REPRESENTATIVE ANTITRUST SUITS BY FOREIGN NATIONS: A CAUSE WITHOUT A CAUSE OF ACTION

In the past three decades there has been a significant increase[1] in United States corporate activity abroad.[2] This increase occurred primarily because it was economically profitable.[3] The existence of the multinational corporation gives rise to two competing interests: the sovereignty of the foreign country, and the economic liberty and power of the multinational corporation.[4] The foreign country and the multinational corporation each prefer that the corporation's activity be conducted in a manner that is mutally beneficial.[5]

When multinational corporate operations result in harm to a foreign country, a critical question arises regarding the action an injured country should take to rectify the damage suffered by itself, its citizens, or both, and to prevent the occurrence of future damage. For example, if several United States multinational corporations were to conspire to fix prices on goods sold in a foreign country, the injured country would have to decide whether to seek the protection of the United States antitrust laws in the courts of the United States, or to implement such tactics of self-help as legislation, negotiation, expulsion, or physical destruction.

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1. [B]etween 1945 and 1973 American investment in foreign firms rose from $8 billion to $107.3 billion and foreign investment in American companies from $2.5 billion to $17.7 billion. According to a 1973 study by the United States Tariff Commission, private institutions on the international financial scene, the majority of which are multinational enterprises, controlled $268 billion in short-term liquid assets at the end of 1971. This figure is more than twice the total of all international reserves held by all central bank and international monetary institutions in the world on the same date.

E. KINTNER & M. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER 265 (1974).

2. United States corporations conducting business in foreign countries will be referred to throughout this comment as multinational corporations.

3. The top 298 U.S.-based global corporations studied by the Department of Commerce earn 40 percent of their entire net profits outside the United States. A 1972 study by Business International Corporation, a service organization for global corporations, shows that 122 of the top U.S.-based multinational corporations had a higher rate of profits from abroad than from domestic operations.

R. BARNET & R. MULLER, GLOBAL REACH 16 (1974).

4. KINTER & JOELSON, *supra* note 1, at 265.

5. *See generally* Joseph, *What Safeguards in Transnational Realm?*, The Christian Science Monitor, Jan. 5, 1977, at 11, col. 3.

In the case of *Pfizer v. Lord*,[6] the plaintiffs, foreign governments, elected to invoke the protection of the United States antitrust laws. In that case, several foreign governments filed antitrust suits in the United States district court alleging that the defendants, six United States pharmaceutical firms, conspired to fix prices on certain antibiotics in violation of section 1 of the Sherman Antitrust Act of 1890.[7] The plaintiff governments prayed for treble damage relief[8] under a *parens patriae*[9] claim as "official representatives" of their individual and corporate citizens who had purchased the defendants' products. Additionally, plaintiffs sought treble damages, on their own behalf, based on the purchase of defendants' products.

The *Pfizer* court held[10] that the plaintiff governments may not sue on behalf of their citizens under a *parens patriae* method of recovery because this method had been denied to states of the United States.[11] Addressing this point, the court stated that "[p]rinciples of comity, international law and existing United States treaties do not afford foreign sovereigns the right to press their citizens' claims in a manner barred to domestic states *vis-à-vis* their

6. 522 F.2d 612 (8th Cir. 1975), *cert. denied sub nom*, Government of India v. Pfizer, 424 U.S. 950 (1976).

7. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

15 U.S.C. § 1 (1976).

8. Section 4 of the Clayton Act provides:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained . . . .

15 U.S.C. § 15 (1976).

The Supreme Court recently held that a foreign country is a "person" within the meaning of section 4. Pfizer, Inc. v. Government of India, —U.S.—, 98 S. Ct. 584 (1978). Further, only those persons who are direct purchasers of the alleged violator of the antitrust laws are persons injured in their business or property within the meaning of § 4 of the Clayton Act. Ill. Brick Co. v. Illinois, 431 U.S. 720, 729 (1976). *See* note 22 *infra*.

9. The concept of *parens patriae* is derived from the English constitutional system. As the system developed from its feudal beginnings, the King retained certain duties and powers, which were referred to as the royal prerogative. These powers and duties were said to be exercised by the King in his capacity as "father of the country." Traditionally, the term was used to refer to the King's power as guardian of persons under legal disabilities to act for themselves.

Hawaii v. Standard Oil Co., 405 U.S. 251, 257 (1971).

A *parens patriae* action is essentially a federal rule 23 class action, *see* note 17 *infra*, without the rule's procedural requirements, such as adequate representation, notice, and proof of each victim's damages. Hawaii v. Standard Oil Co., 405 U.S. 251, 266.

10. 522 F.2d 612, 617-18 (8th Cir. 1975).

11. *Id.* Of course, this holding does not preclude the plaintiff government from seeking treble damages based on its own purchases of the defendant's products.

citizens."[12] The court further noted that citizens of the plaintiff governments may be denied due process of law[13] to which friendly aliens from recognized governments are entitled[14] if their governments seek to adjudicate their claims in the courts of the United States without notice to the citizens, and an opportunity for the citizens to participate in, or exclude themselves from, the litigation.[15]

Although plaintiff governments in *Pfizer* were denied recovery under a *parens patriae* theory, three other methods[16] exist upon which plaintiffs could represent their injured consumer citizens in a United States court. These methods of recovery are a federal rule 23 class action,[17] a *parens patriae* action under the Antitrust Improvements Act,[18] and an expropriation action.[19] It is the purpose

12. *Id.*

13. *Id.* at 619.

14. Russian Fleet v. United States, 282 U.S. 481, 489 (1930). *But see* United States v. Pink, 315 U.S. 203, 228 (1941); Sardino v. Federal Reserve Bank of N.Y., 361 F.2d 106, 111-12 (2d Cir.), *cert. denied*, 385 U.S. 898 (1966).

15. The right to a cause of action has been recognized as a property right within the meaning of the due process clause of the fifth and fourteenth amendments of the United States Constitution. Coombes v. Getz, 285 U.S. 434, 448 (1932). Thus, what the *Pfizer* court is strongly suggesting is that a citizen's right to a cause of action may not be taken without notice and opportunity to be heard. The absence of such notice and opportunity is a due process violation because a decision in favor of the plaintiff would be given *res judicata* effect and thereafter would preclude any plaintiff who has not excluded himself from the action to sue the defendant at a later date. *Accord* Hansberry v. Lee, 311 U.S. 32, 42-43 (1940). The question whether there would be a denial of due process in such a situation was left unanswered by the *Pfizer* court. 522 F.2d 612, 619 (8th Cir. 1975).

16. The term "method" refers to the theory by which a plaintiff might sue. For example, assuming that plaintiff has been injured by an antitrust violation, he could elect to bring an individual suit or a class action suit. The three methods of recovery discussed in this comment are the only methods by which a foreign country could recover treble damages in the courts of the United States for injuries to itself and its citizens sustained as a result of an alleged price conspiracy.

17. FED. R. CIV. P. 23.

18. Pub. L. No. 94-435, § 301, 90 Stat. 1394 (to be codified in 15 U.S.C. §§ 15 (c)-(h) (1976)).

19. Under this method of recovery, the foreign government expropriates its citizens' right to a cause of action against the defendants and then seeks to enforce this right in the courts of the United States. *See* Republic of Iraq v. First National City Bank, 353 F.2d 47 (2d Cir.), *cert. denied*, 382 U.S. 1027 (1965).

For clarification, a literal reading of federal rule 23 and the Antitrust Improvements Act indicates that the difference between the class action and the *parens patriae* action is that in the latter, the plaintiff state attorney general must comply with a significantly reduced number of procedural requirements. For example, the Antitrust Improvements Act authorizes notice by publication and measurement of damages by the "fluid-recovery" procedure, an authorization designed to eliminate the problems of manageability associated with rule 23. [1976] U.S. CODE CONG. & AD. NEWS 4060. In general, recovery is more likely in a *parens patriae* action than in a class action. *Id.* at 4058-61.

The dichotomy between a rule 23 class action and an expropriation action is that in the

of this comment to analyze these three methods of recovery[20] as potential avenues of relief available to plaintiffs in a *Pfizer* fact situation,[21] where United States multinational corporations allegedly conspire to fix prices on goods sold in a foreign country, and where that country seeks treble damages for those citizens who were direct purchasers[22] of the inflated goods by invoking the protection of the

latter, a citizen's right to a cause of action has been transferred to his expropriating government. This transfer thereby precludes that citizen from suing on the right expropriated. *See* Bernstein v. Van Heyghen Frères Société Anonyme, 163 F.2d 246 (2d Cir.), *cert. denied*, 332 U.S. 772 (1947). Because of this preclusion, it follows that the problems of due process and multiple recovery which the procedural requirements of rule 23 are designed to guard against are virtually eliminated.

The variance between a *parens patriae* action and an expropriation action is essentially the same as that between a rule 23 class action and expropriation.

Thus, the procedural requirements are extensive in the rule 23 class action, lessened in the *parens patriae*, and nonexistent in the expropriation action. Only in the expropriation action does the plaintiff possess all the rights to a cause of action. Because the procedural requirements are almost nonexistent in the expropriation action, it may be assumed that the courts of the United States will be most reluctant to award recovery under this method. *See* Hawaii v. Standard Oil Co., 405 U.S. 251, 266 (1971); Eisen v. Carlisle & Jacquelin, 479 F.2d. 1005, 1013 (2d Cir.), *vacated*, 417 U.S. 156 (1973).

20. Before a court concerns itself with the merits of the method upon which the plaintiff foreign government is seeking recovery, such plaintiff must first be granted, by the executive branch, the privilege to sue in the courts of the United States. "It has long been established that only governments recognized by the United States and at peace with us are entitled to access to our courts, and that it is within the exclusive power of the Executive Branch to determine which nation are entitled to sue." Pfizer, Inc. v. Government of India, —U.S.—, 98 S. Ct. 584, 591 (1978). For a detailed discussion of this privilege, *see* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410-12 (1964).

21. The analysis of this comment will be based only on a *Pfizer* type fact situation for two reasons. First, since this is a comment on the *Pfizer* case, it seems appropriate to discuss alternative methods of recovery on the same fact situation. Second, the area of antitrust law is not free from confusion, and limiting the analysis of this comment to a price conspiracy fact situation should achieve some simplicity. This is not to say, however, that the following analysis will not apply to other fact situations.

22. For reasons to follow, a representative suit by a foreign country can include as parties only direct purchasers of the inflated goods. Generally, a particular good passes through the manufacturer, wholesaler, and retailer before it reaches the final consumer. If, for example, pharmaceutical manufacturers conspired to fix prices on their goods, they would be an alleged violator of the antitrust laws. The wholesaler would be the direct purchaser from this violator, and the retailer and consumer would be indirect purchasers.

Consistent with normal business practice, the wholesaler would pass on the costs inflated by virtue of the conspiracy, and the retailer would pass on the same to the consumer. Because these inflated costs are passed on to the next purchaser, a question arises as to what purchases should be deemed for purposes of section 4 of the Clayton Act to have suffered the full injury from the overcharge.

In Ill. Brick Co. v. Illinois, 431 U.S. 720 (1976), the Court held that the pass-on theory may not be used offensively by an indirect purchaser plaintiff against an alleged violator. In other words, only direct purchasers (the immediate purchasers from the alleged violator) are injured within the meaning of section 4 of the Clayton Act. Accordingly, only direct purchasers can invoke the protection of this section. In a *Pfizer* type fact situation, it follows

United States antitrust laws.[23] Attention will then focus on policy arguments favoring relief.[24] Finally, suggestions will be advanced that would make antitrust relief more probable to a foreign country whose citizens are injured by reason of an unlawful price conspiracy.[25]

I. THE THREE POSSIBLE METHODS OF RECOVERY

A. Federal Rule of Civil Procedure 23 — Class Actions

The first of these three methods, the federal rule 23 class action,[26] plays an integral role in our judicial system.[27] This role was underscored in *Pfizer* where the court stated that nothing in its "opinion should be construed to prevent plaintiffs from representing their citizens within the confines of rule 23 if the district court determines that the class should be certified under that rule."[28]

In class actions alleging antitrust violations, the courts hold[29] that, for a class to be certified, the plaintiff must satisfy the four prerequisites of rule 23(a) and the prerequisite of subsection (b)(3) of the rule, in addition to providing adequate notice.[30] Although

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that a foreign country can represent only those citizens who were direct purchasers in an antitrust action in the courts of the United States.

23. Because this comment deals primarily with the facts of *Pfizer*, the question of whether United States antitrust laws have extraterritorial application, which would be at issue if the United States were the plaintiff, will not be discussed.

24. Policy arguments disfavoring a grant of relief will not be made for two reasons. First, such arguments already have been thoroughly discussed. *See* Velvel, *Antitrust Suits by Foreign Nations*, 25 CATH. U.L. REV. 10-16 (1975); JOSEPH, *supra* note 5, at 11. Second, the strongest legal arguments tend to disfavor an award of antitrust relief to foreign nations and the strongest policy arguments tend to favor an award of such relief. By eliminating arguments disfavoring antitrust relief, hopefully a greater balance will be achieved.

25. It is important to note that the Webb-Pomerene Act, 15 U.S.C. §§ 61 *et seq.* (1976), exempts certain export activity from the antitrust laws. Pfizer, Inc. v. Government of India, —U.S.—, 98 S. Ct. 584 (1978); United States v. Concentrated Phosphate Export Assn., 393 U.S. 199 (1968). The exemption applies, however, only to those export activities which "do not restrain trade or affect the price of exported products within the United States and do not restrain the export trade of any domestic competition . . . ." 98 S. Ct. at 593 n.1 (dissenting opinion); 15 U.S.C. § 62 (1976). A price conspiracy of the magnitude as that alleged in *Pfizer* arguably would not come within the purview of the exemption.

26. FED. R. CIV. P. 23.

27. By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be to small to warrant individual litigation.

Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 560 (2d Cir. 1968).

28. 522 F.2d at 620 (8th Cir. 1975).

29. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564 (2d Cir. 1968); *In re* Ampicillin Antitrust Litigation, 55 F.R.D. 269, 275 (D.D.C. 1972).

30. These prerequisites are set forth as follows:

the prerequisites of adequate representation[31] and notice[32] may present some difficulty to a plaintiff government, the most formidable obstacle is the rule 23(c)(3) prerequisite "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[33] There is considerable confusion as to

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(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

. . . .

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

. . . .

(c)(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

FED. R. CIV. P. 23.

The rule states generally that plaintiff must satisfy all four requirements stated in rule 23(a) and at least one of the three requirements stated in rule 23(b). Since the federal district court has original jurisdiction in antitrust cases, there is no jurisdictional amount requirement. 28 U.S.C. § 1337 (1976). For a thorough discussion of rule 23, *see* 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE 499 (1972) [hereinafter cited as 7 WRIGHT & MILLER]; 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE (1972) [hereinafter cited as 7A WRIGHT & MILLER]; Note, *Developments in the Law: Class Actions*, 89 HARV. L. REV. 1318 (1976).

31. Since the judgment in a class action suit will be given *res judicata* effect, due process requires that the absent members receive adequate representation. Hansberry v. Lee, 311 U.S. 32, 44-46 (1940). In cases where a state is the representative party, the courts have not hesitated to hold that the state attorneys general is an adequate representative of the class members so long as the state itself has a claim against the defendant. Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484 (D. Ill. 1969); Minnesota v. United States Steel Corp., 44 F.R.D. 559 (D.Minn. 1968). This same reasoning should apply to a class action suit brought by a foreign sovereign where the sovereign itself has a claim against the defendant. Pfizer v. Lord, 522 F.2d 612, 617 (8th Cir. 1975).

32. The Supreme Court has left no doubt "that individual notice must be provided to those class members who are identifiable through reasonable effort" and "that petitioner must bear the cost of notice to the members of his class." Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 175, 177 (1973). This decision makes it difficult for a party to bring a class action suit where the cost of notice greatly exceeds his potential recovery. Eisen had an individual stake of only $70, whereas the cost of notice to all identifiable class members was $315,000. *Id.* at 167 n.7. However, in a *Pfizer* type fact situation, the differential between potential damage recovery and cost of notice should not present the same difficulty to a foreign government as it does to a private individual because of the sovereign's greater access to capital.

33. In determining whether the prerequisites of rule 23(b)(3) are satisfied, the draftsmen of the rule listed four factors thought to be particularly relevant.

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning

what satisfies this prerequisite.[34] The source of the confusion is the rule 23(b)(3)(D) directive that a court evaluate "the difficulties likely to be encountered in the management of a class action."[35] "Commonly referred to as 'manageability', this consideration encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit."[36] Examples of practical problems that may render an action unmanageable are the burdens of processing numerous claims, the difficulties of distributing any ultimate recovery to the class members, and the problems of notice.[37]

In *Eisen v. Carlisle & Jacquelin*,[38] the Court of Appeals for the Second Circuit concluded that the only potential barrier to the maintenance of the class action was subparagraph (D) of rule 23(b)(3). The court therefore directed the district court to conduct "a further inquiry . . . in order to consider the mechanics involved in the administration of the present action."[39]

On remand, the district court held that the suit was maintainable as a class action.[40] Thereafter, the court of appeals reversed, categorizing the class action unmanageable as defined in rule 23(b)(3)(D).[41] There were six million potential plaintiffs in the class, and "[i]f each had to present his own personal claim for damages, the class, indeed, would not be manageable."[42] At least seven other cases involving diverse and unidentifiable members of an al-

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the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

FED. R. CIV. P. 23 (b)(3).

34. *See* Note, *Developments in the Law: Class Actions*, 89 HARV. L. REV. 1318, 1498 (1976).

35. *See* note 33 *supra*.

36. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 164 (1973).

37. 7A WRIGHT & MILLER, *supra* note 30, at 75. *See also* Note, *Developments in the Law: Class Actions*, 89 HARV. L. REV. 1318, 1498 (1976); Comment, *Managing the Large Class Action: Eisen v. Carlisle & Jacquelin*, 87 HARV. L. REV. 426 (1973).

38. 391 F.2d 555 (2d Cir. 1968). For a more thorough discussion of the history and legal implications of the *Eisen* cases, see Comment, *Eisen v. Carlisle & Jacquelin—Fluid Recovery and Notice Requirements in Rule 23 (b)(3) Class Actions—A Strict Approach*, 1973 UTAH L. REV. 489 (1973) [hereinafter cited as Comment—*A Strict Approach*]; Comment, *Managing the Large Class Action: Eisen v. Carlisle & Jacquelin*, 87 HARV. L. REV. 426 (1973).

39. 391 F.2d at 566-67 (2d Cir. 1968).

40. Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253 (S.D.N.Y. 1971).

41. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1017 (2d Cir. 1973).

42. *Id.* One interpretation of why the court in this case decided that the class was unmanageable is that "huge class actions expend more judicial time than the system can bear." Comment—*A Strict Approach, supra* note 38, at 498-99.

leged class have been dismissed as unmanageable.[43] In a class action suit by a foreign government in a *Pfizer* type fact situation, it is likely that the class, comprised of the government's agencies and individual and corporate citizens, would be composed of a large number of potential plaintiffs whose alleged damages are relatively small.[44] Hence, the government would probably be faced with the same problems of manageability which rendered the class action unmanageable in *Eisen*.[45] The problems of manageability associated with the large class action can be eliminated mainly by proving damages in the aggregate, instead of separately proving the fact or amount of injury to each plaintiff.[46] This procedure of assessing damages is called "fluid-recovery".[47] Although the "fluid-recovery"

43. *In re* Hotel Tel. Charges, 500 F.2d 86, 89-92 (9th Cir. 1974) (court calculated that adjudicating claims of even 10% of the class of 40 million hotel guests would take approximately 100 years); Boshes v. General Motors Corp., 59 F.R.D. 589, 599-601 (N.D. Ill. 1973) (class of 30 million to 40 million automobile purchasers); Donson Stores, Inc. v. American Bakeries Co., 1973-1 Trade Cases, § 74,387 (S.D.N.Y. 1973) (all purchasers of bread in the New York metropolitan area); Cotchett v. Avis Rent A Car Sys., Inc., 56 F.R.D. 549, 553-54 (S.D.N.Y. 1972) (class of over 500,000 consumers who paid a surcharge when renting an automobile from defendant car rental agencies); Philadelphia v. American Oil Co., 53 F.R.D. 45, 64-74 (D.N.J. 1971) (class of 6 million retail consumers of gasoline in Delaware, New Jersey, and Pennsylvania); Reinisch v. NYSE, 52 F.R.D. 561, 563-64 (S.D.N.Y.) (all purchasers of eggs in the United States). Wright and Miller argue:

> In no event should the court use the possibility of becoming involved with the administration of a complex lawsuit as a justification for evading the responsibilities imposed on federal judges by [r]ule 23. If judicial management of a class action, no matter what its dimensions may be, will reap the rewards of efficiency and economy for the entire system that the draftsmen of the federal rule envisioned, then the individual judge should undertake the task.

7A WRIGHT & MILLER, *supra* note 30, at 76.

44. In Illinois Brick Co. v. Illinois, 431 U.S. 720 (1976), the Supreme Court held that only direct purchasers are injured within the meaning of section 4 of the Clayton Act. *See* note 22 *supra*. One logical effect of this decision is to reduce the size of the antitrust class action, for now only direct purchasers can be represented in the suit. Consequently, one might argue that the problems of manageability associated with the large antitrust class action have been significantly eliminated. The contrary argument is that the decision in *Illinois Brick* changed only the form in which the problem of manageability appears. That is, the courts now have the additional burden of ascertaining who are the direct purchasers. Whether the courts view this burden as a manageability problem remains to be seen.

45. In *Eisen*, the court stated that rule 23 "provides an excellent and workable procedure in cases where the number of members of the class is not too large. It seems doubtful that further amendments to Rule 23 can be expected to be effective where there are millions of [class] members . . . ." 479 F.2d at 1019 (2d Cir. 1973).

46. Under this method of assessing damages, the problems of manageability are eliminated because the number of claims filed are of no consequence. *Id.* at 1018.

47. The fluid-recovery procedure consists of three elements:

> (1) a determination of damages to the "class as a whole" in order to establish a general damage fund; (2) an opportunity for individual class members to file claims and share directly in the fund (the processing of these claims is handled administratively rather than judicially); and (3) a judicial determination of how to distribute

procedure would relieve the court of the burden of processing proofs of claim by individual members of the class,[48] the procedure has been held "to be illegal, inadmissible as a solution of the manageability problems of class actions, and wholly improper."[49]

Contained within the recently enacted Antitrust Improvements Act, however, is a section authorizing the use of the "fluid-recovery" procedure of assessing damages in *parens patriae* actions where the alleged wrong is a price conspiracy.[50] Should this section withstand constitutional attack,[51] there remains a question as to whether the "fluid-recovery" procedure of assessing damages like-

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the unclaimed residue of the fund for the benefit of the general class. Fluid class recovery has been utilized only where the class is very large and individual claims are relatively small. Such actions would be unmanageable if proof of each class member's loss were required at trial.

Comment, *A Strict Approach*, *supra* note 38, at 491. *See also* Malina, *Fluid Class Recovery as a Consumer Remedy in Antitrust Cases*, 47 N.Y.U.L. REV. 477 (1972); Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1017-18 (2d Cir. 1973).

An example of the mechanics of the fluid-recovery procedure is set forth as follows:

> Assume that all retail outlets selling pencils in a given city agree to raise the prevailing price of pencils two cents, and then proceed to carry out their illegal conspiracy. . . . Assuming that all the criteria of rule 23 are met and a class action on behalf of all pencil users in the city is approved, the court will proceed to try the issues of violation and measure of damage in a single trial on behalf of the class. The representative plaintiff would then have to prove the fact of the conspiracy and the two-cent inflation of the price of each pencil during the conspiracy period. If the plaintiff succeeds, the simple process of multiplying the defendants' total sales of pencils by two cents will produce a gross damage figure which the court could then incorporate into a judgment, thus creating a fund . . . .

Malina, *supra* at 488-89.

48. Eisen v. Carlisle & Jacquelin, 479 F.2d at 1017-18 (2d Cir. 1973).

49. *Id.* at 1018.

50. Section 4D of the Antitrust Improvements Act states:

> In any action under section 4C(a)(1), in which there has been a determination that a defendant agreed to fix prices in violation of the Sherman Act, damages may be proved and assessed in the aggregate by statistical or sampling methods, by the computation of illegal overcharges, or by such other reasonable system of estimating aggregate damages as the court in its discretion may permit without the necessity of separately proving the individual claim of, or amount of damage to, persons on whose behalf the suit was brought.

Pub. L. No. 94-435, § 301, 90 Stat. 1395 (1976).

51. The argument is that "proof of injury is an essential substantive element of the successful treble damage action." Kline v. Caldwell, Banker & Co., 508 F.2d 226, 233 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). For arguments supporting the unconstitutionality of the Antitrust Improvements Act, *see* 122 CONG. REC. S8, 853, S8, 855, S8, 983 (daily ed. June 10, 1976). For an argument supporting the constitutionality of the section of the Act authorizing fluid-recovery, see Comment, *Managing the Large Class Action: Eisen v. Carlisle & Jacquelin*, 87 HARV. L. REV. 426 (1973), where it is reasoned that

> [w]ere Congress to amend the antitrust laws to provide explicitly for the fluid recovery, it is extremely unlikely that the Supreme Court would strike down such an alteration. Congressional authority to govern economic behavior under the commerce clause is 'broad and sweeping,' if indeed it is not almost boundless.

Id. at 453.

wise would be authorized in class actions.[52] Because the problems of manageability present the most formidable barrier to a foreign government bringing a class action suit, the courts determination on this question is crucial to the outcome of the suit.

B. Parens Patriae Action Under the Antitrust Improvements Act of 1976

An alternative method of recovery to the class action is the *parens patriae* action authorized by the Antitrust Improvements Act.[53] The thrust of the Act is to overturn *California v. Frito-Lay*,[54] "by allowing state attorneys general to act as consumer advocates in the enforcement process, while at the same time avoiding the problems of manageability which some courts have found under rule 23."[55] Although the *Pfizer* court ruled that a foreign government is not entitled to a remedy that is not afforded a domestic state,[56] the court did suggest that a foreign government should be entitled to a remedy that is afforded a state of the United States.[57] The Antitrust Improvements Act permits states attorneys general to enforce the Sherman Act on behalf of injured consumer-citizens by suing for treble damages under the *parens patriae* theory. A strong argument could be made that this same right to sue should extend to foreign governments.

Reliance on the *Pfizer* decision in this situation, however, would be misplaced. The issue is not whether foreign governments should be on an equal footing with domestic states. Rather, the issue is whether Congress intended to create a new cause of action which could be employed by foreign governments. "It is clear from the language of the . . . statute that the new cause of action is created only for states attorneys general."[58] Section 4(C)(a)(1) of the statute reads:

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52. In *Eisen*, Judge Medina stated that "as it now reads, amended Rule 23 contemplates and provides for no such procedure. Nor can amended Rule 23 be construed or interpreted in such fashion as to permit such procedure." Eisen v. Carlisle & Jacquelin, 479 F.2d at 1018 (2d Cir. 1973).

53. Pub. L. No. 94-435, § 301, 90 Stat. 1394 (1976).

54. 474 F.2d 774 (9th Cir.), *cert. denied*, 412 U.S. 908 (1973). In *Frito-Lay*, the court held that California could not maintain a *parens patriae* action for its injured citizens. *See also* Hawaii v. Standard Oil Co., 405 U.S. 251 (1972).

55. [1976] U.S. CODE CONG. & AD. NEWS 4060. For legislative history behind the Act, see *id.* at 4054-130.

56. "Foreign creditors are to be afforded legal access to our courts on the same basis as United States residents." 522 F.2d at 619 (8th Cir. 1975).

57. *Id.*

58. *See* letter from Howard E. O'Leary, Jr., Chief Counsel and Staff Director, Subcom-

> *Any attorney general of a State* may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State; in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of the Sherman Act.[59]

The strongest argument for extending the *parens patriae* cause of action to foreign governments has as its basis treaty agreements such as The Treaty of Amity & Economic Relations[60] between the United States and Iran. The *Pfizer* court construed this treaty as guaranteeing to Iran access to United States courts "on the same terms available to United States nationals."[61] Since states attorneys general can now bring a *parens patriae* cause of action, one could strongly contend that a foreign government should have a right to the same cause of action.[62]

The parties to which Congress intended to grant the right to bring a *parens patriae* action, and the *Pfizer* court's interpretation of the Amity Treaty between the United States and Iran, appear to be in conflict. A literal reading of the Antitrust Improvements Act indicates that Congress apparently did not intend to extend the right to foreign governments.[63] Conversely, the *Pfizer* court's interpretation of the Amity Treaty suggests that foreign governments should have access to courts of the United States on an equal basis with states attorneys general.[64]

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mittee on Antitrust and Monopoly, to Kim W. Cheatum, Sept. 21, 1976 [copy on file with CALIF. W. INT'L L.J.].

59. Pub. L. No. 94-435, § 301, 90 Stat. 1394 (1976) (emphasis added). "State," as used in the statute, is defined as "a State, the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States." *Id.*

60. Article 3 reads in part as follows:

> Nationals and companies of either High Contracting Party shall have freedom of access to the courts of justice and administrative agencies within the territories of the other High Contracting Party, in all degrees of jurisdiction, both in defense and pursuit of their rights, to the end that prompt and impartial justice be done. Such access shall be allowed in any event, upon terms no less favorable than those applicable to nationals and companies of such other High Contracting Party or of any third country.

The Treaty of Amity & Economic Relations, August 15, 1955, United States-Iran, [1957] 8 U.S.T. 899, T.I.A.S. No. 3853, *cited in* Pfizer, Inc. v. Lord, 522 F.2d 612, 619 n.9 (8th Cir. 1975).

61. 522 F.2d 612, 619 n.9 (8th Cir. 1975).

62. In *Pfizer*, the court stated that "[f]oreign creditors are to be afforded legal access to our courts on the same legal basis as United States residents." *Id.* at 619.

63. Pub. L. No. 94-435, § 301, 90 Stat. 1394 (1976).

64. 522 F.2d 612, 619 (8th Cir. 1975).

It is firmly entrenched in United States law, however, that a conflict between domestic legislation and treaty agreement is resolved in favor of the one created subsequent in time.[65] Since the Amity Treaty preceded the Antitrust Improvements Act, the Act should prevail. Therefore, it is reasonable to conclude that the *parens patriae* cause of action created in the Antitrust Improvements Act will not be extended to a foreign government, at least until a treaty agreement subsequent in time to the Act provides otherwise.[66]

C. Governmental Expropriation of Its Citizens' Claims

Assuming that a rule 23 class action or a *parens patriae* action cannot be employed by a foreign government as methods of recovery, a third alternative, expropriation, must be considered. An expropriation action differs markedly from a rule 23 class action and a *parens patriae* suit brought pursuant to the Antitrust Improvements Act.[67] Under the expropriation method of recovery, the foreign government expropriates its citizens' right to bring a cause of action and then individually[68] seeks to enforce these acquired rights in the courts of the United States.[69] Because the citizens' rights have been transferred to the expropriating government, these citizens will not be denied due process of law if a United States court renders judgment in favor of the plaintiff government in the absence of the citizens being given notice and opportunity to participate in, or exclude themselves from, the litigation.[70]

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65. Reid v. Covert, 354 U.S. 1, 18 (1957).

66. A treaty subsequent in time to and in conflict with the Act should prevail. *Id.*

67. For an analysis of the differences, *see* note 19 *supra*.

Presumably an expropriation action would operate simplistically and hypothetically as follows: United States multinational corporations *X* and *Y* conspire to fix prices on widgets sold in country *Z*. *Z* expropriates its victimized citizens' rights to a cause of action and then proceeds to enforce this right against corporations *X* and *Y* in a United States district court.

At trial, *Z* proves that *X* and *Y* each sold 100 widgets to consumers in country *Z* at a price 10 cents higher than otherwise would be in the absence of the price conspiracy. Assuming that *Z* is permitted to utilize the fluid-recovery procedure of assessing damages as authorized in section 4 of the Antitrust Improvements Act, *Z's* damages trebled would be $60 [((2 x 100) x $.10) x 3].

68. In contrast, a literal reading of federal rule 23 and the Antitrust Improvements Act will indicate that under a rule 23 and *parens patriae* action, the plaintiff is suing as a representative of numerous other plaintiffs. *See* notes 18 and 19 *supra*.

69. *See* Republic of Iraq v. First National City Bank, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966).

70. This statement is supported by the following reasoning. Friendly aliens from recognized governments are entitled to due process of law, Russian Fleet v. United States, 282 U.S. 481, 489 (1931), and a right to a cause of action is a property right within the meaning of

The ultimate issue in an expropriation action is whether the taking of a citizen's right to maintain a suit will be judicially recognized in the courts of the United States.[71] The resolution of this issue depends upon whether the act of state doctrine applies.[72] Application of the act of state doctrine hinges upon whether the taking occurs within or without the territory of the expropriating country.[73]

The act of state doctrine was first defined in *Underhill v. Hernandez*[74]:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another *done within its own territory*. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.[75]

The major underpinning of the act of state doctrine is to avoid conflict between the judiciary and executive branches concerning foreign relations.[76] For this reason, the doctrine will not be extended "to acts committed by foreign sovereigns in the course of their purely commercial operations."[77]

These definitions delineate the scope of the doctrine, which applies only to acts of a state that occur within the state's territory. Therefore, in a *Pfizer* type fact situation, the situs of a taking of the

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the fifth amendment of the Constitution, Coombes v. Getz, 285 U.S. 434, 448 (1932). Therefore, an alien's right to a cause of action cannot be taken without being given notice and opportunity to be heard. *See* Pfizer, Inc. v. Lord, 522 F.2d 612, 619 (8th Cir. 1975). However, once the alien's right has been expropriated by its government, the alien no longer has a property right protected by the due process clause. *See* Bernstein v. Van Heyghen Frères Société Anonyme, 163 F.2d 246 (2d Cir.), *cert. denied*, 332 U.S. 772 (1947). *See also* note 15 *supra*.

71. Republic of Iraq v. First National City Bank, 353 F.2d 47, 50-51 (2d Cir. 1965).

72. *Id.*

73. *Id.*

74. 168 U.S. 250 (1897).

75. *Id.* at 252 (emphasis added).

76. The act of state doctrine . . . has its roots, not in the Constitution, but in the notion of comity between independent sovereigns . . . . The line of cases from this Court establishing the act of state doctrine justifies its existence primarily on the basis that juridical review of acts of state or a foreign power could embarrass the conduct of foreign relations by the political branches of government.

First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 765 (1972).

For a more detailed development of the doctrine, *see* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964).

77. Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 706 (1976). Thus, the act of state doctrine, like the doctrine of sovereign immunity, will be applied only to public, as opposed to commercial, acts.

citizens' rights to maintain an action becomes the critical issue. If the situs is outside the taking state's territory, the courts of the United States will approve the taking only if it is "consistent with the policy and the law of the United States."[78] The courts of the United States should recognize and give effect, however, to those takings that occur within the taking state's territory that are not of a commercial nature.[79]

Of great import here is the Hickenlooper Amendment to the Foreign Assistance Act of 1964.[80] This amendment provides that no court in the United States shall decline, on the basis of the act of state doctrine, to review the validity of a claim to a property right asserted by a party who acquired the right by expropriation. However, the amendment specifically exempts from its coverage "any case in which an act of a foreign state is not contrary to international law."[81] Since "acts of a state directed against its own nationals do not give rise to questions of international law,"[82] it is reasonable to submit that the Hickenlooper Amendment does not apply to the instant fact situation. Concerning the situs of a taking of a right to a cause of action, case authority[83] has established that the situs of a resolution effecting the taking is of no consequence in determining whether the act of state doctrine applies. In a *Pfizer* type fact situation, foreign citizens' rights to maintain an antitrust suit against United States multinational corporations are rights that can be enforced only in the courts of the United States.[84] Conse-

78. 353 F.2d 47, 51 (2d Cir. 1965).

79. 425 U.S. 682, 705-06 (1976); 168 U.S. at 252 (1897).

80. 22 U.S.C. § 2370(e)(2) (1976), held constitutional in Banco Nacional de Cuba v. Farr, 383 F.2d 166, 185 (2nd Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).

81. 22 U.S.C. § 2370(e)(2) (1976).

82. Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845, 861 (2d Cir. 1962) *rev'd on other grounds*, 376 U.S. 398 (1964), *cited in* F. Palicio y Compania, S.A., v. Brush, 256 F. Supp. 481, 487 (S.D.N.Y. 1966), *aff'd*, 375 F.2d 1011 (2d Cir.), *cert. denied*, 389 U.S. 830 (1967).

83. Menendez v. Saks, 485 F.2d 1355 (2d Cir. 1973), *rev'd sub nom. on other grounds*, Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682 (1976); Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706 (5th Cir.), *cert. denied*, 393 U.S. 924 (1968); Republic of Iraq v. First National City Bank, 353 F.2d 47 (2d Cir.), *cert. denied*, 382 U.S. 1027 (1965). After King Faisal II of Iraq was killed, a revolution occurred and the new government issued a decree confiscating all property of the dynasty wherever located. The new government then brought suit to recover cash and stock King Faisal had in deposit with a United States bank. United Bank Ltd. v. Cosmic International, Inc., 392 F. Supp. 262 (S.D.N.Y. 1975), *modified*, 548 F.2d 868 (2d Cir. 1976).

84. The court in *Pfizer* suggested that antitrust claims under the laws of the United States are deemed located here because the claims may be enforced or collected only in the courts of the United States. The court stated:

quently, any expropriation of these rights would be a taking of property outside the expropriating government's territory.[85] Therefore, such a taking would not be an act of state, which thereby permits a court of the United States to pass judgment on the expropriation of causes of action that have occurred prior to the expropriation.[86] Assuming the act of state doctrine is not applicable,[87] the remaining question is whether the taking will be recognized in the courts of the United States.

An expropriation by a foreign government is consistent with the law and policy of the United States if the expropriation is for a public purpose, and is coupled with adequate, prompt, and effective compensation.[88] Presumably the State Department can render an

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> [i]t is settled that when foreign governments invoke the benefits of United States courts to deal with tangible or intangible property located in this country, then their actions and decrees with respect to that property will be upheld only if consonant with the policy and law of the United States.

522 F.2d at 620 (8th Cir. 1975). *See also* Menenrdez v. Saks, 485 F.2d 1355, 1365 (2d Cir. 1973), *rev'd sub nom. on other grounds*, Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976); Republic of Iraq v. First National City Bank, 353 F.2d 47, 51 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966).

85. A different conclusion might result if the foreign citizen has a similar right to a cause of action pursuant to the municipal law of his country. In such a situation, the citizen has a right to a cause of action that is enforceable in his country and the United States. It could be contended, therefore, that an expropriation of this right occurs within the territory of the taking state. Accordingly, in conformity with the act of state doctrine, a United States court arguably should not pass judgment on the expropriation.

86. In Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682 (1976), the Supreme Court affirmed the appellate court's holding that the interventors were entitled to the accounts receivable that matured after, but not before, the confiscation by the Republic of Cuba. *Id.* at 690. From this decision, it would seem to follow that an expropriating foreign government would acquire those causes of action that accrue subsequent to the expropriation. For example, assume that on January 1, 1977, sovereign Z issues a decree expropriating its citizens' right to a cause of action, pursuant to the Sherman Act, whenever and wherever acquired. On January 1, 1980, Z brings an action against X and Y in a United States district court seeking treble damages for injuries to its citizens sustained as a result of an alleged price conspiracy. At trial, Z proves that between January 1, 1977, and January 1, 1980, X and Y each sold 100 widgets at $.10 higher than would otherwise be in the absence of a price conspiracy. Since the act of state doctrine should apply to all rights to a cause of action subsequent to the expropriating decree, Z should be able to recover damages trebled in the amount of $60 [((2 x 100) x $.10) x 3].

87. The act of state doctrine could be rendered inapplicable for the additional reason that the expropriation was an act of a commercial nature under Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682 (1976).

88. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 429 (1964). Consistent with this legal principle is a letter to the Mexican Ambassador, dated April 3, 1940, in which Secretary of State Hull writes:

> The Government of the United States readily recognizes the right of a sovereign state to expropriate property for public purposes . . . . On each occasion, however, it has been stated with equal emphasis that the right to expropriate property is coupled with and conditioned on the obligation to make adequate, effective and

expropriation consistent with the law and policy of the United States even in the absence of adequate compensation.[89] In general, it is reasonable to conclude that, in the absence of adequate compensation or an expressed interest by the State Department, a government that expropriates its citizens' rights to a cause of action cannot recover on those rights in the courts of the United States.

In summary, the rule 23 class action would be the method of recovery most acceptable to United States courts;[90] however, the problems of manageability may present an insurmountable obstacle to a foreign government. Further, the procedural requirements of rule 23, in addition to time, distance, cost, and language barriers, may render the class action suit impracticable. Concerning the *parens patriae* action authorized by the Antitrust Improvements Act, there is no indication that Congress intended to extend the right to this cause of action to foreign governments. Finally, recovery under an expropriation action would be unlikely in the absence of a showing that the expropriation was consistent with the policy and law of the United States. Although the law does not favor a foreign government seeking recovery in United States

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prompt compensation. The legality of an expropriation is in fact dependent upon the observance of this requirement.

III G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 662 (1942), *cited in* 8 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1020 (1967).

For a detailed analysis of public purpose and adequate, prompt and effective compensation, *see* 8 WHITEMAN, *id.* at 1036, 1143, 1164, 1183. For additional case authority on the subject, *see* Banco Nacional de Cuba v. Farr, 383 F.2d 166, 185 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968); United Bank Ltd. v. Cosmic International, Inc., 392 F. Supp. 262, 267 (S.D.N.Y. 1975), *modified*, 542 F.2d 868 (2d Cir. 1976).

89. First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 768 (1972). Moreover, in United States v. Belmont, 301 U.S. 324 (1937), and United States v. Pink, 315 U.S. 203 (1942), the Russian government assigned rights it acquired by nationalization to the United States government *via* the Litvinov agreement. The Supreme Court held that the United States could recover on the rights it had acquired even though no compensation was provided by the Russian government to the citizens whose rights were taken. In Republic of Iraq v. First National City Bank, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966), the court construed the Litvinov agreement as it concerns expropriations as follows:

> By the Litvinov agreement our Government had procured, as an incident to recognition, an assignment of the Soviet Union's claims to American assets of nationalized Russian companies, for the benefit of United States nationals whose property in the Soviet Union had been confiscated. *Such action . . . was considered to make the Soviet confiscation decrees consistent with the law and policy of the United States from that time forward* . . . . In this case, by contrast, nothing remotely resembling the Litvinov agreement is present; on the contrary, the Department of State has disclaimed any interest of the executive department in the outcome of the litigation.

Id. at 52 (emphasis added).

90. *See* Hawaii v. Standard Oil Co., 405 U.S. 251, 266 (1971).

courts, there are strong policy arguments in support of granting antitrust relief.

II. POLICY ARGUMENTS FAVORING ANTITRUST RELIEF

Policy arguments favoring antitrust relief[91] fall into four broad categories, including considerations of domestic law, economics, international ramifications, and practicality.[92]

A. Domestic Law Considerations

A major domestic law consideration arose from an interpretation of the Sherman Act by the Supreme Court in *Northern Pacific Railroad Co. v. United States*.[93] Writing for the majority, Justice Black reasoned that the Sherman Act

> was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.[94]

The import of Justice Black's statement is that competition is good,[95] and to this end section 1 of the Sherman Act proscribes "[e]very . . . conspiracy, in restraint of trade or commerce among the several States, or *with foreign nations.*"[96]

To insure that decisions in the marketplace are made in response to the competitive forces, the United States Supreme Court has repeatedly stressed the broad reach of actions for treble damages. In *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*,[97] the Supreme Court declared that the Sherman Act

> does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers . . . . The Act is comprehensive in

91. Arguments disfavoring antitrust relief will not be discussed for the reasons stated in note 24 *supra*.

92. The four policy arguments made in this comment are not inclusive, but are arguments that can be made in support of the proposition that victimized foreign countries should be permitted to bring antitrust actions in the courts of the United States.

93. 356 U.S. 1 (1958).

94. *Id.* at 4.

95. For an analysis of the value of competition, *see* AREEDA, ANTITRUST ANALYSIS 6-26 (2d ed. 1974).

96. 15 U.S.C. § 1 (1976) (emphasis added).

97. 334 U.S. 219 (1947).

> its terms and coverage, *protecting all who are made victims* of the forbidden practices by whomever they may be perpetrated.[98]

Similarly, in two other cases,[99] the Supreme Court rejected defenses that would have negated the treble damage actions.

These cases illustrate that actions which seek treble damages are the most effective deterrent to price conspiracies in restraint of trade.[100] With the amount of United States corporate activity in foreign commerce increasing in significant proportions,[101] a greater need exists to insure that this activity is held accountable to the competitive forces praised by the Sherman Act. To this end, victimized foreign nations should be encouraged to bring treble damage actions in United States courts against United States multinational corporations engaged in business abroad in a manner that offends the letter and spirit of the antitrust laws.[102] To discourage these actions would be tantamount to encouraging multinational corporations to engage in profitable anticompetitive practices with impunity.[103]

B. Economic Considerations

In addition to strong domestic law considerations, equally forceful economic arguments require that treble damages be

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98. *Id.* at 236 (emphasis added).

99. In holding in Perma Mufflers v. International Parts Corp., 392 U.S. 134 (1967) that the court of appeals erred in finding the common law *in para delicto* doctrine a defense to actions for treble damages, the Supreme Court reasoned:

> [T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.

Id. at 139.

In Hanover Shoe, Inc. v. United States Machinery Corp., 392 U.S. 481 (1968), the Supreme Court rejected the passing-on defense which would have negated the treble antitrust action. If the defense was upheld, the

> ultimate consumers . . . would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruit of their illegality because no one was available who would bring suit against them. Treble damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness.

Id. at 494.

100. Pfizer, Inc. v. Government of India, —U.S.—, 98 S. Ct. 584, 589 (1978). *See also* Minnesota Mining and Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318 (1965); Alaska v. Standard Oil Co. of California, 487 F.2d 191, 199-200 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974).

101. *See* notes 1 and 3 *supra*.

102. *See* Velvel, *supra* note 24, at 14.

103. *Id.* at 15.

awarded. Price fixing conspiracies tend to result in the sale of goods at prices higher than would exist in the absence of the conspiracy.[104] The buyer of goods at inflated prices will offset the increase by charging more on goods sold by him. The inflationary spiral set into motion will slowly register itself in the prices of goods exchanged on the international market, and, eventually, on goods imported into the United States.[105]

Moreover, under basic supply and demand analysis, the sale of goods at inflated prices would tend to lessen the demand that would otherwise exist if the goods were priced in response to competitive forces.[106] This decreased demand could be detrimental to the United States balance of payments.[107] Therefore, to negate potentially adverse effects of inflation and a balance of payments deficit, a foreign country injured by reason of antitrust violations should be entitled to antitrust relief in United States courts.[108]

C. International Ramifications

A third consideration which favors the grant of antitrust relief to foreign nations lies in the realm of international ramifications. A sovereign has the right and duty to protect its citizens, a right and duty supported by principles of international law and recognized by the United States.[109] In *French Republic v. Saratoga Vichy Co.*,[110] the French Government brought an antitrust suit on behalf of one of its nationals. The United States Supreme Court, by permitting the suit, recognized that France was suing in a representative capacity:

> [T]he French Republic has had no real interest in the product of the springs for fifty years, and . . . it can have no such interest for thirty years to come . . . . To hold that the French Republic

104. *Id.* at 7-8.

105. *Id.*; *accord*, Pfizer, Inc. v. Government of India, —U.S.—, 98 S. Ct. 584, 589 (1978); *see also* Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 703 (1976).

106. *Id.* at 8.

107. *Id.*

108. *Id.*

109. David Gantz of the Office of Legal Adviser, State Department, has written that "[t]he protection of a national is not only the right but the duty of the State." A. ROVINE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 334 (1973).

110. 191 U.S. 427 (1903). *See also* La République Française v. Schultz, 94 F. 500 (S.D.N.Y. 1899).

> appears in this litigation to be suing for the use and benefit of the Vichy Company [the lessee of the springs] would more accurately describe their relations.[111]

The French Republic was thus allowed to espouse its citizens' claims in a United States court.

A contrary result, however, is suggested in language appearing in *United States v. Diekelman*.[112] In that case, the Supreme Court stated that in circumstances in which a sovereign assumes responsibility for the claims of its citizens, "the claim may be prosecuted as one nation proceeds, against another, not by suit in the courts, as of right, but by diplomacy or, if need be, by war."[113] *Diekelman*, however, can be distinguished from *Saratoga* to the extent that the former was a suit against a sovereign, the United States, while the latter involved a suit against a private party, as was also the case in *Pfizer*.[114]

Similarly, in *Republic of Iraq v. First National Bank of Chicago*,[115] the Court of Appeals for the Seventh Circuit suggested that a sovereign may not bring an action in the United States on behalf of its citizens against another private party. Addressing this point, the court stated:

> Federal courts will not entertain a suit at the instance of the United States if the suit is in reality one between private parties.
>
> . . . .
>
> We think the same rule applies in the case of a foreign nation. If a sovereign nation chooses to assert against a foreign nation private claims of its individual citizens it does so as a sovereign *vis-à-vis* the foreign nation, not as a private litigant.[116]

Bank of Chicago is also distinguished from *Saratoga* in that the persons for whom the Republic of Iraq sought to appoint a guardian in *Bank of Chicago* were domiciled in the United States.[117]

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111. 191 U.S. at 438.

112. 92 U.S. 520 (1876).

113. *Id.* at 524.

114. As a result, a number of sovereign immunity issues that are present in a case such as *Diekelman* are not present in an action against a private party such as that involved in a *Pfizer* type fact situation.

115. 350 F.2d 645 (7th Cir. 1965), *cert. denied*, 382 U.S. 982 (1966).

116. *Id.* at 648-49.

117. The Republic of Iraq, after issuing a decree that appointed a guardian of the persons and estates of certain minor children residing in Chicago, Illinois, brought suit seeking judicial recognition of the decree in the Probate Court of Cook County, Illinois. Plaintiff also alleged that the children, under the Iraqi nationality laws, were Iraqi citizens. However, the

Conversely, in *Saratoga*, the persons represented were domiciled in the plaintiff nation.

In a *Pfizer* situation, citizens injured by the price conspiracy are similarly domiciled in the plaintiff nation. Further, because of time, distance, costs, and language barriers, it is reasonable to conclude that these citizens must be protected by their government if they are to receive protection at all. Thus, because a sovereign has the duty to champion its citizens' claims, especially in circumstances where it is difficult, if not impossible, for the citizens to champion their own claims,[118] an argument can be made that a sovereign injured by reason of antitrust violations should be allowed to fulfill this duty in the courts of the United States.

Another international consideration that favors antitrust relief for foreign sovereigns can be found in agreements to which sovereigns are parties. For example, in the Bretton-Woods Agreements Act,[119] Congress urged foreign government members of the International Monetary Fund to take immediate steps "[to] reduce obstacles to and restrictions upon international trade" and to "eliminate unfair trade practices" in international trade. One could argue that the elimination of unfair trade practices would be achieved, in part, by allowing sovereigns a treble damage remedy for injuries sustained as a result of a price conspiracy by multinational corporations.

D. Practical Considerations

The last argument in favor of antitrust relief is based on practical considerations. At lease one English tribunal has argued that the more difficult it is for sovereigns to recover in English courts, the more likely it is that these sovereigns will implement their own

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children were already under the protection and guardianship of the same probate court. The court refused to recognize the decrees, stating:

> where the children have never been in Iraq and were residing in Chicago with their parents since 1957 or 1958, it is clear that the courts of Illinois would not recognize the Iraqi decrees, and that these principles apply with equal, if not greater, force to the question of the guardianship of the estates located in Illinois.

350 F.2d at 649 (7th Cir. 1965).

118. *See* note 109 *supra*.

119. 22 U.S.C. § 286k (1976). Although the Bretton Woods System effectively collapsed in 1971, the system is ostensibly being revived by the Trilateral Commission. *See* Novak, *New World Economic System Dawns*, The Christain Science Monitor, Feb. 7, 1977, at 18, col. 1.

remedies, such as expulsion, nationalization, or physical destruction.[120] In support of this position, the spokesman for the court stated:

> I conceive that there can be no doubt that a sovereign may sue. If he cannot, there is a right without a remedy . . . . [H]e sues as every sovereign must sue, generally speaking, either on his own behalf, or on behalf of his subjects. If the courts of justice were to refuse to receive his suit, I apprehend that it might be a just cause of war.[121]

Although the likelihood of war is small, it is conceivable that a foreign country that has been denied antitrust relief might resort to remedial measures more harmful to United States multinational corporations than an action for treble damages. Accordingly, the United States should prefer, as a practical matter, that the outcome of an antitrust action against a United States multinational corporation be determined in accordance with United States law, rather than the law of a foreign country.

III. CONCLUSION

The foregoing analysis illustrates that, despite strong policy arguments to the contrary, it is unlikely that foreign countries injured by a price conspiracy will be able to successfully maintain either a class action, a *parens patriae* action, or an expropriation action for treble damages in the courts of the United States. Nevertheless, some suggestions have been advanced that may render antitrust relief more probable to an injured foreign country.

It has been noted that the problems of manageability associated with the large class action present the most formidable obstacle to a foreign nation.[122] However, these problems can be eliminated to a large extent by the "fluid-recovery" procedure of assessing damages.[123] Now that this procedure has been authorized by the Antitrust Improvements Act[124] in situations where the alleged wrong is a price conspiracy, a similar authorization by the courts in class action suits would greatly enhance the chances of recovery for a plaintiff foreign government where the class it purports to represent is large.

120. Hullet v. King of Spain, 1 Dow & Cl. 169, 175, 28 Rev. Reports 56, 61-62 (1828), *cited in* The Sapphire v. Napoleon, Emperor of France, 78 U.S. (11 Wall.) 167, 168 (1870).

121. *Id.*

122. *See* notes 33-43 *supra*, and accompanying text.

123. *See* note 47 *supra*, and accompanying text.

124. Pub. L. No. 94-435, § 301, 90 Stat. 1394 (1976).

There is no indication that Congress intended to extend to foreign governments the *parens patriae* action created by the Antitrust Improvements Act.[125] However, there exist amity treaties which suggest that foreign governments should have access to courts of the United States on the same terms as that afforded states attorneys general.[126] Since this apparent conflict between domestic legislation and treaty agreement traditionally has been resolved in favor of the one subsequent in time,[127]any similar amity treaty subsequent to the Act would permit the signatory to the treaty to employ the *parens patriae* action. Treaty agreements which guarantee foreign nations access to courts of the United States on the same terms available to domestic states can, with the advice and consent of the Senate, be effectuated by the Executive Branch.[128]

In an expropriation action, the taking, by a sovereign, of a citizen's antitrust claim constitutes a "taking" of property outside the expropriating government's territory.[129] Therefore, such a taking is not an act of state.[130] Accordingly, the taking will not be recognized in the courts of the United States, absent of a showing that the taking was for a public purpose and accompanied by adequate compensation.[131] Presumably, however, the State Department can render an expropriation consistent with the law and policy of the United States, even in the absence of adequate compensation, by expressing a sufficient interest in the controversy.[132] Thus, the position of the State Department could be crucial to the outcome of an expropriation action.

The significance of these suggestions is underscored by the dramatic increase in United States corporate activity abroad. If multinational corporations are allowed to charge monopolistic prices with impunity, the United States risks losing substantial benefits garnered by its corporate activity in international commerce. Therefore, foreign countries genuinely wronged by price conspiracies should be entitled to maintain actions for treble damages in the

125. *See* notes 58 and 59 *supra*, and accompanying text.
126. *See* notes 60-62 *supra*, and accompanying text.
127. Reid v. Covert, 354 U.S. 1, 18 (1957).
128. U.S. CONST. art. II, § 2, cl.2.
129. *See* note 84 *supra*, and accompanying text.
130. *See* note 85 *supra*, and accompanying text.
131. *See* note 88 *supra*, and accompanying text.
132. *See* note 89 *supra*, and accompanying text.

courts of the United States. Permitting the maintenance of such actions will further insure that decisions by United States corporations in the international marketplace will be held accountable to the competitive forces extolled by the Sherman Act.

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