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Reciprocity: A Workable Standard for Foreign Government Antitrust Standing

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NOTES

RECIPROCITY: A WORKABLE STANDARD FOR FOREIGN GOVERNMENT ANTITRUST STANDING?

The ability of a foreign government to maintain a suit for treble damages under United States antitrust laws remains unclear despite the 1978 Supreme Court decision in *Pfizer v. India*.[1] The *Pfizer* Court held that a foreign government is a "person" within the meaning of section four of the Clayton Act,[2] and, therefore is capable of instituting an antitrust action. Since that decision, Congress has repeatedly attempted to limit the standing of a foreign government in antitrust suits by imposing a reciprocity requirement[3] on section

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

2. § 4 of the Clayton Act provides a private right of action for treble damages:

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

Clayton Act § 4, 15 U.S.C. § 15 (1976). Section 7 of the Sherman Act first authorized antitrust actions for treble damages. Ch. 647, 26 Stat. 210 (1890). The Sherman Act, considered the essence of antitrust law in the United States, prescribes the violations upon which an action under § 4 of the Clayton Act may be based. The Sherman Act states, in part:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .
>
> Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Sherman Anti-Trust Act §§ 1-2, 15 U.S.C. §§ 1-2 (1976).

3. This Note uses the term "reciprocity" in the antitrust context to refer to the imposition of any standing requirements on a foreign government beyond the traditional requirements: peace with the United States and recognition of the foreign government by the United States executive branch. *See infra* notes 15-16 and accompanying text. Reciprocity traditionally has been defined as "the relation existing between two states when each of them gives the subjects of the other certain privileges at the hands of the latter state." BLACK'S LAW DICTIONARY 1142 (rev. 5th ed. 1979).

four.[4] The success of such an amendment will have far-reaching effects on the United States commitment to consumer protection, world leadership in free trade, and continued friendly relations with foreign nations.

This Note takes the first step in assessing the desirability of a reciprocity requirement. After sketching the background of the reciprocity issue, the Note analyzes relevant antitrust policy considerations to determine whether they necessitate the imposition of a reciprocity requirement. Parts III and IV survey foreign antitrust law, formulate different reciprocity standards, and analyze the practical effects such standards would have in light of current foreign antitrust law. The Note concludes that foreign governments should be granted standing to sue without meeting a reciprocity requirement.

I

BACKGROUND

A. UNITED STATES ANTITRUST LAW

Section four of the Clayton Act contemplates two goals: deterring would-be antitrust violators and compensating victims for injuries caused by antitrust violations. In *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*,[5] the Court stated that the purpose of section four of

4. The most recent attempt to limit the standing of foreign governments was left pending before the 97th Congress. On July 9, 1981, the Senate passed the Antitrust Reciprocity Act of 1981. S. 816, 97th Cong., 1st Sess. (1981). Unlike previously proposed amendments, S. 816 contains an enforceability requirement. To satisfy the standing requirements for an antitrust action under this amendment, a foreign nation must outlaw similar anticompetitive conduct, grant the United States government standing to bring similar suits, and, in addition, the foreign government must enforce its own antitrust laws. S. 816 requires "the laws of such foreign government applicable to conduct similar to the conduct of the person sued under this section [to be] enforced by such foreign government." *Id.* § 1(b)(2). Further, the foreign government must prohibit such conduct at the time the suit is brought, and must have outlawed it "during the time the prohibited conduct [of the would-be defendant] occurred." *Id.* § 1(b)(2). The House counterpart to S. 816 was considered by the House Judiciary Committee's Subcommittee on Monopolies and Commercial Law. H.R. 2812, 97th Cong., 1st Sess. (1981). When the Subcommittee reported H.R. 2812 to the full committee on November 20, 1981, an amendment in the form of a substitute bill, H.R. 5106, was unanimously adopted. H. REP. No. 97-476, 97th Cong., 2d Sess. 6 (1982), H.R. 5106 deleted the reciprocity requirement incorporated in S. 816. Three factors prompted rejection of any type of a reciprocity requirement:

(1) determining whether reciprocal rights exist would be difficult and costly;
(2) a stringent reciprocity test might reduce the deterrent effect of the antitrust laws; and
(3) a reciprocity requirement might adversely affect U.S. foreign relations.

Id. at 2. H.R. 5106 was never enacted into law during the 97th Congress. For a brief review of previously proposed reciprocity bills, see *infra* note 33.

5. 392 U.S. 134 (1968).

the Clayton Act is to "be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws."[6] Later, however, the Court recognized the additional goal of section four. In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,[7] the Court stated that "Section 4 . . . is in essence a remedial provision . . . . Of course, treble damages . . . play an important role in penalizing wrongdoers and deterring wrongdoing. . . . It nevertheless . . . is designed primarily as a remedy."[8]

To effectuate the goals of compensation and deterrence, Congress established a three-pronged system for United States antitrust enforcement:[9] (1) suits initiated by the Federal Trade Commission;[10] (2) suits initiated by the Department of Justice;[11] and (3) suits initiated by private parties.[12] The first two classes of suits are exclusively governmental remedies; they include suits for injunctions, divestment of corporations, and criminal prosecutions.[13] The third class includes the private treble damage remedy provided by section four of the Clayton Act.

This Note deals exclusively with the third prong of the antitrust enforcement structure, private suits. Because of the limited resources available to governmental agencies, the private remedy has become a vital supplement to public antitrust enforcement. The Supreme Court perceives private actions based upon section four as "a bulwark of antitrust enforcement."[14] This Note analyzes the controversy regarding whether foreign governments should be extended this right of a private treble damage remedy in antitrust actions.

B. Standing of Foreign Governments to Sue in United States Courts

Although several well-defined exceptions exist,[15] foreign nations

6. *Id.* at 139.
7. 429 U.S. 477 (1977).
8. *Id.* at 485-86.
9. E. KINTNER & M. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER 19 (1974).
10. Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1976); Robinson-Patman Act, 15 U.S.C. § 13(b) (1976).
11. Sherman Anti-Trust Act, 15 U.S.C. § 4 (1976); Wilson Tariff Act, 15 U.S.C. § 9 (1976); Clayton Act, 15 U.S.C. § 25 (1976).
12. Clayton Act, 15 U.S.C. § 15 (1976).
13. Additionally, a Clayton Act amendment granted the United States Government standing to sue for actual damages. Clayton Act § 4A, 15 U.S.C. § 15a (1976).
14. *Perma Life Mufflers, supra* note 5, at 139.
15. Some recognized restrictions limit a foreign nation's right to bring suit in United States courts. First, only suits of a strictly civil nature may be brought. *See* The Saphire, 78 U.S. (11 Wall) 164 (1871); Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888). Second, nations at war with the United States are denied standing in United States courts. *See* Trading with the Enemy Act, 50 U.S.C. app. § 7b (1976). Third, nations that are not recognized by the United States executive branch are denied standing in United States

generally have standing to sue in American courts by virtue of the principle of comity.[16] The Supreme Court has recognized that " '[c]omity,' in the legal sense, is neither a matter of absolute obligation, . . . nor of mere courtesy and good will."[17] Rather, the principle of comity has been defined as the practice of each nation's courts doing "justice that justice may be done in return."[18] Thus, the idea of reciprocity underlies the comity principle.

Considerations of comity necessarily influenced the Supreme Court in deciding *Pfizer v. India*.[19] In *Pfizer*, the governments of India, Iran and the Philippines[20] filed civil suits on behalf of their citizens against several American pharmaceutical manufacturers. The plaintiff governments alleged that the defendants had "conspired to restrain and monopolize interstate and foreign trade in the manufacture, distribution, and sale of broad spectrum antibiotics,"[21] thus violating the Sherman Anti-trust Act.[22] In deciding whether the

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courts. *See* Guaranty Trust Co. v. United States, 304 U.S. 126 (1938); Rep. of Vietnam v. Pfizer, Inc., 556 F.2d 892 (8th Cir. 1977) (suit dismissed because Republic of Vietnam no longer recognized by the United States Government).

Only nations that are not recognized by the United States are denied standing. The Supreme Court has rejected the mere severance of diplomatic relations, the existence of "unfriendly" relations, or failure to grant reciprocity of treatment for United States nations suing in courts of foreign nations as grounds for denying a foreign country standing in United States courts. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

16. Annot., 54 L.Ed. 2d 854, 857 (1978).

17. Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).

18. Russian Socialist Federated Soviet Republic v. Cibrario, 235 N.Y. 255, 258, 139 N.E. 259, 260 (1923). Comity can be practiced by a country's legislative and executive branches as well as by its judiciary. *Hilton,* 159 U.S. at 164. The Supreme Court explained the principle of comity in the following way:

> Comity is not a rule of law, but one of practice, convenience and expediency. It is something more than mere courtesy, which implies only deference to the opinion of others, since it has a substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question. But its obligation is not imperative. If it were, the indiscreet action of one court might become a precedent, increasing in weight with each successive adjudication, until the whole country was tied down to an unsound principle. Comity persuades; but it does not command. It declares not how a case shall be decided, but how it may with propriety be decided. It recognizes the fact that the primary duty of every court is to dispose of cases according to the law and the facts; in a word, to decide them right.

Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 488 (1900).

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

20. Spain, South Korea, West Germany, Columbia, Kuwait, and the Republic of Vietnam brought similar actions. *Id.* at 309, n.1.

21. *Id.* at 309-10.

22. 15 U.S.C. §§ 1-2 (1976). These suits were based on a claim that a number of pharmaceutical manufacturers had overcharged the plaintiffs in the sale of antibiotics. Pfizer Inc. v. Government of India, 550 F.2d 396, 396 n.1 (8th Cir. 1976). *Pfizer* evolved out of the antibiotic antitrust litigation which included approximately 150 civil actions filed under § 4 of the Clayton Act. West Virginia v. Chas. Pfizer & Co., Inc., 314 F. Supp. 710, 713 (S.D.N.Y. 1970), *aff'd,* 440 F.2d 1079 (2d Cir. 1971), *cert. denied,* 404 U.S. 871 (1971). Over sixty of these suits were settled for a combined total of over 80 million

plaintiffs had properly brought suit in the case, the Supreme Court held that foreign governments are "persons" within the meaning of section one of the Clayton Act.[23] Thus, it necessarily follows that foreign governments have standing as "persons" to sue for treble damages under section four of the Clayton Act.[24]

In determining that the section four remedy of private antitrust suits should be extended to foreign governments, the Supreme Court relied primarily on two previous decisions. In *United States v. Cooper*,[25] the Court held that the U.S. government is not a "person" within the meaning of section four of the Clayton Act.[26] In *Georgia v. Evans*,[27] however, the Court held that a state is a "person" within the meaning of section four, and, therefore, capable of instituting a private treble damage antitrust suit.[28] After examining these two cases, the *Pfizer* Court reasoned that a foreign government, like a private person or a domestic state, can become a victim of anticompetitive practices when purchasing United States goods and services.[29] Further, the Court found that the availability of private remedies is essential to foreign governments that, unlike the United States, are provided with no alternative remedies under United States antitrust laws.[30] The Court concluded:

> 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 pur-

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dollars. 440 F.2d at 1082-84. The majority of these suits, however, involved domestic plaintiffs, not foreign governments.

23. Section 1 of the Clayton Act provides:

> The word 'person' or 'persons' wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Clayton Act § 1, 15 U.S.C. § 12 (1976).

24. Two different bases for a foreign government's standing to sue exist: *parens patriae* and representative claims. A *parens patriae* action is one in which "the State, as parens patriae, can bring suit only to protect the common welfare of its people as a whole." Malina & Blechman, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws,* 65 NW. U.L. REV. 193, 209 (1970) (emphasis deleted). Iran and India had filed suit in a *parens patriae* capacity, but this claim was dismissed in a separate appeal. Pfizer Inc. v. Lord, 424 U.S. 950 (1976).

In a representative claim, the sovereign sues not for injuries to its own interests as a sovereign, but for injuries to its individual citizens. *See* Velvel, *Antitrust Suits by Foreign Nations,* 25 CATH. U.L. REV. 1, 23-24 (1975).

25. 312 U.S. 600 (1941).

26. Congress, however, later amended the Clayton Act to allow the federal government to sue for actual damages. *See supra* note 13.

27. 316 U.S. 159 (1942).

28. Shortly after *Evans*, the Court held that a State may not be sued for antitrust offenses. Parker v. Brown, 317 U.S. 341 (1943).

29. 434 U.S. at 318.

30. *Id.* The United States has a variety of other remedies available, including criminal prosecutions and injunctions. *See supra* note 13 and accompanying text.

> chasers 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" . . . . 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].[31]

Demonstrating apparent dissatisfaction with the broad standing rights afforded foreign sovereigns,[32] several members of the Ninety-fifth and Ninety-sixth Congresses proposed a number of bills that would have partially or fully abrogated the *Pfizer* decision.[33] These bills, however, failed to reach their respective floors. Another more recent attempt has been made to limit the *Pfizer* Court's ruling. A bill was introduced in the Ninety-seventh Congress that would have

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31. 434 U.S. at 318 *citing* 316 U.S. 159, 162-63. The Court took this language from *Evans*, substituting "foreign nations" for "states." *See supra* note 20.

32. Some courts restrict the *Pfizer* decision to its facts. *See* Int'l Ass'n of Machinists v. OPEC, 477 F. Supp. 553 (1979), *aff'd*, 649 F.2d 1354 (9th Cir. 1981). "[T]his court must refrain from extending the *Pfizer* ruling beyond the strict confines of that case." *Id.* at 572 (Foreign sovereigns were antitrust defendants). A strict reading of *Pfizer* would require a finding of "compelling circumstances" before standing would be granted. This contention is based on a *Pfizer* footnote, recognizing that the plaintiff foreign nations were "faced with monopolistic control of the supply of medicines needed for the health and safety of its people." 434 U.S. at 318 n.18. The opinion, however, taken as a whole, refutes this narrow reading of the decision.

33. Following the *Pfizer* decision, the Senate and House Judiciary Committees reported on separate versions of proposed legislation that would have overturned *Pfizer*. H.R. 11942 would have denied standing to all foreign governments. It stated that § 4 "should not authorize suits by a foreign sovereign government." H.R. 11942, 95th Cong., 2d Sess. § 3 (1978). This bill as well as S. 1874 failed to reach the floor before adjournment. [1978] ANTITRUST & TRADE REG. REP. (BNA) No. 882, at A-21; [1978] ANTITRUST & TRADE REG. REP. (BNA) No. 884, at A-11-12. S. 2486 conditioned foreign government standing on satisfying a general reciprocity requirement, allowing no foreign government to bring an action in any United States Court unless:

> (1) the U.S. is entitled to sue in its own name and in its own behalf on a civil claim in the courts of that foreign sovereign; and
>
> (2) such foreign sovereign prohibits restrictive trade practices by its own laws.

S. 2486, 95th Cong., 2d Sess. § 2(b) (1978). *See infra* notes 201-206 and accompanying text. This reciprocal antitrust bill was reintroduced in the 96th Congress. S. 317, 96th Cong., 1st Sess. (1979). Another proposed bill would have required a finding of "strict reciprocity." S. 2724, 95th Cong., 2d Sess. (1978). *See infra* notes 197-200 & 206 and accompanying text. The standard in this bill, according to Senator DeConcini, would have made the right to sue "dependent on the existence of foreign laws formulated precisely like our own." 125 CONG. REC. 1704 (Feb. 1, 1979) (remarks of Mr. DeConcini, defending S. 317 and opposing previous attempts to impose a strict reciprocity requirement). Section 3 of the Antitrust Enforcement Act of 1979 (Illinois Brick Bill) provided another reciprocity standard:

> [S]uits under. . . [Section 4 of the Clayton Act] brought by foreign sovereign governments, departments, or agencies thereof, shall be limited to actual damages; and . . . 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.

S. 300, 96th Cong., 1st Sess. § 3 (1979). Congress failed to act on any of the above bills.

imposed a reciprocity requirement on the right of a foreign government to institute a private antitrust suit under section four of the Clayton Act. Although subsequent amendments to this bill eliminating the reciprocity requirement were approved, the Ninety-seventh Congress failed to enact the bill as amended.[34]

II
POLICIES

In determining whether foreign governments should enjoy standing to sue in federal courts for treble antitrust damages, Congress must consider a number of different and sometimes conflicting policies.[35] The policies most frequently advanced to support a broad grant of standing rights[36] are: (1) protecting consumers; (2) providing compensation; (3) deterring further antitrust violations; (4) encouraging free trade; and (5) maintaining good relations with other nations. The arguments most frequently posited to support the imposition of a reciprocity requirement,[37] thereby limiting the antitrust standing rights of foreign governments, include: (1) resolving conflicts in an equitable manner; and (2) encouraging other nations to adopt antitrust laws. The following analysis indicates that a reciprocity requirement must not be imposed if the policies supporting standing are to be forwarded. The analysis further demonstrates that a reciprocity requirement is, at best, a neutral factor in advancing the policies traditionally cited in support of imposing such a requirement. Achieving these desired policy goals requires neither the imposition nor absence of a reciprocity requirement.

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34. *See supra* note 4.

35. Chief Justice Burger, attacking the *Pfizer* majority's "undisguised exercise of legislative power," stated that "[t]he resolution of the delicate and important policy issue of giving more than 150 foreign countries the benefits and remedies enacted to protect American consumers should be left to the Congress and the Executive." *Pfizer, supra* note 19, at 320-21 (1978) (Burger, C.J., dissenting).

36. For a general discussion of policies supporting standing, see Velvel, *supra* note 24, at 4-10, 18-19; Note, *The Capacity of Foreign Sovereigns to Maintain Private Federal Antitrust Actions,* 9 CORNELL INT'L L. J. 137, 145-46, 150-53 (1975); Note, *Foreign Nation Suits for Treble Damages Under the Clayton Act After Pfizer v. Government of India,* 13 U. MICH. J. L. REF. 405, 412-20 (1980); Note, *Pfizer, Inc. v. Government of India: The Ability of Foreign Governments to Sue Under Section 4 of the Clayton Act,* 5 SYRACUSE J. INT'L L. COM. 299, 312-13, 315-16 (1977-78); 20 B.C.L. REV. 411, 421-424 (1979); 24 N.Y.L. SCH. L. REV. 771, 784-86, 788-89 (1979); 17 DUQ. L. REV. 545, 550-53 (1978-79); 27 EMORY L. J. 815, 835-39 (1978); 19 HARV. INT'L L. J. 701, 706 (1978); 12 J. MAR. J. PRAC. & PROC. 187, 194-97, 202-06 (1978); 11 VAND. J. TRANSNAT'L L. 333, 341-42 (1978).

37. For a definition of reciprocity, see *supra* note 4. As used here, reciprocity does not refer to any specific formulation of standing requirements. For a general discussion of policies supporting reciprocity, see Velvel, *supra* note 24, at 11-16, 21-23; Note, *supra* note 36, 13 U. MICH. J. L. REF. at 413-14; 24 N.Y.L. SCH. L. REV. 771, 788; 11 VAND. J. TRANSNAT'L L. 333, 341-42.

A. Policies Supporting a Foreign Government's Right to Standing

1. Consumer Protection

The antitrust laws are primarily designed to protect consumers from anticompetitive business practices.[38] Thus, other policy goals should be consistent with this central purpose.[39] Only sound reasons will justify the sacrifice of consumer protection to the furtherance of a less important policy goal. The controversy resulting from the *Pfizer* decision specifically deals with the degree of consumer protection Congress wishes to sacrifice in order to forward another policy goal. Congress can let the *Pfizer* decision stand, thereby empowering the largest possible number of private plaintiffs with the right to sue for treble damages. This would provide for enforcement of United States antitrust laws to the fullest extent possible. Or, Congress may choose to qualify the *Pfizer* decision, limiting both the extent to which the antitrust laws are enforced and the degree of protection afforded to consumers.[40]

2. Compensation

The Supreme Court recognizes compensation as the primary objective of section four of the Clayton Act.[41] Although section seven of the Sherman Act, the predecessor of section four, "was conceived of primarily as a remedy for '[t]he people of the United States as individuals,' especially consumers,"[42] the Clayton Act " 'extend[ed] the remedy under Section seven of the Sherman Act' to persons injured by virtue of any antitrust violation."[43] This broader characterization of section four more effectively advances desired policy goals. The right of an injured party to collect damages from a wrongdoer in a private civil suit has traditionally been accepted as

38. "In light of the clear legislative history, it is not surprising that Federal judicial decisions, including those of the Supreme Court, have long recognized the central purpose of antitrust laws in protecting consumers." S. Rep. No. 239, 96th Cong., 1st Sess. 11 (1979) (report on Antitrust Enforcement Act of 1979).

39. Such policy goals may be broad or specific. For example, compare the broad goal of maintaining good relations with other countries to the specific goal of encouraging other nations to adopt antitrust laws.

40. Enforcement of antitrust laws, however, is not limited to private suits by consumers. For a discussion of the three prongs of antitrust enforcement, see *supra* notes 9-12 and accompanying text.

41. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat Inc., 429 U.S. 477, 485-86 (1977). *See also supra* note 8 and accompanying text. The broad purpose of section 4 is to compensate the victims of antitrust violations, and by so compensating, to deter future violations. *Pfizer*, 434 U.S. at 314.

42. *Brunswick Corp., supra* note 41, 429 U.S. at 486 n.10 (quoting from 21 Cong. Rec. 1767-68, 1890 (remarks of Senator George)).

43. *Id.* (quoting from H. Rep. No. 627, 63d Cong., 2d Sess. 14, 1914).

an integral aspect of the justice system in the United States. Nothing seems to preclude applying this fundamental tenet solely because the injured party is a foreign sovereign.[44] A foreign government can suffer injuries resulting from violations of the antitrust laws as surely as American consumers can.[45] Further, while treble damage antitrust actions were adopted primarily to benefit American consumers,[46] the protection afforded by United States antitrust laws has never been limited to United States nationals. The Sherman and Clayton Acts expressly provide that "person" includes "corporations and associations existing under or authorized by the laws of . . . any foreign country."[47] Granting foreign governments standing to sue is consistent with both the United States conception of the civil action and the remedial purpose underlying section four of the Clayton Act. Thus, the policy goal of compensation would best be effectuated by granting standing rights to foreign governments.

3. Deterrence of Future Antitrust Violations

Compensating a foreign government for damages resulting from antitrust violations has the concomitant effect of deterring future behavior inconsistent with the antitrust laws of the United States.[48] A grant of standing to foreign governments may therefore protect both foreign and domestic consumers from future illegal acts. An analysis of the deterrent effect resulting from antitrust suits, when examined in the light of other policy considerations, justifies the extension of standing rights to foreign governments.

The deterrent effect of antitrust damage awards can be viewed, for analytical purposes, as affecting two distinct geographic areas: the territorial United States, and all areas outside of its boundaries.[49]

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44. *See Pfizer,* 434 U.S. at 313-18. The Court construed § 4 of the Clayton Act such that the fact a party is either foreign or a sovereign would not preclude that party's right to standing in a private treble damage suit.

45. The Court recognized that both consumers in the United States and foreign governments were injured by activities of Pfizer, Inc., as well as other drug companies. *See id.* at 310 & nn. 2, 3.

46. *See supra* notes 42-43 and accompanying text.

47. 15 U.S.C. § 12 (1976). *See supra* note 23. The Sherman Act uses similar language. *See* 15 U.S.C. § 7 (1976).

48. The *Pfizer* majority's description of the purposes of § 4 highlights the integral relationship between the goals of compensation and deterrence: the antitrust laws are intended "to deter violators and deprive them of " 'the fruits of their illegality,' " and 'to compensate victims of antitrust violations for their injuries.' " Pfizer, 434 U.S. at 314. Requiring the defendant to pay the plaintiff treble money damages deprives the wrongdoer of illegal "fruits," compensates the victim, and diminishes the likelihood of future violations. Thus, although they are theoretically separate policy objectives, compensation and deterrence are, from the practical perspective of § 4, inseparable.

49. The discussion in this section assumes that United States antitrust law applies in both of these geographic areas. Thus, the acts violating the antitrust laws simultaneously have the requisite effects on both commerce among the states and commerce with foreign

The goal of deterring violations having effects within United States boundaries ("domestic deterrence") underlies United States antitrust law.[50] When an antitrust violation produces effects both at home and abroad, however, it is unclear whether deterrence of these foreign effects ("foreign deterrence")[51] should be considered an equally important goal of United States antitrust law. Congress did not delineate the intended scope of the antitrust laws.[52] Commerce with foreign nations, however, is subject to the prohibitions of the antitrust laws.[53] In addition, Congress granted standing under section four to "corporations and associations existing under or authorized by the laws of . . . any foreign country."[54] These statutory provisions, along with the generally broad standing rights found under section four, demonstrate congressional awareness of the fact that foreign deterrence might be possible.[55] Further, Congress failed to require a preliminary showing that domestic deterrence would be advanced before allowing a foreign entity to bring an antitrust suit for injuries suffered abroad.[56] Finally, Congress created a limited exception to the application of both the Sherman and the Clayton Acts to foreign commerce in the Webb-Pomerene Act.[57] Where that Act does not apply, however, the courts, the FTC, and the Antitrust Division of the United States Department of Justice have usually decided on both the scope and degree of importance attributed to foreign deterrence. For example, the courts determine the extent of

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nations. *See supra* note 2 and Clayton Act § 1, 15 U.S.C. § 12 (1976). The discussion also assumes that United State courts have personal jurisdiction over the violators.

50. *See supra* notes 41-42 and accompanying text.

51. The term "foreign violation" refers to any violation of United States antitrust laws which has effects outside United States boundaries.

52. [W]hether a foreign nation is entitled to sue for treble damages depends upon whether it is a 'person' as that word is used in § 4 [of the Clayton Act]. There is no statutory provision or legislative history that provides a clear answer; it seems apparent that the question was never considered at the time the Sherman and Clayton Act were enacted.

Pfizer, 434 U.S. at 312.

53. *See* Clayton Act, § 1, 15 U.S.C. § 12 (1976); *see also supra* note 49.

54. *See id.; see also supra* note 23.

55. *See supra* notes 41-43 and accompanying text.

56. *See generally* Clayton Act, 15 U.S.C. §§ 12-27 (1976).

57. Webb-Pomerene Act, 15 U.S.C. §§ 61-65 (1976).

The Webb-Pomerene Act was intended to help American firms compete in foreign markets, especially against foreign cartels. The Act provides that an association entered into for the 'sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association' is not illegal, provided it is not in restraint of the export trade of any domestic competitor of such an export association. The Act also contains a provision prohibiting unfair methods of competition in export trade against competitors engaged in export trade.

KINTNER & JOELSON, *supra* note 9, at 18-19.

extraterritorial application of United States antitrust laws,[58] while the Antitrust Division[59] and the FTC[60] decide which foreign violations of the antitrust laws will be prosecuted.

Although Congress has not directly addressed the question of foreign deterrence, an examination of the interests of the United States in deterring such violations indicates that Congress should not impose a reciprocity requirement on the right of a foreign government to bring a private antitrust suit. The threat of a treble damage action by foreign governments can deter not only foreign, but also domestic violations of the antitrust laws.[61] American consumers would benefit directly from this increased domestic deterrence; they would benefit, at least indirectly, from foreign deterrence.[62]

Allowing foreign governments standing under section four would substantially contribute to foreign deterrence. The number of potential plaintiffs capable of bringing antitrust suits would be expanded to include over 150 foreign nations.[63] In addition, these governments, having access to greater financial resources than private parties, would be better able to sustain themselves through protracted antitrust litigation. Thus, these nations would be more likely to bring such suits. Finally, the antitrust law of the United States can only deter anticompetitive business practices by affording these governments standing rights in private antitrust actions.[64]

At present, no satisfactory method exists for deterring violations of United States antitrust laws that have foreign effects; a grant of standing to all foreign nations would serve this purpose.[65] Without

58. *See, e.g.,* United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

59. *See* KINTNER & JOELSON, *supra* note 9, at 19.

60. *Id.* at 52.

61. The acts of a business firm may result in both domestic and foreign violations. In such cases, the threat of a treble damages action by parties injured only by the foreign violations will certainly deter the foreign violations. Moreover, this threat similarly may deter domestic violations. If a firm can select the locations in which the effects of its violations will be felt, it may target its activities so that both domestic and foreign effects are produced. When a firm has such control, the threat of suit by parties injured only by the foreign violations would probably deter only those violations. The firm's likely response would be to discontinue its foreign violations and continue its domestic ones. Where a firm has no such control over the scope of its violations and its acts produce both domestic and foreign violations, the threat of suit would deter both types of violative acts.

62. *See infra* notes 69-71 and accompanying text.

63. *See Pfizer,* 434 U.S. at 330 (Burger, C.J., dissenting).

64. The right to sue under § 4 of the Clayton Act is a personal one.

65. While the Senate Judiciary Committee recognized the importance of deterrence, it was willing to sacrifice an element of deterrence in order to advance "fairness":

> In construing the reciprocity provisions of this section, courts should be mindful that it seeks to strike a balance between two broad objectives: the principles of equity which require some reciprocity, and the deterrent purposes of the antitrust laws. Overly strict interpretation of the reciprocity provisions may operate to

the right to bring antitrust suits, foreign governments, in an attempt to protect themselves, might institute more severe measures, including boycotts and tariffs. Such measures, however, carry with them the ironic possibilities of both reducing competition and restricting trade.[66] Further, many nations, particularly the developing countries, cannot resort to such measures.[67] Finally, when a foreign country is in great need of the violator's goods or services, these measures are of no help. The country has no choice; it must buy on the seller's terms and hope to sue later for damages.[68]

4. Free Trade

In deciding whether or not to impose a reciprocity requirement, Congress must consider the commitment of the United States to free trade as an important policy goal of the United States antitrust laws.[69] Any increase in competition in world trade resulting from

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prohibit most or all foreign governments from invoking American antitrust laws. Such interpretation will frustrate the deterrent purposes of such laws, effectively encouraging American companies to engage in anticompetitive practices in their dealings with foreign governments. Our antitrust laws seek to discourage such conduct by American companies regardless of the identity of its victims. On the other hand, these provisions reflect the proposition that it is unfair to permit foreign governments to reap the benefits of American law when the laws of such governments permit the very type of conduct for which such governments are seeking compensation here. Overly liberal interpretation of the reciprocity provisions will permit such inequity. Thus, in interpreting the reciprocity provisions, courts should seek to strike the balance which they reflect: allowing foreign governments to assist in enforcing our antitrust laws when such governments evidence a parallel opposition to the type or category of conduct challenged here.

S. REP. NO. 239, *supra* note 38, at 46.

66. In his *Pfizer* dissent, Chief Justice Burger cited these types of measures as substitutes for a foreign government's antitrust remedy under § 4 of the Clayton Act. He did not, however, address the possible anticompetitive effects of these measures. *See Pfizer,* 434 U.S. at 326-28 (Burger, C.J., dissenting). In addition, the use of such measures cannot enhance domestic deterrence; actions for treble damages have this concomitant beneficial effect. *See supra* note 61 and accompanying text.

67. Similarly, the developing nations may not have either adequate antitrust laws or the expertise required to enable them to prosecute or even detect antitrust violations by United States corporations. Thus, these countries need the assistance of United States courts, the American bar, and the federal discovery rules in order to achieve relief from United States antitrust violations. Further, access to the United States legal system would allow these countries more bargaining leverage in their negotiations with multinational corporations.

Some commentators have observed that some countries, because of this lack of experience and knowledge, have difficulty even drafting antitrust laws that suit their particular economies and economic needs. Conversation with Professor J.B. Barcelo, Cornell Law School (March 15, 1981); *see also* Oesterle, *United Nations Conference on Restrictive Business Practices,* 14 CORNELL INT'L L.J. 1, 12 & nn.62-65 (1981).

68. *See Pfizer,* 434 U.S. at 318 n.18.

69. *See, e.g.,* the Bretton Woods Agreement Act, which states in part:

[I]t is declared to be the policy of the United States to seek to bring about further agreement and cooperation among nations and international bodies, as soon as possible, on ways and means which will best reduce obstacles to and restrictions upon international trade, eliminate unfair trade practices, promote mutually

the deterrent effects of United States antitrust laws benefits the world economy in much the same way as the United States economy benefits from domestic deterrence. For example, when domestic competition increases, prices decline and inflation abates.[70] The world economy dramatically affects the domestic economy, especially because worldwide inflation contributes to domestic inflation. Thus, American consumers would benefit from the increased competition resulting from more effective foreign deterrence.[71]

Conversely, as recognized by the Senate Judiciary Committee, it is hoped that the imposition of a reciprocity requirement would encourage other nations to adopt their own antitrust laws.[72] Assuming that other countries did adopt such laws and were able to enforce them effectively, international free trade would be enhanced. Extending standing rights to foreign governments under section four would not provide them with this same incentive to adopt their own antitrust laws.

It remains unclear, however, whether the imposition of a reciprocity requirement actually would result in the adoption and enforcement of antitrust laws by other countries. The Senate Judiciary Committee failed to advance any empirical evidence to support this proposition.[73] Further, many countries, including most nations that currently have no antitrust laws, are hostile toward the economic and political influence exerted on them by the developed countries.[74] This suggests that the adoption of a reciprocity requirement by the United States with the stated goal of encouraging the adoption of antitrust laws abroad would not be warmly received.

Incentives that are adequate to encourage foreign nations to adopt antitrust laws may exist independently of the uncertain encouragement attributed to the adoption of a reciprocity requirement. Countries with no antitrust laws recently received positive, consensual encouragement to adopt such laws to govern their own domestic business practices when the United Nations adopted the "Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices."[75] The negotiations result-

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advantageous commercial relations, and otherwise facilitate the expansion and balanced growth of international trade and promote the stability of international economic relations.

22 U.S.C. § 286k (1976). This discussion assumes that United States courts have personal jurisdiction over violators of domestic antitrust law.

70. *See, e.g.,* Velvel, *supra* note 24, at 7-8.

71. *Id.*

72. *See infra* notes 98-101 and accompanying text.

73. *See* S. REP. No. 239, *supra* note 38, at 45-50.

74. *See* Oesterle, *supra* note 67, at 16-17 & nn.50-56.

75. *See generally id.*

ing in the drafting of the "Principles and Rules" vividly illustrate the drastic differences between the less developed countries' conception of an ideal antitrust code and the current statutory scheme of the United States. In addition, the interests less developed countries have in adopting antitrust laws sharply diverge from United States concerns.[76] Thus, whether the United States, by adopting a reciprocity requirement, would be implicitly encouraging the adoption of antitrust laws designed to meet the specific needs of each country remains questionable.

To assume that a reciprocity requirement would exert sufficient influence and incentive to cause nations to adopt antitrust laws is very tenuous. A grant of standing rights, however, would maximize deterrence, thereby increasing worldwide competition. Thus, the goal of encouraging free trade through increased competition requires that no reciprocity requirement be imposed.[77]

5. *Comity*

Before imposing a reciprocity requirement, Congress must consider an additional policy: the principle of comity.[78] If the United States Government expects to use foreign legal systems, it must give foreign governments access to its own courts. The State Department has recognized that the Government needs such access:

> The United States Government frequently sues abroad. The Department of Justice has a special office (the Office of Foreign Litigation) just for this purpose. The United States generally enjoys the same access to foreign courts and the same remedies as private litigants. If foreign governments replicated the Pfizer [reciprocity amendment] approach, it would presumably be more difficult for the United States to recover on claims abroad.[79]

Justice Douglas stated the problem clearly: "[I]t would offend the sensibilities of nations if [a] country, not at war with us, had our courthouse doors closed to it."[80]

Allowing foreign governments to sue under section four should not evoke a dramatic response from other nations. Rather, a grant of standing rights would be consistent with the long-recognized general rule that foreign nations can bring civil actions in the courts of

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76. *Cf. id.*

77. For further discussion of the goal of encouraging the adoption of antitrust laws abroad, see *infra* notes 98-102 and accompanying text.

78. For a discussion of the principle of comity, see *supra* note 18 and accompanying text.

79. S. REP. No. 239, *supra* note 38, at 69-70 (letter from D.J. Bennett, Jr., Assistant Secretary for Congressional Relations, Department of State, to Senator Charles Mathias, Jr. May 8, 1979).

80. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 772 (1972) (concurring opinion).

the United States.[81] The imposition of a reciprocity requirement, however, may result in extreme responses from foreign governments. Nations may either change their laws to conform to the reciprocity requirements, thereby availing themselves of section four standing, or, instead, they may "reciprocate" by denying the United States Government standing to sue for antitrust damages in their own courts. These nations may take a further step and deny the United States Government standing in other areas in which it has previously been granted. Indeed, even countries whose laws meet the requirements of the United States reciprocity standard may, on principle, deny the United States standing in their courts.[82]

Some nations have already demonstrated disapproval of any reciprocity requirement. In *Pfizer*, the Federal Republic of Germany filed an *amicus curiae* brief supporting an extension of section four standing rights to foreign governments.[83] Germany, whose antitrust law development and enforcement is second only to that of the United States, currently allows the United States to bring private antitrust actions in its courts.[84] Germany also urged the United States Department of State to open discussion on the *Pfizer* issue to other departments of the executive branch, as well as the international community.[85] The German position is that "[t]he concept of granting Governments and nationals of other countries the guarantees of the national legal system will quickly deteriorate if it is made contingent on the comparability of statutes and provisions."[86] Similarly, Great Britain is likely to disapprove of a reciprocity requirement. The United Kingdom already resents the attitude that the United States has previously demonstrated through the broad extraterritorial application of United States antitrust laws.

> [T]he practices to which successive United Kingdom Governments have taken exception have arisen in the case of the United States of America. . . .
>
> I have to say that the United States has shown a tendency in certain respects over the last three decades increasingly to try to mould the interna-

81. *See supra* notes 15-16 and accompanying text.

82. Some foreign governments view the extraterritorial application of United States antitrust laws with hostility. *See* H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 1040-46 (2d ed. 1976). Often, this negative attitude extends even further and includes multinational business enterprises generally. *See* Oesterle, *supra* note 67, at 16-17. The imposition of a reciprocity requirement may be viewed with this same degree of hostility, even if it causes no actual economic harm.

83. *Pfizer,* 434 U.S. at 309.

84. S. REP. No. 239, *supra* note 38, at 72 (letter from D.J. Bennett, Jr., Assistant Secretary for Congressional Relations, Department of State, to Senator Edward M. Kennedy, Chairman, Committee on the Judiciary, quoting a letter from the Federal Republic of Germany to the Department of State).

85. *Id.* at 71 (letter from Federal Republic of Germany to the Department of State).

86. *Id.* at 72.

tional economic and trading world in its own image.[87]

Thus, while imposing a reciprocity requirement is probably not a violation of international law,[88] such a requirement may damage United States relations with other countries and adversely affect the integrity of the principle of comity.[89]

B. Policies Advanced in Support of a Reciprocity Requirement

1. Resolving Conflicts Equitably

In deciding whether to grant foreign governments standing in antitrust suits, Congress should consider principles of fairness.[90] The *Pfizer* issue involves three parties, each directly interested in an equitable resolution of the conflict among them: the American consumer, foreign governments, and the antitrust violator. An examination of the concerns of each party demonstrates that each cannot be treated with maximum equity; fairness to some party must be sacrificed in order to adequately resolve the conflict.

To make a fairness evaluation, one must begin with the premise that requiring the violators of United States antitrust laws to compensate their victims is fair to the violator, the victim, and to the American people, who have a direct interest in seeing the antitrust laws enforced. Considerations of equity change, however, when the

87. Comments of Mr. Nott when introducing the Protection of Trading Interests Act in Parliament. This Act is specially designed to undermine the extraterritorial application of United States antitrust law. PARL. DEB. H.C. (5th Ser.) 1533-34 (1979); *see generally* PARL. DEB. H.C. (5th Ser.) 1533-39 (1979). One commentator views the Act as an invitation to negotiate a mutually agreeable solution to the extraterritorial application problem. *See* Note, *Section 6 of Great Britain's Protection of Trading Interests Act: The Lever and the Claw,* 14 CORNELL INT'L L.J. 457 (1981).

88. One commentator believes that a denial of standing to foreign governments in the *Pfizer* context "would seemingly [violate] international law, for as the Court [has] previously held . . . , 'reciprocity of treatment is an essential ingredient of comity generally and therefore, of the privilege of foreign states to bring suit here.' " 19 HARV. INT'L L.J. 701, 706 (1978) (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 408, 411. Reciprocal treatment may be an essential part of comity, but comity itself is "neither a matter of absolute obligation . . . nor of mere courtesy and good will." *Banco Nacional de Cuba,* 376 U.S. at 409 (quoting Hilton v. Guyot, *supra* note 17, 163-64). Thus, it is difficult to understand how such a denial would be a violation of international law. Conversation with Professor J.B. Barcelo, Cornell Law School (March 15, 1981).

89. For a discussion of comity in relation to the extraterritorial application of antitrust laws, see KINTNER & JOELSON, *supra* note 9, at 263.

90. The Senate cited equitable considerations as its major justification for imposing a reciprocity requirement after *Pfizer*:

> [*Pfizer*] arguably created two inequities. First, it permitted foreign governments to seek redress of business conduct not disapproved in their own countries. Second, it granted a right of action to foreign governments which deny the United States Government access to their own courts. In the view of the committee, both considerations must be balanced against the importance of enforcing our antitrust laws.

S. REP. NO. 239, *supra* note 38, at 45.

plaintiff in an antitrust action has engaged in the type of conduct that constitutes the basis of his complaint: anticompetitive business practices. In addressing the issue, the Supreme Court has granted standing to such plaintiffs.[91] "The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition."[92] The Court made this statement with reference to a private plaintiff who could also be sued for his own anticompetitive practices. In contrast, foreign governments are immune from certain antitrust suits.[93]

This problem must be considered in the context of a foreign government. It seems inherently unfair to allow a foreign government that permits or even participates in anticompetitive practices in one area of commerce[94] to sue in a United States court for injuries resulting from anticompetitive conduct involving a different commodity.[95] This appears particularly unjust in light of the fact that a foreign government is often immune to such suits. Yet, it seems equally unfair to deny compensation to the foreign government, a victim that has been forced to pay higher prices, while the guilty party flouts the antitrust laws.[96] The violator becomes the big winner; he retains all ill-gotten gains, avoids paying penalties, and maintains the freedom to engage in any restrictive business practices that involve foreign governments as consumers.[97]

In either situation, fair treatment of one party will likely result in inequitable effects on the others. While it may be fair to deny a foreign government standing because of unclean hands, in such situ-

91. *Perma Life Mufflers, Inc., supra* note 5. The Court was faced with a private party wishing to sue. The question of whether a foreign government also would be able to bring suit was not before the Court.

92. *Perma Life Mufflers, Inc., supra* note 5, at 139; *see* S. REP. No. 239, *supra* note 38, at 11.

93. *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602(a) (1976); *see also, e.g.,* Int'l Ass'n of Machinists and Aerospace Workers v. OPEC, 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd,* 649 F.2d 1354 (9th Cir. 1981). For a general discussion of the defenses of a foreign state to antitrust actions in the United States, see Comment, *Defenses to Actions Against Foreign States Under the United States Antitrust Laws,* 20 HARV. INT'L L.J. 583 (1979).

94. For example, price fixing in the oil industry.

95. For example, monopolistic practices by a grain company.

96. Contrast the case in which the foreign government conspires in the conduct of which it complains. In such a circumstance, a strong case to deny standing would exist. If, for example, a defendant domestic oil company showed that the foreign government plaintiff helped the company fix oil prices, the plaintiff should be estopped from filing an antitrust claim.

97. One commentator argues that such profits may be used as a "war chest" to support anticompetitive business practices within the boundaries of the United States. *See* Velvel, *supra* note 24, at 3, 8. Granting foreign governments standing under United States antitrust laws eliminates this problem.

ations both the victim of the violation and consumers in the Untied States are treated unjustly. They are all denied the full protection of the antitrust laws. To grant a foreign government standing, however, allows it to recover damages for anticompetitive business practices which it uses or allows to be used to victimize others.

The policy of treating all concerned parties fairly must be deemed a neutral factor in evaluating the desirability of a reciprocity requirement. A grant of standing to foreign governments in private antitrust suits may, in some instances, allow the government to benefit from violations in which it participated or impliedly approved. A denial of standing allows a violator to be unjustly enriched as a result of its illegal acts. The imposition of a reciprocity requirement would not solve this dilemma. Standing would be allowed in some cases and denied in others, resulting in the random treatment of violators. Principles of equitable treatment would not be advanced by such an outcome.

2. *Encouraging the Adoption of Antitrust Laws Abroad*

A final policy must be considered when assessing the desirability of adopting a reciprocity requirement: the role such a requirement would play in encouraging other nations to adopt antitrust laws. Such laws are designed to promote free trade.[98] Thus, it is in the interest of the United States for other countries to enact antitrust laws. The Senate Judiciary Committee favors the adoption of antitrust laws with provisions that are similar to those found in the antitrust laws of the United States.[99] The Committee believes that imposing a reciprocity requirement would motivate other nations to adopt their own antitrust laws. If such laws are effectively enforced,

98. The Senate Judiciary expressed its concern with respect to this goal:

> It is . . . the committee's intention to encourage foreign governments, as a condition of their invocation of American antitrust laws, to maintain judicial or administrative processes which both limit restrictive business practices and are open to the United States.

S. REP. NO. 239, *supra* note 38, at 45.

> [T]he *Pfizer* decision without more would grant a right of access regardless of the nature of the laws of the foreign sovereign, providing the benefits of American law—and the potential retention of the fruits of restrictive trade practice—with no incentive to adopt laws proscribing the very activities complained of in this country.

Id. at 47.

99. The Committee recommended that a foreign sovereign be denied standing to sue "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 the United States government has equivalent standing rights in the foreign country. S. REP. NO. 239, *supra* note 38, at 74. The Committee failed to consider the differing nature of foreign cultures and economies. These factors could require a competition law vastly different from that of the United States.

free trade will be enhanced.[100] Such a requirement, however, might also cause a foreign nation to use extreme restrictive measures which directly inhibit trade.[101] Further, developing countries may not have either option available. The current absence of antitrust laws, combined with the inexperience of these nations in dealing with sophisticated illegal business practices, may make it impossible for them to detect, and therefore to stop, anticompetitive practices. Because the developing countries comprise the majority of those nations that have no antitrust laws, the recommendation of the Senate Judiciary Committee advocating a reciprocity requirement appears extremely paternalistic. Finally, attempting to encourage the adoption of antitrust laws by imposing a reciprocity requirement may prove detrimental to free trade.[102]

In summary, the policies of consumer protection, free trade, compensation, deterrence, and comity require that the right of a foreign government to standing under section four of the Clayton Act not be limited by a reciprocity requirement. The goals of encouraging adoption of antitrust laws abroad and treating all concerned parties fairly do not require a reciprocity standard. The assumption that a reciprocity requirement will encourage other countries to adopt antitrust laws is not well-founded. Finally, although denying standing to foreign governments may result in equitable treatment to some parties, corresponding inequities to others would be inevitable.

An evaluation of the policies advanced by allowing a foreign government standing and the goals traditionally attributed to reciprocity strongly suggest that a reciprocity requirement is unnecessary. A complete evaluation of a reciprocity standard, however, requires an assessment of the practical effects of such a requirement. Examining the foreign countries that would be excluded from the courts of the United States under the present state of foreign law, and analyzing the effects that adopting the different reciprocity formulations would have, will allow a more complete evaluation of the desirability of adopting a reciprocity requirement.

III

A REPRESENTATIVE SAMPLING OF FOREIGN COMPETITION STATUTES, PRACTICES AND POLICIES

It is a long settled rule that "a foreign nation is generally entitled to prosecute any civil claim in the courts of the United

100. *But see supra* notes 69-77 and accompanying text.
101. *See supra* notes 66-68 and accompanying text.
102. *See supra* notes 69-77 and accompanying text.

States."[103] Thus, the use of a reciprocity standard to exclude some countries from standing in private antitrust suits must be viewed as an exception to the general rule. Incorporating a reciprocity requirement into the Clayton Act, absent a thorough examination of its practical effects, would contradict the United States policy which requires that all legislation be the result of a deliberate and informed process of legislative inquiry. This section of the Note focuses on the impact that a reciprocity requirement would have on standing under existing foreign antitrust law.[104] Before assessing the practical impact of a reciprocity requirement, however, two variables must be fixed. First, one must come to a basic understanding of the foreign substantive and procedural law relevant to preserving free competition. Second, a definition of reciprocity must be formulated.[105] The following survey of foreign antitrust law provides the basis for determining what the likely practical effects of a reciprocity requirement would be. The survey will include a sampling of the laws of developed countries[106] and developing countries that already have antitrust laws,[107] as well as an examination of the law in those countries that do not presently have antitrust laws.[108] An examination of these laws will assist in determining which countries would be denied standing in antitrust suits under a reciprocity requirement.

A. THE DEVELOPED COUNTRIES

The antitrust or competition laws[109] of the developed countries

103. *Pfizer,* 434 U.S. at 318. *See supra* notes 15-18 and accompanying text.

104. Throughout the world, the body of antitrust law has grown rapidly in recent years, and continued growth is likely. "Antitrust law and antitrust enforcement have been and remain controversial subjects. Nevertheless, despite debates on this subject within nations and between them, there are signs indicating growing acceptance of the basic desirability of regulating anticompetitive practices." J. Davidow, *Antitrust, International Policy, and Merger Control,* Remarks at the Federal Bar Association Conference on Antitrust and International Mergers and Acquisitions (August 28, 1980), *reprinted in* DEP'T OF JUSTICE ANTITRUST DIVISION RELEASES 1 (August 28, 1980).

105. This Note attempts to take merely the first step in determining what the practical effects of a reciprocity requirement will be. In addition to these two variables, a third variable assumes importance: the reactions of foreign nations to the enactment of a reciprocity requirement. Thus, whether any countries will change their laws in order to meet the reciprocity requirement remains an important question. While any attempt to predict foreign reactions is subject to extreme uncertainty, some factors suggest that at least a few foreign nations would not change their antitrust laws merely to gain standing rights in the courts of the United States. *See supra* notes 72-77 & 85-87 and accompanying text.

106. The countries of Europe, including the EEC, its national subparts and the Scandinavian countries, Japan, and Canada will be examined.

107. India will be examined as a representative country which has started developing a body of antitrust law.

108. This group consists of approximately 100 countries that have little or no antitrust law. *See infra* notes 180-89 and accompanying text.

109. Antitrust law is often referred to abroad as the "Law of Competition" or competition law. KINTNER & JOELSON, *supra* note 9, at ix.

are of primary concern to the United States because two-thirds of its foreign investment is made in Canada and EEC member states.[110]

1. Antitrust Laws of the European Nations

The United States has the most comprehensive and strictly enforced statutory scheme of antitrust law in the world.[111] Thus, while other countries have modeled their antitrust laws on those of the United States,[112] variations and gaps exist in foreign antitrust laws when compared to their United States counterparts. Total uniformity is the exception rather than the rule.

Virtually all antitrust and competition laws condemn similar acts: price fixing, market allocations, and customer allocation among competitors.[113] These similarities, however, can "mask significant variations in philosophy and approach."[114] For example, the United States is the only nation that outlaws the intentional securing of a monopoly.[115] In contrast, the European countries do not view the existence of a monopoly as improper in itself; these countries punish only the abuse of a company's "dominant position."[116] This difference in approach probably stems from differences in the policies underlying the laws. United States antitrust

110. *Id.* at 190.
111. *Id.* at viii.
112. *Id.* at ix.
113. Further, "[m]ost condemn resale price maintenance, tying agreements and some forms of exclusive dealing requirements." Davidow, *Foreign & International Antitrust: Variations on the Themes of U.S. Law,* Remarks at Eleventh New England Antitrust Conference (November 18, 1977), *reprinted in* DEP'T OF JUSTICE ANTITRUST DIVISION RELEASES 2 (November 18, 1977).
114. *Id.*
115. 15 U.S.C. § 2 (1976).
116. "Dominant position" is the European equivalent to a monopolistic position in the antitrust vocabulary of the United States. The Europeans, however, have developed stricter rules regarding the definition of a monopolistic position than those developed in the United States. "Under English, German or Common Market law it is possible to conclude that a firm enjoys a dominant position in a market with as little as 25%, 33% or 40%, respectively, of that market—as compared to 67% as a classic United States figure." Davidow, *supra* note 113, at 3. Article 86 of the Treaty of Rome prohibits "undertakings to *exploit in an improper manner a dominant position* within the common market or within a substantial part of it." 298 U.N.T.S. (1958) (emphasis added). For the full text of Article 86, see *infra* note 138. A logical reading of Article 86 suggests that attaining a monopoly or dominant position is not, by itself, prohibited; the law condemns only the abuse of that position.

In Spain, for example, "[t]he existence of a monopolistic situation is not ipso facto condemned, but abuse of it is." Price Waterhouse, DOING BUSINESS IN SPAIN 21 (1980). Further, "Swedish antitrust law is based upon the belief that restraints on competition do not necessarily have harmful effects. The 'rule of reason' is the governing principle." A. WALSH & J. PAXTON, COMPETITION POLICY 162 (1975). Additionally, the EEC competition law has no *per se* illegalities; rather, the impact of restraints is examined closely. A significant impact may indicate an antitrust problem exists. Comment, *A Survey of Antitrust Law in the European Economic Community,* 16 SANTA CLARA L. REV., 535, 540 (1976). *See also infra* note 174.

policy is centered around the belief that competition rather than concentration yields the best returns. Perfect competition, it is believed, would result in a proper allocation of resources, lower production costs, and lower prices to the consumer. Other developed countries have not placed this same faith in pure competition.[117] Rather, the benefits resulting from the economies of scale that are achieved by larger enterprises are viewed more favorably in other nations than they are in the United States. The more lenient EEC competition law, for example, allows practices that promote efficiency but do not hinder the EEC's goal of market integration.[118]

Developed nations almost universally believe that antitrust laws are necessary.[119] Most of these countries outlaw the same general types of conduct that are outlawed in the United States.[120] Some areas of United States antitrust laws, however, either have no counterparts or are only superficially addressed by foreign laws. For example, while the United States has a strict law against price discrimination,[121] such conduct has not been universally prohibited. France enacted a price discrimination law in 1975, "but French officials had so little sympathy for the law that they declined to be involved in enforcing it."[122] Such dissimilarities or gaps are more

117. For example, Japan has recognized that industry concentration results in some benefits.

> The history of [Japan's] Antimonopoly Act, . . . has been one of government and business hostility and hence shrinking applicability. Japanese leaders have viewed the Act's emphasis on competition as an impediment to the creation of a strong national economy. . . . The close cooperation between the Japanese government, business management, and labor has led to a substantial degree of concentration in big business,. . . and to the re-establishment of gigantic business structures similar to the prewar zaibatsu (Mitsui, Mitsubishi, Sumitomo, and so on).

KINTNER & JOELSON, *supra* note 9, at 259.

118. EEC competition law does not adhere to rigid notions as to the efficacy of pure competition as both a means to and an end embodying economic and political good, as does its American counterpart. Community law is extremely flexible in allowing practices which promote efficiency while not hindering the goal of market integration.

Comment, *supra* note 116, at 538.

119. "[E]very country in noncommunist Europe except Turkey has some type of restrictive business practices legislation presently on the books or under consideration." KINTNER & JOELSON, *supra* note 9, at 1. The degree of development of the different national antitrust laws varies, however. Germany, for example, has moved swiftly to enact comprehensive national competition laws, *see supra* note 123, while Italian competition law is largely limited to the antimonopoly policy developed by the EEC, *see supra* note 143.

120. The United Kingdom, for example, prohibits concerted activities and agreements between competitors in restraint of trade. These restrictions are comparable to the prohibitions of section 1 of the Sherman Act. KINTNER & JOELSON, *supra* note 9, at 227.

121. Robinson-Patman Act, 15 U.S.C. § 13 (1976).

122. Davidow, *supra* note 113, at 5-6. Another difference between the antitrust policies of the United States and France lies in the area of merger control. "[T]he United States is prepared to prevent mergers creating a firm with 10% to 20% of a concentrated

pronounced in some countries than in others. The laws vary in scope, ranging from the highly developed antitrust laws of West Germany[123] to the almost nonexistent antitrust laws of Belgium.[124] Finally, the concept of antitrust is alien to the economic systems of the Eastern European Communist countries, Cuba, and the Soviet Union.[125]

A body of antitrust law similar to that of the United States becomes meaningful only if it is enforced. In addition to substantive variations between the United States antitrust laws and foreign competition codes, numerous procedural differences among the many laws[126] result in varied levels of enforcement. An important procedural question involves the existence of a private right of action for damages resulting from antitrust violations.

The general character of foreign enforcement procedures differs from methods used in the United States.[127] Instead of employing

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industry. . . . [In contrast,] France adopted merger control only in June of 1977, and will examine only those mergers involving more than 40% control of a relevant market." *Id.* at 4.

123. Germany has developed antitrust laws that are similar to those of the United States because many of the philosophies underlying United States antitrust law are accepted in Germany. "The general philosophy underlying competition policy and the laws adopted to give effect to it, show some similarities . . . between the United States and West Germany." ZEITSCHRIFT FUR DIE GESAMTE STAATSWISSEN SHAFT, COMPETITION POLICY: GERMAN AND AMERICAN EXPERIENCE 385 (1980). Germany first enacted its antitrust laws in 1958. Responsibility for enforcement of these laws vests in the Federal Cartel office in Berlin. The Office "has refused to permit mergers in at least eleven cases over the past four years [1974-78]. The authority . . . also [deals] with restraints of competition such as the fixing of retail prices and uniform conditions of sale." PRICE WATERHOUSE, DOING BUSINESS IN GERMANY 16 (1978).

124. Presently, Belgium has neither monopoly nor antitrust laws. "However, the law of May 27, 1960 includes a provision prohibiting undertakings from exploiting a dominant position in an improper manner. This provision is in line with Article 86 of the [Treaty of Rome, the treaty] implementing the EEC." PRICE WATERHOUSE, DOING BUSINESS IN BELGIUM 13 (1978). *See infra* note 138.

125. These countries, including Albania, Bulgaria, Czechoslovakia, East Germany, Hungary, Poland, Rumania, the Soviet Union, Mongolia, and Cuba, have centralized, planned systems, made possible because the government owns almost all industry. Therefore, there is no need for antitrust laws. *See* U.S. DEP'T OF COMMERCE, DOMESTIC AND INTERNATIONAL BUSINESS ADMINISTRATION, ANTITRUST IN EAST-WEST TRADE (An Excerpt from Meeting of the Advisory Committee on East-West Trade), 2-4 (March 10, 1976).

126. As one commentator recognizes, "there is as much need for improvement and harmonization in regard to antitrust procedures internationally as [there is] in regard to substantive rules." Davidow, *supra* note 113, at 12.

127. "In contrast to some of the conceptual similarities between United States and European substantive antitrust law . . . , EEC procedure differs dramatically from the United States procedure. [For example,] [t]he EEC's procedures are administrative." Reeves, *European Antitrust Law: A Nontechnical Overly Simplified Introduction,* ANTITRUST 7 (ABA) Vol. 1, No. 4 (1978). The emphasis on administrative procedures has resulted in a more flexible approach regarding prohibited practices. "Great use is made of administrative procedures in the application of EEC competition law, and it is through these procedures that many forms of cooperation are allowed, including joint marketing

rigid enforcement mechanisms, most developed countries rely on more flexible and informal voluntary methods of "enforcement," but describe these mechanisms with terms such as "negotiation," "inquiry," and "arbitration." Sweden has adopted this approach. Swedish law empowers a Freedom of Commerce Ombudsman to supervise compliance with the law. If he believes a certain restraint is harmful, he may "negotiate with the Company to eliminate the problem."[128] If unsuccessful, he can bring the matter to a special court (Marknodsdemstolen) where the "negotiations" continue.[129] Thus, the law lacks strict enforcement mechanisms; it lacks rigid rules backed by criminal and civil sanctions.

Other European nations also fail to enforce their antitrust laws strictly. In Finland, the Competition Ombudsman Office may settle disputes "concerning harmful effects of restrictive practices"[130] through arbitration. The Netherlands competition law requires that all agreements in the field of competition be disclosed to the Ministry of Economic Affairs and entered in the nonpublic cartel register.[131] Failure to file such agreements may be punished by both a fine and imprisonment for up to six years.[132] In practice, however, "[t]he Act has been rarely invoked . . . , and case law is minimal."[133]

While differences in the enforcement mechanisms of the developed countries are important, a more vital concern focuses on who may initiate these procedures; in other words, who has standing to bring these claims. Eleven developed countries currently allow civil actions for damages.[134] The existence of standing and the availability of a private remedy, however, fail to indicate the actual use of these measures. In fact, private suits for damages do not comprise the major method of enforcement in many of these countries. For example, while English law normally provides a civil remedy for the

agreements, and joint research and development agreements." Comment, *supra* note 116, at 537.

128. PRICE WATERHOUSE, DOING BUSINESS IN SWEDEN 12 (1980). In certain cases, an injured party may seek relief on its own. "If in a certain case the Ombudsman decides not to initiate negotiations, an entrepreneur who is directly affected by the restraint of competition in question, or an association of consumers or employees, may apply for the institution of negotiations." GUIDE TO LEGISLATION IN RESTRICTIVE BUSINESS PRACTICES, Sweden, at z, Vol. V (1971).

129. DOING BUSINESS IN SWEDEN, *supra* note 128, at 12.

130. PRICE WATERHOUSE, DOING BUSINESS IN FINLAND 10 (1980).

131. PRICE WATERHOUSE, DOING BUSINESS IN THE NETHERLANDS 21 (1980).

132. The Economic Offenses Act provides for these sanctions. *Id.*

133. *Id.* The normal practice is that the parties confer with the Ministry before making an agreement, and "in the past, cartels and other groups have acceded to the views of the Ministry." *Id.* at 21-22.

134. AVAILABILITY OF CIVIL ACTIONS IN THE AREA OF RESTRICTIVE BUSINESS PRACTICES (Civil action here means a private suit for damages).

breach of any statutory duty,[135] English antitrust law demonstrates a negative attitude toward such claims when they are based on violations of Articles 85 and 86 of the EEC Treaty.[136]

2. *Antitrust Laws of the European Economic Community*

The antitrust program of the Common Market incorporates a two-tiered legal system. The national antitrust laws of the member countries[137] comprise the first tier; the second tier consists of the antitrust law adopted by the Community as a whole. The antitrust law of the EEC is embodied in Articles 85 and 86[138] of the EEC

Statute Clearly Authorizes	Statute Does Not Authorize	Ambiguous
1. Canada	Denmark	Belgium
2. France	Sweden	Finland
3. Germany	United Kingdom*	Ireland**
4. Japan	Austria	
5. Netherlands	Greece	
6. Spain (by case law)	EEC	
7. Norway		
8. Switzerland		
9. Australia		
10. Italy		
11. United States		

*Suit for damages due to the operation of an unregistered agreement is authorized.
**In general, a party may sue for damages if injured by a breach of a statutory duty.

Source: Compiled from ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, COMPARATIVE SUMMARY OF LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES (1978).

135. D. BAROUNOS, D. HALL, & J. JAMES, EEC ANTI-TRUST LAW: PRINCIPLES AND PRACTICE 131 (1975).

136. In this connection it may be mentioned that . . . actions for damages by third parties do not play a role in the enforcement of restrictive practices legislation in England . . . .

It is interesting to contrast the uncertain position under EEC law regarding third party claims and the negative attitude to such claims under English antitrust law with the situation in the USA where the possibility of claims for penal triple damages at the suit of third parties prejudiced by breach of the anti-trust laws is perhaps the main deterrent against their infringement.

Id. at 136. *See also* Rew, *Actions for Damages by Third Parties Under English Law for Breach of Article 85 of the EEC Treaty,* 8 COMMON MKT. L. REV. 46 (1971).

137. Members of the EEC are West Germany, France, Italy, Belgium, the Netherlands, Luxembourg, Denmark, the United Kingdom, Ireland, and Greece. The first six countries were the original members. Comment, *supra* note 116, at 535 & n.1.

138. Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 3 [hereinafter cited as Treaty of Rome]. Articles 85 and 86 of the Treaty read as follows:

(Rules Governing Competition)
Article 85
(1) The following shall be deemed to be incompatible with the Common Market and shall hereby be prohibited: any agreements between enterprises, any decisions by associations of enterprises and any concerted practices which are likely to affect trade between Member States and which have as their object or

Treaty (Treaty of Rome).[139] The EEC's antitrust laws primarily attempt to maximize free competition. Article 85 prohibits practices "which have as their object the prevention, restriction or distortion of competition."[140] This commits all signatories of the EEC to an antimonopoly policy. The interrelationship between the law of the EEC and the laws of its member nations, however, remains complex. The enforcement of the competition rules and regulations of the EEC rests primarily with the Commission of the European Commu-

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result the prevention, restriction or distortion of competition within the Common Market, in particular those consisting in:

a.) The direct or indirect fixing of purchase or selling prices or of any other trading conditions;

b.) The limitation or control of production, markets, technical development, or investment;

c.) Market-sharing or the sharing of sources of supply;

d.) The application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or

e.) The subjecting of the conclusion of a contract to the acceptance by a party of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract.

(2) Any agreements or decisions prohibited pursuant to this Article shall be null and void.

(3) Nevertheless, the provisions of paragraph 1 may be declared inapplicable in the case of:

—any agreement or classes of agreements between enterprises;

—any decision or classes of decisions by associations of enterprises, and

—any concerted practices or classes of concerted practices which contribute to the improvement of the production or distribution of goods or to the promotion of technical or economic progress while reserving to users an equitable share in the profit resulting therefrom, and which:

a. neither impose on the enterprises concerned any restrictions not indispensable to the attainment of the above objectives;

b. nor enable such enterprises to eliminate competition in respect of a substantial proportion of the goods concerned.

Article 86

To the extent to which trade between any Member States may be affected thereby, action by one or more enterprises to take improper advantage of a dominant position within the Common Market or within a substantial part of it shall be deemed to be incompatible with the Common Market and shall thereby be prohibited.

Such improper practices may, in particular consist in:

a. the direct or indirect imposition of any inequitable purchase or selling prices or of other inequitable trading conditions;

b. the limitation of production, markets or technical development to the prejudice of consumers;

c. the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage;

d. the subjecting of the conclusion of a contract to the acceptance, by a party, of additional supplies which, by their nature or according to commercial usage, have no connection with the subject of such contract.

139. Officially known as the Treaty Establishing the European Economic Community, 298 U.N.T.S. 3 (1958). *See supra* note 138.

140. Treaty of Rome, *supra* note 138, art. 85(1).

nities.[141] Articles 85 and 86, however, are considered part of the national law of the member states. Thus, they can be enforced in the national courts.[142] Further, if a conflict between national and EEC law exists, Community law prevails. For some countries, EEC competition law becomes, in effect, the national antitrust law.[143] Finally, the broad definitions contained in Articles 85 and 86 have resulted in an "extensive body of administrative rules [that has] . . . become almost as important as the articles themselves."[144]

EEC competition law authorizes the Commission to initiate administrative proceedings to determine whether any violations of Article 85 or Article 86 have occurred.[145] "The commission may initiate the . . . proceedings . . . either ex officio or upon the complaint of a member state or of any natural or legal persons who claim a legitimate interest."[146] The EEC competition rules contain no provision for private damage actions; creation of that right lies solely with the national laws.[147] Thus, a person may sue for damages in a national court only under national laws that permit such suits.[148]

3. The Antitrust Laws of Japan

Japan's antitrust law has developed through an attempt to balance two often conflicting factors: an awareness of the dangers of concentration and a traditional tolerance of considerable collective action and collusion.[149] Article 1 of Japan's Law Relating to Prohibition of Private Monopoly and Methods of Preserving Fair Trade states the purpose of the law:

> This Law, by prohibiting private monopolization, unreasonable restraint of trade and unfair business practices, by preventing the excessive concentration of power over enterprises, and by excluding undue restriction of production,

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141. The Commission is an executive body responsible for enforcing the laws of the EEC. Treaty of Rome, *supra* note 138, art. 155.

142. KINTNER & JOELSON, *supra* note 9, at 192.

143. This is the case in Italy, Luxembourg, and Belgium, where there appears to be no national body of antitrust law. *See* DOING BUSINESS IN BELGIUM, *supra* note 124, at 13; PRICE WATERHOUSE, GRAND DUCHY OF LUXEMBOURG 14 (1977); *See also* ORGANIZATION FOR ECONOMIC DEVELOPMENT, COMPARATIVE SUMMARY OF LEGISLATIONS ON RESTRICTIVE BUSINESS PRACTICES (1978). For many of the restrictive business practices listed, Belgium had "no specific legislation on [the] subject." *Id.* at 7, 21, 27, 33, 85, 99, 109. Further, Italy and Luxembourg were not even listed in the survey.

144. PRICE WATERHOUSE, DOING BUSINESS ABROAD IN THE COMMON MARKET 47 (1978).

145. Council Regulation 17, art. 3, 1 COMMON MKT. REP. (CCH) § 2421 (1971).

146. KINTNER & JOELSON, *supra* note 9, at 192.

147. 1 COMMON MKT. REP. (CCH) §§ 2041.70, 2041.90, 2041.95 (1973).

148. This delegation to national law of the issue of standing to sue for damages should not be interpreted to mean that the EEC opposes such suits. Rather, "[t]he commission . . . stated that such actions for damages could usefully supplement its own enforcement efforts." KINTNER & JOELSON, *supra* note 9, at 193.

149. *See* WALSH & PAXTON, *supra* note 116, at 158.

> sale, price, technology, etc., through combinations, agreements, etc. and all other unreasonable restraints of business activities, *aims to promote free and fair* competition . . . , and thereby to promote the democratic and wholesome development of national economy as well as *to assure the interest of the general consumer*. [emphasis added][150]

This Antimonopoly Act has five major substantive provisions. They focus on the following areas: private monopolization (Section 3), unreasonable restraint of trade (Section 3), unfair business practices (Section 19), restrictions on the concentration of economic power, and international contracts (Section 6).[151]

On its face, the Japanese statutory scheme seems to adopt the same underlying principles and prohibit the same conduct as the antitrust law of the United States.[152] In practice, however, its "[a]pproach to monopolies and restrictive practices. . . varies from that of Europe and the United States in that the government and the business world accept considerable collective action and collusion as a normal form of business activity."[153] Procedurally, Japan allows for the "indemnification of damages to the person or party injured."[154] Further, a strict liability standard is imposed on the accused. One must only demonstrate that the accused employed the proscribed practice, and that the plaintiff suffered injuries as a result of the accused's activities.[155]

4. The Antitrust Laws of Canada

While antitrust legislation has only recently been adopted by most foreign nations, Canada's initial antitrust legislation actually preceded the Sherman Act of 1890. Further, Canada adheres to the same general philosophy that underlies the antitrust laws of the United States: competition will lead to the optimum amount of production.

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150. EHS (Eibun-Horei-Sha) Law Bulletin Series, Volume II, Part III. Commercial Cases, K—Unfair Competition, at KAZ (1980).

151. KINTNER & JOELSON, *supra* note 9, at 254-58.

152. *Id.* at 252. "This similarity is not coincidental. . . [At the end of World War II,] the U.S. occupation authority, General MacArthur, specifically directed the Japanese government to enact a law which would eliminate and prevent private monopoly and restraint of trade." *Id.* at 252-53.

153. WALSH & PAXTON, *supra* note 116, at 158.

154. CHAPTER VII Indemnification of Damages (Absolute liability) 13

> Article 25. Any entrepreneur who has effected private monopolization or unreasonable restraint of trade or who has employed unfair business practices, *shall be liable for indemnification of damages to the person or party injured.*
>
> 2. *No entrepreneur may be exempted* from the liability as prescribed in the preceding paragraph *by showing the non-existence of willfulness or negligence on his part.*

EHS [Eibun-Horei-Sha] Law Bulletin Series, *supra* note 150, at KA 26. [Emphasis added].

155. *Id.*

> The philosophy behind the Canadian and United States laws was essentially that the establishment of an economic environment in which all business enterprises could freely and fairly compete would usually result in the best allocation of economic resources, the lowest prices, the highest quality and the greatest material progress which would be to the benefit of society as a whole.[156]

Both Canada and the United States recognize that it is important that national antitrust laws work without conflict in the international arena.[157] Because of the growing interdependence between these two countries and the joint Canadian-United States market area, the similar philosophy underlying the antitrust laws of both countries has important practical significance today.[158] Despite both the early enactment of an anti-combines law in Canada[159] and philosophical underpinnings that are similar to those found in the laws of United States, Canadian antitrust enforcement failed to develop as swiftly as its counterpart in the United States.[160]

Canada's Federal Anticombines Investigation Act closely resembles section one of the Sherman Act. It makes any combination or conspiracy that prevents or unduly diminishes competition unlawful.[161] Until recently, however, the provision has rarely been enforced. The number of "[m]onopolistic situations [that] have not been investigated or whose investigation has been dropped at an early stage ha[s] remained large in comparison with those that have

156. United Nations Conference on Trade and Development Secretariat, *Considerations For the Drafting of a Model Law or Laws on Restrictive Business Practices to Assist Developing Countries in Devising Appropriate Legislation,* 22 ANTITRUST BULL. 831, 833 (1977). "The Canadian Law of 1889 and the American Sherman Act of 1890 were political and almost theological expressions of the traditional aspiration for equality of opportunity and freedom of enterprise." Brault, *Current Developments in Competition Policies,* 22 ANTITRUST BULL. 157 (1977).

157. "In those cases in which the national laws affecting such practices have not been interpreted similarly, the partners [U.S. and Canada] will take appropriate action to harmonize their interpretations when such practices prove to be interfering with competition between the partner countries." CANADIAN-AMERICAN COMMITTEE, PLAN FOR A CANADA-U.S. FREE TRADE AREA 8-9 (1965).

158. A joint Canadian American Committee was created in 1957 to study problems arising from the growing interdependence between Canada and the United States. The dangers of restrictive business practices were recognized. "Incompatible with meaningful free trade are agreements between enterprises . . . that have the result of preventing, restricting, or distorting competition within the joint Canadian-U.S. market area." *Id.*, at 8.

159. The Canadian term for antitrust is anti-combines.

160. For example, Canadian merger policy has followed a different direction than its United States counterpart. "Although Canada was one of the first countries to legislate against combines, the extent of investigation and enforcement activity [prior to 1950] has been slight." G. ROSENBLUTH & H. THORBURN, CANADIAN ANTI-COMBINES ADMINISTRATION 1952-1960 (1963).

161. PRICE WATERHOUSE, DOING BUSINESS IN CANADA 32 (1979).

been effectively dealt with."[162] Thus, unlike mergers in the United States, Canadian mergers have benefited from a presumption of legality.[163]

Yet, "[r]ecent Canadian government actions have signaled changes both in actual and anticipated merger policy."[164] For example, recent amendments to the Anticombines Act would require government approval of any merger "likely to lessen" competition.[165] Thus, Canadian and United States merger policies promise to demonstrate greater similarity today than they previously have.

Although there are some differences in the area of practice and enforcement, antitrust development in Canada and the United States has been remarkably similar. Substantively and philosophically, these countries have developed their antitrust laws in almost complete harmony. Further, Canada is one of only a handful of countries besides the United States where antitrust laws are rigorously enforced.[166]

B. THE DEVELOPING COUNTRIES WITH ANTITRUST LAWS

About half of the larger developing nations[167] now have some form of antitrust laws.[168] These laws are mainly in an early stage of development. Some larger developing countries, however, have not developed their antitrust laws in a meaningful way.[169]

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162. ROSENBLUTH & THORBURN, *supra* note 160, at 100. The authors further point out that "judicial interpretations suggest that a merger can be attacked under the legislation only if it eliminates virtually all competition." *Id.*

163. "It is generally accepted that Canadian laws have accorded mergers a prima facie legal status. Specifically only in the narrow case of the establishment of a complete monopoly, or in cases of anticompetitive business conduct like price fixing, has the presumption of legality been rebuttable." Globerman, *Canada's Changing Merger Environment,* 24 ANTITRUST BULL. 519 (1979).

164. Further, the Canadian government has considered legislation that would extend the present legislative rules against monopolistic practices and other practices that may injure consumers. DOING BUSINESS IN CANADA, *supra* note 161, at 32 (1979).

165. Proposed changes in merger law introduced by recent amendments to the Combines Act require mergers that lessen or are likely to lessen substantially, actual or potential competition and that, in the case of horizontal mergers, result in the combined market share of the merged parties exceeding 20 percent, to be brought by the Competition Policy Advocate before a Competition Board. Globerman, *supra* note 163, at 520.

166. Davidow, *International Antitrust Codes: The Post-Acceptance Phase,* 26 ANTITRUST BULL. 567 (1981).

167. This group includes such nations as India, Brazil, Columbia, Chile, the Philippines, and possibly Yugoslavia.

168. Davidow, *The UNCTAD Restrictive Business Practices Code,* Remarks at the International Conference on Legal Problems of Codes of Conduct for Multinational Enterprises (July 16, 1979), *reprinted in* DEP'T OF JUSTICE ANTITRUST DIVISION RELEASES, at 2 (July 16, 1979); *see* White, *Recent Developments in the Control of Restrictive Business Practices in Latin America,* U.N. Doc. TD/B/C.2/AC.6/1F (1978).

169. Mexico is one country which has not developed antitrust law in a meaningful way. While an Article of the Mexican Constitution "prohibits agreements between busi-

India, a country in the midst of developing antitrust law, will be used as an example of the countries within this latter category. Its law is drawn, to a large degree, from the antitrust laws of the United States, the United Kingdom, and the other developed countries.[170] Its principle antitrust legislation, The Monopolies and Restrictive Trade Practices Act (MRTP) of 1969,[171] is defined as "[a]n act to provide that the operation of the economic system does not result in the concentration of economic power to the common detriment, for the control of monopolies, [and] for the prohibition of monopolistic and restrictive trade practices."[172] Thus, the policy underlying Indian antitrust law is in agreement with the philosophy behind its counterpart in the United States. Further, the trend in India's development of substantive antitrust law seems to track United States law closely. The Sachar Committee Report,[173] the publication of an antitrust advisory group, suggested that all monopolistic trade practices be proscribed. It suggested that the following practices be prohibited: "collective discrimination, boycott, collective bidding, resale price maintenance. . ., price discrimination, tie-up sales [tie-ins], exclusive dealings, [and] production sharing . . . ."[174].

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nessmen or other monopolistic practices resulting in increasing or fixing prices to the public. . . *[t]hese rules have not often been invoked*." PRICE WATERHOUSE, DOING BUSINESS IN MEXICO (1981).

170. Indian law on the subject of monopolies and restrictive trade practices draws heavily upon the laws as embodied in the Sherman Act and the Clayton Act in the USA; the Monopolies Act, 1948, Resale Price Maintenance Act, 1956 and the Restrictive Trade Practices Act, 1957 in UK; and as also those found in Japan, Canada, and Germany.

S. GUPTE, MRTP: A COMPENDIUM, at I/3 (1974).

171. It was amended by the Companies (Amendment) Act of 1974. Also, in August, 1978 a committee known as the Sachar Committee (High-powered Expert Committee on the Companies and MRTP Acts) issued a report suggesting further amendments. *See* Singh, *Law of Monopolies and Restrictive Trade Practices,* 14 ANNUAL SURVEY OF INDIAN LAW 40 (1978).

172. GUPTE, *supra* note 170, at III/5.

> (o) "restrictive trade practice" means a trade practice which has, or may have, the effect of preventing, distorting or restricting competition in any manner and in particular,—
>
> (i) which tends to obstruct the flow of capital or resources into the stream of production, or
>
> (ii) which tends to bring about manipulation of prices, or conditions of delivery or to affect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified costs or restrictions;

Id. at III/11.

173. *See supra* note 171.

174. Singh, *supra* note 171, at 69. Initially, many of these restrictive trade practices were treated as *per se* violations, as is done in the United States. In T.E.L. Co. v. Registrar of Restrictive Trade Agreements, 1977 A.I.R. (S.C.) 973, however, India's Supreme Court held that the question of whether a trade practice is restrictive or not must be decided by applying the rule of reason and not the *per se* doctrine. "[T]he concept of per se unreasonableness means that once courts have had sufficient experience with certain

While similarities with United States substantive law are present, important variations exist between India's procedural enforcement mechanism and that of the United States. India delegates responsibility for antitrust law enforcement to the Monopolies and Restrictive Trade Practices Commission (hereinafter the Commission).[175] As is common in most developing countries, the Commission comprises the sole mechanism for antitrust enforcement.[176] A civil action for damages has not yet been provided as a supplemental

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types of conduct, they will conclusively presume that such conduct is unreasonable and therefore illegal." KINTNER & JOELSON, *supra* note 9, at 206. Alternatively, the Court in *TELCO* defined rule of reason as follows:

> (A) restriction as to area or price will not per se be a restrictive trade practice. Every trade agreement restrains or binds persons or places or prices. The question is whether the restraint is such as regulates and thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine this question three matters are to be considered. First, what facts are peculiar to the business to which the restraint is applied. Second, what was the condition before and after the restraint is imposed. Third, what is the nature of the restraint and what is its actual probable effect.

1977 A.I.R. (S.C.) at 979.

Prior to the *TELCO* decision, India was one of the few foreign countries applying a *per se* standard. For example, "there are no *per se* illegalities in EEC competition law." Comment, note 116, at 540. Japan originally adopted the *per se* approach to restraints of trade. KINTNER & JOELSON *supra* note 9, at 255. The trend, however, has been away from the *per se* approach. "[A]mendments to the [Antimonopoly] Act have deleted the stringent per se prohibitions of the original legislation or have replaced per se rules with a test of reasonableness. . . ." *Id.* at 259.

175. The Commission has the powers of a civil court.

> Powers of the Commission
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> 12. (1) The Commission shall, for the purposes of any inquiry under this Act have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:—
>
> (a) the summoning and enforcing the attendance of any witness and examining him on oath;
>
> (b) the discovery and production of any document or other material object producible as evidence;
>
> (c) the reception of evidence on affidavits;
>
> (d) the requisitioning of any public record from any court or office;
>
> (e) the issuing of any commission for the examination of witnesses.
>
> (2) Any proceeding before the Commission shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code (45 of 1860), and the Commission shall be deemed to be a civil court for the purposes of section 195 and Chapter XXXV of the Code of Criminal Procedure, 1898 (5 of 1898).

S. GUPTE, *supra* note 170, at III/15. The Commission may inquire into such areas as restrictive trade practices, monopolistic trade practices, and concentration of economic power. *Id.*

176. "In developing countries, it is not infrequent that responsibility for deciding whether a restrictive agreement is acceptable will be vested in a single administrative official who has no obligation to hold hearings of any particular type." Davidow, *supra* note 113, at 11.

means of enforcement.[177] The Sachar Committee has recommended, however, that such a private right of action be instituted.[178]

While a handful of larger developing countries are making significant strides in the development of a viable body of antitrust law, no developing country currently provides for a private right of action.[179] Many developing countries, as exemplified by India, have modeled their substantive laws on United States antitrust provisions. Although the substance and philosophy of these laws may be similar, enforcement mechanisms have not followed United States methods.

C. Countries Without Antitrust Laws

Today many countries still have no antitrust laws.[180] Many of these nations, especially the developing countries, rarely experience the problems caused by purely domestic anticompetitive practices. These problems are not present because of the nature and size of the economies of these nations.[181] This, however, does not diminish the amount of injury suffered from antitrust violations originating from conspiracies abroad. While many of these developing countries have little need for domestic antitrust laws, they need access to the courts of other nations, especially those of the developed countries, to recover compensation for injuries suffered. Only then can they attempt to eliminate the anticompetitive practices that produce harmful effects within their borders.

Generally, it is unlikely that these nations will develop a viable body of national antitrust law. Perhaps the only hope for the introduction of antitrust law into these countries lies with the development of antitrust law at the supranational level. The developing countries played an important role at the United Nations Conference on Restrictive Business Practices (UNCRBP), concluded on

177. Referring to the *Pfizer* decision, an Indian law professor stated that India has "no parallel provision regarding payment of damages at the instance of any "person" as such." Singh, *supra* note 171, at 41.

178. Commenting on the institution of such a right of action, the Committee stated that it would be a "novel provision . . . for the award of damages not only at the instance of an individual [citing the treble damages provision of the Clayton Act] but also through a class action." *Id.* at 79.

179. Brazil, Columbia, Yugoslavia, and Israel seem to be the only developing countries that provide for such an action. S. Rep. No. 239, *supra* note 38, at 48 (Statement of Assistant Attorney General Ewing).

180. While approximately 90 percent of all developed countries and about half of the larger developing countries currently have some form of antitrust legislation, perhaps as many as one hundred smaller countries have no antitrust laws at all. Davidow, *The UNCTAD Restrictive Business Practices Code,* 13 Int'l Law. 587, 588 (1979). *See also* White, *supra* note 168.

181. The government of Papua New Guinea, for example, believes the nation's relatively small market makes it presently inappropriate to introduce antimonopoly legislation. Price Waterhouse, Doing Business in Papua New Guinea 1 (1979).

April 22, 1980.[182] A "Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices" was adopted by the Conference.[183] This set of Agreed Principles and Rules may help fill the void that exists due to the lack of national antitrust legislation in the developing countries.[184] Thus, "[i]f states respect their obligations as enumerated in the Agreed Principles and Rules, *states will enforce the code through their national legal machinery*."[185] The question remains, however, whether these countries will enforce the Agreed Principles and Rules vigorously, or whether they will become an empty agreement to which no nation adheres. Yet, the real importance of the Principles and Rules lies in the possibility that, in time, they may provide a basis for the development of substantive antitrust laws in the countries presently without any such laws.[186] Substantively, the code "incorporates the general division between agreements in restraint of trade and monopolization contained in sections one and two . . . of the Sherman Act."[187] Due to the significant differences in outlook among the countries of the

182. *See* Oesterle, *supra* note 67, at 2-4, 44; United Nations Conference on Restrictive Business Practices, The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, U.N. Doc. TD/RBP Conf./10 (1980).

183. The United Nations General Assembly adopted the set of "Agreed Principles and Rules" on December 5, 1980. *See* Oesterle, *supra* note 67, at 55.

184. The committees that performed the preparatory work for the UNCTAD Conference received a mandate to identify "restrictive business practices likely to injure international trade, particularly the trade and development of developing countries" and to formulate "a model antitrust law for developing countries." Davidow, *supra* note 180, at 589; UNCTAD Res. 91 (IV) (May 30, 1976).

185. Oesterle, *supra* note 67, at 7 (emphasis added).

186. Thus, the ultimate importance of the UNCTAD Code can be measured only by its interpretation and use over time. The immediate impact of the passage of the UNCTAD Code is likely to be minimal. Its importance lies in the possibility that it will serve as a starting point for the gradual development of antitrust law at the international level and as a course for the expansion of antitrust laws at the national level:

> [W]hile U.N. adoption of the Principles and Rules may deter a few practices, particularly in transactions with developing countries, the provisions will have significant effect only as a gradual process of formal or informal interpretation develops *or as they are embraced or copied in national or regional law that is effectively enforcible*.

Davidow, *International Antitrust Codes: The Post-Acceptance Phase,* 26 ANTITRUST BULL. 567, at 590 (1981) (emphasis added). In the short-run, nations are likely to implement provisions of the UNCTAD Code in their courts only when their national interests would be benefited:

> Presumably, nations will favor or implement strict rules only when their interests in eliminating certain practices actually coincide . . . [For example], some states, particularly the United States, would generally take the position that an agreement restraining trade and competition made without government approval is evil regardless of whether the restraint was in fact harmless, or even arguably in the national interest. Other States would have very little bias against private trade restraints per se, evaluating them after the fact in terms of their effects.

Davidow, *supra* note 180, at 601-02.

187. Oesterle, *supra* note 67, at 4. The language of the Agreed Principles and Rules is unique. The Agreed Principles and Rules emphasize a policy substantially different from

world, however, the Code is filled with "vague, imprecise, [and] largely untested concepts and definitions."[188] Thus, it is not likely that this set of Agreed Principles and Rules will have much practical impact on countries presently without antitrust laws.[189]

D. SUMMARY

This overview of world antitrust law indicates that a number of similarities as well as differences exist between foreign competition law and United States antitrust law.[190] Further, when compared with their counterparts in the United States, the differences between the procedural enforcement mechanisms and the remedies that are available for antitrust violations in foreign countries appear to be

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other antitrust codes; it attempts to meet "the social needs and political demands of developing countries vis-a-vis developed countries." *Id.* at 44.

188. Gill, *The UNCTAD Restrictive Business Practices Code: A Code for Competition?* 13 INT'L LAW. 607, 608 (1979). Thus, the meanings of the substantive elements within the Code are surrounded by a great deal of uncertainty:

> The problem is that one simply does not know what content the terms will be given in the UNCTAD Code. These terms necessarily have much clearer meaning within the context of a unified system such as that of the EEC, where rules of competition form part of the law of each member state and are enforced by the Commission throughout the Community, than in the widely differing contexts and economic and political systems of the member countries of UNCTAD.

Id. at 610-611.

Further, unlike the Commission of the EEC, there is no enforcement mechanism at the international or regional level to secure compliance with the UNCTAD Code, and the likelihood that such a mechanism will be created in the immediate future is slim. "[N]o regional group participating in the RBP negotiation has recommended, or seems likely to support, the creation of an enforcement agency at the international level." Davidow, *supra* note 180, at 601.

189. One commentator believes that "[i]t would be dangerous . . . to accord to these general principles (which are frequently no more than polite statements of disagreement) any greater authority than that of voluntary guidelines or signposts for the continuing process of international education in and acceptance of competition as a rule of business conduct." Gill, *supra* note 188, at 615.

Another commentator believes that the developed countries viewed the UNCTAD Conference as merely an arena to exchange information, and not as the place for realizing the more ambitious goal of developing a binding model antitrust code. He believes that the actual benefits of the UNCTAD restrictive business practice exercise, for the developed countries, has been the actual process of exchanging information. He claims that these countries do not believe an inflexible Code, resulting from a one-time international agreement, is a feasible way of presently dealing with restrictive business practices. "Rather, it is believed that a gradual exchange of information and experience, comparison of legislation and enforcement . . . will, over time, . . . facilitate bilateral cooperation and consultation. . . ." Davidow, *supra* note 180, at 603.

190. Presently, many of the developed countries prohibit most of the conduct that is prohibited in the United States. Articles 85 and 86 of the Treaty of Rome, for example, are comparable to §§ 1 and 2 of the Sherman Act. Generally, however, the antitrust laws of other countries are not as comprehensive as those of the United States. The fact that antitrust development in many of these countries is still in its early stages probably accounts for this difference. For example:

> [r]emedies for the abuses of free-market capitalism began in the United States with the Sherman Act in 1890. The EEC's development of antitrust remedies did not begin until 1957. As a result, antitrust law in the EEC has not fully devel-

even greater than the variations in the substantive law.[191] Thus, applying a reciprocity standard that distinguishes between countries with antitrust laws that are similar to those of the United States and countries with laws that lack the requisite similarity would be difficult. A reciprocity standard that required foreign nations to grant the United States Government standing to sue for damages resulting from antitrust violations before those nations could bring antitrust suits in United States courts would grant only a handful of foreign countries access to the courts of the United States.[192] In many countries that have an operative body of antitrust law, enforcement is delegated to a governmental commission or agency.[193] Those bodies then have the power to initiate complaints, conduct investigations, and prescribe remedies.[194] Practically, these commissions and agencies become the only mechanisms through which the antitrust laws are enforced. Thus, differences between the enforcement mechanisms of the United States and those of foreign nations lead to an important consideration: how many countries will be denied antitrust standing in the courts of the United States if a reciprocity requirement is imposed?

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oped a body of [judicial] precedent similar to that which has evolved through 85 years of litigation in the United States.

Comment, *supra* note 116, at 589. The relatively recent enactment of antitrust statutes in many countries indicates that, in time, such countries may develop a scheme of antitrust laws as inclusive as that developed by the United States.

191. Statutory similarity can be only an initial inquiry. Differences between what statutes proscribe and the provisions that nations actually enforce may be great. Further, although textually similar, policies underlying the statutory schemes of other nations may differ from the policies of the United States. "In short, each modern antitrust or competition law can be fully understood only if one has some feeling for its appropriate political, economic, and social, as well as legal, perspective." KINTNER & JOELSON, *supra* note 9, at 7.

> For example, although some of the antitrust laws of the United States and the European Common Market are textually very similar, the Common Market authorities attach much more importance to the goal of integrating their nine national economies into a single economy capable of competing effectively with the United States and Japan, than they attach to the goal of limiting market power . . . .

Id. at 6-7. United States antitrust laws are designed to maintain free competition in the domestic economy. *Id.* at 8.

192. For example, only 12 of the 17 countries of the OECD have statutory provisions specifically allowing civil actions. *See* COMPARATIVE SUMMARY OF LEGISLATIONS ON RESTRICTIVE BUSINESS PRACTICE, *supra* note 134, at 199-203.

193. *See supra* notes 123, 128-33 and accompanying text.

194. Some countries delegate these tasks to different agencies. In the United Kingdom, for example, the Director of Fair Trade may refer a suspected monopoly to the Monopolies Commission for investigation. The Commission can then recommend that remedies be instituted by the Department of Prices and Consumer Protection. *See* WALSH & PAXTON, *supra* note 116, at 142-48.

IV

THE PRACTICAL EFFECTS OF RECIPROCITY

An endless number of reciprocity standards may be devised. This Note will focus on the effects of four different reciprocity formulations, ranging from a strict or exclusive standard to a loose or inclusive standard.[195] Any reciprocity standard, however, will provide a foreign nation standing only if that nation provides a similar right to the United States. Under the various formulations of reciprocity, the antitrust laws of a foreign nation must provide: (1) standing for the United States government plus substantive antitrust law "formulated precisely like our own" ("strict reciprocity"); (2) standing for the United States and the prohibition of the same "type or category" of conduct that is prohibited by United States antitrust law ("general reciprocity"); (3) proof of an intent or trend on the part of the foreign government to ensure free trade and competition; and (4) a mere showing of nondiscriminatory treatment of the United States in the administration of either the foreign nation's antitrust law or its general laws.[196]

A. STANDARD 1

"Strict reciprocity" requires that the antitrust laws of a foreign country mirror those of the United States. Thus, the standing of foreign governments in antitrust actions would "depend on the existence of foreign laws formulated precisely like our own."[197] Although United States antitrust law has been used as a model by many other countries, no nation has antitrust laws exactly like those

195. Continuum of Reciprocity Standards

Std. 1	Std. 2	Std. 3	Std. 4
identical substantive law + standing	"type" +standing	intent/ trend	no discrimination

← Decreasing number of countries granted standing

An exclusive reciprocity standard refers to a requirement which is likely to deny the majority of foreign nations standing in the United States.

196. Standard 4 grants standing to almost all foreign governments, effectively eliminating any reciprocity requirement. This position reflects the Supreme Court's view in *Pfizer*. Standard 1 would deny all foreign nations standing. This standard formed the basis of a bill proposed in the 95th Congress: H.R. 11942, 95th Cong., 2d Sess. § 3 (1978) (Clayton Act Amendments of 1978); it would preclude any damage actions by foreign governments under § 4 of the Clayton Act.

197. 125 CONG. REC. S. 990 (daily ed. Feb. 1, 1979) (Remarks of Mr. DeConcini). S. 2724, 95th Cong., 2d Sess. (1978) incorporated this formulation. Congress, however, did not act on this proposed bill. *See supra* note 33.

of the United States.[198] For example, treble damage relief and *per se* rules[199] are unique to the antitrust jurisprudence of the United States.[200] Thus, a "strict reciprocity" requirement would deny access to United States courts to all nations affected by antitrust violations. Further, an attempt by the United States to force other sovereign countries to adopt such rigidly defined antitrust laws would be inherently unreasonable.

B. STANDARD 2

"General reciprocity" requires the foreign nation seeking standing in the United States to: (1) grant the United States Government standing to bring antitrust suits in its courts; and (2) enact substantive laws that prohibit the same "type or category" of anti-competitive conduct that is proscribed in the United States.[201] Thus, standing would be granted to all countries that have "demonstrated a commitment to the concepts embodied in . . . U.S. antitrust law."[202]

Under this formulation, the antitrust laws of a foreign country would not have to be "exactly like" those of the United States. Rather, such laws would merely have to embody the same basic concepts that underlie American antitrust law. Because the phrase "type or category" is broad, most foreign countries that currently have antitrust laws would satisfy the first criterion for standing under this "general reciprocity" requirement. The EEC and the larger developing countries, for example, seem to prohibit the same general "type" of conduct that is prohibited in the United States.[203] Thus, approximately thirty-five countries would meet this initial requirement.[204] In addition, many more nations, including many of the developing countries, might be able to meet this requirement by implementing

198. *See supra* note 110 and accompanying text. If one compares the law of the United States to a multinational instrument such as the AGREED RULES AND PRINCIPLES OF THE UNCRBP, the likelihood of finding laws "exactly like" those of the United States decreases even more sharply. *See supra* notes 177-78 and accompanying text.

199. "Treble damage suits are unknown in Europe and any kind of private action in this field is very rare." [1981] ANTITRUST & TRADE REG. REP. (BNA) No. 996 at A-6 (Jan. 8, 1981). *See supra* notes 115-118, 174 and accompanying text.

200. Further, differences in the enforcement mechanisms used by other countries might be the basis for failing the "strict reciprocity" standard. *See supra* notes 128-130 and accompanying text.

201. The *Pfizer* section of the Illinois Brick Bill, S. 300, *supra* note 33, incorporates this standard of reciprocity. While the 96th Congress failed to act upon this bill, it is likely that the Bill's reciprocity portion will be reintroduced in a later congressional session. *See supra* note 33.

202. 124 CONG. REC. S. 1191 (daily ed. Feb. 6, 1978) (Remarks of Mr. DeConcini).

203. *See supra* notes 113, 120, 138-40, 150, 170-174 and accompanying text.

204. KINTNER & JOELSON, *supra* note 9, at 1.

the "Agreed Rules and Principles" formulated by the UNCRBP.[205]

While a relatively large number of countries could satisfy the "type or category" requirement under this reciprocity formulation, many of these countries would fail to satisfy the second requirement that this standard imposes. To acquire standing under a "general reciprocity" standard, a foreign country must provide standing in its courts for United States Government suits concerning antitrust violations. Only fifteen countries[206] presently provide for such standing. Thus, any standard imposing such a "standing" requirement would exclude most nations of the world. If the "general reciprocity" standard were modified by eliminating the "standing" requirement, the right to bring antitrust suits in the United States would be extended to at least thirty-five nations. Countries without any antitrust law, however, still would be denied standing in United States courts.

C. STANDARD 3

The third proposed reciprocity formulation requires a foreign government to demonstrate an intent or a trend, within that nation, to promote free trade and competition. Adopting this standard would extend standing even beyond the thirty-five nations that could satisfy the "type or category" requirement of the "general reciprocity" standard. India, for example, would be considered a country which exhibits a trend toward developing antitrust laws analogous to those of the United States.[207]

This formulation of reciprocity does not require a foreign nation to develop a body of substantive law outlawing the types or categories of conduct that are prohibited by the antitrust laws of the United States. Under this reciprocity standard, a country must only show either some rudiments of antitrust development or that some other means are used to promote free trade and competition. The enactment or even the consideration of initial antitrust legislation or an executive or governmental statement of policy demonstrating such an intent would satisfy the requirement. Many countries, however, have not demonstrated such a trend or intent.[208] Thus, enact-

205. This code, by prohibiting similar antitrust violations, seems to embody many of the basic concepts of United States antitrust law. *See supra* notes 182-87 and accompanying text.

206. A survey of OECD countries indicates that only twelve of these countries provide for a civil damages action for antitrust violations. *See supra* note 134 and accompanying text. Four countries outside the OECD also recognize such a right of action. *See supra* note 179.

207. *See supra* notes 170-74 and accompanying text.

208. *See supra* note 181 and accompanying text. Developing countries comprise the majority of nations within this group.

ing even this loose reciprocity standard would deny those countries standing to sue in the courts of the United States.

D. STANDARD 4

The fourth proposed reciprocity formulation would grant standing to almost all foreign nations. To gain standing rights, a country would have to demonstrate only that it applies its laws to the United States in a nondiscriminatory manner.[209] Thus, standing would be the rule; the denial of standing would be the exception. Foreign nondisclosure statutes offer an example of laws that result in discriminatory treatment. Such statutes deny the courts of the United States the opportunity to examine relevant foreign documents,[210] and thereby limit the ability of the courts to make informed decisions. In 1980, the United Kingdom enacted its nondisclosure law which clearly manifests its disapproval of United States antitrust suits against British nationals. The statute prohibits English citizens from complying with the requests of United States courts for documents sought in United States antitrust litigation. Further, the Act allows English citizens who are defendants in an antitrust action in the United States to recover two-thirds of any treble damages they must pay.[211]

This standard of reciprocity would grant standing rights to most foreign nations, including many developing countries which currently have no antitrust laws.[212] Although even this mild reciprocity requirement would exclude some nations, including the United

209. Conversation with Mr. Joel Davidow, Director of Office of Policy Planning, Antitrust Division, Department of Justice (Feb. 10, 1981).

210. Oesterle, *supra* note 67, at 24. This is also a major issue in the recent uranium cartel litigation. *See generally,* Note, *Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation,* 88 YALE L.J. 612 (1979). *See also* Stanford, *The Application of the Sherman Act to Conduct Outside the United States: A View from Abroad,* 11 CORNELL INT'L L.J. 195 (1978). France was the most recent addition to the list of at least twenty countries that have promulgated statutes of this type.

211. Oesterle, *supra* note 67, at 24 n.105.

> The U.K. law . . . prohibit[s] citizens from complying with requests for documents situated in the United Kingdom if the legal proceeding in the United States is concerned with possible violations of antitrust law. Furthermore, the law establishes a cause of action in U.K. courts for nationals to recover two-thirds of any treble damage award suffered at the hands of specified antitrust plaintiffs in United States courts.

Id. See The Protection of Trading Interests Act, 1980, c. 11, *reprinted in* 959 ANTITRUST & TRADE REG. REP. (BNA) F-1-F-2 (April 10, 1980).

212. One commentator argues that such standing increases the bargaining position of the less developed countries vis-a-vis the multinational corporations. He believes, therefore, that these nations "will be better able to deter anticompetitive practices." Note, *Antitrust: Standing for Foreign Governments—Pfizer, Inc. v. Gov't of India,* 10 CASE W. RES. J. INT'L L. 833, 836-837 (1978). Yet, standing rights alone will not be a panacea for these countries. "The absence of an antitrust remedy is more likely than not a real problem for many of the [developing countries]. . . ." *Id.* at 836.

Kingdom, this standard is the only one of the proposed reciprocity formulations that would not exclude a majority of countries from access to United States courts to institute antitrust claims.[213]

CONCLUSION

Policy considerations and the practical effects of imposing a reciprocity standard indicate that foreign governments should continue to have standing to sue for treble damages under section four of the Clayton Act. No reciprocity requirement should be imposed to limit this right.[214] If Congress decides that a reciprocity requirement is appropriate, it should attempt to perform a country-by-country analysis to determine which countries should be guaranteed standing rights. Factors such as the relationship of the United States to a specific country, as well as that country's manifested commitment to free trade, must be taken into account. This would give some assurance that the policies underlying antitrust standing rights of foreign nations would be considered. Further, a careful individual analysis would avoid some of the negative repercussions in foreign relations that imposing a strict reciprocity standard would trigger.[215] While

213. The first standard would exclude all nations; the second would grant standing to approximately 15 nations; the third would grant standing to approximately 35 nations; and the fourth would grant standing to all but a handful of nations.

Even assuming that a foreign government is granted standing, important questions remain. Should a foreign nation be able to recover treble damages in an antitrust suit, or should it be limited to recovering actual damages? Some of the same policies that support the grant of standing rights to foreign nations similarly support awarding treble damages. *See supra* notes 37-104 and accompanying text. For example, the treble damages award would help effectuate the dual goals of the Clayton Act: compensation and deterrence. *See supra* note 39 and accompanying text. One Antitrust Division official recognizes the importance of a treble damage award as a deterrent to future antitrust violations. "Experience suggests that the possibility of facing treble damage actions brought by persons injured by antitrust violations weighs heavily on the mind of a potential price fixer." Ewing, *The Clayton Act Amendments of 1978,* DEP'T OF JUSTICE ANTITRUST DIVISION RELEASES 4 (Aug. 3, 1978); Parker, *The Deterrent Effect of Private Treble Damage Suits: Fact or Fantasy?* 3 N.M.L. REV. 286 (1973).

The notion that a possible treble damage recovery maximizes the incentive to sue underlies the private enforcement provisions of antitrust law in the United States. For an interesting discussion of the economies of antitrust enforcement, see Schwartz, *An Overview of The Economics of Antitrust Enforcement,* 68 GEO. L. J. 1075 (1980). The incentive provided by a possible treble damage recovery would assume even greater importance in encouraging foreign governments to seek remedies for antitrust violations. The costs of discovery and representation in such suits are likely to be prohibitive. Capital-poor countries may be unable to meet such expenses. The difference between actual damage and treble damage recovery would likely be an important factor in deciding whether to bring suit.

214. Of course, the requirement that a foreign government be at peace with the United States as well as recognized by the executive should be maintained. *See supra* notes 15-18 and accompanying text.

215. Germany, for example, believes the United States must exercise greater care before imposing strict statutory requirements. A German official stated: "We are convinced that the sometimes frail framework of international law would be seriously

individual determinations necessarily would be expensive and time-consuming, the imposition of a uniform reciprocity requirement, even in its mildest form, would result in the arbitrary denial of standing rights to some nations, including some valuable trading partners. Severe damage to United States foreign relations with the excluded nations could be an unwelcome result of a uniform reciprocity requirement.

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affected by a U.S.-legislative demand for conformity with U.S. statutes." S. REP. No. 239, *supra* note 38, at 72 (Letter from Embassy of the Federal Republic of Germany). This is especially significant because "Germany has the strongest and most energetically enforced antitrust laws apart from the United States." *Id.*