

Judicial Decisions

Supreme Court of the United States, No. 76-749

Pfizer, Inc., et al., Petitioners, v. Government of India et al.
On Writ of Certiorari to the United States Court of
Appeals for the Eighth Circuit
January 11, 1978

MR. JUSTICE STEWART delivered the opinion of the Court.

In this case we are asked to decide whether a foreign nation is entitled to sue in our courts for treble damages under the antitrust laws. The respondents are the Government of India, the Imperial Government of Iran, and the Republic of the Philippines. They brought separate actions in federal district courts against the petitioners, six pharmaceutical manufacturing companies. The actions were later consolidated for pretrial purposes in the United States District Court for the District of Minnesota.¹ The complaints alleged that the petitioners had conspired to restrain and monopolize interstate and foreign trade in the manufacture, distribution and sale of broad spectrum antibiotics, in violation of §§ 1 and 2 of the Sherman Act, ch. 647, 26 Stat. 209, *as amended*, 15 U.S.C. §§ 1, 2. Among the practices the petitioners allegedly engaged in were price fixing, market division and fraud upon the United State Patent Office.² India and Iran each alleged that it was a "sovereign foreign state with

¹Similar actions were also brought by Spain, South Korea, West Germany, Colombia, Kuwait and the public of Vietnam. Vietnam was a party to this case in the Court of Appeals and was named as a respondent in the petition for certiorari. Subsequent to the filing of the petition Vietnam's complaint was dismissed by the District Court on the ground that the United States no longer recognized the government of Vietnam; the dismissal was affirmed by the Court of Appeals. *Republic of Vietnam v. Pfizer, Inc.*, 556 F.2d 892 (CA8). Vietnam has not participated as a party in this Court. Some of the other suits have been settled and the rest are pending.

²The antibiotic antitrust litigation originated with a proceeding brought by the Federal Trade Commission which resulted in an order requiring petitioners Pfizer and American Cyanamid to grant domestic applicants licenses under their patents for broad spectrum antibiotics. See *Charles Pfizer & Co. v. F.T.C.* 401 F.2d 574 (CA6). Criminal antitrust proceedings against petitioners Pfizer, American Cyanamid and Bristol-Myers were eventually dismissed. *United States v. Chas. Pfizer & Co.*, 367 F. Supp. 91 (SDNY); see also *United States v. Chas. Pfizer & Co.*, 426 F.2d 32 (CA2), *modified*, 437 F.2d 957 (CA2), *aff'd by an equally divided court*, 404 U.S. 548. Most of the large number of civil suits have been settled. See *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 71(SDNY), *aff'd*, 440 F.2d 1079 (CA2).

whom the United States of America maintains diplomatic relations"; the Philippines alleged that it was a "sovereign and independent government." Each respondent claimed that as a purchaser of antibiotics it had been damaged in its business or property by the alleged antitrust violations and sought treble damages under § 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 15, on its own behalf and on behalf of several classes of foreign purchasers of antibiotics.³

The petitioners asserted as an affirmative defense to the complaints that the respondents as foreign nations were not "persons" entitled to sue for treble damages under § 4. In response to pretrial motions⁴ the District Court held that the respondents were "persons" and refused to dismiss the actions.⁵ The trial court certified the question for appeal pursuant to 28 U.S.C. § 1292 (b).⁶ The Court of Appeals for the Eighth Circuit affirmed, 550 F.2d 396 (CA8), and adhered to its decision upon rehearing en banc.⁷ 550 F.2d, at 400. We granted certiorari to resolve an important and novel question in the administration of the antitrust laws. 430 U.S. 964.

I.

As the Court of Appeals observed, this case "turns on the interpretation of the statute." 550 F.2d, at 397. A treble-damage remedy for persons injured by antitrust violations was first provided in § 7 of the Sherman Act, and was reenacted in 1914 without substantial change as § 4 of the Clayton Act.⁸ Section 4 provides:

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 suit, including a reasonable attorney's fee.

³Each respondent also sued in a *parens patriae* capacity; those claims were dismissed in a separate appeal and are not at issue here. *Pfizer, Inc. v. Lord*, 522 F.2d 612, 615-620 (CA8).

⁴Petitioners moved to dismiss the suits brought by India and Iran. The Philippines moved to strike petitioners' affirmative defense.

⁵The District Court relied upon an earlier decision denying a motion to dismiss a related suit brought by the State of Kuwait, *See* note 1, *supra*, *In re Antibiotic Antitrust Actions*, 333 F. Supp. 315 (SDNY). An appeal was taken from that decision but was dismissed by stipulation of the parties. Thus, the Court of Appeals' decision in the present case marked the first appellate consideration of the issue.

⁶A petition for mandamus had previously been denied. *Pfizer, Inc. v. Lord*, 522 F.2d 612 (CA8).

⁷Two judges dissented, believing that Congress, in passing the Sherman and Clayton Acts, did not intend to include foreign sovereigns within the scope of the term "person." 550 F.2d, at 400. Three judges in the majority also joined a concurring opinion noting the absence of controlling legislative history and urging congressional action. *Id.*, at 399, 400.

⁸Section 7 of the Sherman Act was repealed in 1955 as redundant. Ch. 283, § 3, 69 Stat. 283; *see* S. REP. NO. 619, 84th Cong., 1st Sess., 2 (1955).

Thus, whether a foreign nation is entitled to sue for treble damages depends upon whether it is a "person" as that word is used in § 4. There is no statutory provision or legislative history that provides a clear answer; it seems apparent that the question was never considered at the time the Sherman and Clayton Acts were enacted.⁹

The Court has previously noted the broad scope of the remedies provided by the antitrust laws. "The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236; cf. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 138-39. And the legislative history of the Sherman Act demonstrates that Congress used the phrase "any person" intending it to have its naturally broad and inclusive meaning. There was no mention in the floor debates of any more restrictive definition. Indeed, during the course of those debates the word "person" was used interchangeably with other terms even broader in connotation. For example, Senator Sherman said that the treble-damage remedy was being given to "any party," and Senator Edwards, one of the principal draftsmen of the final bill,¹⁰ said that it established "the right of anybody to sue who chooses to sue." 21 CONG. REC. 2569, 3148.

In light of the law's expansive remedial purpose, the Court has not taken a technical or semantic approach in determining who is a "person" entitled to sue for treble damages. Instead, it has said that "[t]he purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate" the proper scope of the law. *United States v. Cooper Corp.*, 312 U.S. 600, 605.

II.

The respondents in this case possess two attributes that could arguably exclude them from the scope of the sweeping phrase "any person." They are foreign, and they are sovereign nations.

A.

As to the first of these attributes, the petitioners argue that, in light of statements made during the debates on the Sherman Act and the general pro-

⁹The Sherman and Clayton Acts each provide that the word "person" "shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." 15 U.S.C. §§ 7, 12.

It is apparent that this definition is inclusive rather than exclusive, and does not by itself imply that a foreign government, any more than a natural person, falls without its bounds. Cf. *Helvering v. Morgan's Inc.*, 293 U.S. 121, 125 n. 1; *United States v. New York Telephone Co.*, ___ U.S. ___, ___ n. 15.

¹⁰See *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 n. 10.

tectionist and chauvinistic attitude evidenced by the same Congress in debating contemporaneous tariff bills, it should be inferred that the Act was intended to protect only American consumers. Yet it is clear that a foreign *corporation* is entitled to sue for treble damages, since the definition of "person" contained in the Sherman and Clayton Acts explicitly includes "corporations and associations existing under or authorized by . . . the laws of any foreign country." See note 9, *supra*. Moreover, the antitrust laws extend to trade "with foreign countries" as well as among the several States of the Union. 15 U.S.C. §§ 1, 2.¹¹ Clearly, therefore, Congress did not intend to make the treble-damage remedy available only to consumers in our own country.¹²

In addition, the petitioners' argument confuses the ultimate purposes of the antitrust laws with the question of who can invoke their remedies. The fact that Congress' foremost concern in passing the antitrust laws was the protection of Americans does not mean that it intended to deny foreigners a remedy when they are injured by antitrust violations. Treble-damage suits by foreigners who have been victimized by antitrust violations clearly may contribute to the protection of American consumers.

The Court has noted that § 4 has two purposes: to deter violators and deprive them of "the fruits of their illegality," and "to compensate victims of antitrust violations for their injuries." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-86; *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139. To deny a foreign plaintiff injured by an antitrust violation the right to sue would defeat these purposes. It would permit a price fixer or a monopolist to escape full liability for his illegal actions and would deny compensation to certain of his victims, merely because he happens to deal with foreign customers.

Moreover, an exclusion of all foreign plaintiffs, would lessen the deterrent effect of treble damages. The conspiracy alleged by the respondents in this case operated in American markets as well as internationally.¹³ If foreign plaintiffs were not permitted to seek a remedy for their antitrust injuries, persons doing

¹¹The dissent seems to contend that the Sherman Act's reference to commerce with foreign nations was intended only to reach conspiracies affecting goods imported into this country. *Post*, at 4-5. But the scope of congressional power over foreign commerce has never been so limited, and it is established that the antitrust laws apply to exports as well. See, e.g., *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 599; *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (Mass.).

¹²Moreover, in the Webb-Pomerene Act, ch. 50, 40 Stat. 516, *as amended*, 15 U.S.C. § 61 et seq., Congress has provided a narrow and carefully limited exception for export activity that would otherwise violate the antitrust laws. See *United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199. A judicial rule excluding all non-Americans as plaintiffs in treble-damage cases would hardly be consistent with the precisely limited exception Congress has established to the general applicability of the antitrust laws to foreign commerce.

¹³See note 2, *supra*.

business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home. If, on the other hand, potential antitrust violators must take into account the full costs of their conduct, American consumers are benefited by the maximum deterrent effect of treble damages upon all potential violators.¹⁴

B.

The second distinguishing characteristic of these respondents is that they are sovereign nations. The petitioners contend that the word "person" was clearly understood by Congress when it passed the Sherman Act to exclude sovereign governments. The word "person," however, is not a term of art with a fixed meaning wherever it is used, nor was it in 1890 when the Sherman Act was passed.¹⁵ *Cf. Towne v. Eisner*, 245 U.S. 418, 425. Indeed, this Court has expressly noted that use of the word "person" in the Sherman and Clayton Acts did not create a "hard and fast rule of exclusion" of governmental bodies. *United States v. Cooper Corp.*, 312 U.S., at 604-605.

On the two previous occasions that the Court has considered whether a sovereign government is a "person" under the antitrust laws, the mechanical rule urged by the petitioners has been rejected.¹⁶ In *United States v. Cooper Corp.*, *supra*, the United States sought to maintain a treble-damage action under § 7 of the Sherman Act for injury to its business or property. The Court considered the question whether the United States was a "person" entitled to

¹⁴It has been suggested that depriving foreign plaintiffs of a treble-damage remedy and thus encouraging illegal conspiracies would affect American consumers in other ways as well: by raising worldwide prices and thus contributing to American inflation; by discouraging foreign entrants who might undercut monopoly prices in this country; and by allowing violators to accumulate a "war chest" of monopoly profits to police domestic cartels and defend them from legal attacks. Velvel, *Antitrust Suits by Foreign Nations*, 25 CATH. U.L. REV. 1, 7-8 (1975).

¹⁵The case relied on by petitioners as establishing a general rule, *United States v. Fox*, 94 U.S. 315, merely adopted New York's construction of its Statute of Wills, as a matter of state law. *Id.*, at 320. Even in New York the word "person" did not have a settled meaning. *Compare In re Will of Fox*, 52 N.Y. v. 530, *aff'd. sub nom.*, *United States v. Fox*, 94 U.S. 315, with *Republic of Honduras v. Soto*, 112 N.Y. 310, 19 N.E. 845. In fact, contemporaneous cases generally held that the sovereign was entitled to have the benefit of a statute extending a right to "persons." *See, e.g.*, *Stanley v. Schwalby*, 147 U.S. 508, 514-17; *Dollar Savings Bank v. United States*, 19 Wall. 227, 239; *Lofton Cotton v. United States*, 11 How. 229, 231.

Cases construing federal statutes of the same era also indicate that the use of the term "person" did not invariably imply an intent to exclude governmental bodies. *See e.g.*, *Ohio v. Helvering*, 292 U.S. 360 ("person" in §§ 3140 and 3244 of the Revised Statutes of 1878 includes a State); *California v. United States*, 320 U.S. 577, 585-586 ("person" in the Shipping Act of 1916, ch. 451, 39 Stat. 728, *as amended*, 46 U.S.C. § 801 et seq., includes both a State and a city); *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 396 ("person" in the Sherman Act includes a city).

¹⁶Even earlier, in *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 396, the Court held without extended discussion that a city was entitled to sue for treble damages.

sue for treble damages as one to be decided not "by a strict construction of the words of the Act, nor by the application of artificial canons of construction," but by analyzing the language of the statute "in the light, not only of the policy intended to be served by the enactment, but, as well, by all other available aids to construction." *Id.*, at 605. The Court noted that the Sherman Act provides several separate and distinct remedies: criminal prosecutions, injunctions and seizure of property by the United States on the one hand, and suits for treble damages "granted to redress private injury" on the other. *Id.*, at 607-08. Statements made during the congressional debates on the Sherman and Clayton Acts provided further evidence that Congress affirmatively intended to exclude the United States from the treble-damage remedy. *Id.*, at 611-12. Thus, the Court found that the United States was not a "person" entitled to bring suit for treble damages.¹⁷

In *Georgia v. Evans*, 316 U.S. 159, decided the very next Term, the question was whether Georgia was entitled to sue for treble damages under § 7 of the Sherman Act. The Court of Appeals, believing that the *Cooper* case controlled, had held that a State, like the Federal Government, was not a "person." This Court reversed, noting that *Cooper* did not hold "that the word 'person,' abstractly considered, could not include a governmental body." *Id.*, at 161. As in *Cooper*, the Court did not rest its decision upon a bare analysis of the word "person," but relied instead upon the entire statutory context to hold that Georgia was entitled to sue. Unlike the United States, which "had chosen for itself three potent weapons for enforcing the Act," *ibid.*, a State had been given no other remedies to enforce the prohibitions of the law. To deprive it also of a suit for damages "would deny all redress to a State, when mulcted by a violator of the Sherman Law, merely because it is a State." *Id.*, at 162-63. Although the legislative history of the Sherman Act did not indicate that Congress ever considered whether a State would be entitled to sue, the Court found no reason to believe that Congress had intended to deprive a State of the remedy made available to all other victims of antitrust violations.

It is clear that in *Georgia v. Evans* the Court rejected the proposition that the word "person" as used in the antitrust laws excludes all sovereign states. And the reasoning of that case leads to the conclusion that a foreign nation, like a domestic state, is entitled to pursue the remedy of treble damages when it has been injured in its business or property by antitrust violations. When a foreign nation enters our commercial markets as a purchaser of goods or services, it can be victimized by anticompetitive practices just as surely as a private person or a domestic state. The antitrust laws provide no alternate

¹⁷In 1955 Congress amended the Clayton Act to allow the United States to sue for single damages when it is injured in its business or property. ch. 283, § 1, 69 Stat. 282, 15 U.S.C. § 15A.

remedies for foreign nations as they do for the United States.¹⁸ The words of *Georgia v. Evans* are thus equally applicable here:

We can perceive no reason for believing that Congress wanted to deprive a [foreign nation], as purchaser of commodities shipped in [international] commerce, of the civil remedy of treble damages which is available to other purchasers who suffer through violation of the Act. . . . Nothing in the Act, its history, or its policy, could justify so restrictive a construction of the word 'person' in § 7. . . . Such a construction would deny all redress to a [foreign nation], when mulcted by a violator of the Sherman Law, merely because it is a [foreign nation].

316 U.S. at 162-63.

III.

The result we reach does not involve any novel concept of the jurisdiction of the federal courts. This Court has long recognized the rule that a foreign nation is generally entitled to prosecute any civil claim in the courts of the United States upon the same basis as a domestic corporation or individual might do. "To deny him this privilege would manifest a want of comity and friendly feeling." *The Sapphire*, 11 Wall. 164, 167; *Monaco v. Mississippi*, 292 U.S. 313, 323 note 2; *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408-409; see U.S. CONST. Art. III, § 2, cl. 1.¹⁹ To allow a foreign sovereign to sue in our courts for treble damages to the same extent as any other person injured by an antitrust violation is thus no more than a specific application of a long-settled general rule. To exclude foreign nations from the protections of our antitrust laws would, on the other hand, create a conspicuous exception to this rule, an exception that could not be justified in the absence of clear legislative intent.

Finally, the result we reach does not require the judiciary in any way to interfere in sensitive matters of foreign policy.²⁰ It has long been established that

¹⁸While the dissent says there are "weapons in the arsenals of foreign nations" sufficient to enable them to counter anticompetitive conduct, such as cartels or boycotts, *post*, at 8, such a political remedy is hardly available to a foreign nation faced with monopolistic control of the supply of medicines needed for the health and safety of its people.

¹⁹Congress has explicitly conferred jurisdiction upon the federal courts to entertain such suits:

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between— (4) a foreign state . . . as plaintiff and citizens of a State or of different States.

28 U.S.C.A. § 1332 (a) (4) (Supp. 1977).

Among the actions foreign sovereign governments were entitled to maintain at the time of the passage of the Sherman and Clayton Acts were suits for common-law business torts, such as unfair competition, similar in general nature to antitrust claims. See *French Republic v. Saratoga Vichy Spring Co.*, 191 U.S. 427 (1903); *La Republique Francaise v. Schultz*, 194 F. 500 (S.D.N.Y. 1899).

²⁰In a letter that was presented to the Court of Appeals when it reconsidered this case en banc, the Legal Adviser of the Department of State advised "that the Department of State would not anticipate any foreign policy problems if . . . foreign governments [were held to be] persons within the meaning of Clayton Act § 4." A copy of this letter is contained in the Memorandum for the United States as *amicus curiae* in opposition to the petition for a writ of certiorari filed in this Court.

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 nations are entitled to sue. *Jones v. United States*, 137 U.S. 202, 212; *Guaranty Trust Co. v. United States*, 304 U.S. 126, 137-38; *Banco Nacional de Cuba v. Sabbatino*, *supra*, at 408-412. Nothing we decide today qualifies this established rule of complete judicial deference to the Executive Branch.²¹

We hold today only that a foreign nation otherwise entitled to sue in our courts is entitled to sue for treble damages under the antitrust laws to the same extent as any other plaintiff. Neither the fact that the respondents are foreign nor the fact that they are sovereign is reason to deny them the remedy of treble damages Congress afforded to “any person” victimized by violations of the antitrust laws.

Accordingly, the judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

MR. JUSTICE BURGER, with whom MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST join, dissenting.

The Court today holds that foreign nations are entitled to bring treble-damage actions in American courts against American suppliers for alleged violations of the antitrust laws; the Court reaches this extraordinary result by holding that for purposes of § 4 of the Clayton Act, foreign sovereigns are “persons,” while conceding paradoxically that the question “was never considered at the time the Sherman and Clayton Acts were enacted.” *Ante*, at 4.

I dissent from this undisguised exercise of legislative power since I find the result not only plainly at odds with the language of the statute but also with its legislative history and precedents of this Court. The resolution of the delicate and important policy issue of giving more than 150 foreign countries the benefits and remedies enacted to protect American consumers should be left to the Congress and the Executive. Congressional silence over a period of almost a century provides no license for the Court to make this sensitive political decision vastly expanding the scope of the statute Congress enacted.

²¹*Cf.* note 1, *supra*.

A.

“The starting point in every case involving construction of a statute is the language itself.” *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (Powell J., concurring). The relevant provisions here are § 1 of the Clayton Act in which the word “person” is defined, and § 4 in which the treble-damage remedy is conferred on those falling within the precisely enumerated categories. Section 1 provides, in relevant part:

. . . 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.

Section 4 then incorporates this definition by providing:

That 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 suit, including a reasonable attorney’s fee.

Even on the most expansive reading, these two sections provide not the slightest indication that Congress intended to allow foreign nations to sue Americans for treble damages under our antitrust laws. The very fact that foreign sovereigns were not included within the definition of “person” despite the explicit reference to corporations and associations existing under the “laws of any foreign country” in the same definition ought to be dispositive under established doctrine governing interpretation of statutes. I therefore see no escape from the conclusion that the omission by Congress of foreign nations was deliberate.

The inclusion of foreign *corporations* within the statutory definition in no sense argues for a different characterization of Congress’ intent. At the time of the passage of both the Sherman and Clayton Acts, foreign sovereigns, even when acting in their commercial capacities, were immune from suits in the courts of this country under the doctrine of sovereign immunity. *See The Schooner Exchange v. M’Faddon*, 7 Cranch 116 (1812); *Ex parte Peru*, 318 U.S. 578 (1943); *Mexico v. Huffman*, 324 U.S. 30 (1945). Foreign corporations, of course, had no such immunity. *See, e.g., Shaw v. Quincy Mining Co.*, 145 U.S. 444, 453 (1891), *In re Hohorst*, 150 U.S. 653, 662-63 (1893). Given that “person” as used in the Clayton and Sherman Acts refers to both antitrust plaintiffs and defendants, *see United States v. Cooper*, 312 U.S. 600, 606, 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. It would be little short of

preposterous to think that Congress in 1890 was concerned about giving such rights to foreign nations, even though it might well decide to do so now.

Respondent's claim that this disparate treatment cannot be justified today when foreign states effectively control many large foreign corporations and when sovereign immunity has been limited by the Foreign Sovereign Immunities Act of 1976, Pub. L. 94-583, 90 Stat. 2891, is not an argument appropriately addressed to or considered by this Court. If revisions in the statute are required to take into account contemporary circumstances, that task is properly one for Congress particularly in light of the sensitive political nature and foreign policy implications of the question.

The Court's reliance on the references to "foreign nations" in §§ 1 and 2 of the Sherman Act and § 1 of the Clayton Act to support an argument that Congress was specifically concerned with foreign commerce and foreign nations in 1890 when the disputed definition was enacted is similarly unavailing. As a threshold matter, 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. The Webb Pomerene Act, ch. 50, 40 Stat. 516, as amended, 15 U.S.C. § 61 et seq., passed within only a few years of the Clayton Act indicates that such a concern may instead be served at the *expense* of foreign states and consumers.¹

In any event, the relevant language of §§ 1 and 2 of the Sherman Act, as subsequently incorporated in the Clayton Act, does not support respondents' contention. The reference to "commerce . . . with foreign nations" appeared only in the final draft of the Act as reported by the Senate Judiciary Committee, and replaced language in the numerous earlier drafts of Senator Sherman to the following effect:

That all arrangements, contracts, agreements, trusts, or combinations between persons, or corporations made with a view, or which tend, to prevent full and free competition in the production, manufacture or sale of articles of domestic growth or production, or the sale of articles *imported* into the United States, . . . are hereby declared to be against public policy, unlawful and void. . . . 21 CONG. REC. 2598 (1890) (first draft) (emphasis added).²

The focus of this language on protecting *domestic* consumers from anti-competitive practices affecting the *importation* of goods into the United States could not be more clear, nor could the absence of any attention to

¹The Webb Pomerene Act exempts certain actions of export associations from the antitrust laws, but the exemption applies only if the association's actions 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 competitor of the association. 15 U.S.C. § 62. Although the Act was subsequently regarded as carving out an exemption from the antitrust laws, the legislative history indicates considerable question at the time whether the conduct of exporters meeting the conditions specified in the Act would have violated the antitrust laws even without the putative exemption. See H. R. REP. NO. 50, 65th Cong., 1st Sess., 2 (1917).

²The equivalent language of subsequent drafts can be found at 21 CONG. REC. 2598-2600.

affording comparable protection for foreign consumers of American exports? The language substituted by the Judiciary Committee—language tracking that appearing in the Commerce Clause—was chosen to mollify the objections of those Senators who felt the proposed statute exceeded Congress' constitutional power to regulate commerce, see, e.g., 21 CONG. REC. 2600, 3147 (1890) (remarks of Sen. George); *id.*, at 3148-49 (remarks of Sen. Reagan); *cf. Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495; *Atlantic Cleaners and Dyers v. United States*, 286 U.S. 427, 434-35 (1932); that language was not intended to work any substantive change in the focus or scope of the Act. *See United States v. Wise*, 370 U.S. 405, 420 (Harlan, J., concurring). To read this language as evidencing an intent to protect foreign nations or foreign consumers simply belies its lineage.

* * *

B.

Finally, the Court's emphasis on the deterrent effects of treble-damage actions by foreign sovereigns also will not withstand critical scrutiny. We acknowledged in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S., at 485-86, that while treble damages do play an important role in deterring wrongdoers, "the treble-damage provision . . . is designed primarily as a remedy." To allow foreign sovereigns who were clearly not the intended beneficiaries of this remedy to nevertheless invoke it reverses this priority of purposes, and does so solely on the basis of this Court's uninformed speculation about some possible beneficial consequences to American consumers of this "maximum deterrent." *Ante*, at 7. In areas of far less political delicacy, we have been unwilling to expand the scope of the right to sue under the antitrust laws without express congressional intent to do so. *See e.g., Hawaii v. Standard Oil Company*, 405 U.S. 251, 264-65.³

For these reasons I dissent from the Court's intrusion into the legislative sphere.

MR. JUSTICE POWELL, dissenting.

I join THE CHIEF JUSTICE in his dissent, and add a word to emphasize my difficulty with the Court's decision.

The issue is whether the antitrust laws of this country are to be made

³The Court adverts to a letter from the Legal Advisor of the State Department to the Court of Appeals advising that no foreign policy problems were anticipated from a decision holding foreign governments to be persons within the meaning of § 4 of the Clayton Act. The significance of this communication escapes me. Nothing in the Constitution suggests legislative power may be exercised jointly by the courts and the Department of State.

available for treble-damage suits against American businesses by the governments of other countries. The Court resolves this issue in favor of such governments by construing the word "persons" in § 4 of the Clayton Act to include "foreign governments." No one argues seriously that this was the intent of Congress in 1890 when the term "persons" was included in the Act. Indeed, the Court acknowledges that this "question was never considered at the time the Sherman and Clayton Acts were enacted." *Ante*, at 4.

Despite this conclusion as to the absence of any congressional consideration, the inviting possibility of treble damages today is extended by judicial action to the sovereign nations of the world.¹ With minor exceptions, the United States recognizes the governments of all of these nations. We may assume that most of them have no equivalent of our antitrust laws and would be unlikely to afford reciprocal opportunities to the United States to sue and recover damages in their courts.

The Court has resolved a major policy question. As the Solicitor General stated in his Memorandum for the United States as *amicus curiae*, filed March 23, 1977:

Whether foreign sovereigns are 'persons' entitled to sue under § 4 depends largely upon the general policy reflected in the statute, and the general policy of the United States opening its courts to foreign sovereigns.

I had thought it was accepted doctrine that questions of "general policy"—especially with respect to foreign sovereigns and absent explicit legislative authority—are beyond the province of the Judicial Branch. If the statute truly reflected a general policy that dictated the inclusion of foreign sovereigns, the Court might be justified in reaching today's result. In *Georgia v. Evans*, 316 U.S. 159 (1942), a clear policy to protect the States of the Union was reflected in the antitrust laws and in the legislative history. The Court could "perceive no reason for believing that Congress wanted to deprive a State, as purchaser of commodities shipped in interstate commerce, of the civil remedy of treble damages which is available to other purchasers who suffer through violation of the Act." 316 U.S., at 162.

Unlike the majority, I do not believe the same can be said with respect to foreign sovereigns. *See ante*, at 9-10. It is not only the absence of specific congressional intent to include them. It is that the predicate for the Court's approach in *Georgia v. Evans* is not present in the case before us. The solicitude that we assume Congress has for the welfare of each of the United States, especially when the subject matter of legislation largely has been removed from the competence of the States and has been entrusted to the United States,

¹At present there are 162 sovereign nations in the world.

cannot be assumed with respect to foreign nations. Putting it differently, it was not illogical for the *Evans* Court to include the States within the reach of § 4, but it is a quantum leap to include foreign governments.

A court, without the benefit of legislative hearings that would illuminate the policy considerations if the question were left to Congress, is not competent in my opinion to resolve this question in the best interest of our country. It is regrettable that the Court today finds it necessary to rush to this essentially legislative judgment.²

²The Court quotes a letter to the effect that "the Department of State would not anticipate any *foreign policy problems*" if § 4 were held to embrace suits by foreign governments. *Ante*, at 11 note 20 (emphasis supplied). But resolution of the issue here depends not only upon foreign policy considerations but also upon considerations relevant to the general welfare of the United States. The latter are quite beyond the concern of the Department of State and should be considered by the Legislative Branch. The international business conducted by American corporations has economic and social ramifications of great importance to our country.

