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**ANTITRUST: STANDING FOR FOREIGN GOVERNMENTS—
Pfizer, Inc. v. Gov't of India, 434 U.S. 308 (1978).**

The Supreme Court has recently ruled that a foreign government is entitled to bring an action for treble damages under the federal antitrust laws.¹ The case stems from alleged antitrust violations in the marketing of tetracycline by six domestic corporations.² The decision is significant as to its immediate impact upon American corporations doing business abroad, and demonstrates the lengths to which the Supreme Court will expand and support the notion of private antitrust enforcement.

The case turned on a question of statutory interpretation. Section 4 of the Clayton Act provides that “[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws” is entitled to bring a suit for treble damages.³ A “person” under the antitrust laws is “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.”⁴ The issue raised was whether a foreign nation is a “person” under these provisions.

The majority looked to two earlier decisions for guidance: *United States v. Cooper Corp.*⁵ and *Georgia v. Evans*.⁶ In *Cooper*, the Court decided that the United States was not a “person” for the purposes of the treble damages provisions of § 7 of the Sherman Act, and therefore, was not entitled to bring suit for such a claim. That section of the Sherman Act was later re-enacted, without substantial change, as § 4 of the Clayton Act. The theory underlying the case was that whereas the Sherman Act provided several independent remedies for the United States when confronted with antitrust violations, the same could not be said of a private suit. The government could have either brought criminal prosecutions, sought injunctive relief, or seized property. The Court distinguished these remedies which were exclusively

¹ *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308 (1978).

² For a brief history of the case, see *Pfizer, Inc. v. Lord*, 456 F.2d. 532, 533-35 (8th Cir. 1972).

³ 15 U.S.C. § 15 (1976).

⁴ 15 U.S.C. § 7 (1976).

⁵ 312 U.S. 600 (1940).

⁶ 316 U.S. 159 (1942).

available to the United States, from the ones created in § 7 of the Sherman Act. The right to recover treble damages was of a different character than the government remedies and, according to the Court, was created solely to redress private injury. The conclusion reached was that the United States was not entitled to bring a treble damages action under the antitrust laws.

If the United States were foreclosed from bringing suit under § 7, was that rule controlling where a domestic state purported to bring the action? This was the question presented in *Evans*. The Court noted that whereas the United States had several remedies available to it, a state would have none if it were prevented from bringing an antitrust action. Such a result would have been anomalous, since domestic states, when they function as commercial entities, are subject to the same anticompetitive practices as private individuals. Accordingly, the Court ruled that a state was a "person" within the purview of § 7 of the Sherman Act. Though no legislative history existed to support this reading, the Court saw no reason to deprive a domestic state of the remedy afforded other victims of antitrust violations.

On the basis of these decisions, the *Pfizer* majority concluded that a foreign state is entitled to sue for treble damages under § 4 of the Clayton Act. The Court perceived that foreign nations are as susceptible to anticompetitive practices as are domestic states.⁷ Equally important, a right of action can operate as an effective deterrent to antitrust violations, while treble damage recoveries help deprive violators of "the fruits of their illegality."⁸ There is no reason to believe that these purposes would not be served by affording standing to a foreign government. Still further, the Court rebutted the contention that its decision would be inconsistent with the primary concern of Congress to protect American consumers. It was pointed out that the conspiracy alleged by the plaintiffs operated in both domestic and international markets. In a case such as this, maximum deterrence is obtained by affording treble damage remedies wherever the violations occur.⁹ This last argument is rather convincing, in light of the antitrust standing granted to foreign corporations.

The dissenters, led by Chief Justice Burger, with a supporting dissent by Justice Powell, argued that the interpretation was directly at odds with the plain meaning of the statute,¹⁰ lacked supporting

⁷ *Pfizer, Inc. v. Got't of India*, 434 U.S. at 318.

⁸ *Id.* at 314.

⁹ *Id.* at 315.

¹⁰ *Id.* at 321 (Burger, C.J., dissenting).

legislative history,¹¹ was not dictated by the result in *Evans*¹² and constituted "an undisguised exercise of legislative power."¹³ Certainly, the criticism is justified on the first two grounds. There is nothing in the statutory provisions which would indicate an intent on the part of Congress to confer standing on foreign nations. The decision by Congress to list all parties deemed to be "persons" under the Act would allow for the inference that all not included are excluded. The majority, in fact, conceded that the question was never raised at the time of passage of the Sherman and Clayton Acts.¹⁴ The majority's position, rather than resting on solid statutory analysis, is founded on some very general observations of policy expressing the view that the antitrust laws contemplate a broad scope of remedies.¹⁵

The same interpretative arguments, however, would have been appropriate in *Evans*. The dissenters recognized this: ". . . while the result in *Evans* is a tolerable taking of certain liberties with the literal language of the statute, the congruence of that result with Congress' purpose can scarcely be doubted."¹⁶ Their certainty rests on Justice Frankfurter's notion in *Evans* that the state acts on behalf of its citizens; to deny the state a remedy would in effect deprive those very citizens for whom the antitrust laws were enacted.¹⁷ If the dissenters are willing to accept the divinations of Justice Frankfurter as to congressional purpose, their reluctance to adopt those of the majority seems somewhat inconsistent.

The dissenters would treat the antitrust standing of domestic and foreign states as entirely different matters. According to their view, the foreign sovereign's freedom to enact and enforce its own antitrust legislation, and its greater economic and social power, justifies a different approach from that accorded a domestic state. As to the latter distinction, the spectrum of power among the nations of the world is so wide-ranging that the argument seems more perfunctory than meaningful. The former contention is more interesting. Certainly, there is substantial antitrust monitoring among the industrialized powers.¹⁸ The likelihood, however, of an underdeveloped power taking

¹¹ *Id.* at 324-25.

¹² *Id.* at 325.

¹³ *Id.* at 320.

¹⁴ *Id.* at 312.

¹⁵ *Id.* at 312-13.

¹⁶ *Id.* at 326.

¹⁷ *Id.* at 594.

¹⁸ For a recent discussion on the increasingly intense antitrust climate developing among the industrialized nations see Brault, *Current Developments in Competition Policies*, 22 ANTITRUST BULL. 157 (1977).

an aggressive antitrust stand is somewhat remote. If we consider the bargaining power possessed by these nations in relation to the giant multinational corporations, comprehensive antitrust enforcement (if the expertise could be mustered) would mean a departure by the firm for greener pastures. The absence of an antitrust remedy is more likely than not a real problem for many of the sovereign nations of the world.¹⁹

Finally, the dissenting opinion touched on the "political delicacy" of the question. This is, no doubt, a decision which has potential foreign policy impact. The majority had referred to a letter from the Legal Advisor of the Department of State, presented to the Court of Appeals sitting *en banc* to hear this case, which advised that "the Department of State would not anticipate any foreign policy problems if . . . foreign governments were held to be persons within the meaning of Clayton Act § 4."²⁰ On the basis of this letter, the Court felt assured that its decision did not interfere with any sensitive matters of foreign policy. In the dissent's view, the pronouncements of the Department of State would not be enough.²¹ The more appropriate forum to resolve these political questions, which go beyond foreign policy matters, and pertain to the general welfare of the United States, would be the Congress.²²

The decision will have a number of impacts. By eliminating the formal distinction which was previously drawn between government-controlled foreign corporations and sovereign governments acting in a proprietary capacity, the antitrust stakes have been raised substantially, and multinational corporations will have to weigh their decisions all the more carefully. Foreign nations, especially those underdeveloped nations without any antitrust clout of their own, have gained significant leverage in their negotiating positions. Presumably, along with their newly-won right to recover treble damages, they will be better

¹⁹ It has been suggested that an international antitrust convention be adopted to alleviate the problems of conflicting regulations among the industrialized nations and the absence of enforcement in the less-developed nations. Timberg, *An International Antitrust Convention: A Proposal to Harmonize Conflicting National Policies Towards the Multi-National Corporation*, 8 J. INT'L L. & ECON. 157 (1973).

²⁰ Pfizer, Inc. v. Gov't of India, 434 U.S. at 319, n.20.

²¹ "The significance of this communication escapes me. Nothing in the Constitution suggests legislative power may be exercised jointly by the courts and the Department of State." *Id.* at 329 n.3 (Burger, C.J., dissenting). There has been no mention, however, of the policy of adhering to Department of State suggestions on questions of foreign sovereign immunity. *Ex Parte Republic of Peru*, 318 U.S. 578, 587 (1943).

²² Pfizer, Inc. v. Gov't of India, 434 U.S. at 330-31. (Powell, J., dissenting).

able to deter future anticompetitive practices. The crucial question, however, is the impact the decision will have on domestic markets. In reaching its conclusion, the majority expressed the view that foreign sovereign standing would further the ultimate aim of the antitrust laws, the protection of American consumers. Speculation as to domestic impact would be premature at this early stage. It remains to be seen whether American consumers will reap economic benefit from a more competitive international business environment.

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