

## NOTES

### PFIZER, INC. v. GOVERNMENT OF INDIA: THE ABILITY OF FOREIGN GOVERNMENTS TO SUE UNDER SECTION 4 OF THE CLAYTON ACT

#### I. INTRODUCTION

Antitrust legislation in the United States was enacted to promote a free market system.<sup>1</sup> In furtherance of this goal, section 4 of the Clayton Act<sup>2</sup> confers upon persons injured by anticompetitive practices the right to sue for treble damages.<sup>3</sup> Congress imposed this harsh penalty on wrongdoers to deter potential violators and to supply greater enforcement than the government alone could provide.<sup>4</sup> To achieve its purpose, the legislation was made broad in its terms and coverage.<sup>5</sup> Interpretation, application, and development of the Sherman<sup>6</sup> and Clayton<sup>7</sup> Acts were left to the courts.<sup>8</sup> The Acts have been liberally construed with a greater view towards results than judicial exception.<sup>9</sup> Recently the Supreme Court utilized these

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1. In *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958), the Court stated:

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.

See generally *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962); C. KAYSER & D. TURNER, *ANTITRUST POLICY* 11-20 (1959); Blake & Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377, 381-84 (1965).

2. 15 U.S.C. § 15 (1976).

3. "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 . . . and shall recover threefold the damages by him sustained . . ." *Id.* § 4.

4. *Zenith Radio Corp. v. Hazeltine Research Inc.*, 395 U.S. 100, 130-31 (1969); E. TIMBERLAKE, *FEDERAL TREBLE DAMAGE ANTITRUST ACTIONS* 10-11 (1965).

5. *Mandeville Island Farms v. American Sugar Crystal Co.*, 334 U.S. 219, 236 (1948).

6. 15 U.S.C. § 1 (1976).

7. 15 U.S.C. §§ 12-18 (1976).

8. See A. KALES, *CONTRACTS AND COMBINATIONS IN RESTRAINT OF TRADE* 106f (1918); H. THORELLI, *THE FEDERAL ANTITRUST POLICY* 228-29 (1955).

9. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-86 (1977); *FMC v. Seatrains Lines, Inc.*, 411 U.S. 726, 733 (1973); *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 217-18, *modified*, 383 U.S. 932 (1966); *W. Va. v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1087 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971); *Cf. Westinghouse Elec. Corp. v. Pacific Gas & Elec. Co.*, 326 F.2d 575, 580 (9th Cir. 1964) (remedial statutes should be liberally construed).

broad policies in order to allow application of the Clayton Act in treble damage action suits brought by foreign governments.

In *Pfizer, Inc. v. Government of India*,<sup>10</sup> the Court held that foreign governments can sue for antitrust violations committed against them. In *Pfizer*, three foreign governments sued six American pharmaceutical firms alleging that the companies conspired to monopolize and restrain trade in tetracycline, a broad spectrum antibiotic. The companies countered by challenging the right of the foreign governments to sue, contending that sovereigns are not "persons" under the Clayton Act. In its majority decision<sup>11</sup> the Supreme Court upheld the foreign governments' right to sue.<sup>12</sup>

The Court drew upon case law, statutory construction, legislative history, and its interpretation of the purposes behind the antitrust Acts to discern the meaning of "persons" in section 4. The *Pfizer* holding arguably stands for the proposition that foreign governments have standing to sue for treble damages whenever they are injured by anticompetitive practices. Stricter interpretation of *Pfizer* gives foreign governments standing under the Clayton Act only under compelling circumstances. Although the need for compelling circumstances was not directly addressed, the Court stated that the concern of foreign governments for the health and safety of their citizenry gave these countries no choice but to deal with the anticompetitive drug companies.<sup>13</sup> This Note will show that the Court's opinion should be liberally construed, thereby granting foreign governments the right to sue under section 4 of the Clayton Act whenever they are injured by American anticompetitive practices.

## II. PFIZER, INC. v. GOVERNMENT OF INDIA

The governments of India, Iran, and the Philippines brought separate actions against six pharmaceutical manufacturers alleging that the companies conspired to constrain domestic and foreign trade in the manufacture, distribution, and sale of broad spectrum antibiotics, in violation of sections 1 and 2 of the Sherman Act.<sup>14</sup> For

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10. 434 U.S. 308 (1978).

11. Justice Stewart wrote the majority opinion of the Court in which Justices White, Marshall, and Stevens joined. Chief Justice Burger was joined in his dissent by Justice Rehnquist and Justice Powell, who also dissented separately. Justice Blackmun took no part in the decision of the case.

12. 434 U.S. at 308.

13. *Id.* at 318 n.18.

14. 15 U.S.C. §§ 1-2 (1976). Each respondent also sued in a *parens patriae* capacity. Those claims were dismissed in *Pfizer, Inc. v. Lord*, 522 F.2d 612, 615-20 (8th Cir. 1975), cert. denied, 424 U.S. 950 (1976).

practical purposes these actions were consolidated.<sup>15</sup> As an affirmative defense, the drug companies asserted that foreign governments were not "persons" entitled to sue for treble damages. The trial court certified this question for an interlocutory appeal.<sup>16</sup> The United States Court of Appeals for the Eighth Circuit held that foreign nations are "persons" entitled to sue for treble damages.<sup>17</sup> Its decision was affirmed *en banc*.<sup>18</sup>

In affirming the lower court's decision,<sup>19</sup> the Supreme Court relied on the statutory construction of section 4 of the Clayton Act, which states:

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 . . . 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.<sup>20</sup>

The Court's inquiry concerning this section of the Clayton Act centered on the meaning of the word "person." Since there is no legislative history responsive to the definition of "person," the Court examined the broad scope of the antitrust acts. As a result of the Act's

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15. *Pfizer* originated from the "Antibiotic Antitrust Actions," in which a large number of foreign governments sued the drug companies for anticompetitive activities. See *Pfizer, Inc. v. Lord*, 456 F.2d 532, 533-34 (8th Cir.), *cert. denied*, 406 U.S. 976 (1972). These actions were consolidated in *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, Misc. Order No. 74-31 (D. Minn. 1974) and in *In re Coordinated Proceedings in Antibiotic Antitrust Actions*, 333 F. Supp. 315 (S.D.N.Y. 1971). Three interlocutory orders arose from the District Court in Minnesota questioning the ability of foreign governments to sue for treble damages. They were: *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, Misc. Order No. 74-31 (D. Minn. 1974) (*Philippines v. Pfizer, Inc.*); Misc. Order No. 74-37 (D. Minn. 1974) (*Iran v. Pfizer, Inc.*); *In the Coordinated Cases and India*, Misc. Order No. 75-48 (D. Minn. 1974) (*India v. Pfizer, Inc.*). These orders were reviewed by the Court of Appeals for the Eighth Circuit sitting *en banc*, 550 F.2d 396 (8th Cir. 1976). The Supreme Court granted certiorari, 97 S. Ct. 1643 (1977), and subsequently upheld the foreign governments' right to sue, 434 U.S. 308 (1978).

16. 550 F.2d at 397 n.2. The interlocutory appeal was filed pursuant to 28 U.S.C. § 1292(b), which states:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate determination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon . . . permit an appeal . . .

28 U.S.C. § 1292(b) (1970).

17. 550 F.2d at 399.

18. *Id.* at 400.

19. 434 U.S. 308 (1978).

20. 15 U.S.C. § 15 (1976).

remedial purpose, the Court had previously interpreted the law liberally, relying on its purpose, legislative history, and recognized canons of construction.<sup>21</sup>

Upon reviewing these aids of construction, the majority of the Court in *Pfizer* stated that foreign nations have a right to sue under the antitrust laws of the United States. Although legislative history reveals that the Sherman Act was enacted to protect the American people,<sup>22</sup> nevertheless, foreign corporations are included within the meaning of "persons" and are entitled to sue for treble damages.<sup>23</sup> Furthermore, it is questionable whether the direct protection of American citizens was the sole purpose behind the Act. In *Illinois Brick Co. v. Illinois*,<sup>24</sup> the Supreme Court stated that the purposes behind section 4 were to deter violators and to compensate victims for their injuries caused by antitrust illegalities.<sup>25</sup> Granting foreign governments the right to sue creates an additional deterrent to anti-competitive practices, which ultimately benefits the American consumer.<sup>26</sup>

Sovereignty is not a basis for denying treble damage recovery. In *United States v. Cooper Corp.*,<sup>27</sup> the Supreme Court held that the United States could not maintain a treble damage action under section 7 of the Sherman Act.<sup>28</sup> The Court distinguished *Cooper* in *Georgia v. Evans*,<sup>29</sup> where a state was allowed to sue for treble damages. Though specific remedies were given to the United States under the Sherman Act,<sup>30</sup> the states were not afforded any statutory rights. For example, the United States could press criminal charges to deter violation of the antitrust Act, but the states' only basis for recovery was to sue as a "person" under section 4 of the Clayton Act.<sup>31</sup> Foreign governments were considered to be in an analogous position to the states, and, therefore, were granted the right to sue for treble damages.<sup>32</sup>

21. *United States v. Cooper Corp.*, 312 U.S. 600, 605 (1941), quoted in 434 U.S. at 316.

22. See 21 CONG. REC. 2597-2600 (1890).

23. 15 U.S.C. § 12 (1976).

24. 431 U.S. 720 (1977).

25. *Id.* at 746.

26. 434 U.S. at 314.

27. 312 U.S. 600 (1941).

28. *Id.*; see 15 U.S.C. § 15 (1976).

29. 316 U.S. 159 (1942).

30. The United States has the power to criminally prosecute antitrust violators under section 3, to enjoin anticompetitive activity under section 4, and to seize goods in interstate commerce that are in violation of the Act under section 6. 15 U.S.C. §§ 3, 4, 6 (1976).

31. 15 U.S.C. § 15 (1976).

32. 434 U.S. at 318.

In his dissenting opinion in *Pfizer*, Chief Justice Burger stated that neither legislative history nor canons of statutory construction supported the majority's decision that foreign governments had the right to sue for treble damages.<sup>33</sup> Additionally, he argued that the right was not specified in section 4 of the Clayton Act. Congress could have included foreign nations within the definition of "person," but they did not consider the question. Chief Justice Burger was troubled by "[t]he conversion of this silence in 1890 into an affirmative intent in 1978 . . . ."<sup>34</sup> The dissenting justices also questioned the analogy between foreign governments and individual American states, and were unwilling to expand the right of a treble damage remedy without express Congressional approval.<sup>35</sup>

### III. THE MEANING OF "PERSONS"

In *Pfizer*, the Court held that foreign governments are "persons" within the meaning of section 4 of the Clayton Act. The criteria used to interpret the meaning of "person" had been enumerated in a prior case as: "[t]he purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute . . . ."<sup>36</sup> These aids for statutory interpretation were employed by the *Pfizer* Court in reaching its decision.

#### A. Case Law

The Court in *Pfizer* did not question the long-standing common law right of foreign governments to participate as parties in United States courts,<sup>37</sup> nor did it question the position of foreign governments once they are in court.<sup>38</sup> Sovereignty is not a basis for denying foreign governments access to American courts.<sup>39</sup> Indeed, once a government submits itself to an American court it must stand in the same position as a private litigant.<sup>40</sup> The assertion of sovereign im-

33. *Id.* at 326.

34. *Id.* at 324-25.

35. *Id.* at 329.

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

37. See generally *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408-09 (1964); *The Sapphire*, 78 U.S. 164, 167 (1870); *Lehigh Valley R.R. v. Russia*, 21 F.2d 396, 399 (2d Cir.), cert. denied, 275 U.S. 571 (1927); *Swiss Confederation v. United States*, 70 F. Supp. 235, 236 (Ct. Cl.), cert. denied, 332 U.S. 517 (1947).

38. See generally *Alfred Dunhill, Inc. v. Republic of Cuba*, 425 U.S. 682, 704 (1976); *The Foreign Sovereign Immunities Act of 1976*, 28 U.S.C. §§ 1602-1606 (1976).

39. 28 U.S.C. §§ 1602-1606 (1976). See Note, *Sovereign Immunity—Limits of Judicial Control—The Foreign Sovereign Immunities Act of 1976*, HARV. INT'L L.J. 429, 441-43 (1977).

40. *The Foreign Sovereign Immunities Act of 1976*, 28 U.S.C. §§ 1602-1606 (1976). See *Alfred Dunhill, Inc. v. Republic of Cuba*, 425 U.S. 682, 704 (1976).

munity does not act to completely shield a foreign government from liability. Congress has adopted a narrow approach to the doctrine of sovereignty and has denied foreign governments the use of that defense when they act in their proprietary capacity.<sup>41</sup> Once a government subjects itself to the jurisdiction of a court,<sup>42</sup> its liability may be such as to expose it to antitrust claims.<sup>43</sup>

Prior to the Clayton Act, foreign governments acting in their proprietary capacity were able to sue American companies in American courts for unfair competitive practices.<sup>44</sup> In addition, sovereigns have been able to sue under statutes where their rights were not specifically defined.<sup>45</sup> Applying these criteria to *Pfizer*, the absence of specific enabling language in the Clayton Act did not bar the governments from relief in view of the proprietary nature of their actions.<sup>46</sup>

The United States, while acting in its commercial capacity, was denied the right to sue for treble damages under section 7 of the Sherman Act.<sup>47</sup> However, "any person" is allowed to sue under the Clayton Act.<sup>48</sup> "Person" is defined in the legislation "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."<sup>49</sup> In

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41. The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1606 (1976).

42. *Id.* §§ 1605, 1607.

43. See W. FUGATE, *FOREIGN COMMERCE AND THE ANTITRUST LAWS*, 111-14 (2d ed. 1973).

44. See *French Republic v. Saratoga Vichy Spring Co.*, 191 U.S. 427 (1903); *La Republique Francaise v. Schultz*, 94 F. 500 (S.D.N.Y. 1899), *aff'd*, 102 F. 153 (2d Cir. 1900); *City of Carlsbad v. Schultz*, 78 F. 469 (S.D.N.Y. 1897); *City of Carlsbad v. Kutnow*, 68 F. 794 (S.D.N.Y.), *aff'd*, 71 F. 167 (2d Cir. 1895).

45. In *Swiss Confederation v. United States*, 70 F. Supp. 235 (Ct. Cl.), *cert. denied*, 332 U.S. 815 (1947), the court was asked to decide whether a foreign government could sue in the Court of Claims. The court stated:

A foreign government might be unwilling to submit itself to the jurisdiction of the courts of the United States, but if it is willing to do so, we can conceive of no reason why Congress should have intended to prohibit a court established by it from giving to the foreign government the same redress which would be accorded to any other litigant.

*Id.* at 236-37. See *California v. United States*, 320 U.S. 577, 585-86 (1944) (Shipping Act of 1916); *Ohio v. Helvering*, 292 U.S. 360, 369-70 (1934) (revenue statutes); *Ruhl v. Railroad Retirement Bd.*, 342 F.2d 662, 664-66 (7th Cir.), *cert. denied*, 382 U.S. 836 (1965) (Railroad Retirement Act of 1937).

46. See 434 U.S. at 314.

47. *United States v. Cooper Corp.*, 312 U.S. 600 (1941). Section 7 of the Sherman Act was repealed since it was redundant in view of section 4 of the Clayton Act. Act of July 7, 1955, ch. 283, § 3, 69 Stat. 283. See S. REP. No. 619, 84th Cong., 1st Sess. 2 (1955).

48. 15 U.S.C. § 15 (1976).

49. 15 U.S.C. § 12 (1976).

*Cooper*,<sup>50</sup> the Court held that the United States did not fall within this definition: "in common usage, the term 'person' does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it."<sup>51</sup> It was reasoned that if Congress had intended the United States to be a person it would have specifically included language to that effect. The Sherman Act contains two distinct causes of action, one for the individual and one for the government.<sup>52</sup>

Although the United States was denied standing to sue for treble damages, the Court allowed individual states to do so in *Evans*.<sup>53</sup> *Cooper* was distinguished as deciding only the rights of the United States: "It was not held that the word 'person,' abstractly considered, could not include a governmental body."<sup>54</sup> Specific remedies were granted to the United States by the Sherman Act. For example, the United States may obtain an injunction, prosecute criminally, and seize those goods in interstate commerce which were in violation of the Act.<sup>55</sup> Since they were given specific relief, it seemed illogical to include the United States in provisions of the Act where they were not mentioned.<sup>56</sup> By these measures, Congress granted the United States an adequate remedy to deter anticompetitive activity. However, if the states were denied standing to sue they would be left without any redress.<sup>57</sup> The Court in *Evans* could find no reason why Congress would deprive a state purchaser a remedy which was available to other purchasers.<sup>58</sup>

The *Pfizer* Court found foreign governments to be in an analogous position to the states whenever such governments were victimized by anticompetitive practices within the United States. Both have as their sole remedy a suit for treble damages. The *Pfizer* Court reworded its declaration in *Evans*, substituting the words "foreign nations" for "states":

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50. 312 U.S. 600 (1941).

51. *Id.* at 604 (footnote omitted).

52. *Id.* at 606, 608.

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

54. *Id.* at 161.

55. 15 U.S.C. §§ 3, 4, 6 (1976).

56. 312 U.S. at 606-07.

57. 316 U.S. at 162.

58. *Id.* at 162-63. See *Cotten v. United States*, 52 U.S. (11 How.) 229 (1850), where the Court stated: "It would present a strange anomaly indeed, if, having the power to make contracts and hold property as other persons, natural and artificial, they were not entitled to the same remedies for their protection." *Id.* at 231.

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].<sup>59</sup>

The dissent did not propose that the analogy between foreign nations and states entitled both political entities to similar relief against anticompetitive activities.<sup>60</sup> Different treatment of the two political units would be supported only if Congress intended different policy considerations toward each. Chief Justice Burger noted that Congress did not consider whether foreign nations or individual American states could sue for treble damages.<sup>61</sup> However, denying American states a remedy would deny surrogate protection of American citizens by the states. Since the primary purpose behind the Sherman Act was to protect the American consumer,<sup>62</sup> a denial of state standing would frustrate antitrust policy. Granting foreign governments the right to sue does not benefit the American consumer directly nor frustrate the law's purpose. Chief Justice Burger noted additionally that there is an important difference between states and foreign nations.<sup>63</sup>

Foreign nations possess their own effective redress against American anticompetitive practices.<sup>64</sup> Unhampered by the doctrines of federalism, foreign governments are free to enforce their own antitrust laws. Though their own laws are contained by jurisdictional limitations, they still represent a viable remedy not available to American states. Chief Justice Burger concluded by stressing the economic differences between individual states and foreign nations. Foreign nations often engage in anticompetitive activities. It presents a strange anomaly to protect foreign nations from practices in treble damage remedy within the antitrust Acts was to encourage cannot act in contravention to federal antitrust policies.<sup>66</sup>

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59. 434 U.S. at 318, *citing* 316 U.S. 159, 162-63 (1942).

60. 434 U.S. at 326.

61. *Id.*

62. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-86 n.10 (1977).

63. 434 U.S. at 327-28.

64. *Id.* at 327.

65. *Id.*

66. *See Northern Securities Co. v. United States*, 193 U.S. 197, 332, 334-47 (1904). *But*



The majority in *Pfizer* did not directly refute Chief Justice Burger's dissent. However, the Court stated in a footnote that boycotts and cartels are not "available to a foreign nation faced with monopolistic control of the supply of medicines needed for the health and safety of its people."<sup>67</sup> It can be argued that only under compelling circumstances can foreign governments sue for treble damages. However such a strict reading of the *Pfizer* opinion defies the Court's reasoning in *Evans*.<sup>68</sup> Foreign governments are in an analogous position to that of the states. Each state can sue under its own antitrust laws against anticompetitive practices.<sup>69</sup>

In *Evans* the Court held that states can sue for treble damages under the Sherman Act. The question of whether an adequate state remedy existed was not addressed. The *Pfizer* decision is only consistent with the *Evans* holding when construed liberally. Although the *Pfizer* decision is not clearly supported by case law, a study of the legislative history of the antitrust acts provides added support for the Court's holding.

### B. Legislative History

Congress did not consider the rights of foreign governments when it enacted the Sherman and Clayton Acts.<sup>70</sup> Congress' concern was domestic—to foster competition within the American market.<sup>71</sup> Although the Court in *Pfizer* found the legislative history of the acts inconclusive as to foreign state standing, it was able to use the legislative background to delineate and explore congressional purpose more precisely. Though protection of an American free market economy was the purpose behind the antitrust laws, the Court reasoned that this purpose was not dispositive. A definition of "persons" which included foreign corporations indicated broader congressional purpose than mere domestic protection. In his dissenting opinion, Chief Justice Burger stated that there was no legis-

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see *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Parker v. Brown*, 317 U.S. 341 (1943) (cases where the Court has found certain state actions to be exempt from the federal antitrust laws). For limitations on this doctrine, see *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). See generally L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST*, 731-39 (1977); see also Note, *The Commerce Clause and State Antitrust Regulations*, 61 COLUM. L. REV. 1469 (1961).

67. 434 U.S. at 318 n.18.

68. 316 U.S. 159 (1942).

69. See State Laws, 4 TRADE REG. REP. (CCH) ¶ 30,000 (1977).

70. 434 U.S. at 312; 316 U.S. at 162; 312 U.S. 600, 604 (1941).

71. See A. KALES, H. THORELLI, *supra* note 8.

lative support for the majority's opinion. If Congress intended foreign governments to sue for treble damages it would have included nations within the definition of "person." It is not the Court's function to speculate about supposed congressional intent when the issue in question was admittedly never considered.<sup>72</sup>

The legislative environment at the time of the passage of the Sherman and Clayton Acts sheds little light on congressional intent.<sup>73</sup> In 1871 Congress enacted statutes which defined general terms, in a sense creating its own dictionary.<sup>74</sup> At first, "person" was defined to include body politics and corporate beings.<sup>75</sup> Body politics was later deleted from the definition because the word was too comprehensive.<sup>76</sup> Congress did not believe that governments were "persons" in the general sense of the word.<sup>77</sup> It is highly questionable whether this intent was still controlling twenty years later when the Sherman Act was passed. Today there still exists a general definition of "person."<sup>78</sup> However, the Supreme Court has never looked to the general definition to define "person" in the antitrust Acts.<sup>79</sup> Sovereigns have also been allowed to sue under legislation where "person" is not defined to include body politics.<sup>80</sup> Legislative history is a tool the courts may use to discern congressional intent. Yet it is often not persuasive or clear. An examination of the antitrust

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72. 434 U.S. at 329.

73. See 550 F.2d 396, 399-400 (8th Cir. 1976), *aff'd*, 434 U.S. 308 (1978).

74. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 536 (1947).

75. Act of June 27, 1866, ch. 140, 14 Stat. 74-75.

76. Act of Feb. 25, 1871, ch. 71, 16 Stat. 431-32. See Final Report of The Commission to Revise and Codify the Laws of the United States 11 (1909).

77. Blackstone defined "person" to include body politics:

Persons also are divided by the law into either natural persons, or artificial. Natural persons are such as the God of nature formed us, artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or body politic.

1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 122 (rev. ed. 1871), *quoted in* *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 92 (1934).

78. "[T]he words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies as well as individuals." 1 U.S.C. § 1 (1976).

79. See 434 U.S. at 313; *Georgia v. Evans*, 316 U.S. 159 (1942); *United States v. Cooper Corp.*, 312 U.S. 600 (1941); *Chattanooga Foundry v. Atlanta*, 203 U.S. 390 (1906).

80. See *California v. United States*, 320 U.S. 577, 585 (1944) (Shipping Act of 1916); 316 U.S. at 161 (Sherman Act); 203 U.S. at 396; *United States v. General Elec. Co.*, 209 F. Supp. 197, 207 (E.D. Pa. 1962) (Clayton Act). *Contra*, *Greenspan v. Crosbie*, [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,780 (S.D.N.Y. 1976) (1934 Securities Act). Here, however, legislative intent is clear.

statutes and their construction may help define the meaning of "person."

### C. Statutory Construction

The *Pfizer* Court stated, "[t]he word 'person' . . . is not a term of art with a fixed meaning wherever it is used . . ." <sup>81</sup> Examination of a statute in its entirety is more reliable than overly mechanical or technical approaches. <sup>82</sup>

Statutes employing the term "person" will not ordinarily be construed to include the sovereign. <sup>83</sup> The Court employed this presumption to deny the United States the right to sue for treble damages. <sup>84</sup> This presumption originated in the English common law immunity of the crown and was adopted by American jurisprudence. <sup>85</sup> *Cooper* relied on *United States v. Fox*, <sup>86</sup> where the Court, in defining "person" in a New York State statute, stated:

The term 'person' as here used applies to natural persons, and also to artificial persons,—bodies politic, deriving their existence and powers from legislation,—but cannot be so extended to include within its meaning the Federal government. It would require an express definition to that effect to give it a sense thus extended. <sup>87</sup>

However, this presumption has not always been applied. In *Stanley v. Schwalby*, <sup>88</sup> the Court held that the word "person" in a statute would include the United States as a body politic and corporate being. <sup>89</sup> In determining whether states or municipalities could sue under the Sherman Act the presumption raised in *Fox* was not controlling. <sup>90</sup>

Other rules of statutory construction do not clarify whether the meaning of "person" should be extended to the sovereign. In *United States v. Wise*, <sup>91</sup> the Court stated that statutes should be construed

81. 434 U.S. at 315.

82. *Id.* at 313.

83. *United States v. United Mine Workers*, 330 U.S. 258, 275 (1947); *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941); *United States v. Fox*, 94 U.S. 315, 321 (1876). *But see Stanley v. Schwalby*, 147 U.S. 508, 517 (1893).

84. 312 U.S. at 604-05.

85. 3 C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 62.01 (4th ed. 1974).

86. 94 U.S. 315 (1876).

87. *Id.* at 321.

88. 147 U.S. 508 (1893).

89. *Id.* at 517.

90. *See Georgia v. Evans*, 316 U.S. 159, 161 (1942) (states); *Chattanooga Foundry v. Atlanta*, 203 U.S. 390, 396 (1906) (municipalities).

91. 370 U.S. 405 (1962).

with reference to the circumstances existing at the time of passage.<sup>92</sup> Since a sovereign's right to sue for treble damages was not considered at the time of passage,<sup>93</sup> this rule does not provide assistance.

Another rule that is inconclusive is that a foreign sovereign should be placed in the same position as a body corporate.<sup>94</sup> Applying this presumption to the antitrust statutes, however, results in two opposing conclusions. In *Pfizer*, Justice Stewart found that foreign governments and states were in an analogous position,<sup>95</sup> while Chief Justice Burger believed that foreign nations should be compared with the United States.<sup>96</sup>

A number of statutory rules of construction could preclude sovereign nations from being considered as within the meaning of "person." One such rule is that the inclusion of the specific will exclude the unspecified.<sup>97</sup> If one applies this presumption to the antitrust statutes it would follow that sovereigns should be excluded. However, if one applies a different presumption, the unspecified term—sovereign—may fall within the definition of "person." In defining "person," the Clayton Act used the word "include."<sup>98</sup> The term "include" indicates that the listing is descriptive rather than restrictive.<sup>99</sup> The *Pfizer* Court relied upon this presumption,<sup>100</sup> which is also consistent with the ruling of the Court in *Evans*.<sup>101</sup> If sovereigns were excluded from the definition of "persons," the states could not have been granted standing to sue for treble damages.

In his dissent, Chief Justice Burger stated that the Court will not rewrite ambiguous legislation without finding support in the legislative history.<sup>102</sup> The Court could not follow this presumption

92. *Id.* at 411.

93. *Pfizer, Inc. v. Government of India*, 550 F.2d 396, 399-400 (8th Cir. 1976) (Ross, J. concurring), *aff'd*, 434 U.S. 308 (1978).

94. *Guaranty Trust Co. v. United States*, 304 U.S. 126, 134-35 n.2 (1938).

95. 434 U.S. at 313-14.

96. *Id.* at 321-22.

97. *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974); *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929).

98. "The word 'person' or 'persons' wherever used in this Act shall be deemed to include . . ." 15 U.S.C. § 12 (1976).

99. *Cf. Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941); *Helvering v. Morgan's, Inc.*, 293 U.S. 121, 125 n.1 (1934) (both cases construe tax statutes).

100. "The Sherman and Clayton Acts each provide that the word person 'shall be deemed to include . . .' 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." 434 U.S. at 312 n.9.

101. 316 U.S. 159 (1942).

102. 434 U.S. at 325; See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210-11 (1976); *United States v. Cooper Corp.*, 312 U.S. at 606.

without disaffirming its holding in *Evans*. In 1914, prior to the *Evans* case, Congress specifically rejected an amendment authorizing state attorney generals the right to enforce the antitrust statutes.<sup>103</sup> Denying individual states the same rights as those possessed by the United States left the individual states without a clear statutory remedy. The presumption that such a display of legislative intent precluded an expansion of Sherman Act jurisdiction is not supported by case law.<sup>104</sup>

In *United States v. South-Eastern Underwriters Ass'n*,<sup>105</sup> upon examining the Sherman Act, the Court said, "[l]anguage more comprehensive is difficult to conceive. On its face it shows a careful studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states."<sup>106</sup> The statutory scheme is broad and comprehensive. Exceptions to the antitrust laws are construed narrowly and should be limited unless explicitly sanctioned by Congress.<sup>107</sup> In one such limitation, the Webb-Pomerone Act,<sup>108</sup> Congress drafted a narrow exception to the antitrust laws for export activity which otherwise would violate the Sherman Act.<sup>109</sup> However, Congress did not specifically exclude foreign nations from the Act.<sup>110</sup> The antitrust laws are remedial in nature and as such are broadly construed.<sup>111</sup>

103. 51 CONG. REC. 14519-27 (1914), cited in 316 U.S. at 161.

104. See 316 U.S. 159 (1942); *Chattanooga Foundry v. Atlanta*, 203 U.S. 390 (1906).

105. 322 U.S. 533 (1944).

106. *Id.* at 553.

107. See *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973); *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 217-18, modified, 383 U.S. 932 (1966).

108. 15 U.S.C. §§ 61-66 (1976).

109. *Id.* § 62. The Act exempts export trade associations from the antitrust laws as long as the associations do not substantially lessen American domestic competition. In *Pfizer*, the majority and dissent used the Webb-Pomerone Act in support of their positions. Compare 434 U.S. at 314 n.12 with 434 U.S. at 323 n.1.

110. The Clayton Act includes foreign corporations within its definition of "person." 15 U.S.C. § 12 (1976). The Webb-Pomerone Act excludes foreigners in a limited fashion. Congress has never specifically addressed the rights of foreign governments. However, Congress was conscious of them in the aforementioned acts. Through these indirect actions it does not appear that Congress intended to hamper foreign governments' rights.

111. See *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948); *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553 (1944); *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1087 (2d Cir.), cert. denied, 404 U.S. 871 (1971); *Westinghouse Elec. Corp. v. Pacific Gas & Elec. Co.*, 326 F.2d 575, 580 (9th Cir. 1964). See also L. SULLIVAN, *supra* note 66, at 14. Interpretation and enforcement of the antitrust acts were left to the ongoing adjudication of the courts. As the litigated questions became more novel, the courts left the common law and relied on the legislative heritage and purpose behind the Act.

The *Pfizer* Court chose a reasonable path in granting foreign governments antitrust standing; to do otherwise would frustrate the purpose behind the Acts. The purpose and not the literal words should be followed.<sup>112</sup> In light of the Court's expansive reading of the antitrust acts, the *Pfizer* decision should be liberally construed. There are no rules of construction which demand a reading of the antitrust acts that centers on the remedies available. The Court found the two purposes behind section 4 of the Clayton Act to be deterrence of violators and compensation of victims.<sup>113</sup> Only a broad interpretation of the *Pfizer* decision would satisfy these goals fully. Exceptions to the Clayton Act are to be strictly construed<sup>114</sup> since there is no congressional mandate limiting the rights of foreign governments to sue for treble damages. Therefore, the *Pfizer* opinion should be liberally interpreted.

The canons of construction, like the legislative history, are inconclusive as to the precise meaning of "person." Stronger guidelines are found in examination of the policy behind the antitrust statutes and the effect of international enforcement on the United States.

#### D. Policy

In *Pfizer*, the Court said that denial of foreign plaintiffs' standing would defeat the two purposes of the antitrust Acts.<sup>115</sup> Violators would keep the "fruits of their illegality," and the foreign governments would remain uncompensated.<sup>116</sup> The Court believed that business conduct outside the United States could affect economic activity within this country.<sup>117</sup> The reason Congress included the treble damage remedy within the antitrust Acts was to encourage individuals to sue, thereby increasing the deterrent effect of the

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112. *United States v. Trucking Ass'n*, 310 U.S. 534, 543 (1940).

113. 434 U.S. at 314; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 420 U.S. 477, 485-86 (1977); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968).

114. See *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973); *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 217-18, *modified*, 383 U.S. 932 (1966).

115. 434 U.S. at 314.

116. *Id.*

117. In footnote 14, the Court stated that it is possible that denying foreign governments the right to sue may adversely effect the American consumer by contributing to inflation, encouraging monopoly pricing, and allowing antitrust violators to accumulate illegal profit. This result was suggested by Velvel, *Antitrust Suits by Foreign Nations*, 25 CATH. U.L. REV. 1, 7-8 (1975). 434 U.S. at 315 n.14.

law.<sup>118</sup> Greater deterrence affords more protection to the American consumer.

Proscribed business conduct outside the United States has been regulated by American antitrust statutes in the past.<sup>119</sup> In *United States v. Timken Roller Bearing Co.*,<sup>120</sup> the United States brought an action against a domestic corporation for conspiring with foreign corporations to restrain trade.<sup>121</sup> It was also held in *United States v. United States Alkali Export Ass'n*<sup>122</sup> that the price fixing of alkalis outside the United States constituted a Sherman Act violation.<sup>123</sup> In both cases, the anticompetitive activity had the potential to adversely affect the American economy.<sup>124</sup> Both cases also aided in deterring future violators by increasing antitrust prosecution. The *Pfizer* Court adhered to the principle that the American market would be further damaged by this anticompetitive activity.<sup>125</sup> In a similar and related case, *In re Antibiotic Antitrust Actions (Kuwait v. Chas. Pfizer & Co.)*<sup>126</sup> a federal district court addressed the issue of whether it was essential to allow foreign governments to sue for treble damages to effectively enforce the antitrust laws. The court answered the question by stating that "the fundamental goals of the antitrust laws could be seriously frustrated by not permitting Kuwait to maintain a treble damage action for damages resulting from the alleged conspiracy."<sup>127</sup> It was also noted that a successful monopoly controls both the domestic and the foreign market.<sup>128</sup> In *Pfizer* the pharmaceutical companies had control of both of these markets.<sup>129</sup>

In his dissent in *Pfizer*, Chief Justice Burger stated his belief

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118. See *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968). See, e.g., *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648 (1969); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969); *Radiant Burners, Inc., v. Peoples Gas Light & Coke Co.*, 364 U.S. 655, 659-60 (1961); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948).

119. See generally W. FUGATE, *supra* note 43, at 144-72.

120. 83 F. Supp. 284 (N.D. Ohio 1949), *modified & aff'd*, 341 U.S. 593 (1951).

121. 83 F. Supp. at 294.

122. 86 F. Supp. 59 (S.D.N.Y. 1949).

123. *Id.* at 66-68. But see the Webb-Pomerone Act, sections 1-6, 15 U.S.C. §§ 61-65 (1976), where price-fixing abroad by United States exporting companies is allowed with government approval.

124. If the price-fixing activity were not present in the foreign market it might be possible to import the products into the United States and at least create greater competition.

125. 434 U.S. at 315 n.14.

126. 333 F. Supp. 315 (S.D.N.Y. 1971).

127. *Id.* at 316-17.

128. *Id.*

129. 434 U.S. at 310.

that foreign nations have adequate remedies available to counter antitrust activity without relying on American law. However, although foreign nations can enact their own antitrust statutes,<sup>130</sup> this may not provide an adequate solution. Foreign governments would have to overcome jurisdictional<sup>131</sup> and political problems,<sup>132</sup> as well as possible retaliatory measures by American companies. When foreign governments are forced to purchase American commodities because they have a critical need and lack an alternative product or market, this becomes an even more untenable solution.<sup>133</sup> The respondents in *Pfizer* had the choice of either buying price-fixed goods or denying their citizens medicine. Boycotting the American pharmaceutical market was not a realistic alternative.

Chief Justice Burger would not condone granting treble damage actions to foreign governments when they participate in the price-fixing of their own goods on the world market.<sup>134</sup> To affix the criterion of permitting only governments with "clean hands" the right to sue under the antitrust Acts is not within the Court's discretion.<sup>135</sup> First, in allowing foreign governments to sue, an additional deterrent is added to stem antitrust activity within the United States.<sup>136</sup> Second, once a foreign government steps into an American court to assert a claim, it may be subject to counterclaims.<sup>137</sup> Whether a

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130. *Id.* at 315 n.14. It is interesting to note that the respondents India and the Philippines have enacted antitrust legislation. See India Monopolies and Restrictive Trade Practices Act, (1969), 14 INDIA A.L.R. MANUAL 657 (1972); PHILIPPINES REV. PENAL CODE art. 186 (1972).

131. Chief Justice Burger admitted that there are jurisdictional problems; however, he did not believe the problems were insurmountable. 434 U.S. at 327.

132. Nations that have a socialistic or communistic market structure could not, without altering their economic philosophy, enact antitrust statutes. Antitrust statutes are designed to foster a free market system which is based on the following assumptions: (1) a large number of noninfluential buyers and sellers; (2) each seller's product is undifferentiated and indistinguishable from any rival seller's product; (3) there are no barriers to market entry; (4) no artificial restraints on supply, demand, price, or mobility exist; and (5) each buyer and seller has complete market information. J. KOCH, INDUSTRIAL ORGANIZATION AND PRICES 17 (1974).

133. 434 U.S. at 318 n.18.

134. *Id.* at 328.

135. See *Id.* at 320-21. Justice Powell, in his dissenting opinion, questioned the right of the Court to decide an issue of such international consequences. The Court's decision fell within its constitutional powers. However assessing foreign governments' morality is not. If the Court required "clean hands" to enter into litigation, Justice Powell's dissent would certainly be applicable.

136. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968); E. TIMBERLAKE, *supra* note 4.

137. See *Alfred Dunhill, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976); The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1605(a),(b), 1607 (1976).



court decides to hear those claims depends on the sovereign immunity<sup>138</sup> and act of state doctrines.<sup>139</sup> If the American defendant was directly injured<sup>140</sup> by the foreign nation's anticompetitive proprietary activity,<sup>141</sup> he could invoke the Sherman and Clayton Acts.

A narrow interpretation of the *Pfizer* decision would limit the beneficial effect of deterring anticompetitive activity. It would also hamper American courts by forcing them to decide when foreign governments were compelled to enter the American market to obtain vital goods. Extended litigation to determine compelling need would benefit neither the American public nor the foreign governments.

The policy behind antitrust legislation does not hinge on whether another remedy is available. The Sherman Act supplements the common law.<sup>142</sup> Indeed, the drafters of the Sherman Act believed that they were clarifying those illegal acts that were prohibited at common law.<sup>143</sup> Treble damage actions were included within the Act to encourage individuals to sue,<sup>144</sup> and not to supply the sole redress for victims of anticompetitive activity. Limiting foreign governments access to the courts would be in contravention of the broad purpose behind antitrust legislation.

#### IV. CONCLUSION

The underlying purpose of antitrust legislation is to protect the American ideal of a free market economy.<sup>145</sup> In particular, section 4 of the Clayton Act granting a treble damage remedy attempts to deter violators and compensate victims of anticompetitive activity.

138. 28 U.S.C. §§ 1605 (a), (b), 1607 (1976).

139. The act of state doctrine dictates that every sovereign respect the laws and independence of every other sovereign, and not sit in judgment of its internal acts. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 72-74 (1977); *New York Times Co. v. City of New York Comm'n on Human Rights*, 41 N.Y.2d 345, 352-53, 361 N.E.2d 963, 968-69, 393 N.Y.S.2d 312, 317-18 (1977).

140. The drug companies in *Pfizer* could not have sued, (for example, respondent Iran) for fixing the price of oil because they did not directly purchase oil from Iran. The Court, in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), held that indirect purchasers cannot collect for passed on damages caused by antitrust violations.

141. A foreign government does not have the right to exercise sovereign immunity when acting in its proprietary capacity. *Alfred Dunhill, Inc. v. Republic of Cuba*, 425 U.S. 682, 693-94 (1976).

142. See H. THORELLI, *supra* note 8, at 226-29.

143. See Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221 (1956).

144. *Zenith Radio Corp. v. Hazeltine Research Inc.*, 395 U.S. 100, 130-31 (1969); E. TIMBERLAKE, *supra* note 4.

145. C. KAYSEN & D. TURNER, *supra* note 1.

The *Pfizer* decision arguably satisfies these goals by allowing foreign governments to sue for antitrust violations.

The decision, however, will require further judicial refinement in order to ascertain its full scope. A broad interpretation, allowing foreign governments to sue without restriction, as opposed to the narrower view, restricting standing to compelling circumstances, will further the purposes behind the antitrust Acts. The Acts do not require a plaintiff to come into court with "clean hands." It should not be within the purview of the Court to decide the compelling need of a foreign government.

*Jannet L. Gurian*