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Antitrust Law - Sherman Act - Sections 1 and 2 - Clayton Act - Section 4 - Interpretation of the Term Person

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ANTITRUST LAW—SHERMAN ACT—SECTIONS 1 AND 2—CLAYTON ACT—SECTION 4—INTERPRETATION OF THE TERM "PERSON"—The Supreme Court of the United States has held that foreign nations are entitled to sue for treble damages under section 4 of the Clayton Act.

Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978).

In 1974, the governments of India, Iran, and the Phillipines[1] brought separate actions in federal district court seeking treble damages under section 4 of the Clayton Act[2] against six pharmaceutical companies.[3] The plaintiffs alleged that the companies had violated sections 1[4] and 2[5] of the Sherman Act by conspiring to restrain and monopolize interstate and foreign trade in the manufacture, distribution, and sale of tetracycline. Among the practices in which the defendant companies allegedly engaged were price fixing, market division, and fraud upon the United States Patent Office.[6] Because the drug companies believed that foreign governments were not "persons" entitled to bring suit under section 4 of the Clayton Act,[7] they moved to dismiss the action for failure to state a

1. Vietnam was a party to the suit in the United States District Court for the District of Minnesota, and was a respondent in the petition for certiorari. Vietnam's complaint was dismissed by the district court since the United States no longer recognized the government of Vietnam. Republic of Vietnam v. Pfizer, Inc., 556 F.2d 892 (8th Cir. 1977).

2. In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, No. 74-48 (D. Minn., filed Dec. 27, 1975). The suit brought by India was but one of the more than sixty Antibiotic Antitrust Actions which were consolidated for pretrial purposes in the District of Minnesota. Each suit was based on allegations that certain drug companies conspired to exclude competitors as well as to fix the prices of antibiotic drugs abroad.

3. The six pharmaceutical companies were Pfizer Incorporated, American Cyanamid Company, Bristol Meyers Company, Squibb Beech-Nut Corporation, Olin Corporation, and Upjohn Company. Antibiotic Antitrust Actions, 333 F. Supp. 317 (S.D.N.Y. 1971).

4. Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations is declared to be illegal." 15 U.S.C. § 1 (1970) [hereinafter referred to as section 1].

5. Section 2 of the Sherman Act provides: "Every person who shall monopolize, or to 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." 15 U.S.C. § 2 (1970) [hereinafter referred to as section 2].

6. Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978).

7. Section 4 of the Clayton Act provides that:

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

claim.[8] The United States District Court for the District of Minnesota refused to dismiss the action, relying on *Antibiotic Antitrust Actions,*[9] for the holding that a foreign government is a "person" entitled to sue under the antitrust laws.[10]

On May 19, 1976, the United States Court of Appeals for the Eighth Circuit, which had earlier ruled that the proprietary interests of foreign governments could not be challenged on mandamus,[11] heard the appeal as a certified question.[12] In affirming the district court's decision, the court of appeals relied upon the United States Supreme Court's decisions of *United States v. Cooper*[13] and *Georgia v. Evans,*[14] each of which had focused upon the interpretation of the term "person" in antitrust legislation.

Dissatisfied with the court of appeals decision, the drug companies appealed to the United States Supreme Court and were granted certiorari.[15] Following an exhaustive analysis of section 4 of the Clayton Act, the Court affirmed, concluding that a foreign government is a "person" entitled to sue for treble damages under section 4 of the Clayton Act.[16]

Justice Stewart, speaking for a majority of the Court, noted that not only has the scope of remedies provided by the antitrust laws been broadly interpreted,[17] but also that the legislative history of the

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sustained, and the cost of suit, including a reasonable attorney's fee.
15 U.S.C. § 15 (1970) [hereinafter referred to as section 4].

8. FED. R. CIV. P. 12(b)(6). Under this rule, a pleader's motion can be based upon the defense that there is a failure to state a claim upon which relief can be granted.

9. 333 F. Supp. 315 (S.D.N.Y. 1971). Kuwait brought a treble damage antitrust action against certain drug manufacturers for alleged price fixing in the sale of antibiotics. In *Kuwait,* Judge Lord recognized that any conspiracy to eliminate or reduce competition of foreign drug sales would have an adverse effect on domestic competition. The court reasoned that to deny Kuwait's action would frustrate the goals of the antitrust laws, and concluded that the maintenance of the action was "essential to the effective enforcement of the antitrust laws." *Id.* at 316.

10. 333 F. Supp. 315.

11. Pfizer, Inc. v. Lord, 522 F.2d 612 (8th Cir. 1975). The court of appeals denied a request for mandamus without reaching the question of whether a foreign government is a "person" within the meaning of 15 U.S.C. § 15. Because Judge Lord had earlier ruled in *Kuwait* that foreign nations are "persons" within the coverage of the Clayton Act, the court ruled that mandamus would not lie to review the ruling of the district court.

12. Pfizer, Inc. v. India, 550 F.2d 396 (8th Cir. 1975) *aff'd,* 434 U.S. 308 (1978).

13. 312 U.S. 600 (1941). *See* note 25 and accompanying text *infra.*

14. 316 U.S. 159 (1942). *See* note 29 and accompanying text *infra.*

15. 430 U.S. 964 (1977).

16. Pfizer, Inc. v. Government of India, 434 U.S. at 320.

17. In support of this proposition, Justice Stewart cited Mandeville Island Farms v. American Crystal Sugar, 334 U.S. 219 (1948). *Mandeville Island* involved price fixing by

Sherman Act failed to demonstrate an intent to exclude foreign nations from its provisions.[18] However, he recognized two attributes possessed by the pharmaceutical companies that could arguably exclude them from section 4 coverage. First, Pfizer argued that the legislative history of the Sherman Act indicated an intent by Congress to protect only American consumers.[19] Second, Pfizer attempted to distinguish these respondents since they were foreign nations, contending that the word "person" was clearly understood by Congress when it passed the Sherman Act to exclude sovereign governments.[20]

In disposing of the initial contention, the Court observed that the Sherman and Clayton Acts each provide that the word "person" shall include *foreign* corporations,[21] and also noted that Congress had made explicit references to "foreign nations" in both of the Acts.[22] This specificity in terms was viewed by the Court as a clear expression of Congressional intent not to limit treble damage remedies only to United States consumers.[23] Moreover, the Court recognized that to deny foreign nations the right to sue would defeat the section 4 policies of deterring antitrust violations and compensating the victims of antitrust violations.[24]

California sugar refiners in their purchase of California sugar beets. The refiners' defense, that their agreement had no effect upon interstate commerce, did not enable them to avoid treble damage liability. The Court recognized that Congress intended the effect of the Act to be far-reaching and stated that:

> The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. The Act is comprehensive in its terms and coverage protecting *all* who are made victims of the forbidden practices by whomever they may be perpetrated.

Id. at 236 (emphasis added).

18. 434 U.S. at 312.

19. *Id.* at 313.

20. *Id.*

21. *Id.* Both sections state that a "person" shall be "deemed to include corporations . . . existing under . . . the laws of any *foreign* country." 15 U.S.C. §§ 7, 12 (1970)(emphasis added).

22. 434 U.S. at 313. Section 1 of the Sherman Act declares illegal contracts, combinations or conspiracies in restraint of trade or commerce "with foreign nations." Section 2 proscribes monopolizing and conspiring and attempting to monopolize commerce "with foreign nations." Section 1 of the Clayton Act expressly refers three times to commerce "with foreign nations."

23. *Id.* at 314.

24. In support of this statement, the Court cited Illinois Brick v. Illinois, 431 U.S. 720 (1977). In *Illinois Brick*, the Court held that to deny a foreign government injured by an antitrust violation the right to sue would defeat the two purposes of section 4. These purposes are to deter violators by depriving them of the "fruits of their illegality," and "to compensate victims of antitrust violations for their injuries." *Id.* at 746.

In considering the second contention, Justice Stewart noted that on two prior occasions the Supreme Court had considered whether a sovereign government is a "person" within the meaning of the antitrust laws and had rejected the mechanical rule urged by the petitioners. In *United States v. Cooper,*[25] the Court had denied standing to the United States government in an action for treble damages under section 7 of the Sherman Act.[26] According to Justice Stewart, the *Cooper* result was premised upon legislative debates[27] as well as the fact that the United States has alternative remedies to enforce antitrust compliance.[28] Justice Stewart next considered *Georgia v. Evans,*[29] in which the Court concluded that the state of Georgia had standing to sue under section 7. The *Evans* Court reasoned that unlike the enforcement remedies available to the United States government,[30] there would be no means for the state effectively to redress antitrust violations if standing were denied.[31] The *Pfizer* Court likewise concluded that the antitrust laws do not provide alternative remedies for foreign nations as they do for the United States, and, consequently, foreign sovereigns must be

25. 312 U.S. 600. In *Cooper,* the United States brought a treble damage action for antitrust violations against the Cooper Company, alleging that Cooper and others had illegally combined to fix prices of articles purchased by the United States.

26. Although section 7 of the Sherman Act was repealed in 1955, section 4 of the Clayton Act, which now covers the remedies under the Sherman Act, contains identical language.

27. That Congress intended to preclude the United States from bringing a treble damages action was stated as early as the legislative debates when Senator Sherman remarked that the United States was excluded from section 2. Section 2 was the civil damage section that later became section 4 of the Clayton Act. *See* 21 CONG. REC. 2563 (1890).

28. 434 U.S. at 317. *See* United States v. Cooper, 312 U.S. at 607. The *Cooper* Court pointed out that section 3 of the Sherman Act, 15 U.S.C. § 3 (1970), as well as sections 1 and 2, impose criminal sanctions for violations of the acts denounced therein. The Act vests jurisdiction in the federal courts in proceedings by the government to restrain violations of the Act and imposes upon the United States attorneys the duty to institute equity proceedings to that end. 15 U.S.C. § 4 (1970). Section 5 of the Sherman Act, 15 U.S.C. § 5 (1970), regulates service of process in such suits. Section 6 of the Sherman Act, 15 U.S.C. § 6 (1970), authorizes seizure, in the course of interstate transportation of goods owned under any contract or pursuant to any conspiracies made illegal by statute.

29. 316 U.S. 159. In *Evans,* the State of Georgia brought treble damage actions against asphalt dealers who had combined to fix prices and suppress competition in the sale of asphalt in violation of the Sherman Act.

30. *Id.* at 161. The *Evans* Court stated that the United States chose three potent weapons for enforcing the Act—namely, the threat of criminal prosecution under sections 1, 2 and 3; the remedy of injunctive relief under section 4; and seizure of property under section 6. The Court concluded that Congress did not choose to grant the United States the remedy of damages in civil actions.

31. *Id.* at 162.

granted standing to sue under section 4 of the Clayton Act.[32]

Dissenting, Chief Justice Burger, along with Justices Powell and Rehnquist, agreed with the majority that the starting point in every case involving construction of a statute is the language itself.[33] However, the dissenters believed that because Congress chose to include foreign corporations as "persons" entitled to sue under the Sherman and Clayton Acts did not likewise reflect an intent to include foreign nations within the statutory definition.[34] Rather, Burger perceived the failure of Congress to make similar explicit provisions for foreign nations to be a deliberate omission that indicated a clear intent to exclude them from the statutory definition of "person".[35] He also declared that the legislative history of the treble damages remedy under section 4 of the Clayton Act gave no more support to the result reached by the majority than did the language of the statute. Burger found the majority's reliance on the absence of any express Congressional intent to exclude foreign nations from taking advantage of the treble damages remedy to be a remarkable innovation in statutory interpretation.[36] Burger thus concluded that if contemporary circumstances should require new consideration of the word "person" in the Clayton Act, that task would be properly one for Congress in light of the sensitive political nature and foreign policy implications of the question.[37]

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32. 434 U.S. at 318.

33. *Id.* at 321. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975). In *Blue Chip*, retail users of trading stamps brought an action against a stamp corporation and others for violation of Rule 10b-5 of the Security Exchange Act of 1934. The Supreme Court looked to the language of Rule 10b-5 as a starting point for analysis, but added that before a court can look to statutory construction, other sources must be consulted. "[T]here should be, at least, unmistakable support in history and structure of the legislation." *Id.* at 756 (Powell, J., concurring).

34. 434 U.S. at 321-22.

35. *Id.* Chief Justice Burger reached this conclusion after scrutinizing section 1 of the Sherman Act and section 4 of the Clayton Act and discovering no mention of the term "foreign nation."

36. In support of this position, Burger emphasized that at the time of the enactment of the Sherman and Clayton Acts, sovereigns were immune from suit, while corporations were not similarly immune. Burger believed that this Congressional policy of exclusion extended to antitrust legislation. *See* In re Hohorst, 150 U.S. 653 (1893) (suit permitted by a New York citizen against a German corporation doing business in New York); Shaw v. Quincy Mining Co., 145 U.S. 444 (1892) (suit permitted against a corporation in the district where the plaintiff or defendant resides).

37. 434 U.S. at 322-23. The Court went on to state: "Respondents' claim that this disparate treatment cannot be justified today when foreign states effectively control many large foreign corporations and when sovereign immunity has been limited . . . is not an argument appropriately addressed to or considered by this Court." *Id.* at 322.

Finally, Chief Justice Burger believed that the majority's reliance on *Evans* was misplaced,[38] and emphasized that there are cogent differences between states and foreign sovereigns which the majority failed to consider.[39] First, he conceded that to deny domestic states the treble damages remedy would effectively deny surrogate protection to American citizens in whose behalf the state acts, and for whose benefit the Sherman Act was enacted. He concluded, however, that while the result in *Evans* was a tolerable taking of certain liberties with the literal language of the statute, the same logic does not even remotely apply to the situation of foreign nations.[40] Additionally, he observed that unlike the domestic states, who are constrained by the commerce and supremacy clauses, foreign nations remain free to enact and enforce their own antitrust statutes to provide them with a means of redressing anticompetitive practices in which American corporations engage.[41]

In a separate dissent, Justice Powell added that he perceived the majority's "general policy" decision to grant foreign nations the right to bring suit under section 4 to be clearly beyond the province of the judicial branch in the absence of explicit legislative authority.[42]

The *Pfizer* Court's decision to construe foreign nations as "persons" within the meaning of section 4 of the Clayton Act is supported by both the legislative intent underlying the Act as well as by principles of statutory interpretation. Moreover, Congress has tacitly approved the Court's construction, not only by declining to enact legislation that precludes foreign sovereigns from bringing suit under either the Sherman or Clayton Acts, but also by enacting recent legislation granting foreign nations standing as antitrust plaintiffs.

Although the Clayton Act is primarily a remedial statute,[43] its

38. *See* note 29 and accompanying text *supra*.

39. 434 U.S. at 326.

40. *Id.*

41. *Id.* at 326-27.

42. 434 U.S. at 329-31 (Powell, J., dissenting).

43. In the floor debates concerning the passage of the Sherman Act, Senator Sherman stated that the nature of the statute was a remedial one. 21 CONG. REC. 2461 (1890). Furthermore, when section 7 of the Sherman Act was re-enacted in 1914 as section 4 of the Clayton Act, the House debates concerning the provisions related to private damages actions indicated an intent to provide redress for "everyman" injured by antitrust violations. 51 CONG. REC. 9073 (1914)(remarks of Rep. Webb). *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) (section 4 is a remedial provision designed to afford redress to injured parties by a multiple of the injury actually proved).

purpose has significantly expanded beyond that of remedying individual antitrust grievances. Congressional intent underlying the enactment of the Clayton Act discloses that governmental enforcement of the antitrust laws is to be supplemented by individuals seeking redress for alleged violations.[44] The Supreme Court has acknowledged this legislative purpose and emphasized that section 4 was intended to create a group of private attorneys general to enforce compliance with the antitrust laws.[45] It seems clear then, that since section 4 has become such an effective supplemental agent for enforcing compliance with the antitrust laws, the Court was correct in including foreign sovereigns within the class of "persons" entitled to bring suit under section 4.[46]

An analysis of the principles of statutory interpretation likewise supports the majority's construction of the statute. The majority concluded that the absence of any explicit references to foreign nations in the statutes did not necessarily evidence a Congressional policy to exclude them from bringing suit.[47] As defined in section 1 of the Clayton Act, a "person" is to "include corporations and associations existing under or authorized by the laws . . . of any foreign

44. *See* Macintryre, *The Role of the Private Litigant in Antitrust Enforcement*, 7 ANTITRUST BULL. 113 (1962)(sponsors of the Clayton Act in the House debates indicated that they perceived treble damages suits to be an important means of enforcing antitrust law). *See, e.g.*, Radovich v. National Football League, 352 U.S. 445, 453 (1957), where the Court stated: "Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party."

45. Hawaii v. Standard Oil Co., 405 U.S. 251 (1972). In *Standard Oil*, the State of Hawaii brought an antitrust action against certain petroleum producers alleging monopolistic practices. Although Hawaii was not awarded damages since no specific injury was claimed, the Court stated: "By offering potential litigants the prospect of a recovery three times the amount of their damages, Congress encouraged these persons to serve as 'private attorneys general'." *Id.* at 262.

46. *See* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968), where the Court, in reversing the judgment of the United States Court of Appeals for the Seventh Circuit, held that the doctrine of *in pari delicto* was not a defense in an antitrust treble damages action. In reaching this decision, the Court stated: "We have often indicated the inappropriateness of invoking broad common law barriers to relief where a private suit serves important public purposes." *Id.* at 138-39. The Court also recognized that the purposes of antitrust laws are best served by insuring that private actions are an ever present threat to deter violations of the antitrust laws. The Court further stated: "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 policy in favor of competition." *Id.* *See also* Simpson v. Union Oil, 377 U.S. 13 (1964) (consignment dealer who failed to adhere to a fixed resale price was permitted to bring an antitrust suit even though, by signing the agreement, he had become a participant in the price fixing scheme).

47. 434 U.S. at 315-16.

nation."[48] In *Helvering v. Morgan,*[49] the Court held that the term "include" imports a general class even though individual items are specifically designated in the definition. The Court in *Helvering* further stated that a statute that "includes" certain designations does not exclude others not specifically so designated in the absence of a definite expression of such intent to exclude. Consequently, the Court properly perceived that Congress' failure to include foreign nations within the definitional section of the Act should not be construed as evidence of intentional exclusion.

Further strengthening the conclusion reached by the *Pfizer* Court is the fact that prior to the enactment of the Sherman Act in 1890, foreign governments seeking a forum were permitted access to the courts of the United States.[50] Although legislators were aware of these judicial decisions when enacting the Sherman Act, they chose to utilize language which did not expressly exclude foreign sovereigns from bringing antitrust suits.[51] Additionally, between the enactment of the Sherman Act and the 1914 enactment of the Clayton Act, a number of antitrust suits were brought in the courts of the United States by foreign cities and nations.[52] If the 1914 Congress were dissatisfied with the situation and intended to preclude foreign

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48. 15 U.S.C. § 15 (1970).

49. 293 U.S. 121, 125 (1934). The Court, in construing a statute, stated: "The phraseology is . . . open to the construction that the word 'includes' is used as the equivalent of 'comprehends' or 'embraces' . . . ."

50. *See* The Sapphire v. Napoleon III, 78 U.S. (11 Wall.) 127 (1870). This action arose after an American vessel had allegedly damaged a French sea vessel. Justice Bradley wrote: "A foreign sovereign, as well as any other foreign person, who has a demand of a civil nature against any person here, may prosecute in our courts. To deny him this privilege would manifest a want of comity and friendly feeling." *Id.* at 130. *See also* Cotton v. United States, 52 U.S. (11 How.) 229 (1850). In *Cotton* the Court stated:

> Every sovereign state is of necessity a body politic, or artifical person, and as such capable of making contracts and holding property. . . . It would present a strange anomaly, indeed, if having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection.

Id. at 231.

51. At the time of the passage of the Sherman Act, the legislators used language that facilitated an expansive reading of the statute. For example, Senator Sherman remarked that "every person injured" should be redressed. 21 CONG. REC. 2563 (1890). Senator Davis stated that "a universal right of action was being enacted," *id.* at 2612, and Senator Hoar characterized the Bill as directed at "international and interstate commerce." *Id.* at 3152.

52. *See, e.g.*, French Republic v. Saratoga Vichy Springs, 191 U.S. 427 (1903). In *Saratoga Vichy Springs,* the French Republic brought a bill in equity to vindicate its rights under the Industrial Property Treaty to exclusive use of the word 'vichy' on bottled water. The issue of whether the French Republic could bring suit in the United States was resolved in favor of the Republic.

nations from bringing antitrust suits, specific prohibitions would have been made at that time.

Recently enacted legislation also reaffirms Congressional approval of granting foreign nations standing as antitrust plaintiffs. The Breton Woods Agreement,[53] passed in 1970, urges foreign nations to take steps to reduce obstacles to, and restrictions upon, international trade. In light of this policy, it would seem to be inconsistent to deny a foreign nation access to this country's courts to redress antitrust violations caused by American companies. Congress has also enacted the Foreign Sovereign Immunities Act of 1976[54] which states that a foreign government can be sued when it engages in commercial activity having any adverse effect on the United States economy. Consistency as well as comity therefore mandates that, if foreign governments are to be subjected to suits for violating antitrust laws, they should correspondingly be granted standing as antitrust plaintiffs.

Monopolies and conspiracies in restraint of trade cannot be tolerated in an economic system which encourages free enterprise if that system is to continue to flourish. Therefore, the antitrust laws must be broadly interpreted to include foreign nations within that coverage. Granting foreign nations standing under section 4 of the Clayton Act serves to implement the deterrent aspect underlying the Act and thereby insures compliance by potential antitrust violators.

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53. 22 U.S.C. § 286 (1970).
54. 28 U.S.C.A. § 1605 (1976).