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Pfizer, Inc. v. Government of India: An Irreconcilable Interpretation of Section 4 of the Clayton Act as Applied to Sovereign Foreigns.

I. INTRODUCTION

In January 1978, the Supreme Court decided the case of Pfizer, Inc. v. Government of India (hereinafter Pfizer). The Court had the opportunity, for the first time, to consider the question of whether a foreign government is entitled to bring a treble damages action under section 4 of the Clayton Act. The resolution of this issue rested on the determination of a foreign government's status as a 'person' within the meaning of section 4 of the Clayton Act. By

1. 434 U.S. 308 (1978). Although a number of articles have already been written on the Pfizer decision, only one has critically examined the opinion with respect to the statutory interpretation of section 4 of the Clayton Act and this was done by counsel for the Philippines. See Houser and Rigler, Antitrust and the Foreign Government Trader: The Impact of Pfizer, Inc. v. Government of India, 10 LAW & POLICY INT'L BUS. 719 (1978). The remaining articles merely regurgitate the background and holding of Pfizer and only occasionally do they even mention the analytical problems with the Court's decision. See, e.g., Note, Antitrust - Treble Damages - A Foreign Sovereign is a Person Entitled to Sue Under Section 4 of the Clayton Act, 10 VAND. J. TRANSNAT'L L. 333 (1978); Note, Private Actions by Foreign Governments Under the U.S. Antitrust Laws, 10 LAW AM. 609 (1978); Recent Development, Antitrust: Standing for Foreign Governments - Pfizer, Inc. v. Gov't of India, 434 U.S. 308 (1978), 10 CASE W. RES. J. INT'L L. 833 (1978); Recent Decisions, Antitrust - Standing to Sue - A Foreign Nation Otherwise Entitled to Sue in the Courts of this Country is a 'Person' within the Meaning of Section 4 of the Clayton Act, and thus Entitled to Sue for Treble Damages Under the Federal Antitrust Laws, 18 VA. J. INT'L L. 370 (1978); Note, Standing for Foreign Gov'ts - Pfizer, Inc. v. Gov't of India, 434 U.S. 308 (1978), 19 HARV. INT'L L. J. 701 (1978); Casenote, Foreign Sovereigns as Private Antitrust Plaintiffs: Pfizer, Inc. v. Gov't of India, 20 B. C. L. REV. 411 (1979); 4 BROOKLYN J. INT'L L. 287 (1978); Recent Developments, Antitrust Law - Clayton Act - Foreign Nations are 'Persons' within the Meaning of the Clayton Act, 8 GA. J. INT'L L. 950 (1978).

This comment will present an analytical discussion of section 4 in terms of the legislative intent expressed at the time of its enactment.

resolving this issue in the affirmative, the Court accorded foreign governments standing to sue in U.S. courts under the antitrust laws.

In Pfizer, the governments of India, Iran, and the Philippines (hereinafter

3. The Court's use of the word 'standing' is used as an equivalent of 'protected by the statute' and is not used to denominate the traditional notion of standing. At the present time, no Supreme Court case has enunciated a test for antitrust standing. However, the circuit courts are not in agreement as to this test and have applied four different 'impact' tests.

The first test, the 'direct injury' test, was first exposed in Loeb v. Eastman Kodak Co., 183 F. 704 (3d Cir. 1910). This test requires a showing of 'direct' and 'primary' injuries resulting from the defendant's antitrust violations and those plaintiffs whose injuries are remote, indirect or inconsequential are denied standing. See Reibert v. Atlantic Richfield Co., 471 F.2d 727, 731 (10th Cir. 1973).

The 'target area' test allows standing only when it can be shown that the plaintiff is within the area of the economy which is threatened by a breakdown of competitive conditions. See In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122 (9th Cir. 1973), cert. denied sub nom., Morgan v. Automobile Mfrs. Ass'n, Inc., 414 U.S. 1045 (1973). The Second Circuit seems to apply a much narrower version of this test by requiring that the plaintiffs themselves were the intended 'targets' of the anticompetitive act. The Ninth Circuit, on the other hand, extends standing to those plaintiffs who the defendant's actions were reasonably foreseen to affect. Compare Fields Production, Inc. v. United Artists Corp., 432 F.2d 1010 (2d Cir. 1970), cert. denied, 401 U.S. 949 (1971) with Mulvey v. Samuel Goldwyn Productions, 433 F.2d 1073 (9th Cir. 1970), cert. denied, 402 U.S. 923 (1971).

The third test, the 'zone of interest' test, was adopted by the Sixth Circuit in Malanud v. Sinclair Oil Corp., 521 F.2d 1142 (6th Cir. 1975). This test requires a showing that the plaintiff's interests are 'arguably within the zone of interests to be protected by the statute or constitutional guarantee in question.' Id. at 1151, quoting Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153 (1970). Therefore, the Clayton Act grants standing to a person 'injured in his business or property by reason of anything forbidden in the antitrust laws.' 15 U.S.C. § 15 (1976).


Recently, the Ninth Circuit has adopted a tripartite analysis: first some effect on American foreign commerce must be shown; second, a greater restraint may have to be shown to demonstrate that a sufficiently large effect is present and therefore the presence of an antitrust injury; and finally, a determination of whether the interests of, and contacts with, the United States outweigh these same considerations as applied to other nations for purposes of extraterritorial authority. Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 613 (9th Cir. 1976).


The Pfizer decision provoked an immediate response in the 95th Congress. Bills to overturn or modify the decision were introduced in both the House and Senate. H.R. 11942, 95th Cong., 2d Sess. § 3 (1978), would have prohibited suits by foreign nations altogether. The Senate response, S. 1874, 95th Cong., 2d Sess. § 3 (1978), would have limited recovery to actual damages and further required a certification by the Attorney General that 1) the United States is entitled to sue in its own name and on its own behalf on a civil claim in the courts of such foreign sovereign and 2) such foreign sovereign by its own laws prohibits restrictive trade practices. See generally H.R. REP. NO. 95-1397, Part I, 95th Cong., 2d Sess. (1978) (hereinafter cited as HOUSE REPORT); Clayton Act Amendments of 1978: Hearing on Section 3 of H.R. 11942 Before the Subcomm. of International
Respondents) brought separate antitrust treble damages actions in various Federal District Courts against six pharmaceutical companies (hereinafter Petitioners). The actions were consolidated for trial in the United States District Court for the District of Minnesota. The various complaints alleged


Efforts in the Senate in the 96th Congress have again attempted to reach a balance between absolute entitlement and a total prohibition of suits by foreign sovereigns. S. 300, 95th Cong., 2d Sess. § 3 (1979), parallels various bills introduced into the Senate in the 95th Congress. See S. REP. No. 96-239, 96th Cong., 1st Sess. (1979). As reported out of the Judiciary Committee, this bill reads in relevant part:

SEC. 3. Section 4 of the Clayton Act is amended by adding at the end of that section the following new language: Provided, however, that suits under this section brought by foreign sovereign governments, departments, or agencies thereof, shall be limited to actual damages; and provided further, that no foreign sovereign may maintain an action in any court of the United States under the authority of this section unless its laws would have forbidden the type or category of conduct on which the action is based if that conduct had occurred within its territory at the time it occurred in the United States, and unless its laws allow the Government of the United States to recover damages caused by such conduct through the judicial or administrative processes of the foreign sovereign.

This type of approach seems to be the most realistic from a politically acceptable point of view. See International Relations Hearings, supra, at 4; HOUSE REPORT, supra, at 312.

5. The pharmaceutical firms involved were Pfizer, Incorporated, American Cyanamid Company, Bristol-Myers Company, Squibb Corporation, Olin Corporation, and Upjohn Corporation.

6. Similar actions were also brought by Spain, South Korea, West Germany, Columbia, Kuwait, and the Republic of Vietnam. Pfizer, 434 U.S. at 309 n.1. The latter two have had decisions reported relevant to the issue of standing.

The action filed by Kuwait was attacked on the ground that Kuwait, as a foreign government, lacked standing under section 4 of the Clayton Act. In re Antibiotic Antitrust Actions, 333 F. Supp. 315, 316 (S.D.N.Y. 1971). The District Court in New York denied the motion. Its determination was based on the theory that a suit by a foreign government would add to the effective enforcement of the antitrust laws. Id. at 316. However, Kuwait stipulated to dismissal prior to an appellate decision.

The suit brought by the Republic of Vietnam was dismissed by the United States District Court in Minnesota. This was affirmed on appeal. Republic of Vietnam v. Pfizer, Inc., 556 F.2d 892 (8th Cir. 1977). Dismissal was grounded upon the fact that the Republic of Vietnam had ceased to exist, in law or in fact, as a state or government and that the United States had, as yet, not recognized any representative as the official sovereign in what was known as South Vietnam. Id. at 893-94; see Pfizer, Inc. v. Lord, 522 F.2d 612, 613 n.3 (8th Cir. 1975).

In June 1975, the Department of Justice requested the advice of the Department of State regarding the position of the executive branch towards the Government of South Vietnam. Specifically, the inquiry concerned 1) whether the United States recognized the Government of the Republic of South Vietnam; 2) If not, did the United States recognize any Government as the official representative of South Vietnam; and 3) Whether any special circumstances might occur so as to warrant suspension rather than dismissal of the action on the behalf of South Vietnam. E. McDowell, DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW 30-31 (1975).

In response, the Department of State answered:

We wish to advise you that the answer to all three questions is no. The Government of the Republic of Viet-Nam has ceased to exist, and therefore the U.S. no longer recognizes it as the sovereign authority in the territory of South Viet-Nam. The U.S. has not recognized any other government as constituting such authority. Whether,
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 sections 1 and 2 of the Sherman Act. Each Respondent claimed that it had been impaired in its business or property as a purchaser of antibiotics by the alleged antitrust violations and sought treble damages under section 4 of the Clayton Act on its own behalf and on behalf of several classes of foreign purchasers of antibiotics.

...
The Petitioners asserted, as an affirmative defense to the complaints, that the Respondents as foreign nations were not 'persons' entitled to commence an action under the antitrust laws. The District Court found no indication of a Congressional intent to foreclose a foreign nation, as a purchaser of commodities shipped in foreign commerce, from a civil remedy of treble damages which is available to other foreign purchasers who suffer harm as a result of a violation of the Act. The Court of Appeals affirmed, relying upon the analysis of the District Court and the fact that "civil suits by foreign sovereigns have long been recognized in the Federal Courts." The Supreme Court granted certiorari to resolve this issue.

In a five to three decision the Court held that foreign governments are 'persons' within the meaning of section 4 and that therefore they have standing to sue in U.S. courts. Writing for the majority, Justice Stewart first indicated that although the question of whether a foreign government is a 'person' as the Act, see H.R. REP. NO. 94-499, 94th Cong., 1st Sess. (1975), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2572-96.

The 1976 Act appears to question the validity of Pfizer, Inc. v. Lord today. Although the court ruled a remedy not afforded a domestic state is an equally inappropriate remedy for a foreign government, it was suggested that a foreign government should be entitled to a remedy that is available to a domestic state. Pfizer, Inc. v. Lord, 522 F.2d at 619. The issue here, just as it is in the section 4 standing issue, is whether a Congressional intent to include foreign governments in the remedy can be fostered from the statute, legislative history, subject matter, context and executive interpretations. For a brief analysis of these factors, see Comment, Representative Antitrust Suits by Foreign Nations: A Cause without a Cause of Action, 8 CAL. W. INT'L L. J. 562 (1978). Cf. Comment, "Parens Patriae" Suits by Foreign Governments: Foreign Governments Possessing Only a Proprietary Interest in an Antitrust Treble Damage Action Cannot Sue "Parens Patriae" for Injury to Their Citizens, 16 VA. J. INT'L L. 437 (1975).

10. See id. at 311; Pfizer, Inc. v. Government of India, 550 F.2d 396 (8th Cir. 1976).
12. Pfizer, Inc. v. Government of India, 550 F.2d at 397. The general rule is that foreign nations are entitled to bring suit in U.S. courts. See The Sapphire, 78 U.S. (11 Wall.) 164 (1871); Guaranty Trust Co. v. United States, 304 U.S. 126 (1938); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); First Nat. City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972). One exception arises when the foreign nation is at war with the United States. This principle is codified in the Trading with the Enemy Act, 50 U.S.C. App. § 2(b) (1976), which defines 'enemy' as including "the government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, agent, or agency thereof." In Sabbatino, the Court noted that a recognized foreign nation may resort to U.S. courts if it has any relationship with the United States short of war. 376 U.S. at 409.

A second exception occurs when the foreign nation is not recognized by the United States. See note 5 supra. Guaranty Trust held that the recognized representative of a foreign nation is to be determined by the executive branch. This determination is conclusive on all domestic courts. 304 U.S. at 137-38. The Supreme Court has expressly rejected proposals that the severance of diplomatic relations, 'unfriendly' relations, or lack of reciprocity should deny a foreign nation the right to sue in U.S. courts. Sabbatino, 376 U.S. at 408-11.

this term is used in section 4 is covered neither explicitly by any statutory provision nor implicitly by any legislative history, Congress intended the word to have a broad and inclusive meaning in accordance with the antitrust laws' expansive remedial purpose. The Court then found that the application of the treble damages remedy to foreign interests was not precluded by the antitrust laws. This analysis was based upon the inclusion of foreign corporations in section 1 of the Clayton Act, which defines the word 'person' and upon the extension of this statute to trade with foreign countries. Since a foreign nation can be the victim of anti-competitive practices in the same manner as a private person or domestic state, the Court reasoned that Congress could not have intended to deny foreign nations the treble damages remedy available to others injured through violations of the antitrust laws.

In Pfizer, the Court for the first time squarely confronted the unresolved issue of the scope of the treble damages remedy of section 4 of the Clayton Act as applied to foreign governments. In discussing the significance and impact of Pfizer, this Comment will analyze the Court's holding in light of the purpose, subject matter, context and legislative history of the U.S. antitrust laws. First, it will set out the manner in which foreign interests have normally been brought within the reach of U.S. laws and the manner in which the Supreme Court has applied the definition of 'person' in the Sherman and the Clayton Acts in two cases involving the United States and the State of Georgia as sovereign plaintiffs. Second, it will discuss the case with regard to the Court's analysis of the language of the statutes involved, the purpose behind the statutes, and the Court's reliance on precedent. Finally, this Comment will analyze the basis for the Court's holding in Pfizer in the light of the antitrust laws' ultimate aim of benefitting American interests. The author will conclude that the Court's reliance on distinguishing cases that involved a sovereign's right to treble damages is misplaced and that treble damage suits by foreign governments are not necessary to effectuate either the compensatory or deterrent elements of the antitrust laws.

II. THE BASIS FOR HOLDING THAT FOREIGN SOVEREIGNS ARE 'PERSONS'

The Pfizer Court needed to lay a foundation upon which to build a conclusion with respect to foreign governments and section 4 of the Clayton Act. The next three subsections briefly describe existing doctrines of law in the United States from which the Pfizer Court based its decision.

15. Id. at 312.
16. Id. at 313-15.
17. See § III. A infra for the text of § 1 of the Sherman Act.
18. See note 7 supra.
19. Id. at 318.
20. Id. at 313; see also United States v. Cooper, 312 U.S. 600, 605 (1941); Georgia v. Evans, 316 U.S. 159, 161 (1942).
A. The Extraterritorial Application of the U.S. Antitrust Laws: Subject Matter Jurisdiction

United States courts have long acknowledged Congressional authority to regulate foreign relations of the United States. When Congress identifies specific conduct outside the United States to which a statute applies, a court is bound to follow the Congressional direction unless this would violate the due process requirement of the Fifth Amendment. However, most legislation is drafted to deal with some problem existing in the United States, and little or no consideration is given to applying the statute extraterritorially. Therefore, courts are constantly required to decide the scope of the statute involved and thereby determine if the court has subject matter jurisdiction.

Subject matter jurisdiction is a threshold question in any antitrust dispute. This issue was first addressed by the Supreme Court in American Banana Co. v. United Fruit Co. Mr. Justice Holmes wrote that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done." Since the conduct that was alleged to have caused injury to American Banana was committed by the Costa Rican government, and thereby lawful by definition within its own jurisdiction, it would be impossible to prove that United Fruit

25. This issue should not be confused with the determination of a substantive offense under the antitrust laws. See Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 102 (C.D. Cal. 1971), aff'd, 461 F.2d 1261 (9th Cir.), cert. denied, 409 U.S. 950 (1972); Rasmussen v. American Dairy Association, 472 F.2d 517, 521-524 (9th Cir. 1972), cert. denied, 412 U.S. 950 (1973).
26. 213 U.S. 347 (1909). United Fruit, before the formation of American Banana, engaged in conduct with the intent to control and monopolize the banana trade. Id. at 354. Such conduct included purchasing the property and business of many of its competitors and making agreements with other competitors to regulate the quantity to be purchased and the price to be paid. Id. In 1904, American Banana bought a banana plantation in Panama along with the right to build a railway. One month later, at the 'instigation' of United Fruit, the Costa Rican government seized American Banana's plantation and supplies and stopped the construction and operation of the railway. Id. at 354-55. The land, through two separate transactions, ended up in the possession of United Fruit. Id.

As a result of the defendant's act the plaintiff has been deprived of the use of the plantation, and the railway, the plantation and supplies have been injured. The defendant also, by outbidding, has compelled producers to come to its terms, and it has prevented the plaintiff from buying for export and sale. This is the substantial damage alleged.

Id. at 355.
27. Id. at 356. "The acts causing the damage were done, so far as appears, outside the jurisdiction of the United States and within that of other states. It is surprising to hear it argued that they were governed by the act of Congress." Id. at 355.
violated the antitrust laws. At no point in the opinion did the Court discuss the effect upon U.S. commerce.

However, the primary factor in any determination of subject matter jurisdiction under the antitrust laws subsequent to *Addyston Pipe & Steel* has been whether the conduct adversely affects the commerce of the United States. In *United States v. American Tobacco Co.* the Court invalidated an agreement, executed in England, between a number of American companies and two English corporations to limit their business to their respective countries. The

28. Id. at 358.

This last formula, i.e., "substantial and foreseeable", is very similar to the Restatement (Second) of Foreign Relations Law of the United States § 18 (1965):

A State has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either

a) the conduct and its effect are generally recognized as constituent elements of crime or tort under the law of States that have reasonable developed legal systems, or

b) (i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by States that have reasonably developed legal systems.

Id.

31. 221 U.S. 106 (1911).
32. Id. at 172. Division of markets are now per se violations of section 1 of the Sherman Act. See Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899) (division of markets are unreasonable restraints under the Sherman Act); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); United States v. Topco Associates, Inc., 405 U.S. 596 (1972).
substantial impact of the agreement on competition in U.S. commerce persuaded the Court to find the division of markets illegal under sections 1 and 2 of the Sherman Act.\textsuperscript{33}

These early decisions demonstrate that the antitrust laws "may apply, not only to conduct in this country, but also to acts abroad, performed by an American firm acting alone or in concert with foreign firms with such substantial effects upon American foreign commerce as amount to unreasonable restraints, attempts to monopolize, or monopolization."\textsuperscript{34} The classic statement defining the extent to which the antitrust laws may be applied to actions committed abroad was expressed in \textit{United States v. Aluminum Co. of America}, (hereinafter \textit{Alcoa}).\textsuperscript{35} "It is settled law...that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends."\textsuperscript{36}

In \textit{Alcoa}, it was alleged that Alcoa, an American corporation, and Aluminum Limited, a Canadian company owned by Alcoa, had conspired with French, Swiss and British ingot producers to restrain the interstate and foreign commerce of the United States in violation of the Sherman Act.\textsuperscript{37} Despite the fact that the parties were neither U.S. citizens nor corporations and that the alleged illegal conduct occurred in its entirety outside the United States, the Court held that the antitrust laws were violated since the agreements were not only intended to substantially affect American imports, but such activities were coupled with actual injurious affects.\textsuperscript{38}

Nevertheless, a discussion of the vagaries of comity was espoused by the

\begin{itemize}
  \item \textsuperscript{33} \textit{American Tobacco}, 221 U.S. at 184. Similarly, the Supreme Court in \textit{United States v. Sisal Sales Corp.}, 274 U.S. 268 (1927), emphasized the "forbidden results within the United States," at 276. The trial court had dismissed the complaint finding \textit{American Banana} controlling. The Supreme Court reversed finding "the circumstances of the present controversy...radically different from those presented in \textit{American Banana Co. v. United Fruit Co.}..." The Court went on to explain that:
  \begin{quote}
Here we have a contract, combination and conspiracy entered into by parties within the United States and made effective by acts done therein. The fundamental object was control of both importation and sale of sisal and complete monopoly of both internal and external trade and commerce therein. The United States complain of a variation of their laws within their own territory by parties subject to their jurisdiction, not merely of something done by another government at the instigation of private parties.
  \end{quote}
  \item \textsuperscript{34} \textit{REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS} 70 (1955) (footnotes omitted).
  \item \textsuperscript{35} 148 F.2d 416 (2d Cir. 1945).
  \item \textsuperscript{36} \textit{Id.} at 443.
  \item \textsuperscript{37} \textit{Id.} at 442. Alcoa was found not to be a part of this 'Alliance,' and it "did not join in any violation of \$3 of the [Sherman] Act, so far as concerned with foreign commerce." \textit{Id.}
  \item \textsuperscript{38} \textit{Id.} at 443-44. "Both agreements would clearly have been unlawful, had they been made within the United States; and it follows from what we have just said that both were unlawful, though made abroad, if they were intended to affect imports and did affect them." \textit{Id.} at 444.
\end{itemize}
Pfizer Court at the expense of a more realistic analysis of any injurious effect upon U.S. commerce and section 4 of the Clayton Act.39

Generally, the laws of the United States have no effect beyond the boundaries of the sovereign from which their power is derived.40 The extent to which these laws may be permitted to operate within the dominion of another nation is subject to the principle of comity. Comity in the legal sense "is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other." 41 It is the approbation which one nation accords to the conduct of another nation with respect to its laws, emphasizing both an international duty and convenience, and the rights of individuals who, as a matter of course, are under the protection of its laws.42 It has long been the policy of the United States that foreign sovereigns or foreign persons who have claims of a civil nature against any person in the United States may institute suit in U.S. courts.43 "To deny him this privilege would manifest a want of comity and unfriendly feelings."44 However, whether a foreign government has standing to sue under a specific statute depends upon the interpretation of the statute itself.45

In Pfizer the Supreme Court did not recognize any legislative history with respect to, nor any specific language in, the U.S. antitrust laws which provided any guidance for determining whether foreign governments are 'persons' within section 4 of the Clayton Act.46 The Court relied principally on case law to determine the effect that the 'sovereign' attribute has on allowing a treble damage suit by foreign governments. The Supreme Court had considered the inclusion of a sovereign within the ambit of the antitrust laws on two prior occasions and had reached two different results.

39. For the relation between jurisdiction and international law, see I. Brownlie, Principles of Public International Law, 291-314 (2d ed. 1976); 6 M. Whiteman, Digest of International Law 118-83 (1968).
41. Id. at 163-64; see Sábato, 376 U.S. at 409; Guaranty Trust, 304 U.S. 126 (1938).
42. When an action is brought in a court of [the United States] by a citizen of a foreign country against [a citizen of the United States], to recover a sum of money adjudged by a court of that-country to be due from the defendant to the plaintiff, a judgment is prima facie evidence, at least of the matter adjudged; and the judgment is conclusive upon the merits tried in the foreign court. Hilton v. Guyot, 159 U.S. at 205. This is prima facie evidence only, and not conclusive of the merits of the claim if by the law of the foreign country judgments of the courts of the United States are not recognized as conclusive. Id. at 227-28.
43. See The Sapphire, 78 U.S. (11 Wall.) 164 (1870); Sábato, 376 U.S. at 409; Guaranty Trust, 304 U.S. 126 (1934).
45. Pfizer, 434 U.S. at 311.
46. Id. at 312.
B. United States v. Cooper

In United States v. Cooper (hereinafter Cooper) the word 'person' in the Sherman and Clayton Acts was said not to create a "hard and fast rule of exclusion" of governmental bodies. Cooper held that the United States was not a 'person' entitled to bring suit for treble damages. The reasoning was simple and straightforward. The Sherman Act provides separate and distinct remedies for the United States on the one hand, and suits for treble damages granted to redress private injury on the other. Although the United States is a juristic person and is therefore ordinarily entitled to all legal remedies available to any other party, the Court pointed out that the Sherman Act created new rights and remedies which would be accorded only to those upon whom they had been specifically conferred by the Act. The issue before the Court was whether Congress intended the United States to come within the ambit of the phrase 'any person.' Writing for the Court, Justice Roberts opined that the common usage of the phrase 'any person' denied inclusion of a sovereign "[b]ut there is no hard and fast rule of exclusion." He relied heavily on the scheme and structure of the Sherman Act as well as upon its legislative history.

The opinion in Cooper noted that sections 1 through 6 of the Sherman Act, as they appeared in 1941, dealt with criminal and civil remedies of the United States. The only other substantive section was section 7, which provided a civil action for an injury to property rights. The Court felt compelled to rely on

47. 312 U.S. 600 (1941). The United States had brought a civil action under the predecessor of section 4 of the Clayton Act (Act of July 2, 1890, ch. 647, § 7, 26 Stat. 210) against the Cooper Corporation and 17 other defendants to recover treble damages. United States v. Cooper, 31 F.Supp. 848 (S.D.N.Y.), aff'd, 114 F.2d 413 (2d Cir. 1940). The complaint alleged that the injuries resulted from an agreement to fix prices in violation of the antitrust laws. United States v. Cooper, 114 F.2d at 413.

48. Cooper, 312 U.S. at 604-05.


51. Cooper, 312 U.S. at 604.

52. Id.

53. Id. at 603-04.

54. Id. at 604-05. "The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate, by the use of the term, to bring a state or nation within the scope of the law." Id. at 605.

55. Id. at 605-08.

56. Id. at 608. "It seems evident that the [Sherman] Act envisaged two classes of action —
this specific intent of exclusion in order to hold that the United States should not be awarded the same treble damages remedy that was available to a private litigant. 57

The legislative history of the Sherman Act persuaded the Court that the Act was not intended to provide the United States a civil action for treble damages. The original proposed bill was introduced by Senator Sherman on December 4, 1889 and was immediately referred to the Committee on Finance. 58 The bill, as reported out of the Committee on Finance, was made up of two sections: section 1 provided for various civil actions to be brought by the United States and section 2 provided a double damages remedy for private citizens of the United States. 59 When Senator Hoar rewrote the bill, 60 he retained section 2 of the bill — increasing the recoverable damages to treble and renumbering the section as ‘section 7’. 61

The Court held the text of the Sherman Act,

taken in its natural and ordinary sense, makes against the extension of the term ‘person’ to include the United States, and that the usual aids to construction, taken together, instead of inducing the contrary conclusion, go to support the view that Congress did not use the word [with the intention of including the United States]. 62

those made available only to the Government, which are first provided in detail, and, in addition, a right of action for treble damages granted to redress private injury. 57 Id.

57. Id.

58. The bill, S.1, 51st Cong., 1st Sess. (1889), was read twice and then referred to the Committee on Finance. See 21 CONG. REC. 96 (1889).

59. Sections 1-7 of the Sherman Act, as enacted originally, were revised editions of Senator Sherman’s proposed bill. The proposed bill had read in relevant part:

Section 1

[And the circuit court of the United States shall have original jurisdiction of all suits of a civil nature at common law or in equity arising under this section, and to issue all remedial process, orders, or writs proper and necessary to enforce its provision. And the Attorney General and the several District Attorneys are hereby directed, in the name of the United States, to commence and prosecute all such cases to final judgment and execution.

Section 2

That any person or corporation injured or damned by such arrangement, contract, agreement, trust or combination defined in the first section of this Act may sue for and recover, in any court of the United States of competent jurisdiction, without respect to the amount involved, of any person or corporation a party to a combination described in the first section of the Act, twice the amount of damages sustained and the costs of the suit, together with a reasonable attorney’s fee.

S.1, 51st Cong., 1st Sess. (1889) (as reported out of the Committee on Finance), reprinted in 1 TOULMIN, A TREATISE ON THE ANTITRUST LAWS OF THE UNITED STATES 5 (1949).

Senator Sherman asserted that the right to sue for double damages under the proposed § 2 (the enacted § 7) provided a purely personal remedy. 21 CONG. REC. 2564 (1890).


61. See Cooper, 312 U.S. at 612.

62. Id. at 614.
In other words, the Sherman Act, itself, in conjunction with the Congressional debates on the Sherman and Clayton Acts afforded the Court clear evidence that Congress affirmatively intended to exclude the United States from the treble damages remedy.\textsuperscript{63}

C. \textit{Georgia v. Evans}

The second case, \textit{Georgia v. Evans} (hereinafter \textit{Evans})\textsuperscript{64} was decided the very next term.\textsuperscript{65} It conferred the treble damages remedy, denied to the United States in \textit{Cooper}, upon all domestic states.\textsuperscript{66} In \textit{Evans}, as in \textit{Cooper}, a mechanical definition of 'person' was not applied and the entire statutory context was considered.\textsuperscript{67}

However, the Court had to distinguish \textit{Cooper} in order to reach its conclusion. The Court determined that \textit{Cooper} was limited to a very narrow issue: whether Congress intended the United States to be included within the phrase 'any person' therefore having the right to maintain a treble damages action on its own behalf. "It was not held that the word 'person,' abstractly considered, could not include a governmental body."\textsuperscript{68} The inclusion or exclusion of each entity depends upon its legislative environment.\textsuperscript{69} The considerations which led to the conclusion in \textit{Cooper} were not present in \textit{Evans}. As opposed to denying a remedy to the United States, to deprive the State of Georgia (and all other domestic states) the treble damages remedy 'would deny all redress to a State, when mulcted by a violator of the Sherman Law, merely because it is a State.'\textsuperscript{70} Although this question was not considered during the debates on the antitrust laws, the Court refused to accept the proposition that Congress in-

\textsuperscript{63} While the Clayton Act was before the Senate, the usual type of prosecutions under the Sherman Act were enumerated by Senator Culberson, the Chairman of the committee that reported the bill. Those indicated were criminal prosecutions, suits in equity, and actions for damages and that with respect to government suits under the Sherman and Clayton Acts "there [was] no suit authorized by any of these statutes by the United States except criminal prosecution or a suit in equity. The United States does not bring a suit at law for damages." 51 CONG. REC. 13898 (1914) (remarks of Sen. Culberson).

\textsuperscript{64} 316 U.S. 159 (1942). The State of Georgia had brought an action against certain corporations and individuals to recover treble damages as a result of injuries allegedly caused by a conspiracy to control the sale of emulsified asphalt throughout the United States in violation of the antitrust laws, \textit{Georgia v. Evans}, 123 F.2d 57 (5th Cir. 1941).

\textsuperscript{65} The defendants were American Bitumuls Co., Shell Oil Co., Inc., Emulsified Asphalt Refining Co., Hiram Wesley Evans, a dealer in emulsified asphalt and John W. Greer, Jr., purchasing agent for the State Highway Board of Georgia.

\textsuperscript{66} \textit{Id.} at 162-63. See \textit{Chattanooga Foundry v. Atlanta}, 203 U.S. 390 (1906) (allowing a municipality the treble damages remedy).

\textsuperscript{67} \textit{Evans}, 316 U.S. at 161.

\textsuperscript{68} \textit{Id.}

\textsuperscript{69} \textit{Id.}

\textsuperscript{70} \textit{Id.} at 162-63.
tended to deprive a state of the remedy made available to all other victims of antitrust violations. 71

Preliminarily, these two Supreme Court cases suggest that standing of a foreign sovereign is not necessarily precluded by the antitrust laws. With this in mind, the Pfizer Court opted for the reasoning in Evans and permitted foreign sovereigns the right to seek a private treble damages remedy. 72

III. PFIZER, INC. V. GOVERNMENT OF INDIA

A. The Court's Statutory Analysis

The starting point for the Court's determination in Pfizer was an analysis of sections 1 and 4 of the Clayton Act which define the word 'person' and confer the treble damages remedy on those entities falling within the precisely enumerated categories, respectively. 73 Section 1 provides in relevant part:

The word 'person' or 'persons' whenever used in this act shall be deemed to include 74 corporations and associations existing under or authorized by the laws of either the United States, the laws of any

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71. "Nothing in the Act, its history, or its policy, could justify so restrictive a construction of the word 'person' in [the predecessor to § 4 of the Clayton Act] as to exclude a state." Id. at 162.

72. The Supreme Court in Pfizer maintained that since, as independent considerations, being foreign and being a sovereign nation did not necessarily exclude a foreign government from the protection of the antitrust laws, the only logical conclusion to be drawn was that the antitrust laws were intended to encompass foreign governments. 434 U.S. at 313-18. However, these attributes considered jointly preclude inclusion of a foreign sovereign within the phrase 'any person'. See § III.B infra.

73. See Pfizer, 434 U.S. at 311-12.

74. Although 'includes' is sometimes taken as interchangeable with 'means,' these two terms are not necessarily synonymous. "The natural distinction would be that where 'means' is employed, the term and its definition are to be interchangeable equivalents, and that the verb 'includes' imports a general class, some of whose particular instances are those specified in the definition." Helvering v. Morgan's, Inc., 293 U.S. 121, 125 n.1 (1934). Notwithstanding the reliance placed by the Court in Helvering on what is now I.R.C. § 7701(b) defining 'include' and 'includes' as not excluding other things otherwise within the meaning of the term defined, no issue shall be made of this basic assumption as applied to 'includes' in section 1 of the Clayton Act. Evans lends ample support for such a proposition.

75. Cooper and Evans both lead to the determination that a foreign government shall not be construed as a corporation existing under, or authorized by, the laws of any foreign country.

In Cooper, the Court said in passing that "the argument that the United States may be treated as a corporation organized under its own laws . . . seems so strained as not to merit serious consideration." 312 U.S. at 607. And in Evans, the Court declared that when in . . . [the predecessor to section 1 of the Clayton Act] Congress took the trouble to include as 'persons' corporations organized under the laws of a State, the inference is plain that the State itself was not to be deemed a corporation organized under its own laws, any more than the United States is to be deemed a corporation organized under its own laws.

316 U.S. at 163-64. (Roberts, J., dissenting).

It is inconceivable that Congress could have contemplated the use of the antitrust laws by a foreign government in a manner totally incongruous with that of a domestic sovereign. Cf. Pfizer, Inc. v. Lord, 522 F.2d at 619. The Federal Republic of Germany, as amicus curiae, argued that
Section 4 provides:

That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore 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.77 (emphasis supplied).

The Court, without searching beyond the actual language of section 4, found the phrase 'any person' alone to be insufficient to authorize an action by a foreign government.78 However, the Court found the broad scope of the remedies of the antitrust laws noted in Cooper and Evans and the legislative histories to be persuasive.79

B. The 'Purpose' Basis for the Supreme Court's Decision in Pfizer

The Court noted that the treble damages provision of the antitrust laws served two purposes, neither of which was inconsistent with a suit by a foreign sovereign.80 It was designed to deter violators and to compensate victims for injuries resulting from antitrust violations.81 The broad scope of section 4, the inclusive language used in various cases82 and the legislative history83 were

The Federal Republic of Germany is a corporation under the laws of the Federal Republic of Germany. This point is not subject to doubt or dispute. . . . As a corporation, the Federal Republic is capable of possessing rights, and under the German Civil Procedure Code, has both capacity to sue and corresponding susceptibility to be sued.

Thus, the Federal Republic of Germany does not contend that it may be regarded or should be treated as a corporation, but more simply, that it is a corporation under its own law.


78. Pfizer, 434 U.S. at 312.
79. Id. at 312-13.
80. See id. at 314-15.
82. The Court, in quoting from a previous case, found "[t]he Act . . . comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." Pfizer, 434 U.S. at 312, quoting Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1947).
83. Pfizer, 434 U.S. at 312-13; see also 21 CONG. REC. 2569, 3148 (1890) (remarks of Senators Sherman & George, respectively).
noted by the Court in further support of its conclusion that the term ‘person’ included a foreign government.

As in Cooper and Evans, “[t]he purpose, the subject matter, the context, the legislative history . . . of the statute [were] aids to construction” which indicated the scope of section 4 to the Pfizer Court. However, any argument of exclusion of a foreign government from the broad scope of section 4 must rest either on the attribute of being foreign or being a sovereign nation.

As to the first attribute, being foreign, the Court emphasized that notwithstanding contemporaneous tariff bills, any inference that the antitrust laws were intended to protect only American consumers could not be drawn. Support for this conclusion was found under sections 1 and 2 of the Sherman Act, which enable foreign corporations to sue for treble damages and specify that the antitrust laws extend to trade with foreign countries as well as to trade among the several states.

Additionally, the Court presumed that treble damage suits by foreign nations have beneficial effects for the American consumer. Even if the primary goal of the antitrust laws is to protect American consumers, this does not, ipso facto, preclude the provision of a remedy to foreign nations. The Court noted that the ultimate purpose of the antitrust laws is inapposite to the identity of the parties who are permitted to invoke statutory remedies.

It is clear that the Court was stressing the deterrent effect a treble damage suit is intended to promote. It was held that an exclusion of foreign nations would not only defeat this purpose, but would enable foreign nations to enter into anti-competitive alliances that would ultimately be injurious to the American consumer. If an antitrust violator must account for the total costs of its conduct, American consumers will benefit since corporations would not be permitted to offset domestic liability with exhorbitant prices abroad. For these reasons, the Court was prompted to conclude that foreclosure from the courts of the United States is not compelled by simply being foreign.

The second characteristic, being sovereign, necessitated the consideration of Cooper and Evans. Both of these cases dealt with the status of a sovereign government as a ‘person’ under the antitrust laws and neither applied a

84. Pfizer, 434 U.S. at 313.
85. Id.
87. Pfizer, 434 U.S. at 313-14.
88. Id.; see §§ 1 & 2 of the Sherman Act, note 6 supra.
89. “Treble damage suits by foreigners who have been victimized by antitrust violations clearly may contribute to the protection of American consumers.” Pfizer, 434 U.S. at 314.
90. Id. at 314.
91. Id.
92. Id. at 315.
93. Id.
94. See id. at 316.
mechanical rule in reaching its determination. 95 *Cooper* denied the treble damages remedy to the United States 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." 96 The *Cooper* Court noted the separate and distinct remedies provided in the Sherman Act for the United States on one hand and private litigants on the other. 97

In *Evans*, domestic states were granted the treble damages remedy. "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." 98 The *Pfizer* Court then noted that, unlike a situation involving the United States, deprivation of the treble damages remedy would deny any redress to a state when injured by an antitrust violation. The *Evans* Court found no reason to believe that it was the desire of Congress to deprive a state of the remedy available to all others who are injured as a result of an antitrust violation. 99 The *Pfizer* Court held the reasoning of *Evans* to be applicable to a case involving a foreign sovereign, since the antitrust laws provide no alternative remedies for a foreign nation.

We can perceive no reason for believing that Congress wanted to deprive a [foreign nation], as purchasers of commodities shipped in [international] commerce, of the civil remedy of treble damages which is available to other purchasers who suffer through the 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 162-163. 100

C. The Supreme Court’s Reliance on Precedent 101

Faced with legislative history that did not even contemplate foreign nations, 102 the Supreme Court analyzed the two prior relevant cases, *Cooper* and *Evans*, in seeking to elicit a legislative intent applicable to foreign sovereigns. These two cases dealt with the applicability of the treble damages remedy to sovereigns. *Cooper* denied the United States this remedy because the antitrust laws provided it with other alternatives, whereas the Court in *Evans*
permitted domestic states to pursue this remedy since unlike the United States, the states had been given no other remedies to enforce the prohibitions of the law.\textsuperscript{103} Neither case relied upon an analysis of the word ‘person’ in the statute, but relied instead upon the overall statutory context of the legislation.\textsuperscript{104}

After analyzing the holdings in \textit{Cooper} and \textit{Evans}, the \textit{Pfizer} Court went on to state that it was clear that \textit{Evans} rejected the proposition that all sovereigns are excluded from the word ‘person’ as used in the antitrust laws.\textsuperscript{105} The Court reasoned that the natural consequence of the reasoning used in \textit{Evans} necessarily leads to the conclusion that a foreign government, like a domestic state, comes within the ambit of the phrase ‘any person’ in section 4 of the Clayton Act since it, too, is provided with no alternative remedies under the antitrust laws.\textsuperscript{106} The Court concluded that a foreign sovereign is therefore entitled to sue for treble damages when injured by a violation of the antitrust laws.\textsuperscript{107}

\section*{IV. Analysis of Pfizer}

The \textit{Pfizer} Court incorrectly equates standing for foreign sovereigns under the antitrust laws with the absence of any explicit exclusionary language plus the expansive remedial purpose given to these laws. The Court was unwilling to reach two conclusions: 1) the Congressional attitude embodied in the antitrust laws states, sometimes explicitly, that U.S. consumers were to benefit from foreign commerce, \textit{even if to the detriment of foreigners} and 2) the applicability of the \textit{Evans}’ reasoning is based upon a false proposition, \textit{i.e.}, it is not the case that foreign nations and domestic states are so essentially alike as to warrant similar treatment under the U.S. antitrust laws.

\subsection*{A. The Court’s Statutory Analysis}

The determination in \textit{Pfizer} was based on the interpretation of the statute.\textsuperscript{108} However, the Court failed to find unambiguous any statutory provision or legislative history on the question of whether the phrase ‘any person’ in section 4 includes foreign nations.\textsuperscript{109} In fact “it seem[ed] apparent [to the Court] that the question was never considered at the time the Sherman and Clayton Acts were enacted.”\textsuperscript{110}

\begin{thebibliography}{99}
\bibitem{103} See \textit{Evans}, 316 U.S. at 162.
\bibitem{104} \textit{Pfizer}, 434 U.S. at 313; \textit{Cooper}, 312 U.S. at 605; \textit{Evans}, 316 U.S. at 161.
\bibitem{105} \textit{Pfizer}, 434 U.S. at 318.
\bibitem{106} \textit{Id.}
\bibitem{107} \textit{Id.}
\bibitem{108} \textit{Id.} at 311.
\bibitem{109} \textit{Id.} at 312. Five of the eight judges in the Circuit Court of Appeals also concluded that the issue had not been discussed by Congress during the debates on the Clayton Act. The majority found “Congress, in passing \textsection 4 of the Clayton Act, 15 U.S.C. \textsection 15 (1976), gave no consideration nor did it have any legislative intent whatsoever, concerning the question of whether foreign governments are ‘persons’ under the Act.” \textit{Pfizer}, Inc. v. Government of India, 550 F.2d at 399.
\bibitem{110} \textit{Pfizer}, 434 U.S. at 312.
\end{thebibliography}
It seems that if this were the purpose of the antitrust laws, acknowledged formalities of speech would have led to an explicit reference.111 "In common usage, the term 'person' does not include a [foreign] sovereign and statutes employing this phrase are ordinarily construed as excluding it."112 However, as the Pfizer Court noted, a strict rule of exclusion had never existed within the ambit of statutory interpretation.113 On the contrary, statutory language should be read in its "ordinary and natural sense" and if ambiguity lingers, it is to be resolved through reference to not only the intended policy of the legislation, but through the utilization of all other available aids to construction, including legislative purpose, subject matter, context, legislative history and policy considerations.114

B. The Purpose of the Antitrust Laws Does Not Dictate the Result in Pfizer

The phrase ‘any person’ can be given meaning by inquiring into the nature of the antitrust laws to determine the intended beneficiaries and the proscribed transactions under these laws. Transactions not affecting U. S. commerce, either foreign or domestic, or its citizens do not create liability under the antitrust laws.115 It is submitted that if transactions in foreign commerce with no adverse impact upon domestic trade are not subject to the antitrust laws unless specifically included, it necessarily follows that Congress could not have intended to extend the antitrust laws to foreign governments. This interpretation is especially reasonable in light of the remedies presently available that benefit domestic consumers.116

1. The U.S. Antitrust Laws Were Designed for the Protection of U.S. Citizens

Although the legislative history of the Sherman and Clayton Acts is not very informative on this point, it does provide an indication of the legislative at-

112. Cooper, 312 U.S. at 604. See also United States v. Fox, 94 U.S. 315 (1876).
114. See Pfizer, 434 U.S. at 313; Cooper, 312 U.S. at 605; Evans, 316 U.S. at 161.
115. "An American's conduct in trade among or trade within foreign nations is not of antitrust concern, unless it is found to have prohibited consequences for competition in U.S. export, import or domestic markets." BREWSTER, supra note 27, at 76.
116. "[T]o apply the Sherman Act to a combination of United States firms for foreign activities which have no direct or intended effect on United States consumers or export opportunities would, we believe, extend the Act beyond the point Congress must have intended." Antitrust Guide, supra note 30, at 154.

titude embodied in the antitrust laws. Treble damages for violations of the antitrust laws were first authorized by section 7 of the Sherman Act. Discussions of this section on the floor of the Senate indicate that it was conceived primarily as a remedy for individual United States citizens, especially consumers. When the Clayton Act was under consideration, the House debates addressing the treble damages provisions reveal that these actions were conceived primarily as “opening the door to every man whenever he may be injured by those who violate the antitrust laws.” This type of universal language was used throughout the Clayton Act debates. Such language presents a potent suggestion that the antitrust laws were intended to encompass foreign nations in the absence of explicit exclusionary language.

However, if the Sherman Act contemplated implicit protection of domestic individuals only, it is logical to conclude that the all inclusive language used in the Clayton Act debates was conveyed with a previously limited class in mind. In 1871 a general interpretive statute was enacted by Congress. The statute provided that the word “person” in future legislation “may extend and be applied to bodies politic and corporate. . . .” However, the following year Congress received a report from the commissioners appointed by the President of the United States to revise, simplify, arrange and consolidate all statutes of the United States.

The report criticized the statute of 1871 because it required draftsmen of statutes employing the word “person” to additionally provide for the explicit exclusion of states and foreign governments. The commissioners’ recommendation, therefore, was that the statute be modified so as to remove any

117. Act of July 2, 1890, ch. 647, § 7, 26 Stat. 210. Section 7 reads as follows:

Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damage by him sustained, and the costs of suit, including a reasonable attorney’s fee.

Id.


119. 51 CONG. REC. 9073 (1914) (emphasis added) (remarks of Congressman Webb).

120. See, e.g., id. at 9079, 9270, 9414-9417, 9466-9467, 9487-9495, cited in Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc., 429 U.S. at 486 n.10.

121. “Words having universal scope, such as ‘Every contract in restraint of trade,’ ‘Every person who shall monopolize,’ etc., will be taken as a matter of course to mean only every one subject to such legislation, not all that the legislator subsequently may be able to catch.” American Banana, 213 U.S. at 357.


123. See Act of June 27, 1866, ch. 140, 14 Stat. 74.

This was done to ensure that the extension of the word 'person' in future legislation would not include such governments without explicit inclusion. Congress adopted this recommendation. The revised statute, with which the drafters of the Sherman Act were undoubtedly familiar, provided that "the word 'person' may apply and be extended to partnerships and corporations." One contemporary commentary clearly manifested that the exclusion of foreign governments was an express intention of the provision.

The choice of similar language in section 8 of the Sherman Act appears to exhibit a similar intent to exclude foreign governments. The drafters of the Clayton Act manifested the same purpose by adopting the same language that was used in the Sherman Act. This inference is clear since no language is found in the debates of the Clayton Act to suggest it was to expand the class to which the antitrust laws were applicable.

It follows from this analysis that the language of the Clayton Act debates should be confined to the definitions utilized in the debates on the Sherman Act. In other words, the inclusive language used in the debates on the Clayton Act referred to the class specifically denoted by Congress in 1890 to be the beneficiaries of the Act. Approaching the problem in this manner, it becomes apparent that Congress, by discussing the Clayton Act in such broad and inclusive terms was not including foreign governments. Foreign powers do not belong to the 'universe' to which the phrases such as 'every man' refer.

2. Transactions Having Minimal Impact upon U.S. Commerce Are Not Violations of the Antitrust Laws

Statutes are construed by courts with reference to the circumstances existing at the time of enactment. Since the statutory analysis is not assisted by the legislative history of the Clayton Act, a study of the legislative climate, manifested by the contemporaneous enactment of the Webb-Pomerene Act, is useful in this analysis. The rule of law in existence in the early 1900s con-
sidered voluntary restraints of trade reasonable, and therefore lawful, when no American interest was prejudiced by undue restraints of competition within the United States or obstructions in its export trade.\textsuperscript{133} The argument that any voluntary restraint of trade by American competitors in marketing their goods abroad is a reasonable restraint of trade within the meaning of the antitrust laws was concisely stated in the form of a syllogism by Senator Culberson:

1.) A voluntary restraint of trade, in order to be unreasonable within the meaning of the antitrust acts, must prejudice the public, i.e., American, interest.\textsuperscript{134}
2.) No American interest is prejudiced when American corporations, who are competing in the domestic market in the purchase of raw materials, employment of labor, and the sale of products, eliminate competition voluntarily among themselves in the marketing of their goods in foreign countries.\textsuperscript{135}
3.) Therefore, associations engaged solely in export trade,
regardless of the proportion of a given industry involved, are not illegal under the [antitrust laws].136 [footnotes added].

During the period of the debates on the Webb-Pomerene Act, there were serious doubts as to whether American corporations were prohibited under the antitrust laws from forming joint selling agencies (to conspire under the terms of the antitrust laws) in the export of goods.137 Many lawyers believed they were not; but the doubt surrounding the issue was sufficient to restrain any such effort.138

A further, and possibly more significant, illustration of the jingoistic attitude embodied in the Webb-Pomerene Act and its contemporary legislation, is a statement by Congressman Webb in the House debates that "[he] would be willing that there should be a combination between anybody or anything for the purpose of capturing the trade of the world, if [it does] not punish the people of the U.S. in doing it."139 The legislative atmosphere leaves little doubt about the scope of section 4 of the Clayton Act.

In addition, the Federal Trade Commission corroborated these views in a report submitted to Congress on May 3, 1916.140 It did not believe that by the enactment of the antitrust laws, Congress intended to prevent American competitors from freely engaging in export trade.141 The Commission recommended the enactment of declaratory and permissive legislation to remove the then present doubt as to the law and to definitively establish the legality of such cooperation.142

In this atmosphere, in both the enacting and enforcement branches of government, the Webb-Pomerene Act was passed. The Congressional intent could not be any more explicit: American exports were to be increased at no cost to competition within the United States, or its export trade, by withholding the benefits of competition among American corporations from foreigners. However, it cannot be stressed too lightly that the Webb-Pomerene Act was not designed to lessen the force of the then existing antitrust laws.143 The antitrust laws are applicable not only within the United

137. See Pfizer, 434 U.S. at 323 n.1 (Burger, J., dissenting).
139. 55 Cong. Rec. 3580 (1917) (remarks of Congressman Webb).
140. 53 Cong. Rec. 7285 (1916).
142. Id. at 379.
143. The Webb-Pomerene Act, § 2, 15 U.S.C. § 62 (1976), provides that it shall be illegal for a corporation to "enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein." Id.
States, but their fullest operation is also extended to export associations insofar as they restrain trade within the United States or force U.S. exporters to involuntarily refrain from competing.\footnote{144} However, there should be "no operation whatsoever of any of the antitrust laws against such technical restraints of trade outside the United States as result when U.S. exporters voluntarily combine and cease to compete with one another."\footnote{145} Thus, it is clear that the Sherman and Clayton Acts are concerned only with those practices resulting in anti-competitive conduct in the U.S. export, import or domestic markets. Although the antitrust laws are concerned with foreign commerce,\footnote{146} it is only in the terms of American foreign commerce. Thus, this evidence does not support the conclusion reached in \textit{Pfizer}.

As appears from this brief discussion, the antitrust laws do not contemplate the inclusion of foreigners in the absence of a specific exception or adverse effect upon U.S. trade.\footnote{147} The inclusion of foreign sovereigns within the ambit of 'any person' would be in direct conflict with the meaning and purpose of the antitrust laws. Obviously, Congress would not, and in fact could not, withhold liability for conduct impairing the business or property of a foreign government on the one hand, but then grant the government standing to sue on the other, when it is clear that there would be no claim upon which relief might be granted.\footnote{148}

\footnote{144. The Webb-Pomerene Act maintains that it shall not be a violation of the antitrust laws to engage in a technical restraint "provided such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association." \textit{Id.}}

\footnote{145. \textit{Montague, supra} note 113, at 156.}

\footnote{146. \textit{See} notes 66-68 and accompanying text \textit{supra}.}

\footnote{147. The Sherman Act is not intended to protect foreign consumers against monopoly in their home markets. \textit{See IV.B supra}. Instead, it should encourage the competitive allocation of American resources between foreign and domestic markets. A change in price through the normal mechanism of supply and demand should not be contemplated as creating an adverse result. The focus of attention should be placed upon the competition between the domestic market and export trade, not, in this limited respect, within each.

Whether price changes occur as the result of combinations or normal market forces, they will almost invariably accompany changes in the volume of export trade. This change could be either temporary or permanent. In a competitive market if the price of the commodity increases, but the cost of production remains constant, \textit{i.e.}, the profit for unit of output increases, firms will be induced to enter the industry forcing an increase in production and a reduction in price. \textit{See generally} P. Samuelson, Economics chs. 23 & 24 (10th ed. 1976). However, if the commodity requires a scarce material, a price change will tend to be of a more permanent nature. But the same type of change, although different in degree, will occur regardless of whether the increase in exports was due to export combinations or to the normal responses of a competitive market. Jones, \textit{Extraterritoriality in U.S. Antitrust: An International "Hot Potato,"} 11 Int'l L.J. 415, 424 (1977) ("The case law establishes that the effect on United States commerce must be direct, not just a collateral or after effect"); \textit{see} Rahl, \textit{Foreign Commerce Jurisdiction of the American Antitrust Laws}, 43 Antitrust L.J. 521 (1974).

When trade between the two markets is competitive and prices are permitted to adjust themselves, changes of this nature cannot be said to unreasonably restrain trade.

\footnote{148. Foreign governments, in order to have standing under the Clayton Act, must have suf-}
3. Suits by Foreign Governments Are Not Necessary for the Enforcement of the Antitrust Laws

The final argument espoused by the Pfizer Court in support of its conclusion is that an exclusion of foreign governments from the word 'person' lessens the deterrent effect of treble damages.\(^1\)

The purposes of the treble damages remedy are to provide compensation to victims of an antitrust violation and to supplement the federal government's limited enforcement capacity with private suits so as to deter future violations.\(^{150}\) The issue here is not simply whether a treble damages action by a foreign government is capable of compensating victims and deterring future violations of the antitrust laws, for it is clear that any action, in and of itself, has this potential. But the question of whether these actions actually effectuate the Congressional purposes of the antitrust laws in any significant manner remains unclear. As discussed supra,\(^{151}\) the interests of a foreign government are not among those which Congress sought to protect in the antitrust laws. Furthermore, the Supreme Court has held that section 4 essentially is a remedial provision.\(^{152}\) Although it plays an important role in deterring potential violators, it is, nevertheless, designed primarily as a remedy for the kind of injury Congress sought to prevent.\(^{153}\)

With this in mind, it becomes evident that the allowance of a treble damages remedy to a foreign government will not in any way fulfill the aim of the antitrust laws, i.e., the compensation for injuries to U.S. interests. However, it still remains to be seen whether Congress could have intended a treble damage suit by a foreign government to serve as a deterrent. Section 4 of the Clayton Act is designed to deter prohibited conduct by giving victims of antitrust violations incentive to bring suit. Punitive damages and attorney fees are authorized in order to ensure the effectiveness of the remedy, i.e., to counterbalance "the difficulty of maintaining a private suit against a combination such as is described."\(^{154}\) The inference to be drawn is clear: the treble damages remedy is not the deterrent, rather the maintenance of an antitrust action is. This inference is the primary reason for the distinction between the United States
and private entities since presumably greater resources are available to the former in its pursuit of legal actions. This same presumption, no doubt, applies to foreign governments as well.

Furthermore, it is improbable that Congress would have considered assistance from a foreign government in the enforcement of U.S. laws an appropriate aim, especially in light of the anti-competitive principles espoused by many of those countries. However, Pfizer suggests that foreign governments acting in a proprietary capacity should be accorded the same rights and liabilities as foreign corporations, especially government controlled corporations.

The inclusion of foreign corporations within the statutory definition of 'person' in section 4 merely reflects their susceptibility to suit at the time of enactment of both the Sherman and Clayton Acts. However, foreign governments were immune from suit, even when acting in a commercial capacity. A foreign corporation was given the benefits of the antitrust laws apparently because it was subject to its burden.

In 1890, Congress made a distinction between foreign governments and foreign corporations and it continues to perceive such a distinction. When the Sherman Act was enacted, the treble damages remedy was often characterized as a penalty. Congress, with the passage of the Foreign Sovereign Immunities Act, still recognized the special status of a foreign government. This Act provides that a foreign sovereign, even when acting in a commercial

155. This difference in treatment is a recognition of the difference in the position of the United States and of 'persons' in this connection. Both may recover their actual damages. The damages of 'persons' are trebled so that private persons will be encouraged to bring actions which, though brought to enforce a private claim, will nonetheless serve the public interest in the enforcement of the antitrust laws.


156. "The notion that we should extend even to collectivist socialist states the benefit of our antitrust laws, while they are actively trying to destroy the whole system of free enterprise, is a strange view to be held by our courts." S. REP. NO. 94-934, 95th Cong., 2d Sess. 26 (1978).

157. Pfizer, 434 U.S. at 313.

158. See id. at 322 (Burger, J., dissenting). While this differential with respect to the susceptibility to suit was relevant at the time of enactment, subsequent decisions have tended to ignore this distinction. See, e.g., Evans, 316 U.S. 159 (1941); Parker v. Brown, 317 U.S. 341 (1943) (states not amenable to suits for treble damages).

159. At the time of the passage of both the Sherman and Clayton Acts, foreign sovereigns, even when acting in a commercial capacity, were immune from suits in the United States. See The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116 (1812); Ex parte Peru, 318 U.S. 578 (1943).

160. Cf. Evans, 316 U.S. at 163: "If the word 'person' is to include a State as a plaintiff, it must equally include a State as a defendant or the language used is meaningless." Id. (Roberts, J., dissenting).

161. See 21 CONG. REC. 1765, 1767, 3146 (1890) (remarks of Senators George & Hoar, respectively).

capacity, shall not be liable for punitive damages even though its agency or instrumentality may be so liable. The intent of Congress in 1890 and again in 1915 is obvious: the lack of any consideration of the status of a foreign government under the antitrust laws indicated that they were not entitled to the remedies under these laws. Despite this, the Pfizer Court felt compelled to allow suits by a foreign government as a result of the decision in Evans.

C. Evans and Cooper Do Not Dictate the Result in Pfizer

In the purported absence of any legislative language or history, the Pfizer Court attempted to justify its expansive reading of 'person' by reference to Justice Frankfurter's opinion in Evans which granted the State of Georgia and all other domestic states the right to sue for treble damages. The Court found the analogy of foreign nations to that of the states with respect to the incongruity of leaving the states without any remedy whatsoever under the antitrust laws dispositive.

Unquestionably, confined to the explicit provisions of the antitrust laws, a foreign nation's remedies are comparable to those of a state — they are virtually nonexistent. However, as Justice Berger's dissent in Pfizer correctly notes: "[t]he limited scope of the inquiry in Evans precludes consideration of the manifold and patently obvious respects in which foreign nations and our own domestic states differ — cogent differences bearing on the question under consideration here, though obviously not at all on the Court's inquiry in Evans." Initially, it is necessary to note that the comparison of the two political entities is important only if it can be shown that Congress, by enacting the Sherman and Clayton Acts, intended them to be the recipients of the same remedies against anti-competitive conduct. The denial of a treble damages remedy to domestic states would, as the Evans Court noted, essentially deprive U.S. citizens, the beneficiaries of state action, of the protection mandated by the antitrust laws. But the analogy to Evans used in Pfizer is not only an intolerable strain on the literal language of the antitrust laws, but an insupportable amplification of the legislative histories as well. As has been noted, the legislative histories of the various antitrust laws lend no support, and in

163. As to any claim for relief with respect to which a foreign state is not entitled to immunity . . . the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages.

Id. § 1606.

164. Pfizer, 434 U.S. at 318; see Evans, 316 U.S. at 164.

165. Pfizer, 434 U.S. at 318.

166. Id. at 326 (Burger, J., dissenting).

167. Evans, 316 U.S. at 162.

168. See § III.B supra.
many instances contradict the supposition that states and foreign nations are so essentially alike as to warrant similar treatment under the antitrust laws.\textsuperscript{169}

Second, the Supreme Court's acceptance of the argument that a foreign nation, absent a treble damages remedy, would be denied its only weapon to deter anti-competitive conduct by American corporations is inaccurate.\textsuperscript{170}

This argument is true only with respect to remedies under the laws of the United States. Unlike domestic states, whose actions are confined by the Commerce\textsuperscript{171} and Supremacy Clauses,\textsuperscript{172} a foreign sovereign may, if it so desires, enact and enforce its own comprehensive antitrust laws to satisfy its needs.\textsuperscript{173} In fact, "\textsuperscript{[o]}ne need look no further than the laws of respondents In-

\textsuperscript{169.} The \textit{Pfizer} Court could not have granted foreign nations the treble damages remedy without this presupposition. \textit{See Pfizer, 434 U.S. at 318.}

\textsuperscript{170.} In fact, the antitrust laws and enforcement programs various foreign nations have adopted [or could adopt] may offer a more direct means for redressing unreasonable trade restraints which have their primary impact on the residents of those jurisdictions, but have no significant impact on United States consumer interests or export opportunities.

\textsuperscript{171.} U.S. CONST. art. I, \S 8, cl. 3.

\textsuperscript{172.} Id. art. VI, \S 2.

\textsuperscript{173.} Indeed, many countries either individually or in connection with an association of countries do have comprehensive antitrust laws. India, for example, enacted a statute in 1969 to regulate monopolies and restrictive trade practices. Inida Monopolies & Restrictive Trade Practices Act, 1969, 14 INDIA A.I.R. MANUAL 657 (1972), \textit{reprinted in Singh, The Commercial Laws of India}, in III DIGEST OF COMMERCIAL LAWS OF THE WORLD (G. Kahlik ed. 1979). The main provisions of the Act are —

1) To regulate expansion, mergers and amalgamations, and the appointment of directors in respect of "dominant" undertakings having assets of Rs. 10 million or more and of undertakings, having assets of more than Rs. 200 million in value;

2) To regulate all new undertakings which would become inter-connected undertakings of such existing undertakings and the total assets of which exceed Rs. 200 million;

3) To control and prohibit such monopolistic and restrictive trade practices as are found to be prejudicial to the public interest.

\textit{Id.} For a complete analysis of the Act, \textit{see id.}

Another good example is the Federal Republic of Germany, which filed an amicus brief on behalf of Respondents. The German statute 'Against Restraints of Trade' stresses the importance of domestic commerce as do the U.S. antitrust laws. Neugassung des gesetzes gegen Wettewerbabshrankungen (Act Against Restraints of Competition), April 10, 1974, [1974] BGBI. I 869 (W. Ger.). The provisions of this statute suggest that the attitude towards foreign trade is similar to the views espoused in the legislative history of the Webb-Pomerene Act. \textit{See notes 114-24 supra and accompanying text. Sections 1(1), 6(1) & 98(2) of the German Act read as follows:}

\$ 1(1) Agreements made for a common purpose by enterprises of associations of enterprises and decisions of associations of enterprises shall be of no effect, insofar as they are likely to influence, by restraining competition, production or market conditions with respect to trade in goods or commercial services. This shall apply only insofar as this Act does not provide otherwise.

BGBI. I 869, \textit{reprinted in Germany, Act Against Restraints of Competition}, in 1 GUIDE TO LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES § 1.0 (O.E.C.D. ed. 1979).

\$ 6(1) Section 1 shall not apply to agreements and decisions which serve to protect and
dia and the Philippines for evidence that such remedies are possessed by foreign nations. 174

Finally, there are obvious and dramatic differences in terms of coercive economic power and political interest which distinguish the states of the United States from foreign sovereigns. Anti-competitive practices existing within foreign countries, such as price fixing and boycotts by the Organization of Petroleum Exporting Countries (OPEC), 175 were the primary reasons for the enactment of the Webb-Pomerene Act. This statute was designed to remove any doubt as to the legality of U.S. firms cooperating to gain entrance into and possible dominance of foreign markets. 176 It is unreasonable to presume that Congress contemplated protection of a foreign nation from anti-competitive conduct even when that nation does not support a competitive ideology. 177

to promote exports, insofar as they are limited to regulation of competition in markets outside the area to which this Act applies.

Id. § 98(2). This Act shall apply to all restraints of competition which have effect in the area in which this Act applies, even if they result from acts done outside such area.

Id. As can be seen, the Act applies to any restraint of competition regardless of its origin so long as it has an effect on domestic markets.

What constitutes an "effect in the area in which this Act applies" has not yet been finally clarified. The prevailing view is that this term includes only direct effects on the competitive process or on the economic freedom of enterprises on domestic markets, not however, other indirect economic effects.

Id. § 2.0 at 19.

See REHBINDER, EXTRATERRITORIALE WIRKUNGEN DES DEUTSCHEN KARTELLRECHTS, 112-53 (1965); Judgment of July 12, 1973, Bundesgerichtshof, W. Ger., [1973] BGHZ 203, wherein it was held that Section 98(2) of the Act was not applicable to export cartels when they are found not to have an effect on the domestic market. Markert, Recent Developments in German Antitrust Law, 43 FORDHAM L. REV. 697 (1975).


174. Pfizer, 434 U.S. at 327 (Burger, J., dissenting).

175. For an excellent analysis of the Arab boycott under both international law and the U.S. antitrust laws, see CONFERENCE ON TRANSNATIONAL ECONOMIC BOYCOTTS & COERCION (Merisky & Papers eds. 1976).

On December 29, 1978 the International Association of Machinists & Aerospace Workers (IAM) filed a complaint against OPEC and its members individually alleging a price fixing contract, combination and conspiracy. International Machine and Aerospace Workers v. Organization of Petroleum Exporting Countries, No. 78-5012 (C. D. Cal., filed Dec. 29, 1978). The case was dismissed, but the Court gave both parties two months in which the IAM was to amend its complaint and OPEC was to more fully develop its sovereign immunity argument. On the second time around, the case was again dismissed, 48 U.S.L.W. 2257 (1979).

176. See § IV. B.2 supra.

177. A foreign nation's anticompetitive practices are not, ipso facto, a bar to a treble damage
Viewed in this light, the considerations necessary to make an informed determination in *Pfizer* were drastically different than those facing Justice Frankfurter in *Evans*. The inference to be drawn from the Court’s analysis in *Pfizer* is unmistakable: a “hard and fast rule of inclusion” has been substituted for the “hard and fast rule of exclusion” avoided by the Court in both *Cooper* and *Evans*.178

V. CONCLUSION

This Comment has examined *Pfizer* in light of the purpose, subject matter, context and legislative history of U.S. antitrust laws as well as the Court’s reliance on two prior cases that involved the right of a sovereign to treble damages. The Supreme Court acknowledged that the sole issue to be decided in *Pfizer* was one of statutory interpretation, *i.e.*, are foreign sovereigns ‘persons’ within section 4 of the Clayton Act.179 Even though the Court recognized no statutory provision nor legislative history directed towards this issue, the Court responded in the affirmative.180 The Court supported its opinion by relying upon the purpose that Congress should have enacted or would have had it recognized the problem in 1890.181
The decision represents an "undisguised exercise of legislative power . . . not only plainly at odds with the language of the statute but also with the legitimate history and precedents of [the Supreme Court]." In this regard, it can be said that the Supreme Court has violated its own rules on judicial restraint in expanding the scope of the Clayton Act beyond the statutory language without the clear expression of Congressional intent.

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182. Pfizer, 434 U.S. at 320 (Burger, J., dissenting).
183. See Illinois Brick v. Illinois, 431 U.S. 720 (1977); Gulf Oil Corp. v. Corp. Paving Co., 419 U.S. 186 (1974); Hawaii v. Standard Oil Co., 405 U.S. 251 (1971). In this connection it must be noted that Congress has been much more receptive to legislatively expanding a narrow interpretation of the antitrust laws by the Supreme Court than to narrowing an expansive reading. In fact, while Congress has amended the antitrust laws a number of times to overrule or modify a narrow holding by the Supreme Court, see notes 4, 8, 49 & 50 supra, it has never criticized the Court for expanding the rights and remedies available under the antitrust laws.