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"ARE THE RECENT TITANIC FINES IN ANTITRUST CASES JUST THE TIP OF THE ICEBERG?"

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ARE THE RECENT TITANIC FINES IN ANTITRUST CASES JUST THE TIP OF THE ICEBERG?

Introduction

The Division's recent success in cracking international cartels has been widely reported within the business community and the bar. In particular, the historic $100 million fine imposed on Archer Daniels Midland Company ("ADM") for its role in two international antitrust conspiracies has been described as a wake-up call heard in board rooms around the world. After ADM's guilty plea and fine in October 1996, I predicted that the Division would regularly obtain fines over $10 million. I also stated that the Division would continue to raise the stakes for international conspirators by aggressively pursuing international cartels with every means at our disposal, by bringing greater numbers of cases against foreign-based corporations and individuals, and by obtaining the heaviest fines against those firms that cause the greatest harm to American businesses and consumers. I submit the Division has delivered on those predictions.

In reviewing the Division's enforcement efforts against international cartels, I will address: (1) investigative and case statistics for the Division's international cartel program; (2) examples of recent international cartel prosecutions; (3) the reasons behind the Division's successful expansion into international enforcement; and (4) a potential new weapon in the Division's arsenal to fight international cartels -- a proposal to raise the statutory maximum fine for antitrust offenses from $10 million to $100 million.

Division's Crackdown On International Cartels: Statistics Reflecting Dramatic Increase

Enforcement of our criminal antitrust laws against international cartels that prey on American businesses and consumers is one of the highest priorities of the Antitrust Division. International cartels cannot and will not be permitted to act with impunity at the expense of the American people. The statistics below reflect the Division's remarkable success thus far in cracking international cartels, securing the conviction of the major conspirators, and obtaining record-breaking fines.

Grand Jury Investigations. Over 25 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. Our investigations have uncovered meetings of international cartels in a total of *60 cities in 25 countries*, including most of the Far East and nearly every country in Western Europe. (See attached World Map). The agreements reached at these meetings typically resulted in the conspirators agreeing upon prices and allocating customers worldwide.

Volume Of Commerce. The geographic scope of the criminal activity currently under investigation is matched only by the massive amount of commerce impacted by these conspiracies. In some of our matters, the volume of commerce affected by the suspected conspiracy is over $1 billion per year; in others, over $500 million per year; and in over half of our investigations, the volume of commerce affected is well over $100 million over the term of the conspiracy. Suffice to say, international cartels are costing the American people billions of dollars.

International Prosecutions. Since the beginning of FY 1997, the Division has prosecuted 23 foreign-based companies and 27 foreign nationals for participating in international cartels affecting U.S. commerce.

Percentage Of Foreign Defendants. A comparison of the number of cases involving foreign defendants in FY 1991 versus figures for FY 1997 and FY 1998 demonstrates the Division's recent commitment to prosecuting international cartels. In FY 1991, only 1% of the corporate defendants in the cases brought by the Division were foreign, and there were no charges brought against a foreign individual defendant during that fiscal year. (In the four previous years, from FY 1987-1990, the Division did not bring a single case against a foreign corporation or a foreign individual.) By comparison, in FY 1997, 32 percent of the corporate defendants in our cases were foreign-based and 32 percent of the individual defendants were foreigners; in FY 1998 to date*, 48 percent of corporate defendants were foreign-based and 29 percent of individual defendants were foreigners*.

Record Fines. The Division's international enforcement efforts have led to impressive results. In the last fiscal year (1997), the Division collected a record-breaking $205 million in criminal fines. This total is almost *500 percent higher* than the level of criminal fines imposed during any previous year in the Division's history. (See attached bar chart of Antitrust Division Criminal Fines). Moreover, in the first five months of this fiscal year (beginning October 1, 1997), the Division already has secured nearly $130 million in criminal fines. Of the roughly **$335 million** in fines imposed since the beginning of FY 1997, roughly $305 million, or *over 90 percent of the fines collected, were in connection with the prosecution of international cartel activity*.

Common Characteristics Of International Cartels

The Division has now prosecuted a number of foreign-based firms and their executives for their participation in large international cartels. These cartels have had their differences, such as number of participants, locations and frequency of meetings, procedures for resolving disagreements, and mechanics of operation; but they also have shared a number of common characteristics.

Common Characteristics. Cartel agreements have included the following common features: agreed-upon prices; agreed-upon volumes of sales worldwide; agreed-upon prices and volumes (market share allocation) on a country-by-country basis; exchanges among the conspirators of all types of otherwise competitively sensitive information, such as monthly sales figures by geographic area, prices charged (bid) to customers in particular geographic areas, and prices to be charged (to be bid) to specific customers; and sophisticated mechanisms to monitor and police the agreements.

Examples - Lysine And Citric Acid. The international cartels that operated in the lysine and citric acid industries possessed all of the features described above. Lysine, a feed additive used by farmers to ensure the proper growth of livestock, is a $600 million a year industry worldwide. Citric acid, a flavor additive and preservative in products found in nearly every home in the United States, such as soft drinks and processed foods, as well as in detergents, pharmaceuticals and cosmetic products, is a $1.2 billion a year industry worldwide. The lysine and citric acid cartels reached agreements to carve up the world by allocating sales volumes among members themselves and agreeing on what prices would be charged to customers worldwide. The conspirators also agreed on complex systems to monitor and enforce their agreements. For example, in the citric acid conspiracy, the conspirators devised a compensation system whereby the cartel members reviewed the sales of each conspirator at the end of the year, and any company that sold more than its precisely allotted share in one year was required in the following year to purchase the excess from another conspirator that had not reached its volume allocation target in that proceeding year.

To date, the lysine and citric acid investigations have resulted in criminal charges against eight companies and ten individuals, and convictions against defendants from five countries on three continents, and has yielded nearly $200 million in fines -- including a $100 million fine imposed on ADM and a $50 million fine imposed on Haarmann & Reimer Corporation, the U.S. subsidiary of the German pharmaceutical giant Bayer AG.

Recent International Prosecutions

When the lysine and citric cartels were detected, they were the most elaborate and harmful conspiracies ever discovered by the Division. However, the Division has since uncovered a number of international conspiracies which operated with a similar (or even greater) degree of sophistication and, in some cases, involved even larger volumes of commerce. Of course, I cannot comment on the nature of any ongoing investigations that have not been made public. However, I can provide examples of large international-cartel prosecutions which we have filed in the last two months -- including major cases against two foreign-based companies and a foreign executive filed last week.

Marine Construction And Transportation. On December 22, 1997, the Division charged a company from The Netherlands and a foreign executive with participating in an international conspiracy in marine construction services, and a company from Belgium and its U.S. subsidiary and two foreign executives with participating in a separate international conspiracy in marine transportation services. The three related firms, which have a common parent, agreed to plead guilty and to pay a total of $65 million in criminal fines -- the second largest criminal antitrust settlement in antitrust history.

In the marine construction cartel, the conspirators reached an agreement to allocate customers and agree on pricing for heavy-lift derrick barge and related marine construction services in the major oil and gas production regions of the world. Heavy-lift derrick barges are floating crane barges with a capacity to lift heavy structures, such as the decks of offshore oil and gas drilling and production platforms. The conspirators originally targeted marine construction contracts in the North Sea. The conspiracy then grew to include projects in the Gulf of Mexico, and next expanded to include the Far East. Members of the cartel met in the United States, The Netherlands, Italy, Turkey, and elsewhere to carry out their conspiracy. Worldwide revenues on the fixed contracts were in excess of $1 billion. (I will have more to say about this case in the sections below on Amnesty and Sentencing Guidelines issues.)

In the marine transportation cartel, the conspirators colluded on semisubmersible heavy-lift transport services to customers in the United States and throughout the world. Semisubmersible heavy-lift transport ships are ocean-going vessels that partially submerge to carry extremely large cargo, most commonly oil rigs and other ships, across long distances in the open ocean. Its customers include drilling contractors and the U.S. Navy. The conspirators met in a number of locations in Europe, the United States, and elsewhere and agreed to share information about upcoming jobs, prices quoted to customers, fleet positions and other aspects of their internal operations. The parties then would agree on which customers each would service, *pool the revenues from all customers*, and then

divide up the profits according to a complex formula developed by the cartel. Bids on contracts let by the U.S. Navy were rigged by the conspirators as part of their agreement, and these contracts were included in the pool of revenues and profits divided by the cartel. In connection with the guilty pleas, the U.S. Navy was paid civil damages for the rigged contracts.

Graphite Electrodes. Last week, on February 23, Showa Denko Carbon, Inc. ("SDC'), a U.S. subsidiary of a Japanese firm, agreed to plead guilty and pay a fine of $29 million for participating in an international cartel to fix the price and allocate market shares worldwide for graphite electrodes. The company's fine was reduced from the minimum Sentencing Guidelines fine of approximately $75 million because of the company's early and very helpful cooperation. Graphite electrodes are used in electric arc furnaces in steel mills to melt scrap steel. Steel makers, whose products are integral to a variety of business and consumer items, paid non-competitive and higher prices for graphite electrodes used in the manufacturing process. Total sales of graphite electrodes in the United States during the term of the conspiracy were well over a billion dollars. As discussed in the Amnesty section below, these charges (like the charges in the marine construction conspiracy) stem from cooperation received from a corporate amnesty applicant.

The Information charged that SDC agreed with its co-conspirators to fix prices and allocate volume on a region-by-region basis around the globe. In addition, it charged that the defendant agreed with unnamed co-conspirators to restrict capacity for producing graphite electrodes and, further, to restrict non-conspirator companies' access to graphite electrode manufacturing technology. The Information also alleged that the conspirators agreed to exchange sales and customer information to monitor and enforce the conspiracy. The conspirators met in the Far East, Europe and the United States to carry out this criminal activity.

Sodium Gluconate. Also last week, on February 25, Fujisawa Pharmaceutical Co., Ltd., a Japanese corporation, agreed to plead guilty and pay a fine of $20 million for participating in an international conspiracy to suppress and eliminate competition by allocating the volume of sales of sodium gluconate worldwide and fixing prices by region. One of the company's executives, a Japanese citizen, also agreed to plead guilty and to pay a $200,000 fine. Sodium gluconate is an industrial cleaner used to clean metal and glass. This investigation arose from information received from cooperating defendants in the Division's food and feed additives investigation. To date, the sodium gluconate investigation has resulted in criminal charges against Dutch, French, and Japanese companies and their foreign executives and has yielded over $30 million in fines.

Reasons Behind The Antitrust Division's Successful Expansion Into International Enforcement

The Division's success in expanding rapidly into international investigations, breaking up cartels, and prosecuting the responsible parties can be attributed to a number of factors.

Globalization Of U.S. Economy. None of us need government statistics to convince us that the U.S. economy is becoming increasingly globalized. The manifestations of increased export and import trade are observable everywhere in our daily lives. While this increased trade has many benefits, the openness in trade also creates more opportunities for international cartels to flourish at the expense of U.S. businesses and consumers. Faced with this growing challenge, the Division has stepped up its own enforcement efforts to ensure that international cartels are not free to prey on Americans with impunity.

Division's Reallocation Of Resources / Changed Emphasis. In the past few years, the Antitrust Division has devoted an ever-increasing amount of resources to investigating and prosecuting international cartels. This strategy recognizes that international cartels pose a greater threat to American businesses and consumers than domestic conspiracies, because they tend to be highly sophisticated and extremely broad in their impact -- in terms of geographic scope, number of victims, and amount of commerce affected by the conspiracy. The increasing number of investigations and cases aimed at large international cartels demonstrates that there is no higher priority for the Division than prosecuting this criminal activity.

Amnesty Program. The Division has recently attacked several large international conspiracies with cooperation received from co-conspirators pursuant to the Division's Corporate Leniency Policy (Amnesty Program). As discussed more fully below, domestic and foreign firms have come to realize that acceptance into the Amnesty Program can potentially save a company tens of millions of dollars in fines and can eliminate the threat of prosecution and incarceration for the firms' culpable executives. With the business community's and the bar's growing appreciation and interest in the Division's program, the number of international cartels reported and prosecuted has increased, and we fully expect this trend to continue.

Cooperation With Foreign Antitrust Authorities. The investigation and prosecution of international cartels create a number of imposing challenges for the Division. In many cases, key documents and witnesses are located abroad -- out of

the reach of U.S. subpoena power and search and seizure authority. In those cases, national boundaries may present the most significant obstacle to the successful prosecution of the cartel.

The Division has received substantial assistance from foreign law enforcement authorities in a number of cases to obtain foreign-located documents, including by the use of search warrants executed simultaneously at corporate offices in the United States and abroad. In addition to providing access to key documents, international cooperation has a tremendous psychological impact on the subjects and targets of an international cartel investigation. When countries assist one another in investigating international cartels, the conspirators realize that there is no place to run and no where to hide. Conversely, this scenario is reversed when cooperation agreements do not exist between nations. Then national boundaries can create safe harbors where cartel members feel free to conduct criminal activity affecting American commerce with little fear of successful prosecution by the United States on behalf of its victimized businesses and consumers.

Therefore, the Division is aggressively pursuing cooperation agreements and Mutual Legal Assistance Treaties (MLATs) with foreign authorities to step up cooperation aimed at hard-core cartels. For example, the Organization for Economic Cooperation and Development (OECD) recently took an important step toward committing the world's major industrial countries to cooperate in stamping out international cartels. Two weeks ago today, on February 20, the OECD's Committee on Competition Law and Policy reached consensus on and forwarded to the OECD's Council a "Recommendation Concerning Effective Action Against Hard-Core Cartels." The Recommendation is an important statement by the OECD's 29 member countries of the critical need to effectively halt and deter hard-core cartels, by ensuring that every country has laws providing for deterrent sanctions and effective enforcement procedures. The Recommendation underscores the common interest in enforcement cooperation directed at hard-core cartels, and encourages such cooperation, in particular through the exchange of documents and information. Countries also are encouraged to consider bilateral or multilateral agreements to facilitate cooperation, and to review all obstacles to effective cooperation.

Implementation of the OECD Recommendation could result in a profound positive impact on the Division's international enforcement efforts and, ultimately, on American businesses and consumers. The membership of the OECD consists of 29 of the leading industrial nations in the world. The Division has uncovered evidence of international cartel meetings taking place in 19 of these nations. With the prospect of increasing cooperation among the Member States, international cartels will come to realize that the world community is committed to eliminating hard-core cartels and that there is no sanctuary from prosecution for their crimes.

Memorandum Of Understanding With The INS. Obtaining jurisdiction over foreign citizens living abroad is a constant challenge for the Division. 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. Therefore, the Division solicited assistance from the INS to create an inducement that would encourage foreign cartel members to submit to U.S. jurisdiction. However, before discussing this "carrot," it may be helpful to first examine the dilemma facing both the Division and the typical foreign defendant.

Antitrust offenses are considered a crime of moral turpitude by the INS. As such, an alien convicted of a Sherman Act offense is likely to face deportation and/or permanent exclusion from the United States after his/her sentence is served. Therefore, a foreign target living abroad has three options: (1) sit tight, wait until indictment, and become a fugitive by remaining outside of the jurisdiction of U.S. courts; (2) return to the United States if indicted and contest the charges in court; or (3) prior to indictment, offer to plead guilty to an Information and cooperate with the government's investigation in exchange for more lenient treatment and immigration relief. Until recently, all of these options carried a fair degree of uncertainty.

For the alien defendant who elects the first option and decides to remain outside of the United States as a fugitive, he/she must avoid traveling into the United States or into any country with whom we have an extradition treaty applicable to antitrust offenses. This is often a very risky strategy and a heavy price to pay for executives of international businesses who place a high premium on their ability to travel internationally without fear of being detained or arrested. Of course, the alien defendant who chooses the second option and decides to take his chances at trial, faces even greater potential risks of conviction, incarceration and, finally, permanent exclusion from the United States. That leaves the final option -- cooperation with the government prior to indictment in exchange for the promises of (a) more lenient treatment in charging and/or sentencing and (b) immigration relief.

Until two years ago, Division attorneys were limited in terms of what they could offer a cooperating foreign defendant. Division attorneys could promise that they would "go to bat" for the cooperating alien by making their cooperation known to the INS, but there would be no assurances as to how the INS would treat the conviction. However, in March of 1996, the Division entered into a Memorandum of Understanding ("MOU") with the INS which heightens the value and certainty of the immigration relief which the Division can offer to cooperating aliens in plea agreements. The MOU, which is unique in the Department of Justice, establishes a protocol whereby the Antitrust Division may petition the INS to preadjudicate the immigration status of a cooperating alien witness before the witness enters into a plea agreement or pleads to a crime. Therefore, before submitting to U.S.

jurisdiction or pleading guilty, cooperating aliens will receive written assurances in their plea agreement as to how the INS will treat their conviction. Typically, the INS will waive any grounds for exclusion or deportation based on the antitrust conviction and will permit the alien defendant to obtain a nonimmigrant visa that will permit him/her to travel freely in and out of the United States. This compelling, new incentive for cooperation has been instrumental in inducing putative individual defendants who are aliens to plead guilty and cooperate in our recent international cases and, in turn, has enhanced our ability to enter into plea agreements with the corporate defendants as well.

Increased Effectiveness Of Border Watches. In addition to providing immigration relief to cooperating aliens, the INS has worked with the Division to enhance our ability to detect those foreign individuals attempting to enter the United States. The border watches requested by the Division are now far more effective than in the past. The improved system allows the Division to move quickly to interview, subpoena, and, if necessary, detain aliens before they have an opportunity to leave the country. As a result, in a number of cases the Division has secured the testimony of key foreign witnesses who were intercepted by INS border watches. The individuals who have experienced being intercepted, and their counsel, have spread the word about the new effectiveness of border watches. Consequently, many foreign international businesspeople who are defendants or targets in our investigations recognize that the price of continued travel to the United States, and a number of other countries, is submitting to U.S. jurisdiction and cooperating in order to obtain immigration relief.

Revitalized Partnership With The FBI. In addition to working more closely with the INS, the Division has revitalized its partnership with the FBI to improve its international enforcement efforts. In 1997, the FBI made antitrust crimes one of the top priorities in its white-collar crime program. Since then, the FBI has nearly doubled the agent hours devoted to investigating antitrust offenses. In addition, FBI agents now serve as case agents on every international matter. In this capacity, FBI agents work closely with Division staff and, in some cases, other federal investigative agencies. The FBI also greatly assists international cartel investigations by working with their legal attaches ("legats") stationed in foreign countries. Legats develop close working relationships with local law enforcement agencies where they are based. These relationships often result in invaluable assistance when the Division needs access to information located in a foreign country.

The FBI's commitment to investigating antitrust crimes has led to the creation of a novel pilot program to detail FBI agents to Division Field Offices for one- to two-year stints. The detail program is unique in the Department of Justice and is currently in place in over half of the Divisions's field offices. The FBI detail

program has had an immediate impact on the Division's international enforcement efforts by, for example: (1) developing agent expertise in investigating complex international cartels; (2) ensuring that agents are ready and able to travel on a moment's notice to conduct key interviews (for example, when the INS notifies the Division that a subject of a border watch has entered the United States); and (3) sending a clear message that the FBI is dedicating the resources necessary to ensure that international cartel members are brought to justice.

Amnesty - A Corporate "Super Saver"

When the Division revised its Corporate Leniency Policy (Amnesty Program) in August 1993, many in the private bar took a wait-and-see approach to observe how the Division applied the policy. Gradually, as the legal benefits of amnesty materialized in case after case, the initial skepticism was replaced with a growing appreciation of the merits of the program and a high regard for the Division's good faith in granting amnesty applications. The antitrust bar's changed attitude is reflected in the fact that on average only one corporation per year applied for amnesty under the old policy, whereas under the revised policy, we have been receiving applications for corporate amnesty at a rate closer to one per month. The violations reported include some of the largest matters on the Division's docket.

Over the past four years, I have spoken frequently about the legal benefits of corporate amnesty, but it has been difficult for me to quantify the financial benefits publicly. That is because the Division has a policy of treating the identity of amnesty applicants as a confidential matter, much like the treatment afforded to confidential informants. Thus, the Division will not publicly disclose the identity of an amnesty applicant unless required to do so by court order in connection with litigation. However, in two recent investigations -- marine construction and graphite electrodes -- publicly held companies issued press releases announcing their acceptance into the amnesty program. These public disclosures by the applicants present an opportunity to look at real examples of the financial advantages of the amnesty program.

In the marine construction investigation, the amnesty applicant reported its role in a conspiracy to allocate customers and agree on pricing for marine construction contracts in the major oil and gas production regions of the world. In return for its corporate confession and continuing cooperation, the company received amnesty and paid zero dollars in fines. Shortly after the investigation went overt, a corporate co-conspirator agreed to plead guilty and cooperate with the government's investigation. Though the company provided very valuable cooperation and received a significant reduction for that cooperation, it still paid a fine of $49 million. In addition, a foreign executive pled guilty and paid a fine of $100,000.

In the graphite electrodes investigation, the cooperation of an amnesty applicant led to the execution of search warrants and the cracking of another international cartel. These developments quickly resulted in a plea agreement with another corporate conspirator. In this case, the amnesty company paid zero dollars in fines, and the company next in the door after the amnesty applicant paid a $29 million fine. While nearly $30 million is a substantial saving to the amnesty company, even that measure may understate the financial benefits of amnesty in this case -- for two reasons: (1) the defendant's exposure was limited by the fact that it had less than a 20 percent market share in the United States; and (2) even with that market share, the defendant's Guidelines fine may have been above $75 million but for the timing and extraordinary value of its cooperation. Therefore, as this investigation continues, the financial advantages of the amnesty program may become more apparent and more dramatic.

Given the sizable stakes involved in large international cartels, it is not surprising that many of the recent corporate amnesty applications relate to such matters. These types of conspiracies are ideally situated for the amnesty program from both the Division's and the corporation's perspective. The Division receives cooperation on a significant matter which is likely to result in convictions and heavy criminal sentences that otherwise might not have been possible. At the same time, the corporate amnesty applicant avoids criminal exposure, escapes the prospect of a very heavy fine, and secures nonprosecution protection for all of its directors, officers, and employees who cooperate. I am confident that the next year will present additional examples of stunning financial savings for companies that take advantage of the amnesty program.

Including Worldwide Sales In Sentencing Guidelines Calculations

The prosecution of international cartels raises a novel issue under the Sentencing Guidelines. Should foreign sales, in addition to domestic sales, affected by a conspiracy be factored into a defendant's Sentencing Guidelines calculation? The issue has yet to be litigated in court. However, 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 affected 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.

Using Worldwide Sales To Calculate The Affected Volume Of Commerce. The Sentencing Guidelines provide the framework for using worldwide sales when determining the volume of commerce affected by an international cartel. Volume of commerce is a specific offense characteristic under the Sentencing Guidelines for antitrust offenses. U.S.S.G. §2R1.1(b)(2) provides that, for sentencing purposes, the volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in goods or services that were affected by the violation. U.S.S.G. §1B1.3 sets forth the rules for determining what conduct is relevant for calculating specific offense characteristics. This section provides that "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . that occurred during the commission of the offense of conviction" and, "solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions [just] described . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction" get counted in calculating specific offense characteristics.

When a defendant is charged with participating in an international cartel affecting commerce in the United States and abroad, all of the defendant's sales covered by the conspiracy were either acts committed by the defendant that occurred during the commission of the offense of conviction or acts that were part of the same course of conduct or common scheme or plan as the offense of conviction, and so may be considered to determine a defendant's Guidelines range under §2R1.1. This result is consistent with the background commentary to §2R1.1 that "[t]ying the offense level to the scale or scope of the offense is important in order to ensure that the sanction is in fact punitive and that there is an incentive to desist from a violation once it has begun." Including only the U.S. portion of a defendant's worldwide sales from a price-fixing conspiracy in its volume of commerce calculation under §2R1.1(b)(2) may not ensure that the sanction will be sufficient to provide adequate general, or even specific, deterrence. If the portion of the unlawful sales made in the U.S. is small in relation to the overall sales affected by the offense, a fine based only on U.S. sales may be considered merely a cost of doing business. To the extent that a defendant's volume of commerce is a proxy for its gain from or the harm caused by the violation, it is the total gain or loss that is relevant to determining a proportionate sentence.

Treating Worldwide Sales As An Aggravating Factor. The Sentencing Guidelines also provide the framework for taking into account worldwide sales as an aggravating factor in determining a defendant's sentence. The Division and corporate defendants agreed to do exactly that in two recent plea agreements. In both cases, foreign sales were not counted in determining the volume of affected commerce, but rather served as a basis for an upward adjustment pursuant to U.S.S.G. §5K2.0.

Sodium Gluconate. Section 5K2.0 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." This provision was relied on to sentence a sodium gluconate defendant to pay a fine above its Guidelines fine range. The defendant agreed to pay a $2.5 million fine even though its U.S. volume of commerce was only $2.6 million during the charged conspiracy, resulting in a Guidelines range of $748,000 to $1,282,000. 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. In this case, the defendant's U.S. market share was very small whereas its share of the worldwide market was substantially larger. 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.

Marine Construction. In the marine construction cartel, a Dutch corporation 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. Plea negotiations with the defendant commenced shortly after a co-conspirator announced that it had applied for amnesty. However, negotiations reached a temporary impasse on whether the cartel's agreements relating to marine construction contracts in the North Sea and Far East were (1) in violation of U.S. antitrust laws or (2) affected commerce under the Guidelines. The defendant's willingness to plead guilty and provide substantial cooperation at a very early stage in the investigation led the Division to accept a compromise on the second issue. The commerce in the North Sea and Far East was not included in the calculation of the volume of affected commerce. Ultimately, the defendant pled guilty and agreed to cooperate at a very early stage of the investigation, before we had gathered sufficient evidence to determine whether to include commerce in the North Sea and Far East in the calculation of volume of affected commerce. However, the parties agreed to treat the defendant's conduct in these two geographic areas as an aggravating factor, and agreed to an upward adjustment of $20 million -- twice the $10 million statutory maximum -- to account for the commerce in the North Sea and Far East. With the $20 million upward adjustment, the defendant's total fine was $49 million.

Amending The Sherman Act
Statutory Maximum Fine To $100 Million

The Antitrust Division supports a proposal that Congress amend the Sherman Act to raise the maximum fine from $10 million to $100 million. The Sentencing Guidelines establish a methodology for calculating corporate fines based on a percentage of the volume of commerce affected by the conspiracy. However, for an increasing number of the national and international conspiracies, the Sentencing Commission methodology results in a fine greater than the $10 million statutory maximum. In such cases, the only alternative to a fine statutorily capped at $10 million 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). The Division has relied on this provision on nine occasions to obtain fines greater than $10 million. However, establishing the precise gain or loss in antitrust offenses is often difficult. On six occasions, we have had to settle for the $10 million statutory maximum when the Sentencing Commission rationale may have justified a greater fine. (See attached fine chart of Sherman Act Violations Yielding A Fine Of $10 Million Or More).

The end result is that for the largest, most harmful antitrust conspiracies -- typically those involving international cartels and foreign corporations -- the methodology adopted by the Sentencing Commission for calculating antitrust fines is mooted in favor of a fine calculation that tends to be considerably more lenient towards the offender. The current statutory scheme thereby provides less deterrent effect for firms doing the greatest injury to U.S. businesses and consumers -- an inherently incongruous result. This problem is particularly acute with foreign-based firms because, unlike domestic firms, generally there is little prospect of jail time for individuals as a substantial added deterrent to engaging in antitrust offenses.

Therefore, heavy fines may be the only meaningful deterrent to prevent foreign-based firms from victimizing American businesses and consumers. If a company stands to profit to the tune of tens of millions of dollars from illegal cartel activity, it may be untroubled by the prospect of having to write a check for $10 million to the U.S. Treasury. In such cases, the antitrust fine would be regarded as a mere cost of doing business. Raising the maximum antitrust fine in the Sherman Act to $100 million would rectify this problem and ensure that multinational corporations that commit antitrust offenses involving hundreds of millions or billions of dollars in U.S. commerce are punished as severely, in relative terms, as local firms that commit antitrust offenses involving far lesser sums.

Conclusion

The message should be clear: international cartels that prey on American businesses and consumers will be prosecuted and severely sentenced. Our efforts already have resulted in nearly $335 million in criminal fines in less than 18 months -- an amount greater than all of the fines imposed on corporate defendants in the previous 12 years combined. However, with 25 grand juries now looking at suspected international cartels, these record-breaking fines may be just the tip of the iceberg.

Sherman Act Violations Yielding A Fine Of $10 Million Or More

Defendant	Product	Fine (Million $)	Scope	Country
Archer Daniels Midland	Lysine & Citric Acid	$100	International	U.S.
Haarmann & Reimer Corp.	Citric Acid	$50	International	German Parent
HeereMac v.o.f.	Marine Construction	$49	International	Netherlands
Showa Denko Carbon, Inc.	Graphite Electrodes	$29	International	Japan
Fujisawa Pharmaceuticals	Sodium Gluconate	$20	International	Japan
Dockwise N.V.	Marine Transportation	$15	International	Belgium
F. Hoffmann-L aRoche, Ltd.	Citric Acid	$14	International	Switzerland
Jungbunzlauer I nternational	Citric Acid	$11	International	Switzerland
Akzo Nobel Chemicals, BV & Glucona, BV	Sodium Gluconate	$10	International	Netherlands
ICI Explosives	Explosives	$10	Domestic	British Parent
Dyno Nobel	Explosives	$10	Domestic	Norwegian Parent
Mrs. Baird's Bakeries	Bread	$10	Domestic	U.S.
Ajinomoto Co.	Lysine	$10	International	Japan
Kyowa Hakko Kogyo, Ltd.	Lysine	$10	International	Japan