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Recommended Citation

Figa, Phillip S. (1975) "The Capacity of Foreign Sovereigns to Maintain Private Federal Antitrust Actions," *Cornell International Law Journal*: Vol. 9: Iss. 1, Article 7.

Available at: <http://scholarship.law.cornell.edu/cilj/vol9/iss1/7>

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THE CAPACITY OF FOREIGN SOVEREIGNS TO MAINTAIN PRIVATE FEDERAL ANTITRUST ACTIONS

Large-scale antitrust suits recently initiated by consumers against members of the pharmaceutical industry for price fixing¹ have prompted nine foreign sovereigns,² which had purchased quantities of antibiotics from the defendant drug manufacturers, to become plaintiffs in similar antitrust actions. The appearance of foreign sovereigns in the Antibiotic Drug litigation marks one of the first times in which non-domestic governmental entities have sought United States antitrust relief.³

The Antibiotic Drug cases include over 150 civil antitrust damage actions brought by a number of different categories of plaintiffs, including the federal government, states of the United States, wholesalers and retailers, private hospitals, agricultural purchasers, insurance companies, and competitors.⁴ Almost all the suits have been settled except for those instituted by foreign sovereigns and a few others. The continuing

1. See *In re Antibiotic Drugs*, 320 F. Supp. 586 (J.P.M.L. 1970). Many of the more than 150 plaintiffs involved in this series of antitrust actions against members of the pharmaceutical industry filed as class representatives.

2. Republic of the Philippines, Imperial Government of Iran, Republic of Vietnam, State of Kuwait, Government of India, Republic of West Germany, Government of Spain, Government of Columbia, and the Republic of South Korea.

3. *Kuwait v. Chas. Pfizer & Co.*, 333 F. Supp. 315, 316 (S.D.N.Y. 1971). Previously, Israel and possibly India filed claims for private antitrust relief as part of the *Electrical Equipment Co.* cases. *When Foreign Nations Sue Under Antitrust*, BUS. WEEK, Feb. 24, 1975, at 26. For a history of the *Electrical Equipment Co.* cases, see C. BANE, *THE ELECTRICAL EQUIPMENT CONSPIRACIES* (1973). In India's case the named plaintiff was the Damodar Valley Corporation, an Indian corporation which the defendants claimed was "the Republic of India acting in the guise of a corporation." *Kuwait v. Chas. Pfizer & Co.*, *supra*, at 316 n.3. Defendants' motion to dismiss the corporation's suit was overruled, but since the basis of that decision was not articulated the ruling lacks precedential value. *Id.* Israel's claim was never litigated and was apparently settled out of court.

A foreign sovereign and foreign political subdivision maintained common law unfair competition and trade-name infringement suits in the U.S. many years ago. *French Republic v. Saratoga Vichy 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); *Carlsbad v. Schultz*, 78 F. 469 (S.D.N.Y. 1897); *Carlsbad v. Kutnow*, 68 F. 794 (S.D.N.Y. 1895), *aff'd*, 71 F. 167 (2d Cir. 1895).

In contrast to foreign nations and subdivisions, the federal government, states of the United States, and political subdivisions of states have invoked civil antitrust remedies in federal courts for some time. See, e.g., *United States v. Ward Baking Co.*, 376 U.S. 327 (1964); *Georgia v. Evans*, 316 U.S. 159 (1942); *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390 (1906).

4. For the background and history of the Antibiotic Drug litigation see *Pfizer Inc. v. Lord*, 456 F.2d 532 (8th Cir. 1972), *cert. denied*, 406 U.S. 976 (1972).

litigation between the defendant drug manufacturers and the complaining foreign governments is partially due to the uncertainty surrounding the right of this particular class of plaintiffs to maintain private antitrust actions.

This question has been a point of contention in two Antibiotic Drug cases involving Kuwait⁵ and the Philippines,⁶ and both the plaintiffs⁷ and the United States⁸ have argued that the foreign governments should be entitled to sue. The Eighth Circuit, however, has recently dismissed an appeal on this point⁹ on procedural grounds,¹⁰ and thus the right of foreign sovereigns to maintain treble damage actions under the federal antitrust laws¹¹ has not been decided authoritatively. As a result, a potential liability of United States corporations to foreign governments

5. *Kuwait v. Chas. Pfizer & Co.*, 333 F. Supp. 315 (S.D.N.Y. 1971). The *Kuwait* decision is discussed in Note, 5 *VAND. J. TRANSNAT'L L.* 531 (1972). Convinced that a domestic conspiracy to reduce competition has an adverse effect in the United States, and concluding that Congress did not intend to prevent a foreign government which purchased price-fixed commodities from utilizing the same treble-damage remedy available to foreign corporations, the District Court in that case held that Kuwait was a "person" within the meaning of § 4 of the Clayton Act, 15 U.S.C. § 15 (1970), and was entitled to maintain suit. An interlocutory appeal was certified by the District Court and granted by the Second Circuit, but an intervening settlement resulted in dismissal of the appeal without prejudice. *BNA ANTITR. & TRADE REG. REP.*, No. 697, A-23 (Jan. 21, 1975).

6. Order No. 74-31 (D. Minn. 1974), cited in *BNA ANTITR. & TRADE REG. REP.*, No. 697, A-23 (Jan. 21, 1975). In this order, Minnesota District Judge Miles Lord permitted the Republic of the Philippines to maintain its treble-damage antitrust suit against the defendants, relying on his earlier decision in *Kuwait v. Chas. Pfizer & Co.*, 333 F. Supp. 315 (S.D.N.Y. 1971).

7. The plaintiff in *Kuwait* relied upon "a long line of cases which allow foreign sovereigns to maintain actions in United States Courts." *Kuwait v. Chas. Pfizer & Co.*, 333 F. Supp. 315, 316 (S.D.N.Y. 1971).

8. The United States in an *amicus curiae* brief argued that "foreign nations, as a matter of good foreign policy, should be given the protection of our antitrust laws." *Kuwait v. Chas. Pfizer & Co.*, 333 F. Supp. 315, 316 (S.D.N.Y. 1971). The United States also submitted an *amicus curiae* brief in support of the foreign sovereign position in *Pfizer, Inc. v. Lord*, 522 F.2d 612 (8th Cir. 1975). See note 9 *infra*.

9. *Pfizer, Inc. v. Lord*, 522 F.2d 612 (8th Cir. 1975). The drug manufacturers had sought review of Judge Lord's order in the Philippine case, *supra* note 6, by requesting the lower court to certify the order for interlocutory appeal. The request was denied, however, presumably because of the precedential effect of Judge Lord's earlier decision in *Kuwait v. Chas. Pfizer & Co.*, 333 F. Supp. 315 (S.D.N.Y. 1971). Following this denial, the defendants sought review through a writ of mandamus.

10. The Eighth Circuit never reached the merits of the issue because of its determination that mandamus did not lie to review the ruling of the District Court. *Pfizer, Inc. v. Lord*, 522 F.2d 612, 614 (8th Cir. 1975). The court also held that a foreign sovereign could not sue as *parens patriae* on behalf of its individual and corporate citizens.

11. It is interesting although unclear, and in the final analysis unimportant, whether this issue is framed as a standing question or a capacity to sue determination. Both terms are used interchangeably in this Note.

amounting to many millions of dollars is presently unresolved.¹² This Note will review the pertinent antitrust statutory material, case law, and policies relating to foreign sovereign antitrust actions and, based on these considerations, will offer a tentative resolution of this controversy.¹³

I

THE STATUTORY AND DECISIONAL SETTING

There is no statutory litmus test for determining whether or not foreign sovereigns have the right to maintain private antitrust actions. Section 4 of the Clayton Act¹⁴ grants the right to sue to any "person" injured in his business or property by acts forbidden under the antitrust laws, and the Act's definition of "person" includes "corporations or associations" authorized by the laws of the United States, its territories, "or the laws of any foreign country."¹⁵ Thus, whether foreign sovereigns may maintain private antitrust actions depends upon whether or not they are "persons" under these provisions.

Generally, foreign nations recognized by the United States are entitled to sue on contracts and vindicate property rights in United States courts.¹⁶ The basis of this privilege rests upon the notion of international comity;¹⁷ our courts, however, are not obliged to grant foreign states the

12. For example, one of the nine foreign sovereigns which asserted antitrust claims in the Antibiotic Drug cases speculated that it suffered actual damages in the area of \$10 million, which would be trebled if proven. *When Foreign Nations Sue Under Antitrust*, BUS. WEEK, Feb. 24, 1975, at 26.

13. This Note assumes that U.S. federal courts have requisite jurisdiction over the issues and parties of the antitrust suits under consideration. Jurisdiction over the litigated issues and the parties, are, of course, crucial threshold questions. See W. FUGATE, *FOREIGN COMMERCE AND THE ANTITRUST LAWS* (1973) for a comprehensive analysis of the jurisdictional bases of U.S. antitrust law. State antitrust laws are not within the scope of this Note.

14. 15 U.S.C. § 15 (1970).

15. 15 U.S.C. § 12, para. 3 (1970).

16. The judicial power of the United States extends to controversies "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. CONST. art. III, § 2 (emphasis added). See *The Sapphire*, 78 U.S. (11 Wall.) 164 (1870); *Honduras v. Soto*, 112 N.Y. 310, 19 N.E. 845 (1899).

17. *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 277 (1839). Comity has been defined as that "reciprocal courtesy which one member of the family of nations owes to the others." *Russian Socialist Federated Soviet Republic v. Cibrario*, 235 N.Y. 255, 257, 139 N.E. 259, 260 (1923). Another court has said:

What is termed comity of nations is the formal expression and ultimate result of that mutual respect accorded throughout the civilized world by representatives of each sovereign power to those of every other, in considering the effects of their official acts. Its source is a sentiment of reciprocal regard, founded on identity of position and similarity of institutions.

right to sue under all circumstances.¹⁸ Customary international practice need not be followed in those instances where there are compelling reasons for not permitting foreign sovereigns to invoke the benefits of U.S. law.

Because U.S. antitrust law is a statutory creation, the right to maintain an antitrust suit is statutorily conferred. Since neither the Clayton Act nor the policy of comity dictates a resolution of the issue, the question of whether foreign governments may obtain civil antitrust relief depends upon a panoply of more subtle factors. As the Supreme Court has reasoned:

The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the [antitrust] statute are aids to construction which may indicate intent, by use of the term ["person"], to bring state or nation within the scope of the law.¹⁹

While a body of case law precedent is often a persuasive, if not mandatory, basis from which to decide a legal issue, the only case touching upon foreign sovereign antitrust suits on the merits is the *Kuwait* decision. The brevity of the *Kuwait* opinion and its cursory analysis suggests that the decision is neither a definitive treatment of, nor necessarily the better view on, this issue.²⁰ Proper examination entails a more complete analysis of the analogous case law precedent, the legislative history of the antitrust laws, antitrust policy, and political and diplomatic considerations.

Fisher Brown & Co. v. Fielding, 67 Conn. 91, 108, 34 A. 714, 716 (1895).

18. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408-409 (1964). The Supreme Court has called "comity" in the legal sense "neither a matter of absolute obligation, on one hand, nor of mere courtesy or good will, on the other." *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). Thus, for example, unrecognized foreign governments may not maintain law suits in U.S. courts. *Guaranty Trust Co. v. United States*, 304 U.S. 126, 136-41 (1938); *Federal Republic of Germany v. Elicofon*, 358 F. Supp. 747 (E.D.N.Y. 1972), *aff'd*, 478 F.2d 231 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974); *accord*, *Banco Nacional de Cuba v. Sabbatino*, *supra*, at 408-12. See Lubman, *The Unrecognized Government in American Courts: Upright v. Mercury Business Machines*, 62 COLUM. L. REV. 275 (1962). The same holds true for governments at war with the United States. *Ex parte Colonna*, 314 U.S. 510 (1942).

19. *United States v. Cooper Corp.*, 312 U.S. 600, 605 (1941).

20. See note 5 *supra*. The *Kuwait* court was so troubled by the difficulties posed by this question that it stated there was "substantial ground for difference of opinion" so as to permit an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (1970). *Kuwait v. Chas. Pfizer & Co.*, 333 F. Supp. 315, 317 (S.D.N.Y. 1971).

II

FACTORS INFLUENCING THE OUTCOME

A. ANALOGOUS CASE LAW PRECEDENT

There have been two leading cases analyzing the right of governmental entities to obtain civil antitrust relief. In 1941, the Supreme Court held in *United States v. Cooper Corp.*²¹ that the federal government could not maintain a treble-damage antitrust action. The following year, the Court held in *Georgia v. Evans*²² that individual states of the United States may obtain such relief.²³

The *Cooper* Court in denying private antitrust relief to the United States emphasized that the federal government was in possession of three express methods for enforcing U.S. antitrust law: criminal prosecution, injunction, and forfeiture. It was thought unlikely that Congress implicitly gave the United States a civil remedy for antitrust wrongs perpetrated against it as well. The Court reasoned:

It seems evident that the Act envisaged two classes of actions—those made available only to the Government, which are first provided in detail, and, in addition, a right of action for treble damages granted to redress private injury.²⁴

The *Cooper* majority also pointed out that the Court ordinarily took a narrow view when interpreting the antitrust laws,²⁵ and thus lack of express congressional authorization precluded the finding of any implicit right to sue.²⁶

21. 312 U.S. 600 (1941).

22. 316 U.S. 159 (1942).

23. These two cases interpreted § 7 of the Sherman Act, 15 U.S.C. §§ 1-7 (1970), forerunner of the present § 4 of the Clayton Act, 15 U.S.C. §§ 12-27 (1970). Section 7, repealed by Act of July 7, 1955, ch. 282, § 3, 69 Stat. 282, applied to violations of the Sherman Act, while § 4 of the Clayton Act, presently in effect, covers violations of all federal antitrust laws. Otherwise, the two provisions contain virtually identical language.

24. 312 U.S. 600, 608 (1941).

25. For example, initially only the federal government had express authorization to utilize injunctive relief to halt antitrust violations, and the Supreme Court held in *Minnesota v. Northern Securities Co.*, 194 U.S. 48 (1904), that similar relief was not extended to private suitors since it was not expressly authorized. Legislation has since reversed the *Northern Securities* result. See 15 U.S.C. § 26 (1970).

26. In 1955 Congress enacted legislation permitting the United States the right to obtain actual damages for injuries sustained as a result of antitrust violations. 15 U.S.C. § 15a (1970). The Senate Report of the bill noted that the remedial amendment was necessary because of the vast amount of federal government procurement expenditures, and that the government deserved redress when economically injured by antitrust violators. S. REP. No. 619, 84th Cong., 1st Sess. 3 (1955). The Committee agreed with the *Cooper* decision in that the treble damage remedy for the United States was inappropriate

In *Georgia v. Evans*, the Court distinguished *Cooper* on the ground that without the civil damage remedy the State of Georgia, as distinguished from the federal government, would be left without methods to redress injuries suffered as a result of federal antitrust violations. Justice Frankfurter for the majority stated:

Nothing in the Act, its history, or its policy, could justify so restrictive a construction of the word "person" in § 7 as to exclude a State. Such a construction would deny all redress to a State, when mulcted by a violation of the Sherman Law merely because it is a State.²⁷

The Court also thought that a state should not be treated differently than its political subdivisions. It had earlier held that local municipalities are entitled to maintain private treble-damage actions;²⁸ a contrary holding in *Georgia v. Evans* would have been anomalous.

B. SIMILARITY WITH THE UNITED STATES

It can be argued that a foreign sovereign is much more closely akin to the United States than to an individual state and hence should not be allowed to maintain a private antitrust action absent curative legislation. The key factor in the *Cooper* decision denying the federal government a civil damage remedy was that the United States possessed many alternative techniques for enforcing its antitrust laws without having to resort to the civil damage remedy for protection. By virtue of its sovereignty, a foreign government has substantial control over its domestic economic and commercial affairs. In order to protect itself and its people, a foreign government may impose its own antitrust laws which can be as stringent as, or even harsher than, United States antitrust law,²⁹

because "it would be wholly improper to write into the statute a provision whose chief purpose is to promote the institution of proceedings." *Id.*

27. 316 U.S. 159, 162-63 (footnote omitted).

28. *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390 (1906).

29. For example, until recently the maximum criminal penalty for a corporation violating §§ 1 or 2 of the Sherman Act has been a \$50,000 misdemeanor fine, whereas corporations found violating the antitrust provisions of the Treaty Establishing the European Economic Community, done March 25, 1957, art. 85, can be fined 10 percent of their total sales for the preceding business year for all products, not just those goods which are the subject of the complaint. Reg. 17, art. 15(2), see CCH COMM. MKT. REP. ¶ 2541 (1972). Also, the French antitrust laws, in particular, prohibit certain refusals to sell which would be lawful under U.S. law. See CCH DOING BUS. IN EUROPE ¶ 23,023 (1974). See also Rahl, *American Antitrust and Foreign Operations: What is Covered?*, 8 CORNELL INT'L L.J. 1-2 (1974). As one former Justice Department official recently wrote, "we should expect that other nations and communities will use *their* antitrust laws to protect *their* consumers against those who restrain competition in *their* markets." Baker, *Antitrust and World Trade: Tempest in an International Teapot?*, 8 CORNELL INT'L L.J. 16, 41 (1974) (emphasis in original).

and can also use other controls over its commerce, such as pricing, import, and tariff regulation. Thus, in one way it appears redundant and unnecessary to protect other sovereign governments.

The *Evans* decision, according to this view, can be distinguished on the ground that individual states do not possess protectionist powers within the capability of foreign governments, having long ago relinquished such power to the federal government.³⁰ This factor of enforcement capacity also distinguishes foreign sovereigns from other foreign purchasers, who are unquestionably permitted to sue for private antitrust relief.³¹

The analogy of foreign sovereigns to the United States, however, is easily deflatable. The preexisting duty of the federal government to pursue antitrust violators, whether or not it has been directly injured, makes such incentives as treble damages and attorney's fees superfluous to it alone. This analysis does not apply to foreign sovereigns, for they have neither a preexisting duty to sue nor any incentive to sue for antitrust relief other than monetary reward. Injunctive remedies would generally not be of value to them.³² They would be effectively without U.S. antitrust remedies if denied the right to assert the treble-damage action.

Other considerations militate in favor of this position as well: the fact that they have their own antitrust laws, for example, should be irrelevant. States of the United States have their own antitrust laws,³³ yet they may maintain federal antitrust suits. Furthermore, foreign sovereigns have even more reason to need monetary incentives than conventional antitrust complainants. Formidable and expensive discovery problems³⁴ and diplomatic considerations are encountered by foreign sovereigns which domestic plaintiffs do not face.

30. The federal government's power over economic affairs is contained in several sections of the Constitution, including the Supremacy Clause, the Commerce Clause, and the clause authorizing duties on imports. U.S. CONST. art. VI, cl.2; art. I, § 8, cl.3; art. I, § 10, cl.2.

31. The same reasoning applies to political subdivisions of foreign nations. Just as central foreign governments are generally treated as responsible for the acts of their political subdivisions, see 119 CONG. REC. 2213 (1973) (comment of the Attorney General), so should these political subdivisions be treated the same as their central governments for purposes of antitrust standing.

32. The injunctive relief provisions which can be invoked by civil antitrust plaintiffs would be of little use to foreign sovereigns which had already completed their contracts with U.S. price-fixing corporations by the time antitrust violations were discovered.

33. See, e.g., COLO. REV. STAT. ANN. §§ 6-4-101 through 6-4-109 (1974); FLA. STAT. ANN. § 542.01-.12 (1973); VA. CONST. art. 12, § 165.

34. See Doyle, *Taking Evidence by Deposition and Letters Rogatory and Obtaining Documents in Foreign Territory*, 1959 A.B.A. SECTION OF INT'L & COMP. L. PROCEEDINGS 37; Emergich, *Antitrust Jurisdiction and the Production of Documents Located Abroad*, 11 RECORD OF THE N.Y.C.B.A. 122 (1956); Note, *Subpoena of Documents Located in*

C. LEGISLATIVE INTENT

The most effective argument that can be made against permitting foreign sovereign antitrust suits is that there was no such legislative intent. Nowhere in the legislative history of the antitrust laws is there any indication that Congress contemplated foreign governments asserting treble-damage actions; conversely, there is much in the legislative history militating against foreign sovereigns becoming antitrust suitors.

The original Sherman Act was principally authored by Senator Hoar, who apparently envisioned a rather narrow "person" provision which excluded foreign sovereigns.³⁵

When Congress enacted the Clayton Act to deal effectively with monopolistic practices not covered by the Sherman Act, it originally circumscribed the limits of who could assert treble damage claims with apparent exactitude. Foreign sovereigns did not fall within the Act's ambit; indeed, the first version of the Act implicitly excluded all non-individuals and nonbusiness entities from maintaining treble damage suits.³⁶

Despite the above arguments, at best it can be said that the legislative history of the antitrust laws is inconclusive as to foreign sovereign suitors. Throughout the hearings and debates foreign sovereigns were never expressly made ineligible or even mentioned at all, and deriving legislative intent from Congressional silence is a dubious proposition.³⁷

Foreign Jurisdictions Where Law of Situs Prohibits Removal, 37 N.Y.U.L. REV. 295 (1962); Note, *Ordering Production of Documents from Abroad in Violation of Foreign Law*, 31 U. CHI. L. REV. 791 (1964); Note, *Discovery of Documents Located Abroad*, 14 VA. J. INT'L L. 747 (1974).

35. Senator Hoar, who is credited with being the true father of the Sherman Act, A. WALKER, HISTORY OF THE SHERMAN LAW OF THE UNITED STATES OF AMERICA 27-28 (1910), criticized Senator Sherman's original bill as failing to provide effective remedies "except so far as it gave power to *private citizens* to bring suit for private damages." 21 CONG. REC. 2567 (1890) (remarks of Senator Hoar) (emphasis added). When he rewrote the bill, however, Senator Hoar did not enlarge upon the scope of *who* may be a private antitrust suitor. WALKER, *supra*, at 330-31.

36. H.R. 15657, 63d Cong., 2d Sess. (1914) did not define "person" but allowed the right to sue to "any person, copartnership, association, or corporation . . ." Later, the House Judiciary Committee revised the Act to refer to "persons" and then defined that term separately in § 1. See note 15 *supra* and accompanying text. The change appeared to be entirely for structural purposes and no substantive change in scope appears to have been intended from what Congressman Clayton originally proposed. Joint Brief for Petitioners-Appellants at 20-22, *Pfizer, Inc. v. Lord*, 522 F.2d 612 (8th Cir. 1975).

37. See *Girouard v. United States*, 328 U.S. 61, 69 (1946); *Helvering v. Hallock*, 309 U.S. 106, 119-20 (1940).

D. ANTITRUST POLICY

1. *Maximizing the Incentive to Sue*

The basic policies underlying the private treble damage remedy provide strong support for foreign sovereign antitrust suitors, and overshadow the semantic ambiguities inherent in a legislative history unconcerned with foreign sovereigns.

Potential antitrust violators are deterred from committing proscribed acts because they know that their victims can recover three times the amount of their damages plus costs and attorney's fee.³⁸ The treble-damage action thus has a result orientation making private claimants "private attorneys general" who supplement Justice Department and Federal Trade Commission enforcement mechanisms.³⁹ These policies behind the treble-damage action would be furthered by permitting all classes of juristic entities, including foreign sovereigns, the right to sue. Were foreign governments denied this right, violators of the antitrust laws who inflicted harm only upon overseas sovereigns would retain the fruits of their illegality and would enjoy de facto immunity because no one would be available to bring suit against them.⁴⁰

As the Supreme Court has shown time and again, it believes that maximizing incentives to sue compels antitrust enforcement.⁴¹ Congres-

38. The private antitrust action is intended as "an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws." *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968). As the Second Circuit recently said, "the most important thing to keep in mind is the result orientation with which the Court has approached the whole area of private treble-damage litigation." *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1087 (2d Cir. 1971), *aff'd by an equally divided Court*, 404 U.S. 548 (1972).

39. *See, e.g.*, *Mulvey v. Samuel Goldwyn Productions*, 433 F.2d 1073, 1075 (9th Cir. 1970).

40. The Supreme Court used similar reasoning when it severely limited use of the "passing-on" defense in antitrust suits, noting that if the defense were permitted generally, "those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one [would be] available who would bring suit against them." *Hanover Shoe Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968).

41. Even complainants who are themselves antitrust violators *in pari delicto* with the defendants they sue, for example, may obtain treble-damage recoveries. *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134 (1968). The Court noted in *Perma Life* that giving antitrust violators the right to sue does not encourage antitrust violations since the plaintiffs still remain civilly and criminally liable for their own conduct. Thus, countries such as Kuwait and Iran should not be denied standing to sue in antitrust actions because of their membership in cartels such as OPEC which harm the United States. *Cf.* statement of Attorney General Levi in *Justice Studying Foreign Price-Fixing, Possible Violations of U.S. Antitrust Laws*, BNA ANTITR. & TRADE REG. REP., No. 725, A-12 (Aug. 5, 1975).

Another example of the Court's willingness to maximize the incentive to sue can be

sional intent with respect to enforcing the antitrust laws will be most effectively implemented by maximizing inducements to curb antitrust violators.

2. *The Webb-Pomerene Act*

Maximizing antitrust enforcement as the rationale for permitting foreign sovereigns the right to redress antitrust violations is undercut somewhat by the existence of and policies behind the Webb-Pomerene Act of 1918.⁴² A supplement to the original antitrust laws, the Webb-Pomerene Act permits United States corporations to combine and act monopolistically under certain circumstances in foreign trade dealings without being subject to the prohibitions of the antitrust laws.⁴³

The Webb-Pomerene Act, enacted shortly after the Clayton Act, can certainly be considered part of the "legislative environment" of the Clayton Act and thus must be considered when interpreting whether foreign sovereigns are allowed to maintain treble-damage actions.⁴⁴ The rationale and legislative history of the Webb-Pomerene Act reveal United States antitrust law as not entirely noble in its quest to foster free competition and low prices. Some elements of mercantilism are

found in *Simpson v. Union Oil Co. of Calif.*, 396 U.S. 13 (1969), in which the Court allowed the plaintiff treble damages even though liability hinged on a new principle of law first announced earlier in the same litigation.

42. 15 U.S.C. §§ 61-65 (1970).

43. 15 U.S.C. § 62 (1970) states that the Sherman Act does not declare illegal "an association entered into for the sole purpose of engaging in export trade, . . . or an agreement made or act done in the course of export trade by such association," provided the association does not restrain trade within the United States.

44. The "legislative environment" is the basis from which the word "person" includes a state or the United States. *Georgia v. Evans*, 316 U.S. 159, 161, *citing Ohio v. Helvering*, 292 U.S. 360, 370 (1934). See text accompanying note 19 *supra* for the elements constituting the legislative environment of the antitrust laws.

Twenty-five years ago, Judge Wyzanski illuminated the policies behind the Webb-Pomerene Act as well as defined its scope:

Now it may very well be that every successful export company does inevitably affect the foreign commerce of those not in the joint enterprise and does bring the members of the enterprise so closely together as to affect adversely the members' competition in domestic commerce. Thus every export company may be a restraint. But if there are only these inevitable consequences an export association is not an unlawful restraint. The Webb-Pomerene Act is an expression of Congressional will that such a restraint shall be permitted. And the courts are required to give as ungrudging support to the policy of the Webb-Pomerene as to the policy of the Sherman Act. Statutory eclecticism is not a proper judicial function.

United States v. Minn. Mining & Mfg. Co., 92 F. Supp. 947, 965 (D. Mass. 1950). THE REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 113-14 (1955) urged retention of the Webb-Pomerene Act. A dissenting view asserted that the Webb-Pomerene Act is antithetical to the Sherman Act, capable of being abused, and of little aid to U.S. business. *Id.* at 114.

present;⁴⁵ the Webb-Pomerene Act was passed "to aid and encourage our manufacturers and producers to extend our foreign trade."⁴⁶ Congress desired U.S. corporations to compete with powerful cartels on an equal basis, and thus tolerated monopolistic practices under Webb-Pomerene so long as domestic interests were not affected.

The dominant theme of the congressional debates over the bill was that American corporations should get the highest prices possible for their products overseas, regardless of what foreigners were made to pay.⁴⁷ Some comments of the bill's sponsors, therefore, could be read to mean that foreign suitors should not be protected. Senator Pomerene acknowledged:

[W]e have not reached that high plane of business morals which will permit us to extend the same privileges to the people of the earth outside of the United States that we extend to those within the United States.⁴⁸

Congressman Webb candidly declared:

I would be willing that there should be a combination between anybody or anything for the purpose of capturing the trade of the world, if they do not punish the people of the United States in doing it.⁴⁹

In this charged atmosphere of the early years of the antitrust laws it is conceivable that Congress had not intended foreign sovereigns to be antitrust suitors under the Clayton Act.

Nevertheless, the Webb-Pomerene exception to the antitrust laws is not a strong basis from which to launch an attack against foreign sovereign antitrust suitors. The exception is a limited one; it applies only to joint associations engaging in foreign trade. Moreover, the narrow ex-

45. Perhaps more than any other limitation . . . [the Webb-Pomerene Act] dramatizes the nationalistic perspective of the United States, and, in fact, of any national antitrust law. It does not appear to be consistent policy to advance steadfastly the principle of international trade liberalization, maintenance of a competitive domestic market structure, and at the same time the exemptive, anticompetitive provisions of the Webb-Pomerene Act. However, until there is more evidence of the good-faith inclination of other nations to remove substantial trade barriers, the Webb-Pomerene exemption will continue to receive strong support in Congress from many proponents. In a system lacking international economic strictures, individual nations are often compelled to protect their own industry at the expense of international progress toward free trade.

E. KINTNER & M. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER 264-65 (1974).

46. H.R. REP. NO. 1118, 64th Cong., 1st Sess. 1 (1916).

47. See, e.g., the comments of one Representative to the effect that "I have no sympathy with what a foreigner pays for our products; I would like to see the American manufacturer get the largest price possible . . ." *Hearings on H.R. 16707 Before the House Comm. on the Judiciary*, 64th Cong., 1st Sess. 7 (1916).

48. 55 CONG. REC. 2787 (1917).

49. *Id.* at 3580.

emption has itself been narrowly construed. The Act, for example, has been held not to insulate transactions initiated, controlled, and financed by the United States when a foreign government was the nominal purchaser through the Agency for International Development foreign aid program.⁵⁰

Transactions between foreign sovereigns and American corporations involve the foreign commerce of the United States, an area subject to United States antitrust law prohibitions absent a Webb-Pomerene association. Foreign corporations are entitled to maintain private antitrust suits despite the xenophobic streak Webb-Pomerene represents,⁵¹ and it is illogical to distinguish between a foreign corporation owned substantially or entirely by a foreign government and the foreign sovereign itself. Permitting the former to maintain a treble damage action and not the latter places undue significance on the incorporation laws of foreign countries. Denying foreign sovereigns antitrust relief would lead to the strange anomaly of foreign sovereigns being the only juristic entity unable to obtain redress for federal antitrust law violations.⁵² Thus, the impact of Webb-Pomerene on the foreign sovereign standing question should be negligible.

E. STATUTORY CONSTRUCTION

One of the strongest arguments available to antitrust defendants who would deny foreign sovereigns the right to maintain treble damage actions focuses upon the statutory construction of the Clayton Act. Foreign sovereigns were not explicitly included as "persons" entitled to section 4 relief despite the fact that foreign nations were mentioned.⁵³

50. *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199 (1968).

51. *See, e.g., Afran Trans. Co. v. Nat'l Maritime Union*, 169 F. Supp. 416 (S.D.N.Y. 1958), 175 F. Supp. 285 (S.D.N.Y. 1959); *Moviecolor Ltd. v. Eastman Kodak Co.*, 24 F.R.D. 325 (S.D.N.Y. 1959), *aff'd*, 288 F.2d 80 (2d Cir. 1961), *cert. denied*, 368 U.S. 821 (1961).

52. The present status of the law as to the right to maintain a treble-damage action under § 4 of the Clayton Act is diagramed below:

	individuals & corporations	political subdivisions	nations
foreign	Yes	?	?
domestic	Yes	Yes	No*

*Section 4a of the Clayton Act, 15 U.S.C. § 15a (1970) provides the United States with a private actual damage remedy.

Other than the limitations imposed on the United States in the *Cooper* decision, *see note 21 supra* and accompanying text, all juristic entities to date have been entitled to maintain civil antitrust suits under § 4.

53. *See note 15 supra* and accompanying text.

Many federal and state court decisions have excluded the federal government and the states from being "persons" under various statutory schemes on the grounds that governmental entities usually are not considered "persons" absent express designation.⁵⁴ Such reasoning could also be extended to foreign sovereigns.

The sovereign immunity doctrine, moreover, also lends support to the inference that Congress did not intend foreign sovereigns to invoke the benefits of United States antitrust law. Both the Sherman Act of 1890 and the Clayton Act of 1914 refer to private antitrust *defendants* as "persons," just as they do eligible plaintiffs. "Persons" are even subject to criminal prosecution for antitrust violations.⁵⁵ When the original antitrust laws were enacted, the United States applied the international law principle of sovereign immunity in the absolute sense, so that no foreign sovereign could be a civil or criminal defendant in United States courts for any claim or offense absent consent or waiver.⁵⁶ Thus, it may be

54. See, e.g., *Broom v. Simon*, 255 F. Supp. 434 (W.D. La. 1965) (United States not a "person" within the meaning of the Civil Rights Act and thus could not be made a defendant in a suit thereunder); *S. Union Gas Co. v. New Mexico Pub. Service Comm'n*, 82 N.M. 405, 482 P.2d 913 (1971) (The United States and the State of New Mexico not "persons" within the meaning of the New Mexico Public Utilities Act); *Commissioner of Rev. v. Arkansas State Highway Comm'n*, 232 Ark. 255, 337 S.W.2d 665 (1960) (State Highway Commission not a "person" within the meaning of the term as defined in the Arkansas Use Tax Statute).

In *United States v. United Mine Workers*, 330 U.S. 258 (1947), the Supreme Court held that the United States was not a "person" so as not to fall within the provisions of the Norris-LaGuardia Act when the federal government acted as an employer when operating the nation's coal mines in a national emergency. The Court stated that "[t]he absence of any comparable provision extending the term to sovereign governments implies that Congress did not desire to extend the term to them." *Id.* at 275.

55. See 15 U.S.C. §§ 1-3 (1970); 15 U.S.C. §§ 13, 13a, 14 (1970); cf. 15 U.S.C. § 8 (1970).

56. *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562 (1926). A study of the law of sovereign immunity reveals the existence of two conflicting approaches. According to the classical or "absolute" theory of sovereign immunity, a sovereign cannot, without its consent, be made a respondent in the courts of another sovereign. According to the newer or "restrictive" theory, the immunity of a sovereign in the courts of another country is recognized relative to its sovereign or public acts (*jure imperii*), but not as to its commercial or private acts (*jure gestionis*). Proponents of both theories, supported by practice, agree that sovereign immunity should not be claimed or granted in actions involving real property in the forum state (diplomatic and consular property excepted) or with respect to the disposition of property of a deceased person even though a foreign sovereign is the beneficiary.

The classical theory of sovereign immunity, at least until 1952, had been followed by the courts of the United States, the British Commonwealth, Czechoslovakia, Estonia, and probably Poland. See Letter from the Acting Legal Advisor of the Department of State to the Department of Justice, May 19, 1952, 26 DEP'T STATE BULL. 984 (1952) (also known as the "Tate Letter"). As a result of the 1952 Tate Letter, the United States prospectively adopted the restrictive theory of sovereign immunity. See Note, *Proposed Draft Legislation on the Sovereign Immunity of Foreign Governments: An Attempt to Revest the Courts With a Judicial Function*, 69 NW. U.L. REV. 302 (1974).

reasonable to assume that Congress chose not to include foreign sovereigns as antitrust "persons" because when the original antitrust laws were enacted foreign sovereigns could not be made antitrust defendants.⁵⁷

On the other hand, it is apparent that section one of the Clayton Act was not exclusive in its definition of who are "persons" for antitrust purposes. Congress' use of the word "include" in the statutory language⁵⁸ is strong indication that the statute should be broadly interpreted. Obviously the statute is not limited to associations and corporations because individuals may assert antitrust claims; conceivably, foreign sovereigns as well fall within its broad scope. This view is supported by the definition of "person" in the Antitrust Civil Process Act,⁵⁹ a subsequently enacted statute which complements the original antitrust laws in many respects and includes in its definition of "person" any "other legal entity not a natural person" besides corporations, associations, and partnerships.⁶⁰ While this definition clearly includes foreign sovereigns, it does not appear that the Antitrust Civil Process Act attempted to broaden the scope of those eligible to sue under the antitrust laws.⁶¹

Arguably, the words "any person" appearing in section 4 of the Clayton Act evidence an intent by Congress to confer a remedy upon every juristic entity injured by the antitrust laws. The term "any person" has been broadly interpreted; as the Supreme Court has pointed out, "[t]he Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."⁶² Under this expansive view, foreign sovereigns may well be included as permissible plaintiffs under the statute.

F. POLITICAL AND DIPLOMATIC CONSIDERATIONS

The issue of whether foreign governments may assert antitrust claims

57. Cf. *Georgia v. Evans*, 316 U.S. 159, 163 (1942) (Roberts, J., dissenting): "If the word 'person' is to include a State as plaintiff, it must equally include it as a defendant or else the language used is meaningless." See also *United States v. Cooper Corp.*, 312 U.S. 600, 607 (1941): "It is fair to assume that the term 'person,' in the absence of an indication to the contrary, was employed by the Congress throughout the Act in the same, and not in different senses."

58. 15 U.S.C. § 12, para. 3 (1970). See note 15 *supra* and accompanying text.

59. 15 U.S.C. § 1311 *et seq.* (1970).

60. 15 U.S.C. § 1311(f) (1970).

61. The Supreme Court stated in *United States v. Freeman*, 44 U.S. (3 How.) 556, 564-65 (1845) that when construing a statute a court may resort not only to contemporaneous and prior acts of a legislature, but also to subsequent acts of the legislature *in pari materia* for the purpose of ascertaining the intention or meaning of an earlier statute.

62. *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) (citations omitted).

in United States courts also touches upon sensitive issues of international relations. Courts of the United States generally have abstained from foreign policy meddling as exemplified by the judicially-created Act of State Doctrine, the judiciary's view that the courts are bound by executive assertions of immunity, and the great weight given to executive interpretations of international law.⁶³ It is the political branches of the federal government, not the judiciary, which form, implement, and fund our nation's foreign policy activities. This preeminence in foreign affairs is rooted in both the Constitution⁶⁴ and the deference traditionally accorded co-equal branches of government.⁶⁵ The judiciary has sought to avoid embarrassing the political branches in world affairs through non-interference. In the words of Professor Lewis Henkin:

Thanks to both constitutional and political limitations, the paramount judicial prerogative of invalidating acts of the political branches have not loomed large in the conduct of foreign relations.⁶⁶

Policy considerations, therefore, play an important role in determining whether or not to accord foreign governments the right to sue. The judiciary, it can be argued, should maintain a posture not inconsistent with our nation's foreign policy, and a decision in favor of foreign sovereign suitors would mean that the courts would have taken an initiative in this area of international relations which may later cause embarrassment to the other, more internationally visible, branches. For example, were Congress later to decide, perhaps at the behest of the President, that foreign governments should be *denied* the right to maintain treble damage antitrust actions, such an overt act directed against other nations could conceivably result in severe diplomatic ramifications. No such embarrassment would result if the courts took the opposite position and ruled against the right to sue under the present statutory scheme. On the other hand, assuming the courts ruled against the foreign sovereigns and Congress wanted to give foreign sovereigns a treble damage or actual damage remedy (such as Congress provided the federal government after *Cooper*), it would be a small matter to enact overriding or modifying legislation. Such congressional action could only enhance United States esteem throughout the international community.

By denying foreign sovereigns civil antitrust remedies, the courts could ensure that the opportunity to establish foreign policy initiatives

63. L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 207 (1972).

64. Judicial acquiescence in many areas of foreign affairs such as abiding by executive interpretations of the Act of State Doctrine is said to have "constitutional underpinnings" because it arises out of "the basic relations between branches of government in a system of separation of powers." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964).

65. HENKIN, *supra* note 63, at 206-209.

66. *Id.* at 206-207. See *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936).

effectively remains with those constitutionally authorized as well as most capable of making such decisions. Conceivably, a ruling adverse to the foreign sovereign suitors, especially in light of the absence of explicit congressional resolve on this issue, would be the most neutral and prudent course.

For the foreign governments, on the other hand, it could be effectively argued that while political and diplomatic considerations often play an important role in shaping judicial decisions, the foreign sovereign antitrust issue does not mandate a protectionist approach. Judicial deference to the political branches generally occurs when a treaty is being interpreted or when sovereign immunity is at issue. When the rights of individual aggrieved parties require resolution, the courts have not hesitated to decide such controversies on their merits despite the fact that delicate foreign relations may be intimately connected.⁶⁷ It is highly probable that there is no basic conflict between protecting United States interests and allowing foreign sovereigns private antitrust remedies. Moreover, the nation can be embarrassed by judicial decisions holding against foreign sovereign standing as easily as it can by specific legislative prohibition.⁶⁸

While foreign sovereign antitrust suits ostensibly involve hard foreign policy considerations, such factors are not novel to the development of United States antitrust law. Cases in which a domestic corporation sues a foreign corporation, which would seem to involve far more difficult problems of foreign policy, are allowed.⁶⁹ Hence, a fortiori, foreign policy should not play a significant role against the standing of foreign governments to maintain private antitrust actions under United States law.

67. HENKIN, *supra* note 63, at 207-208. Professor Henkin cites such examples as a company challenging the validity or application of a tariff, a soldier seeking to enjoin the Secretary of Defense from sending him to Vietnam, and review of the foreign activities of the Departments of Commerce and Treasury.

68. A judicial declaration against foreign sovereign antitrust suits may appear to the world as an arbitrary and unfriendly act based more upon political considerations than upon legal principle. Moreover, the various treaties which the United States has signed with other nations indicate that a holding against foreign sovereign suitors would impede their thrust. See, e.g., Treaty with Iran on Amity, Economic Relations and Consular Rights, Aug. 15, 1955, [1957] 1 U.S.T. 899, T.I.A.S. No. 3853; Treaty with Vietnam on Amity and Economic Relations, April 3, 1961, [1961] 2 U.S.T. 1703, T.I.A.S. No. 4890. (Of course, due to the fact that the new government of South Vietnam is presently unrecognized by the U.S. it is unable to maintain a law suit in U.S. fora. See note 18 *supra*.)

69. See *Calnetics Corp. v. Volkswagen of Am., Inc.*, 353 F. Supp. 1219 (C.D. Cal. 1973); *United States v. Standard Oil Co.*, 1970 TRADE CAS. ¶ 72,988 (N.D. Ohio 1970). See *British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.*, [1952] 2 All E.R. 780 (C.A.) and *British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.*, [1954] 3 All E.R. 88 (Ch.). In the British cases one corporation sued another in British courts to enjoin the defendant from complying with an antitrust judgment rendered by a United States court in *United States v. Imperial Chemical Industries, Ltd.*, 105 F. Supp. 215 (S.D.N.Y. 1952).

CONCLUSION

Arguments against permitting foreign sovereigns the right to maintain private antitrust actions in the United States are not compelling in light of the overall purposes behind private antitrust actions. Deterrence from committing antitrust violations would be lessened if foreign sovereigns were barred from asserting private antitrust actions in the federal courts. Foreign governments closely resemble states of the United States under the antitrust statutory scheme, in that both are governmental entities which may be harmed by federal antitrust violations and have no other way in which to seek relief. Since the latter enjoy antitrust standing, so should the former. Any attempt to distinguish foreign sovereigns from foreign corporations, which are permitted to assert treble damage actions, places too much emphasis on the letter of the law, itself ambiguous, while ignoring its spirit.

Whether foreign sovereigns should be granted the right to obtain private antitrust relief in the United States is a question particularly appropriate for clarification by Congress, but in the absence of express congressional resolve, the broad scope of the present antitrust statutory scheme lends itself admirably to having foreign sovereigns invoke its benefits.

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