes rather than its fears and in part because its economic and military dependence on the United States made the outright rejection of such a high American priority impractical.

Britain and the United States outlined their objectives in a clause of the February 1942 Lend-Lease Agreement, which London signed in part in exchange for an American promise not to seek repayment after the war for its military aid.[70] The two countries agreed to explore steps "directed to the expansion, by appropriate international and domestic measures, of production, employment, and the exchange and consumption of goods," including the elimination of all forms of discrimination in international commerce and the reduction of tariffs and other trade barriers.[71]

The Antitrust Division of the Justice Department argued that the trade program should include measures against international cartels. One memo asserted, "Free trade, however, involves more than governmental policies as to tariffs, quotas, and exchange controls. It implies freedom to buy from competitive sellers, and to sell to competitive buyers. . . . If we are to abolish governmental trade restraints, it would be absurd to leave in private hands a power or prerogative denied or foregone by nations as incompatible with world order."[72] This analysis was not confined to the American Justice Department. As a British economist noted, "It is possible for producers to make international [cartel] agreements . . . whereby free-trade policy is overreached by clauses reserving the home market to home producers."[73]

The State Department willingly placed cartels on the agenda of commercial talks. Though generally not as dogmatic as their counterparts in the Justice Department, its personnel conceded that cartels were part of the machinery of restriction that had retarded and distorted trade in the 1930s. Other concerns also drove State. As early as 1941, officials there worried, "There is a grave danger that work with respect to post-war economic policies will either be done independently by several agencies of the Government

or else that it will be coordinated under other leadership than that of the Department of State."[74] Because the military and the White House had largely excluded State from decisions on the conduct of the war, the department was all the more determined to control postwar planning. In the spring and early summer of 1943, it organized under its aegis twelve interdepartmental committees to coordinate economic policy, including the Special Committee on Private Monopolies and Cartels. This body included not only officials from State but also representatives of the Justice and Agriculture Departments, the Tariff Commission, and the Office of Strategic Services (OSS), the government's intelligence arm.[75] From the beginning the committee sought an "agreement with other nations to forbid and prevent objectionable cartel activities."[76] The State Department's effort received reinforcement from the president's September 1944 public letter to Secretary of State Cordell Hull in which he asked Hull to "keep your eye on this whole subject of international cartels."[77]

Dean Acheson chaired the Cartel Committee. A Harvard-trained lawyer and the epitome of the "Eastern Establishment," Acheson was a conservative Democrat who in 1933 had quit a position in the Treasury Department to protest President Roosevelt's currency policies. In 1940, he had served as the lead counsel for the defense in the *Ethyl* case.[78] Nevertheless, Acheson firmly supported the president's stand against Nazi Germany and had returned to Washington during the war. By 1943, he was a rising figure at the State Department, in charge of economic affairs. Acheson held moderate views on international cartels. In a statement outlining postwar economic challenges he argued, "Most of these barriers and discriminations [restricting trade] are the result of government action," though he conceded that "a sound international economic policy must take cognizance not only of governmentally imposed restrictions but also the restrictive practices of international business agreements."[79] Acheson may have assumed the chair of the Cartel Committee to limit radical anticartel proposals. If such was the intention, however, it failed. Acheson's other duties left him little time for the Cartel Committee, and he rarely attended meetings. His memoirs, *Present at the Creation*, do not mention the subject at all.[80]

Effective leadership of the Cartel Committee fell to Edward S. Mason, an Iowa-bred economist on the faculty of Harvard who, during the war, had worked for the OSS. After 1945, he would become a pioneer in the economic subdiscipline of international organizations. Mason was one of the few leading figures in the drive against cartels not associated with the Antitrust Division, and his opinions on the subject reflected a balance rarely

evident there. In a 1944 article in *Foreign Affairs*, Mason complained, "Very little of the recent literature is devoted to careful description or cool appraisal of their [cartels'] activities. Those opposed have relied on such words as conspiracy, monopoly, Fascism and treason." He also observed, "It was the depression of the thirties which produced that array of protective tariffs, exchange controls, quantitative limitations [quotas], currency depreciation, export subsidies and restrictions through cartels which by the end of the decade had put international economic relations in a strait jacket." In other words, cartels were more a symptom than a cause of the world's economic problems. Nevertheless, Mason's opinion was clear. "There can be little doubt," he wrote, "that international cartels on the whole restrict the total volume of world trade and divert its channels." "The political and economic interests of the United States," he concluded, "run so strongly in the direction of a liberal [economic] foreign policy that the appropriate attitude toward international cartels may be said to be predetermined."[81]

Corwin Edwards, an economist representing the Justice Department, also enjoyed considerable influence on the Cartel Committee. Although he was somewhat more dogmatic than Mason in his opposition to cartels, the two seem to have worked well together, and through talent and commitment they dominated the committee.

Surprisingly, the Cartel Committee included no representative from the Federal Trade Commission. The committee's organizers insisted, "Despite the obvious logic of a Federal Trade Commission representative, we were frankly unable to find any individual there who seemed to have any particular contribution to make."[82] The claim was improbable. The FTC maintained a large staff that was by 1943 supplying the Antitrust Division with information on international cartels. More likely, the State Department failed to include anyone from the commission because it saw no need to take into account the views of an agency with so little political influence. The FTC's exclusion from the committee, coupled with the leading role of the Justice Department's Corwin Edwards in the Cartel Committee's deliberations, did nothing to strengthen the FTC vis-à-vis the Antitrust Division, its chief rival in the antimonopoly field. Complaints from the FTC finally led to the appointment of one of its people to the Cartel Committee in February 1945, but by that time the group had been at work for almost two years.[83]

Farm policy constituted a far graver problem for the anticartel drive than squabbling between departments. During the 1930s, Washington had erected a complex system of price supports for agricultural commodities,

controlling their production and marketing. These measures raised domestic prices over those of the outside world, requiring extensive protection. Despite restrictions on output, American farmers continued to produce more than the domestic market could absorb, forcing the government to dispose of the excess by subsidizing foreign sales at low prices—in commercial parlance, "dumping" it. Though not labeled as such, the system was a government-managed cartel. Nor was the American policy unique—many other countries had comparable schemes for agriculture. Because many of these programs contained provisions to dump surpluses, they created the risk of government-financed price wars over export markets. Exporting nations had avoided this by negotiating commodity accords that apportioned foreign markets—in effect, international cartels. The war had temporarily converted the surpluses of most commodities into shortages, but agricultural specialists generally expected the surpluses to return with peace.

It was hard to reconcile such programs with blanket denunciations of cartels. Their advocates justified farm programs on the grounds that they kept the supply and demand for agricultural commodities in balance and allowed farmers to earn a decent living, exactly the same terms used to defend private cartels. A few involved in the anticartel drive did address the issue squarely. Thurman Arnold stated, "I recognize that farmers cannot stand (or will not) the deflation of suddenly establishing an absolute competitive market. . . . The sudden liquidation of an entire group in the interest of free trade is never a political possibility."[84] The circumstances justified government-managed cartels, which, being accountable to the public, were unlikely to abuse their power. Such arguments, however, convinced few in the business community. If government cartels were acceptable under certain conditions, then as far as businessmen were concerned, so were private ones. If the latter were pernicious, then the former, clothed with the power of law and so able to compel adherence, were even more likely to cause harm. This interesting theoretical question received little attention because in practice it was moot. Farmers strongly supported agricultural programs, and they enjoyed considerable political influence. Washington was not going to abandon farm programs in the name of intellectual consistency on the cartel question. Instead, the State Department organized the Special Committee on Commodity Agreements and Methods of Trade. This body contained no one from the Justice Department, although Corwin Edwards did act as liaison between it and the Cartel Committee. Whereas the Cartel Committee sought to ban private accords restricting competition, the Com-

modity Agreements Committee aimed to define procedures for government cartels.

American and British officials held preliminary talks on trade in the fall of 1943. Military successes in North Africa and Italy had raised the hope of victory and encouraged the Allies to consider their postwar plans more carefully. As the leading capitalist powers among the Allies, the United States and the United Kingdom expected to dominate talks on the shape of world trade after the war. As one diplomatic dispatch claimed, "Representatives of small countries in particular feel that the commercial policies of their countries must be largely determined by the policies adopted by the larger states and in particular the United States and Great Britain."[85] John Maynard Keynes led a British delegation that traveled to Washington and met with a host of American officials, including members of the Cartel and Commodity Agreements Committees. Participants spent most of their time on financial questions, but they examined many other issues as well, including cartels.

The discussion of cartels surprised the British. As one State Department memo noted, "The British group came over here without any instructions on the subject of monopolies and cartels."[86] This did not discourage the Americans, who lectured their guests on the evils of cartels. A report on the talks stated, "The British participants, after a remarkable educational job by Mr. C. D. Edwards of the Department of Justice and Mr. E. S. Mason of the OSS . . . expressed themselves as personally much impressed by the merits of the American position."[87] The Americans may have overestimated their success. One month later Keynes produced a memo stating, "I believe that the future lies with . . . international cartels for necessary manufacturers."[88] In any case, lacking instructions, the British could agree to nothing. The Americans nevertheless took the opportunity to recommend a program involving the "registration of all private international agreements" and the "prohibition by international agreement of objectionable international cartel activities," which included price fixing, restrictions on output, and the allocation of markets among firms.[89]

The talks made greater progress on commodity accords. Here the Americans and British had different interests. A major exporter of commodities, the United States desired to sell dearly, whereas the United Kingdom, a leading importer, preferred to buy cheap. Keynes was enthusiastic about schemes for buffer stocks, under which a central authority would buy and store commodities when prices were low and sell when the market improved. This would not only even out swings in the market but, Keynes hoped,

stabilize farm income and contribute to general economic equilibrium. The American with whom Keynes dealt in these particular discussions, William Clayton, was not so sure. Clayton was yet another conservative Democrat who had made his way to Washington during the war. In private life he had built the world's largest cotton brokerage firm; his expertise had secured him a position in the government's commodity bureau. In November 1944, he would move to the State Department, from which he would direct the government's commercial negotiations until retiring in 1948. In the 1943 talks with Keynes, Clayton argued, "The advocates of a buffer stock program underrate the constructive aspects of private trade on the commodity exchanges in regulating markets forces and . . . assume that a board of few men would be wiser in its decisions with respect to prices than the impersonal operations of the free market."[90] Clayton himself was an advocate of free markets and skeptical of government intervention, but other Americans present attacked Keynes's scheme because it lacked any controls on production, which they considered the only device capable of bringing long-term stability to commodity markets.[91] The minutes of the meeting indicate that, although not entirely convinced, "Lord Keynes thought that some restrictive schemes might be required in cases where the propensity to produce outruns the propensity to consume."[92] In the end, the two countries agreed to disagree. The final communication from the talks noted, "The U.K. group is hopeful that in practice it will be possible in the case of most commodities to allow long-term price trends to follow supply and demand and to constitute the primary means of effecting adjustments in productive capacity to balance demand. The U.S. group consider that it may well be necessary to have greater recourse to quantitative regulation schemes."[93]

Dissent over the exact shape of commodity accords did not prevent the two sides from agreeing on procedures to govern them. Both favored an "international commodity organization [that] would be charged with responsibility for reviewing, supervising and coordinating international commodity arrangements of all kinds and, if necessary, for initiating them." Individual accords would seek "the mitigation of violent short-term price fluctuations . . . which would help to counteract business cycles." In the long run, commodity agreements would aim for "a state of affairs under which price adjustments would follow changes in basic conditions of supply and demand and in which there would be increasing opportunities for supplying world requirements from countries able to furnish such requirements most effectively." No commodity accord would run for more than five years, although renewal would be possible at the end of that time.[94]

Diplomats made little further progress in the next two years, largely because the Allies had other priorities. Both the United States and Britain devoted much effort to working out the charter of the United Nations; in the economic sphere, they concentrated on the reorganization of the international financial system. When American military aid ceased after the war, the British would face a severe payments deficit, and they desired to put into place as soon as possible financial structures to help them deal with the problem. Certainly Keynes, perhaps the most important figure in the discussions, devoted most of his time to finance, his specialty. His efforts yielded fruit in the 1944 Bretton Woods Accords, which established a new framework for international finance.

Nevertheless, planning on cartels continued in the United States. In May 1944, the Cartel Committee laid out its ideal program. Noting that "the typical effects of cartels are to reduce output, raise and stabilize selling prices, increase profit margins, reduce employment, and protect high costs members," the committee recommended "the adoption of a coordinated program by which each nation undertakes to prohibit the most restrictive cartel practices." The International Office for Business Practices would administer the effort and suggest where "international conventions and national laws about patents, trademarks, and company organizations should be amended or supplemented to make such restrictive cartel practices more difficult." The Cartel Committee conceded that restrictive programs for "the furtherance of international security, the conservation of natural resources, the protection of public health and morals, or the relief of insupportable distress during the application of constructive measures to shift resources from over-developed industries to more productive uses" might be worthwhile, but they "should be agreed upon between governments rather than between private interests."[95] At the same time, the Cartel Committee set minimum goals. Corwin Edwards contended that any agreement should include at least "general language against private international agreements which are restrictive in character, [and] . . . the plan should include specific provision for some device . . . by which the things prohibited can be more fully defined from time to time." "We should insist," Edwards continued, "upon retaining the principle that international agreements for restrictive action shall be governmental in character. . . . We should insist, moreover, that the burden of proof shall rest upon the advocates of each restrictive arrangement."[96]

Planning for commodity accords proceeded as well. In October 1944, the Commodity Agreements Committee formally submitted its recommendations to the president. It argued that historically commodity prices had

been unstable and suggested that free markets did not work particularly well in this area, permitting extended gluts. The committee also noted the "need for reconciling existing unilateral national policies in support of internationally-traded commodities." It believed that "a properly conceived and executed, selective program for international commodity agreements can be harmonized with a broad program of international economic expansion," though it conceded, "It will be necessary to provide adequate safeguards against possible abuses of international commodity agreements."[97]

The Cartel Committee well served the interests of both the State and Justice Departments. It gave the Antitrust Division and other foes of cartels a voice in postwar planning that they probably would not have enjoyed otherwise while lodging undisputed responsibility for the subject with the State Department. Put simply, State adopted Justice's program in exchange for recognition of its authority. This compromise entailed no great sacrifices. People at the State Department had little enthusiasm for cartels; the Justice Department's lawyers showed little desire to become diplomats. Still, without the Cartel Committee it is unlikely that the federal government would have spoken with such a firm, united voice against international cartels.

The Short, Unhappy Life of the International Trade Organization

Allied victory brought no great acceleration of commercial talks. Political arrangements in Europe occupied much of the attention of national leaders, particularly with the development of the Cold War. Yet even in the economic sphere other matters came first. The disastrous state of the world economy in the years immediately after 1945 forced government officials to devote most of their time simply to staving off disaster. Long-term goals like commercial liberalization had to wait. Progress on trade did occur, but it was halting, and many objectives remained unrealized. Anticartel measures were among the casualties. They foundered because the nations of the world could not agree on general principles for organizing trade. Measures restricting cartels were not themselves particularly controversial, but they could not exist outside a broader context of agreement, which did not exist.

The chances for a general agreement on cartels seemed promising in 1945. By the end of the war, the British had conceded the need for reform. The State Department's Cartel Committee noted "a significant shift in Brit-

ish thinking about cartels. It is now generally recognized in the U.K. . . . that restrictive private arrangements often result in the contraction of trade and hence frustrate governmental policies directed toward trade expansion."[98] The change of opinion reflected, in part, the anticartel rhetoric emanating from the United States. The British had not ignored the 1944 indictment of ICI and DuPont—an anonymous pamphlet recounting the Justice Department's charges had circulated in the House of Commons, and the House of Lords had debated the case.[99] Publications attacking cartels had also appeared. Many of these originated in the United States—Joseph Borkin and Charles Welsh's *Germany's Master Plan* made a particularly strong impact—but British publications like *Patents for Hitler*, which examined ties among British, American, and German firms, had influence as well.[100] Cartels even lost ground in government circles. In 1944, a council of ministers devoted to postwar planning concluded that "restrictive practices of the type and scope prevalent before the war would be a major impediment to the full employment policy and expansionist economy which the government have adopted as their postwar aim."[101] Such opinions were hardly universal, but they indicated declining enthusiasm for cartels.

London, however, wanted to pursue a more flexible policy toward international cartels than did Washington. The authors of a Foreign Office memo drafted shortly before the end of the war noted, "It is, in our view, a proposition not entirely borne out by the facts that the best economic—or social—results can always be relied on to follow from the freest competition. . . . Our approach to cartels is quite empirical and does not derive from any moral judgement on the question whether international trade should be conducted on the basis of free competition or planned arrangements."[102] Such attitudes did not excite the American Cartel Committee. It observed, "The British leaned toward an examination of every restrictive practice. They wished to consider each on its own merits, and they believed that by a case-by-case analysis in each country a body of precedent would be developed."[103] Another memo noted, "Considerable doubt exists in the minds of the U.S. experts whether the consultative machinery of the U.K. Proposals could operate expeditiously."[104] Nevertheless, the prospects for some sort of agreement appeared good.

Restrictions on cartels constituted part of a broader program involving the creation of the International Trade Organization (ITO). This autonomous, supranational body was designed to oversee trade policy in the postwar era. It was to guarantee that the restrictive trade practices that had charac-

terized the 1930s, the complex networks of regulations created by governments to protect their balance of payments and, often, exert political pressure on their neighbors, did not reemerge. In the fall of 1945, the United States and Britain released the "Proposals for Consideration by an International Conference on Trade and Employment," which called for a ban on various discriminatory and protective practices, including cartels, and the creation of the ITO to administer these prohibitions. Though technically an American document, the proposals were in fact a joint statement. British support was, in part, a quid pro quo for a massive reconstruction loan granted on favorable terms by Washington in 1945. Despite unease over some specific points of the proposals, however, London nevertheless generally favored them.[105]

William Clayton oversaw negotiations for the Americans. As a former commodities trader he instinctively favored free markets, yet his vision transcended business. Clayton was a convinced internationalist who believed that healthy trade was vital to world prosperity and that prosperity was key to peace. Cartels, he believed, violated the ideals of free trade and tended to restrict and channel commerce. Although not as dogmatic on the subject as some members of the Antitrust Division—Clayton never considered cartels the chief problem confronting the world economy—he worked hard to include restrictions on cartels in the ITO charter.

The proposals reflected the minimum demands of the State Department's Cartel Committee. They stated, "The [International Trade] organization should receive complaints from any member . . . that the objectives of the Organization are being frustrated by a private international combination." The ITO would have the authority to investigate complaints and "make recommendations to the appropriate members for action." The proposals also left Washington free to act on its own against cartels, providing, "Any act or failure to act on the part of the organization should not preclude any member from enforcing within its own jurisdiction any national statute or decree directed toward the elimination or prevention of restrictive business practices."[106]

The document also provided for commodity agreements. Washington had decided not to continue the bilateral arrangements through which it had managed much of its commodities trade during the war, stating that it "favors the use of private channels in international trade as most consistent with the principles of liberal trade policy."[107] Although necessary in wartime, state trading during peace represented an unacceptable departure from the

open economic system that the United States championed. Nevertheless, American officials realized that exceptions were necessary. Agricultural programs would not disappear with peace, and governments would not abstain from intervening in markets for commodities on which their economies were particularly dependent. A carefully regulated system of commodity accords seemed the best way to reconcile these realities with an otherwise liberal commercial regime. According to the Anglo-American proposals, the ITO would have the authority to determine whether a "burdensome world surplus" existed in any market. If such was the case, "The members which are important producers or consumers of the commodities should agree to consult together with a view to promoting consumption increases, to promoting the reduction of production through the diversion of resources from uneconomical production, and to seeking, if necessary, the conclusion of an intergovernmental commodity accord."[108]

Washington believed that British support for the proposals vastly increased the chances for an agreement limiting cartels. Though these organizations had many partisans in Europe, elsewhere they were unpopular. In 1945, the government of Canada issued to an enthusiastic public reception a long report alleging that international cartels had, before 1939, retarded the country's industrial development by keeping prices high and discouraging the growth of domestic producers.[109] At an international conference of businessmen in 1944, Indian representatives insisted that cartels had stymied economic progress in the subcontinent.[110] Many critics of cartels associated them with imperialism, in part because in cartel accords British and French firms usually reserved for themselves the markets of their colonial empires. Corwin Edwards claimed that "international cartels have usually acted as substantial deterrents to the industrial development of parts of the world which their members regard as colonial markets."[111] Considering the emphasis on national self-determination and industrial development after World War II, the identification of cartels with economic and political imperialism did not bode well for them.

The Soviet Union did not involve itself in the cartel issue or any aspect of the ITO. A State Department memo noted, the Russians "consistently attributed their absence [from talks] to a shortage of trained personnel."[112] Few American officials accepted this explanation. As the U.S. ambassador in Moscow wrote, "It is difficult to understand how a nation of 180,000,000 inhabitants and pretensions to world leadership cannot achieve the same degree of participation in international organs as a small country such as

Belgium, with its population of 8,000,000. . . . It would appear that the distribution of this personnel was one of conscious administrative decision."[113] Because the Soviet government controlled all that country's foreign trade, it had little stake in liberalization, and it may have feared that the ITO would impinge on its sovereignty. Moscow's opinion of cartels is not clear. The Soviet press had denounced them as instruments of capitalist aggression, but at the same time Russia had participated in some cartels during the 1930s.[114] In any case, the Soviet Union did not consider the issue important enough to warrant participation in the ITO talks.

Despite the favorable alignment among the great powers—American and British support coupled with Soviet indifference—the ITO faced serious opposition. Still, a preliminary meeting of eleven leading trading nations, held in London in late 1946, did yield promising results.[115] The Americans went to the conference eager to secure "acceptance of the American draft [the proposals] as the basis of the Committee's deliberations."[116] Because no one else had an overall plan the ploy succeeded, and as a State Department report noted, "From then on all the work of the Committee was directed toward our document. This gave us a great advantage in the negotiations. We had stated the problems, suggested the solutions, established the general pattern of the charter, and provided large sections of the text that have not been and will not be altered in any way."[117]

Participants accepted the cartel and commodity accord provisions of the proposals. Before the London meeting, Washington had received from several European countries "objections . . . to provisions in the Draft Charter [of the ITO] regarding cartels and inter-governmental commodity arrangements. . . . In particular they object to the presumption that the specific practices of cartels are bad and are inclined to feel that the burden of proof should be on the [international trade] organization to prove them so. Regarding commodity agreements they feel that the machinery is so cumbersome as to prevent or delay unduly the taking of needed action."[118] Nevertheless, thanks largely to American persistence, Canadian support, and the fact that the U.S. proposal formed the basis of discussions, the American delegates secured "a revised chapter [on cartels] that is stronger than our original proposals and far stronger than we thought was possible."[119]

Unfortunately, the ITO made little progress over the next year. Commercial negotiators turned to tariff reduction, and as a State Department memo noted, "In view of the thousands of tariff items involved, and the need for proceeding with tariff reduction on a selective, product-by-product basis,

provisions effectuating actual tariff reductions cannot be incorporated into the [ITO] Charter itself."[120] Instead, participants conducted tariff talks in a separate forum, the General Agreement on Trade and Tariffs (GATT). These negotiations eventually succeeded, substantially reducing levies, but they took a long time. Talks on the ITO resumed in Geneva only in late 1947; their successful conclusion required a second round of meetings in Havana, Cuba, the next spring.

Final negotiations on the ITO did not proceed as smoothly as the preliminary talks in London. Several factors accounted for the difficulty. By late 1947, it was clear that the European and East Asian economies were recovering only slowly from the war, if at all, and that governments there would have to maintain tight control over foreign exchange and trade for the indefinite future. Most of these countries still favored the ITO in principle, but they did not think that they could implement its provisions for quite a while. The attitudes of Third World countries presented an even more serious obstacle. These nations wanted to industrialize, and contemporary theory on the subject favored "import substitution," restricting imports while subsidizing domestic manufacturing. Representatives of Third World countries pointed out that during critical periods of economic development the industrial countries had pursued comparable policies—Britain in the late eighteenth century and the United States and Germany in the late nineteenth century. Many developing countries feared that unless they could do the same their industries would remain stunted. Reconciling such a program with a liberal trade regime would be very difficult.

The problem had manifested itself at the preliminary meeting in London in 1946. According to a State Department memo, "The Indians came in with a chip on their shoulder. They regarded the Proposals as a document prepared by the U.S. and U.K. to serve the interests of the highly industrialized countries by keeping the backward countries in a position of economic dependence."[121] In London, the other participants had managed to mollify the Indians, but in Geneva and Havana, representatives of Third World countries constituted a much larger proportion of delegates and accordingly enjoyed greater power. In Havana, the leader of the Mexican delegation insisted, "Reduction of trade barriers must not be such as to hamper development in underdeveloped countries. These countries demanded the right to use the instruments of protection which other countries had used in the past to develop their industries. . . . Freezing the present pattern of world economy could not be tolerated."[122]

Import quotas soon became the center of dispute. With tariffs now set by GATT, protectionists saw quotas as the best way to regulate trade. Washington had hoped to ban quotas altogether but instead had to make concessions. The final draft of the ITO charter allowed countries to impose quotas either to encourage development or to deal with a severe balance-of-payments deficit. The United States had little choice but to agree to these exceptions if it wanted to secure approval of the ITO charter because Third World countries simply refused to forgo protection. The charter still included general language banning quotas. Nevertheless, many Americans feared that the prohibition against quotas contained so many exceptions that it would in fact institutionalize them in many circumstances.

Foreign investment constituted another problem. The United States and Britain wanted the ITO to guarantee their investments abroad. Developing countries, believing that the operations of foreign interests often impinged on their sovereignty, demanded the right to regulate foreign businesses. Negotiators compromised, accepting general language protecting foreign investments but allowing governments to transfer ownership of such property if they provided "just compensation," a term that was not defined. As with the provisions on quotas, many in both the United States and Britain believed that the exceptions would in fact institutionalize grave abuses.

Conflict between the industrialized nations and the Third World even touched the issues of cartels and commodity accords. Several Latin American delegations in Havana demanded that the ITO charter direct commodity accords to strive for "remunerative prices," which meant "prices which maintain a fair relationship with the prices which the producers of primary commodities are obliged to pay for manufactured . . . goods."[123] They believed that the prices of commodities tended to fall relative to manufactured goods, hurting the producers of raw materials to the benefit of industry. This tendency particularly affected Third World countries, which exported raw materials and imported manufactured goods. The suggestion had precedent—U.S. farm policy sought "parity" between agricultural prices and the costs of manufactured goods. Yet a requirement to strive for remunerative prices would make drafting commodity accords even more complicated, and many considered the entire concept flawed. The chief British delegate insisted, "The phrase 'fair relationship' could not be interpreted by inter-government commodity agreements. It was something which only general economic and social development might bring about *assuming* that there was any unfairness in past and present relationships."[124] The conference eventually rejected the proposed language.

The negotiators did, however, make a change in the cartel section. Some countries feared that the ITO's provisions directed against cartels might "be used to attack either the principle of public ownership or members' basic legislation."[125] Many countries had ambitious plans for postwar industrial development that entailed government rationing of scarce capital and resources among competing firms and, in some cases, creating government-owned companies or nationalizing private ones. Such programs restricted competition and so might run afoul of the ITO's anticartel measures. The final draft of the charter exempted government-owned firms from anticartel provisions. At first glance the exception seemed sizable, as even the governments of capitalist nations often owned large firms.[126] Yet the construction of an effective international cartel by government-owned companies alone was generally impossible. In almost every industry some private companies remained powerful, and an agreement that ignored them would not last. Barring a massive shift toward public ownership, this exception was not likely to be critical.

With respect to cartels and commodity agreements, the ITO charter actually followed the 1945 Anglo-American proposals fairly closely. In contrast with the provisions on quotas and foreign investment, Third World nations had little at stake in cartels, in which their companies rarely had a place. Many believed that these organizations had actually retarded their economic development. An official summary of the final agreement noted that the ITO had the authority to investigate "price-fixing, territorial exclusion, discrimination, production quotas, technological restriction, misuse of patents, trademarks and copyrights," and that "members are obligated to take action against restrictive business practices in international trade wherever they are contrary to the principles of the charter." The summary did note, "The powers of the ITO will be limited mainly to instructing the offending member to correct the abuse and to publication of the facts." Nevertheless, this language, in theory, banned most of the practices of international cartels. The ITO charter also laid down fairly strict procedures for commodity accords. The summary noted, "Members are obligated to enter into new control type agreements only through Charter procedures," which permitted action "only when there is a burdensome surplus or widespread unemployment, which could not be corrected by normal market forces alone."[127]

In the United States, the ITO charter generated little enthusiasm. Business groups, which had provided critical—albeit at times grudging—support for the Bretton Woods Accords and the loan to the British in 1945, refused to endorse it.[128] They particularly objected to the clauses on import quotas

and foreign investment, but the cartel and commodity provisions also caused annoyance. Business groups noted the contradiction between provisions condemning private cartels and those regulating and thereby implicitly endorsing government commodity accords. The U.S. International Chamber of Commerce stated that it "rejects as unsound the notion that one standard of conduct can be applied in the case of private agreements and a different one in the case of similar agreements between governments."[129] The National Association of Manufacturers argued that the ITO charter "leaves the position of cartels in the world economy pretty much unchanged. True, it allows complaints to be made and outlines a procedure for dealing with them; but nothing in this Charter resembles even distantly a moderate version of anti-trust commitments."[130] As for commodity agreements, NAM stated, "They are especially to be condemned as an invasion of free enterprise, since the production, processing, and distribution of raw materials and foodstuffs are properly the responsibility of private management and operation. . . . They aim at fixing these monopoly prices at the height at which production pays also for the submarginal producers. They raise average costs of production. They result in monopolistic exploitation of the consumers for the sole benefit of the producers"[131]

The cartels and commodity provisions of the ITO did have defenders. A report issued by two congressmen, James G. Fulton and Jacob K. Javits, noted, "The provisions relating to restrictive business practices fall short of the ideal, but they are comprehensive, and given support by the governments should effectively serve . . . [to prevent] restrictive practices which limit the expansion of production or trade." The two lawmakers also observed, "It is an exaggeration to say that the charter provisions open the door wide to commodity agreements. The limitations applying particularly to commodity control agreements are significant. . . . No existing or prewar commodity agreements could meet all the standards laid down in the charter."[132] Besides, no better agreement was likely.

The ITO never came close to securing congressional approval. The business community was generally hostile. Many executives were reluctant to dispense with protection, which American manufacturers had enjoyed in many cases for eighty years. Others feared that the provisions on quotas and foreign investment would permit foreign governments to shut American firms out of lucrative markets by restricting imports and direct investment. More broadly, the idealistic enthusiasm for international cooperation that had carried the approval of the United Nations and the Bretton Woods Accords had subsided. The failure (thus far) of European reconstruction and

the growth of Soviet power had soured many Americans on broad initiatives like the ITO that relied on supranational bodies. Finally, the Truman administration had other priorities. For most of his tenure, the president's support in Congress was precarious, and during 1948 and 1949, he devoted his limited political capital to winning approval of the Marshall Plan for European reconstruction. The White House considered it more important than the ITO and more likely to win passage. The Marshall Plan promised to contain Soviet power, whose growth alarmed both the public and policymakers, whereas the ITO offered no such geopolitical dividends. Congress never even voted on the ITO, and in 1950 the administration officially gave up on securing its approval.[133]

The failure of the ITO reflected the lack of consensus among nations on economic policy. They disagreed on how to treat private property and on how much control governments should exercise over trade and the economy in general. Concessions necessary for Washington to attract the support of other countries alienated the American business community, whose support was necessary for approval. The GATT talks on tariff reduction, which after the demise of the ITO became the vehicle for trade liberalization, succeeded because they operated on a quid pro quo basis, with countries making reciprocal concessions on specific rates. The ITO, a statement of principles, offered no such flexibility.

International cartels numbered among the less contentious issues surrounding the ITO—a consensus apparently existed for restricting them. Considering the enthusiasm lavished on cartels just a decade earlier, the shift was remarkable. The stream of denunciations emanating from the United States had apparently had an effect.

Yet the fate of the ITO also demonstrated the limits of the cartel issue among Americans. Despite grumbling, the provisions on cartels and commodity accords were not a center of debate. Indeed, they were probably acceptable to most members of Congress. Yet no one seriously suggested that the ITO's restrictions on cartels, however appealing, justified accepting an otherwise flawed agreement.

The Triumph of Antitrust

In contrast with commercial talks, the judicial offensive against international cartels enjoyed spectacular success. Throughout the war, the Justice Department had been preparing cases against these organizations, and by

early 1945, it had at least nineteen ready for argument.[134] Peace sent the Antitrust Division back to court.

The Justice Department had good reason to expect a sympathetic hearing from the courts. In his twelve years as president, Franklin D. Roosevelt had remade the judiciary. Once the federal courts had been the bane of reformers, stoutly defending property rights against most forms of government interference. During the 1930s, the Supreme Court had struck down so much New Deal legislation that in 1937 Roosevelt had, in frustration, proposed his notorious "Court-packing" plan, which would have allowed him to create a slew of new justices. Although the measure failed in Congress, its prospect had frightened the judiciary into a more accommodating stance. More important, as time passed, Roosevelt was able to appoint more and more judges sympathetic to economic reform. By 1945, the Supreme Court included such notable New Dealers as Hugo Black, Felix Frankfurter, William O. Douglas, and Robert Jackson. Equally dramatic changes occurred in the lower courts. Although never monolithic in opinion, Roosevelt's appointees usually embraced a doctrine known as "legal realism," which at the risk of oversimplifying held that the law was not a science or a set of divine truths but a practical method for managing disputes whose interpretation ought to adapt to social change. They generally gave the government wide latitude in implementing economic reforms, an attitude that encouraged firm application of the antitrust laws. By 1945, the Antitrust Division believed that the Supreme Court was ready to overturn the legal precedents that permitted cartel agreements, particularly the 1926 *General Electric* decision regarding patent agreements, a key support for international cartels.[135]

The *National Lead* case provided the vital precedent. Among other things, the National Lead Company produced titanium oxide, a white pigment used chiefly in paint. By 1940, output in the United States totaled 100,000 tons, worth approximately $40 million. Legally the industry rested on three sets of patents taken out around World War I, each developed separately by groups in the United States, Norway, and France. National Lead, already a large maker of paint, had purchased rights to the American titanium oxide process and, in the early 1920s, had reached an agreement with the Norwegian group, exchanging all patents and apportioning the world's markets. National Lead received North America; the Norwegians got the rest of the world. The agreement eliminated both competition and the possibility of vexing patent litigation. Meanwhile, DuPont had obtained the American rights to the French process. In 1933, it signed an accord with

National Lead exchanging all patents and submitting to the existing international division of territory. Within the United States, DuPont and National Lead competed vigorously for customers, cutting prices and increasing output on a regular basis, although their joint control of patents prevented the emergence of any serious outside challenger.[136]

In the summer of 1943, the Antitrust Division filed suit to break up this arrangement. Wendell Berge wrote, "It is difficult to believe that the public interest has been adequately served by having the most valuable of white pigments subjected to complete control in this country and throughout the world by a cartel. . . . One may be quite sure that when the cartel shackles are broken, titanium will take its rightful place as not only the most important and useful of all pigments but also for a wide variety of other industrial uses."[137] The military forced the suspension of prosecution until the end of the war in Europe, but the case went to trial in the summer of 1945.

In October 1945, the federal district judge decided, "When the story is seen as a whole, there is no blinking the fact that there is no free commerce in titanium. Every pound of it is trammeled by privately imposed regulation. . . . It was more difficult for the independent outsider to enter this business than for the camel to make its proverbial passage through the eye of the needle." He continued, "Whether the form of association they created be called a cartel, an international cartel, a patent pool, or a 'technical and commercial cooperation' is of little significance. It is a combination and conspiracy in restraint of trade; and the restraint is unreasonable. As such it is outlawed by Section 1 of the Sherman Act." The court ruled against the cartel's domestic and foreign aspects alike, noting, "No citation of authority is any longer necessary to support the proposition that a combination of competitors, which by agreement divides the world into exclusive trading areas, and suppresses all competition among the members of the combination, offends the Sherman Act."[138] Though phrased in an off-handed manner, this statement represented a daring claim of power by the court, bringing into the province of U.S. antitrust law most international cartels. Other judges quickly recognized the value of this doctrine—decision after decision concerning international cartels quoted this section of *National Lead*.

The authority of National Lead's and DuPont's patents did not impress the court much. The original rights had expired by the 1940s, and the firms relied on patents to various incremental improvements in the product and the way it was made to keep competition at bay. The court noted that "the newcomer [to the titanium dioxide field] is confronted by a veritable jungle

of patent claims through which only the very powerful and stouthearted would venture, having a regard for the large initial investment which this business requires. These patents, through the agreements in which they are enmeshed and the manner in which they have been used, have, in fact, been forged into instruments of domination of an entire industry. The net effect is that a business, originally founded upon patents which have long since expired, is today less accessible to free enterprise than when it was first launched." The court ordered National Lead and DuPont to license their titanium patents at a reasonable royalty to all applicants.[139]

The decision rested on law, not economics. The court conceded, "During the regime of the combination, the art has rapidly advanced, production has increased enormously and prices have sharply declined." Nevertheless, "the major premise of the Sherman Act is that the suppression of competition in international trade is in and of itself a public injury; or at any rate, that such suppression is a greater price than we want to pay for the benefits it sometimes secured."[140]

Decisions from the Supreme Court further weakened the status of patent cartels. In 1947, the High Court upheld the *National Lead* decision.[141] The next year it issued two opinions, *United States Gypsum* and *Line Material*, which further restricted patent cartels. *United States Gypsum* dealt with the producers of gypsum, a natural substance used to make plasterboard. As the Supreme Court noted, "By development and purchase, it [the U.S. Gypsum Company] has acquired the most significant patents covering the manufacture of gypsum board, and beginning in 1926, United States Gypsum offered licenses under its patents to other concerns in the industry, all licenses containing a provision that United States Gypsum should fix the minimum price at which the licensee sold."[142] *Line Material* involved a comparable situation. Several firms held patents on electric fuses; in some cases, one firm's patent represented a refinement of a technology controlled by another company. Accordingly the firms, of which Line Material was perhaps the most important, exchanged patents. The agreement, however, not only licensed rights but also stipulated minimum prices for fuses.[143]

The Antitrust Division, under Wendell Berge's leadership, filed suit to break up both the Gypsum and Line Material arrangements. The Supreme Court decided that Gypsum's patent agreements formed part of a larger effort to control the market for all gypsum products, some of which were not patented. It concluded, "Conspiracies to control prices and distribution, such as we have here, we believe to be beyond any patent privilege." More

broadly it asserted, "Patents grant no privilege to their owners of organizing the use of those patents to monopolize an industry through price control, through royalties for the patents drawn from patent-free industry products and through regulation of distribution. Here patents have been put to such uses as to collide with the Sherman Act's protection of the public from evil consequences."[144] In *Line Material*, the Supreme Court decided, "Where two or more patentees with competitive, non-infringing patents combine them and fix prices on all devices produced under any patent, competition is impeded. . . . Even when, as here, the devices are not commercially competitive because the subservient patent cannot be practiced without consent of the dominant, the statement holds true." It concluded, "As the Sherman Act prohibits agreements to fix prices, any arrangement between patentees runs afoul of that prohibition and is outside the patent monopoly."[145]

Although the High Court did not say so, its conclusions effectively overturned the 1926 *General Electric* precedent, which had granted companies broad latitude to regulate competition through patent accords. These decisions imposed many of the restrictions on patent rights that the foes of economic concentration had been seeking for years from Congress, without success. Any patent agreement that restricted marketing or set prices was liable to challenge. Of course, if a firm owned rights to a key technology it could simply refuse to license competitors and enjoy a monopoly. Such patents were rare, however, and a company that possessed one might well run afoul of Judge Hand's *Alcoa* decision, which argued that monopoly by its very existence violated the Sherman Act.[146] The cases in question dealt with domestic arrangements, but as one student of antitrust law noted, "The rules applying to international patent licensing are no more and no less stringent than those applying within the United States."[147]

DuPont and ICI realized that their situation was hopeless. In November 1946, Lord McGowan conceded, "The Sherman Antitrust Act is capable of so many interpretations that it may well be that DuPonts and ourselves have contravened some sections of it," though he insisted that any violation was inadvertent.[148] The firms tried to negotiate a settlement with the Justice Department in 1946 but failed to come to terms, in part because of McGowan's determination to make as few concessions as possible.[149] Nevertheless, the two companies backed away from their traditional alliance. In 1946, DuPont revised an agreement concerning nylon with British Nylon Spinners (BNS), a cooperative effort between ICI and Courtaulds, Britain's leading producer of synthetic fibers. The initial contract, a cartel accord camou-

flaged as a patent agreement, had granted BNS exclusive rights to nylon in the British market while restricting exports, and it had provided for ongoing technical cooperation between BNS and DuPont. The new contract was simply a licensing agreement, granting BNS rights to DuPont's technology in exchange for a royalty. It provided for neither the division of territories nor ongoing technical cooperation.[150] The revision of the BNS agreement represented merely the first step of an industrial divorce. In 1948, DuPont and ICI terminated the patent and processes agreement, the basis of their alliance, and DuPont began "to make a survey of sales possibilities in the British Empire."[151] In 1950, ICI purchased Arnold, Hoffman, & Company, a chemical firm headquartered in New England, with the intention of using it as a foundation on which to build an American presence.[152]

When the federal district court finally handed down a decision in the ICI/DuPont case in 1951, after a long and complex trial featuring over 3,500 exhibits, the result surprised no one. The judge concluded, "We deem irrelevant any inquiry into whether the arrangements between the parties actually injured the public interest, or whether the public benefited thereby." The court enjoined any resumption of the patents and process agreement and ordered that the two firms dissolve most of their jointly owned foreign subsidiaries, dividing the assets. This order applied to Canadian Industries Limited and the Duperial companies of Argentina and Brazil.[153] ICI and DuPont had hoped that the decision would allow them to cooperate in other countries, but the court adhered to the principle that restrictions on competition abroad violated American law, noting, "Restraints were placed [by DuPont and ICI] upon the commercial activities of these joint companies, and restrictions were placed upon the exports to the United States." In ordering these dissolutions, the court apparently did not consult with the governments of Canada, Argentina, and Brazil. It did, however, exempt ICI's and DuPont's joint operations in Chile as well as a Brazilian enterprise devoted entirely to making ammunition. The court concluded that these organizations owed their existence solely to policies of the Brazilian and Chilean governments favoring locally made products at the expense of imports and that their operations had no appreciable impact on American commerce.[154] The Sherman Act had a broad reach, but limits did exist.

In the long run, the change probably benefited both ICI and DuPont. In the 1920s and 1930s, with both firms threatened by formidable German competition and general economic instability, alliance made sense, strengthening the two companies and the chemical industries of the United States

and Britain in general. After 1945, conditions were different. The two companies were far more formidable than in the 1920s, and the war had temporarily removed German competition. New technologies, particularly in petrochemicals and synthetic fibers, opened up promising avenues for growth. DuPont and ICI no longer needed each other, and a continuation of their alliance would merely have reduced their flexibility. Yet without antitrust prosecution, cooperation probably would have continued. The alliance between the firms had existed in one form or another for two generations, and institutions rarely abandon such entrenched practices without outside pressure.

General Electric, which fought hard to retain its cartel arrangements, did not fare as well. In 1948, a federal district court overturned GE's tungsten carbide cartel, which was based on a patent agreement with the German firm Krupp.[155] A more serious blow fell early the next year when another court dissolved GE's long-standing lightbulb cartel. This complicated case, which had been in the courts for years and also involved GE's American licensees and the Dutch company Philips, produced a decision that ran over 150 pages.

First the court had to decide whether the government's argument differed from that in 1926, when the Supreme Court had ruled GE's lightbulb cartel legal, setting the key precedent in favor of patent cartels. Although the *Ethyl*, *National Lead*, *Gypsum*, and *Line Material* cases had severely limited this precedent, they had not formally overturned it. The federal district court deftly avoided the whole question, arguing, "The very passage of time has evolved new activities upon the part of the defendants and is essentially a factor bearing upon the continuing validity of patents and their efficacy as a basis for contractual relationships."[156] In 1926, the lightbulb cartel had rested on the patent to the tungsten filament, which was very strong. No serious legal challenge to it had emerged, and the tungsten filament was the basic component of the lightbulb. This patent had since expired. By 1949, GE was relying on its rights to incremental improvements such as frosted bulbs. This, the court asserted, created a different situation. The argument had validity, but in all likelihood the changing legal atmosphere was more important to the outcome than the changing patent position of the cartel. Had it held the tungsten filament patent in 1949, General Electric still probably would have lost.

Once the court had disposed of the 1926 precedent, the verdict was inevitable. The court cited fifteen different ways in which GE and its cartel

allies had suppressed competition, concluding, "The aggregation of the foregoing activities and manifestations inevitably leads to the conclusion that General Electric monopolized the incandescent electric lamp industry in violation of the antitrust act." The decision conceded, "The record of General Electric's industrial achievement has been impressive. Its predecessors pioneered the lamp industry and it organized through the years an establishment that stands as a model of industrial efficiency. It early established the policy of making the best lamps as inexpensively as possible." "Admiration for the business acumen of General Electric, however," the court continued, "cannot avoid adherence to the philosophy of political economics enunciated in the antitrust laws of the United States." Nor did the court spare GE's foreign operations. It concluded, "The evidence overwhelmingly supports the Government's contentions[,] for it is a fact that I[nternational] G[eneral] E[lectric, GE's foreign arm,] was the manipulator which brought into being the Phoebus cartel and General Electric activities in the United States were geared to the Phoebus agreement." The judge discerned in GE's policies both at home and abroad "the plain intent to monopolize the incandescent electric lamp industry in the United States and protect their dominant position from foreign competition."[157]

The decree in the case, finalized in 1953, required GE to license its technology at reasonable prices to all applicants and to abstain from interfering through its position as a stockholder in the operations of otherwise independent producers of lightbulbs like Philips. The decision led GE to reconsider its entire position abroad. Many of the foreign companies in which it held stakes were not doing very well, and the court's order foreclosed any sort of cooperative arrangement with them. GE could better use the capital invested abroad at home. After 1953, General Electric disposed of most of its minority stakes in foreign companies, retaining only its wholly owned foreign subsidiaries (mainly in Latin America) and its shares in AEG and Tokyo Electric, for which it could not find buyers. GE became a passive investor in these two firms. The company returned to Europe, the world's second-largest market for its products, only after 1960. General Electric, the international leader in its industry during the 1920s and 1930s, was in retreat after 1945 thanks in large part to antitrust prosecution.[158]

The Antitrust Division also won its campaign against Webb-Pomerene companies. These organizations allowed U.S. firms to work together in export markets and often cooperated with international cartels. The Justice Department had challenged this practice in a suit against Alkasso and

Calkex, Webb-Pomerene companies that dominated foreign sales of synthetic alkali made in the United States and that had cartel ties with ICI. Although the sudden death of the presiding judge delayed a final decision until 1949, the Antitrust Division secured an unqualified victory in this case. The court rejected the authority of the FTC's "silver letter," in which the agency had sanctioned the participation of Webb-Pomerene companies in foreign cartels, noting, "Administrative interpretation must fall where clearly unsanctioned by law or in conflict with judicial decision." It went on: "Viewing the Webb Act in the light of contemporaneous interpretation of antitrust laws, considering the import of the Act when read as a whole, and giving careful attention to the entire legislative history of its passage, the conclusion is irresistible that the Webb-Pomerene Act affords no right to export associations to engage on a world-wide scale in practices so antithetical to the American philosophy of competition." The court also agreed with the government that the alkali industry used Alkasso and Calkex to manipulate the domestic market.[159] The decision effectively banned American firms from participating in international cartels through Webb-Pomerene companies, although the FTC itself did not formally abandon the "silver letter" until 1955.[160]

Another decision further restricted the utility of Webb-Pomerene companies. In the 1950 *Minnesota Mining and Manufacturing* case, a federal district court ruled that a Webb-Pomerene company could not own or operate plants abroad. The leading American producers of abrasives, which included Minnesota Mining and Manufacturing, had organized a Webb-Pomerene firm in 1929 to handle their exports. Subsequently, the growth of sales abroad, coupled with protection against imports in the most lucrative markets, encouraged this organization to construct plants in other countries—a step that, the Justice Department contended, exceeded the legitimate powers of Webb-Pomerene companies. The court agreed, concluding that "when a dominant group of American manufacturers in a particular industry combine to establish manufacturing plants in a foreign area to which the evidence shows that it is legally, politically and economically possible for some American enterprises to export products in reasonable volume, . . . [it] proves a violation of . . . the Sherman Act." "It is no excuse," the court asserted, "for the violations of the Sherman Act that supplying foreign customers from foreign factories is more profitable." The prohibition on foreign investment, however, applied only to Webb-Pomerene companies, not American firms operating on their own.[161]

Another decision involving foreign investment, *Timken Roller Bearing*, did apply to all American firms. Since before World War I, Timken Roller Bearing, the nation's leading producer of tapered, frictionless bearings, had agreements with a British firm that provided for the exchange of patents and technology, as well as for the division of world markets. In 1927, the American firm had purchased a 50 percent stake in its British ally, which assumed the name British Timken. Management of the British firm took the other 50 percent. Subsequent public offerings reduced the American firm's stake to 30.25 percent, although it remained the largest stockholder. Meanwhile, the British firm had, with financial aid from its American parent, organized a French subsidiary, French Timken, in which the other two Timken firms held a controlling stake. The three Timken companies coordinated their activities through agreements exchanging patents and technology and dividing markets. The Justice Department, as part of its campaign against patent cartels, filed suit to break up these arrangements. Timken defended itself on the grounds that the British and French firms were its subsidiaries. It claimed that the agreements in question were simply management arrangements and that the Sherman Act did not obligate different divisions of the same organization to compete against each other.[162]

Ruling in 1949, the district court found this reasoning unconvincing. It noted that anti-competitive arrangements predated the American firm's investment in the British and French companies. The purchase of stock in these organizations "did not mark the beginning of new business contacts. [It] merely extended the restrictive arrangements which had existed for almost twenty years." Perhaps more important, the American firm did not control a majority of the stock in the British and French firms. The court noted, "British Timken and French Timken retained their corporate independence and jealously guarded their interests in dealings with the defendant," adding that the "defendant had no control over the business conduct of either." Because the companies retained their operating independence, they "were potential competitors in the tapered bearing market." The court ordered the Timken companies to terminate their alliance and the American firm to dispose of its stakes in the British and French concerns.[163]

The Supreme Court upheld the principles laid down by the lower court. It concluded "that [to claim] the trade restraints were merely incidental to an otherwise legitimate 'joint venture' is, to say the least, doubtful." The court continued, "The fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws." It did relent on one point. It did not require American Tim-

ken to dispose of its holdings in the British and French firms but merely to sever the illegal agreements. The High Court also implied that the decision did not apply to agreements between American firms and their wholly owned subsidiaries.[164]

The *Timken* decision provoked great controversy. Justice Robert Jackson, hardly an apologist for monopoly, complained in a dissent, "I doubt that it should be regarded as an unreasonable restraint of trade for an American industrial concern to organize foreign subsidiaries, each limited to serving a particular market area. If so, it seems to preclude the only practical means of reaching foreign markets by many American industries. . . . I think this decision will restrain more trade than it will make free."[165] Subsequent decisions did retreat somewhat from *Timken*. Nevertheless, the case struck a serious blow against the joint subsidiaries that members of international cartels had often used to coordinate their activities.[166]

Taken together these decisions represented perhaps the greatest victory for antitrust prosecution since World War I. They made the participation of American firms in international cartels through patent accords, joint ventures, or Webb-Pomerene corporations illegal under most circumstances, even if the cartels in question were not directed specifically at American markets. Exceptions to this rule did exist, like DuPont's and ICI's Chilean venture, but they had to meet very strict standards. The implications reached far beyond the United States. Because American firms were among the leading concerns in most industries, the ban on their participation in international cartels made the construction of such organizations an uncertain proposition at best. These court decisions also established the right of the federal government to sue foreign firms involved in cartels that affected American markets, even if the companies in question had simply agreed to stay out of the United States.[167] Theoretically such firms were beyond American jurisdiction if they did no business in the United States, but the American courts usually concluded that any activity within the country, no matter how small, brought firms under their purview. ICI had only one office in New York, dealing mainly with patent matters, but the U.S. courts considered this presence sufficient to subject the entire company to American law. Besides, most large foreign firms wanted access to the lucrative U.S. market. Forced to choose between the profits they could earn in America and participating in cartels, they usually opted for the former.

International cartels did not suddenly vanish from the world economy. In some cases, such as the De Beers diamond cartel, they managed to reconfigure themselves outside the reach of American law. In other cases, like

shipping, American legislation explicitly exempted the international cartel from the antitrust laws. Cartels often persisted at the national level where protection or the cost of transportation insulated domestic producers from foreign competition. Nevertheless, few of the great international cartels of the 1930s, particularly in high-tech fields like electrical machinery and chemicals, recovered from the blows administered by the U.S. courts.