No. 03-724

In The
Supreme Court of the United States

F. HOFFMANN-LA ROCHE, LTD., ET AL.,

Petitioners,

v.

EMPAGRAN S.A., ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF THE GOVERNMENT OF JAPAN AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

May foreign plaintiffs pursue Sherman Act claims seeking recovery for injuries sustained in transactions occurring entirely outside United States commerce?

PARTIES TO THE PROCEEDING

Petitioners, who were Appellees in the United States Court of Appeals for the District of Columbia Circuit, are as follows: F. Hoffmann-La Roche, Ltd.; Hoffmann-La Roche Inc.; Roche Vitamins Inc.; BASF AG; BASF Corporation; Rhône-Poulenc Animal Nutrition Inc.; Rhône-Poulenc Inc.; Hoechst Marion Roussel S.A.; Rhône-Poulenc S.A.; Takeda Chemical Industries, Ltd.; Takeda Vitamin & Food USA, Inc.; Daiichi Pharmaceutical Co., Ltd.; Daiichi Pharmaceutical Corp.; Daiichi Fine Chemicals, Inc.; Eisai Co., Ltd.; Eisai U.S.A., Inc.; Eisai Inc.; Akzo Nobel Chemicals B.V.; Akzo Nobel Inc.; Bioproducts Incorporated; Chinook Group Ltd.; Cope Investments Ltd.; Degussa AG; Degussa Corp.; DuCoa, L.P.; DCV, Inc.; EM Industries, Inc.; Merck KGaA; E. Merck; Lonza Inc.; Lonza AG; Alusuisse-Lonza Group Ltd.; Mitsui & Co., Ltd.; Nepera, Inc.; Reilly Chemicals, S.A.; Reilly Industries, Inc.; Sumitomo Chemical Co., Ltd.; Sumitomo Chemical America, Inc.; Tanabe U.S.A. Inc. and UCB Chemicals Corp.

Respondents, who were Appellants in the United States Court of Appeals for the District of Columbia Circuit, are as follows: Empagran, S.A.; Nutricion Animal, S.A.; Winddridge Pig Farm; Brisbane Export Corp. Pry, Ltd. and Concern Stirol, on behalf of themselves and all others similarly situated.

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INTEREST OF THE AMICUS CURIAE[1]

Petitioners in this case include Japanese companies that are alleged to have participated in an international cartel to fix prices and allocate markets for bulk vitamin sales in various national markets. The Government of Japan has significant economic, political, and legal interests in ensuring that companies based in Japan shall comply with the Japanese legal system, and that Japanese companies running businesses elsewhere shall comply with "reasonable" jurisdictional requirements of other nations. Japan also has a significant interest in making certain that Japanese companies are not subject to the unreasonable extraterritorial reach of United States competition and class action laws by private foreign plaintiffs who purchased vitamins from Petitioners only in foreign markets and are now seeking treble damages in private lawsuits filed in United States courts against Japanese companies for such foreign purchases.

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Supreme Court Rule 37.3. In accordance with Rule 37.6, the Government of Japan states that Sonnenschein Nath & Rosenthal LLP recently acted as local counsel in Kansas state court for Petitioners Eisai Co., Ltd., Eisai U.S.A., Inc., and Eisai, Inc. ("Eisai") in a related state indirect-purchaser antitrust case, *Stephen L. Cox, et al. v. F. Hoffmann-La Roche, Ltd., et al.*, No. 00 C 1890 (Dist. Ct. of Wyandotte County, Kansas). This case has now settled. In addition, Sonnenschein Nath & Rosenthal LLP acted for Eisai more than four years ago in separate federal proceedings relating to vitamins. At present, Sonnenschein Nath & Rosenthal LLP does not represent Eisai. No counsel for a party in this case authored this brief in whole or in part, and no monetary contribution to the preparation or submission of the brief was made by any person other than the *amicus curiae*.

SUMMARY OF THE ARGUMENT

The Foreign Trade Antitrust Improvements Act ("FTAIA"), 15 U.S.C. § 6a, should not be interpreted to allow foreign purchasers of goods from foreign corporations in foreign markets to bring actions in United States courts for alleged injuries under United States antitrust laws. There is nothing in the legislative history of the FTAIA, or the Sherman and Clayton Acts it sought to clarify, to suggest that U.S. antitrust jurisdiction over foreign firms in foreign markets should be expanded, nor does this Court's decision in *Pfizer* change the fact that no statute expands such judicial jurisdiction. Giving foreign purchasers the right to damages for purely foreign market transactions undermines the important principle of comity, respect due to a sovereign nation to regulate conduct within its national territory. Such an interpretation of the FTAIA has international public policy implications which would adversely affect the ability of the Government of Japan to regulate its own economy and govern its own society. Therefore, the decision of the Court of Appeals for the District of Columbia should be reversed.

ARGUMENT

I. THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT OF 1982 ("FTAIA"), 15 U.S.C. § 6A, WAS NOT INTENDED TO EXPAND UNITED STATES ANTITRUST JURISDICTION TO REACH ALLEGED INJURIES TO FOREIGN CONSUMERS FOR PURCHASES IN FOREIGN MARKETS FROM FOREIGN CORPORATIONS, NOR WERE THE SHERMAN OR CLAYTON ACTS IT SOUGHT TO CLARIFY.

A. The FTAIA Sought to Clarify the Limits of United States Antitrust Jurisdiction in United States Foreign Commerce, Not Expand that Jurisdiction.

The FTAIA was a part of, and complement to, the Export Trading Company Act of 1982, 15 U.S.C. §§ 4001 *et seq.* Both laws sought to promote U.S. exports by seeking to assure American businesses that they were not subject in foreign commerce to a "stricter regimen of [U.S.] antitrust than their competitors of foreign ownership." H.R. Rep. No. 97-686, at 10 (1982). The FTAIA made clear that:

> American-owned firms that operate entirely abroad or in United States export trade [are freed] from the possibility of dual and conflicting antitrust regulation. When their activities lack the requisite [U.S.] domestic effects, they can operate on the same terms, and subject to the same antitrust laws that govern their foreign-owned competitors.

Id. The law was enacted to "level the playing field" between U.S. and foreign companies overseas, and to promote foreign antitrust enforcement over foreign conduct in foreign markets by *reducing* the perceived scope of U.S.

antitrust jurisdiction abroad. *See* H.R. Rep. No. 97-686, at 14 ("[T]he clarified reach of our own laws could encourage our trading partners to take more effective steps to protect competition in their markets" under their competition laws.). There is nothing in the legislative history of the FTAIA to suggest that it was intended to expand U.S. antitrust jurisdiction to subject foreign firms in foreign markets to U.S. law.

B. If the FTAIA Had Been Seen to Expand U.S. Extraterritorial Jurisdiction to Foreign Corporations That Allegedly Injured Foreign Purchasers in Foreign Markets, There Would Have Been a Storm of Criticism by Foreign Governments.

The early 1980s were a time of international tension over the extraterritorial application of U.S. antitrust law. In 1982, many close allies of the United States were concerned that some U.S. antitrust enforcement against foreign persons for conduct in foreign nations, allegedly aimed at causing direct, substantial, and reasonably foreseeable injury in U.S. markets, exceeded established international law standards. *See generally* A.V. Lowe, *Extraterritorial Jurisdiction* (1983). Japan, for example, was concerned about a U.S. private antitrust lawsuit brought against the Japanese color television industry for alleged cartel activity in Japan, *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 513 F. Supp. 1100 (E.D. Pa. 1981). In addition, the United Kingdom, Australia, and Canada all passed "frustration of judgments" statutes preventing the enforcement of foreign antitrust judgments inconsistent with their sovereignty and national interests.

See Spencer Weber Waller, 1 *Antitrust and American Business Abroad* § 4:17 (3d ed. 1997).

The Supreme Court also appeared to recognize this tension when it began its analysis in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986) by stating its understanding that "American antitrust laws do not regulate the competitive conditions of other nations' economies." By expanding U.S. jurisdiction to give Japanese consumers a U.S. legal claim against Japanese and other manufacturers selling into the Japanese market, the D.C. Court of Appeals' decision has done just that.

C. The Decision in *Pfizer* Does Not Change the Fact that the FTAIA Did Not Bestow on Foreign Purchasers the Right to Damages for Transactions Only in Foreign National Markets, or that Such a Right Was Not Bestowed by the Sherman or Clayton Acts, Which the FTAIA Sought to Clarify.

In *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 312 (1978), the Court recognized that "[t]here is no statutory provision or legislative history that provides a clear answer" to whether a foreign government is a person under U.S. antitrust law. The Court concluded that "it seems apparent that the question was never considered at the time the Sherman and Clayton Acts were enacted." *Pfizer*, 434 U.S. at 312. The dissent criticized "this undisguised exercise of legislative power" by the Court in answering the question judicially. *Id.* at 320. A distinguishing feature in *Pfizer*, absent in the Decision below, is that one of the factors the majority relied upon when creating, *de novo*, this foreign governmental right to sue was that to

not do so "would manifest a want of comity and friendly feeling" for foreign nations. *Id.* at 319. The Decision below seems to ignore considerations of comity.

It is apparent in reviewing the history of Sherman Act anti-cartel enforcement from *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) through *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993) that there is no statutory provision or legislative history to the Sherman and Clayton Acts that justifies the Decision below. The Court would go well beyond what it did in *Pfizer* if the Court of Appeals' decision were affirmed, given the lack of any consideration of its impact on foreign sovereign jurisdictions.

II. INTERPRETING THE FTAIA TO ALLOW FOREIGN PURCHASERS OF GOODS IN FOREIGN MARKETS TO BRING SUIT AGAINST FOREIGN CORPORATIONS UNDERMINES COMITY, THE PRINCIPLE OF THE SOVEREIGN EQUALITY OF STATES TO GOVERN WITHIN THEIR NATIONAL TERRITORIES.

Since the seventeenth century and the rise of the nation state, the cornerstone of public and private international law has been that nation states are equal sovereigns, entitled to mutual respect and deference in the exercise of their sovereignty. As J.L. Brierly, the Oxford scholar, wrote in 1928:

> At the basis of international law lies the notion that a state occupies a definite part of the surface of the earth, within which it normally exercises, subject to the limitations imposed by international law, jurisdiction over persons and things to the exclusion of the jurisdiction of other states.

> When a state exercises an authority of this kind over a certain territory it is popularly said to have 'sovereignty' over the territory[.]

J.L. Brierly, *The Law of Nations* 162 (6th ed. 1963). Judicial comity reflects this principle in declining to prescribe where matters are more appropriately adjudicated elsewhere, thereby respecting the sovereign equality of states. *See generally Hilton v. Guyot*, 159 U.S. 113 (1895); *see also* Restatement (Third) of Foreign Relations Law § 403 (1986) (outlining the limitations on a state's jurisdiction to prescribe, including the consideration of the likelihood of conflict with regulation by another state). The Court of Appeals extended U.S. jurisdiction, without clear Congressional direction, so as to interfere with the regulation of transactions between producers and consumers in foreign national markets unrelated to the U.S. market. Doing so alters and, as discussed below, undermines Japanese sovereignty over the Japanese market and Japanese people. *See* Restatement (Third) of Foreign Relations Law § 403(3) (indicating that in exercising jurisdiction over a person or activity, "a state should defer to the other state if that state's interest is clearly greater"). "[S]tatutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting in part).

III. AFFIRMING THE DECISION BELOW WOULD HAVE SERIOUS ADVERSE IMPLICATIONS, WHICH CANNOT BE FULLY ANTICIPATED, FOR REGULATION OF THE JAPANESE ECONOMY AND SOCIETY BY THE GOVERNMENT OF JAPAN.

Japanese law and policy already address the interests of Japanese consumers with regard to transactions that impact the Japanese market. Japan has the Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade ("the Antimonopoly Act"), Law No. 54 of April 14, 1947, which is enforced by competent authorities such as the Japan Fair Trade Commission ("JFTC"). Prime Minister Koizumi has stated that one of his government's goals is "[t]he enhancement of the JFTC system as the guardian of the market to establish [in Japan] a competition policy appropriate for the 21st century." *Annual Report on Competition Policy in Japan (January-December 2001)*, JFTC Doc. No. DAFFE/COMP(2002)27/21, at 3 (quoting Prime Minister Jun-ichiro Koizumi, Policy Speech (May 7, 2001)). However, U.S. lawyers will become antitrust prosecutors for the Japanese market if the Decision below is upheld.

Japanese law does not provide for treble damage awards in antitrust claims. Treble damages would be viewed as punitive damages, mixing civil and criminal liability. The Supreme Court of Japan has ruled that foreign judgments may not be enforced in Japanese courts beyond the level of actual compensatory damages. *Ore. State Union No-su-kon I v. Mansei Ko-gyo Co.*, 51 MINSHŪ 2573 (Sup. Ct., July 11, 1997).

If the Decision below is upheld, a large number of lawsuits, including class action lawsuits, requesting

punitive damage awards and an automatic award of attorneys' fees to prevailing plaintiffs are likely to be filed against persons (including juridical persons) in Japanese territory by persons having no connection to the United States. The Government of Japan is concerned that exercise by U.S. courts of such extraterritorial jurisdiction against its sovereign will would be inappropriate. Furthermore, the coexistence of class actions with punitive damages in the United States adds to the difficulties. If the Decision below is upheld, it would cause "forum shopping" in U.S. courts by plaintiffs from all over the world who seek large punitive damages awards through class action lawsuits.

Encouraging Japanese and other foreign consumers with no connection to the United States to file lawsuits under U.S. law could have a severe impact on Japanese interests. Private plaintiffs may selectively choose to sue only one or two alleged participants in an international cartel, and those selected defendants have no right of contribution from the remaining cartel participants. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981). This means that if U.S. courts exercise such extraterritorial jurisdiction, a worldwide foreign plaintiff class could seek damages of scores of billions of dollars from just two or three Japanese defendants. This could, at the least, put Japanese firms at a serious competitive disadvantage with other firms in that industry. In *Radcliff*, 451 U.S. at 646, the Court recognized that there were "far-reaching" policy questions raised by an antitrust defendant's claimed right to contribution, which were beyond the courts' competence to resolve. That can be no less true with respect to the Decision below.

The likely impact of applying Federal Rule of Civil Procedure 23, relating to class actions, to a worldwide class of foreign consumers also raises a number of questions. Is it practicable to join consumers as a class in up to 150 national markets, with disparate market structures and conditions? Is it practicable to certify a worldwide class of foreign consumers potentially speaking hundreds of languages? How is a U.S. District Court to decide what is the "best notice practicable" to global class members? United States rules presume that class members wish to participate unless they give notice of opting out. Making that determination for Japanese consumers in the Japanese market, without the input of the Japanese government, is a concern. Who is to assure that the U.S. class action lawyers are properly serving the interests of their Japanese "clients"? Are Japanese government views of effective representation to be taken into account by the U.S. court?

The Government of Japan is fully confident that the U.S. government would never seek to expand its extraterritorial jurisdiction in such a dramatic fashion as to governmental enforcement. However, it is particularly troublesome that this right to, at the least, interfere with Japanese governmental regulation of the Japanese market would be given to private U.S. attorneys with little experience in international diplomacy and cooperation.

There is a network of international relationships among national antitrust authorities which provides lines of direct communication to lessen or remove sovereign national conflicts. Japan and the United States have a bilateral antitrust cooperation agreement. *See* Agreement Between the Government of Japan and the Government of the United States of America Concerning Cooperation on

Anticompetitive Activities, Oct. 7, 1999. Japan and the United States are members of the Organisation for Economic Co-operation and Development ("OECD"). The 1995 Recommendation of the OECD Council recognizes the need for Member countries to "use moderation and self restraint in the interest of cooperation in the field of anticompetitive practices." *See* Recommendation of the Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade, OECD Doc. No. C(95)130/FINAL (July 27, 1995). The Council encourages Member countries to exchange information, coordinate action, consult, and conciliate. Furthermore, there is the International Competition Network ("ICN"), in which the antitrust agencies of many of the world's governments consult to harmonize standards and promote best practices in antitrust enforcement. *See* http://www.internationalcompetitionnetwork.org (last visited Jan. 27, 2004). There is no comparable network by which foreign antitrust agencies, or their governments, can consult with private U.S. antitrust lawyers or with U.S. courts having jurisdiction over global class actions. The Government of Japan is concerned that neither national governments nor national courts are well suited to supervising and resolving the conflicts that would result if the Decision below is not reversed.

CONCLUSION

The FTAIA should not be interpreted to allow foreign purchasers of goods from foreign corporations in foreign markets to bring suits in United States courts for alleged injuries under United States antitrust laws. Accordingly,

the judgment of the Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,

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