DEPARTMENT OF JUSTICE

DEPARTMENT OF JUSTICE PERSPECTIVES ON INTERNATIONAL ANTITRUST ENFORCEMENT: Recent Legal Developments and Policy Implications

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I. Introduction:

Just a few moments ago, Don asked me if we should let everyone enjoy themselves a little longer, or if I would like to begin my speech.

Thank you, Don, for that introduction and for your and Doug Melamed's invitation to be here today.

It is a pleasure to be here with this distinguished panel to discuss a very timely – if rather overstated – topic: U.S. "judicial imperialism" in private antitrust damage actions generally, and in discovery in such actions. I should say, however, that having a particular appreciation for the work of judges, having been involved in the judicial confirmation process the past couple of years, I had nothing to do with the provocative title of today's panel. With that disclaimer, let me say that in my remarks today, I would like to address this topic in the context of recent federal court of appeals and Supreme Court actions, and more precisely in terms of the views recently expressed by the Department of Justice through *amicus* briefs filed in several of these cases, including *Statoil*, *Empagran*, and *Intel v. AMD,* in which the Supreme Court granted *cert.* just last week. I know that the recent legislative activities have attracted the attention of some here today, so I will discuss briefly pending legislation to improve criminal antitrust enforcement efforts at the Department.

II. Recent Cases Concerning the Scope of Jurisdiction Under the FTAIA

I will begin with the recent cases involving jurisdiction and discovery. I must preface my comments, however, with a cautionary statement: While I personally find these issues fascinating and would love to have a brainstorming session with you today, both Hew Pate and the Solicitor General will be very cross with me if I say too much on the *Empagran*, and *Intel v.*

AMD cases, both of which are, or soon could be, pending in the Supreme Court. So I will be circumspect, but I hope, at least a little interesting – and if not, Don will send you a videotape of the 30-hour Senate debate on judicial nominations to make up for it.

There was a time, not so long ago, when only a very few jurisdictions around the world, including the United States, had effective government antitrust agencies and enforcement policies, and almost no one except the United States had effective private rights of action in antitrust matters. One consequence of this situation was that many of our trading partners, and most foreign firms, regarded U.S. antitrust enforcement, particularly international antitrust enforcement, with a combination of disdain and horror, and certainly had no intention of doing anything about international antitrust problems themselves. But times have changed. And continue to change even more rapidly. We now live in a world where there are nearly 100 jurisdictions with antitrust laws of one sort or another, from Albania to Zambia, where both foreign governments and foreign firms take antitrust seriously, and where they discuss antitrust and competition policy issues in multilateral fora ranging from the Organization for Economic Cooperation and Development, or OECD to the World Trade Organization, or WTO to the International Competition Network, or ICN.

One of the more unexpected consequences, I think, of this new worldwide interest in antitrust has been the strong interest of many foreign persons (represented, of course, by U.S. counsel) in pursuing private treble damage remedies in U.S. courts against foreign firms and alleged antitrust transgressors. At one level, there is nothing new in this. Ever since the Supreme Court's decision 25 years ago in *Pfizer, Inc. v. Government of India,*[1] it has been clear

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

that foreign plaintiffs can pursue damage actions in federal courts to more or less the same extent as U.S. plaintiffs can.

What is new, though, is that a new breed of foreign plaintiffs are seeking recovery for damages that they have suffered *outside* the flow of U.S. commerce, on the theory that their damages were caused by conspiracies, and by conspirators, that also affected U.S. commerce in some way. These foreign plaintiffs have been told by some federal courts of appeals that they could be entitled to such recovery. This line of cases includes the recent courts of appeals decisions that have interpreted – or attempted to try to interpret – the Foreign Trade Antitrust Improvements Act – the "FTAIA" [15 U.S.C. 6a] – so as to open U.S. district courts to foreign plaintiffs who want to seek treble damages under U.S. antitrust laws against foreign defendants and based on injuries (typically purchases) that occur entirely *outside* the United States.

For many years after the FTAIA was enacted in 1982, it lay mostly unnoticed in dusty pages of the United States Code; few lawsuits invoked it, and almost none were successful. This may have had something to do with the fact that the FTAIA is "inelegantly phrased," to use one court of appeals' eloquent understatement.[2] I can personally assure you that such inelegant phrasing would never have occurred the past five years on a Judiciary Committee legislation.

Some observers have been less kind. However that may be, I should point out initially that the FTAIA, in the Supreme Court's words in *Hartford Fire*, "was intended to exempt from the Sherman Act export transactions that did not injure the United States economy[.]"[3] I should

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[2] *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997), cert. denied, 522 U.S. 1044 (1998).

[3] *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 n.23 (1993).

also point out that the vast majority of courts treat the FTAIA as limiting the subject matter jurisdiction of the district courts, and not as adding a new element to a Sherman Act claim. Most recently, in *United Phosphorus, Ltd. v. Angus Chem. Co.,*[4] the Seventh Circuit, sitting *en banc*, expressly held that the FTAIA is a subject matter jurisdiction statute.

The part of the FTAIA that is pertinent to our discussion today is the provision that requires that the foreign conduct's effect on United States commerce "gives rise to a claim" under the Sherman Act. More precisely, the issue is the extent to which foreign plaintiffs may bring lawsuits under the Sherman Act for injuries caused by foreign conduct. An international cartel that fixes prices may have a substantial effect on United States commerce, but foreign plaintiffs' claims often do not arise from those domestic effects.

These recent FTAIA decisions started out well enough, from our perspective. In *Statoil*,[5] a Norwegian state-owned oil company brought suit against participants in a cartel that had fixed prices for heavy lift marine construction services. A divided panel of the Fifth Circuit affirmed the district court's dismissal for lack of jurisdiction, reasoning that the plaintiff's injury occurred only in the North Sea and therefore the plaintiff's claim did not arise from the cartel's anti-competitive effects in the United States. The court thus held that the domestic effects must give rise to the claim of the particular plaintiff who brings the lawsuit. When the plaintiff filed a petition for a writ of certiorari, the Supreme Court invited the Solicitor General to express the views of the United States. The subsequent brief of the United States, joined by the Federal

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[4] 322 F.3d 942 (7th Cir. 2003).

[5] *Den Norske Stats Oljeselskap AS v. HeereMac v.o.f.*, 241 F.3d 420 (5th Cir. 2001), cert. denied, 122 S. Ct. 1059 (2002).

Trade Commission, urged that the Fifth Circuit's interpretation of the FTAIA was correct, given the statute's language and legislative history. The Supreme Court denied the petition.

In contrast, in *Kruman v. Christie's International PLC*,[6] purchasers of art at auctions in London filed suit against the auction houses that allegedly fixed sellers' commissions. The Second Circuit reversed the district court's dismissal of the suit, disagreed with *Statoil* and held that the FTAIA permits suit when the plaintiff's injury does *not* arise from the domestic effect of the conspiracy, as long as *some* domestic effect violates the Sherman Act. The defendants petitioned for a writ of certiorari, but the parties settled while the petition was pending.

Finally, in *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*,[7] foreign purchasers of bulk vitamins – some of them European and Asian subsidiaries of U.S. firms that had themselves filed their own private lawsuits for alleged damages suffered in U.S. commerce – brought suit against members of the international bulk vitamins cartel that had fixed prices over a period of many years. A divided panel of the District of Columbia Circuit held that the foreign plaintiffs could sue, adopting a view that it described as close to, although not identical to, the position of the Second Circuit. The majority rejected the plaintiffs' argument, based on *Kruman*, that the "FTAIA only speaks to the question what conduct is prohibited, not which plaintiffs can sue," but nonetheless interpreted the phrase "gives rise to a claim" as requiring only that "the conduct's harmful effect on United States commerce must give rise to 'a claim' by someone, even if not the foreign plaintiff who is before the court."

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[6] 284 F.3d 384 (2d Cir. 2002), cert. dismissed, 124 S. Ct. 27 (2003).

[7] 315 F.3d 338 (D.C. Cir. 2003).

The defendants petitioned for rehearing *en banc*, and the D.C. Circuit requested the views of the Solicitor General. In response, the United States, joined by the Federal Trade Commission, argued in support of rehearing *en banc* and took the position (1) that the majority's decision was an erroneous interpretation of the FTAIA, and (2) that policy considerations based on deterrence counseled against the majority's interpretation. The *amici* also noted that the majority gave no explanation how the determination whether the domestic effect gives rise to a claim by "someone" is to be made when that "someone" is not before the court. The D.C. Circuit denied the request for *en banc* rehearing by a 4-3 vote on September 11, 2003. I can probably go on a limb here and predict that it is likely that the defendants will seek Supreme Court review.

In addition to the Second and the D.C. Circuits, the Seventh Circuit, without ruling directly on this question, has stated that its precedents "appear[ ] to point in the direction of the approach taken by the D.C. and Second Circuits."[8]

The current situation, then, is that the majority view in the courts of appeals is represented by the decisions of the Second and District of Columbia Circuits. But this certainly is not a manifestation of "judicial imperialism." Making sense out of the FTAIA has proven to be a difficult task for the courts of appeals. I do not think it would be useful here to repeat the detailed legal analysis of why we think the *Statoil* court accurately captured the meaning of the FTAIA as a matter of sound statutory construction, and why the *Kruman* and *Empagran* courts

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[8] *Metallgesellschaft AG v. Sumitomo Corp. of America*, 325 F.3d 836, 840 (7th Cir. 2003).

did not; I refer you to our briefs for that. Rather, I want to explain why we believe that *Kruman* and *Empagran* have profoundly disturbing policy implications.

First, and most obviously, it will encourage more class action lawsuits in our already-crowded federal courts by foreign plaintiffs who claim antitrust injuries from conduct outside the United States. This is not consistent with what the Supreme Court has repeatedly described as the paramount purpose of the United States antitrust laws, which is to protect consumers, competition, and commerce in the United States.[9]

Second, opening our courts to foreign plaintiffs in this context threatens to complicate our relations with other countries, many of whom, in recent years, have been developing their own antitrust enforcement regimes. When Doug Melamed, Conference Chair for today's Forum, was Deputy AAG and Acting AAG at the Division during the last Administration, he sometimes reminded his audiences, in speaking of international antitrust issues, that we live in a global economy, but not in a global state.[10] Obviously, the United States is not alone in today's antitrust world; we are joined by nearly 100 other jurisdictions, many of them with effective court systems, and as they have considered their system of enforcement, some have found it fit, as a matter of domestic policy, to provide for certain private rights of action and some have not.

I should note that, as some of you know, the English High Court recently concluded that English courts can entertain private damage actions under EU law for damages suffered, as a result of the global bulk vitamins conspiracy, by EU-based plaintiffs in Europe, but outside the

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[9] *See Pfizer, supra,* 434 U.S. at 314. *Pfizer* involved foreign purchasers injured by anticompetitive *domestic* conduct and effects.

[10] *E.g.*, A. Douglas Melamed, *Antitrust Enforcement in a Global Economy* 1-2 (Oct. 22, 1998), *available at*: http://www.usdoj.gov/atr/public/speeches/2043.htm.

United Kingdom. However, even this remarkable development in British law[11], is not quite as remarkable as what has developed here with the *Empagran* line of cases, since at least the UK is part of the European Union.

But many of the foreign class action plaintiffs who come here may well choose not to make use of the legal mechanisms and remedies available in their home countries. We should not assume, as the D.C. Circuit panel appears to have assumed, that the United States' antitrust regime is uniquely well-suited, acting alone, to deter and remedy anticompetitive behavior across the globe, regardless of other jurisdictions' interests in enforcing their own antitrust laws. Indeed, we should be hesitant to skew the development of other countries' antitrust regimes, private and public, by encouraging a dependence on U.S. treble damage actions for the redress of antitrust injuries. And the more that the conduct of foreign businesses in foreign countries becomes subject to the regulatory effect of decisions by United States courts, the more our antitrust laws risk impinging inappropriately on the economic policies and sovereignties of foreign countries. This would be contrary to our traditions of comity and the Supreme Court's clear statement that American antitrust laws were not intended to "regulate the competitive conditions of other nations' economies."[12]

Third, the proliferation of treble damage lawsuits arising outside U.S. commerce undercuts the deterrence value of the United States' own criminal enforcement program. Price-fixing and other illegal international cartel conduct is inherently difficult to detect and prosecute.

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[11] *Provimi Ltd v. Aventis Animal Nutrition SA*, [2003] EWHC 961 (Comm), All ER (D) 59 (May)(2003), *appeal pending*; *see* Mark Furse, *Provimi v. Aventis: Damages and Jurisdiction*, [2003] J. Comp. Law 119.

[12] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986).

Cooperation by a co-conspirator, through provision of documents or testimony, therefore is often vital to law enforcement. The Antitrust Division maintains a robust Corporate Leniency Policy to induce such cooperation. That policy, under the stewardship of my colleague Jim Griffin, the career Deputy AAG in charge of our criminal enforcement efforts, has proven indispensable in government antitrust enforcement; it is the number one source of leads for breaking up international cartels. But even co-conspirators who come forward to cooperate still remain subject to private actions seeking treble damages here in the United States. Thus, potential amnesty applicants weigh their civil liability exposure when deciding whether to avail themselves of the government's amnesty policy. By permitting suits for treble damages by foreign plaintiffs whose injuries arise from conduct outside U.S. commerce, the present appellate majority view may create a potentially serious disincentive for corporations and individuals to report antitrust violations under our Corporate Leniency Policy or, when amnesty under the policy is unavailable, to cooperate with prosecutors by plea agreement.

As Hew Pate has emphasized, these cases have arisen "precisely because of the successful detection and prosecution of international cartels by the Division and other antitrust agencies in recent years."[13] Some of these recent appellate decisions, however, are hardly calculated to enhance either overall deterrence of anticompetitive behavior – or the overall credibility of antitrust enforcement – in a world with many antitrust regimes. I should also say that just last month when I participate in the OECD's forum in Paris, I was shocked by the level of attention and concern the *Empagran* line of cases have attracted in the international

[13] R. Hewitt Pate, *Anti-Cartel Enforcement: the Core Antitrust Mission*, available at: http://www.usdoj.gov/atr/public/speeches/201199.htm.

community. As part of our efforts to enhance our international efforts towards cooperation on cartel enforcement, many countries pointed to the impact of *Empagran* for their reluctance to enter into information sharing pacts with the United States.

Before I move on to discovery, I should briefly mention another issue that has arisen concerning the jurisdictional requirements of the FTAIA. In addition to the provision I just discussed, the FTAIA also requires that the conduct at issue have a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce. What does that mean? Well, in *Hartford Fire*, the Supreme Court addressed the FTAIA in a footnote and said that "it is unclear" whether the "direct, substantial, and reasonably foreseeable effect" standard of the FTAIA amended existing common law or merely codified it.[14] The Court further stated that, assuming the FTAIA's standard applied, and further assuming that the FTAIA's standard differed from the prior common law, the conduct alleged in *Hartford Fire* – which was essentially a conspiracy among reinsurers in London that had the effect of restricting the availability of certain kinds of primary insurance in the United states – "plainly" met the FTAIA's requirements. But the Court did not say what "direct, substantial, and reasonably foreseeable effect" means, and to date no court of appeals has done so either.

The Ninth Circuit may now have a chance. The case is *United States v. LSL Biotechnologies, Inc.*,[15] in which the Department of Justice brought a civil enforcement action to enjoin a horizontal non-compete agreement that keeps certain kinds of long shelf-life tomato seeds, and the tomatoes that would grow from them, out of the United States. The district court

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[14] *Hartford Fire*, 509 U.S. 764, 796 n.23 (1993).

[15] 2002 WL 51115336 (D. Ariz. 2002).

dismissed a portion of the complaint for lack of subject matter jurisdiction under the FTAIA on the ground that the effect on U.S. commerce was not sufficiently "direct" or "substantial." But the district court did not define those terms or indicate what kind of effect would satisfy the statute.

An appeal of that decision is now pending. The United States' position is: *first*, that the FTAIA did not change the common law jurisdictional standard, but merely codified it in slightly different words; *second*, that even if the FTAIA is read as changing the pre-existing law, the most sensible interpretation of the term "direct" is as a synonym for "proximate cause"; and *third*, that in any event the facts of the case parallel the factual situation in *Hartford Fire*, and should therefore be deemed to have satisfied the statute as a matter of law.

III. Recent Cases Concerning Discovery

These troubling developments concerning the scope of jurisdiction under the FTAIA have been accompanied, as it happens, by wholly separate developments in the law of discovery that may magnify the practical impact of the jurisdictional decisions. I am referring in particular to a line of cases interpreting 28 U.S.C. 1782, which authorizes federal district courts to provide foreign tribunals and interested parties with assistance in obtaining evidence for use in foreign proceedings. These cases have recently come to a head in *Intel Corp. v. Advanced Micro Devices, Inc.* (*Intel v. AMD*),[16] in which the Supreme Court granted *cert.* on November 10.

Section 1782 is the latest iteration of a 55-year-old statute that plays an important role in enabling the Department of Justice to assist its foreign counterparts in criminal law enforcement of all sorts, as well in the resolution of private U.S. and foreign disputes. It also plays an

[16] No. 02-572, cert. granted, Nov. 10, 2003.

important role in fostering international comity. It should be obvious, however, that there must be some common-sense limitations on foreign parties' ability to come to the United States and obtain court-ordered discovery for use in foreign legal proceedings, and also some limitations on the disclosure of documents that have been submitted in confidence to antitrust or other law enforcement authorities in foreign countries.

The federal courts of appeals have divided on whether Section 1782 authorizes production of materials only when they would be subject to compelled disclosure in the foreign proceeding in which the material would be used. The Second, Third, and Ninth Circuits have held that Section 1782 does not contain this requirement,[17] while the First and Eleventh Circuits have construed the statute to include such a requirement implicitly.[18]

One of these cases, out of the Ninth Circuit, is *Intel v. AMD*,[19] with respect to which the Supreme Court has now granted a petition for certiorari – a result that the Department of Justice Solicitor General had urged in an *amicus* brief requested by the Court. This case, which happens to involve antitrust claims at bottom, raises not only the "foreign discoverability" issue, but also whether the European Commission's investigation into anti-competitive practices constitutes "a proceeding in a foreign or international tribunal" and whether a party that files a complaint with the Commission is an "interested person" under Section 1782.

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[17] *See In re Metallgesellschaft AG*, 121 F.3d 77 (2d Cir. 1997); *In re Application of Gianoli Aldunate*, 3 F.3d 54 (2d Cir. 1993); *In re Bayer AG*, 146 F.3d 188 (3d Cir. 1998); *Four Pillars Enters. v. Avery Dennison Corp.*, 308 F.3d 1075 (9th Cir. 2002).

[18] *In re Application of Asta Medica, S.A.*, 981 F.2d 1 (1st Cir. 1992); *Lo Ka Chun v. Lo To*, 858 F.2d 1564 (11th Cir. 1988); *In re Request for Assistance from Ministry of Legal Affairs of Trinidad & Tobago*, 848 F.2d 1151 (11th Cir. 1988).

[19] The Ninth Circuit's decision is reported at 292 F.3d 664 (9th Cir. 2002).

While we believe that the Ninth Circuit's decision is correct in holding that Section 1782 does not include a *per se* requirement that the materials sought would be of a type discoverable in a foreign proceeding, the decision also has some disturbing implications. The Ninth Circuit did not discuss the discretion a district court has in determining whether a request for discovery under Section 1782 is appropriate, and thereby gives the misleading impression that such discovery requests should be liberally granted. But a district court is not required to grant the discovery simply because it has authority to do so.

As the United States explained in its *amicus* brief to the Supreme Court, there are important prudential considerations that should limit the reach of Section 1782. In applying its discretion about whether to order particular discovery, a district court might properly consider, for example, considerations of international comity, litigation fairness, the burdensomeness of the discovery request, and whether the party seeking assistance under Section 1782 is trying to circumvent foreign discovery rules or other policies of the United States or a foreign jurisdiction that would make the requested discovery inappropriate.

A particular concern in this regard was raised by the European Commission in its brief *amicus curiae*. The Commission, in its role as an antitrust law enforcement agency, operates a Leniency Program that, not coincidentally, closely resembles the Antitrust Division's own program. The Commission's brief pointed out that a Section 1782 request could implicate submissions to its Leniency Program. Granting discovery of those materials could undermine the EC's Leniency Program by destroying the confidentiality of submissions to the Commission and thereby deterring companies from coming forward in the first place with vital information about

illegal cartel activity.[20] In our view, a district court faced with a request for discovery assistance that could implicate a foreign antitrust agency's leniency program likewise would have the responsibility, in properly exercising its discretion over the request, to consider carefully the views of a foreign antitrust agency and the potential harm that could be done to its leniency program. In our perhaps parochial view, that should be especially true of an agency, like the EC, with which the Department itself regularly cooperates in the fight against international cartels.

IV. Recent Legislative Proposals Considered by Congress

Let me know say a few words on the legislative proposals being considered by Congress, and the Department's views with respect to some of the provisions we have become familiar with. As you know, criminal antitrust enforcement has always been a core mission of the Division and it is a top priority for Hew Pate. Cartels are a direct assault on the forces of competition, and those who participate in them deserve severe penalties.

Our experience is that cartel behavior is extremely profitable to those who engage in it. As a result, cartelists go to great lengths to conceal their activities, making cartel behavior much more difficult to detect. To address this problem, the Division has had tremendous success in combining vigorous criminal prosecution with our Leniency Policy which I mentioned earlier. This program, under the stewardship of Jim Griffin, who, as I noted earlier, is the Deputy AAG in charge of our criminal enforcement program, uses a classic carrot and stick approach to anti-cartel law enforcement. It provides major incentives for companies that choose to self report antitrust offenses — relief from criminal conviction and sentencing for the reporting corporation and its

[20] Brief for the Commission of the European Communities as Amicus Curiae in Support of Petitioner at 6-8 (No. 02-572).

officials. On the other hand, leniency is available only on strict conditions — it is not available to "ring leaders" and requires full, complete, and truthful cooperation. And it is available only to the first one in the door. Those who do not win the "race to the prosecutor" face severe penalties. In this way, the program can serve to prevent cartels from forming, or to destabilize them by causing members to turn against one another in a race to the government.

It is only grudgingly that we afford the opportunity for leniency to cartel participants. The preferred result would be to see the full weight of prosecution fall on all members of a cartel. The experience of the last several years has made clear, however, that without the Division's leniency program, cartel activity of great significance would simply never come to light. Only when criminal conduct comes to light can prosecution occur. Likewise, only then can consumers obtain redress through restitution pursued by the Division or state attorneys general or through the follow-on process of civil damages actions.

This program has achieved great successes and there are several significant new matters now active at the Division. But we remain convinced that — because this form of crime is so profitable — substantial cartel activity continues to occur and to remain undetected. The Senate Judiciary Committee recently reported out bipartisan legislation, H.R. 1086, which in our view would go a long way to improving cartel enforcement. Let me discuss a few aspects of that legislation germaine to our discussion today.

First, the bill would increase maximum prison terms for cartel violations to ten years. The current three-year statutory maximum jail sentence for antitrust offenders is among the shortest for federal white-collar crimes. The current gulf between the statutory maximum sentences for

antitrust versus other white-collar crimes would be narrowed under this bill reflecting the enormous harm caused by antitrust crimes.

Second, the bill would increase the Sherman Act's statutory maximum fines for both individuals and corporations. The Sentencing Guidelines establish a methodology for calculating corporate fines based on a percentage of the volume of commerce affected by the conspiracy. But for many of the national and international conspiracies we prosecute, the Sentencing Commission methodology results in a fine greater than the current $10 million corporate maximum in particular. In such cases, the only way to impose the appropriate fine is for the offending corporation to be sentenced under the "twice the gain or twice the loss" alternative sentencing provision, 18 U.S.C. § 3571(d). Thus, for the largest, most harmful antitrust conspiracies — typically those involving international cartels and foreign corporations — the methodology for calculating antitrust fines is one that tends to be considerably difficult to administer, less certain, and potentially more lenient toward the offender. The ABA Section of Antitrust Law recognized this disparity in August 1999 when it issued a detailed report supporting an increase in the corporate antitrust fine.

Third, the bill proposes to enhance the Division's leniency program in order to increase exposure of cartel activity. It amends the antitrust laws to limit the damage recovery from a corporation that meets the strict criteria of our leniency program, and that also cooperates with the consumers victimized by the cartel in their suits to recover damages from the remaining members of the cartel, to the actual damages caused by the corporation. This carefully limited detrebling language addresses a major disincentive that currently confronts companies who are contemplating exposing cartel activity to the Division — the threat of treble damage lawsuits with

joint and several liability. Under the bill, all other conspirator firms would remain jointly and severally liable for treble damages caused by the conspiracy, so the full potential for victims to be compensated civilly would remain. Of course, without detection, the potential compensation to consumers harmed by antitrust crime is zero.

While it remains to be seen what will be the outcome of the legislative process, we applaud Congress for undertaking serious consideration to enhance our enforcement efforts.

V. Conclusion

In conclusion, I think that it is not too much to say that the recent cases I have discussed regarding antitrust jurisdiction and discovery do threaten to effect a marked change in the character of international antitrust litigation in the federal courts. It is *not* fair to say that we have several courts of appeals that have knowingly embarked on a course of U.S. antitrust imperialism; nothing in these opinions suggests that was their intention. But the fact is that, evidently all unknowing, these decisions combine open U.S. jurisdictional rules, traditional treble damages, and broad U.S. notions of pre-trial discovery into a multi-color brochure for international antitrust tourism that will surely be – indeed, already is – irresistible to many foreign plaintiffs whose alleged injuries have little to do with cognizable U.S. interests. We do not think that is what U.S. antitrust law and process should be about.

It is self-centered and ultimately self-defeating to set ourselves up as the world's antitrust policeman, intentionally or otherwise. We at the Department of Justice will work, in our briefs in the courts of appeals and the Supreme Court, to convince our courts that their antitrust jurisdiction and processes should continue to focus, as they traditionally and successfully have done, on protecting U.S. commerce, U.S. consumers, and competition in U.S. markets. We will

continue to examine ways to enhance our cartel enforcement efforts and will continue to advocate appropriate interpretation of our laws to ensure that our efforts to protect competition and consumers is not jeopardized.

Thank you.