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Bribery and Brokerage: An Analysis of Bribery in Domestic and Foreign Commerce Under Section 2(c) of the Robinson-Patman Act

The continuing disclosures that have been compelled by the Securities and Exchange Commission\(^1\) of bribery of government officials, both domestic\(^2\) and foreign,\(^3\) have stimulated interest in the problem of commercial bribery. This interest is reflected in the Foreign Corrupt Practices Act of 1977\(^4\), in proposals for new domestic\(^5\) and international\(^6\) legislation, and in a reexamination of whether present laws, including the securities laws\(^7\) and the antitrust

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2. See, e.g., N.Y. Times, April 9, 1976, at 60, col. 4 (22 government officials rebuked by the Secretary of the Air Force for accepting hunting trips from Northrop Corp. and Rockwell International).
3. See, e.g., Wall St. J., Sept. 16, 1976, at 7, col. 1 (to that date over 200 firms had disclosed making questionable payments abroad); id., June 18, 1975, at 7, col. 3. See also Prohibiting Bribes to Foreign Officials: Hearings on S.3133, S.3379, & S.3418 Before the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess. (1976) [hereinafter cited as Senate Hearings].
4. Pub. L. No. 95-213, 91 Stat. 1494 (1977) (to be codified in scattered sections of 15 U.S.C.). The Act might be thought to obviate the need for any other methods of attacking bribes of foreign officials. It amends the Securities Exchange Act of 1934 by making it unlawful for any domestic concern to bribe a foreign official. However, the Act does not, on its face, provide any remedies for private plaintiffs, and even if the courts imply a civil remedy, it would probably not be extended to a plaintiff who is a competitor. Since it is the shareholders of the bribing company who are directly affected by the expenditures of funds for the bribe, and since competitors are not members of a "class for whose especial benefit the statute was enacted," Cort v. Ash, 422 U.S. 66, 78 (1975) (emphasis original) quoting Texas & Pac. Ry. Co. v. Rigby, 241 U.S. 33, 39 (1916), the courts may limit any implied remedy to those shareholders. Cf. Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 37 (1977) (implied civil remedy under § 14(e) of the Securities Exchange Act available only to the shareholders accepting the tender offer and not to a defeated tender offeror).
5. See N.Y. Times, June 15, 1976, at 1, col. 5 (city ed.) (President Ford proposes legislation to curb bribes paid by American corporations abroad).
7. Before the Foreign Corrupt Practices Act of 1977, the securities laws compelled disclosure of those aspects of corporate payments abroad which were of interest to investors, but they did not directly prohibit such payments. It was, of course, hoped that the prospect of disclosure would deter corporations from making such payments. Moreover, since disclosures were required only of material facts relevant to investors, some information of importance to the general public—such as the purposes for which the foreign payments were made or the identity of the recipients—may have gone undisclosed. See Lowenfels, Questionable Corporate Payments and the Federal Securities Laws, 51 N.Y.U.L. Rev. 1 (1976); Note, Disclosure of Payments to Foreign Government Officials Under the Securities Acts, 89 Harv. L. Rev. 1848 (1976); Note, Foreign Bribes and the Securities Acts' Disclosure Requirements, 74 Mich. L. Rev. 1222 (1976); Comment, Bribes, Kickbacks and Political Contributions in Foreign Countries—the
laws, regulate such activities. This Note investigates the feasibility and wisdom of regulating the anticompetitive effects of bribery in domestic and foreign commerce through section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act.9

This Note first analyzes the substantive and jurisdictional criteria of section 2(c) to evaluate the possible and the desirable scope of its applicability to commercial bribery. The Note next asks whether this statute reaches bribery of domestic and foreign government officials and concludes that where the requirements of section 2(c) are otherwise met and where the person accepting the bribe is acting administratively rather than politically,10 the statute could be ap-


9. 15 U.S.C. § 13(c) (1976) provides:
   It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

The Foreign Corrupt Practices Act of 1977 expands the Securities and Exchange Act of 1934 to enable the government to impose criminal penalties and civil injunctions on foreign commercial bribery. This Note submits that § 2(c) of the Robinson-Patman Act may provide an alternative route by which private parties, as well as the government, can attack commercial bribery of both domestic and foreign officials.

10. In determining whether there was a relationship between the government agent’s actions and the purported bribe the court must be able adequately to formulate standards for review of the agent’s actions. In a commercial setting this is relatively simple, since the agent is expected to obtain for his principal the best deal possible. However, while there are government officials who occupy a position similar to that of the commercial agent, some officials are required to base decisions upon more complex, albeit definite, standards, and others, whose functions are political rather than administrative, have great discretion. Although the actions of the first two could be reviewed by a court under the reasonable man standard, the actions of
plied to bribery of agents of domestic governments. However, a wholesale application of section 2(c) to bribery of foreign government agents would leave American competitors in foreign commerce defenseless when competitors not subject to the American antitrust laws bribed foreign customers' agents. Since this might exclude Americans from many important overseas contracts without appreciably benefiting competition in any market, application of section 2(c) to bribery of foreign government agents should be resisted unless the courts are willing to permit "defensive bribery."  

I. THE APPLICATION OF SECTION 2(C) TO COMMERCIAL BRIBERY

In 1936 Congress enacted the Robinson-Patman Act as an amendment to section 2 of the Clayton Act in order to control and prohibit the injury to small businesses that it believed resulted when mass buyers used their greater purchasing power to force sellers to supply them at prices discriminately lower than those available to the small businesses. Section 2(a), as amended, set forth the conditions under which price discrimination would be unlawful. Although that section covers direct price concessions, Congress feared that it might not reach subtler methods of price discrimination. One such method involved "dummy" brokerage arrangements in which intermediaries, often termed brokers, were employed by buyers but rendered no services. Congress was concerned that sellers were required to pay fictitious brokerage fees that were passed on to mass buyers, so that these buyers received lower prices for their purchases than their smaller competitors. Section 2(c) was designed to prevent this kind of arrangement, as were most early suits brought under it.

the third may rest in part on unarticulated, noneconomic, political principles beyond the scope of judicial review. See text at notes 129-33 (discussing this problem in the context of the Noerr-Pennington doctrine in domestic commerce) and 140-44 (discussing this problem in the context of the act of state doctrine in foreign commerce) infra.

11. "Defensive bribery" as used in this Note denotes the behavior of a firm which, after learning that a competitor is attempting to secure a contract by improper payments to an intermediary, offers a counter-payment to remain in competition for the contract.
18. See, e.g., Great Atl. & Pac. Tea Co. v. FTC, 106 F.2d 667 (3d Cir. 1939), cert. denied, 308 U.S. 625 (1940); Oliver Bros. v. FTC, 102 F.2d 763 (4th Cir. 1939); Biddle Purchasing Co. v. FTC, 96 F.2d 687 (2d Cir.), cert. denied, 305 U.S. 634 (1938).
But section 2(c) was worded broadly enough to cover a plethora of other intermediary transactions as well: it prohibited paying or granting, or receiving or accepting, "anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered." Moreover, unlike section 2(a), section 2(c) did not by its terms require a discrimination in price. Further, section 2(c) lacked section 2(a)'s numerous exceptions and defenses. Thus, the courts soon faced cases involving payments to intermediaries which amounted to commercial bribery. In determining the extent to which section 2(c)

19. 15 U.S.C. § 13(c) (1976). Moreover, the courts have held that a violation of § 2(c) does not require a finding of actual injury to competition. See FTC v. Simplicity Pattern Co., 360 U.S. 55, 65 (1959). Thus, § 2(c) is usually called a per se rule. See A. Neale, The Antitrust Laws of the U.S.A. 259 (2d ed. 1970). Not even the "except for services rendered" provision was considered an exception to the flat prohibition against compensating a broker employed by another until the Supreme Court in FTC v. Henry Broch & Co., 363 U.S. 166, 173-74 (1960), suggested in dictum that there might be situations in which the employee of one party to a transaction might legitimately render services to the other party. See Empire Rayon Yarn Co. v. American Viscose Corp., 238 F. Supp. 556, 560 (S.D.N.Y. 1965), aff'd en banc, 364 F.2d 491 (2d Cir. 1966), cert. denied, 385 U.S. 1002 (1967); text at notes 87-93 infra.

20. In addition to numerous exceptions to the general prohibition against price discrimination, § 2(a) permits the defense of cost justification. Furthermore, under § 2(b), offering discriminatory prices in a good-faith effort to meet competition is a defense to § 2(a).

21. All a plaintiff was required to show was that a commission or discount had been received in lieu of brokerage where no legitimate service had been provided to the person giving the commission or discount by the person receiving it. See, e.g., Oliver Bros. v. FTC, 102 F.2d 763 (4th Cir. 1939); see also Note, Beleaguered Brokers: The Evisceration of Section 2(c) of the Robinson-Patman Act, 77 Harv. L. Rev. 1308, 1313-14 (1964).

In defining those services that an intermediary could legitimately perform for a brokerage fee, the courts looked to the legislative intent underlying § 2(c). Since that section was enacted in part to prevent hidden price discrimination in the brokerage function, and in part to protect the "fiduciary relationship" between the broker and his client, the courts uniformly held that any scheme in which an intermediary received compensation from both the buyer and seller in a single transaction violated § 2(c). See, e.g., Southgate Brokerage Co. v. FTC, 150 F.2d 607 (4th Cir. 1945), cert. denied, 326 U.S. 774 (1945); Great Atl. & Pac. Tea Co. v. FTC, 106 F.2d 667 (3d Cir. 1939), cert. denied, 308 U.S. 625 (1940). It was believed that dual representation could disguise price discrimination where the intermediary passed the benefit of his second commission back to his original employer either directly in cash or indirectly by requiring a lesser fee from him. As the court in Great Atl. & Pac. Tea Co. v. FTC, 106 F.2d 667, 674-75 (3d Cir. 1939), cert. denied, 308 U.S. 625 (1940), pointed out:

The agent cannot serve two masters, simultaneously rendering services in an arm's length transaction to both. While the phrase, "for services rendered," does not prohibit payment by the seller to his broker for bona fide brokerage services, it requires that such service be rendered by the broker to the person who has engaged him. In short, a buying and selling service cannot be combined in one person.

See also Biddle Purchasing Co. v. FTC, 96 F.2d 687 (2d Cir.), cert. denied, 305 U.S. 634 (1938). While this reading of the statute effectuated the legislative desire of preventing all disguised price discrimination or other abuses of the brokerage function, it also radically limited businessmen's allocation of the various elements of the brokerage function in any transaction among themselves, even absent discrimination or other abuse. The effect of these decisions was to ban outright any payment of brokerage by either party in a transaction to an employee of the other, even where the latter genuinely performed brokerage service for the former. While more recent cases have demonstrated a greater flexibility in this area, see note 19 supra; text at notes 87-93 infra, the earlier § 2(c) bribery cases evolved in the context of the inflexible rule prohibiting a servant from serving two masters.
should be applicable to bribery, courts have had to interpret both the
substantive and the jurisdictional requirements of section 2(c).

A. Substantive Requirements of Section 2(c)

Many instances of commercial bribery, unlike other intermediary
transactions attacked under section 2(c), do not result in price dis­

crimination. Since section 2(c) was enacted as part of a scheme to
eliminate discriminatory price differentials obtained by large buyers
who have greater economic power than their smaller competitors,22
it was questionable whether that section should apply when no such
discrimination resulted. In the typical brokerage situation resulting
in price discrimination, mass buyers perform brokerage services for
sellers through a dummy broker and then demand a price differen­
tial on the theory that they are paying their salesmen, agents, or bro­
kers to perform the seller's sales function.23 A payment to the broker
is passed back to his employer either directly in cash or indirectly by
discount. As Representative Wright Patman observed:

The legislative history of subsection 2(c) clearly shows that Congress
knew that the only effective way to stamp out and prevent the practice
of mass buyers coercing sellers to pay them compensation for fictitious
sales services was by prohibiting sellers absolutely from paying or al­


22. See H.R. REP. NO. 2287, 74th Cong., 2d Sess. 7-16 (1936); W. PATMAN, COMPLETE
GUIDE TO THE ROBINSON-PATMAN ACT 110 (1963).
23. W. PATMAN, supra note 22, at 106.
24. Id. at 110 (emphasis original).
25. 136 F.2d 12 (6th Cir. 1943).
26. 136 F.2d at 16.
ary transactions, section 2(c) was held applicable. Later cases have followed this reasoning.

While, as the court in *Fitch* noted, this result appears to apply section 2(c) to situations other than the price discrimination it was enacted to prevent, there is evidence that Congress considered such cases to be properly within the ambit of section 2(c). Thus, as Representative Patman stated during Congress's debate over the Robinson-Patman Act: "A practice has grown up whereby large mass buyers bribe representatives of the seller . . . under the guise of a brokerage allowance. It is not a brokerage allowance at all, it is a bribe. This bill will . . . prohibit one party from bribing the representative of the other." The notion that section 2(c) was intended to protect these fiduciary relationships also appears in the Senate Committee report that accompanied the Robinson-Patman Act to the Senate floor.

Yet even if price discrimination is not the only type of injury section 2(c) is designed to prohibit, and even if the injury resulting from betrayal of the fiduciary relationship is one of the other injuries prohibited by section 2(c), further problems remain. What was Congress's intention regarding the class of plaintiffs who may be able to invoke section 2(c) protection? Should a class of plaintiffs that was intended to be protected by section 2(c) be able to obtain relief under the federal antitrust laws when a remedy is already

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27. It could be argued that bribery is merely an additional element in price competition, at least once a competitor becomes aware of its existence, since the competitor who offers the most desirable combination of product and bribe will probably receive the contract. But even if the most efficient competitor would prevail, the principal would usually still have suffered injury by the bribery of his agent, and Congress sought to prevent that injury by enacting § 2(c). *See* text at notes 30-31 *infra*. In addition, given the imperfect information with which markets actually operate, a competitor might never learn of his competitors' bribes. *See*, e.g., the situation described in note 110 *infra*.

28. *See*, e.g., *Rangen, Inc. v. Sterling Nelson & Sons*, 351 F.2d 851 (9th Cir. 1965), *cert. denied*, 383 U.S. 166 (1966), discussed in text at note 45 *infra*. In rejecting the argument that § 2(c) requires actual price discrimination, the Ninth Circuit relied on both the legislative history of § 2(c), which indicated congressional concern with the fiduciary responsibilities of brokers, *see* text at notes 30-31 *infra*, and the Supreme Court's dicta in *FTC v. Henry Broch & Co.*, 363 U.S. 165, 169 n.6 (1960), that § 2(c) was intended to proscribe the bribery of a seller's broker by the buyer. 351 F.2d at 856 & n.3.

29. 136 F.2d at 16.


31. Whether employed by the buyer in good faith to find a source of supply, or by the seller to find a market, the broker so employed discharges a sound economic function and is entitled to appropriate compensation by the one in whose interest he so serves. But to permit its payment or allowance where no such service is rendered . . . is but to permit the corruption of this function to the purposes of competitive discrimination. The relation of the broker to his client is a fiduciary one. To collect from a client for services rendered in the interest of a party adverse to him, is a violation of that relationship; and to protect those who deal in the streams of commerce against breaches of faith in its relations of trust, is to foster confidence in its processes and promote its wholesomeness and volume.

S. REP. No. 1502, 74th Cong., 2d Sess. 7 (1936).
available under state law? Because the question of adequate alternative remedies cannot be completely separated from any definition of which classes of injured persons should be able to recover damages under the statutes, these two issues are dealt with simultaneously.

_Fitch_ involved a suit by a principal whose agent had been bribed. While legislative texts suggest that Congress intended to protect the fiduciary relationship in this type of situation, it is less clear that protection should extend to buyers whose brokers have been bribed by sellers. Support for the position that only the former situation was considered for protection can be inferred from statements by Representative Patman at the time the Robinson-Patman Act was being debated which seem to indicate a concern only for the position of the seller betrayed by his agent. Moreover, the legislative history contains examples only of bribery of a small seller's agent by a large mass chain buyer, indicating that Congress may not have anticipated broad protection of the "fiduciary" aspects of the broker's functions. Such a restriction on the scope of section 2(c) is consistent with the general concern of the authors of the Robinson-Patman Act for the protection of small, local, independent businesses from predatory acts of mass-buying national chains.

On the other hand, it can be argued that in phrasing section 2(c) broadly, Congress intended it to apply to any situation in which anticompetitive effects result from abuse of a broker's position. When a broker, by accepting a bribe from the other party to the transaction, betrays his duty to transmit market information to his principal, the injury to competition is the same whether the principal is a seller or a buyer.

But even if the principal is within the class of plaintiffs intended to receive section 2(c) protection, should he receive that protection when an adequate remedy is available under state law? The concern with protecting the fiduciary relationship between the electric

32. See text at notes 30-31 _infra_.

33. [O]ur investigation has disclosed that [a certain sellers' broker] had a secret contract with a large mass corporate chain buyer by which he obligated himself to sell every car of . . . potatoes of [his farmer customers] to this large buyer . . . at the market price. . . . [B]ut fortunately for the large mass buyer, he was big enough to make the market price . . . . This man representing the farmers sold those potatoes to that mass buyer, fixing the price himself . . . [and] got a secret rebate of $2.50 to $5 on every car that the farmers knew nothing about . . . . That is the kind of dummy-brokerage arrangement we are trying to prohibit in this bill.


34. See F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 19-23 (1962).

35. As the Supreme Court noted in _FTC v. Henry Broch & Co._, 363 U.S. 166, 169 (1960): "Congress in its wisdom phrased § 2(c) broadly, not only to cover the other methods of price discrimination through brokerage then in existence but all other means by which brokerage could be used to effect price discrimination. . . ." In a footnote appended to that statement the Court also noted that § 2(c) was intended "to proscribe other practices such as the 'bribing' of a seller's broker by the buyer." 363 U.S. at 169 n.6.
company and its president in Fitch is arguably met by state common law on fiduciary duty. Although Fitch's argument that potential competitors should be protected from the competitive injury resulting from the coal company's president's conduct is plausible, in fact the decision in Fitch resulted in compensation to the principal rather than to the injured competitor. In such cases state law is supplemented by a federal antitrust remedy only to the extent that the threat of liability for treble damages under the latter provides an additional increment of deterrence. Concern with duplicity of remedies was influential in the Seventh Circuit's refusal to apply section 2(c) in Norville v. Globe Oil & Refining Co. In that case the lessor of a filling station required the lessee to purchase all his gasoline and oil from an oil company that held a mortgage on the station. The lessee purchased these products through the lessor at a price higher than that the lessor paid the company; the difference in price was credited to the lessor's account. In granting the defendant's motion for summary judgment, the Seventh Circuit reasoned that any wrongdoings were actionable under state law, and that the antitrust laws were "never meant to be a panacea for all wrongs."

The justification for extending section 2(c) to protect principals from their unfaithful agents is taken by the courts from congressional statements that section 2(c) was intended to police fiduciary relationships in general and especially to prevent bribery in such cir-

36. For example, when the plaintiff in Sears, Roebuck & Co. v. Blade, 110 F. Supp. 96 (S.D. Cal. 1953), lost its § 2(c) bribery claim for failure to meet that section's commerce require-
ments, see text at notes 61-62 infra, it simply brought suit in a state court, arguing that defendant Blade had breached a fiduciary duty. Sears apparently recovered its damages, albe-
In at least one jurisdiction such conduct may also constitute a criminal offense. See N.Y.
Penal Law § 180.00 (McKinney 1975) (making commercial bribery a misdemeanor). The predecessor to this statute, N.Y. Penal Law § 439 (McKinney 1967), however, was construed as not providing a civil remedy for the injured employer-principal. See Hearn v. Schuchman, 80 Misc. 311, 141 N.Y.S. 242 (Sup. Ct. 1913), affd., 157 App. Div. 926, 142 N.Y.S. 337 (App. Div. 1915). Since § 180.00 was intended to be a mere reenactment of the relevant parts of § 439, see Practice Commentary to N.Y. Penal Law § 180.00 (McKinney 1975), Hearn should remain good law under § 180.00. Thus, the plaintiff-employer would be limited to theories that require him to establish that his employee, in accepting the bribe, breached a common-law fiduciary duty.
37. 303 F.2d 281 (7th Cir. 1962).
38. 303 F.2d at 283 (quoting Parmelee Transp. Co. v. Keeshin, 292 F.2d 794, 804 (7th Cir.),
cert. denied, 368 U.S. 944 (1961), in which the court refused to apply § 1 of the Sherman Act to an alleged bribery of a government official for the same reason). See note 42 infra. The Norville court added: "It is, of course, immaterial that the appeal of treble damages and attorneys' fees afforded by federal law may be more attractive than the simple compensatory dam-
ages available under state law." 303 F.2d at 283.
A recent case, however, indicates, without reference to Norville, that the Seventh Circuit is willing to apply § 2(c) to commercial bribery in some circumstances. Grace v. E.J. Kozin Co., 538 F.2d 170 (7th Cir. 1976). This case involved secret payments made by one frozen-seafood producer to the agent of a competitor in connection with the latter's purchase of frozen seafood from the former.
cumstances. If Congress expressly enacted section 2(c) to prohibit bribery, the courts should enforce that prohibition even if they see no compelling need for additional protection.

When the plaintiff is a competitor of the party offering the bribe, the problem of duplicity of remedies does not exist. Unlike the injured principal, the competitor is not likely to be protected either by common-law notions of fiduciary duty or by state unfair trade practice statutes. But even though there may be no alternative remedy, should section 2(c) be applied where, as here, Congress has not expressed concern for the plight of the competitor? Concern for the competitor who is excluded because of bribery has not been believed strong enough to persuade courts to apply the much more flexible standards of the Sherman Act to such cases.

39. See text at notes 30-31 supra.
40. See RESTATEMENT (SECOND) OF AGENCY § 352 (1958). (Absent an independent tort, an agent is not liable for harm to a person other than his principal for breach of fiduciary duty.) See also id. § 357.

Since bribery is rarely encountered on the consumer level, the only forms of these statutes which might be applicable are those forbidding unfair trade practices in general (Alternative Form 1 and, perhaps, Alternative Form 2, where it is extended to cover unfair trade practices as well as fraudulent or deceptive acts). Section 3 of the FTC's draft provides, however, that the statute is to be construed with special reference to the federal courts' interpretation of § 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1976). Thus, the applicability of such statutes to commercial bribery turns on whether or not “commercial bribery” constitutes an unfair trade practice under federal law. While the reach of § 5 may go well beyond that of the antitrust laws, see, e.g., FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239-44 (1972) (holding that the reach of § 5 goes beyond practices forbidden by the letter or the spirit of the antitrust laws), at the very least any violation of the antitrust laws, including the Robinson-Patman Act, constitutes an unfair trade practice. See, e.g., American News Co. v. FTC, 300 F.2d 104, 108 (2d Cir.), cert. denied, 371 U.S. 824 (1962) (violation of § 2(d) of the Clayton Act also constitutes an unfair trade practice); United States v. St. Regis Paper Co., 285 F.2d 607, 610 n.4 (2d Cir. 1960), affd on other grounds, 368 U.S. 208 (1961). Since commercial bribery violates § 2(c) of the Clayton Act as amended by the Robinson-Patman Act, it should also be an unfair trade practice under both federal and state law where the language of § 5 of the Federal Trade Commission Act is employed. This outcome, however, results from the incorporation of federal unfair-trade law into state law and does not justify limiting § 2(c) at the federal level in commercial bribery cases. If § 2(c) did not make such bribery an unfair trade practice, no state remedy would exist.

42. See Parmelee Transp. Co. v. Keeshin, 292 F.2d 794, 804 (7th Cir.), cert. denied, 368 U.S. 944 (1961) (refusing to apply § 1 of the Sherman Act in a complex fact situation involving
Nevertheless, the broad language of the Robinson-Patman Act, as well as the entire Clayton Act, may require such protection. Congress intended the Robinson-Patman Act to be part of the antitrust law of the United States, and section 4 of the Clayton Act provides treble damages for "[a]ny person who shall be injured" by violation of the antitrust laws. Even if Congress' concern was the protection of the fiduciary relationship, a potential competitor is injured by violation of section 2(c) and thus is a proper plaintiff under section 4 of the Clayton Act. This reasoning was employed to grant section 2(c) relief in *Rangen, Inc. v. Sterling Nelson & Sons*, in which a manufacturer of fish food sued a competitor for excluding the former from selling its product to the State of Idaho by bribing the state employee who chose the fish food the state purchased. Thus, section 2(c) has been applied notwithstanding the absence of price discrimination to commercial bribery both in cases in which the plaintiff was a principal and in cases in which the plaintiff was a competitor.

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45. 351 F.2d 851 (9th Cir. 1965), cert. denied, 383 U.S. 936 (1966).

46. The District Court in *Rangen* had refused to apply §§ 1 & 2 of the Sherman Act on the ground that commercial bribery was "not the type of misconduct within the purview of the concepts of a combination in restraint of trade or monopoly as well as used in the Sherman Act," although it did grant relief under § 2(c) of the Clayton Act. *Sterling Nelson & Sons v. Rangen, Inc.*, 235 F. Supp. 393, 399-400 (D. Idaho 1964), aff'd on other grounds, 351 F.2d 851 (9th Cir. 1965), cert. denied, 383 U.S. 936 (1966); Calnetics Corp. v. Volkswagen of America, Inc., 532 F.2d 674, 687 (9th Cir.), cert. denied, 429 U.S. 940 (1976) (refusing to apply § 1 of the Sherman Act to commercial bribery, citing the opinion of the district court in *Rangen*). See note 46 infra.

In fact, the very flexibility of § 1 of the Sherman Act may be a substantial reason for regulating bribery under § 2(c) of the Clayton Act instead. Whereas § 2(c) is limited to payments made to other parties in sale transactions, § 1 of the Sherman Act prohibits any conspiracy in restraint of trade. If a conspiracy involving bribery were held to violate § 1, it is difficult to see how the courts could avoid extending Sherman Act coverage to conspiracies involving other kinds of criminal behavior when a restraining effect on trade is shown. Such an interpretation could easily lead to the use of antitrust laws to regulate conduct because it is morally offensive, rather than economically undesirable. A clear example of this tendency was the Nixon administration's proposal to use the antitrust laws against organized crime. See Steiner, *Toward a National Antitrust Policy?*, 21 Univ. of Mich. L. Quad. Notes 12, 13 (Fall 1976).

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45. 351 F.2d 851 (9th Cir. 1965), cert. denied, 383 U.S. 936 (1966).

46. The Ninth Circuit subsequently cited with approval the *Rangen* application of § 2(c) and the refusal to apply the Sherman Act to commercial bribery in Calnetics Corp. v. Volkswagen of America, Inc., 532 F.2d 674, 687 (9th Cir.), cert. denied, 429 U.S. 940 (1976). Other circuits have also approved of this application of § 2(c). See Grace v. E.J. Kozin Co., 538 F.2d 170 (7th Cir. 1976); Ideal Plumbing Co. v. Benco, Inc., 529 F.2d 972, 977 (8th Cir. 1976) (dictum); Jones v. Borden Co., 430 F.2d 568, 572 (5th Cir. 1970) (dictum).

B. Jurisdictional Requirements of Section 2(c)

Section 2(c) prohibits any person (1) "engaged in commerce, in the course of such commerce" (2) from paying or accepting anything of value (3) except for services rendered (4) in connection with the sale or purchase (5) of goods, wares or merchandise (6) either to the other party to such a transaction or to an agent, representative or other intermediary. While each of these six requirements has an established meaning in cases involving price discrimination through brokerage, application of section 2(c) to bribery requires that each of these elements be reexamined.

1. Engaged in Commerce, in the Course of Such Commerce

a. Commerce. Section 1 of the Clayton Act defines "commerce" for the purposes of the entire Clayton Act, including the Robinson-Patman Act, as "trade or commerce among the several States and with foreign nations." Because the price discrimination provisions of section 2(a) have been limited to domestic commerce, it has been argued that section 2(c) should likewise be limited. However, while section 2(a) is specifically limited to sales for "use, consumption or resale within the United States," section 2(c) contains no such language. Moreover, the view that the latter should be applied extraterritorially finds support in remarks of Representative Patman regarding Congress's intent. The first case to extend section 2(c) to export sales was Baysoy v. Jessop Steel Co. Since the court expressed doubt that the transaction involved was actually an

47. See 15 U.S.C. § 13(c) (1976); note 9 supra.
48. See generally F. Rowe, supra note 34, at 330-62.
51. See F. Rowe, supra note 34, at 82.
52. 15 U.S.C. § 13(a) (1976) provides in pertinent part:
It shall be unlawful for any person engaged in commerce, in the course of such commerce, . . . to discriminate in price between different purchasers of commodities . . . where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption or resale within the United States . . .
53. As Rep. Patman indicated after the passage of the Act:
This delimitation [of § 2(a) to domestic commerce] is not found in the remaining clauses of the Act, which apply to payment for the use of services and facilities used in furthering the movement of goods involved in the sales transaction. These clauses apply to any person engaged in commerce, who in the course of such commerce enters into actions prohibited by the clauses. To determine the limit and scope of such commerce we must turn to the definition found in the Clayton Act itself.
export sale, but decided the case on the assumption that it was, it could be argued that the case is dubious precedent. However, in Canadian Ingersoll-Rand Co. v. D. Loveman & Sons, Inc., the court held that section 2(c) applied to bribery in a transaction that clearly involved foreign commerce.

b. Engaged in commerce. Section 2(a) requires not only that the defendant be engaged in commerce, but also that at least one of the sales compared for the purpose of proving price discrimination be in interstate commerce. Since any person who makes a sale in interstate commerce is "engaged in interstate commerce," usually all that has been required to establish jurisdiction is proof of one or more sales in interstate commerce. Section 2(c), however, does not contain the sales requirement of section 2(a). But it should be clear that a person whose sales involve the shipment of goods, wares, or merchandise from one state to another is engaged in interstate commerce. Most cases have taken this so much for granted that little discussion can be found on this point. Although all of the early section 2(c) cases involved persons selling in interstate commerce, none of the opinions discussed the commerce requirements. Only when a claim had been dismissed for lack of jurisdiction had the issue been raised. For example, in Sears, Roebuck & Co. v. Blade, the court refused to apply section 2(c) to a situation in which local printing firms made kick-backs to a Sears employee in order to secure contracts for printing advertisements. Because the market was intrastate and there was no evidence that any of the printing firms had ever engaged in interstate commerce, the claim was dismissed for failure to meet the "engaged in commerce" requirement.

Where no interstate sale has occurred, two lines of argument have been unsuccessful in expanding the "engaged in commerce" language beyond the restrictive flow of commerce theory outlined above. The first line of argument, exemplified by Gulf Oil Corp. v. Copp Paving Co., attempts to expand jurisdiction to include any activity with a sufficient "nexus" to interstate commerce. In that

55. 90 F. Supp. at 305.
57. 227 F. Supp. at 833-34.
59. See F. Rowe, supra note 34, at 78-79.
60. See Southgate Brokerage Co. v. FTC, 150 F.2d 607 (4th Cir. 1945); Oliver Bros. v. FTC, 102 F.2d 763 (4th Cir. 1939); Biddle Purchasing Co. v. FTC, 96 F.2d 687 (2d Cir.), cert. denied, 305 U.S. 634 (1938).
62. 110 F. Supp. at 102.
case defendants were accused of violating sections 2(a), 3, and 7 of the Clayton Act. Both produced asphalt for street paving, some of which was used in interstate highways, but none of the sales of either defendant was in the flow of interstate commerce. The plaintiff argued that the use of the product in interstate highways provided a sufficient nexus to interstate commerce. Although a similar argument had been successful in cases under the Fair Labor Standards Act, the Supreme Court distinguished those cases on the ground that while the Fair Labor Standards Act was intended to exploit the full reach of federal power under the commerce clause, the Clayton Act was not. Furthermore, the Court stated that because the nexus approach lacked any inherent limits, it was incompatible with the practical economic concerns of the antitrust laws.

The second unsuccessful line of argument characterizes any transaction that affects interstate commerce as being in interstate commerce for the purposes of the Clayton Act. The Supreme Court rejected this argument in *United States v. American Building Maintenance Industries*, in which the defendant, which was itself engaged in interstate commerce, was charged with violating section 7 of the Clayton Act in acquiring several firms which happened not to be in interstate commerce. Section 7 requires that both the acquiring and the acquired firm be engaged in interstate commerce. Although the acquired firms affected commerce in that they supplied services to firms engaged in interstate commerce, the Court held that they were not engaged in commerce for purposes of section 7. After noting that the earlier cases had limited section 7 to the flow of commerce theory and that the same commerce requirement had subsequently been reenacted in the 1950 amendments to that section, the Court held that "the phrase 'engaged in commerce' as used in §7 of the Clayton Act means engaged in the flow of interstate commerce, and was not intended to reach all corporations engaged in activities subject to the federal commerce power." Although the commerce requirements of section 2(c) have not been expressly reaf-

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65. 419 U.S. at 196-97.
66. 419 U.S. at 198.
67. Although this argument was made in *Copp*, the Court did not decide that issue at the time since it held that an effect on interstate commerce could not be presumed and the plaintiff had presented no evidence of such effect. 419 U.S. at 202-03.
68. 422 U.S. 271 (1975).
69. Section 7, 15 U.S.C. §18 (1976), provides in part: "No corporation engaged in commerce shall acquire . . . any part of . . . another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."
70. 422 U.S. at 283.
71. 422 U.S. at 284.
72. 422 U.S. at 283.
firmed by Congress, as those of section 7 have been, this definition of "engaged in commerce" probably applies in section 2(c) cases as well, since the definition of "engaged in commerce" in section 1 of the Clayton Act was intended to apply to all of that Act, including the Robinson-Patman Act.73

c. In the course of such commerce. The "in the course of such commerce" requirement of section 2(c) might reasonably be interpreted as requiring that the transaction which gives rise to the lawsuit occur in interstate commerce. However, courts have not always viewed this requirement so strictly. In Rangen,74 the Ninth Circuit found that an Idaho corporation doing business in Idaho which had bribed an employee of the state to induce the purchase of fish food manufactured in that state violated section 2(c).75 Although the defendant had sold fish food in interstate commerce in the past, it was difficult to view the particular sale out of which the case grew as occurring in the course of such commerce. The court nonetheless held that bribery in an intrastate transaction which excluded an interstate competitor was within the jurisdictional reach of section 2(c), relying on the holding of the Supreme Court in Moore v. Mead's Fine Bread Co.76 Moore held section 2(a) applicable to a New Mexico baker doing business in Texas and New Mexico who attempted to force another New Mexico baker out of business by discriminatorily reducing prices in New Mexico but not in Texas.77 The Moore Court explained:

We have here an interstate industry increasing its domain through outlawed competitive practices. The victim, to be sure, is only a local merchant; and no interstate transactions are used to destroy him. But the beneficiary is an interstate business; the treasury used to finance the warfare is drawn from interstate, as well as local, sources . . . .78

The Rangen court reasoned that just as Moore was able to finance his predatory activities in New Mexico because of profits earned in Texas, Rangen derived a competitive advantage in its interstate competition from its restraint of the Idaho fish-food trade.79 But if the "in the course of such commerce" requirement is to have meaning beyond the "engaged in commerce" requirement, there must be

73. See F. Rowe, supra note 34, at 77 n.137.
74. 351 F.2d 851 (9th Cir. 1965), cert. denied, 383 U.S. 936 (1966).
75. However, the plaintiff, a Utah corporation, apparently was engaged in interstate commerce while it was competing with the defendant to sell fish food to Idaho. 351 F.2d at 860.
77. 348 U.S. at 120.
78. 348 U.S. at 119.
79. 351 F.2d at 861.
some nexus between the violative act and interstate commerce. In *Moore* the nexus between interstate and intrastate activities is clear. Assuming that predatory pricing is a rational business strategy in the relevant market, the intrastate business that can draw upon resources from markets in other states may have an advantage over the entirely intrastate business. But this approach is inapplicable to section 2(c) bribery cases like *Rangen* since they do not involve predatory or below-cost sales. Instead, the bribed agent induces his principal to enter into a contract that permits the party offering the bribe to earn profits in excess of a competitive level. Although those profits could finance predatory pricing in some other market, any such conduct should be dealt with under the price discrimination provision of section 2(a).

Another objection to this war-chest interpretation of *Rangen* is that absent separate incorporation of interstate and intrastate businesses or absent maintenance of separate accounts, it may be extremely difficult to establish that an enterprise engaged in both interstate and intrastate commerce has not financed the former with proceeds from the latter or vice versa. The fungibility of money makes such an inquiry absurd. Thus, in many situations the "war...
“chest” presumption is effectively irrebuttable. As a consequence, the Clayton Act in its entirety, including both section 2(a) and section 2(c), could apply to situations beyond the reach of the Sherman Act’s “affecting commerce” test, since, at least under a literal interpretation of Rangen’s jurisdictional test, any firm engaged in both interstate and intrastate commerce would fall under the jurisdiction of the Robinson-Patman Act. 83

The lesson of Rangen thus appears to be primarily one of pleading. A complaint alleging only an effect on commerce will probably be dismissed. A complaint stressing the defendant’s involvement in both interstate and intrastate commerce and alleging a nexus between the restraint on intrastate commerce and the defendant’s competitive position in interstate commerce will probably meet the commerce requirements of section 2(c).

2. Paying or Accepting Anything of Value

While all successful section 2(c) bribery cases have involved direct monetary payments to the agent in question, large contributions to the agent’s political party 84 or lavish and extravagant entertain­ment 85 might achieve the desired result without involving an actual “payoff.” Making or receiving a campaign contribution clearly falls within the prohibitions of section 2(c). 86 But in the case of entertainment it is not always clear where standard business practice ends and bribery begins. Courts should thus be extremely cautious about attaching antitrust penalties to legitimate sales techniques. However, this is a factual rather than a legal issue; where the facts disclose an attempt to induce the agent or intermediary to breach his fiduciary duty, the courts should find a section 2(c) violation.

83. While this interpretation of Rangen appears to extend the reach of the Clayton Act well beyond that of the Sherman Act, Rangen and Clausen & Sons, Inc. v. Theo. Hamm Brewing Co., 284 F. Supp. 148 (D. Minn. 1967) (applying the Rangen test in a case arising under § 3 of the Clayton Act), revd. on other grounds, 395 F.2d 388 (8th Cir. 1968), might be limited to their facts, since any firm making some sales in interstate commerce and therefore “engaged in commerce” might be viewed as acting “in the course of such commerce” whenever the effect of that firm’s intrastate bribery is to prevent another firm from making a sale in interstate commerce.

84. See, e.g., note 114 infra and accompanying text.

85. See, e.g., note 2 supra.

86. Even where the contribution is given to another person or a political party rather than to the person to be influenced, but is given at the latter’s behest, the person being influenced has received something of benefit. This has been recognized in tax cases involving the anticipatory assignment of income. See Lucas v. Earl, 281 U.S. 111, 114-15 (1930), in which the Court held that no anticipatory arrangement could prevent income from being taxed to the person who earned it.
3. Except for Services Rendered

Section 2(c) forbids any party to a transaction to make any payment to an agent or intermediary who is not his agent, intermediary, or representative except in compensation for services legitimately rendered. 87

Early section 2(c) cases held that since "[t]he agent cannot serve two masters," one party's broker could not be compensated by the other party to the transaction without violating section 2(c). 88 This interpretation limited the ability of businesses to allocate the brokerage function among themselves and prevented them from eliminating brokers altogether and passing on the resulting savings to their customers. 89

However, a more flexible reading of the "services rendered" clause was suggested in 1960 by the Supreme Court in _FTC v. Henry Broch & Co._, 90 the only section 2(c) case to reach the Court. The defendant broker was accused of accepting a lower-than-normal commission rate from the seller so that the seller could offer a price acceptable to the buyer. Concluding that section 2(c) applied, the Court noted in dictum that although the purchaser had not provided any service that might justify the price concession it received, if such a service had been rendered, the result might have been different. 91 This has led to speculation that the Court would apply the "services rendered" exception at least when brokers were eliminated in order to decrease distribution costs and no competitive injury occurred. 92 Since _Broch_, the predominant view in the lower courts has allowed such a defense. 93

88. See, e.g., Great Atl. & Pac. Tea Co. v. FTC, 106 F.2d 667, 674 (3d Cir. 1939), cert. denied, 308 U.S. 625 (1940). See also Biddle Purchasing Co. v. FTC, 96 F.2d 687 (2d Cir.), cert. denied, 305 U.S. 634 (1938).
89. See, e.g., Southgate Brokerage Co. v. FTC, 150 F.2d 607 (4th Cir.), cert. denied, 326 U.S. 774 (1945) (holding that Southgate, in eliminating its brokers in certain transactions and passing part of the resulting savings on to its customers, violated § 2(c)), discussed in Schiering, _The Robinson-Patman Act: Is Section 2(c) Back?,_ 26 CASE W. RES. L. REV. 594, 600-01 (1976); Fitch v. Kentucky-Tennessee Light & Power Co., 136 F.2d 12, 15 (6th Cir. 1943).
90. 363 U.S. 166 (1960).
91. 363 U.S. at 173.
93. See, e.g., Thomasville Chair Co. v. FTC, 306 F.2d 541 (5th Cir. 1962) (price cuts justified by decreased costs resulting from elimination of brokers); Green Bay Packaging, Inc. v. Hoganow & Assoc., 362 F. Supp. 78 (N.D. Ill. 1973) (a defendant who eliminated brokers and sold its own products directly to customers at correspondingly reduced prices did not violate § 2(c)). But cf. Rangen, Inc. v. Sterling Nelson & Sons, 351 F.2d 851, 859-60 (9th Cir. 1965), cert. denied, 383 U.S. 936 (1966) (though the "services rendered" exception might apply when a buyer's agent performed promotional services for a seller, the exception does not include services performed by a buyer's agent for the seller against the interest of the buyer).
4. Goods, Wares, or Merchandise

Section 2(c) forbids the payment of anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise. The limitation to a "sale or purchase of goods, wares, or merchandise" has been imposed upon section 2(c) in its entirety, rather than merely to the "services rendered" clause. Courts have treated "goods, wares, or merchandise" as equivalent to "commodity" in section 2(a) by limiting section 2(c) to transactions involving tangibles. Thus, in Freeman v. Chicago Title & Trust Co., the court refused to apply section 2(c) bribery analysis to an insurance contract because indemnification against possible loss, rather than a tangible object, was being sold. And in Stutzeman Feed Service, Inc. v. Todd & Sargent, Inc. section 2(c) bribery analysis was held inapplicable to a construction contract because it involved a significant service element. While no section 2(c) case has raised the issue of mixed transactions predominantly involving intangibles, the similar language of section 2(a) has been said to require that "[p]rice quotations fusing physical elements with dominant intangible factors cannot beget price discriminations in commodity sales within the ambit of the Act." This should be equally applicable to section 2(c), since the commodi-

This analysis suggests that § 2(c) might also be inapplicable in situations other than the cost-justified price reduction hinted at in Broch when the defendant could show the absence of competitive injury. If this reading of Broch were accepted, defendants might be able to argue, at least in cases where price discrimination is the injury to be prevented, that the discount was equally available to all competitors and that all were functionally able to use it. The general position of the courts prior to Broch, however, was that functional availability was not a defense to § 2(c). See Southgate Brokerage v. FTC, 150 F.2d 607, 611 (4th Cir. 1945), cert. denied, 326 U.S. 774 (1945).

A similar argument based on the Broch dicta exists where the offer of a discount was made in good faith to meet a lawful, equally low offer of a competitor. Prior to the Supreme Court's decision in Broch, such a defense was also not allowed. See FTC v. Washington Fish & Oyster Co., 271 F.2d 39, 43-44 (9th Cir. 1959) (expressly distinguishing the Seventh Circuit's approval of such a defense in FTC v. Henry Broch & Co., 261 F.2d 725, 727 (7th Cir. 1958), rev'd., 363 U.S. 166 (1960)).

While the functional availability argument is admittedly of little relevance to bribery, the meeting-competition defense might be available where one firm offered a bribe to avoid losing a sale to a competitor who also engaged in bribery, especially where, as in foreign commerce, the competitor was not subject to § 2(c). See note 11 supra and text at notes 152-54 infra.

95. See, e.g., Webb-Crawford Co. v. FTC, 109 F.2d 268, 270 (5th Cir. 1940).
96. See, e.g., Columbia Broadcasting Sys. v. Amana Refrigeration, Inc., 295 F.2d 375, 378 (7th Cir. 1961) (holding that "commodity" as used in § 2(a) means goods, wares and merchandise and does not include the use of television broadcasting for product advertising). See also F. Rowe, supra note 34, at 59-61 (discussing in detail the judicial interpretation of § 2(a)'s "commodity" requirement).
97. 505 F.2d 327 (7th Cir. 1974).
99. F. Rowe, supra note 34, at 60-61.
ties restrictions of the two sections have been interpreted similarly in the past.

But if tangibles predominate, section 2(c) may be applicable to an apparently mixed transaction. In *Rangen*, the defendant, a seller of pre-mixed fish food, argued that it had sold the services of mixing and packaging the food, as well as the food itself, and thus that the transaction did not fall under section 2(c).\(^{100}\) The court rejected this argument, holding that since the ingredients had lost their separate identities and could be characterized as a new product, the transaction was a sale of commodities.\(^{101}\)

5. **In Connection with a Sale or Purchase**

Assuming that "in connection with the sale or purchase of goods, wares, or merchandise," modifies section 2(c) in its entirety, rather than merely the "services rendered" clause, this limitation might place certain types of bribery outside the scope of section 2(c). For example, in *Rodman v. Haines*\(^{102}\) the court refused to apply that subsection to the alleged bribery of employees to induce their employer to enter into leases at excessive rates, since a lease is not a "sale or purchase."\(^{103}\)

6. **To an Agent, Representative or Other Intermediary**

Bribery of a purchasing agent, as in *Canadian Ingersoll-Rand Co. v. D. Loveman & Sons*,\(^{104}\) or a corporate representative, as in *Fitch v. Kentucky-Tennessee Light & Power Co.*,\(^{105}\) may violate section 2(c). In some cases, however, the facts may not fit the language of this subsection so easily. Where the person accepting the bribe does not actually make the purchasing decision for his employer but only advises him concerning it, there is a plausible argument for limiting the applicability of section 2(c). Although he owes certain duties to his employer, such a person is not in the fiduciary position of an agent or a corporate officer.

However, section 2(c) has not been so limited. In *Rangen*, Grimes, who accepted the bribe, had been employed to test fish foods and to recommend which should be purchased. The ultimate decision, however, was made by other employees.\(^{106}\) While the defendant characterized Grimes as an employee rather than as a broker or agent, the court treated him as an intermediary within the

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100. 351 F.2d at 862.
101. 351 F.2d at 861-62.
103. 1976-2 Trade Cas. at 69,842.
105. 136 F.2d 12 (6th Cir. 1943).
106. 351 F.2d at 854.
meaning of section 2(c), since he was instrumental in his employer's purchasing decisions.

It has been suggested that an intermediary or agent who accepts a bribe to betray his principal should no longer be deemed an intermediary or agent. This argument was rejected in both Rangen and Fitch. Thus, any person who occupies a position of trust for valuable compensation and who abuses that trust by inducing his employer to enter into an unfair contract for the sale or purchase of goods, wares or merchandise should be held to be within the jurisdictional requirements of section 2(c).

II. Bribery of Government Officials

Part I of this Note demonstrated that, where section 2(c)'s substantive and jurisdictional criteria are met, the section is applicable to bribery of commercial agents. This part examines the feasibility and desirability of utilizing section 2(c) to prevent bribery of government officials for commercial purposes.

Such bribery can take three forms. The first is "predatory" bribery, whereby a company bribes an agent or representative of a prospective buyer to obtain a sale that might otherwise have been lost to a competitor. The aerospace industry has apparently often experienced this form of bribery. Lockheed, for instance, has allegedly been involved in overseas payoffs to obtain weapons contracts since at least the middle of the 1950s, throughout the 1960s and into the 1970s. Such payoffs can take the form of direct payments, such as those allegedly made to Prince Bernhard of the Netherlands, political contributions, such as those allegedly made to Prince Bernhard of the Netherlands.

107. 351 F.2d at 862.
108. "[A] faithless agent, in the course of representing his principal, does not by his departure from fidelity, become less an agent." 136 F.2d at 15.
109. The language of § 2(c) would permit its application to situations where the person accepting the bribe was not even an employee of the other party to the transaction when the intermediary was under the "direct or indirect control of the other party," as when a person agrees to represent a friend without compensation. However, given the absence of expressed congressional concern in this area and the lack of a compelling need for regulation of such activity, no court is likely to extend § 2(c) this far.
110. For example, in late 1958 and early 1959 the Lockheed F-104 Starfighter and the Grumman F11F-1F Super Tiger were evaluated by the Germans and the Japanese. The Grumman design lost the initial competition in Germany, but was selected by the Japanese for their Self Defense Force. After alleged payoffs approaching $1.5 million, Lockheed evidently "persuaded" the Japanese government to change its mind and reject the F11F in favor of its own F-104. Grumman apparently was never made aware of this misconduct. See N.Y. Times, April 2, 1976, at 1, col. 1.
111. See, e.g., Wall St. J., Dec. 4, 1975, at 1, col. 6 (Lockheed ex-employee discloses payoffs in 1960s to sell F-104).
112. See, e.g., id., Aug. 4, 1975, at 2, col. 2 (Lockheed admits payoffs of $22 million to foreign officials and political organizations to secure contracts).
German Social Democratic Party of Franz-Josef Strauss,\textsuperscript{114} or lavish entertainment.\textsuperscript{115} Northrup,\textsuperscript{116} Boeing,\textsuperscript{117} and Dassault of France\textsuperscript{118} have also been accused of such activity. This sort of bribery, however, is not directed exclusively toward government agents; many of the section 2(c) cases discussed in Part I above involved bribes of private purchasing agents.\textsuperscript{119} In either situation, the anticompetitive effect is the same—the party offering the bribe obtains an unfair advantage in competition for sales.

A second form of bribery seeks to obtain favorable treatment or regulation by a domestic or a foreign government.\textsuperscript{120} Where the regulatory preference restricts or eliminates competitors from a market, the anticompetitive effect is obvious. However, such conduct cannot be curbed by section 2(c) where the “sale or purchase” requirement is not met.\textsuperscript{121}

\textsuperscript{114} See, e.g., Wall St. J., Dec. 4, 1975, at 1, col. 6 (Lockheed ex-employee reports contributing to the German Social Democratic Party to secure aircraft sales).

\textsuperscript{115} See, e.g., note 2 supra.

\textsuperscript{116} See id.

\textsuperscript{117} See, e.g., N.Y. Times, Feb. 20, 1976, at 45, col. 2 (Boeing allegedly made payments to executives of the Egyptian national airline to sell commercial jets).

\textsuperscript{118} See, e.g., N.Y. Times, Feb. 11, 1976, at 75, col. 3 (Dassault officials on trial in the Netherlands for bribing government officials in order to sell jet fighters).


\textsuperscript{120} For example, in 1968, the United Brands Company, formerly the United Fruit Company, allegedly paid the then-President of the Honduran Republic $1.25 million in order to obtain a 50% reduction in the tax on bananas exported from that country. Wall St. J., April 9, 1975, at 1, col. 6. United Brands also has been accused of paying $750,000 to prominent Italian politicians to win relief from the Italian Government’s quantitative restrictions on Central American banana imports. Wall St. J., April 10, 1975, at 2, col. 2. Similar cases have also arisen domestically. For instance, in Metro Cable Co. v. CATV of Rockford, Inc., 375 F. Supp. 350 (N.D. Ill. 1974), discussed in note 133 infra, defendant Rockford was charged with bribing municipal legislators to obtain local ordinances prohibiting Metro Cable from providing competing cable television service in that municipality. See also Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341 (9th Cir. 1969) (bribery to obtain exclusive county refuse-disposal contract).

\textsuperscript{121} For a discussion of the purchase or sale requirement, see text at notes 102-03 supra. However, if the political nature of the actions involved was held not to bar application of the antitrust laws, see note 10 supra, such conduct might be attacked as a monopolization of foreign commerce under § 2 of the Sherman Act, which prohibits monopolization of or an attempt to monopolize any part of trade or commerce. 15 U.S.C. § 2 (1976). The requirements for a § 2 offense, simply stated, are monopoly power and actions tending to restrict competition on the merits. See United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 342 (D. Mass. 1953), aff’d per curiam, 347 U.S. 521 (1954). Since the very preferential nature of the regulation achieved is inherently anticompetitive, the act of seeking such regulation should meet the United Shoe “tending to reduce competition” test. Therefore, a plaintiff would need to prove only that the degree of the exclusion generated by the regulation was great enough to grant the defendant a monopoly. In such a case, both the geographic and product markets would be
A third form of bribery occurs where businesses must pay "baksheesh" to prod foreign bureaucracies into taking actions they are obligated to take, such as issuing building permits or providing electricity or water. This form of bribery is distinguishable from both of the above. Because all businesses must make such payments, they more closely resemble a tax than a bribe. Indeed, much evidence exists that many non-Western nations rely on such contributions to provide necessary income for otherwise underpaid bureaucrats. Because they affect all competitors equally, the impact of such payments on competition may be insignificant. However, where the sale or purchase and commodities restrictions of section 2(c) are met, such transactions may fall within that section's literal language. Whether any of these forms of bribery of government officials should be attacked under section 2(c) is another question.

A. Application of Section 2(c) to Bribery of Domestic Government Officials

It has been seen that in Rangen the court held section 2(c) applicable to bribery of a state government employee without distinguishing between bribery of commercial agents and bribery of government purchasing agents. Bribes of government purchasing agents form a familiar pattern: although a state may be able to protect itself by enforcing its criminal statutes, no redress is offered the injured competitor. Nevertheless, as was noted above, when it enacted section 2(c), Congress was concerned for the injured principal rather than the excluded competitor. While the applicability of section 2(c) to bribery of government agents might be thought to depend on legislative intent, it is unlikely that Congress considered defined by the government regulation. The Sherman Act has extraterritorial application. See, e.g., Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) (holding §§ 1 & 2 of the Sherman Act applicable where the defendant, by abusing power granted to it by the Canadian government, excluded the plaintiff from the Canadian vanadium market); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) (holding § 2 of the Sherman Act applicable to actions taken abroad which were intended to monopolize aluminum production).


126. See text at notes 32-34 supra.
the possibility that section 2(c) might be applied as in *Rangen*. This application must therefore be justified by those modern interpretations of sovereign immunity which suggest that where the government acts "commercially" rather than "governmentally," it is as subject to regulation as private individuals engaged in the same activity.127 Since section 2(c) is limited to sale and purchase transactions, it will seldom be applied to any function so uniquely governmental as to preclude sensible analogy to the commercial bribery cases.128

Bribery of government purchasing agents might arguably fall within the *Noerr-Pennington* doctrine, which grants immunity from the antitrust laws to certain forms of communication between domestic governments and their citizens.129 In *California Motor Transport Co. v. Trucking Unlimited*, however, the Supreme Court held that where the communication claim is a mere "sham" intended to mask anticompetitive conduct, the antitrust laws apply. The Court indicated in dictum that bribery of a government purchasing agent, as in *Rangen*, falls within the "sham" exception to *Noerr-Pennington* immunity.131 Although some commentators view this dictum as placing all bribery of government officials in the "sham" exception,132 at least one lower court has indicated that bribery of persons with legislative responsibilities may be treated differently than bribery of persons with judicial or administrative responsibilities.133

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127. "[W]hen a government becomes a partner in a trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen." Bank of United States v. Planters' Bank, 22 U.S. (9 Wheat.) 904, 907 (1824).

128. As long as the decision is made by an administrative official on the basis of comprehensible standards, judicial review seems possible. See note 10 *supra*. But where the legislature, for example, makes these decisions case by case through procurement legislation directed to a specific contract, or where it delegates its legislative authority, readily discernible standards of review may be lacking. See note 133 *infra*.

129. See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) (holding the Sherman Act not applicable to the petitioning of political officials to obtain preferential regulation); UMW v. Pennington, 381 U.S. 657 (1964) (extending the *Noerr* rationale to protect certain petitioning even though it is shown to be part of a broader conspiracy in restraint of trade).

130. 404 U.S. 508 (1972).

131. 404 U.S. at 513.

132. See, e.g., McManis, *supra* note 8, at 240.

133. See *Metro Cable Co. v. CATV of Rockford, Inc.*, 375 F. Supp. 350, 358 (N.D. Ill. 1974) (holding in a Sherman Act bribery case that legislative proceedings by their very nature could not give rise to the "sham" exception since legislatures, unlike courts and administrative agencies, may make decisions based on considerations of policy not a part of a judicial or quasi-judicial record).

Although no court has yet applied § 2(c) to a case involving bribery to obtain a procurement contract, such a transaction could, if it involved a purchase or sale of goods, wares, or merchandise in interstate commerce, fall within the language of that section. However, in such a case the court would lack the power to review the actions of the government agent or the party offering the payment, as such conduct would be political rather than economic and hence within the protection of *Noerr-Pennington*. See generally Costilo, *Antitrust's Newest Quagmire: The Noerr-Pennington Defense*, 66 MICH. L. REV. 335 (1967); Note, *Application of*
However, since most section 2(c) cases will involve purchasing agents rather than legislators, the Noerr-Pennington doctrine is not likely to prevent recovery in most such cases. Thus, there appears to be no reason that section 2(c) should not be applied to bribery of most domestic government officials in the same way that it is applied to bribery of commercial agents.

B. Application of Section 2(c) to Bribery of Foreign Government Officials

No case has raised the question of the applicability of section 2(c) to bribery of foreign government agents. But in view of the recent interest in curbing such bribery, as evidenced by Federal Trade Commission investigations of allegations that such payments were made by the General Tire and Rubber Company in Morocco\(^\text{134}\) and by Lockheed Aircraft Corporation in Europe\(^\text{135}\) and in view of many such incidents revealed in response to SEC disclosure requirements,\(^\text{136}\) the question will probably confront the courts soon.

Need the United States provide an antitrust remedy in such a situation? Foreign governments, like states, can protect themselves through their own criminal laws.\(^\text{137}\) But, as is the case with laws prohibiting domestic bribery, these laws do not compensate the injured competitor—the only private remedy available outside the antitrust laws is through a disclosure suit under the securities laws. But this remedy is intended to promote accountability to shareholders, not to redress competitive injury.\(^\text{138}\) Thus, given that other laws are inadequate and that section 2(c) has been applied extraterritorially,\(^\text{139}\) that section is as appropriate a weapon to combat bribery of government officials abroad as at home.

Two possible obstacles might prevent applying section 2(c) to this situation: the doctrines of sovereign immunity and act of state. songs of the Sherman Act to Attempts To Influence Government Action, 81 HARV. L. REV. 847 (1968); (arguing for application of Noerr-Pennington where the action to be influenced was "political" rather than "administrative").

\(^\text{134}\) Wall St. J., April 28, 1976, at 4, col. 2.
\(^\text{136}\) Id., Sept. 16, 1976, at 7; col. 1 (by that date over 200 firms had admitted making payments abroad).
\(^\text{137}\) This power has been recognized by the United Nations Charter of Economic Rights and Duties of States, G.A. Res. 3281, 24 U.N. GAOR, Supp. (No. 31) 50, U.N. Doc. A/9631 (1974), reprinted in 14 INTL. LEGAL MATERIALS 251 (1975) (every state has the right to regulate foreign investment within its jurisdiction in accordance with its laws). Indeed, the board of directors of Gulf Oil Corp., in their investigation of overseas bribery, were unable to identify a single country in which bribery of government officials to procure a contract was not made illegal by that country's laws. See Senate Hearings, supra note 3, at 6 (testimony of John J. McCloy).
\(^\text{138}\) See McManus, supra note 8, at 228-31.
\(^\text{139}\) See text at notes 50-57 supra.
ereign immunity prohibits one nation from enforcing its laws against the sovereign representatives of another nation or its agents. But this doctrine would at most preclude a suit against the government agent accepting the bribe; it would not prevent an action against the party offering the bribe. The act-of-state doctrine is said to prevent the courts of one nation from sitting in judgment on the acts of another nation committed within the latter’s own territory. In the United States, this doctrine is part of the political-question doctrine, which allocates the function of determining the validity of the actions of foreign nations to the executive rather than to the judicial branch of government. The primary rationale for this is that judicial inquiry into the legality of acts of foreign governments might impair the diplomatic functions of the executive.

These doctrines, however, will be inapplicable in many bribery situations. First, not every instance of a government official accepting a bribe is necessarily an act of the sovereign. Although acts of heads of state or foreign ministers are clearly acts of the sovereign, other government agents are immunized only for those acts that the state authorizes them to perform or that they must perform in order to complete their delegated duties. In Continental Ore Corp. v. Union Carbide & Carbon Co., the Canadian government had delegated the power to purchase vanadium for the Canadian government. The delegates used this power to exclude Continental from Canada’s vanadium market. The Supreme Court refused to apply the act-of-state doctrine, noting that the exclusion of Continental re-

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140. Restatement (Second) of Foreign Relations Law § 65 (1965).
141. See McManis, supra note 8, at 233-34.
142. While the precise meaning of the doctrine is unclear, see Calvani, Book Review, 74 Mich. L. Rev. 164, 171-72 (1975), this appears to be the best available definition. See id.; Underhill v. Hernandez, 168 U.S. 250, 252 (1897).
145. Restatement (Second) of Foreign Relations Law, § 66 (1965) (outlining the scope of sovereign immunity).
146. 370 U.S. 690 (1962).
sulted solely from the action of these delegates and had not been intended by the Canadian government. Where, as here, governmental power is used without governmental consent, no sovereign immunity precludes adjudication in an American court. In bribery cases brought under section 2(c), it should often be possible to prove an absence of authorization, since such bribery is outlawed by most foreign countries.

Second, both the sovereign-immunity and act-of-state doctrines may be irrelevant to bribery cases in which the foreign government is acting "commercially," rather than governmentally. When a government functions as a private business enterprise, the courts should be able to judge it as such. In such a situation, refusing to apply these doctrines is consistent with the rationale of the political-question doctrine. Thus, bribery in many procurement-contract cases might be brought within the ambit of section 2(c). However, there may be some procurement contracts that cannot be evaluated in purely "commercial" terms. For example, in the case of a contract for sophisticated military equipment, an American court may be unable to determine another nation's optimal mix of design specifications and cost without assessing that nation's security needs. Such an assessment is clearly governmental, not commercial.

But even if these doctrinal obstacles can be overcome, an important distinction between domestic and foreign commerce renders the wisdom of applying section 2(c) to the latter questionable. In domestic commerce, all competitors are subject to the United States antitrust laws. But in foreign commerce, only those competitors within the jurisdiction of a United States court are so subject. If a company not within the extraterritorial jurisdiction of the antitrust laws offers a bribe, a competitor within that jurisdiction faces two unacceptable alternatives: he must either refuse to offer a counterpayment and lose the contract or offer the payment and risk treble-

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147. 370 U.S. at 705.
148. See note 137 supra.
149. See Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 695-706 (1976) (four of the five Justices concurring in the result stated that both sovereign immunity and the act-of-state doctrine should be limited to "governmental" as opposed to "commercial" activities).
151. Nevertheless, this argument carried too far could obliterate the distinction between commercial and governmental decisions, since any action can affect the legitimate concerns of a foreign government. See, e.g., In re Investigation of World Arrangements, 13 F.R.D. 280 (D.D.C. 1952) (commercial actions of Anglo-Iranian Oil Co., Ltd., owned 50% by Great Britain, protected by sovereign immunity because oil essential to British Navy).
damage liability. Foreign firms would thus be able to exclude all American competitors from the competition for any contract by bribing an intermediary in the transaction and threatening to sue any American competitor responding in kind. Since predatory bribery, like baksheesh, is reportedly routine business practice in dealing with the governments of many foreign countries, applying section 2(c) to such cases would severely restrict the competitive position of American businessmen abroad in an attempt to prevent the lesser evil of predatory bribery. Thus, unless section 2(c) can be construed to permit a defendant in foreign commerce to avoid liability by showing that the payments he made were defensive rather than predatory, application of section 2(c) to bribery of foreign government purchasing agents would probably cause more harm than good.  

152. See notes 122-23 supra and accompanying text.  

153. One possible method of exonerating defensive bribery would be to apply the "meeting competition" defense of § 2(b), discussed in note 20 supra, to § 2(c). Although the Supreme Court indicated in FTC v. Henry Broch & Co., 363 U.S. 166 (1960), that this defense was not directly applicable to § 2(c), the Court's analysis of competitive injury in the price-discrimination context might be extended to foreign bribery cases in order to permit a defendant to prove an absence of such injury by showing that he made the payment in good faith in response to a similar offer by a competitor. This argument is developed more fully in note 93 supra.  

In § 2(a) cases, however, the meeting-competition defense has been available only where the defendant had reasonable grounds to believe that his competitor's offer was lawful. See FTC v. A.E. Staley Mfg. Co., 324 U.S. 746 (1945) (holding that a sugar manufacturer could not defend his otherwise illegal, basing-point price scheme under § 2(b) simply because all other sugar manufacturers in his market employed similar pricing schemes). But it is not clear that an action by a foreign business not subject to American antitrust laws that would have violated the Robinson-Patman Act if done within the jurisdiction of the United States should be an unlawful action for the purposes of § 2(b). Cf. American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909) (holding that the legality of actions should be determined by the law of the place where the activity occurred). Indeed, where the Robinson-Patman Act cannot protect those subject to its requirements from the predatory actions of others, a compelling justification exists for permitting businesses otherwise subject to that Act to protect themselves through defensive bribery.  

An alternative way to distinguish between predatory and defensive bribery is to invoke the equitable doctrine of "unclean hands." This doctrine might be used to deny American antitrust law remedies to a foreign business not subject to the Act if that business first offered a bribe but lost the contract because of a counterbribe from a firm subject to the Act. While this approach would prevent the foreign firm from using both the bribe and the threat of suit to exclude an American firm, it would not preclude a third party from bringing such a suit. Thus, the American firm might still view the risks associated with offering a counterbribe as excessive and withdraw from the market. In addition, the status of the unclean-hands defense in antitrust law was put in doubt by the United States Supreme Court's rejection of the analogous doctrine of in pari delicto in Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968). However, where a firm not subject to American antitrust laws takes advantage of that position by offering the initial bribe and the American firm offers a counterbribe in self-defense, it is at least arguable that a court should not view both those firms as equally at fault.  

154. A similar argument under the Sherman Act was rejected by the Supreme Court in Timkin Roller Bearing Co. v. United States, 341 U.S. 593 (1951), on the ground that to allow defendants to justify actions in restraint of trade as necessary to meet foreign competition would make the Sherman Act a "dead letter." 341 U.S. at 599. This holding should not, however, be applied to § 2(c), since Sherman Act violations such as price fixing, market allocations, and concerted refusals to deal, unlike bribery in violation of § 2(c), involve collusive behavior among competitors which enriches all competitors at the consumers' expense. Any
III. CONCLUSION

The prohibitions of section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, are applicable to bribery of both commercial agents and domestic government purchasing agents in interstate commerce. In these situations section 2(c) redresses a legitimate competitive injury, since bribery in such cases eliminates competition on the merits. While section 2(c) theoretically can be used to prevent the similar competitive injury that results from bribery of foreign government officials, as that statute is presently interpreted, the overall competitive impact on American business of such an extension of section 2(c) would be unfortunate. But, if section 2(c) is construed to permit defensive payments in appropriate circumstances, that statute offers a unique and valuable tool for limiting the competitive injury caused when American businessmen bribe the agents of foreign governments.

individual competitor not holding its prices at the inflated level established by the conspiracy would presumably increase its market share at the expense of the other firms in the market. While a competitor forbidden by United States law to join such a restrictive cartel might not reap the monopoly profits it would get if allowed to participate in the cartel, he would probably earn a reasonable return despite the cartel. A competitor faced with a § 2(c) payment problem in foreign commerce, on the other hand, must either offer a counter-payment to protect its market position or be excluded entirely. In this situation, holding American competitors to a higher standard than that generally prevailing in the relevant market might disastrously impair the ability of American business to compete in foreign markets.