Boston College Law Review

Volume 20
Issue 2 *Number 2*

Article 3

1-1-1979

Foreign Sovereigns as Private Antitrust Plaintiffs: Pfizer, Inc. v. Government of India

William B. Simmons Jr

CASENOTES

Foreign Sovereigns as Private Antitrust Plaintiffs: *Pfizer, Inc. v. Government of India*[1]—The governments of three foreign nations,[2] as purchasers of antibiotics, instituted separate antitrust actions against six United States pharmaceutical companies.[3] The alleged violations included price-fixing and monopolization in the sale of broad spectrum antibiotics,[4] in violation of sections 1 and 2 of the Sherman Act.[5] The plaintiffs sought treble damages under section 4 of the Clayton Act, which provides a cause of action to "[a]ny person who shall be injured in his person or property" by a violation of the antitrust laws.[6] The cases were subsequently consolidated for trial in the United States District Court for the District of Minnesota.[7]

The drug companies moved for dismissal on the ground that the respondents, as foreign nations, were not "persons" entitled to sue for treble damages under section 4.[8] The district court denied the motion, holding that foreign nations are "persons" for purposes of section 4, and are therefore

---

[1] 434 U.S. 308 (1978).

[2] The plaintiffs were the Government of India, the Imperial Government of Iran, and the Republic of the Philippines. 434 U.S. at 309. Vietnam was a party in the court of appeals and a respondent in the petition for certiorari. The district court subsequently dismissed Vietnam's complaint, however, on the ground that the United States no longer recognized Vietnam. The dismissal was affirmed by the court of appeals. Republic of Vietnam v. Pfizer, Inc., 556 F.2d 892, 895 (8th Cir. 1977). Suits were also brought by Columbia, West Germany, South Korea, Spain, and Kuwait. The latter three nations have subsequently withdrawn their suits. 8 GA. J. INT'L & COMP. L. 950, 950 n.1 (1978).

[3] The firms were Pfizer, Inc., American Cyanamid Company, Bristol-Meyers Company, Squibb Corporation, Olin Corporation, and the Upjohn Company. Pfizer, Inc. v. Government of India, 550 F.2d 396, 396 n.1 (8th Cir. 1976). The cases were part of the massive litigation known as the Antibiotics Cases, which have involved over 160 plaintiffs. Velvel, *Antitrust Suits by Foreign Nations*, 25 CATH. U. L. REV. 1, 1 & n.4 (1975).

[4] Pfizer, Inc. v. Government of India, 434 U.S. at 301.

[5] 15 U.S.C. §§ 1, 2 (1976).

[6] Section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), provides in full:

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

[7] 434 U.S. at 309. The cases were originally brought in the Southern District of New York before Judge Lord of the District of Minnesota, sitting by assignment. *See* Pfizer, Inc. v. Lord, 456 F.2d 532, 534 (8th Cir.), *cert. denied*, 406 U.S. 976 (1972). Judge Lord transferred the cases for trial pursuant to 28 U.S.C. § 1404(a) (1976). 456 F.2d at 534. The transfer was approved by the court of appeals. Pfizer, Inc. v. Lord, 447 F.2d 122, 125 (2d Cir. 1971).

[8] Pfizer, Inc. v. Lord, 522 F.2d 612, 614 (8th Cir. 1975). The definition of the word "person" as used in the Clayton Act is given in 15 U.S.C. § 12 (1976):

> The word 'person' or 'persons' wherever used in this Act 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.

entitled to institute treble damage suits.[9] On interlocutory appeal,[10] the United States Court of Appeals for the Eighth Circuit affirmed the district court's decision,[11] and then adhered to its affirmance upon rehearing en banc.[12] The circuit court found nothing in either the language or the legislative history of the antitrust laws which indicates that Congress intended to prohibit foreign nations from seeking private remedies under the Clayton Act.[13]

The Supreme Court, in a five to three decision,[14] affirmed the Eighth Circuit's decision and HELD: Foreign nations otherwise entitled to sue in United States courts are "persons" under section 4 of the Clayton Act, and may therefore institute antitrust suits for treble damages.[15] Finding no specific authority for its decision in either the language or the legislative history of the Clayton Act,[16] the *Pfizer* Court based its holding on its interpretation of prior case law, and on the general policies underlying the antitrust laws.[17] The significance of the *Pfizer* decision lies in its expansion of the class of antitrust plaintiffs beyond those parties clearly set out in the Clayton Act. The decision to make available the treble damage provisions of the Clayton Act to some 160 sovereign nations,[18] many of which buy enormous quantities of American goods, may have a great impact on United States corporations

---

[9] Pfizer, Inc. v. Lord, 522 F.2d 612, 614 (8th Cir. 1975). *See also* Pfizer, Inc. v. Government of India, 550 F.2d 396, 396-97 (8th Cir. 1976). The district court relied on an earlier decision in a related case holding that the State of Kuwait was a "person" under section 4. In re Antibiotic Antitrust Actions, 333 F. Supp. 315, 316-17 (S.D.N.Y. 1971). In the Kuwait ruling, the district court found that the real question was "whether the maintenance of this action is essential to the effective enforcement of the antitrust laws." *Id.* at 316. The district court decided that the result orientation approach to the antitrust laws dictated that foreign nations should have status as "persons," in order that violators would be more fully liable. *Id.* at 316-17. *See* 434 U.S. at 311 n.5.

A corporation wholly owned by the government of India appeared as a plaintiff in the Electric Equipment Antitrust Cases in the early 1960's. "Preliminary motions to dismiss plaintiffs for lack of standing were filed, argued, and denied." Velvel, *supra* note 3, at 1 n.3. However, the cases were settled before trial. *Id.* Apparently, the Antibiotics Cases were the first trials involving whether foreign sovereigns are "persons." *Id.* Consequently, the literature on the question is extremely limited.

[10] The interlocutory appeal was filed pursuant to 28 U.S.C. § 1292(b) (1976), which allows a district court judge to recommend an appeal on an order not otherwise appealable if in his opinion the appeal will "materially advance" the litigation. The court of appeals may then, in its discretion, hear the appeal.

[11] Pfizer, Inc. v. Government of India, 550 F.2d 396, 399 (8th Cir. 1976).

[12] *Id.* at 400.

[13] *Id.* The circuit court felt that the situation was more similar to that in Georgia v. Evans, 316 U.S. 159 (1942), holding that domestic states would be allowed to sue under § 4, than to the situation in United States v. Cooper Corp., 312 U.S. 600 (1941), denying the right to sue to the United States Government. 550 F.2d at 398-99.

[14] The opinion was written by Justice Stewart, who was joined by Justices Brennan, White, Marshall, and Stevens. Chief Justice Burger dissented, joined by Justices Powell and Rehnquist. Justice Powell also wrote a separate dissenting opinion. Justice Blackmun took no part in the consideration or decision of the case.

[15] 434 U.S. at 320.

[16] *Id.* at 311-13.

[17] *Id.* at 313-20.

[18] *Id.* at 330 n.1 (Powell, J., dissenting).

and on the economy. In addition, the decision reaffirms both the broad remedial nature of the antitrust laws and the Court's active role in enforcement of those laws.

This casenote will first examine the rationale employed by the *Pfizer* Court in extending private antitrust remedies to foreign sovereigns. The statutory language, legislative history, prior case law, and policy considerations will then be discussed in an effort to assess the merits of the majority's decision. It will be submitted that allowing foreign nations to institute treble damage actions will strengthen the enforcement of the antitrust laws in foreign commerce, in accordance with antitrust policy. It will further be suggested that, despite the dissent's desire to defer to Congress, the *Pfizer* Court reached the proper decision.

I. THE *PFIZER* DECISION

In determining whether a foreign government is a "person" under the Clayton and Sherman Acts, and therefore entitled to sue for treble damages in United States courts, the *Pfizer* Court first observed that "[t]here is no statutory provision or legislative history that provides a clear answer . . . ."[19] The Court noted that foreign nations are not specifically included in the statutory definition of "person."[20] The Court maintained, however, that Congress did not intend that the word "person" be given a restrictive definition.[21] Therefore, the Court examined "[t]he purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute" to determine whether the statute nevertheless is applicable to foreign governments.[22]

The *Pfizer* Court postulated that foreign nations "possess two attributes that could arguably exclude them from the scope of the sweeping phrase 'any person,'"[23] but considered neither attribute to be a compelling reason for exclusion. In examining the first attribute—foreign status, the Court noted that foreign corporations are included in the statutory definition of "person"[24] and that the antitrust laws extend to trade with foreign nations.[25] In view of this express concern with foreign commerce, the Court reasoned, "Congress did not intend to make the treble damages remedy available only to

---

[19] *Id.* at 312.

[20] *Id.* at 312 n.9. For the statutory definition of "person," see note 8 *supra.*

[21] *Id.* at 312.

[22] *Id.* at 313 (quoting United States v. Cooper Corp., 312 U.S. 600, 605 (1941)).

[23] 434 U.S. at 313.

[24] Section 1 of the Clayton Act states that the word "person" will "be deemed to include corporations and associations existing under or authorized by the laws of . . . any foreign country." 15 U.S.C. § 12 (1976).

[25] Sections 1 and 2 of the Sherman Act both forbid anticompetitive acts in "commerce . . . with foreign nations." 15 U.S.C. §§ 1, 2 (1976). Section 1 of the Clayton Act covers "commerce . . . with foreign nations." 15 U.S.C. § 12 (1976). For a discussion of the foreign application of the antitrust laws, see Kintner & Griffin, *Jurisdiction Over Foreign Commerce Under the Sherman Antitrust Act,* 18 B.C. IND. & COM. L. REV. 199 (1977).

consumers in our own country."[26] Furthermore, the Court explained that extending private antitrust remedies to foreign sovereigns may actually contribute to the protection offered American consumers.[27] Such remedies promote the general policies underlying the antitrust laws by denying violators the fruits of their conduct, by compensating victims of unlawful conduct, and by deterring future violations.[28] Thus, the Court concluded, to preserve the overall effectiveness of the antitrust laws, foreign nations should be allowed to bring suit.[29]

The Court next determined that the second attribute of foreign nations—sovereign status—also should not prevent them from pursuing antitrust remedies.[30] In so deciding, the Court rejected the defendants' contention that Congress intended by the use of the word "person" to exclude sovereign governments. Rather, the Court found that the word "person" does not have a fixed meaning, nor did it at the time the antitrust laws were enacted.[31] In order to define the scope of that statutory term, the majority examined two earlier Supreme Court cases construing the word "person" as used in the Clayton Act.[32]

The first case examined by the *Pfizer* Court was *United States v. Cooper Corp.*[33] In *Cooper*, the United States sued to recover treble damages for overcharges on items it had purchased from the defendants.[34] The *Cooper* Court denied recovery, holding that the United States is not a "person" under section 4 of the Clayton Act and therefore cannot pursue private antitrust remedies.[35] The *Pfizer* Court pointed out, however, that *Cooper* did not establish a mechanical rule that all sovereigns are excluded from the definition of "person."[36] Rather, the *Pfizer* majority explained, the *Cooper* Court rested its decision on the fact that separate and distinct antitrust remedies are specifically reserved for the United States, and on legislative history indicating that "Congress affirmatively intended to exclude the United States" from private antitrust remedies.[37] By contrast, neither alternative remedies nor specific legislative history exists with regard to foreign nations. On this basis, the *Pfizer* Court found *Cooper* distinguisable.[38]

The second case which the Court examined was *Georgia v. Evans,*[39] in which the state of Georgia attempted to recover under the Clayton Act for

---

[26] 434 U.S. at 313-14.

[27] *Id.* at 314. The Court noted that denial of the right to sue would provide violators with funds to offset liability to domestic consumers. *Id.* at 315.

[28] *Id.* at 314-15.

[29] *See id.* at 313-15.

[30] *Id.* at 315-19.

[31] *Id.* at 315 & n.15.

[32] United States v. Cooper Corp., 312 U.S. 600 (1941); Georgia v. Evans, 316 U.S. 159 (1942).

[33] 312 U.S. 600 (1941).

[34] *Id.* at 603-04.

[35] *Id.* at 614.

[36] 434 U.S. at 316-17.

[37] *Id.* The other remedies noted in *Cooper* included criminal prosecutions, injunctions, and seizure of property. *Id.* at 317.

[38] *Id.* at 316-18.

[39] 316 U.S. 159 (1942).

alleged overcharges on quantities of asphalt which it had purchased.[40] The *Evans* Court held that domestic states are "persons" entitled to institute private suits under the antitrust laws.[41] In so holding, the Court distinguished its earlier decision in *Cooper* on the ground that state governments, in contrast to the federal government, do not have access to separate and distinct antitrust remedies.[42] The *Evans* Court therefore concluded that Congress intended state governments to pursue private remedies under section 4.[43]

From its examination of *Evans,* the *Pfizer* Court concluded that the word "person" as used in the antitrust laws does not automatically exclude all sovereign governments.[44] Analogizing to *Evans,* the Court reasoned that foreign sovereigns are in much the same position as state governments since they have no separate and distinct remedies available under the antitrust laws.[45] Using the very words of *Evans,* the *Pfizer* Court stated that it could "perceive no reason for believing that Congress wanted to deprive a [foreign nation] . . . of the civil remedy of treble damages which is available to other purchasers who suffer through violation of the Act."[46]

Thus, although the Court could find nothing in either the express language or the legislative history of the antitrust laws which dictated the result in *Pfizer,* it concluded that foreign sovereigns should not be denied access to private antitrust remedies. The Court based its decision on the broad remedial purpose which Congress intended the antitrust laws to serve,[47] and, in this regard, the Court was guided by its own prior constructions of the word "person" in *Cooper* and *Evans.* The Court concluded its *Pfizer* opinion by noting that the decision to allow foreign nations to sue was "no more than a specific application of a long-settled general rule."[48] Foreign nations are generally allowed access to our courts "to prosecute any civil claim . . . upon the same basis as a domestic corporation or individual might do,"[49] and, the majority reasoned, denial of an antitrust remedy to them would be an unjustified exception when there was no clear expression of congressional intent to exclude them.[50]

Chief Justice Burger, joined by Justices Powell and Rehnquist, dissented in *Pfizer,* arguing that the issue presented involved major policy considerations whose resolution should be left to Congress.[51] The dissent began by examining the Clayton Act and the definition of the word "person" therein, and found no evidence, express or implied, of a congressional intention to allow foreign nations to sue.[52] In contrast to the specific inclusion of foreign

---

[40] *Id.* at 160.
[41] *Id.* at 162-63.
[42] *Id.* This was the same reasoning the *Pfizer* Court used to distinguish *Cooper.* See text at notes 37-38 *supra.*
[43] 316 U.S. at 162-63.
[44] 434 U.S. at 317-18.
[45] *Id.* at 318.
[46] *Id.* (quoting *Evans,* 316 U.S. at 162-63).
[47] *Id.* at 314-18.
[48] *Id.* at 319.
[49] *Id.* at 318-19.
[50] *Id.* at 319.
[51] *Id.* at 320-29 (Burger, C.J., dissenting).
[52] *Id.* at 321-24.

corporations as "persons,"[53] the dissent noted, foreign nations are not mentioned.[54] The dissent reasoned that the failure to specifically include foreign nations indicates a congressional intent to exclude them from the provisions of section 4.[55] Thus, any action to include foreign sovereigns within the definition of "persons" should be taken by Congress, not the Court.[56]

In addition to attacking the majority's construction of the statutory language, Chief Justice Burger took issue with the Court's conclusion that Congress, in encompassing commerce with foreign nations within the scope of the antitrust laws, intended to include foreign nations within the definition of "persons."[57] The dissent contended that "congressional concern with the foreign commerce of the United States does not entail either a desire to protect foreign nations or a willingness to allow them to sue Americans for treble damages in our courts."[58] Quite the contrary, the dissent argued, the focus of the Sherman Act's concern with foreign commerce is to protect *domestic* consumers of imported goods.[59] Finding no indication in the legislative history that Congress even considered the question whether foreign sovereigns are "persons" under the antitrust laws,[60] the dissent stated that the question should be left "to the same political process that gave birth to the Sherman and Clayton Acts."[61] The absence of any express intention to exclude foreign nations is not, according to the dissent, sufficient reason to justify allowance of such suits.[62]

Finally, the dissent disputed the Court's reliance on *Georgia v. Evans*,[63] distinguishing *Evans* on the basis of "cogent" differences between domestic states and foreign nations.[64] The dissent first noted that while domestic states are not expressly included as antitrust plaintiffs, their *parens patriae* relationship to United States citizens justifies extending private remedies to them

---

[53] For the statutory definition of "person," see note 8 *supra*.

[54] 434 U.S. at 321-24. The dissent pointed out that foreign sovereigns, in terms of their immunity from suit, were in a different position from that of foreign corporations at the time of passage of both the Sherman and the Clayton Acts. *Id.* at 322. The dissent therefore reasoned that

> [g]iven that 'person' as used in the Clayton and Sherman Acts refers to both antitrust plaintiffs and defendants . . . the decision of Congress to include foreign corporations while omitting foreign *sovereigns* from the definition most likely reflects this differential susceptibility to suit rather than any intent to benefit foreign consumers or to enlist their help in enforcing our antitrust laws.

Id. (emphasis in original).

[55] *Id.* at 321-22.

[56] *Id.* at 322-23.

[57] *Id.* at 323.

[58] *Id.*

[59] *Id.* at 324.

[60] *Id.* at 324-25. The majority agreed with the dissent's evaluation of the legislative history, stating that "it seems apparent that the question was never considered at the time the Sherman and Clayton Acts were enacted." *Id.* at 312.

[61] *Id.* at 325.

[62] *Id.*

[63] 316 U.S. 159 (1942); see note 39 *supra*.

[64] 434 U.S. at 326-28.

since it fulfills the congressional purpose to protect American consumers.[65] The same argument would not apply to foreign states, since the benefits would flow to foreign rather than to United States citizens. A second consideration of the dissent in distinguishing *Evans* was that foreign nations may themselves enact effective antitrust legislation while states are constrained from so doing by the Commerce and Supremacy Clauses.[66] Furthermore, stated the dissent, "it takes little imagination to realize the dramatic and very real differences in terms of coercive economic power and political interests which distinguish our own States from foreign sovereigns."[67] For the dissent, therefore, *Evans* did not mandate a decision expanding the definition of "person" to include foreign nations.[68] Thus, on the basis of its examination of the language, legislative history, and prior case law interpreting section 4, the dissent concluded that the decision whether to allow foreign nations to sue for treble damages required the resolution of important policy considerations which should be deferred to Congress.[69]

II. Analysis of *Pfizer's* Foreign Sovereign Inclusion

A. *Statutory and Legislative Basis for Inclusion*

In spite of the dissent's objections, it is submitted that the *Pfizer* Court was on solid ground in concluding that the failure of Congress to specifically include foreign sovereigns in the statutory definition of "person" is not dispositive of whether foreign sovereigns may sue for treble damages under the antitrust laws. A number of arguments, based both upon the statutory language and upon the overall policy of the antitrust laws, may be made indicating a congressional intent to include foreign nations as antitrust plaintiffs. One such argument is based directly on the statutory language. As the *Pfizer* Court pointed out, "Congress used the phrase 'any person' intending it to have its naturally broad and inclusive meaning."[70] Moreover, the Court has previously noted that when a statutory definition contains the verb "include," as does the definition of the word "person" under the antitrust laws, it "imports a general class, some of whose particular instances are those specified in the definition."[71] Since Congress used the broad phrase "any person" and since "include" is interpreted as giving certain examples rather than all instances, it is suggested that Congress intended that foreign nations be included within the scope of the word "person."

This broad interpretation of the statutory definition is supported by congressional amendments subsequent to the enactment of the antitrust laws. On several occasions when the Court has restricted the definition of "person" in

---

[65] *Id.* at 326.

[66] *Id.* at 326-27. West Germany was given as an example of a country having strong antitrust laws. *Id.* at 327.

[67] *Id.* The dissent noted the price-fixing and boycotts of the Middle East nations as examples of the greater power available to foreign states. *Id.* at 327-28.

[68] *Id.* at 328.

[69] *Id.*

[70] *Id.* at 312.

[71] Helvering v. Morgan's Inc., 293 U.S. 121, 125 n.1 (1934). For the statutory definition of "person," see note 8 *supra*.

applying the antitrust laws,[72] Congress has acted to reverse the decisions. For example, after the Court held that domestic states could not sue for injunctive relief under the antitrust laws,[73] Congress enacted section 16 of the Clayton Act, giving states and private parties the right to injunctive relief.[74] A second example of legislative reversal occurred after the Court held in *Cooper* that the United States could not be a plaintiff in a treble damage suit.[75] In 1955 Congress enacted section 4A of the Clayton Act, which allows the United States to sue for actual damages.[76] These reversals indicate that Congress does not want the antitrust laws interpreted restrictively.[77]

Congressional intention for a broad reading of the word "person" is also indicated by the fact that Congress did not act to legislatively overrule decisions allowing suits by foreign nations in other contexts. Several unfair competition suits,[78] which are similar to antitrust actions, were brought by foreign nations after passage of the Sherman Act but prior to enactment of the Clayton Act.[79] Yet Congress, when enacting the Clayton Act, did not change the definition of "person" to exclude foreign nations. Thus, it may be argued that foreign nations were understood to be included.

---

[72] Minnesota v. Northern Sec. Co., 194 U.S. 48 (1904) (domestic states could not sue for injunctive relief); United States v. Cooper Corp., 312 U.S. 600 (1941) (United States was not a "person" entitled to sue for treble damages).

[73] Minnesota v. Northern Sec. Co., 194 U.S. 48, 70-71 (1904).

[74] 15 U.S.C. § 26 (1976). Section 16 of the Clayton Act provides that "[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . ."

[75] 312 U.S. at 614.

[76] 15 U.S.C. § 15a (1976). As Chief Justice Burger pointed out, section 4A provides only for the recovery of actual damages by the United States, rather than the treble damages available to other plaintiffs. 434 U.S. at 328 (Burger, C.J., dissenting). Nevertheless, this distinction does not weaken the persuasiveness of the amendment as evidence that the definition of "person" should be read broadly. The difference in damages awarded to the United States was due to the fact that the treble damage award was seen as necessary to encourage suit. Since "[t]he United States is, of course, charged by law with the enforcement of the antitrust laws . . . it would be wholly improper to write into the statute a provision whose chief purpose is to promote the institution of proceedings." S. REP. No. 619, 84th Cong., 1st Sess. 3, *reprinted in* 1955 U.S. CODE CONG. & AD. NEWS 2328, 2330. The Senate Report specifically states that the amendment was introduced for the purpose of providing the United States with the relief denied by the Court in *Cooper*. *Id.*

[77] Since the *Pfizer* decision, three Senate bills have been introduced which would change the position of foreign nations under the Clayton Act. Senator Thurmond introduced S. 2395, which would limit foreign nations to actual damages. 124 CONG. REC. S28 (daily ed. Jan. 19, 1978). S. 2724, introduced by Senator Inouye, would only allow suits by foreign nations allowing reciprocal access to the United States. 124 CONG. REC. S3455 (daily ed. March 10, 1978). The final bill, S. 2486, introduced by Senator DeConcini, would both limit recovery to actual damages and require reciprocal access. 124 CONG. REC. S1189 (daily ed. Feb. 6, 1978). The bills have been referred to the Judiciary Committee. It is interesting to note that, while all three bills would modify the right of foreign sovereigns to recover damages, none of the bills would overrule the *Pfizer* Court's determination that foreign sovereigns are "persons" for purposes of the antitrust laws.

[78] *E.g.*, French Republic v. Saratoga Vichy Spring Co., 191 U.S. 427 (1903).

[79] Velvel, *supra* note 3, at 18.

More positively, it must be recognized that Congress intended the antitrust laws to apply to foreign commerce.[80] If foreign nations were not allowed to sue, a significant portion of foreign commerce would not be subject to the antitrust laws. Thus, it would seem that Congress intended the inclusion of foreign nations when it enacted such a comprehensive statute. Additional support for this proposition is found in the specific inclusion of foreign corporations.[81] Since the inclusion is without restriction, corporations organized and controlled by foreign sovereigns would seemingly be allowed to sue.[82] Therefore, an exclusion of foreign sovereigns would bar treble damage suits only where the sovereign has not incorporated its purchasing functions.[83] Proponents have suggested that this is another indication of a congressional intent to include foreign nations as persons under section 4.[84]

While there are several arguments supporting the view that Congress did *not* intend foreign sovereigns to be included as "persons," they are not persuasive. It may be argued, for example, that since Congress was primarily concerned with protecting domestic consumers,[85] it did not intend to extend the right to sue under the Clayton Act to foreign sovereigns.[86] This argument does not give sufficient weight, however, to the fact that the antitrust laws do encompass foreign commerce.[87] Furthermore, even where the violations do not directly affect American consumers, violations directly affecting foreign consumers may indirectly affect domestic price levels.[88] Therefore, a primary congressional concern with domestic consumers does not preclude the conclusion that the statute also is intended to protect foreign sovereigns participating in commerce.

Another argument that Congress intended to exclude foreign sovereigns from private antitrust remedies is based on the doctrine of sovereign immunity.[89] At the time the antitrust laws were enacted, the doctrine of sovereign immunity prevented foreign sovereigns from being sued in the courts of the United States.[90] Since the definition of "person" in section 4 applies to both plaintiffs and defendants, this argument proceeds, Congress could not have intended to include foreign sovereigns as plaintiffs, because they could not be defendants. Nonetheless, one year after the decision in *Evans* that domestic

---

[80] See note 25 *supra*.

[81] See note 24 *supra*.

[82] *See* In re Antibiotic Antitrust Actions, 333 F. Supp. 315, 316 n.3 (S.D.N.Y. 1971); 5 VAND. J. TRANSNAT'L L. 531, 534 (1972).

[83] If government-owned corporations were barred from suit, there would remain the question of how much government involvement would be necessary before the bar operated. Velvel, *supra* note 3, at 20 n.81.

[84] *Id.* at 20.

[85] *See* 434 U.S. at 324 (Burger, C.J., dissenting).

[86] *Id.*

[87] *See* Timken Roller Bearing Co. v. United States, 341 U.S. 593, 599 (1951) (Sherman Act "prohibits contracts and conspiracies in restraint of foreign trade"). See note 25 *supra*.

[88] *See* Rahl, *A Rejoinder*, 8 CORNELL INT'L L. J. 42, 43 (1974).

[89] *See* 434 U.S. at 322 (Burger, C.J., dissenting).

[90] *See* The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136-47 (1812); *cf.* Berizzi Bros. Co. v. Steamship Pesaro, 271 U.S. 562, 570-76 (1926) (holding that a ship owned and operated by a foreign sovereign is immune from private suit).

states are "persons" entitled to sue for treble damages,[91] the Supreme Court held that a state is immune to private antitrust suits for restraints on trade established under its legislative authority.[92] Consequently, despite their sovereign immunity as defendants, domestic states can still act as plaintiffs in antitrust suits.[93] Thus, the doctrine of sovereign immunity does not necessarily bar protected sovereigns from instituting antitrust actions as plaintiffs,[94] and this argument is therefore not persuasive of a congressional intent to bar foreign sovereigns from the protection of the antitrust laws.

Although the above statutory and legislative arguments provide some support for the *Pfizer* Court's decision, they are not, by themselves, a conclusive basis for including foreign nations as "persons" under section 4. Further support for the Court's decision, however, can be drawn from its previous interpretations of section 4.

B. *Prior Supreme Court Decisions*

The issue facing the Supreme Court in *Pfizer* was one of first impression. Neither of the two previous cases dealing with the effect of sovereign status on access to private remedies under section 4 was directly controlling in *Pfizer*. *Cooper* was distinguishable since Congress had already provided the United States separate and distinct remedies under the antitrust laws.[95] *Evans* was also distinguishable because of Congress' concern for protecting domestic consumers and because of the close relationship states have to such consumers.[96]

Despite the differences between domestic states and foreign nations, *Evans* appears closer to the situation in *Pfizer* than does *Cooper*. In general terms, *Evans* established that sovereigns are not necessarily barred from commencing antitrust suits.[97] *Evans* was based, in large part, on the lack of alternative federal antitrust remedies for states.[98] While it is true that foreign nations generally have more economic power and flexibility to counter antitrust violations than do domestic states, they are in a position similar to domestic states as far as lacking other remedies under the antitrust laws.[99] The *Cooper* Court, in contrast, based its decision to exclude the United States from the definition of "person" on the other remedies available to the United States, as well as on specific legislative history indicating a congressional intent to exclude the United States from the treble damages remedy.[100] Therefore, it would appear that the *Pfizer* Court was correct in placing principal reliance

---

[91] 316 U.S. 159 (1942).

[92] Parker v. Brown, 317 U.S. 341, 350-51 (1943).

[93] *Id.* at 351.

[94] Velvel, *supra* note 3, at 21-22.

[95] *See* 434 U.S. at 318.

[96] 434 U.S. at 325-28 (Burger, C.J., dissenting).

[97] 316 U.S. at 161.

[98] *Id.* at 162-63.

[99] Encouraging foreign nations to use their retaliatory power to control antitrust violations would tend to be disruptive of international commerce. Velvel, *supra* note 3, at 10. Also, the *Pfizer* Court noted that retaliation is not practicable in a situation where a nation is "faced with monopolistic control of the supply of medicines needed for the health and safety of its people." 434 U.S. at 318 n.18.

[100] See text at note 37 *supra*.

on *Evans* in deciding to extend private antitrust remedies to foreign sovereigns.

C. *Policy Considerations*

In reaching its decision to include foreign nations as "persons" under section 4, the *Pfizer* Court also relied on the policies underlying the antitrust laws. It is suggested that the *Pfizer* Court's decision is particularly appropriate in light of those policies. Congress enacted the antitrust laws in order to preserve competition.[101] "[T]he vast majority of congressmen were sincere proponents of a private enterprise system founded on the principle of 'full and free competition.'"[102] Competition was considered necessary and desirable to maintain a free society.[103] The Supreme Court has recognized this underlying policy over a long history of enforcement of the antitrust laws. As the Court has stated, the "[a]ntitrust laws . . . are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedom."[104] Accordingly, the Court has consistently recognized that the means by which Congress has chosen to preserve economic freedom is by fostering competition through the application of the antitrust laws.[105]

The private treble damage actions authorized by section 4 of the Clayton Act occupy an increasingly important position in the statutory scheme designed to foster competition. While in the early years of antitrust enforcement government suits were more frequent than private suits, the pattern has been changing since World War II. Today, private suits outnumber government suits by a factor of ten.[106] As one commentator has stated, the existence of the right to a private action "automatically puts a host of interested and well informed persons in the enforcement force."[107] Thus, in terms of numbers alone, private actions help to fight antitrust violations in a way that the government could not do without a large increase in staff.

---

[101] H. THORELLI, THE FEDERAL ANTITRUST POLICY, at 226-32 (1955).

[102] *Id.* at 226.

[103] Loevinger, *Antitrust, Economics and Politics*, 1 ANTITRUST BULL. 225, 227-30 (1955). For a discussion of the economic theory of the period and its development, see THORELLI, *supra* note 101, at 1-232.

[104] United States v. Topco Assocs., 405 U.S. 596, 610 (1972).

[105] Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958). In United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945), Judge Learned Hand stated:

> True, it might have been thought adequate to condemn only those monopolies which could not show that they had exercised the highest possible ingenuity, had adopted every possible economy, had anticipated every conceivable improvement, stimulated every possible demand. . . . Be that as it may, that was not the way that Congress chose; it did not condone 'good trusts' and condemn 'bad' ones; it forbad all.

Id. at 427.

[106] Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809, 809 n.1 (1977).

[107] Loevinger, *Private Actions—The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167, 168 (1958).

In addition to enforcement, private actions serve two other goals of the antitrust laws—deterrence and compensation. The treble damages awarded a private plaintiff generally are more effective as a deterrent than the threat of criminal prosecution, fines, and injunctions under government actions.[108] Private damages also compensate the victims of the violations, which government actions, essentially punitive in nature, cannot.[109] Thus, private treble damage actions play a dominant role in implementing a strong antitrust policy.[110]

Recognizing the importance of effective enforcement of the antitrust laws, the Supreme Court has interpreted them broadly. As the Court has noted, antitrust legislation "has a generality and adaptability comparable to that found to be desirable in constitutional provisions."[111] The Court has also stated that the Clayton Act is "comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices."[112] Determination of the antitrust statutes' applicability in a particular case thus depends not on a "strict construction," but on consideration of "[t]he purpose, the subject matter, the context, the legislative history, and the executive interpretation."[113] The courts have tended to "liberalize traditional doctrines and statutory interpretations"[114] which would otherwise bar relief. This judicial attitude has aided the development of the private action into a strong weapon for antitrust enforcement.

The Court's decision in *Pfizer* is consistent with a strong antitrust policy since it increases the deterrent effect of the antitrust laws. Trade with foreign nations constitutes a significant portion of United States commerce. Allowing treble damage suits by foreign nations will provide a large number of potential plaintiffs to enforce the antitrust laws. Conversely, denying foreign governments the right to sue could lessen the deterrent effect of private actions. In the absence of a cause of action for foreign nations, antitrust violators dealing exclusively with foreign sovereigns "would retain the fruits of their illegality because no one was available who would bring suit against them."[115]

---

[108] *Id.* at 168-69.

[109] *Id.* at 168.

[110] The Court has recognized this role, describing the private actions as creating a group of "private attorneys general" to increase enforcement. Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 262 (1972). As the Court has stated, "the purposes of the antitrust laws are best served by ensuring that the private actions will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws." Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968). In addition to noting this important deterrent effect, the Court has emphasized the compensatory function of the private actions. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485-86 (1977).

[111] Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360 (1933).

[112] Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948). Even in a case where the Court restricted the right of indirect purchasers to maintain an action, it did so on the basis that suits by direct purchasers will be more effective and will often compensate the injured party. Illinois Brick Co. v. Illinois, 431 U.S. 720, 745-46 (1977).

[113] United States v. Cooper Corp., 312 U.S. 600, 605 (1941).

[114] Berger & Bernstein, *supra* note 106, at 809 n.1.

[115] Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968) (refusal to allow as defense that plaintiff had passed on the illegal overcharge since the violator might thereby escape liability).

Even if other, non-sovereign foreign purchasers were involved, so that some part of any illegal gain would be recoverable, the sovereign is most likely in the best position to effectively litigate a suit in the United States.[116] In any event, allowance of direct suits by foreign sovereigns should further the policy of maximizing the deterrent effect of the antitrust laws.[117]

The *Pfizer* decision should also result, under the economic theory on which the antitrust laws are based,[118] in increased competition in foreign commerce. This increased competition should provide benefits for the American economy, both by increasing exports and by lowering domestic prices.[119] In contrast, as one commentator has noted, "[i]t seems clear that a rule prohibiting treble damage suits by foreign sovereigns would not only fail to promote the economic goals furthered by the antitrust laws, but it would run contrary to them and could have an overall detrimental impact upon the domestic American economy."[120] Thus, the Court's decision should benefit foreign commerce and, ultimately, the domestic consumer.

It may be argued that increasing potential liability of American corporations may have harmful effects on the American economy by removing money from the country. However, this argument ignores both the fundamental importance of competition as a policy underlying the antitrust laws and the principle that increasing competition will benefit the economy.[121] Moreover, only a failure to comply with the antitrust laws in dealing with foreign nations will result in liability. The harm thus results only from violations of the established policy of free competition.[122] Therefore, the argument that the potential harm to the American economy should suspend the normal operation of the antitrust laws is not a strong one.

Diplomatic considerations also favor the *Pfizer* Court's decision. Allowance of suits by foreign sovereigns will eliminate the resentment foreign nations would feel if unable to recover for the same type of violations for which

---

[116] *See* Velvel, *supra* note 3, at 32.

[117] See text and notes 101-05 *supra.*

[118] See text at notes 101-05 *supra.*

[119] 434 U.S. at 315. Competition should result in lower world market prices, which have an impact on domestic prices and the cost of imports. *See* Velvel, *supra* note 3, at 7.

[120] Velvel, *supra* note 3, at 7. The author discusses a number of ways in which unpunished anticompetitive practices in foreign commerce may increase domestic inflation, such as the influence of United States export prices on world trade and thereby on domestic price levels, the discouragement of competitive prices on foreign goods imported into the United States, and the creation of "war chests" for defending against domestic antitrust suits. *Id.* at 7-8. The Court also discussed these economic arguments. 434 U.S. at 314-15. See text at notes 26-29 *supra.*

[121] The Webb-Pomerene Act, 15 U.S.C. §§ 61-65 (1976), provides for an exception to the application of the antitrust laws in a limited area of foreign commerce by joint associations. The limited nature of the exceptions provides an argument against the idea that competition is normally seen as undesirable in the area of foreign commerce.

[122] In any event, the potential harm to the American economy is to some extent illusory, since much of the recovery by a foreign nation may be spent in the United States, either in normal business transactions or by judicial decree. Velvel, *supra* note 3, at 15-16.

United States consumers can recover.[123] Also, granting the right to sue aids and gives credence to efforts by the United States to establish antitrust policies among the nations of the world.[124] A failure to grant the right would cast doubt on the seriousness of these efforts. Furthermore, the Court has stressed that, under principles of comity, foreign governments should be permitted to bring claims in United States courts.[125] Denial of the right may lead to a retaliatory denial of access for the United States to foreign courts,[126] and to possible harm to foreign relations.[127] Therefore, in addition to furthering antitrust policies, the Court's decision may further international relationships.

CONCLUSION

Based on the above considerations, it is submitted that the *Pfizer* Court's decision to extend treble damage remedies to foreign sovereigns is a sound one. The statutory and legal authority before the Court, while providing some indication of a congressional intent to include foreign nations as "persons" under section 4, did not provide a strong basis for decision. The Court properly turned, therefore, to an examination of the policy considerations behind the antitrust laws. The Court's decision accords well with those policy considerations, since it will result in stronger enforcement of the laws against anticompetitive conduct. Given the broad scope of those laws and the position of the Court as both interpreter and enforcer of them, the Court's action to extend the permissible class of plaintiffs rather than to defer decision to Congress was proper.

WILLIAM B. SIMMONS, JR.

---

[123] *Id.* at 9.

[124] *See, e.g.*, the Bretton Woods Agreements Act, 22 U.S.C. §§ 286 to 286k-1 (1976), which urges that measures be taken "which will reduce obstacles to and restrictions upon international trade." 22 U.S.C. § 286k (1976). For a discussion of efforts to deal with antitrust violations on an international level, see Joelson, *"International Antitrust": A Look At Recent Developments*, 12 WM. & MARY L. REV. 565, 578-79 (1971).

[125] *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 408-12 (1964) (right to sue was extended even to an unfriendly nation).

[126] Velvel, *supra* note 3, at 9-10.

[127] *See* Note, *The Capacity of Foreign Sovereigns to Maintain Private Federal Antitrust Actions*, 9 CORNELL INT'L L.J. 137, 152 (1975). Denial of the suits may adversely affect treaty relationships. *Id.* at 152 n.68. *See, e.g.*, Treaty with Iran on Amity, Economic Relations and Consular Rights, Aug. 15, 1955, [1957] 8 U.S.T. 899, T.I.A.S. No. 3853.