

University of Miami Law School Institutional Repository

University of Miami Inter-American Law Review

9-1-1978

Private Actions by Foreign Governments Under U.S. Antitrust Laws *Pfizer v. Government of India*, 98 S. Ct. 584 (1978)

Everett N. Hughes

Follow this and additional works at: <http://repository.law.miami.edu/umialr>

Recommended Citation

Everett N. Hughes, *Private Actions by Foreign Governments Under U.S. Antitrust Laws Pfizer v. Government of India*, 98 S. Ct. 584 (1978),
10 U. Miami Inter-Am. L. Rev. 609 (1978)

Available at: <http://repository.law.miami.edu/umialr/vol10/iss2/16>

This Note is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

NOTE

Private Actions by Foreign Governments Under U.S. Antitrust Laws

Pfizer v. Government of India, 98 S. Ct. 584 (1978)

India, Iran, and the Philippines¹ brought independent civil actions for treble damages under the Clayton Act² against six American pharmaceutical companies.³ The foreign governments alleged the existence of a conspiracy among the drug companies to restrain and monopolize interstate and foreign trade in the manufacture, distribution, and sale of broad spectrum antibiotics⁴ in violation of the Sherman Act.⁵ The defendant companies asserted the affirmative defense that foreign governments were not "persons" entitled to sue under Section 4 of the Clayton Act,⁶ as defined by both the Sherman and Clayton Acts.⁷ In response to defendants' pretrial motions to dismiss and a counter-motion by the plaintiffs to strike the affirmative defense, the district court held that the foreign governments were in fact "persons" entitled to sue and denied defendants' motions to dismiss the complaints. The district court then certified this question for interlocutory appeal.⁸ The original three judge panel of the Eighth Circuit Court of Ap-

1. A fourth respondent's complaint, the Republic of Vietnam's, was dismissed by the district court subsequent to petitioners' filing for certiorari, but prior to the Supreme Court's granting of the writ. The dismissal was based upon the ground that the United States no longer recognized the government of Vietnam, and was affirmed by the circuit court. *Republic of Vietnam v. Pfizer*, 556 F.2d 892 (8th Cir. 1977).

2. Clayton Act § 4, 15 U.S.C. § 15 (1976) provides that:

Any persons 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 damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

3. *Pfizer, Inc., American Cyanamid Company, Bristol-Meyers Company, Squibb Corporation, Olin Corporation and The Upjohn Company.*

4. The objectionable activities allegedly practiced by the companies included price fixing, market division, and fraud upon the United States Patent Office.

5. Sherman Act §§ 1, 2, 15 U.S.C. §§ 1, 2 (1976). Section 1 of the Sherman Act provides in appropriate part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

Section 2 of the Sherman Act provides in appropriate part:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by said punishments, in the discretion of the court.

6. See note 2 *supra*.

7. 15 U.S.C. § 7 (1976); 15 U.S.C. 12 (1976). Both the Sherman and Clayton Acts provide that the word "person" "shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

8. 28 U.S.C. § 1292(b) (1976).

peals⁹ and the entire circuit in a later *en banc* rehearing,¹⁰ affirmed the district court's rulings. Upon writ of certiorari, the Supreme Court of the United States¹¹ held, affirmed: Foreign nations are "persons" under Section 4 of the Clayton Act and, therefore, are entitled to sue for treble damages. *Pfizer v. Government of India*, 98 S. Ct. 584 (1978).

I. INTRODUCTION

A. General Right of Foreign Sovereign to Sue in United States Courts

Accessibility to U.S. courts by foreign nations for civil litigation is well established.¹² The Constitution's extension of judicial power "to all Cases, in Law and Equity arising . . . between a State or Citizen thereof, and foreign States, Citizens or Subjects,"¹³ in conjunction with the Congressional grant of original jurisdiction to federal courts over controversies between "a foreign state . . . as plaintiff, and citizens of a State or of different States,"¹⁴ provide the legal base upon which such access to U.S. courts derives. In addition, principles of comity¹⁵ among sovereign states support, but do not require this access.¹⁶ This limit to the influence of such principles of comity results from a recognition of the fact that foreign access to U.S. courts is a matter of national policy transcending the interests of the parties to the action.¹⁷

Resolution of the question of which foreign sovereigns will be allowed to sustain actions in U.S. courts has been left to the executive and legislative

9. *Pfizer v. Government of India*, 550 F.2d 396 (8th Cir. 1976).

10. *Pfizer v. Government of India*, 550 F.2d 400 (8th Cir. 1976) (*en banc*).

11. Justice Blackmun not participating.

12. *The Sapphire*, 78 U.S. (11 Wall.) 164 (1870), was the first United States Supreme Court decision which dealt with the issue of whether a foreign sovereign might sue in civil action in a United States court. The case involved a collision between the French ship *Euryale*, owned by the Emperor Napoleon III, and the American ship *Sapphire* in San Francisco harbor. The representative of the Emperor filed a libel against the American vessel two days after the collision in federal district court. In addressing the issue of whether a civil suit could be sustained by a foreign government the court noted that the Constitution had expressly extended the judicial powers of the court to controversies "between a State, Citizen thereof, and foreign States, Citizens or Subjects." (U.S. Const. art. III, § 2, cl. 1). In addition, the Court noted that to deny such a right of action "would manifest a want of comity and friendly feelings." *The Sapphire*, 78 U.S. (11 Wall.) at 167. Consequently, the Court held that a United States court may entertain civil suits by foreign sovereign plaintiffs.

For an earlier circuit court decision which expressed a rationale similar to the one expressed in *The Sapphire*, see *King of Spain v. Oliver*, 14 F. Cas. 577 (C.C.D. Pa. 1810) (No. 7814).

13. U.S. Const. art. III, § 2, cl. 1.

14. 28 U.S.C. § 1332(a) (1977).

15. Comity, as defined by Webster, "is in general terms that there are between nations at peace with one another rights both national and individual resulting from country or courtesy due one friendly nation to another. Among these is the right to sue in their courts respectively." 6 Webster Works, 117 quoted in *Russian Socialist Federated Soviet Republic v. Cibrario*, 235 N.Y. 255, 258, 139 N.E. 259, 260 (1923); *Disconto Gesellschaft v. Terlinden*, 127 Wis. 651, 660, 106 N.W. 821, 823 (1906).

16. *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

17. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408 (1964).

departments of government.¹⁸ The avoidance of judicial involvement in these determinations results from a recognition of the Constitution's general grant of power over foreign relations to these other departments of government.¹⁹ In addition, judicial deference recognizes the politically sensitive nature of these decisions and the need to avoid embarrassing contradictions in the handling of the extension or withdrawal of this right to sue.²⁰ The medium for access to the courts has been executive recognition of a plaintiff government.²¹ Once recognized, accessibility will be denied only during war;²² mere severance of diplomatic relations, establishment of commercial embargoes, or the freezing of a foreign government's assets in this country is insufficient to preclude such access.²³ Parenthetically, it should be noted that once a foreign sovereign avails itself of this right to sue, it abandons its

18. *Lehigh Valley R.R. v. Russia*, 21 F.2d 396, 399-400 (2d Cir. 1927). See *Jones v. United States*, 137 U.S. 202, 212-13 (1890).

19. *Lehigh Valley R.R.*, 21 F.2d at 399-400.

20. See *Banco Nacional de Cuba*, 376 U.S. at 931-32.

21. Cf. *The Penza*, 277 F. 91 (E.D.N.Y. 1921); *Russian Socialist Federated Soviet Republic*, *supra* note 15.

22. *Ex parte Colonna*, 314 U.S. 510 (1942). In this case, the Royal Italian Ambassador filed a petition in the United States District Court seeking writs of prohibition and mandamus against the seizure of one of the Italian Government's oil-laden vessels. The ambassador's defense consisted of the affirmative defense of a foreign government's sovereign immunity from suit. Subsequent to the bringing of the action war was declared between the United States and Italy. The Court citing the Trading with the Enemy Act of 1917, 40 Stat. 411, and a number of cases which recognized the principle that war suspends the right of enemy plaintiffs to prosecute actions in our courts, dismissed the Ambassador's petition. The Trading with the Enemy Act of 1917, 50 U.S.C. app. § 7 (b) (1970) provides:

Nothing in this Act [sections 1-6, 7-39 and 41-44 of this Appendix] shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war, except as provided in section ten hereof [section 10 of this Appendix]: *Provided however*, That an enemy or ally of enemy licensed to do business under this Act [sections 1-6, 7-39 and 41-44 of this Appendix] may prosecute and maintain any such suit or action so far as the same arises solely out of the business transacted within the United States under such license and so long as such license remains in full force and effect: *And provided further*, That an enemy or ally of enemy may defend by counsel any suit in equity or action at law which may be brought against him.

23. *Banco Nacional de Cuba v. Sabbatino*, *supra* note 17, at 931. The Court offered the following rationale for its refusal to adopt the defendant's assertion that Cuba as an unfriendly power should be denied access to United States courts:

This Court would hardly be competent to undertake assessments of varying degrees of friendliness or its absence, and, lacking some definite touchstone for determination, we are constrained to consider any relationship, short of war, with a recognized sovereign power as embracing the privilege of resorting to United States courts. Although the severance of diplomatic relations is an overt act with objective significance in the dealings of sovereign states, we are unwilling to say that it should inevitably result in the withdrawal of the privilege of bringing suit. Severance may take place for any number of political reasons, its duration is unpredictable, and whatever expression of animosity it may imply does not approach that implicit in a declaration of war.

sovereign immunity and is subjected to the procedures and rules of decision governing the local forum.²⁴

II. THE SHERMAN AND CLAYTON ACTS' TREBLE DAMAGE REMEDY

Although the above explanation indicates that U.S. courts are generally available for redress of foreign sovereigns' civil grievances, whether those sovereigns will be afforded a right of action for antitrust treble damages "turns on . . . interpretation of the statute,"²⁵ which grants the right of action. The Clayton Act grants a right of action for treble damages to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust law. . . ."²⁶ "Person," as defined by the statutes, includes "corporations and associations . . . authorized by the laws of either the United States . . . (its) territories, . . . (or) any State, or (by) the laws of any foreign country."²⁷ Despite the fact that the Sherman Act, since its inception in 1890, and the Clayton Act, since its inception in 1915, have allowed treble damage relief, the court had never before been confronted with the question of construing these words *vis-à-vis* a foreign sovereign.²⁸ Some direction is offered, however, by previous constructions of these provisions with relation to the federal government and to the several states.

24. In *Guaranty Trust Co. of New York v. United States*, 304 U.S. 126, 135 (1938), the court held that barring some persuasive demand of public policy, principles of justice require that a state statute of limitation be applied to a foreign sovereign plaintiff.

In *Republic of Honduras v. Soto*, 112 N.Y. 310, 19 N.E. 845 (1889), the New York Court of Appeals construed section 3276 of the New York Code of Civil Procedure, requiring plaintiffs ("persons") residing outside the state to post security for court costs, to include foreign sovereign plaintiffs.

The recently enacted Foreign Sovereign Immunities Act of 1976 allows a defendant to assert a counterclaim against a foreign sovereign plaintiff if the counterclaim arises out of the same transaction as the foreign plaintiff's claim (28 U.S.C. § 1607 (b) (1977)) or if the extent of "the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state." (28 U.S.C.A. § 1607 (c) West 1978). This latter right of counterclaim (§ 1607(c)) was included to prevent a foreign state from asserting a sovereign immunity defense from situations involving a set off. H.R. Rep. No. 1487, 94th Cong., 2nd Sess., (1976) *reprinted in* [1976] U.S. Code Cong. & Ad. News 6604, 6622. *See First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972).

25. 98 S.Ct. at 587, *quoting the circuit court*, 550 F.2d at 397. Parenthetically it should be noted that foreign sovereigns were at the time of the passage of the Sherman and Clayton Acts permitted to maintain actions for common-law business torts. *See, e.g. French Republic v. Saratoga Vichy Spring Co.*, 191 U.S. 427 (1903); *La Republique Francaise v. Schultz*, 194 F. 500 (S.D.N.Y. 1894).

26. 15 U.S.C. § 15. *See note 2 supra*.

27. 15 U.S.C. § 12. *See note 7 supra*.

28. The Court of Appeals noted that "all parties agree this is a case of first impression." *Pfizer v. Government of India*, 550 F.2d at 397.

The Southern District of New York had faced this question in a related action involving the same defendants, resolving the issue in favor of the plaintiff government, *Kuwait*. In *re Antibiotic Antitrust Actions*, 333 F. Supp. 315 (S.D.N.Y. 1971). An appeal was taken from this decision but was later dismissed by stipulation of the parties, *see* 98 S. Ct. at 586, n. 5.

A. Unavailability of the Treble Damage Remedy to the United States

In *United States v. Cooper*,²⁹ the Treasury Department brought a civil action for treble damages against eighteen named defendants who, in response to a government solicitation of bids for intended tire purchases, had submitted four sets of identical bids. The Treasury Department's complaint charged collusion and prayed for treble damage relief for the injuries sustained when the Department was forced to purchase the tires under such unfavorable circumstances. The defendants' answer raised the affirmative defense that the United States was not a "person" entitled to sue for treble damages under Section 7 of the Sherman Act.³⁰ The Supreme Court upheld the defendants' affirmative defense.

In an exhaustive legislative and judicial analysis of the Sherman Act, Justice Roberts' majority opinion offered several rationales for the court's conclusion. The opinion first noted that if the United States was to have been included in the statute's use of the words "any person," which would secure a right of action for the United States, then the United States would also have to have been included in the same statute's use of the word "person" in the phrase "injured . . . by any other person or corporation." Such a reading, the Court reasoned, would not only entitle the United States to sue for treble damages but would also make the United States liable to suit for treble damages.³¹ The Court, therefore, concluded that the statute's use of the word "any person" was insufficient to authorize a governmental right of action.³²

Second, the Court discussed the legislative scheme envisioned by the Sherman Act. It noted that the Act envisaged two classes of action: those made available only to the Government, *viz.* criminal prosecution,³³ injunctive relief,³⁴ and seizures of property,³⁵ and that made available to

29. 312 U.S. 600 (1941).

30. Prior to 1955, two sources of the treble damage remedy were available to plaintiffs injured by the anticompetitive activities of others, *viz.* Section 7 of the Sherman Act, ch. 647, § 7, 26 Stat. 209, 210 (1890) (repealed 1955) and Section 4 of the Clayton Act, 15 U.S.C. § 15 (1976). The enactment of Section 4 of the Clayton Act in 1914 was in part a recognition by the Congress that Section 7 of the Sherman Act had not successfully stimulated private litigation for the enforcement of the Sherman Act. S. Rep. No. 619, 84th Cong., 1st Sess. 2 (1955) *reprinted in* [1955] U.S. Code Cong. & Ad. News 2328, 2329. Section 7 in the Sherman Act differs from Section 4 of the Clayton Act in that the former statute includes the following phrase "by any other person or corporation."

Compare Section 7 of the Sherman Act which reads in its entirety:

Any person who shall be injured in his business or property *by any other person or corporation* by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

(emphasis supplied) *with* Section 4 of the Clayton Act, note 2, *supra*.

31. *Cooper v. United States*, 312 U.S. at 606.

32. *Id.*

33. *See* 15 U.S.C. §§ 1-3 (1976).

34. *See* 15 U.S.C. § 4 (1976).

35. *See* 15 U.S.C. § 6 (1976).

redress private injury, *viz.* the treble damage remedy.³⁶ The Court reasoned that since Congress had not seen fit to provide injunctive relief to private parties, the Court had not done so in its prior opinions.³⁷ Conversely, the Court reasoned that it could not now extend a right of action for treble damage relief, a private remedy, to the United States.³⁸ Third, the Court noted that previous judicial expressions,³⁹ the legislative history of the Sherman Act,⁴⁰ and the fact that prior to this suit, the United States had not sought treble damages since the inception of the Sherman Act fifty years earlier,⁴¹ led the Court to conclude that the treble damage remedy was an exclusively private remedy. Upon these grounds, the Court held that the United States was not a "person" entitled to sue for treble damages.

Justice Black, in a forceful dissent joined by Justices Reed and Douglas, countered the majority's opinion by arguing that Congress intended "to give equal protection to all persons similarly injured."⁴² He stated that nothing short of "clear and unequivocal statutory language" could exclude any single purchaser.⁴³ Furthermore, he noted that even the familiar canons of statutory construction⁴⁴ support a U.S. right of action for treble damages. A denial of a right of action for treble damages to the largest single purchaser would restrict "the remedy in such a way . . . [as to make] the evil aimed at less likely to be suppressed."⁴⁵

To the degree that the majority's opinion in *Cooper* is based on the added language of Section 7 of the Sherman Act⁴⁶ rather than the language of Section 4 of the Clayton Act,⁴⁷ the Court's opinion is of little analytic value because Section 7 of the Sherman Act has since been repealed.⁴⁸ To the extent, however, that the opinion is based upon the Court's analysis of the legislative scheme envisioned by the Sherman Act, the opinion offers an

36. See 15 U.S.C. § 15 (1976).

37. See, e.g., *Minnesota v. Northern Securities Co.*, 194 U.S. 48, 71 (1903); *Paine Lumber Co. v. Neal*, 244 U.S. 459, 471 (1916).

The *Cooper* Court noted however that the Sherman Act had been amended in 1914 to authorize suits for private injunction (see Clayton Act § 16, 15 U.S.C. 26 (1976)). *Cooper v. United States*, 312 U.S. at 608, n. 9.

38. *Cooper v. United States*, 312 U.S. at 608.

39. See cases cited in 312 U.S. at 610, n. 14.

40. The Court noted that the initial bill proposed by Senator Sherman included a government right to single damages in Section 1 of the bill and a private right to double damages in Section 2. When Senator Hoar rewrote the bill before its final presentation to the Congress he eliminated Section 1's grant of a right to single damages and substituted a number of other civil and criminal remedies. He also increased Section 2's grant of double damages to treble damages. See *Cooper v. United States*, 312 U.S. at 611-12.

41. 312 U.S. at 613-14.

42. *Id.* at 615.

43. *Id.*

44. *Id.* at 617 which states: "For it is a primary principle that a law should be construed so as to carryout its purpose, in light of the evil aimed at and the protection intended to be afforded."

45. *Id.*

46. See notes 30-32 and accompanying text *supra*.

47. See note 2 *supra*.

48. Act of July 7, 1955, Pub. L. No. 84-137, ch. 283, § 3, 69 Stat. 283.

opportunity for analytical comment. The Court held that the legislative scheme of the Sherman Act envisioned two mutually exclusive sets of remedies, the governmental remedies and the private treble damage remedy. In addition, prior cases have indicated that the treble damage remedy encompasses two purposes: (a) To compensate victims of antitrust violations and (b) to act as a deterrent to anticompetitive behavior.⁴⁹ Another objective of the treble damage remedy is the encouragement of the private enforcement of the antitrust laws.⁵⁰ Inasmuch as the purposes of the treble damage remedy are to compensate victims and deter violations, the Court's decision in *Cooper* to withhold a right of action for treble damages for the United States, serves to thwart these purposes, particularly in light of the fact that the U.S. Government is the single largest consumer.⁵¹ However, since the treble damage remedy is used to encourage private action, the added incentive of receiving three times the actual damages to a government that should already be vigilant, is legislative overkill. As a result, it is no wonder that Congress, in 1955, amended the Sherman Act to give the United States a right of action for single damages.⁵²

B. Availability of the Treble Damage Remedy to the States

The Court expanded the notion of governmental standing to sue for treble damages in *Georgia v. Evans*,⁵³ decided only one term after *Cooper*. The State of Georgia, through its attorney general, brought an action against respondent asphalt manufacturers seeking treble damage relief for injuries sustained when the respondents allegedly combined to fix prices and suppress competition. The respondents, citing *Cooper*, asserted the affirmative defense that the states were not "persons" entitled to sue for treble

49. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977).

50. *Id.*

51. See Justice Black's dissent in *Cooper*, 312 U.S. at 615-16, n. 1.

52. Act of July 7, 1955, § 4A, 15 U.S.C. § 15a (1970). But see Langsdorf, *The United States as Antitrust Damage Plaintiff: Mistreated Stepchild of the Parents Patriae*, 16 Antitrust Bull. 187 (1971), in which the author discusses judicially created limitations indirectly affecting the Government's ability to assert its right to single damage relief. These limitations were enunciated in *United States v. Grinnell Corp.*, 236 F. Supp. 244 (D.R.I. 1964), *aff'd in part and rev'd in part*, 384 U.S. 563 (1966). The limitations include: (1) The fact that the Government must bring its action for damages within four years after the cause of action accrues and is not entitled to wait until one year after the conclusion of the enforcement action as other plaintiffs are, and (2) the fact that the Government may not assert the doctrine of collateral estoppel once an enforcement action has found a defendant to have violated the Act.

However, in one interesting case a district court has allowed a governmental corporation to assert an action for treble damages. In *United States v. General Electric Co.*, 209 F. Supp. 197 (E.D.Pa. 1962), the court held that the Tennessee Valley Authority, as a wholly owned corporation of the United States Government, was entitled to sue for treble damages, since Section 1 of the Clayton Act, 15 U.S.C. § 12, defines "person" to include *inter alia*, "corporations and associations existing under or authorized by the laws of . . . the United States . . ." Furthermore, the court noted that "the form in which Congress created TVA was not the result of fortuitous or capricious circumstance. The very reason for the utilization of the corporate form was to free the agency from the inadequacies and restraints of the controversial executive agency." 209 F. Supp. at 204.

53. 316 U.S. 159 (1942).

damages under Section 7 of the Sherman Act.⁵⁴ The Court held that the States were persons entitled to sue for treble damage relief.⁵⁵

The Court reached its decision using the following analysis. Justice Frankfurter, writing for the majority, quoted *Cooper*, noting that "there is no hard and fast rule of exclusion."⁵⁶ The Court stated that there was no reason to believe that Congress had wanted to deprive the states of the treble damage remedy.⁵⁷ The opinion pointed to the fact that the Court had previously held that a municipality, a subdivision of the state, is entitled to sue for treble damages.⁵⁸ It reiterated its finding that the legislative scheme of the Sherman Act envisaged two classes of action — governmental and private.⁵⁹ The Court reasoned that unlike the situation in *Cooper* in which the United States had recourse to a number of remedies, the states are not afforded any of those remedies by the Sherman Act.⁶⁰ If the states were not allowed a right of action for treble damages, they would be afforded no remedy at all.⁶¹ As a result, the Court held that the states were "persons" entitled to sue for treble damage.

Justice Roberts, the lone dissenter in *Georgia*, reiterated his argument in *Cooper* that the language of the statute itself would prevent the Court's finding a right of action for the states.⁶²

The Court's opinion in *Georgia* serves both the compensatory and deterrent purposes of the treble damage remedy.⁶³ The fact that the states are afforded treble damages, instead of single damages, however, seems an unnecessary incentive and windfall, considering the general obligation of government to be vigilant in enforcing its laws. However, since existing legislation did not then (and does not now) leave the Court with the single damage option for the states, the treble damage remedy is preferable to no remedy at all.

III. THE PFIZER OPINION

The suit brought in *Pfizer* presented the Court with an opportunity to resolve the last of a series of cases construing the word "persons" in relation to the treble damage remedy. Justice Stewart, writing for the majority, recognized that when Congress had passed the Sherman and Clayton Acts, it had not considered the question of whether a foreign nation might be entitled to sue for treble damages.⁶⁴ The Court, however, adopting a rationale similar to the one enunciated by Justice Black's dissent in *Cooper*, reasoned that the Sherman Act was designed to be comprehensive in its terms,

54. See discussion in note 30, *supra*.

55. *Georgia v. Evans*, 316 U.S. at 162.

56. *Id.* at 161 quoting *Cooper v. United States*, 312 U.S. at 604-05.

57. *Id.* at 162.

58. *Id.*; See *Chattanooga Foundry & Pipe Works v. Atlanta* 203 U.S. 390 (1906).

59. See notes 33-38 and accompanying text *supra*.

60. *Georgia v. Evans*, 316 U.S. at 162.

61. *Id.*

62. *Id.* at 163. See discussion of this argument in text accompanying notes 31 *supra*.

63. 316 U.S. at 163.

64. 98 S. Ct. at 587.

protecting all potential victims from the perpetrators of forbidden practices.⁶⁵ Therefore, the Court concluded that Congress' use of the phrase "any person" was intended to have its naturally broad and inclusive meaning.⁶⁶

The majority next directed its attention to the respondents' foreign and sovereign characteristics. With respect to the former, the Court reasoned that since Congress had granted a right of action for treble damages to foreign corporations,⁶⁷ it clearly did not contemplate restricting the remedy to only the American consumer, although this may have been Congress' foremost concern.⁶⁸ With respect to respondents' sovereign characteristics, the Court adopted a rationale similar to the one it articulated in *Georgia*.⁶⁹ It noted that, similar to a state of the Union, a foreign nation is not afforded the several remedies permitted the United States.⁷⁰ Consequently, a denial of the treble damage remedy would present a foreign sovereign no alternative remedy.⁷¹ The majority reiterated the Court's prior finding of two purposes for the treble damage provision, compensation and deterrence,⁷² and reasoned that to deny a foreign plaintiff the right to sue for treble damages would permit a violator to escape full liability for his actions and result in compensation being denied to certain victims.⁷³ It reasoned that such exclusion would lessen the deterrent effect of the treble damage remedy.⁷⁴ As a result, the Court concluded that foreign sovereigns should be included within Section 4 of the Clayton Act's use of the word "person" and thereby should be permitted to maintain an antitrust action for treble damages.

Finally, the majority's opinion noted that the decision reached by the Court did not result in judicial interference in sensitive foreign policy matters, since the Court's decision limited a foreign sovereign's right to initiate a treble damage action to the long standing threshold requirements for suit of a foreign sovereign in a U.S. court. That is, in order for a foreign nation to, sue, it must be recognized by and be at peace with the United States.⁷⁵

Chief Justice Burger, joined in his dissent by Justices Powell and Rehnquist, characterized the holding of the majority as an "undisguised exercise of legislative power . . . at odds with the language of the statute (and) with its legislative history and [the] precedents of this Court."⁷⁶ He reasoned that statutory construction begins with the language of the statute itself, and the absence of "foreign sovereigns" from the definition of "person" in light of

65. *Id.*

66. *Id.*

67. See notes 2 & 7 *supra*.

68. 98 S. Ct. at 588.

69. See text accompanying notes 60 & 61 *supra*.

70. 98 S. Ct. at 590.

71. *Id.*

72. *Id.* at 588. See *Illinois Brick Co. v. Illinois*, 431 U.S. at 746.

73. 98 S. Ct. at 588.

74. *Id.* at 589.

75. *Id.* at 591. See text accompanying notes 12-24 *supra*.

76. 98 S. Ct. at 592.

the inclusion of an explicit reference to "corporations and associations" existing under "the laws of any foreign country,"⁷⁷ should be dispositive in concluding that Congress intended to omit foreign sovereigns from the benefits of the Act.⁷⁸ The majority had reasoned that since Congress had granted a right of action for treble damages to foreign corporations, Congress had not contemplated restricting the remedies of the Sherman Act to the American consumer.⁷⁹ The Chief Justice responded that, unlike foreign corporations which must submit to the jurisdiction of the United States when they enter the American marketplace, foreign sovereigns, at the time of the passage of the Sherman Act, did not have to do so; the doctrine of sovereign immunity afforded these nations immunity from suit in U.S. courts.⁸⁰ The dissent also argued that given the majority's admission that Congress had not considered the question of whether foreign sovereigns were persons,⁸¹ the legislative history of the treble damages remedy did not support the proposition of a right of action for treble damages by a foreign sovereign.⁸²

The dissent then considered the majority's analogy between the states of the Union and foreign sovereigns.⁸³ The Chief Justice argued that unlike "our own states, whose freedom of action in this regard is constrained by the Commerce and Supremacy Clauses, foreign sovereigns remain free to enact and enforce their own comprehensive antitrust statutes and to impose other more drastic sanctions on offending corporations."⁸⁴ In addition, the dissent pointed to the coercive economic power and political interests which serve to distinguish domestic states from foreign sovereigns.⁸⁵ Concluding with these points, the Chief Justice noted that the majority's opinion created an anomaly. He reasoned that while the U.S. Government may not sue for treble damages, other nations which are free to engage in anticompetitive

77. See notes 2 & 7 *supra*.

78. 98 S. Ct. at 592.

79. *Id.* at 588.

80. *Id.* at 592.

The Chief Justice, recognizing that the enactment of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C.A. §§ 1330, 1602-1611 (West 1978), militates against the asserting of the sovereign immunity defense by a foreign state (§ 1605(a) (2) specifically precludes the assertion of the sovereign immunity defense from suit when those suits involve the commercial activities of a foreign state in or having an affect upon United States), implied that a law enacted in 1976 could not be used to construe a statute enacted in 1890. Consequently, he reasoned it is Congress and not the courts who should take these later developments into account if statutory reinterpretation is desired.

81. See *id.* at 587.

82. *Id.* at 594.

83. In particular, the Chief Justice noted that respondents India and the Philippines as well as *amicus* West Germany, had a number of antitrust laws. And in fact West Germany had already commenced proceedings against petitioner Pfizer under German law for alleged violations involving the same facts at issue in the noted case.

84. 98 S. Ct. at 595.

85. *Id.*

The dissent went on to provide a poignant example: "The International price fixing, boycotts, and other current anti-competitive practices undertaken by some Middle Eastern nations are illustrative of the weapons in the arsenals of foreign nations which no domestic State could ever employ."

conduct have the right to sue for treble damages.⁸⁶ The dissent then made one final argument; it asserted that "the treble damage provision . . . is designed primarily as a remedy."⁸⁷ As such, the dissent reasoned that treble damages should not be invoked to reverse their priority from one of remedy to that of deterrence.⁸⁸

IV. ANALYSIS OF THE *PFIZER* OPINION

Pfizer firmly resolves the last of a series of cases construing "persons" entitled to sue for treble damages. Its holding is founded on the strong deterrent value afforded by the treble damage remedy and the remedy's function of compensating victims. The rationale underlying the majority's opinion is, however, open to analysis.

First, Justice Stewart's majority opinion reasoned that since foreign corporations are afforded a right of action for treble damages, the Congress indicated that it did not intend to restrict the remedy solely to the American consumer.⁸⁹ Although this reasoning may be correct on its face, it implicitly exaggerates the degree of concern which the Congress may have had for foreign entities when the Sherman Act was passed. The mere equitable recognition by Congress of a right to treble damages by a foreign corporation subject to our antitrust laws upon its entering the U.S. marketplace, does not indicate an intent to expand the application of the treble damage remedy to foreign entities whose own activities are less susceptible to the scrutinies of our antitrust law.⁹⁰

Second, the majority opinion places much weight upon its analogy between the situation of a foreign sovereign in the U.S. marketplace and the position of the domestic states in U.S. commerce. Justice Stewart reasons that since the Sherman Act does not include alternative or special remedies for a foreign sovereign, as it does for the United States,⁹¹ then a foreign nation, like a domestic state, would be remediless if the private treble damage remedy were not available to the foreign sovereign.⁹² Such analysis, however, ignores the basic differences between these two entities.

As noted by the Chief Justice in his dissent, while a foreign sovereign has the power to enact a wide range of anticompetitive measures which it can enforce outside of the territorial jurisdiction of the United States, a domestic state is limited in the scope of its action against the antitrust of-

86. *Id.* at 595-96.

87. *Id.* at 596.

88. *Id.*

89. *Id.* at 588.

90. See the Chief Justice's dissent, *id.* at 593.

91. See text accompanying notes 33-36 *supra*.

92. 98 S. Ct. at 590.

fender by the parameters established by the commerce⁹³ and supremacy⁹⁴ clauses.⁹⁵ It should be noted, however, that the states are not preempted from enacting antitrust legislation of their own, and in fact, all states have done so to one degree or another.⁹⁶

In addition to the above distinctions, the laws of a foreign country may legitimately require a broad range of activities which might otherwise be considered to be in violation of the Sherman Act. A domestic state, on the other hand, is much more limited in its legal ability to require such activity. The foreign sovereign's prerogative takes the form of the "act of state doctrine"⁹⁷ and the "sovereign compulsion defense."⁹⁸ These defenses to Sherman Act applications offer wide discretion to the actions of foreign sovereigns within their own territories *vis-a-vis* corporations which operate therein, even when these corporations interact with and have broad anticompetitive effects on the U.S. commerce. The states' ability to avoid Sherman Act proscriptions directed to corporate activities, on the other hand, is much more limited. The states' prerogative is encompassed in the "state action exemption."⁹⁹ Although the leading case in this area, *Parker v. Brown*,¹⁰⁰ implied rather broad discretion to the states,¹⁰¹ subsequent decisions have narrowed the application of the exemption.¹⁰²

93. The Commerce Clause, U.S. Const. art 1, § 8, cl. 3, provides that Congress shall have power: "To regulate Commerce with Foreign Nations, and among the several States and with the Indian Tribes."

94. The Supremacy Clause, U.S. Const. art VI. cl. 2, provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound Thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

95. 98 S. Ct. at 595.

96. For a compilation of various state antitrust, see, 4 Trade Reg. Rep. (CCH) ¶¶ 30,000.00-35,530.10 (1978).

97. The "act of state" doctrine comprises an affirmative defense to Sherman Act violations which a foreign or domestic corporation may assert to avoid liability for treble damages or criminal prosecution under the Act. It comprehends a recognition of the "validity of governmental acts of a foreign sovereign within its own territory," Kitner & Griffin, *Jurisdiction Over Foreign Commerce Under the Sherman Antitrust Act*, 18 B.C. Indus. & Com. L. Rev. 199, 230 (1977), thereby avoiding the application of the Sherman Act to such "acts of state." *But see* Hickenlooper Amendment to the Foreign Assistance Act of 1964, 22 U.S.C. § 2370 (e)(2) (1970).

98. The "sovereign compulsion defense" constitutes a second affirmative defense which a foreign or domestic corporation may assert to avoid liability under the Sherman Act. Here "immunity from suit exists [for the foreign or domestic corporation] where [such] a party's acts are compelled by regulations of a foreign sovereign." Kitner, note 97 *supra*. See also Comment, 65 Geo. L.J. 1001 (1977).

99. The "state action exemption" enunciated a policy in which the Supreme Court recognized that Congress in enacting the Sherman Act did not intend to infringe upon state's sovereignty by nullifying a state's legislative control over its officers and agents. *Parker v. Brown*, 317 U.S. 341 (1943). Thus, the proscriptions of the Sherman Act were viewed as inapplicable to the actions of a state acting as sovereign.

100. 317 U.S. 341 (1943).

101. *Id.* at 351.

102. See, e.g., *City of Lafayette v. Louisiana Power & Light Co.*, 46 U.S.L.W. 4246 (1978); *Cantor v. Detroit Edison Co.*, 428 U.S. 759 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). *But see* *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

This distinction between the scope of a state's prerogative and that of a foreign sovereign becomes more readily apparent in the following example. If state law is used to compel compliance with the anticompetitive arrangements of private parties, the "state action exemption" will not apply.¹⁰³ Whereas, if a foreign sovereign compelled similar compliance, the "act of state doctrine" and "the sovereign compulsion" defense would sustain the anticompetitive behavior.¹⁰⁴ Furthermore, even if the court were to find the requisite "state action" to avoid application of the Sherman Act, such a finding would not preclude further commerce and supremacy clause analysis of the questioned activity.¹⁰⁵ As already noted, a foreign sovereign need not undergo such scrutiny.

Third, the majority's opinion implies without explicitly stating,¹⁰⁶ a recognition of the impact of the recently enacted Foreign Sovereign Immunities Act of 1976.¹⁰⁷ This act provides for a number of exceptions to the jurisdictional immunity from suit in a U.S. court enjoyed by a foreign state.¹⁰⁸ One such exception provides that sovereign immunity shall not apply in any case:

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.¹⁰⁹

103. See *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951).

104. Compare *Schwegmann*, *supra* note 103 with *American Banana Co.*, 213 U.S. 347 (1909) ("act of state" doctrine) and *Interamerican Refining Corp., v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970) ("sovereign compulsion defense").

105. See *Simmons & Fornaciari, State Regulations as an Antitrust Defense: An Analysis of the Parker v. Brown Doctrine* 43 U. Cin. L. Rev. 61, 98-99 (1974).

106. The Chief Justice's dissent alludes to this effect. See 98 S. Ct. at 593, note 80 *supra*.

107. 28 U.S.C.A. §§ 1330, 1602-1611 (West 1978).

108. This jurisdictional immunity possessed by a foreign sovereign is encompassed in the "sovereign immunity" defense. This defense has never served as an absolute bar to all civil suits against a foreign sovereign in United States courts even prior to the enactment of the Foreign Sovereign Immunity Act, particularly when the suit involved the commercial activity of the foreign sovereign. *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 706 (1970) (plurality opinion: Justice White Burger, Powell & Rehnquist). See *Kintner*, *supra* note 97, at 228-30.

109. 28 U.S.C.A. § 1605(a)(2) (West 1978).

With respect to the acts of foreign sovereigns outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere "causing a direct effect in the United States." The legislative history of the Act indicates that United States may exercise jurisdiction over these foreign sovereigns consistent with the principles set forth in Restatement (second) of Foreign Relations Law § 18 (1965). H.R. Rep. No. 17, 94th Cong., 2nd Sess. (1976) *reprinted in* [1976] U.S. Code Cong. & Ad. News 6604, 6618. Section 18 of the Restatement provides in appropriate part that:

A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if . . .

(b) (i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

Furthermore, the legislative intent of this act indicates that the proscriptions of the Sherman Act were intended to apply to the commercial activities of foreign sovereigns.¹¹⁰

The effect of the above legislation militates against the dissent's argument that the Court, in finding a right of action for treble damages for foreign sovereigns, extended a benefit to a party whose own commercial activities need not observe the full constraint of our antitrust laws. Although the Foreign Sovereign Immunities Act will generally avoid this result, the nature of these potential foreign sovereign defendants generates certain factors which detract from the universal application of our antitrust laws to all participants in the U.S. marketplace. Those factors include: (1) The need for personal jurisdiction over the foreign sovereign, and (2) the need for a sufficient nexus between the domestic and foreign commerce of the United States in order to establish subject matter jurisdiction of U.S. courts.¹¹¹ As a result, foreign sovereigns still enjoy some measure of immunity from suit in U.S. courts even when commercial activity is involved. To the extent that they enjoy this immunity, the result of the majority opinion is to extend a benefit without requiring comparable adherence to our antitrust laws.

Fourth, the majority's opinion suggests that U.S. recognition of a foreign state and the existence of peace between the United States and that country is sufficient criteria to discern which foreign nations should be afforded a right of action for treble damages.¹¹² However, the treble damage remedy, by definition, involves the conferring of a remedy that compensates the victim an amount equal to three times the damages suffered. Consequently, since the remedy affords such an exaggerated benefit, a more sensitive test should be utilized when giving this remedy to foreign nations. Mere recognition of a foreign sovereign need not imply amicable relations,¹¹³ nor need it imply that the United States would care to extend the benefits of its antitrust laws to such a country.

In sum, the majority's opinion serves to open up the class of plaintiffs who may seek treble damage relief. Whether the added deterrence achieved by the broadening of the right of suit is worth the added welfare costs to American society is a question which remains unanswered.

V. CONGRESSIONAL RESPONSE TO THE *PFIZER* DECISION

Congressional reaction to the *Pfizer* opinion came swiftly. To date, three independent bills and two amendments to existing antitrust legislation have been proposed.

On January 19, 1978, only eight days after the Supreme Court handed down the *Pfizer* opinion, Senator Thurmond (R.S.C.), along with five other

110. See H.R. Rep. No. 1487, *supra* note 109, at 6618.

111. See Timberg, *Sovereign Immunity and Act of State Defenses: Transnational Boycotts and Economic Coercion*, 55 Tex. L. Rev. 1, 36 (1976).

112. 98 S. Ct. at 591.

113. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, note 17 *supra*.

senators,¹¹⁴ introduced S. 2395.¹¹⁵ The bill provides that the use of the word "person" in Section 4 of the Clayton Act¹¹⁶ "not include a foreign sovereign government,"¹¹⁷ thereby precluding treble damage relief to the foreign sovereign. The bill, however, provides for the placing of the foreign sovereign government on the same level as the U.S. government. It does so by amending section 4A of the Clayton Act,¹¹⁸ adding to the right of the United States to receive single damages, a similar right to single damages by the foreign sovereign. Senator Thurmond, speaking before the Senate, indicated his rationale for these proposals in stating that, "It appears to me that it is only fair and that common sense would lead us to treat a foreign sovereign nation no better or no worse than we treat our own country in U.S. courts."¹¹⁹ In addition, the Senator pointed to the fact that foreign nations were free to enact their own antitrust laws. He called into question the Court's majority assertion that by permitting foreign sovereigns to recover treble damages, these damages, would act as a deterrent to those who would violate our antitrust laws and benefit U.S. consumers.¹²⁰ He concluded by saying "I have somewhat more difficulty in following the foreign consumer benefit as one which will help U.S. consumers."¹²¹

Senator De Concini (D. Ariz.), along with co-sponsors, Senators Thurmond and Allen, who each have introduced proposals of their own on the *Pfizer* case,¹²² introduced S. 2486.¹²³ The bill would amend sections 4 and 4A of the Clayton Act in the same manner proposed by Senator Thurmond's bill. Also, it would add an additional prerequisite to an amended Section 4A of the Clayton Act: that before a foreign sovereign would be entitled to sue for single damages, the Attorney General of the United States would have to certify that: (1) The United States is entitled to sue in its own name and on a civil claim in the courts of such foreign sovereign; and (2) such foreign sovereign by its laws prohibits restrictive trade practices.¹²⁴ Senator De Concini indicated that his bill was intended to address some of the "inequities and distortions" created by the Supreme Court's decision in *Pfizer*.¹²⁵ Like Senator Thurmond, Senator De Concini quoted Chief Justice Burger's dissent when introducing his bill citing the anomaly created by affording a right to a foreign sovereign which the U.S. Government itself is unable to claim in its own courts.¹²⁶ The Senator indicated that in drafting

114. Senators Allen (D. Ala.), Hatch (R. Utah), Helms (R. N.C.), Wallop (R. Wyo.), Melcher (D. Mont.). Eight additional cosponsors have been added to date: Senators DeConcini (D. Ariz.), Domenici (D. Colo.), Eastland (D. Miss.), Heinz (R. Pa.), Hodges (D. Ark.), Riegle (D. Mich.), Roth (R. Del.), Towers (R. Tex.), and Zorinsky (D. Neb.).

115. 95th Cong., 2d Sess. (1978).

116. See note 2 *supra*.

117. S. 2395, note 115 *supra*.

118. See Act of July 7, 1955, note 52 *supra*.

119. 124 Cong. Rec. S. 37 (daily ed. January 19, 1978).

120. *Id.*

121. *Id.*

122. See notes 114-15 & 133-34 and accompanying text *supra*.

123. 95th Cong., 2d Sess. (1978).

124. *Id.*

125. 124 Cong. Rec. S. 1190 (daily ed. February 6, 1978).

126. *Id.*

his proposal, he had considered making a foreign sovereign's access to U.S. courts for antitrust relief strictly reciprocal. That is, the access would be contingent upon the existence of antitrust laws in the foreign country and the right of the United States to sue under those laws in the foreign sovereign's courts. But the Senator and his co-sponsors rejected this approach reasoning that many nations which have antitrust laws do not have a provision for a private right of action comparable to section 4 of the Clayton Act. Enforcement in these cases is strictly left to the government.¹²⁷ The Senator went on to note:

The bill is thus based on a general principle of reciprocity. It seeks to serve broader purposes than simply the compensation of foreign nations which are victims of anticompetitive practices under our laws. By its enactment we would demonstrate our intent to encourage other nations to recognize the right of the United States to sue in their courts, thus providing an opportunity for the United States to vindicate any claims it might have under foreign laws in the courts of that country. But it would also signal our commitment to encourage other nations to adopt standards of fairness in the marketplace which are consistent with those reflected in our antitrust laws.¹²⁸

A third independent bill introduced was that of Senator Inouye (D. Haw.), S. 2724.¹²⁹ This bill seeks to leave the holding of the Supreme Court in *Pfizer* intact, but would amend section 4 of the Clayton Act¹³⁰ to require complete reciprocity before such a foreign sovereign might assert an action for treble damages in a U.S. court.¹³¹ The Senator reasons that in an increasingly competitive world in which the United States is losing its ability to effect its economic objectives and policies, foreign nations and firms will gleefully take advantage of our unwillingness to close the loopholes in our antitrust laws and policies, which are oblivious to the conditions of the real world and that permit foreign firms to neatly circumvent the force of our laws.¹³²

127. *Id.*

128. *Id.* at S. 1191.

The Senator rather eloquently pointed out:

Let me add, Mr. President, that the purpose of this bill is not to penalize any nation. Each country remains free to accept or reject anticompetitive trade practices. But the United States ought to utilize its own courts to promote healthy competition and not to reward nations which, on the one hand, allow and sometimes encourage monopoly and price-fixing but, on the other, demand to sue when they are the victims of such practices. Justice requires that those nations who do make an honest effort should be afforded the same consideration under the same circumstances as the United States. Those which do not, however, should be excluded from suing under Section 4 of the Sherman Act.

129. 95th Cong., 2d Sess. (1978).

130. See note 2 *supra*.

131. The bill calls for amending Section 4 of the Clayton Act, 15 U.S.C. § 15 (1977), by adding the following sentence at the conclusion of the section: "A foreign sovereign 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 government."

132. 124 Cong. Rec. S. 3461 (daily ed. March 10, 1978).

Senator Allen (D. Ala.) introduced an amendment¹³³ to S. 1874.¹³⁴ The amendment is comparable to Senator Thurmond's proposal,¹³⁵ which Senator Allen had already co-sponsored.

The final proposal is that of Congressman Wiggins (R. Calif.). The Congressman introduced his amendment to an existing antitrust bill, H.R. 8359,¹³⁶ before the House Judiciary's Subcommittee on Monopolies and Commercial Law. The proposal calls for amending Section 4 of the Clayton Act¹³⁷ to exclude specifically foreign sovereigns from the right to sue for treble damages.¹³⁸ This proposed amendment has recently passed the Subcommittee and will be reported to the Judiciary Committee for action before it goes to the entire House. It is questionable, however, whether this amendment will survive the scrutiny of the full Committee at this time, since many of the Subcommittee's members were not present when the Wiggins amendment passed and since no hearings were held on the merits of the proposed amendment prior to its adoption by the Subcommittee.

Of all of the above proposals, Senator De Concini's would seem to have the most beneficial effect. First, it allows a foreign sovereign a right to single damages only. The single damage remedy for an entity which possesses power comparable to that of the United States when within its own territory is appropriate: it provides a true measure of the actual injury suffered. Further, it helps limit the degree to which a defendant might be subject to multiple liability in the event a foreign sovereign decided to sue or prosecute a defendant under both U.S. law and its own antitrust laws.¹³⁹ The incentive to prosecute a claim afforded by the treble damage remedy would not seem to be adversely affected by limiting the remedy to only single damages since government contracts, whether foreign or domestic, tend to be larger than the ordinary corporate contract and this size alone provides an incentive, in and of itself, to seek redress of grievances. Second, the added requirement that the U.S. Attorney General certify a foreign state before allowing such a state to sue in U.S. courts under antitrust law¹⁴⁰ provides, as Senator De Concini has indicated, an opportunity for the United States to vindicate any claims it has under foreign law while at the same time encouraging other nations to adopt antitrust measures similar to our own.¹⁴¹

The Thurmond and the Allen proposals fall short of the above proposal since they do not require certification by the Attorney General and thus do

133. Amend. No. 1669, 95th Cong., 2d Sess. (1978). Senator Allen died on June 1, 1978.

134. S. 1874, 95th Cong., 1st Sess. (1977), is a bill proposed by Senator Kennedy (D. Mass.) to counteract the effect of another recent Supreme Court decision, *Illinois Brick v. Illinois*, see note 72 *supra*.

135. See text accompanying notes 114-18 *supra*.

136. H.R. 8359, 95th Cong., 1st Sess. (1977), is the House version of S. 1874 which deals with the *Illinois Brick v. Illinois* decision of the Supreme Court. See notes 134 & 72 *supra*.

137. See note 2 *supra*.

138. The Congressman's proposal would amend Section 4 of the Clayton Act by adding the following to the last sentence of the section: "provided however that this section shall not authorize suits by a foreign sovereign government, a department, or agency thereof,"

139. Cf. *Illinois Brick v. Illinois*, note 72 *supra*.

140. See text accompanying note 124 *supra*.

141. See text accompanying note 128 *supra*.

not achieve the added benefits discussed above. The Inouye proposal seems to afford little or no right of actions for damages, since it requires complete reciprocity. Such a requirement fails to take account of the varied nature of antitrust laws enacted by many foreign states, measures which are effective and display similar concerns as our own antitrust laws, although they might not afford a treble damage remedy.¹⁴² Finally, Congressman Wiggin's proposal denying any right of action to a foreign sovereign does not achieve the benefits that the granting of a limited right of action might achieve by helping shape foreign nations' commercial behavior *vis-à-vis* the United States.

VI. CONCLUSION

Pfizer represents a substantial broadening of the plaintiff class entitled to sue for treble damages. Whether the Court's decision will result in a large influx of suits by foreign sovereigns may become manifest in the near future. However, given the Congressional concern generated by the Court's opinion,¹⁴³ the holding of the Court may be short lived. The *Pfizer* Court's concern for fulfilling the treble damage remedy's twin purpose of maximizing deterrence and providing compensation, might better be served by the extension of a right to single damages premised upon a prerequisite certification by the Attorney General that the foreign sovereign seeking relief permits the United States to sue in its courts and prohibits unfair trade practices.

EVERETT N. HUGHES*

142. See Senator De Concini's remarks before the Senate upon the introduction of his bill in the *Congressional Record*, note 125 *supra*.

143. To date, 17 of 100 United States Senators have either sponsored or co-sponsored bills which would affect the holding of the Supreme Court in *Pfizer*.

*J. D. candidate, University of Miami School of Law, Associate Editor, Lawyer of the Americas.