1980

Foreign Nation Suits for Treble Damages Under the Clayton Act After Pfizer v. Government of India

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Available at: https://repository.law.umich.edu/mjlr/vol13/iss2/7
FOREIGN NATION SUITS FOR TREBLE DAMAGES UNDER THE CLAYTON ACT AFTER *PFIZER* v. *GOVERNMENT OF INDIA*

Despite the long-standing right of foreign nations to sue in American courts,¹ the issue of a foreign government's ability to

¹ "The judicial Power shall extend to all Cases . . . affecting Ambassadors, other public Ministers and Consuls; . . . to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects." U.S. CONST. art. III, § 2, cl. 1.

The basis for this right is the principle of international comity. Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839). "What is termed the 'comity of nations' is the formal expression and ultimate result of that mutual respect accorded throughout the civilized world by the representatives of each sovereign power to those of every other . . . ." Fisher, Brown & Co. v. Fielding, 34 A. 714, 716 (Conn. 1895). See also Russian Socialist Federated Soviet Republic v. Cibrario, 139 N.E. 259 (N.Y. 1923). Comity is not, however, a matter of mere courtesy or goodwill. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). The purpose of comity is to promote friendly relations between sovereigns so that justice between individuals can be achieved. "We do justice that justice may be done in return." Russian Socialist Federated Soviet Republic v. Cibrario, 139 N.E. 259, 260 (N.Y. 1923).

The Supreme Court has rejected several alternative rationales as a basis for maintaining a suit, namely, diplomatic or "friendly" relations with the United States and reciprocity of treatment for American nationals suing in foreign courts. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

This right, however, is subject to some exceptions. Federal courts will not entertain an action to enforce the penal codes of another state. Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888) (the penal laws of a country do not reach beyond its boundaries except when extended by express treaty or statute; such laws cannot be administered by the courts of another nation). The Trading with the Enemy Act, 50 U.S.C. App. §7 (1976), forbids suits by nations at war with the United States. A government not recognized by the executive branch cannot maintain an action in American courts. Guaranty Trust Co. v. United States, 304 U.S. 126 (1938). At times courts have extended this prohibition to suits brought by entities considered to be extensions of the unrecognized sovereign. Compare Amtorg Trading Corp. v. United States, 71 F.2d 524 (C.C.P.A. 1934) (New York corporation wholly-owned by unrecognized Soviet government granted standing to challenge import duty because of its New York citizenship and the absence of a public policy issue) with Federal Republic of Germany v. Elicofon, 358 F. Supp. 747 (E.D.N.Y. 1972), aff'd per curiam, 478 F.2d 231 (2d Cir. 1973) (East German art museum denied standing to intervene in private action because it was mere instrumentality of an unrecognized government). Finally, a suit may not be brought against one of the states of the United States without its consent. Principality of Monaco v. Mississippi, 292 U.S. 313 (1934) (the need for such consent is clearly implied from U.S. CONST. art. III, § 2, cl. 1).
maintain an antitrust suit for treble damages remained unresolved until the Supreme Court decided *Pfizer v. Government of India* in 1978. In *Pfizer*, the Court held that a foreign sovereign could recover treble damages under section 4 of the Clayton Act in an antitrust action. The Court thus made a major policy decision which could have far-reaching political and economic effects.

After summarizing the rationale behind *Pfizer*, this article will trace the ramifications of the decision on American foreign, economic, and antitrust policies. Second, a suggestion for a foreign sovereign antitrust bill will then be offered. Finally, an examination of present congressional proposals will show that these proposals fail to address fully the political and economic consequences of *Pfizer*.

I. *Pfizer v. Government of India*

*Pfizer* was a case of first impression on the issue of whether a foreign nation could sue for treble damages under section 4 of the Clayton Act in an antitrust action.

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1 Foreign sovereigns have maintained suits under common law for unfair competition and trademark infringement. See French Republic v. Saratoga Vichy Spring Co., 191 U.S. 427 (1903); La Republique Francaise v. Schultz, 94 F. 500 (S.D.N.Y. 1899), aff'd, 102 F. 153 (2d Cir. 1900); City of Carlsbad v. Schultz, 78 F. 469 (S.D.N.Y. 1897); City of Carlsbad v. Kutnow, 68 F. 794 (S.D.N.Y.), aff'd, 71 F. 167 (2d Cir. 1895).


3 Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. 15 U.S.C. § 15 (1976).


5 The question of whether a foreign government could sue for treble damages was first decided in *In re Antibiotic Antitrust Actions*, 333 F. Supp. 315 (S.D.N.Y. 1971), in which the court held that a foreign nation could maintain a suit for treble damages. The court based its ruling on the rationale employed by the Supreme Court in *Georgia v. Evans*, 316 U.S. 159 (1942), viewing a foreign sovereign as more similar to a state than to the United States. See text accompanying notes 26-30 infra. In a cursory opinion, Judge Lord stated that he could "perceive no reason for believing that Congress wanted to deprive a foreign nation, as purchaser of commodities shipped in foreign commerce, of the civil
A. The Majority Opinion

The question of whether a foreign government was entitled to sue for treble damages turned upon the statutory interpretation of the word "person" in section 4 of the Clayton Act. Mr. Justice Stewart, writing for the majority, noted the dearth of both statutory provisions and legislative history to shed light on the definition of "person." The Court felt that the available legislative history evidenced a congressional intent that the term "any person" should have a "naturally" broad and inclusive meaning so as to embrace foreign sovereigns.

remedy of treble damages which is available to other foreign purchasers who suffer through violation of the Act." 333 F. Supp. at 317. The district court certified an interlocutory appeal which was granted by the Court of Appeals for the Second Circuit. An intervening settlement caused the court to dismiss the case without prejudice. ANTITRUST & TRADE REG. REP. (BNA) No. 697, A-23 (Jan. 21, 1975). In Pfizer, Inc. v. Lord, 522 F.2d 612 (8th Cir. 1975), cert. denied, 424 U.S. 950 (1976), the drug companies sought review of Judge Lord's holding in favor of foreign sovereigns on the treble damage question in the Philippines case, Order No. 74-31 (D. Minn. 1974), cited in ANTITRUST & TRADE REG. REP. (BNA) No. 697, A-23 (Jan. 21, 1975). The Eighth Circuit Court of Appeals dismissed the appeal on a procedural ground and thus never considered the merits of the claim.

7 See note 4 supra.

8 "[I]t seems apparent that the question was never considered at the time the Sherman and Clayton Acts were enacted." 434 U.S. at 312.

9 434 U.S. at 315-18. The dissenting opinion stated that the majority "[converted] . . . this silence in 1890 into an affirmative intent in 1978." 434 U.S. at 325 (Burger, C.J., dissenting).

Statutory construction is not an easy task. In an early article, for example, Mr. Justice Frankfurter aptly commented:

The difficulty in many instances where a problem of meaning arises is that the enactment was not directed towards the troubling question. The problem might then be stated, as once it was by Mr. Justice Cardozo, "which choice is the more likely that Congress would have made?" While in its context the significance and limitations of this question are clear, thus to frame the question too often tempts inquiry into the subjective and might seem to warrant the court in giving answers based on an unmanifested legislative state of mind. But the purpose which a court must effectuate is not that which Congress should have enacted or would have. It is that which it did enact, however inaptly, because it may fairly be said to be imbedded in the statute, even if a specific manifestation was not thought of, as is often the very reason for casting a statute in very general terms.


The Supreme Court decided Pfizer in the absence of a clear legislative intent. This judicial exercise of legislative power troubled both the Court of Appeals and members of the Supreme Court. The majority in Pfizer referred to a letter from the Legal Advisor of the Department of State to the effect that "the Department of State would not anticipate any foreign policy problems if . . . foreign governments [were held to be] 'persons' within the meaning of the Clayton Act §4." 434 U.S. at 319 n.20. The Court therefore felt that it was free to rule on the issue. Mr. Justice Powell pointed out, however, that the question had "economic and social ramifications" which were beyond the jurisdiction of the Department of State and could be decided only by Congress. Id. at 331 n.2 (Powell, J., dissenting).
1. The foreign government as a consumer—The Court rejected the argument that the two peculiar attributes of a foreign government, that it is both foreign and sovereign, would exclude it from the definition of person. The Court reasoned that the Sherman and Clayton Acts expressly included foreign entities despite the strong protectionist attitude of the Congress which enacted the statutes. Foreign corporations clearly have a right to treble damages because the definition includes "corporations and associations existing under or authorized by . . . the laws of any foreign country." Thus, the Court wrote, Congress could not have intended to protect only the American consumers but foreign consumers as well. The Court found that allowing foreign suits would carry out two purposes of the treble damage remedy, namely, deterrence of future illegality and compensation for injury. It also stressed the benefit to the American consumer of allowing a foreign government this remedy; suits brought by foreign nations would serve to lower prices worldwide, lessen the rate of international inflation, and reduce prices in the American markets.

2. The foreign government as sovereign—On two occasions prior to Pfizer, the Court had considered the right of a sovereign to maintain an antitrust action for treble damages. United States v. Cooper Corp. and Georgia v. Evans dealt respectively with the right of the United States and the right of an

Mr. Justice Powell spoke strongly against the Court's action:

I had thought it was accepted doctrine that questions of "general policy"—especially with respect to foreign sovereigns and absent explicit legislative authority—are beyond the province of the Judicial Branch. If the statute truly reflected a general policy that dictated the inclusion of foreign sovereigns, the Court might be justified in reaching today's result . . . .

. . . A court, without the benefit of legislative hearings that would illuminate the policy considerations if the question were left to Congress, is not competent in my opinion to resolve this question in the best interests of our country. It is regrettable that the Court today finds it necessary to rush to this essentially legislative judgment.

Id. at 330-31 (Powell, J., dissenting). See also Pfizer v. Gov't of India, 550 F.2d 396, 399-400 (8th Cir. 1976) (Ross, J., concurring), aff'd, 434 U.S. 308 (1978).

* Pfizer, 434 U.S. at 313-14.
* Id. at 314-15.
* Id. at 315 n.14. It is important to note that the majority based its economic analysis in large part upon a law review article, Velvel, Antitrust Suits by Foreign Nations, 25 Cath. U.L. Rev. 1 (1975). The author, a former counsel for the government of India in the early stages of the Pfizer litigation, was actively advocating the cause of his client but failed to substantiate any of his economic arguments.

* 312 U.S. 600 (1941).
* 316 U.S. 159 (1942).
individual state to bring treble damage actions under section 7 of the Sherman Act. Each of these cases turned upon the statutory interpretation of a “person” within the meaning of section 7 of the Sherman Act.

In Cooper, the Court held that the United States was not a “person” and, therefore, could not maintain a treble damage action. The Court reasoned that, because the Sherman Act created new rights and remedies, recourse to the remedies could accrue only to those on whom those new rights were conferred. The Court noted that while it is not a “hard and fast” rule of exclusion, the phrase “person,” as commonly used, does not include a sovereign. Statutes employing the term are generally construed to exclude the federal government. The definition’s sweeping inclusion of various entities strengthened the Court’s findings. According to the Court, if Congress had intended to include the United States, it would have done so expressly.

In addition, the Court looked to the legislative history, which it found “persuasive” on the issue. Senator Sherman, the original proponent of the bill, declared that the damage recovery was a right conferred only on a private party and not on the federal government. Two additional factors which influenced the Court’s decision were the federal government’s recourse to other criminal and civil remedies to enforce the antitrust laws and the feeling that the United States does not and should not need the monetary incentive of treble damages to prosecute violations.

The Court came to a different conclusion in Evans, holding that a state falls within the definition of a “person” and can recover a treble damage award. Considerably less legislative history existed to enlighten the Court as to congressional intent with respect to the status of states in antitrust litigation than existed with respect to status of the federal government. The Court instead turned to the legislative history to determine what remedies were available to states injured by an antitrust violation. It concluded that, if a state were denied an action for treble damages, it would be remediless. In 1914 Congress had rejected

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18 United States v. Cooper Corp., 312 U.S. 600, 614 (1941).
19 Id. at 610-12.
20 Id.
21 Id. at 607.
22 Id. at 611.
23 21 Cong. Rec. 2563-64 (1890).
24 United States v. Cooper Corp., 312 U.S. 600, 614 (1941).
26 Id.
an amendment to allow states to institute criminal proceedings in the name of the United States to enforce the antitrust laws.\textsuperscript{28} The Court in \textit{Evans} could thus "perceive no reason for believing that Congress wanted to deprive a State, as a purchaser of goods shipped in interstate commerce, of the civil remedy of treble damages which is available to other purchasers who suffer through violation of the Act."\textsuperscript{29}

The \textit{Pfizer} Court chose to follow the analysis of \textit{Evans}. Reasoning that because the antitrust laws denied foreign nations, like states, the alternative remedies available to the United States, the Court held that a foreign nation should have recourse to the treble damage remedy.\textsuperscript{30}

\textbf{B. The Dissenting Opinion}

Mr. Chief Justice Burger's dissenting opinion vigorously criticized the majority's "undisguised exercise of legislative power."\textsuperscript{31} The silence of the statute as to foreign sovereigns when compared with its express inclusion of foreign corporations was, according to the dissent, dispositive of the issue;\textsuperscript{32} Congress did not intend to extend the treble damage remedy to foreign governments. The dissenting Justice did not view the exclusion of foreign sovereigns as inconsistent with the explicit inclusion of foreign corporations; a foreign government enjoys immunity from suit under the doctrine of sovereign immunity while a foreign corporation does not. The dissenting opinion reasoned that this difference in susceptibility to suit should account for the unequal treatment of the two entities.\textsuperscript{33} This view gains additional support from the legislative history of the Webb-Pomerene Act,\textsuperscript{34} which indicates that Congress intended to protect American consumers at the expense of foreign markets.\textsuperscript{35}

The dissent thus rejected the \textit{Evans} rationale as it applied to

\begin{footnotes}
\item[28] 51 Cong. Rec. 14519, 14527 (1914).
\item[29] Georgia v. Evans, 316 U.S. 159, 162 (1942).
\item[30] Quoting the \textit{Evans} decision, the Court stated: "We can perceive no reason for believing that Congress wanted to deprive a [foreign nation], as purchaser of commodities shipped in [international] commerce, of the civil remedy of treble damages which is available to other purchasers who suffer through violation of the Act." 434 U.S. at 318 (quoting \textit{Evans}, 316 U.S. at 162-63).
\item[31] 434 U.S. at 320 (Burger, C.J., dissenting). See note 9 supra.
\item[32] \textit{Id.} at 321-22.
\item[33] \textit{Id.} at 322.
\item[35] 434 U.S. at 322-23 (Burger, C.J., dissenting).
\end{footnotes}
foreign sovereigns. Unlike an individual state of the United States, whose actions are constrained by the supremacy and commerce clauses of the United States Constitution, a foreign nation remains free to enact its own antitrust laws and impose its own sanctions. The dissent also discussed various measures such as boycotts and price-fixing which were "weapons in the arsenals of foreign nations which no domestic State could ever employ."  

Finally, the dissent focused on the two major inequities created by the majority decision. The decision would allow a foreign nation which engages in anticompetitive behavior to sue an American company for practicing the same methods and recover treble damages. The second anomaly is that a foreign government may enjoy a remedy which has been explicitly denied our own government in Cooper.

II. RAMIFICATIONS OF Pfizer

The decision that a foreign government should enjoy a cause of action for treble damages under the American antitrust laws has wide-ranging economic and foreign policy consequences. The character of international trade is undergoing a rapid transformation, with a marked increase in commercial transactions between the public and private sectors. A number of governments, trading partners, and allies, developed and less developed countries alike, are assuming roles previously played only by private industry. It is no longer surprising to find the "nation-

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38 Id. at 326-27.
37 Id. at 327-28.
36 Id. at 328. For a discussion of this aspect of Cooper, see notes 19-25 and accompanying text supra.

In the resource area, state-owned firms now predominate in the oil field in many developing countries: two of the new entrants on Fortune magazine's list of the 50 largest industrial companies in the world, Petrobras and National Iranian Oil Company are state owned. National agricultural marketing boards are playing an increasing direct role in grain trade; in shipping, many developing countries are buying national fleets which are operated as state monopolies; and of course, most international airlines have long been state-controlled entities.

States are also becoming involved in the creation of industrial conglomerates which buy, sell, and invest in the U.S. and elsewhere abroad through companies such as Sonatrach of Algeria, Pertamina of Indonesia, or I.V.P. of Venezuela.

Id. at 71. See also B. BALASSA, CHANGING PATTERNS IN FOREIGN TRADE AND PAYMENTS 55-126 (3d ed. 1978).
trader” involved in the areas of medicine, oil production, or steel manufacture. Thus, the foreign commerce facet of the American antitrust laws takes on new significance.

Two questions must be considered in the following evaluation of the foreign, economic, and antitrust policies of the United States with respect to the Pfizer decision: whether foreign states should have access to the American courts on the same basis as domestic individuals and whether a foreign sovereign should be allowed treble damages if it brings suit for antitrust violations.

A. American Foreign Policy: International Antitrust Goals and the Spirit of Comity

A major tenet of American foreign policy is the encouragement of free trade throughout the world. This free market sentiment is more than diplomatic rhetoric. The American attempt to promote international competition has taken two forms. The first thrust of American foreign policy, which has yet to bear fruit, has been to establish a formal international antitrust treaty. The United States has been reluctant, however, to ratify various United Nations proposals for such an agreement. Such reluctance does not stem from neglect of a commitment to free world trade. Rather, as the American representative to the United Nations explained in 1955, the United States government concluded that the differences which presumably existed in national poli-

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41 See, e.g., the Bretton Woods Agreement Act, which states:
In the realization that additional measures of international economic cooperation are necessary to facilitate the expansion and balanced growth of international trade and render most effective the operations of the [International Monetary] Fund and the [World] Bank, it is declared to be the policy of the United States to seek to bring about further agreement and cooperation among nations and international bodies, as soon as possible, on ways and means which will best reduce obstacles to and restrictions upon international trade, eliminate unfair trade practices, promote mutually advantageous commercial relations, and otherwise facilitate the expansion and balanced growth of international trade and promote the stability of international economic relations.
cies and practices in the antitrust field were sufficiently great that the agreement then proposed would have been neither satisfactory nor effective in eliminating harmful restraints on international trade. At the same time, the spokesman reaffirmed the United States' objective to promote free trade. More recently, the United States has participated in the issuance of a Code of Conduct for Multinational Enterprises and in the UNCTAD project of developing standards of prohibited restrictive business practices.

The second, and by far the more successful approach, has been to promote competition as part of our economic cooperation and mutual security treaties. The Panama Canal Treaty, for example, forbade the passage through the canal of any ship owned or controlled by a company violating the Sherman Act. Many post-World War II treaties of friendship, commerce, and navigation have included anti-cartel provisions. The United States has also negotiated many bilateral antitrust cooperation agreements. Since 1958 the United States and Canada have engaged in a practice of weekly consultation on antitrust investigations. In 1976, the United States and Germany signed an agreement for mutual cooperation and exchange of information on antitrust matters. The spirit of international comity appears to suggest that the United States open its courts to other nations in furtherance of this international antitrust policy.

Unrestricted access to an American remedy as promulgated by the Pfizer decision, however, runs counter to the American policy of encouraging nations to develop their own antitrust laws. By permitting foreign nations to rely on American courts rather

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42 Id.
44 15 U.S.C. § 31 (1973) states:
No vessel permitted to engage in the coastwise or foreign trade of the United States shall be permitted to enter or pass through the Panama Canal if such ship is owned, chartered, operated, or controlled by any person or company which is doing business in violation of the provisions of section 1 to 11 of [the Sherman Act] or of any other Act of Congress amending or supplementing the same.
46 See Davidow, supra note 43, at 443.
47 See note 1 supra.
than to develop their own means for controlling harmful corpo-
rate activity, the United States is actually hindering interna-
tional progress towards a vigorous supranational antitrust pro-
gram. Common sense also suggests that nations should not be
allowed to prosecute American corporations in United States
courts for business conduct which is not illegal in their own
countries. The Pfizer decision should not place the United States
in the anomalous position of allowing nations that encourage
monopolistic practices to sue American corporations when those
nations become the victims of price-fixing. Adding to this irony is
the fact that the doctrines of sovereign immunity and act-of-
state protect nations such as those that constitute OPEC from
treble damage actions by American consumers. 61

61 Much ambiguity surrounds the ability of an American plaintiff to sue a foreign gov-
ernment for its anticompetitive practices. See, e.g., Baker, Antitrust Remedies Against
Government-Inspired Boycotts, Shortages, and Squeezes: Wanderings on the Road to
Mecca, 61 CORNELL L. REV. 911 (1976); Timberg, Sovereign Immunity and Act of State
Defenses: Transnational Boycotts and Economic Coercion, 55 TEX. L. REV. 1 (1976);
Note, Antitrust as an Antidote to the Arab Boycott, 8 LAW & POL. INT'L BUS. 799 (1974);
Note, Commercial Obligations Under the Act of State Doctrine, 8 LAW & POL. INT'L BUS.

The foreign sovereign immunity doctrine as originally expounded in Underhill v. Her-
nandez, 168 U.S. 250 (1897), conferred a blanket immunity on all acts of a foreign gov-
ernment: "Every sovereign state is bound to respect the independence of every other sov-
ereign State, and the courts of one country will not sit in judgment on the acts of the
government of another done within its own territory." Id. at 252. The courts eventually
rejected the theory of absolute sovereign immunity in favor of a more restrictive theory.
Under this restrictive theory, a state is immune from prosecution with respect to its pub-
ic acts ("jure imperii") but not as to its commercial acts ("jure gestionis"). See Victory
Transport Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d
Cir. 1964). Congress eventually codified the restrictive theory of sovereign immunity in
The Act defines a "commercial activity" by "reference to the nature of the course of
conduct or particular transaction or act, rather than by reference to its purpose." 28
panded explanation of the purpose of 28 U.S.C. §§ 1602-1611. Even if a government is
found liable for its "commercial activities," it may not be subject to the treble damage
remedy. Section 1606 of the Act protects a foreign government from "punitive damages"
and the trebling of antitrust damages may be viewed in part as a punitive action.
If a domestic plaintiff can overcome the jurisdictional hurdle of the sovereign immu-
nity doctrine, the plaintiff is then faced with the affirmative defense of the act of state
d Doctrine. "[A] court in the United States . . . will refrain from examining the validity of
an act of a foreign state by which that state has exercised its jurisdiction to give effect to
its public interests." RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE U.S. § 41
(1965) [emphasis added]. See also Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398
(1964). While the act of state doctrine does not protect all government acts, the scope
of protection is still broader than the foreign sovereignty immunity doctrine. In Timberline
Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976), the court enumerated
many of the factors to be weighed when considering the defense:

[the] degree of conflict with foreign law or policy, the nationality or allegiance of
the parties and the locations or principal places of business of corporations, the
The United States does not, however, wish to punish those nations which do have antitrust laws similar to our own and would allow civil suits by the American government. A blanket prohibition would serve only to antagonize many nations as well as to violate the spirit of comity. An additional problem is that the United States frequently brings suits in foreign courts, generally enjoying the same access to the courts and the same remedies as a private litigant enjoys. The Department of Justice established the Office of Foreign Litigation for the sole purpose of bringing these suits. An overly restrictive approach by Congress on the Pfizer issue may spur retaliatory measures by foreign nations to restrict recovery by the United States of its foreign claims.52

In light of the Supreme Court’s decision in Perma Life Mufflers v. International Parts Corp.,53 courts should arguably remain indifferent to the character of the plaintiff in antitrust litigation. In striking down the in pari delicto defense, the Court in Perma Life found that

the plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement.54

There is, however, an important distinction between corporations and sovereign nations which would render the Perma Life rationale inapplicable to foreign sovereigns. The Court was apparently willing to do away with the in pari delicto defense because “permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since

extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

Id. at 614.

Recently, in IAM v. OPEC, 477 F. Supp. 553 (C.D. Cal. 1979), the International Association of Machinists brought a class action suit against OPEC. The judge ruled that the activities of the OPEC nations in setting the terms and conditions for the removal of natural resources from its territories were governmental activities. The nations were thus immune from suit under the Foreign Sovereign Immunities Act.

54 Id. at 139.
they remain fully subject to civil and criminal penalties for their own illegal conduct." While a foreign corporation may be subject to suit, a foreign sovereign is immune from suit; thus, there is no such check on its activities.

B. American Export Policy

A major goal in American foreign economic policy is the maximization of the value of American exports. Congress affirmatively supported this policy by enacting the Webb-Pomerene Act, which permits certain business combinations when exporting to foreign countries. More recently, the executive order establishing the Export Expansion Advisory Committee of the Export-Import Bank declared: "[f]oreign trade ... an essential and continuing element in sustaining the growth, strength, and prosperity of our economy ... ." In 1972, however, Congress rejected a bill which would have greatly expanded the Webb-Pomerene exemptions for restraint of competition in exports, in addition to replacing the antitrust enforcement role of the Department of Justice in this area with a new enforcement system. The rejection of this bill does not, however, indicate a reversal of congressional intent on the issue of export maximization. Rather, it indicates a realization on the part of the legislature that liberalization of the antitrust laws would not serve to maximize the value of American exports. American exports

55 Id.
56 See note 59 and accompanying text supra.
58 The House Report accompanying this statute stated, in pertinent part, that [t]he bill does not authorize any violation of the present antitrust laws. There are many great lawyers who think there is nothing in existing laws to prevent American manufacturers and exporters from combining in whatever manner they please in foreign countries to dispose of their products, but other lawyers take the position that there is doubt about this power, and in order to absolutely clarify the situation and in common fairness to our American exporters we present this bill. The bill prohibits the slightest violation of our antitrust laws within the United States, but makes it clear that American exporters doing business in foreign countries are to be allowed to do business in those foreign countries according to the foreign laws.

H.R. REP. No. 50, 65th Cong., 1st Sess. 3 (1917).
60 S.2754, 92d Cong., 2d Sess. (1972).
61 Miles Kirkpatrick, Chairman of the Federal Trade Commission, testified before the Senate Subcommittee on Foreign Commerce and Tourism that Webb-Pomerene activities were unlikely to expand American export activity. According to Kirkpatrick, permitting American corporations greater freedom in forming export cartels was more likely to result in a retardation of the growth of American exports in addition to the adverse spill-
would be more successful in a competitive world trade atmosphere. Thus, the thrust of American policy should be to break down the artificial barriers to trade which hinder the ability of American exports to compete successfully abroad. This goal can in part be served by encouraging foreign nations to develop and use their own antitrust laws not merely against American enterprises but against all companies which engage in anticompetitive practices.

Furthermore, denying treble damages and demanding reciprocity could serve to protect American exporters from discriminatory restraints. American corporations would no longer have to bear the burden of being singled out for retributory antitrust actions. The danger of double recovery under both American and foreign laws would also be diminished. This policy would enable American corporations to maximize the long-term value of their products in a competitive international market and still protect consumers by forcing the exporters to obey the laws of the United States and of the foreign importing nations.


A 1968 study by the Bureau of International Commerce listed types of government action which the companies surveyed felt would most encourage export expansion: development of tax incentives for exports, improvements of credit and insurance for exports, removal of nontariff barriers, tariff cuts, reduction of domestic inflation and transport costs, and elimination of foreign direct investment restrictions. Export Expansion Hearings, supra note 68, at 281 (statement of Bruce W. Rohrbacher, Director, McKinsey & Co.).

As the counsel for the defense in Pfizer argued, "By hastening to grant foreign governments a cause of action under our laws, the Court encourages them to rely on those laws to punish their American suppliers, rather than to enact their own antitrust laws, which they might apply uniformly against all their suppliers, not just American companies." Petition for Rehearing, No. 76-749 (October term 1977) at 8, Pfizer, Inc. v. Gov't of India, 434 U.S. 308 (1978).

See text accompanying note 95 infra.
C. Domestic Economic Considerations

The unrestricted treble damage remedy given to a foreign government may have serious immediate and cumulative repercussions on the American domestic economy. The sheer size of a damage award may severely cripple, if not bankrupt, a losing corporation. Although this is also possible in domestic suits, damages in antitrust suits by governments tend to be greater than in other cases because government contracts are larger than ordinary corporate contracts. For example, one of the nine litigants in Pfizer estimated its damages to be in the area of $10 million before trebling.

If a company which must pay such an award has as a result to raise prices, stop production, or curtail its expansion effort, the American economy bears the brunt of the loss in unemployment and inflation. When dealing with foreign nations, Congress should fashion legislation which will compensate the victim but not do irreparable harm to the offending company and indirectly to the American public. A second effect of a treble damage award to a foreign government is the loss to the federal government of taxes on the awards. While a foreign corporation which recovers treble damages is subject to federal income tax, a foreign government is not. The cumulative tax loss thus may be

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85 See P. Areeda & D. Turner, Antitrust Law vol. II, 32-33 (1978). Some of the cost of treble damage award can be shifted onto the federal treasury, as treble damages are generally deductible as an ordinary and necessary business expense under federal income tax law. Rev. Rul. 64-224, 1964-2 C.B. 52. I.R.C. § 162(g) limits this deduction by prohibiting any deduction for two-thirds of the amount paid when the defendant is subsequently convicted or pleads guilty or nolo contendere to a related criminal charge. The deduction does not, however, vitiate the effects of the treble damage award completely. A corporation may not generate sufficient taxable income to take advantage of the deduction. The deduction also does not aid companies which have restricted cash flows.

For an interesting article concerning the effects of the tax law on antitrust enforcement, see Wright, A Tax Formula to Restore the Historical Effects of the Antitrust Treble Damage Provisions, 65 Mich. L. Rev. 245 (1966).


87 The American economy also suffers if a domestic antitrust suit places a substantial burden on an American business. An important distinction exists, however, between a domestic and a foreign plaintiff. The United States may be willing to experience dislocation in one sector of the economy in order to redress a harm which occurred in another domestic sector of the economy. Where the plaintiff is a foreign sovereign, the domestic economy suffers when relief is provided in a remote area where the benefits, if any, to the American economy are secondary.


89 See I.R.C. § 892; Rev. Rul. 75-298, 1975-2 C.B. 290. Recently the Commissioner of the Internal Revenue Service proposed new regulations, 43 Fed. Reg. 36,111 (1978), subjecting to federal tax the income derived by a foreign sovereign from commercial activities in the United States. The regulations, if enacted, would tax only a small percentage
quite large. Finally, the exodus of American currency abroad has an adverse effect on both the balance of payments and on capital investment in the United States. This type of harm may occur when a foreign corporation or even a domestic corporation receives a damage award because there is no guarantee that these companies will spend the money in the United States. With respect to corporations, this problem could be solved by having the court fashion a decree prohibiting the plaintiff from investing the treble damage award abroad. When applied to a foreign government, however, the same type of decree is a severe infringement upon its sovereignty and would serve only to antagonize it. When a sovereign sues in an antitrust action, it is seeking to redress a wrong done to its people and thus would most likely want to use the damage award as it sees fit rather than in a manner dictated by an American court.

D. American Antitrust Policy

1. Protection of the American consumer—The protection of the American consuming public is one of the major purposes of antitrust enforcement in international commerce. Supporters of treble damages for foreign nations advance three economic arguments concerning harm to the American consumer: (1) to deny a foreign government a treble damage action encourages illegal conspiracies which raise worldwide prices and accelerate American inflation; (2) foreign manufacturers who may be able to undercut monopoly prices are discouraged from entering into the American market; and (3) without such a penalty, the conspirators would be able to amass a “war chest” of ill-gotten gain to finance domestic cartels and defend against legal action.

The arguments of increased inflation and illegal activities arising out of the unchecked conspiratorial practices of American and foreign companies, while ominous, do not support the conclusion that the United States must give foreign governments the treble damage remedy accorded them in Pfizer. The same problems can be solved more expeditiously by encouraging foreign nations to develop antitrust laws of their own. Presumably, the American consumer receives the same benefits whether an illegal conspirator is punished abroad or in the United States. The

of treble damage awards received by foreign governments.


71 Velvel, supra note 15, at 7-8.
American consumer is in fact better off in the long run if more nations develop antitrust laws which can be applied to all conspirators instead of only American wrongdoers. If the number of national antitrust laws is increased, the need for greater enforcement and procedural cooperation might eventually lead to supranational antitrust agreements. If international antitrust activity is expanded, it would become increasingly more difficult for conspirators to establish monopolistic prices which would contribute to inflation, discourage competition, and finance "war chests."

2. Enforcement—The treble damage award, apart from being a remedy, has two additional purposes. It acts first as an incentive to encourage antitrust litigation to aid the federal government in enforcing its antitrust policies. Second, treble damages supposedly act as a major deterrent to antitrust activity. Any alternative to the foreign government treble damage suit should contain these remedial, incentive, and deterrent elements of current antitrust law.

III. A LEGISLATIVE RESPONSE

To deal most satisfactorily with the economic, social, and political problems which arise when a foreign nation sues an American company in an American court, the statutory response to *Pfizer* should include the following three features: a limitation of recovery to single damages, a requirement of general reciprocity, and an additional prerequisite of exhaustion of local remedies.

A. Single Damages

Congress found it distasteful to offer the United States a monetary incentive to enforce the law. Similarly, a foreign government should not require a reward to protect its own best interests or those of its own people. The compensation afforded by a single damage recovery should be a sufficient incentive to prosecute the claim. Moreover, the aid of foreign governments is not
essential to American enforcement of its antitrust laws. Indeed, as in Pfizer, foreign nations are much more likely to "tag along" once a major suit has been instituted than to initiate a suit themselves. Antitrust violations have previously been effectively uncovered without the presence of foreign nation plaintiffs. Little danger therefore exists that antitrust laws will go unenforced.

In addition, by limiting the recovery to single damages, many of the adverse effects of awarding large treble damage awards to foreign governments would diminish. A company in violation of the law would merely return those monies which were taken from that country illegally. This would reduce the danger that the company would suffer serious financial harm. Furthermore, the domestic economy would experience fewer of the attendant harms associated with large recoveries.

By limiting recovery, certain circumstances, such as those found in Pfizer, would also be less likely to recur. India, one of the principal plaintiffs, admitted in the early stages of litigation that a major reason for its decision to sue under American rather than Indian law was to acquire hard American currency to help its balance of payments. The American antitrust laws were not intended to fill the coffers of foreign governments and should not be used for this purpose.

The additional deterrent effect of the treble damage claim when a government is plaintiff is questionable. No evidence has been found which suggests that the prospect of a government suit for actual damages is less of a deterrent than a private treble damage remedy, especially in view of alternative government civil and criminal remedies. Some scholars have even suggested that reparations-induced private antitrust actions are the least efficient method to counter anticompetitive activities.

does not deny a foreign nation alternate remedies. See notes 93-104 and accompanying text infra.

78 See Joint Brief for the Petitioners at 38, Pfizer v. Gov't of India, 434 U.S. 308 (1978).
79 Private treble damage suits have increased markedly in the last ten years. See [1977] ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, Table 20 ("Antitrust Cases Commenced, Statistical Years 1960-1977").
80 See part II C supra.
82 The Cooper Court did not suggest that denial of treble damages to the United States would encourage companies dealing with the government to violate the antitrust laws. United States v. Cooper, 312 U.S. 600 (1941). See text accompanying notes 16-25 supra.
83 See Breit & Elzinga, Antitrust Penalties & Attitudes Toward Risk: An Economic Analysis, 86 HARV. L. REV. 693 (1973); Breit & Elzinga, Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble Damages, 17 J. L. & ECON. 329 (1974). In the latter article, the authors state:
B. Reciprocity

The requirement of general reciprocity, that foreign nations themselves prohibit the same business conduct complained of and that the United States has a right to bring civil claims in the other nations' courts, would help to balance the conflicting foreign policy goals. The United States would encourage nations to develop their own antitrust laws and to enforce them against all firms equally. At the same time, foreign sovereigns would have access, albeit somewhat limited, to American courts. The United States would reserve the right to exclude those nations which engage in anticompetitive practices but would not infringe upon a nations' sovereignty in the formulation of its own laws.

1. The sovereignty of foreign governments—The United States has been careful to recognize the sovereignty of a foreign government in the administration of the latter's laws. Each nation possesses its own economic philosophy which necessarily may conflict with that of other nations, at times to the point of open antagonism. A government applies its laws in a manner calculated to maximize the benefits to its own society. In general, the acts of American citizens in a foreign nation are subject to the law of that nation. Antitrust law should be no exception

[From an efficiency standpoint the present reliance upon reparations to private parties in antitrust enforcement has three defects. First, if expected payments to plaintiffs do not completely deter monopolistic activity, private actions are a fertile source of perverse incentives. Second, the use of reparations to stimulate private actions generates misinformation in the form of nuisance suits. The third serious defect of treble damage suits is that real resources are utilized not only in the conviction of violations but in the determination of damages.]

Id. at 344.

The authors argue for a new system of enforcement which places a heavy reliance on financial penalties rather than on the probability of detection and conviction. They propose a system of fines similar to those in some European countries based on percentages of company profits. Given the general risk aversion of American management, high fine levels work to deter management even with low probabilities of detection and conviction. See Breit & Elzinger, Antitrust Penalties & Attitudes Toward Risk: An Economic Analysis, supra.

"Anticompetitive practices" include such restraints of trade as price-fixing and market-sharing. The OPEC nations are clear examples of nations engaging in anticompetitive practices.

One such conflict has been in the area of enforcement jurisdiction. Orders by American courts to produce in the United States documents kept abroad have provoked adverse official reactions abroad. More than one foreign government has enacted legislation whereby removal of records in response to a foreign subpoena is an offense. RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965). See, e.g., In Re Grand Jury Subpoena Duces Tecum, 72 F. Supp. 1013 (S.D.N.Y. 1947).

to this rule. In *American Banana Co. v. United Fruit Co.*, the first antitrust case to involve an extraterritorial question, the Supreme Court said, "the general and almost universal rule is that the character of the act as lawful or unlawful must be determined *wholly* by the law of the country where the act is done. . . ." This doctrine was later modified by Judge Learned Hand in the *Alcoa* case, in which he observed that "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends. . . ." American law clearly recognizes the right of foreign sovereigns to punish illegal acts which take place in or have effects within their own nations.

The United States should therefore not try to seduce foreign nations into relying on American law for remedy and enforcement in the antitrust area. Unlike the states, which have relinquished part of their sovereign powers to the United States, these foreign governments owe no allegiance to the United States government. In turn, Congress has not assumed any responsibility for protecting the economic welfare of foreign states by any means whatsoever, much less by an extension of American antitrust laws to the degree sanctioned in *Pfizer*. The policy of one nation may be to attack that which another has vowed to protect. Many nations, for example, prefer to bolster infant industry or increase short-term profits while sacrificing consumer choice.

In *Pfizer*, for example, each of the defendant drug manufacturers was doing business and held industrial patents in each of the nations which brought suit. The majority of the purchases occurred in foreign markets. Each of these foreign governments remained free to deal with the conspirators under its own law. The United States was under no obligation to offer these nations a treble damage remedy.

2. *Alternative antitrust remedies*—Forcing a foreign nation to rely on its own judicial system for redress of antitrust harms does not leave it without a remedy. These nations have remedies apart from a suit under section 4 of the Clayton Act. Many na-

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**Footnotes:**

88 148 F.2d 416 (2d Cir. 1945).
90 United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945).
tions have recourse to their own antitrust laws. West Germany, for example, which filed an *amicus curiae* brief in *Pfizer* urging the applicability of the treble damage remedy, has antitrust laws which include penalties such as injunctions, fines, and stringent price regulation. The Common Market's Treaty of Rome establishes further economic regulation. In fact, at the time of the *Pfizer* litigation, an antitrust suit alleging many of the same charges found in the American suit was in progress in West Germany. The Phillipines and India have also enacted antitrust laws. Some commentators have even called antitrust law one of America's "most successful exports." Foreign nations may also secure jurisdiction over foreign corporations to restrict extraterritorial business practices which affect their economies.

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85 See *Pfizer*, 434 U.S. at 327 (Burger, C.J., dissenting).


In 1954, only eight member nations of the Organization for Economic Cooperation and Development (OECD) had enough interest in antitrust law to send a delegate to meetings of the Ad Hoc Committee of Experts on Restrictive Business Practices of the Economic and Social Council of the UN (ECOSOC). The antitrust laws of the Federal Republic of Germany, Japan, and, to some extent, those of France were largely the result of pressure from the United States during and after World War II. By 1973, antitrust laws embodying principles similar to those found in U.S. law had been adopted by more than half of the 23 members of OECD. The European Economic Community (EEC), which applies competition rules to nine members and a number of associate nations, has developed a sophisticated and stringent system for the regulation of competition influenced by U.S. experience and values.

During the 1970's, U.S. antitrust principles have served as a model for the antitrust laws of a number of nations including India, Pakistan, Brazil, Argentina and even Yugoslavia.


88 See, e.g., GWB, *supra* note 93, § 98, (2), which applies German law to all restrictive behavior "which [has] effects in the territory to which this Act applies, even if they result from acts done outside the territory." See also Europemballage Corp. and Continental Can Co., Inc. v. Commission of the European Communities, [1973] E. Comm. Ct. J. Rep. 215, 242, 12 Comm. Mklt. L.R. 199, 222 (1973). The court stated: "Community law is applicable to . . . an acquisition which, influences market conditions within the Community. The circumstance that [the American company] does not have its registered office within the territory of one of the Member States is not sufficient to exclude it from the
Even those nations which do not have antitrust laws still have effective weapons against conspirators. Retaliatory steps against foreign business may include seizures of goods, increasing tariff and non-tariff barriers, withdrawals of licenses to do business, or refusals to honor licensing agreements or patents. International boycotts also have a definite impact on the regulation of foreign corporations. 99

3. Advantages of alternative remedies—Significant advantages accrue to a nation bringing suit in its own courts. The expense of bringing a law suit in a foreign nation is often cited as a reason for allowing treble damage recoveries in American courts. The expense of suing a foreign corporation would be reduced by bringing the suit in one's own court system. 100 The problems of the failure to understand American antitrust law, extreme geographical distance, and language difficulties, among others, would be largely overcome. Foreign nationals could also pursue their own claims more easily. 101 Finally, a foreign nation using its own laws might be able to reach more types of anticompetitive acts than by relying on American law. For example, a American enterprise operating under the Webb-Pomerene Act 102 may engage in restrictive business practices abroad with impunity, provided no spillover effects reach the United States. Foreign governments can not prosecute that business under American law. They are free, however, to use their own laws. 103

application of Community Law.” Id. at 242, 12 Comm. Mkt. L.R. at 222.

99 Pfizer, 434 U.S. at 327-28 (Burger, C.J., dissenting).

A long-term plan for nations with and without antitrust policies is to do without the product now and to search for alternative sources. Monopoly profits, especially in the low and medium technology industries, attract new foreign and domestic entrants. Often a government could encourage the infant industry with protective measures. Eventually the new firms would undercut the monopoly price and institute lower prices.

Decrease in demand also places a greater strain on the members of a cartel. As demand slackens and profits decrease, greater incentive exists for one member to "cheat" on the others by lowering his prices to capture a larger share of the market.

100 The “rigors” of the discovery process can also be mitigated by reciprocal agreements calling for cooperation between participant nations in antitrust investigations. Such an agreement already exists between the United States and West Germany. See Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 11, 1976, United States-Federal Republic of Germany, 27 U.S.T. 1956, T.I.A.S. No. 8291. Self-limitation, such as the limiting of requests for foreign evidence to reasonably relevant material rather than engaging in fishing expeditions, is another method of coping with the costs of discovery. See Shenefiel, The Perspective of the U.S. Department of Justice, in Perspectives on the Extraterritorial Application of U.S. Antitrust and Other Laws 12, 21 (J. Griffin ed. 1979).

101 See Velvel, supra note 15, at 5.


Another benefit from foreign governments' prosecution of claims in their own courts would be the easing of the burden on the American court system. American courts could concentrate their energies on cases which have an impact on the domestic economy rather than on those which concern injuries abroad. 104

4. Determination of the existence of reciprocity—Reciprocity, in terms of antitrust law, is a complex issue. Many nations have adopted antitrust policies, 105 but the substantive elements vary from nation to nation. 106 This does not mean, however, that the same business practices condemned in the United States are condoned in England. The American laws may not be duplicated, but "[t]here may be no real conflict at all . . . [since] non-prohibition is not necessarily affirmative approval." 107 A result-oriented approach would produce the most accurate evaluation of the trade regulations of another nation. The American judge would decide as a matter of fact, based on the proof offered by the foreign government, whether a certain business practice is prohibited or allowed by that nation at a given time. The court would therefore look beyond the existence of a particular statute to determine whether it is actually enforced. Antitrust laws which are shams would thus not qualify under the reciprocity requirement.

C. Exhaustion of Remedies

The international antitrust objectives of the United States are not only to have countries enact antitrust measures but also to encourage the nations to use them effectively. A requirement that the foreign government exhaust all local remedies prior to

104 One author has stated: "At a time, however, when our courts are already burdened by substantial claims which have insignificant bearing on the effective administration of justice as to our own markets, there is wisdom in limiting antitrust jurisdiction to avoid a drain on our judicial resources occasioned by remote injuries." Rosenthal, supra note 46, at 219.

105 See text accompanying notes 93-97 supra.

106 One British commentator noted that

The differences in substantive law between the United States and the United Kingdom in antitrust . . . are far too numerous to mention . . . [O]ur legislation follows very different lines from the Sherman and Clayton Acts. Broadly, conduct, whether monopolistic or merely restrictive, is never wrong per se, but only after it has been found by an investigation, more administrative than judicial, to be contrary to the public interest. Willoughby, Remarks by an English Solicitor, in PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST AND OTHER LAWS 56, 59-60 (J. Griffin ed. 1979). See also Davidow, Extraterritorial Application of U.S. Antitrust Law in a Changing World, 8 LAW & POL. INT'L BUS. 885 (1978).

bringing suit in the United States would further that goal. Such
a requirement is not unknown in either international or Ameri­
can law. For example, it is used in the international context as a
jurisdictional requirement of the International Court of Justice
and the Permanent Court of International Justice. This re­
quirement "is both ancient and commonplace. It is so funda­
mental that it has almost become a cliché and it is difficult to
find any real analysis of its meaning." A state must have at­
tempted all possibilities of obtaining a local remedy, whether or­
dinary or extraordinary, substantive or procedural, or legal or
administrative, before an international procedure may be insti­
tuted to recover damages under international law.

The Overseas Private Investment Corporation (OPIC), a
government agency which invests in and insures private Ameri­
can enterprises which develop industry in less developed friendly
nations, imposes similar requirements under American law. Under the general terms of the Investment Insurance Agreement
between the enterprise and OPIC, an American company may
not collect its insurance money if the expropriatory action of the
project country is a result of "failure on the part of the Investor
or the Foreign Enterprise (to the extent within the Investor's
control) to make all reasonable measures, including proceeding
under then available administrative and judicial procedures in

108 T. Haesler, The Exhaustion of Local Remedies in the Case law of International
109 2 McNair, International Law Opinions 312 (1956).
110 The Interhandel Case (Switzerland v. United States), [1957] I.C.J. Rep. 6, demon­
strates how far a plaintiff must go to prove the exhaustion requirement. A Swiss com­
pany, Interhandel, had already appeared twice before the United States Supreme Court.
At the end of the second proceeding, some of the issues were reopened for yet another
trial. The issue before the I.C.J. was whether the Swiss company would have to await the
outcome of this third appearance before the I.C.J. had jurisdiction to hear the interna­
tional claim brought on its behalf by the Swiss government. The I.C.J. decided that not­
withstanding the exhaustion of all remedies ordinarily available, there were still some
extraordinary measures for which the company could apply. This rule imposes itself even
more strongly when the internal procedures are in process, as was the case for
Interhandel.
111 See T. Haesler, supra note 108; The Ambatielos Case (Greece v. United Kingdom).
112 Congress created OPIC by enacting the Foreign Assistance Act, 22 U.S.C. §§ 2191-
2200a (1976), the purpose of which is to "mobilize and facilitate the participation of
United States private capital and skills in the economic and social development of less
developed friendly countries and areas, thereby complementing the development assis­
tance objectives of the United States . . . ." Id. at § 2191.
113 An additional analogy is found in American labor law. A plaintiff-employee must
allege and show exhaustion of the contractual grievance procedure before bringing a suit
against an employer for breach of the collective bargaining agreement. See Vaca v. Sipes,
the Project Country, to prevent or contest such action."

Applied in the antitrust context, the exhaustion requirement would mandate that a foreign sovereign who has suffered injury first seek to redress the wrong in its own court system. The requirement is, however, flexible. The foreign sovereign could be allowed to prove circumstances which would excuse it from the requirement. The foreign sovereign could plead futility on grounds that the antitrust violation is outside the jurisdiction of its courts. An alternative excuse would be unreasonable expense. Certain cases may arise where the cost of litigating the matter in local courts is substantially larger than bringing suit in the United States.

In sum, restricting access to American courts by foreign sovereigns through use of the exhaustion of local remedies doctrine and the reciprocity requirement would throw the burden of enforcing antitrust law and protecting consumers upon the nation which is injured by the action. Under the foregoing proposal, a foreign sovereign wishing to bring an antitrust suit in an American court under the American antitrust laws would be limited to a single damage recovery. In order to sue, the foreign government would have to meet two requirements. The nation would first have to prove that under a standard of general reciprocity its laws prohibit the same type of anticompetitive conduct alleged in the instant suit. The sovereign would then have to show

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114 "General Terms and Conditions," (234 KGT 12-70) art. 1.113(2), reprinted in H. STEINER AND D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 474 (2d ed. 1976). This requirement is in accordance with the definition of "expropriation" in 22 U.S.C. § 2198(b) (1976):

The term "expropriation" includes, but is not limited to, any abrogation, repudiation, or impairment by a foreign government of its own contract with an investor with respect to a project, where such abrogation, repudiation or impairment is not caused by the investor's own fault or misconduct, and materially adversely affects the continued operation of the project.

115 An example of such a case is that where the evidence pertaining to the violation is located in the United States and the cost of foreign discovery is prohibitive.

116 See Baker, supra note 103, at 35. The author states: "Government rarely works effectively unless it has an affirmative interest, and enforcement in this area is no exception."

117 This proposal limits the restrictions to a foreign sovereign. To apply the same standards to government-owned entities as are applied to foreign governments would be iniquitable. First, these corporations, like all other foreign corporations, do not have remedies apart from the treble damage suit. Second, these companies are not immune from suit under the Foreign Sovereign Immunities Act because they engage in commercial activities. Finally, unless a special tax treaty exists, these corporations are subject to American tax law. While a government-owned corporation is often merely an arm of the sovereign, the court should be able to "pierce the veil" in such cases and deny treble damages to a corporation which is an extension of a foreign sovereign. See, e.g., Federal Republic of Germany v. Elicofon, 358 F. Supp. 747 (E.D.N.Y. 1972).
either that it has exhausted all local remedies prior to bringing
suit in the United States or that it should be excused from the
requirement. 118

IV. CONGRESSIONAL PROPOSALS

Legislators responded quickly to the Pfizer opinion but have
failed to take into account all the issues raised therein. The pro-
posed legislation fails to meet the need to encourage foreign na-
tions to use their own courts to redress their antitrust grievances.

Senator Strom Thurmond introduced a bill119 on January 19,
1978, which would have amended section 4 of the Clayton Act to
expressly exclude a foreign sovereign from the meaning of the
word "person." Thus, a foreign government would not have been
allowed the treble damage remedy. The bill did not, however,

118 A foreign sovereign may try to circumvent a statute of this type by using an Ameri-
can forum but applying the law of the foreign government under an analysis similar to
the place-of-wrong analysis that is applied under conflict of laws principles in tort cases.
RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971). An American court, if it so
chooses, may provide a forum for the foreign antitrust claim. RESTATEMENT (SECOND) FOR-
EIGN RELATIONS LAW OF THE UNITED STATES § 19, Comment (b) (1965). International law
does not, however, require a United States court to provide a forum. See id. at §2, Com-
ment (c). A forum court may refuse to give effect to foreign laws on many grounds, such
as the fact that the law of the foreign sovereign is contrary to the public policy of the
forum or that the forum court's judgments are not given effect by the foreign government
involved. Id. at § 9, Comment (a). Thus, an American court could abstain from hearing
an antitrust claim based on foreign law if it believes that the law is contrary to American
policy or because it believes that there is little reason to expect a foreign court to enter-
tain an action based on a violation of American antitrust law.

In light of the American policy of encouraging international antitrust activity, Ameri-
can courts should, perhaps, provide forums for the application of foreign antitrust law. If
the court decides to hear the claim, it will determine, according to its own conflict of laws
rules, whether a given question is one of substance or of procedure. If the question is one
of substance the foreign law is applied, but the law of the forum governs all matters of
procedure. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 and Comments a & b
(1971). The question of whose law is to determine the measure of damages is more com-
plex. Considerable controversy exists as to whether the question of damages is substan-
tive or procedural. See generally J. MARTIN, CONFLICT OF LAWS: CASES AND MATERIALS 121-
22 (1978). A legislature arguably incorporates a specific remedy into a statute as a
method of enforcing public policy. Thus, an antitrust remedy may be an important sub-
stantive provision. Therefore, a foreign sovereign could theoretically recover quadruple
damages for a price-fixing violation should its laws so dictate. Many courts, however,
have treated the issue of damages as procedural and applied the remedies of their forum.
See generally A. EHRENZWEIG, CONFLICT OF LAWS § 21 (1962).

Even if a court were to decide that the question of damages was substantive, it would
be unlikely to award more than single damages because such a remedy would be contrary
to American public policy. The United States Congress, if it enacted a statute limiting a
foreign sovereign to single damages in an antitrust action, would act upon the clear pub-
lic policy of protecting American businesses. A court would probably be unwilling to defy
such an explicit expression of legislative intent by allowing a foreign sovereign to collect
damages through the back door which it would be denied under American law.

leave a foreign government without redress; section 4(A) of the Clayton Act would have been amended to allow a foreign sovereign single damages. Thus, while Senator Thurmond's bill addressed the issue of damages, it failed to provide any provision to encourage foreign nations to use their own courts.

A second bill, introduced by Senator Dennis DeConcini, incorporated the amendments proposed by Senator Thurmond's bill, and added an additional requirement of general reciprocity to the amended section 4(A). As a prerequisite to the suit, the Attorney General of the United States would be required to certify that (1) the United States could sue in its own name on a civil claim in the foreign nation's courts and (2) the foreign government has laws which prohibit anticompetitive practices. Both Senator Thurmond and Senator DeConcini addressed the anomalous situation created by Pfizer decision wherein a foreign sovereign would have a right in an American court which is denied to the United States government. As Senator Thurmond remarked, "[i]t appears to me that it is only fair and that common sense would lead us to treat a foreign nation no better or no worse than we treat our own country in U.S. courts." Senator DeConcini's bill had an advantage over Senator Thurmond's proposal in that its general reciprocity requirement encouraged nations to develop their own antitrust laws. However, the bill's requirement that the Attorney General certify the existence of comparable antitrust laws ran counter to the general common law rule that proof of foreign law was a question of fact. In addition, it placed an unwieldy burden on the Attorney General's office. Courts have developed a far greater expertise in dealing with proof of foreign law; judges are better able to decide in light of the facts of each case whether such anticompetitive practices would have been prohibited by the foreign sovereign's

120 15 U.S.C. § 15a (1976) reads: Whenever the United States is hereinafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefore in the United States district court for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover actual damages by it sustained and the cost of the suit.

121 S.2486, 95th Cong., 2d Sess. (1978). Co-sponsors were Senators Thurmond and Allen, each of whom had introduced a bill of his own. Senator Allen's proposal, an amendment (Amend. No. 1669, 95th Cong., 2d Sess. (1978)) to S.1874, 95th Cong., 1st Sess. (1977), was substantially equivalent to Senator Thurmond's proposal and thus will not be discussed here.


laws.

Senator Daniel Inouye proposed another bill which would have allowed treble damage recovery provided there was strict reciprocity between the two nations. The bill amended section 4 of the Clayton Act by adding: "A foreign government, including any agency or agent thereof, may sue for any injury pursuant to this section if United-States persons and the United States government are permitted equivalent access and relief for the same injury in the courts of such foreign sovereign government." The standard of reciprocity demanded by Senator Inouye's bill was much stricter than that required by Senator DeConcini's bill. The former standard makes the right to sue "dependent on the existence of foreign laws formulated precisely like our own," leaving no freedom for foreign nations to fashion laws and remedies to meet their own needs. Because no other nation has a treble damage remedy similar to ours or exactly the same legal system as ours, Senator Inouye's bill would have effectively banned all nations from American courts in antitrust cases.

Congressman Charles Wiggins' amendment to an existing antitrust bill was perhaps the most drastic measure yet proposed, precluding all suits by foreign sovereigns without exception. The bill failed to distinguish between those nations which have no antitrust laws and those countries which have demonstrated a commitment to the same concepts on which American antitrust laws are based. Thus, no incentive was provided to foreign nations to develop antitrust laws and the bill hindered progress towards an international antitrust structure. Congress did not act on any of the aforementioned proposals and only Senator DeConcini's bill was reintroduced during the 96th Congress.

Presently under consideration is the Antitrust Enforcement Act of 1979, which contains an amendment by Senator Charles Mathias. This bill was originally designed to overturn Illinois Brick Co. v. Illinois. The amendment limits foreign sovereign

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126 Id.
131 S.300, 96th Cong., 1st Sess. (1979). At this writing, the passage of this bill appears unlikely. Senate sources report "the bill has become a buzzword for complicated, bad legislation which will not help those consumers it is intending to." Road Looks Rough for Illinois Brick Bill, 65 A.B.A.J. 1783 (1979).
132 In Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), the Supreme Court held that an indirect purchaser does not have standing to sue for treble damages under the antitrust
governments, departments, or agencies thereof, to single damages. The general reciprocity requirement is unusual in that it speaks only of violations which occur in the United States. The proposal is silent on the ability of a foreign sovereign to bring suit if, as in Pfizer, the American enterprise's conduct occurs abroad. Furthermore, the bill offers little incentive for a foreign sovereign to exhaust its own remedies prior to bringing suit in the United States.

The Congressional response to the Pfizer decision, though swift, has been inadequate. The reciprocity requirements have for the most part been so strict as to bar any foreign nation from suit. The more liberal proposals fail to encourage nations to use their antitrust laws.

**CONCLUSION**

The consequences of the Pfizer decision remain unclear. The likelihood is great, however, that in a world of increasing interdependence, the appearance of the government-trader seeking redress for real or imagined harms will become more frequent. Congress should take this opportunity to enact legislation that will promote the economic and political interests of the United States and still give foreign nations access, if somewhat limited, to American courts. The United States has neither the responsibility nor the need to protect or regulate the internal markets of

laws. While Pfizer and Illinois Brick both deal with the issue of consumer access to antitrust remedies, the decisions have little practical impact on each other. A foreign sovereign generally purchases directly from American producers and is thus unlikely to be barred from suit by Illinois Brick.

The provision reads:

[S]uits under . . . [Secton 4 of the Clayton Act] brought by foreign sovereign governments, departments, or agencies thereof, shall be limited to actual damages: And . . . no foreign sovereign may maintain an action in any Court of the United States under the authority of this section unless its laws would have forbidden the type or category of conduct on which the action is based if that conduct had occurred within its territory at the time it occurred in the United States, and unless its laws allow the government of the United States to recover damages caused by such conduct through the judicial or administrative processes of the foreign state.

S.300, 96th Cong., 1st Sess. § 3 (1979) (as amended). The Federal Republic of Germany has already expressed its fear that the Mathias Amendment would "be construed as a de facto bar to the German Government or its corporations from suing antitrust cases in U.S. courts." S. Rep. No. 96-239, 96th Cong., 1st Sess. 71 (1979) (note from Federal Republic of Germany to Department of State, presented by Douglas Bennet, Ass't Secretary for Congressional Relations).

See text accompanying note 92 supra.

A major problem with all of the proposed legislation is the failure to adequately define "sovereign." The definitions raise questions as to the status of transnational organizations and protectorates under the law.
other nations. By taking the measures outlined above, the United States can move another step along the road toward an international antitrust program and freer world markets.

—Marianne P. Gaertner