DEPARTMENT OF JUSTICE

The Thirteenth Annual

NATIONAL INSTITUTE ON WHITE COLLAR CRIME

Presented By The
ABA's Criminal Justice Section

"NEGOTIATING THE WATERS OF INTERNATIONAL CARTEL PROSECUTIONS

Antitrust Division Policies Relating To Plea Agreements In International Cases"

By

GARY R. SPRATLING
Deputy Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Presented at

The Westin St. Francis Hotel
San Francisco, California

March 4, 1999

Table of Contents

NEGOTIATING THE WATERS OF INTERNATIONAL CARTEL PROSECUTIONS

Antitrust Division Policies Relating To Plea Agreements In International Cases

I. Introduction

In the last several years, the Antitrust Division has made the prosecution of international cartels that victimize American businesses and consumers one of its highest priorities. This focus has led to unprecedented success in cracking international cartels, securing the conviction of the major conspirators, and obtaining record-breaking fines.[1] The Division has uncovered international cartels in a broad spectrum of commerce, including food and feed additives, chemicals, vitamins, graphite electrodes (used in making steel), and marine construction and transportation services. As a result, the Division has obtained nearly $440 million in fines in its international cartel prosecutions in the *past two years* -- an amount roughly equivalent to the total fines imposed in all of the Division's prosecutions (domestic and international) over the *previous 20 years*.

The explosion of international cartel prosecutions has relied heavily on the Division's ability to secure the cooperation of foreign companies and witnesses through plea agreements. Such plea agreements generate a number of complex policy issues that are not raised in domestic cases. The pleading defendant is typically a multinational corporation pleading guilty to participating in a global conspiracy, which means that: (1) it can provide the Division with access to key documents and witnesses located outside the United States; and (2) it may be the subject of criminal and/or civil investigations by foreign law enforcement authorities who have a parallel interest in investigating the cartel activity.[2] The combination of these two factors results in a number of competing policy considerations.

For example, one policy issue that sometimes arises is resolving the conflict between (1) the Division's general objectives of promoting cooperation among enforcement authorities whenever cartel activity affects their respective jurisdictions, and (2) the Division's specific objective of prosecuting a particular cartel when the putative cooperating defendant, whose cooperation is essential, insists that its plea and cooperation are conditioned on the Division agreeing not to share the information it provides with any foreign government. Of course, a Division promise to not disclose information provided would address any possible concerns the putative defendant may have about incriminating itself in a foreign jurisdiction as a result of cooperating with the United States, raise its incentive to plead guilty and provide information against other members of the cartel pursuant to a plea agreement, and ultimately enable the Division to break up the cartel and prosecute the culpable corporations and individuals. However, such a promise would also tend to undermine our widespread efforts to foster cooperation among U.S. and foreign authorities aimed at stamping out hard-core cartel activity that impacts the United States. Moreover, if the Division routinely negotiated away its ability to cooperate with other foreign law enforcement authorities, our foreign counterparts would likely adopt the same practice.

This paper discusses disclosure questions and several other recurring issues that arise in plea negotiations in international cartel prosecutions. For each issue,

---

[1] See Status Report On International Cartel Enforcement (February 1, 1999) at Attachment 1.

[2] See Locations Of International Cartel Meetings Affecting United States Commerce (revised February 1999) at Attachment 2.

the paper provides the Division's policy and rationale, and, where appropriate, sample model plea agreement language, case history, and practical considerations relating to the issue.[3]

II. Defendants' Cooperation Obligations

The Division's incentives for entering into a plea/cooperation agreement may be increased, as discussed above, when the defendant can offer valuable cooperation, such as documents and testimony, that otherwise would be unavailable to the Division because of jurisdictional restraints. However, plea agreements that include cooperation provisions involving the production of foreign-based documents and witnesses raise a number of issues relating to how the cooperation obligations are defined and enforced, such as: what documents and which employees must the company make available to the Division; how, where, and in what form will the information be provided to the government; and what are the consequences *to the company* if one of its foreign employees refuses to travel to the United States and cooperate. As described below, the Division will insist on safeguards to ensure that it receives the benefit of its bargain when it enters into a plea/cooperation agreement calling for a corporate defendant to produce key documents and employees located overseas.

A. Cooperation Obligations Of The Corporate Defendant

- Model Language. The Division's model language for defining a corporate defendant's cooperation obligations is as follows:

> *1. The defendant, including its parents, subsidiaries, affiliates, predecessors and partnerships that are engaged in the sale of [insert generic description of industry, e.g., widgets] or have an ownership interest in a company engaged in such a business ("related entities"), will fully and truthfully cooperate with the United States in the prosecution of this case, the conduct of the current federal investigations of violations of the federal antitrust and related criminal laws in the [widgets] industry, any other federal investigation resulting therefrom and any litigation or other proceedings arising or resulting from any such investigation to which the United States is a party ("Federal Proceeding"). Such cooperation shall include, but not be limited to:*
>
> > *(a) producing to the United States all documents, information and other materials, wherever located, in the possession, custody or control of the defendant or any of its related entities, requested by the United States in connection with any Federal Proceeding;*

[3]The policies stated herein are intended to apply prospectively and are published for the purpose of providing the Bar with guidance on issues in an evolving area of antitrust criminal practice. As the Division gains further experience in this area, these policies will be subject to modification. In addition, the polices do not create or confer any rights, privileges, or benefits to prospective or actual defendants or witnesses, nor are they intended to have the force of law or of a United States Department of Justice directive.

[b] [See optional model paragraph on page 6, Section II.E., which will be inserted when the value of the defendant's cooperation is measured by the testimony of certain key foreign-based executives.]

(b) [c] using its best efforts to secure the ongoing, full and truthful cooperation, as defined in Paragraph 2 of this Plea Agreement, of the current and former directors, officers or employees of the defendant or any of its related entities [,in addition to those specified in subparagraph (b) above,] as may be requested by the United States, including making such persons available in the United States and at other mutually agreed-upon locations, at defendant's expense, for interviews and the provision of testimony in grand jury, trial and other judicial proceedings in connection with any Federal Proceeding.

2. The ongoing, full, and truthful cooperation of each person described in either Paragraph 1(b) [or 1(c)] above will be subject to the procedures and protections of this paragraph, and shall include, but not be limited to:

(a) producing in the United States and at other mutually agreed-upon locations all documents (including claimed personal documents) and other materials requested by attorneys and agents of the United States;

(b) making himself or herself available for interviews in the United States, and at other mutually agreed-upon locations, upon the request of attorneys and agents of the United States;

(c) responding fully and truthfully to all inquiries of the United States in connection with any Federal Proceeding, without falsely implicating any person or intentionally withholding any information;

(d) otherwise voluntarily providing the United States with any materials or information, not requested in (a) - (c) of this Paragraph, that he or she may have related to any such Federal Proceeding; and

(e) when called upon to do so by the United States, testifying in trial and grand jury or other proceedings in the United States, fully, truthfully and under oath, subject to the penalties of perjury (18 U.S.C. § 1621), making false statements or declarations in grand jury or court proceedings (18 U.S.C. § 1623) and contempt (18 U.S.C. §§ 401-

402), in connection with any such Federal Proceeding.

B. Providing Foreign-Based Documents "Wherever Located"

- Policy. The Division will require a defendant to provide all documents, wherever located, requested by the Division in connection with its investigation.

- Rationale. Notwithstanding that documents covered by this provision may be located outside the United States, the Division may, and often will, require a cooperating defendant to produce the documents as a condition to the benefits and protection it receives in the plea agreement. Often production of such documents has been critical to investigations of international cartels, depending on what information is already available, and what alternative means, if any, are available to the Division to reach this information.

- Case History. The Division has routinely insisted on the production of all relevant documents, wherever located, in plea agreements with foreign defendants. See, e.g., United States v. HeereMac, v.o.f., Crim. No. 97-CR-869 (N.D. Ill. 1997), paragraph 10(a).

- Practical Consideration - Destruction Of Foreign-Based Documents. As discussed more fully in Section V.B. below, a cooperating defendant which cannot provide key foreign-based documents because the evidence was destroyed when the investigation became known will not qualify for treatment by the Division which is as favorable/lenient as for the defendant who can provide all documents. The defendant who cannot produce important documents because of prior destruction is not necessarily disqualified from receiving favorable/lenient treatment, but certainly will be unable to give "full" cooperation and, therefore, will receive a lesser credit for cooperation than would otherwise potentially be available. Moreover, the Division's recommendation as to an appropriate sentence will be affected by any evidence of document destruction that impeded the Division's investigation.

C. Foreign-Based Documents Voluntarily Produced In Response To A Grand Jury Subpoena

- Policy. If, pursuant to a plea agreement, a defendant produces foreign-based documents to the Division that also are responsive to an outstanding grand jury subpoena, such documents will be treated, for grand jury secrecy purposes, as produced in response to the subpoena.

- Rationale. If the Division issues a grand jury subpoena to a company and it is anticipated that documents responsive to the subpoena are located outside of the United States, the Division's policy is generally to request that the company produce such documents voluntarily. Any foreign-based documents voluntarily produced will be received by the Division as responsive to the grand jury subpoena. When a company, as part of a plea agreement, offers to produce foreign-based documents responsive to an outstanding grand jury subpoena,

the documents should receive the same degree of protection. Such a policy ensures that the cooperating defendant, which is willing to produce voluntarily documents that would otherwise remain abroad, is not put in a worse position than a U.S. firm that is *not* cooperating but is compelled to produce documents.

- Case History. See, e.g., United States v. Haarmann & Reimer, Crim. No. CR 97-00019 (N.D. Cal. 1997), paragraph 12(e).

D. Interviewing Cooperating Employees Of The Corporate Defendant

- Policy. Before entering into a plea agreement with a corporate defendant, the Division routinely requires that key employees of the corporate defendant submit to interviews.

- Rationale. This procedure benefits both parties to the agreement. The Division has the opportunity to measure the extent of cooperation it will receive pursuant to the plea agreement, and the company can demonstrate the value of the cooperation it is offering through the interviews of its employees.

E. The Defendant's Specific Obligation To Make Available Certain Key Employees

- Policy. When the Division enters into a plea agreement with a corporation, U.S. or foreign, and the value of the defendant's cooperation is measured by the cooperation of certain key foreign-based executives, the Division may require that the company specifically promise to make these individuals available for interviews and testimony. In such situations, a provision will be added to the plea agreement, requiring that the company's cooperation include:

> *securing the ongoing, full and truthful cooperation, as defined in Paragraph [*] of this Plea Agreement, of [insert designated individuals], including making such persons available in the United States and at other mutually agreed-upon locations, at defendant's expense, for interviews and the provision of testimony in grand jury, trial and other judicial proceedings in connection with any Federal Proceeding.*

If one or more of the designated individuals fails to cooperate or testifies falsely, the United States can void the plea agreement with the defendant.

Note: If used, this language would be inserted into the model language defining the cooperation obligation of the corporate defendant on page 3, Section II.A.

- Rationale. Conditioning the plea agreement on the cooperation of certain key employees is appropriate where (1) the company's cooperation is essentially meaningless without the Division having access to the designated employees, and (2) the designated individuals are located outside the United States. If

one or more of the designated individuals fails to cooperate or testifies falsely, the cooperation promised by the company would be rendered null, and the United States would be denied the benefits of the plea agreement.

- Case History. See, e.g., HeereMac, v.o.f., supra, paragraph 10(b).

F. The Defendant's General Obligation To Secure The Cooperation Of Its Foreign Employees - What Constitutes "Best Efforts"

- Policy. The Division will require that a company use its best efforts to bring its employees to the United States for interviews or testimony. For example, in paragraph 1(c) of the model language, the company is required to:

> *us[e] its best efforts to secure the ongoing, full and truthful cooperation . . . of the current and former . . . employees of the defendant . . . including making such persons available in the United States and at other mutually agreed-upon locations, at defendant's expense, for interviews and testimony in grand jury, trial and other judicial proceedings in connection with any Federal Proceeding.*

- Rationale. At the time the plea agreement is negotiated, the government generally can not identify all individuals it may later need to interview, or who may testify before the grand jury or at trial. Therefore, the government needs assurance of the company's continuing cooperation to make all of its employees available as necessary.

- Case History. See, e.g., HeereMac, v.o.f., supra, paragraph 10(c).

- Practical Considerations. Depending on the employment laws of the country where an employee is located, "best efforts" of a corporate defendant may include terminating an employee who is unwilling to travel to the United States, at the company's expense, to be interviewed or testify pursuant to the plea agreement. However, except as noted in Section II.E. above, the Division will not refuse to enter into a prospective plea agreement or seek to void an executed plea agreement with a company if one or more of its employees refuses to cooperate or fails to tell the truth despite a company's best efforts. Of course, in such situations, the non-cooperating individuals would lose the protection given cooperating employees under the plea agreement, and the Division would be free to prosecute such individuals for the substantive offense and/or perjury.

G. Safe Passage - Travel For Interviews And Testimony

- Policy. If a foreign national travels to the United States to cooperate pursuant to a plea agreement, the Division will grant the individual "safe passage" to and from the United States as follows:

> *The United States agrees that when any person travels to the United States for interviews, grand jury appearances or court appearances pursuant to this Plea Agreement, the United States will take no action, based upon any offense subject to this Plea Agreement, to subject such person to arrest, service of process or prevention from departing the United States. This Paragraph does not apply to an individual's commission of perjury (18 U.S.C. § 1621), making a false statement or declaration in grand jury or court proceedings (18 U.S.C. § 1623), obstruction of justice (18 U.S.C. § 1503) or contempt (18 U.S.C. §§ 401-402) in connection with any testimony provided in trial, grand jury or other judicial proceedings in the United States.*

- Rationale. The Division has offered safe passage protection for years. Clearly, cooperating witnesses would not risk, during the period of their cooperation, subjecting themselves to the very enforcement actions -- service of process, detention, arrest, etc. -- they are trying to avoid as a result of their cooperation. However, the model language for safe passage protection allows the United States to subject an individual to arrest, service of process or detention if he/she commits perjury or a number of other related offenses.

- Case History. Early versions of the safe passage provision promised witnesses unfettered travel to and from the United States without exception. This language exposed government witnesses to the impeachment argument that they could falsely accuse the defendant with impunity since they could readily escape a successful perjury prosecution by leaving the country. The revised model language was first used in United States v. UCAR International Inc., Crim. No. 98-177 (E.D. Pa. 1998), paragraph 15.

- Practical Considerations. The model "safe passage" language protects cooperating witnesses from unnecessary attacks on their credibility -- a matter of paramount importance to the Division. Furthermore, as a matter of policy, no witness should ever expect protection from perjury.

H. Safe Passage - Voiding The Plea Agreement

- Policy. The "Violation Of Plea Agreement" language has been revised in plea agreements with corporate defendants as follows:

ABC, International agrees that, should the United States determine in good faith, during the period any Federal Proceeding is pending, that ABC, International has failed to provide full cooperation (as described in Paragraph [*] of this Plea Agreement) or otherwise has violated any other provision of this Plea Agreement, the United States may notify counsel for ABC, International in writing by personal or overnight delivery or facsimile transmission of its intention to void any of its obligations under this Plea Agreement (except its obligations under this paragraph).

- Rationale. Earlier versions of plea agreements contained a "safe passage" provision requiring the United States to wait five days after giving a defendant notice of its intention to void a plea agreement before taking action against any individuals subject to the plea agreement. As discussed above, this type of provision has been removed from Division plea agreements to avoid the appearance that a foreign national will be given five days to "get out of town" after violating the plea agreement.

- Practical Considerations. See "Practical Considerations" in Section II.G. above, regarding the necessity of the revised language.

III. Providing Information To U.S. Or Foreign Law Enforcement Agencies

A. Restrictions On Disclosing To U.S. Or Foreign Authorities Information Obtained From Cooperating Defendants

- Policy. The Division will not agree to restrictions in plea agreements which limit our ability to provide to U.S. or foreign government authorities information obtained from cooperating defendants, to the extent permitted by law.

- Rationale. The policy considerations on both sides of this issue make it a difficult one to resolve. The argument ***against*** providing information is strongest when we likely would not obtain the documents or testimony absent the putative defendant's voluntary production pursuant to a plea agreement. In such cases, defense counsel is likely to argue that it is unfair to ask the defendant to provide the information to the United States if the information may be provided to other government agencies and possibly used against the company. (Indeed, as discussed below, similar arguments have persuaded the Division to adopt a policy of not disclosing to foreign antitrust agencies information obtained from an amnesty applicant unless the amnesty applicant agrees first to the disclosure.) Refusing to accede to the putative defendant's requested restrictions may be a deal-breaker in plea agreement negotiations and, consequently, may result in the Division not obtaining the information necessary to prosecute the cartel.

  The argument ***for*** providing information is the Division's long-standing policy not to enter into agreements that restrict our ability to provide information to U.S. or foreign authorities. Regarding sister enforcement agencies in the United States, our policy is based on our commitment to cooperate fully and share

with those agencies such information as is permitted by Fed. Crim. R. 6(e). The Division has adopted a similar policy for foreign law enforcement authorities -- i.e., to provide information pursuant to international cooperation agreements, to the extent the disclosure is permitted by law and does not adversely affect U.S. prosecutorial interests. Agreements not to disclose information to foreign authorities may raise issues under Mutual Legal Assistance Treaties (MLATs) and other bilateral cooperation agreements with foreign nations. Moreover, the Division has been at the forefront of efforts to increase cooperation among the world's industrial nations to combat international cartels, and the requested restrictions on cooperation would jeopardize the progress we have made in this area.

- Practical Considerations. Counsel for cooperating defendants often argue for restrictions on disclosure to limit the collateral exposure of their clients cooperating in the Division's antitrust investigation. In the plea agreement context, however, counsel must confront possible collateral exposure in other ways. (But see Section III.B. below regarding a different policy for amnesty applicants and Section III.C. below regarding notice of disclosure.)

B. Restrictions On Disclosing To Foreign Authorities Information Obtained From An Amnesty Applicant

- Policy. The Division's policy is to treat as confidential the identity of amnesty applicants and any information obtained from the applicant. Thus, the Division will not disclose an amnesty applicant's identity, absent prior disclosure by or agreement with the applicant, unless authorized by court order. Consistent with this policy, and in order to protect the integrity of the Corporate Amnesty Program, the Division has adopted a policy of not disclosing to foreign authorities, pursuant to cooperation agreements, information obtained from an amnesty applicant unless the amnesty applicant agrees first to the disclosure.

- Rationale. The Division has strived to make the Corporate Amnesty Program as attractive as possible to induce companies to self-report antitrust offenses. As a result of these efforts, the Amnesty Program is the Division's most effective generator of large cases, and it is the Department's most successful leniency program.[4] When amnesty applicants approach the Division to report international cartel activity, their greatest concern, invariably, is whether the Division will be free to disclose the information to any foreign governments in accordance with our obligations under bilateral antitrust cooperation agreements. As discussed above, these same concerns are raised by foreign

[4]Shortly after the announcement of the revised Corporate Amnesty Program in August 1993, the number of applications increased from approximately one per year to over one per month, and applications over the past year have jumped to approximately two per month. The violations reported include some of the largest matters on the Division's docket. In FY 1998, the Amnesty Program resulted in over a dozen convictions and over $200 million in fines.

targets who are considering whether to voluntarily provide information located outside of the jurisdiction of U.S. courts to the Division pursuant to plea agreements. However, the Division's policy of nondisclosure is limited to amnesty applicants because of disclosure's significantly adverse impact on the Amnesty Program.

The Division's amnesty nondisclosure policy might appear to run counter to the Division's ongoing efforts to increase cooperation among the world's antitrust enforcement agencies. However, the amnesty nondisclosure policy is in everyone's interest. Based on five years' experience of amnesty negotiations under the Division's revised Amnesty Program, there is no doubt that without the amnesty nondisclosure policy, the number of amnesty applications involving international cartels would dry up. Then no one would have the information! Moreover, information provided by amnesty applicants often leads to additional evidence being provided by other conspirators -- information that we can share with foreign government agencies to the extent permitted by law.

- Practical Considerations. In some cases, such as with publicly held corporations, companies may choose, or feel that they are required, to identify themselves as amnesty applicants -- and may even issue press releases announcing their conditional acceptance into the Amnesty Program. If a company wants to disclose the fact that it has applied for amnesty, the Division will work with the applicant to reconcile both the fact and timing of its disclosure with the Division's interest in not jeopardizing an ongoing covert investigation, if one exists. In addition, since amnesty applicants have an obligation to make restitution, at some point they will need to disclose their participation in the conspiracy (if not the Amnesty Program) to the victims.

C. Providing Notice Before Disclosing To Foreign Authorities Information Obtained From A Cooperating Defendant

- Policy. The Division will not agree to provide notice *before* disclosing to foreign law enforcement authorities information obtained from cooperating defendants. However, the Division may agree to provide notice after disclosing information, unless such notice would violate a treaty obligation of the United States, or a court order, or may jeopardize the integrity of any U.S., state or foreign investigation.

- Rationale. The Division will not agree to blanket commitments to provide notice to cooperating defendants either before or after disclosing information to foreign sovereigns because such commitments may run afoul of MLAT obligations or may jeopardize an investigation.

- Case History. See United States v. Showa Denko Carbon Inc., Crim. No. 98-85 (E.D. Pa. 1998) (graphite electrodes) for an example of a provision affording notice after disclosure to foreign enforcement authorities.

- Practical Consideration - Advising Foreign Authorities Of A Defendant's Cooperation. In the event that the Division shares

information from a cooperating defendant with a foreign government, the Division will consider an agreement to advise the foreign government of the fact, manner, extent, and value of the defendant's cooperation.

IV. Foreign Individual Defendants

A. Sentencing Agreements With Foreign Nationals

- Policy. The Division's general policy is not to enter into plea agreements that require the Division to recommend a "no-jail" sentence for the individual defendant. However, in cases involving cooperating foreign nationals over whom we have no reasonable means of obtaining personal jurisdiction, the Division may make exceptions to this policy.

- Rationale. The Division's willingness to enter into a no-jail deal will depend on: (1) the likelihood that the Division will ever be able to obtain personal jurisdiction over the individual absent his/her voluntary submission to jurisdiction pursuant to a plea agreement; and (2) the value of that individual's cooperation to securing the conviction of the remaining co-conspirators. In some cases, the Division may refuse to agree to a no-jail deal even if obtaining personal jurisdiction is unlikely. For example, a no-jail deal for a foreign national may compromise the successful prosecution of remaining defendants, particularly U.S. defendants. However, in other cases, the cooperation of a foreign national may be deemed valuable enough to justify a no-jail deal's litigation risks.

- Case History. See, e.g., United States v. Jan Meek, Crim. No. 97-CR-869 (N.D. Ill. 1997), paragraph 8.

- Practical Considerations. Notwithstanding jurisdictional obstacles, the Division has at times insisted on, and obtained, jail time for cooperating alien defendants. For example, in the disposable plastic dinnerware investigation, two Canadian nationals entered into plea agreements requiring them to submit to U.S. jurisdiction, plead guilty, cooperate with the investigation, and serve time in a U.S. prison. The Canadian nationals could have been extradited to the United States to face prosecution pursuant to the U.S./Canadian extradition treaty that expressly includes extradition for antitrust offenses. (The fact that the Canadian government had previously executed search warrants in this investigation on the Division's behalf pursuant to the U.S./Canadian MLAT confirmed that extradition was a serious risk.) In addition, the Canadian nationals had substantial U.S. business interests that necessitated their continued travel into the United States.

  Executives of international businesses often place a high premium on their ability to travel without fear of being detained or arrested. For such executives, the ability to put the matter behind them and avoid deportation or exclusion from the United States is a powerful inducement to enter into a plea agreement -- even, in some cases, one calling for incarceration.

B. Immigration Relief

- Policy. The Division will advise cooperating aliens of their ultimate immigration status before they plead to a crime. Pursuant to a unique Memorandum of Understanding with the INS, the Division may petition the INS to preadjudicate the immigration status of cooperating aliens before such individuals enter into plea agreements.[5] Therefore, before submitting to U.S. jurisdiction and pleading guilty pursuant to plea agreements, cooperating aliens can receive written assurances in their plea agreements that their convictions will not be used by the INS as a basis to deport or exclude them from the United States.

- Model Language. The Division's model language for providing immigration relief to cooperating aliens pursuant to the MOU with the INS is as follows:

> *(a) Subject to the full and continuing cooperation of the defendant, as described in Paragraph [*] of this Plea Agreement, and upon the Court's acceptance of the defendant's guilty plea and imposition of sentence in this case, the United States agrees not to seek to remove the defendant from the United States under section 240 of the Immigration and Nationality Act, based upon the defendant's guilty plea and conviction in this case, should the defendant apply for or obtain admission to the United States as a nonimmigrant (hereinafter referred to as the "agreement not to seek to remove the defendant"). The agreement not to seek to remove the defendant is the equivalent of an agreement not to exclude the defendant from admission to the United States as a nonimmigrant or to deport the defendant from the United States. (Immigration and Nationality Act, § 240(e)(2));*
>
> *(b) The Antitrust Division of the United States Department of Justice has consulted with the Immigration and Naturalization Service of the United States Department of Justice ("INS"). The INS, in consultation with the United States Department of State, has agreed to the inclusion in this Plea Agreement of this agreement not to seek to remove the defendant;*
>
> *(c) So that the defendant will be able to obtain any nonimmigrant visa that he may need to travel to the United States, the INS and the Visa Office, United States Department of State, have concurred in the granting of a nonimmigrant waiver of the defendant's inadmissibility. This waiver will remain in effect so long as this agreement not to*

[5]See Memorandum Of Understanding Between The Antitrust Division And The Immigration And Naturalization Service dated March 15, 1996 at Attachment 3.

seek to remove the defendant remains in effect. While the waiver remains in effect, the Department of State will not deny the defendant's application for a nonimmigrant visa on the basis of the defendant's guilty plea and conviction in this case, and the INS will not deny his application for admission as a nonimmigrant on the basis of his guilty plea and conviction in this case;

(d) This agreement not to seek to remove the defendant will remain in effect so long as the defendant:

(i) acts and has acted consistently with his cooperation obligations under this Plea Agreement;

(ii) is not convicted of any felony under the laws of the United States or any state, other than the conviction resulting from the defendant's guilty plea under this Plea Agreement or any conviction under the laws of any state resulting from conduct constituting an offense subject to this Plea Agreement; and

(iii) does not engage in any other conduct that would warrant his removal from the United States under the Immigration and Nationality Act.

The defendant understands that should the Antitrust Division become aware that the defendant has violated any of these conditions, the Antitrust Division will notify the INS. The INS will then determine, in consultation with the Antitrust Division, whether to rescind this agreement not to seek to remove the defendant;

(e) The defendant agrees to notify the Assistant Attorney General of the Antitrust Division should the defendant be convicted of any other felony under the laws of the United States or of any state; and

(f) Should the United States rescind this agreement not to seek to remove the defendant because of the defendant's violation of a condition of this Plea Agreement, the defendant irrevocably waives his right to contest his removal from the United States under the Immigration and Nationality Act on the basis of his guilty plea and conviction in this case, but retains his right to notice of removal proceedings.

- Rationale. Although the United States has negotiated a number of extradition treaties with other countries that cover antitrust

offenses, a number of countries have no extradition treaty or no extradition treaty that covers antitrust crimes. Therefore, in many cases, if foreign defendants are willing to become fugitives by remaining outside of the jurisdiction of U.S. courts, they can escape prosecution. Of course, this is a risky strategy and a heavy price to pay for executives of international businesses who place a high premium on their ability to travel. The INS considers Sherman Act convictions to be crimes of moral turpitude that can result in deportation and exclusion from the United States for a minimum of 15 years. The hardship caused by fugitive status has led many foreign defendants to consider a plea agreement with the United States. Prior to the MOU with the INS, the Division was unable to guarantee that a criminal conviction would not result in an alien's deportation and permanent exclusion from the United States. The MOU enables the Division to make those guarantees and thereby significantly increases the incentive for a foreign citizen to submit to U.S. jurisdiction, plead guilty, and cooperate with the Division's investigation.

- Case History. The Division has periodically revised the model immigration relief language used in its plea agreements. The current model language, set forth above, was first used in United States v. Akira Nakao, Crim. No. CR 98-00035 (N.D. Cal. 1998), paragraph 13. The consultation between the Division and the INS in petitioning for and approving, respectively, immigration relief has been a model working relationship between DOJ enforcement components. Since the MOU was adopted in March 1996, the INS has not rejected a single petition for immigration relief filed by the Division on behalf of a foreign citizen offering to submit to U.S. jurisdiction, plead guilty, and cooperate in the investigation and prosecution of other members of the cartel.

C. Extradition

- Policy. When the Division enters into plea agreements with foreign nationals who reside in, or are citizens of, a country with s antitrust crimes, the defendant may be required to agree that, in the event the defendant breaches the plea agreement, he will not oppose or contest a request by the United States for extradition to face charges arising from that breach.

- Model Language.

> *The defendant agrees to and adopts as his own the attached factual statement which is incorporated here by reference. In the event that the defendant breaches the Plea Agreement, the defendant agrees that the Plea Agreement, including the attached fact statement, provides a sufficient basis for any possible future extradition request that may be made for his return to the United States to face charges either in the Information referenced in paragraph [*] of this Plea Agreement or in any related indictment. The defendant further agrees not to oppose or contest any request for extradition*

by the United States to face charges either in the Information referenced in paragraph [*] of this Plea Agreement or in any related indictment.

- Rationale. The model language facilitates a request for extradition of a foreign defendant who breaches a plea agreement. It makes clear that the United States will make every effort to ensure that a foreign national who fails to meet his obligation of providing full and truthful cooperation will be brought to justice in the United States.

- Case History. See, e.g., United States v. Andrew Liebmann, Crim. No. 94-246-2 (E.D. Pa. 1994), paragraph 10.

V. Sentencing

A. Calculating The Volume Of Affected Commerce In International Cartel Cases

- Policy. The Division will normally use the volume of U.S. commerce affected by the defendant's participation in a conspiracy when calculating that defendant's Sentencing Guidelines fine range. However, when the amount of U.S. commerce affected by a defendant in an international cartel understates the seriousness of the defendant's role in the offense and, therefore, the impact of the defendant's conduct on American businesses and consumers, the Division will consider the defendant's worldwide (U.S. *and foreign*) sales in the Sentencing Guidelines calculation.

- Rationale. The Sentencing Guidelines afford two potential ways to take into account a defendant's foreign sales in determining that defendant's sentence: (1) determining the volume of commerce under U.S.S.G. § 2R1.1(d)(1) based on worldwide (U.S. and foreign) sales affected by the violation, instead of limiting volume of affected commerce to U.S. sales only, as the first step in calculating the base fine; or (2) treating sales outside of the United States as an aggravating factor requiring an upward adjustment in the Sentencing Guidelines calculation pursuant to U.S.S.G. § 5K2.0.[6]

- Case History. In December 1997, HeereMac, v.o.f., a Dutch company, pled guilty to participating in an agreement to allocate customers and agree on pricing for marine construction contracts in the major oil and gas production regions of the world, including the Gulf of Mexico, the North Sea and the Far East. The commerce affected by the cartel's agreements on construction contracts in the latter two geographic areas -- the North Sea and Far East -- were not included in the calculation of the defendant's Guidelines fine range. However, the defendant's conduct in these two geographic areas was treated as an

[6]For a more detailed discussion of the Division's policy on calculating the volume of affected commerce in international cartel cases, see, Gary R. Spratling, "Are the Recent Titanic Fines In Antitrust Cases Just The Tip Of The Iceberg?," Twelfth Annual National Institute On White Collar Crime (March 6, 1998), at pages 11-13.

aggravating factor, and the court imposed an upward adjustment of $20 million -- twice the $10 million statutory maximum -- to account for this activity. With the $20 million upward adjustment, the defendant's total fine was $49 million. See HeereMac, v.o.f., supra, paragraph 7.

In December 1997, Roquette Freres, a French corporation, pled guilty to participating in the worldwide sodium gluconate conspiracy where the defendant's U.S. market share was very small and its share of the worldwide market was substantially larger. United States v. Roquette Freres, Crim. No. CR 97-00356 (N.D. Cal. 1997). The Division took the position that sentencing the defendant based on the small amount of U.S. commerce in which the company had engaged would not adequately reflect the seriousness of the company's conduct in participating in a cartel that injured the United States, nor would it be sufficient to provide adequate general, or even specific, deterrence. Section 5K2.0 of the Guidelines provides for a sentence above the Guidelines range when "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into account by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." In the Roquette plea agreement, though the company's U.S. volume of commerce was only $2.6 million during the charged conspiracy with a corresponding Guidelines range of $748,000 to $1,282,000, the defendant agreed to pay a fine of $2.5 million. The court, based on the Division's and the defendant's joint recommendation, imposed an upward departure to the defendant's Guidelines fine range in order to more accurately reflect the defendant's true role in the worldwide conspiracy.

B. Destruction Of Foreign-Based Documents

- Policy. The Division considers the destruction of *foreign-based* documents, like the destruction of domestic documents, for the purpose of impeding an investigation to be a criminal offense. It will use every available means to prosecute and punish individuals and corporations who engage in such activity.

- Rationale. An executive who destroys *foreign-based* documents for the purpose of covering up his company's participation in a conspiracy may subject himself and his employer to serious sentencing consequences. The executive and the company may be charged with a violation of the "omnibus clause" of 18 U.S.C. § 1503, which carries a potential 10-year sentence against the individual and a $500,000 fine against the company. Moreover, if the company is convicted of the antitrust offense, it may face substantially greater fines, even if it is not formally charged with obstruction as a separate offense in an indictment or information. Under the Sentencing Guidelines, there are three avenues by which this fine enhancement may take place.

  First, if it can be shown by a preponderance of the evidence at sentencing that an organization willfully impeded an antitrust investigation by destroying key foreign-based documents, then the organization can have its culpability score increased by

three points pursuant to U.S.S.G. § 8C2.5(e). If we assume that a corporate defendant's participation in an antitrust offense affected $100 million in commerce (more than one-half of the Division's investigations involve more than $100 million in affected commerce), a three-point upward adjustment to its culpability score would add $12 million to the minimum fine.

Second, a court can substantially increase an organization's fine for document destruction abroad even in the absence of a finding that the conduct warranted an upward adjustment in the organization's culpability score. In determining the sentence to impose within an organization's Guidelines range, "the court may consider, without limitation, any information concerning the background, character, and conduct of the defendant." U.S.S.G. § 1B1.4. Therefore, evidence of document destruction is highly relevant to a court's determination of where within the Guidelines range a fine will be imposed, and could conceivably increase an organization's fine by tens of millions of dollars.

Third, as discussed in Section II.B. above, the destruction of foreign-based documents can result in higher fines even if the organization later enters into a plea agreement with the government and pledges its full cooperation. If a cooperating defendant cannot provide key foreign-based documents because they were destroyed when the investigation became known, it is unable to give "full" cooperation and, therefore, will receive a lesser credit for cooperation than would otherwise potentially be available.[7]

- Case History. The Division has several ongoing investigations where cooperating defendants have received less credit for their cooperation because employees destroyed foreign-based documents when the investigation became known.

VI. Selecting The Type Of Plea Agreement And Identifying The Appropriate Corporate Defendant

A. Fed. R. Crim. P. 11(e)(1)(C) Agreements

- Policy. The Division will generally not oppose requests by cooperating foreign defendants to enter into plea agreements pursuant to Fed. R. Crim. P. 11(e)(1)(C).

- Rationale. "C" agreements allow a defendant to withdraw its guilty plea, pursuant to Fed R. Crim P. 11(e)(4), if the Court does not accept the recommended sentence. If the court rejects a plea agreement and a defendant withdraws its plea of guilty, the plea agreement, guilty plea, and any statements made in connection with or in furtherance of the plea agreement are not admissible against the defendant in any criminal or civil proceeding (Fed. R. Crim. P. 11(e)(6)).

---

[7]For a more detailed discussion of the Division's position on this issue, see, Gary R. Spratling, "The Legal and Sentencing Guidelines Consequences of Destroying Foreign-Based Documents," ABA Section of Antitrust Law, Criminal Practice and Procedure Committee Newsletter, March 1998 at 3.

Nearly all of the plea agreements that the Division has entered into with foreign corporate and individual defendants have been "C" agreements. This practice recognizes the fact that foreign defendants are naturally unwilling to submit to U.S. jurisdiction and enter into plea agreements without insisting on the limitation on their exposure provided by "C" agreements.

- Case History. In every case but one, the courts have accepted the "C" agreements that the Division has entered into with foreign corporate or individual defendants. The only exception was a plea agreement with Showa Denko Carbon ("SDC") in the graphite electrodes investigation. In that case, the court initially rejected a "C" agreement calling for SDC to pay a $29 million fine, because it believed that the agreed-upon U.S.S.G. § 5K departure from the Guidelines fine range for the defendant's cooperation was excessive. The parties then revised the "C" agreement so that it provided the court with a fine range of $29 to $32.5 million. The court accepted the revised plea agreement and imposed a $32.5 million fine. The Division's model language for voiding plea agreements pursuant to Fed. R. Crim. P. 11(e)(4) can be found in UCAR International, supra, paragraph 8(e).

- Practical Considerations. The courts' familiarity with and acceptance of "C" agreements varies greatly from district to district and, often times, from judge to judge within the same district. The Division occasionally files cases in districts where "C" agreements are rarely, if ever, used and/or before a judge who either has no experience with "C" agreements, or has a reputation for disfavoring "C" agreements. The Division will check on the local practice for handling "C" agreements in the districts where the plea agreement might be filed.

B. Identifying The Appropriate Corporate Defendant

- Policy. If both the foreign-based corporation and its U.S. subsidiary participated in an international cartel, and the Division is willing to bring charges against just one entity as the pleading defendant in a plea agreement, the Division's *strong preference* is to prosecute the most culpable party involved in the conspiracy. However, the Division *may* accept a plea from either the U.S. or foreign-based entity so long as we have a solid factual basis for the plea and the entity that pleads had a substantial level of involvement in the conspiracy.

- Rationale. The Division is frequently requested to substitute a U.S. subsidiary for the foreign-based parent company as the pleading defendant. In addition to considering the relative culpability of the foreign-based parent and its subsidiary, and the level of involvement of each in the conspiracy, the Division evaluates the potential deterrent effect of prosecuting one company over the other. For example, in some cases, the foreign parent is widely known in the business world and with the general public while the U.S. subsidiary has little or no name recognition. In such cases, the Division is unlikely to agree to bring charges against just the U.S. subsidiary because a prosecution of the better-known foreign parent would have greater deterrent value.

C. Expedited Sentencing For Foreign-Based Defendants

- Policy. In jurisdictions where the practice is permissible, the Division generally will not oppose a request for expedited sentencing made by a foreign-based defendant who is pleading guilty pursuant to a Rule 11(e)(1)(C) agreement.

- Model Language. The model language allows the defendant to request, without government objection, that the court sentence the defendant at the time of arraignment:

> *The defendant, pursuant to the terms of this Plea Agreement, will plead guilty at arraignment to the antitrust criminal charge described in Paragraph [*] above, and will make a factual admission of guilt to the Court in accordance with Rule 11, Fed. R. Crim. P., as set forth in Paragraph [*] below. The United States and the defendant believe that this Plea Agreement contains sufficient information concerning the defendant, the crime charged in this case, and the defendant's role in the crime to enable the meaningful exercise of sentencing authority by the Court pursuant to 18 U.S.C. § 3553. The United States will not object to the defendant's request that the Court accept the defendant's guilty plea and immediately impose sentence on the day the case is filed, based upon the record provided by the defendant and the United States. The Court's denial of the request to impose sentence immediately will not void this Plea Agreement.*

- Rationale. The model language allows a foreign-based defendant to combine arraignment, taking of the plea, and sentencing into a single proceeding as a matter of convenience to the defendant. The provision is appropriate in "C" agreements where the court's discretion on sentencing is limited once it accepts the plea agreement. However, the "C" agreement will not be voided if the court denies the defense request for expedited sentencing.

- Case History. See, e.g., Haarmann & Reimer, supra, paragraph 3.

VII. Uniform Application Of Division Policies

A final issue is whether foreign defendants are apt to receive more lenient treatment than their domestic co-conspirators because of the evidentiary and jurisdictional problems associated with investigating and prosecuting foreign defendants. A distinguished panel of economists and attorneys recently considered this issue at a hearing of the International Competition Policy Advisory Committee (ICPAC).[8] The panelists raised three questions which, depending on the answer,

[8]ICPAC is an advisory committee comprised of business, labor, academic, economic, and legal experts. It was assembled by Attorney General Janet Reno and Assistant Attorney General Joel Klein to provide the Division with outside expert advice on international antitrust problems that arise in criminal, merger, and civil

might suggest more favorable treatment for foreign members of international cartels than for their U.S. counterparts. First, is the fact that the two largest criminal fines in the Division's history were imposed on U.S. companies evidence that U.S. companies are treated less favorably in plea negotiations than foreign companies? Second, do the "no-jail" plea agreements that the Division has entered into with foreign nationals suggest that U.S. citizens are treated less favorably than foreign nationals in plea negotiations? Third, are exceptions made to the Division's Corporate Amnesty Program requirement that applicants not be the "leader" or "organizer" of the activity if the applicant is a foreign company that can provide access to key foreign-based evidence? The Division's responses to these questions follow:

A. U.S. And Foreign Corporate Defendants Are Treated Equally

The two largest criminal fines in the Division's history were imposed on U.S. companies -- a $110 million fine imposed on UCAR International for its participation in the graphite electrodes conspiracy and a $100 million fine imposed on Archer Daniels Midland for its participation in two international cartels operating in the food and feed additives industry. However, it does not follow that jurisdictional issues have resulted in more favorable deals for foreign corporations.

First, the Division's enforcement statistics show that foreign corporate defendants are getting hit as hard as their U.S. cohorts in the Division's international cartel prosecutions. The Division has obtained fines of $10 million or more against U.S., Dutch, German, Japanese, Belgian, Swiss, British, and Norwegian-based companies. In fact, in 14 of the 17 instances in which the Division secured a fine of $10 million or greater, the corporate defendants were foreign-based. These numbers reflect the fact that the typical international cartel likely consists of a U.S. company and three or four of its competitors that are market leaders in Europe, Asia, and throughout the world.

Second, notwithstanding the high percentage of foreign-based defendants, it is entirely predictable that the largest fines would be levied against U.S. companies. In the great majority of cases, the Division's fine recommendations for corporations are based, in large part, on the volume of domestic commerce affected by the defendant's participation in the conspiracy. Therefore, in cases where a U.S. company has secured the lion's share of the U.S. market as a result of a global market allocation agreement -- such as Archer Daniels Midland in the lysine conspiracy -- the U.S. company will generally face the greatest fine exposure under the U.S. Sentencing Guidelines.

Third, the Division has not given a discount to any foreign-based corporate defendant in calculating its fine in response to a defendant's jurisdictional argument. For the most part, obtaining personal and subject matter jurisdiction over foreign corporate defendants has not been a significant problem in our international cartel enforcement. In any event, jurisdictional challenges have not resulted in disproportionate fines levied against U.S. or foreign conspirators.

B. U.S. And Foreign Individual Defendants Are Treated Equally

Several panelists at the ICPAC hearing pointed out that the Division has entered into "no-jail" plea agreements with foreign nationals residing outside of the United States as a means of getting their cooperation, and expressed concern that domestic defendants had not received similar treatment. There is no question that,

---

non-merger enforcement. The panel discussion on international cartel enforcement issues took place during the Committee's hearing on November 4, 1998.

in most cases, a foreign co-conspirator residing abroad has an advantage over his/her U.S. counterpart during the plea negotiations simply because the Division cannot prosecute the foreign national unless he/she voluntarily submits to the jurisdiction of U.S. courts. The United States has negotiated a number of extradition treaties with other countries that cover antitrust offenses, but these treaties do not begin to cover all of the nations where members of international cartels reside. Nevertheless, the Division has *never* entered into a no-jail deal with a foreign defendant after entering into a plea agreement with a U.S. citizen that calls for jail time. In the cases where the Division has entered into plea agreements with foreign nationals recommending no jail, the foreign defendants approached the Division early in the investigation and offered to plead guilty and cooperate before the remaining co-conspirators. Thus, the promise not to seek incarceration in these cases was made in order to crack the international conspiracy.

C. Application Of The Division's Corporate Amnesty Program Is Uniform

Lastly, the question was raised at the ICPAC hearing as to whether the Division's application of its Corporate Amnesty Program would vary depending on whether the applicant is a U.S. or foreign corporation. Specifically, would the Division be willing to make an exception to the requirement in the Corporate Amnesty Program that applicants not be "the leader in, or originator of, the activity" when the applicant is a foreign company that can advance the Division's investigation by providing access to witnesses and evidence located abroad. The fact is that no exception has been or will ever be granted to permit the ringleader of an antitrust conspiracy -- foreign or domestic -- to qualify for corporate amnesty, irrespective of the corporation's ostensible "leverage" because it has high-quality, but otherwise unavailable, evidence. The requirements of the Division's Corporate Amnesty Program apply uniformly to U.S. and foreign companies alike. Contrary to the proposition that the Corporate Amnesty Program may favor foreign firms, amnesty grants in the Division's biggest international cartel investigations thus far have been obtained by U.S. companies and not their foreign co-conspirators. The graphite electrodes and marine construction services investigations offer two prime examples.

VIII. Conclusion

Criminal enforcement of the U.S. antitrust laws against international cartel activity that affects U.S. businesses and consumers is a relatively recent development. Five years ago, only *one percent* of the corporate defendants in our cases were foreign-based, and there were *zero* prosecutions involving international cartel activity. By comparison, in FY 1998, roughly *50 percent* of the corporate defendants were foreign-based, and there were *16* international cartel prosecutions. This sea change in criminal enforcement has required the Division to navigate its way through a number of complex issues that are not found in domestic cases. Although new issues will surely continue to surface, it is hoped that this paper will provide guidance on the Division's policies in this evolving area.

STATUS REPORT:
INTERNATIONAL CARTEL ENFORCEMENT

International Cartel Enforcement. The Division's strategy of concentrating its resources on international cartels that victimize American businesses and consumers has continued to lead to remarkable success in terms of cracking international cartels, securing the conviction of the major conspirators, and obtaining record-breaking fines. For example:

- Grand Jury Investigations. Over 30 sitting grand juries are currently looking into suspected international cartel activity.

- Geographic Scope. The subjects and targets of the Division's international investigations are located on 5 continents and in over 20 different countries. However, the geographic scope of the criminal activity is even broader than these numbers reflect. As of February 1, 1999, our investigations had uncovered meetings of international cartels in nearly *80 cities in 30 countries*, including most of the Far East and nearly every country in Western Europe.

- Volume Of Affected Commerce. In some matters, the volume of commerce affected by the suspected conspiracy is well over $1 billion per year; and in over half of the investigations, the volume of commerce affected is well over $100 million over the term of the conspiracy.

- Estimated Harm. Since the beginning of FY 1997, the Division has prosecuted international cartels affecting over *$10 billion* in U.S. commerce. The cartel activity in these cases have cost U.S. businesses and consumers many hundreds of million of dollars annually.

- Percentage Of Foreign Defendants. In FY 1991, only 1% of the corporate defendants in cases brought by the Division were foreign. (In the four previous years, from FY 1987-1990, the Division did not bring any cases against a foreign corporation.) By comparison, in FY 1997, 32 percent of the corporate defendants in our cases were foreign-based; and in FY 1998, roughly *50 percent* of corporate defendants were foreign-based.

February 1, 1999

Record Fines. In the past two years, the Division has obtained nearly a half-billion dollars in criminal fines. To put these criminal fines in perspective, the total fines imposed on corporate defendants in the *past two years* is virtually identical to the total fines imposed in all of the Division's prosecutions during the *20 years* from 1976 through 1995. In FY 1998, the Division set new marks in terms of year-end fines, average fines, and top-end fines:

- **Year-End Fines**. Prior to FY 1997, the highest amount of fines obtained by the Division in any given year was roughly $42 million. In FY 1997, the Division shattered that mark when it collected $205 million in criminal fines - - nearly *500 percent higher* than during any previous year in the Division's history. In FY 1998, the Division broke its record again when it obtained over $265 million in criminal fines. (See attached bar chart of Antitrust Division Criminal Fines).

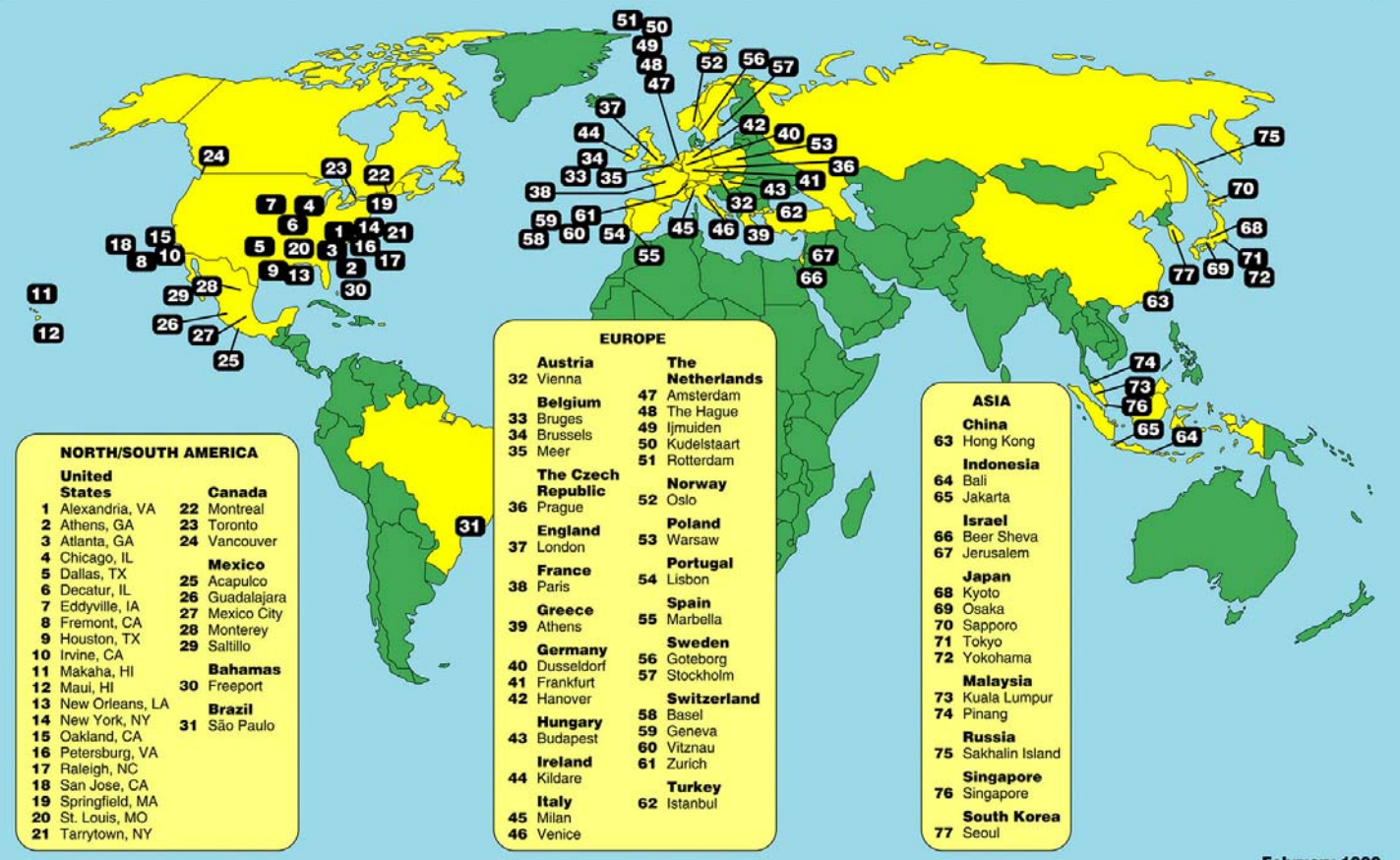
- **Higher Average Fines**. In FY 1991, the average corporate fine for an antitrust offense was a little less than $320,000. In FY 1998, the average fine on corporations was roughly $12 million, a nearly *forty-fold* increase since FY 1991.

- **Higher Top-End Fines**. Six years ago, the largest corporate fine ever imposed for a single Sherman Act count was $2 million. However, in the past two years, fines of over $10 million have become commonplace - including a $100 million fine against Archer Daniels Midland in October 1996 and a $110 million fine against UCAR International in April 1998. (See attached bar chart of the Largest Criminal Fines Imposed Per Single Sherman Act Count).

- **Fines From International Prosecutions**. Of the roughly $470 million in fines obtained in FYs 1997 and 1998, nearly $440 million, or well *over 90 percent of the fines, were in connection with international cartel activity*.

- **International: Fines Of $10 Million or More**. The Division has obtained fines of $10 million or more against U.S., Dutch, German, Japanese, Belgian, Swiss, British, and Norwegian -based companies. In fact, in 14 of the 17 instances in which the Division secured a fine of $10 million or greater, the corporate defendants were foreign-based.

Locations of International Cartel Meetings Affecting United States Commerce



NORTH/SOUTH AMERICA

United States
1 Alexandria, VA
2 Athens, GA
3 Atlanta, GA
4 Chicago, IL
5 Dallas, TX
6 Decatur, IL
7 Eddyville, IA
8 Fremont, CA
9 Houston, TX
10 Irvine, CA
11 Makaha, HI
12 Maui, HI
13 New Orleans, LA
14 New York, NY
15 Oakland, CA
16 Petersburg, VA
17 Raleigh, NC
18 San Jose, CA
19 Springfield, MA
20 St. Louis, MO
21 Tarrytown, NY

Canada
22 Montreal
23 Toronto
24 Vancouver

Mexico
25 Acapulco
26 Guadalajara
27 Mexico City
28 Monterey
29 Saltillo

Bahamas
30 Freeport

Brazil
31 São Paulo

EUROPE

Austria
32 Vienna

Belgium
33 Bruges
34 Brussels
35 Meer

The Czech Republic
36 Prague

England
37 London

France
38 Paris

Greece
39 Athens

Germany
40 Dusseldorf
41 Frankfurt
42 Hanover

Hungary
43 Budapest

Ireland
44 Kildare

Italy
45 Milan
46 Venice

The Netherlands
47 Amsterdam
48 The Hague
49 Ijmuiden
50 Kudelstaart
51 Rotterdam

Norway
52 Oslo

Poland
53 Warsaw

Portugal
54 Lisbon

Spain
55 Marbella

Sweden
56 Goteborg
57 Stockholm

Switzerland
58 Basel
59 Geneva
60 Vitznau
61 Zurich

Turkey
62 Istanbul

ASIA

China
63 Hong Kong

Indonesia
64 Bali
65 Jakarta

Israel
66 Beer Sheva
67 Jerusalem

Japan
68 Kyoto
69 Osaka
70 Sapporo
71 Tokyo
72 Yokohama

Malaysia
73 Kuala Lumpur
74 Pinang

Russia
75 Sakhalin Island

Singapore
76 Singapore

South Korea
77 Seoul

February 1999

MEMORANDUM OF UNDERSTANDING
Between
THE ANTITRUST DIVISION
UNITED STATES DEPARTMENT OF JUSTICE
and
THE IMMIGRATION AND NATURALIZATION SERVICE
UNITED STATES DEPARTMENT OF JUSTICE

AND NOW, this 15th day of March 1996, the Antitrust Division of the United States Department of Justice ("Antitrust Division") and the Immigration and Naturalization Service ("INS"), hereby agree and understand that:

WHEREAS, the criminal enforcement of the antitrust laws is the core mission of the Antitrust Division;

WHEREAS, in today's globalized economy, many of the Antitrust Division's highest priority criminal prosecutions involve foreign firms and individuals;

WHEREAS, the Antitrust Division's ability to investigate and prosecute international cartel activity successfully requires the cooperation of aliens;

WHEREAS, the Antitrust Division generally cannot secure jurisdiction over aliens charged with antitrust offenses by extradition;

WHEREAS, the chief inducement for aliens charged with antitrust offenses to submit to U.S. jurisdiction is the ability to resume travel for business activities in the United States;

WHEREAS, in a small number of cases each year, the Antitrust Division may need to include as a term in a plea/cooperation agreement a cooperating alien's ability to travel to the United States;

WHEREAS, the INS considers criminal violations of the Sherman Antitrust Act, 15 U.S.C. § 1, to be crimes involving moral turpitude, which may subject an alien to exclusion or deportation from the United States;

WHEREAS, removal of criminal aliens is the highest of the INS enforcement priorities;

WHEREAS, the INS has discretion under certain circumstances to waive grounds of exclusion, to parole excludable aliens into the United States, and to defer the deportation of deportable aliens;

WHEREAS, the use of an S nonimmigrant visa may be unfeasible in a given Antitrust case;

WHEREAS, the possibility of exclusion or deportation from the United States significantly impacts decisions by aliens about whether to submit to the jurisdiction of U.S. courts for purposes of entering pleas and providing assistance to the Antitrust Division in its investigations;

WHEREAS, prior consultation and written approval by INS is required before the Antitrust Division can represent that an alien's conviction under 15 U.S.C. § 1 will not result in the alien's exclusion or deportation from the United States;

WHEREAS, negotiations regarding plea/cooperation agreements frequently are very time-sensitive; and

WHEREAS, the Antitrust Division's consultation with INS on the possible issuance of a waiver during the Antitrust Division's plea/cooperation negotiations with aliens requires an expeditious and clearly-defined procedure;

THEREFORE, the Antitrust Division and INS desire to enter into the following Memorandum of Understanding ("MOU") to cooperate with each other in their respective enforcement obligations and to reconcile the administration of their respective duties within the United States Department of Justice.

1. Under this agreement, an alien is a "cooperating alien" if, in the determination of the Antitrust Division:

a. the alien is in possession of critical reliable information relevant to the Antitrust Division's investigation or prosecution of a significant antitrust matter;

b. the alien has cooperated, or is willing to cooperate with the Antitrust Division in its investigation or prosecution;

c. the alien's ability to travel to the United States after conviction will significantly enhance the Antitrust Division's ability to secure the alien's cooperation.

2. If the Antitrust Division determines that an alien qualifies as a cooperating alien, the Assistant Attorney General for the Antitrust Division, or his/her designee, may petition the Commissioner of the INS, or his/her designee, to defer the alien's deportation, to waive the alien's inadmissibility or to grant parole, notwithstanding the alien's conviction for antitrust or related federal offenses. The petition made by the Antitrust Division shall:

a. contain a summary of the investigation;

b. represent that the cooperating alien has demonstrated a willingness to provide or has provided the Antitrust Division with significant assistance in its investigation or prosecution of a significant antitrust matter;

c. represent that the cooperating alien has accepted responsibility for his/her criminal conduct;

d. state that the cooperating alien has not been convicted of any felony in the United States other than the offense(s) that he/she has been or may be convicted of in connection with the subject antitrust matter;

e. represent that the cooperating alien does not pose a continuing threat to United States commerce or to take part in future criminal conduct;

f. briefly state the reason for not using the S nonimmigrant visa provisions for the cooperating alien's case; and

g. specify the period during which the alien should be permitted to travel to or remain in the United States.

3. The petition made by the Antitrust Division also shall include a certification executed by the cooperating alien, in which he/she:

a. acknowledges that any additional felony conviction in the United States may result in the cooperating alien's deportation and/or exclusion from the United States;

b. executes a waiver to his/her right to a deportation hearing;

c. if the matter is ongoing, agrees to cooperate fully with the United States;

d. agrees to report to the Assistant Attorney General for the Antitrust Division should he/she be convicted of any felony while in the United States; and

e. lists the alien's date and place of birth, alien registration number, and the date, place and manner of the alien's last entry into the United States. If the alien has no alien registration number, or has never entered the United States, the alien's certificate shall make this clear.

4. The INS shall determine within five (5) business days of its receipt of the Antitrust Division's petition on behalf of a cooperating alien whether to defer the alien's deportation, to grant a waiver of exclusion and admit the alien as a nonimmigrant, or to parole the alien into the United States. The INS will also determine within five (5) business days of its receipt of the Antitrust Division's petition when the deferral of deportation proceedings or the period of the alien's parole or admission shall expire, and whether the alien may seek a single parole or admission, or multiple paroles or admissions, during this period. The Commissioner of the INS, or his/her designee, shall provide written notification of this determination to the Assistant Attorney General of the Antitrust Division, or his/her designee within five (5) business days of the INS's receipt of the Antitrust Division's petition. In order to facilitate the INS's actions within the designated timeframe, the Antitrust Division shall notify the INS of the cooperating alien's identity and country of origin and the prospective terms of his/her plea agreement as early as practicable in the process but, in any case, before the alien executes the certification described in paragraph 3 of this MOU.

5. A grant of a deferral of deportation, a waiver of inadmissibility or a parole under this MOU shall be subject to the following conditions:

a. the cooperating alien acts consistent with his/her cooperation obligations;

b. the cooperating alien is not convicted of any felony in the United States other than the offense(s) that he/she has been or may be convicted of in connection with the subject antitrust matter;

c. the cooperating alien does not act in a manner which would warrant his/her exclusion from the United States; and

d. the Antitrust Division notifies INS of any information material to the immigration status of the cooperating witness, including, but not limited to, a breach of the alien's cooperation obligations or a conviction of any crime unrelated to the subject antitrust matter, whether against the laws of the United States, any of the several States, or a foreign country, in so far as the Antitrust Division has knowledge of any such conviction.

Should the cooperating alien violate any of these conditions, the INS shall determine, in consultation with the Antitrust Division, whether to withdraw the cooperating alien's permission to travel to or remain in the United States.

6. If the INS determines that the alien is to be permitted access to the United States under a grant of parole, the INS shall provide the alien with a Form I-512 or a transportation letter. If the INS determines that the alien is to be granted a waiver of exclusion and admitted, but the alien lacks the necessary visa, the INS shall notify the consular officer to whom the alien will present a nonimmigrant visa application and recommend the issuance of a nonimmigrant visa to the alien.

7. If the INS declines a petition made by the Antitrust Division pursuant to this MOU, the Antitrust Division may appeal INS's decision to the Attorney General, through the Deputy Attorney General, and request that the Attorney General exercise his/her discretionary power to grant the waiver. The Antitrust Division shall submit a written notification of appeal to the Attorney General, through the Deputy Attorney General, and simultaneously shall deliver a copy of the notification to INS, after which the

Antitrust Division and INS shall have five (5) business days to submit position papers on the issue for the Attorney General's consideration.

8. Not more than thirty (30) days before the expiration of the deferral of deportation or of the alien's period of admission or parole, the Assistant Attorney General of the Antitrust Division, or his/her designee, may petition the Commissioner of the INS, or his/her designee, to extend the period of the deferral of deportation proceedings, or of the alien's admission or parole, if the Antitrust Division determines that the alien still qualifies as a cooperating alien. A petition for extension shall include the information required in paragraphs 2 and 3 of this MOU. The INS will handle the petition in accordance with paragraphs 4, 5, 6, and 7 of this MOU.

Anne K. Bingaman
Assistant Attorney General
Antitrust Division

Doris M. Meissner
Commissioner
Immigration and
Naturalization Service