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CRIMINAL ANTITRUST COMES TO THE GLOBAL MARKET

DONALD C. Klawiter*

Despite the headlines trumpeting the antitrust battles of Microsoft and Intel and the merger explosion of the mid-1990's, the most significant and enduring antitrust enforcement initiative of this era will be the aggressive criminal enforcement of international cartels by the Antitrust Division of the U.S. Department of Justice ("Division").¹ The Antitrust Division leadership heralds the detection and criminal prosecution of international cartels as its highest enforcement priority.² And why not? The sheer size

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² See Joel I. Klein, The Importance of Antitrust Enforcement in the New Economy, Address Before the New York State Bar Association (Jan. 29, 1998), available in 1998 WL 211240, at *1 (noting that globalization of economy has required internationalization of antitrust enforcement); Joel I. Klein, Anticipating the Millennium: International Antitrust Enforcement at the End of the Twentieth Century, Address at Fordham Corporate Law Institute 24th Annual Conference on International Law and Policy (Oct. 16, 1997), available in 1997 WL 662508, at *3 [hereinafter Anticipating the Millennium] (stating that recent antitrust success stories are "wake-up call" for both enforcers and consumers to reality that bulk of fines imposed in international price-fixing schemes rather than domestic had rigging cases common in 1980's); Joel I. Klein, Criminal Enforcement in a Globalized Economy, Address Before the ABA Advanced Criminal Antitrust Workshop (Feb. 20, 1997), available in 1997 WL 71437, at *5-6 [hereinafter Criminal Enforcement in Globalized Economy] (discussing high priority placed on antitrust criminal enforcement); Sharon Walsh, Food Additives Price-Fixing Probe Nets Two More Guilty Pleas;
of the international markets make these investigations irresistible. The Division's success in major prosecutions and the size of the corporate sentences obtained have gained the attention and respect of corporate executives around the world. The Division has seized every opportunity to extend, or at least stretch, the territorial reach of the U.S. antitrust laws and has conducted its investigations with the cooperation of governments around the world. The prospect of European and Asian citizens cooperating in U.S. criminal investigations and submitting to the jurisdiction of the U.S. courts was unthinkable five years ago. Today, rather than declining the Division's invitation to participate in antitrust enforcement proceedings, these individuals agree to provide testimony in U.S. courts in exchange for lenient treatment by U.S. antitrust enforcement and immigration authorities.  

I. WHY THE EMPHASIS ON INTERNATIONAL CARTEL CASES? 

Four major developments are responsible for this dramatic and intensive emphasis on prosecuting international cartel cases under the criminal antitrust laws. First, the Antitrust Division has had enormous success in prosecuting large, highly publicized international cartel cases and in persuading the antitrust bar that these cases merely represent the tip of the iceberg. Second, after the GE Diamond debacle in 1994, the Division took substantial

Swiss Chemical Companies to Pay $25 million in Fines for Role in Global Citric Acid Conspiracy, WASH. POST, Mar. 27, 1997, at 1 (quoting Antitrust Division’s Deputy Assistant Attorney General, Gary R. Spratling, who stated that Division’s top priority is to investigate and prosecute international cartels that violate Antitrust laws); see also Michael B. Himmel et. al., Victims May 'Collude' to Contest Dumping: The Noerr-Pennington Doctrine Can Protect Firms that Join to Threaten Antidumping Action, NAT’L L. J., Mar. 31, 1997, at 1 (breaking up international cartels involving both foreign and domestic defendants has become top priority of Antitrust Division).

3 See John E. Daniel et. al., U.S.: Japanese Companies Enter Pleas, Agree to Cooperate in Major U.S. Criminal Antitrust Investigation, BUS. MONITOR, Aug. 29, 1997, at 5 (discussing six foreign defendants’ decisions to enter into cooperation agreements with U.S. government); Anne Marriot, Concentrating on Antitrust Cases, Justice Wields Big Fines, WASH. TIMES, Mar. 14, 1997, at B4 (reporting that foreign executives in antitrust cases are more likely to cooperate since they will be allowed to keep their travel privileges in United States); see also Japanese Chemical Giant to Pay $20 Million Fine: Penalties from International Conspiracy Cases Top $250 Million in One Year, Dep’t of Justice News Release, Feb. 25, 1998, available in 1998 WL 86752, at *1 (reporting that two Japanese defendants in international antitrust case have agreed to cooperate with Department of Justice’s investigation).

steps to obtain evidence outside of the United States with substantial cooperation from non-U.S. companies and executives. Third, the courts expressly confirmed the broad criminal jurisdictional scope of the Sherman Act over companies and conduct outside of the United States. Fourth, many other nations have begun to work closely with the United States to detect and eliminate international cartels. Together these four causes have created a powerful enforcement trend that literally did not exist in the early 1990's.

A. The Successful Prosecution of High Profile International Cases

The defining moment that brought international cartels to the center stage of U.S. antitrust enforcement was the public disclosure of the FBI investigation of the Archer-Daniels-Midland Company ("ADM"). The bizarre, tabloid-like tale of ADM senior executive Mark Whiteacre's participation in the undercover investigation and the morality play that was subsequently presented in a Chicago courtroom will alter forever the antitrust enforcement landscape. The investigations and convictions in the lysine and citric acid markets resulted in roughly $200 million in fines against companies and individuals on three continents and a rare antitrust criminal trial with an international audience that resulted in the conviction of the high-level ADM officials.

Although highly sensationalized, the food and feed additives cases were not the first of the 1990's international cartel cases.

not prove that defendant, Loitier, was acting on behalf of defendant, DeBeers, in furtherance of price-fixing scheme since government's case was frustrated by fact that three named defendants, DeBeers, Peter Frenz and Philippe Loitier were beyond territorial jurisdiction of court; see also Dale J. Montpelier, Diamonds Are Forever? Implications of United States' Antitrust Statutes on International Trade and the DeBeers Diamond Cartel, 24 CAL. W. INT'L L.J. 277, 299 (1994) (explaining how DeBeers, foreign defendant, was able to avoid U.S. jurisdiction); Stephen J. Squeri, Government Investigation and Enforcement: Antitrust Division and the Federal Trade Commission, in 37TH ANNUAL ANTITRUST LAW INSTITUTE, at 539, 612 (PLI Corp. L. and Practice Course Handbook Series No. 942, 1996) (stating that after government's loss in General Electric case there was increase in cooperation with foreign governments to aid international enforcement).


6 See Mark Whiteacre, My Life as a Corporate Mole for the FBI, FORTUNE, Sept. 4, 1995, at 52 (providing detailed first person account of antitrust conspiracy).
Slowly and quietly through the early 1990s, the Antitrust Division prosecuted the fax paper cases, where several Japanese corporations and a Japanese official were convicted, and a U.S. corporation and official where acquitted, of price-fixing.\(^7\) This was followed by the plastic dinnerware cases, where the Royal Canadian Mounted Police executed a search warrant on the offices of a Canadian target simultaneously with the execution of search warrants on target companies in the United States. In that case, the senior officers in the Canadian company were convicted of price-fixing in a U.S. Court and actually served jail sentences in the United States.\(^8\)

The food and feed additives cases of 1996 and 1997, however, were a dramatic departure from these earlier cartel cases. The level of publicity and anticipation surrounding these cases was enormous. Never before had the public been treated to the intimate details of such a wide-reaching antitrust conspiracy. Mr. Whiteacres's disclosures painted a fascinating story of international intrigue and the Division's prosecutorial tactics, including the well-publicized and dramatic tapes of competitor meetings.

Because of the substantial amount of commerce involved in these cases—almost $2 billion—the Antitrust Division saw the opportunity to make "the punishment fit the crime," a feat that could not be accomplished by imposing only the Sherman Act's maximum fine of $10 million. Empowered by the strength of its extensive tape and testimony evidence, the Antitrust Division for


the first time under the current sentencing statute invoked the alternative sentencing provision of 18 U.S.C. § 3571(d) to calculate the applicable fine in an antitrust case. That provision authorizes a maximum fine based on twice the gain derived from the unlawful conduct or at twice the loss by persons, other than the defendant, as a result of the unlawful conduct.\textsuperscript{9} Since its success in invoking this provision in the food and feed additives case, the Division has effectively sought to make the "twice the gain, twice the loss" standard the new norm in antitrust cases. The potential impact of the future use of section 3571(d) in criminal antitrust cases is enormous. Under the U.S. Sentencing Guidelines, for example, virtually any company whose sales during the alleged antitrust conspiracy exceeded $25 million could now face a fine above the current statutory maximum of $10 million.\textsuperscript{10}

\textbf{B. New Antitrust Division Strategies to Obtain Cooperation in International Cases}

While the high drama of Mark Whiteacre's revelations in \textit{Fortune} generated intense interest in the two-year FBI undercover investigation into the food and feed additives industry, the real success of these prosecutions can be attributed to the new strategies and initiatives employed by the Antitrust Division to enhance its success in these cases.

In 1994, the Antitrust Division prosecuted a major international cartel case, \textit{United States v. General Electric Company}.\textsuperscript{11} At the close of the government's case, the court directed the verdict for GE.\textsuperscript{12} This represented a major loss for the Antitrust Division and resulted from the Division's inability to compel key

\textsuperscript{9} See 18 U.S.C. § 3571(d) (1998) (extending maximum fines to greater of either twice gross gain or twice gross loss from conduct).

\textsuperscript{10} See Spratling, \textit{supra} note 8 (setting forth this calculation under Sentencing Guidelines that can make companies members of "ten million dollar club"); see also Gary R. Spratling, \textit{Are the Recent Titanic Fines in Antitrust Just the Tip of the Iceberg}, Address Before the 12th Annual National Institute on White Collar Crimes (Mar. 6, 1998), \textit{available in} 1998 WL 113821, at *12 (stating that Antitrust Division supports Congress' proposal to amend Sherman Act to raise maximum fine from $10 million to $100 million).


\textsuperscript{12} See \textit{General Electric}, 869 F. Supp. at 1301 (stating that "[i]t would have been difficult for the government to prove its case even in the best of circumstances...[particularly] [h]ere...because three of the four named witnesses, [were] foreign nationals beyond the jurisdiction of this court").
foreign defendants and witnesses to submit to the jurisdiction of U.S. courts.  

Significantly, GE defended itself in the lawsuit while its co-defendant, DeBeers, and two individual defendants from Europe did not even appear at the trial. The court explained that GE prevailed because the government had not linked one of the individual defendants to DeBeers. The court found that the lack of specific testimony regarding relationships with DeBeers was fatal to the Division's case. The lesson for the Antitrust Division was simple: It had to develop the evidence needed to try its cases through new investigative tactics and ensure that the evidence would be available in the United States at the time of trial.

The Antitrust Division has remedied this major problem in two ways. First, in its undercover investigation in the lysine case, the Division effectively used electronic surveillance, including video surveillance of actual meetings between competitors, to develop direct, eyewitness evidence against individuals who might never submit to the jurisdiction of the U.S. courts. The tapes were the key evidence that established the Division's case at trial. The Division now has the reputation of employing very sophisticated crime detection tools in its investigations.

Second, the Antitrust Division determined how to obtain unprecedented cooperation from foreign citizens by getting them to agree to plead guilty to antitrust charges. Since its evidentiary failure in the General Electric trial, the Division's primary vehicle for gaining cooperation from foreign citizens has been the Memorandum of Understanding ("MOU") between the Antitrust Division and the Immigration and Naturalization Service ("INS"). Until this MOU was signed in 1996, most foreign citi-

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13 See Anticipating the Millennium, supra note 2, at *4-5 (noting that while Division was successful in ADM case because of evidence, comparable it was unable to achieve level of evidence in GE/DeBeers); Criminal Enforcement in a Globalized Economy, supra note 2, at *3 (noting difficulty in obtaining evidence and witnesses in multijurisdictional cases and that "our inability to do that cost us in GE/DeBeers prosecution").


16 See Memorandum of Understanding between the Antitrust Division, the United States Department of Justice and the Immigration and Naturalization Service (Mar. 15, 1996).
Criminologists avoided the consequences of criminal antitrust prosecution in the United States by remaining outside of the United States or any country with an extradition treaty regarding antitrust violations; few submitted to the jurisdiction of the U.S. courts or entered pleas of guilty because there was no long-term benefit in doing so. If the foreign citizen were found guilty or cooperated with the U.S. authorities, he could still be barred from the United States by the Immigration and Naturalization Services.\footnote{17} The foreign defendant choosing to become a fugitive by failing to submit to U.S. jurisdiction faced an uncertain future indeed, a particularly high risk for international business executives “who put a high premium on their ability to travel without fear of being detained or arrested.”\footnote{18} The foreign citizen opting to appear in the United States to answer the charges against him faced the possibility of immediate arrest, conviction, imprisonment and permanent exclusion from the United States. Under these two options, unless the foreign defendant was acquitted at trial, there was virtually no possibility for that individual to even travel freely to and from the United States again.\footnote{19}

Neither of these alternatives provided a foreign defendant with any incentive to submit to U.S. jurisdiction. As a result, the Antitrust Division was left, in many cases, without a defendant to try and certainly without the cooperation of key participants in allegedly criminal conduct. Prior to the enactment of the MOU, the Division was significantly limited in what it could offer to a cooperative foreign defendant. The new INS policy, however, provides real incentives for cooperation.

Pursuant to the MOU, the cooperating foreign defendant is advised of the INS’ decision regarding his travel rights to, from and within the United States in advance of his cooperation. Moreover, many cooperating foreign defendants were not subject to actual incarceration.\footnote{20} This alternative is extremely attrac-

\footnote{17} See Spratling, supra note 8 (enumerating three methods by which foreign targets of U.S. criminal antitrust violations avoided prosecution prior to enactment of MOU).

\footnote{18} See Spratling, supra note 8 (noting fear of deportation or exclusion as reasons that “criminal aliens” are sometimes willing to accept responsibility in United States for criminal conduct in return for promise of future immigration relief).

\footnote{19} See Spratling, supra note 8 (stating that “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”).

\footnote{20} Under the terms of the plea agreements in the food and feed additive cases, the
tive to an international executive whose business requires free and frequent mobility. This new enforcement tool was used effectively in the food and feed additive cases to bring implicated foreign citizens to the table and obtain their cooperation.\textsuperscript{21}

Third, an effective border watch strategy has allowed the Department of Justice to limit the U.S. business travel of foreign citizens who, as present or former employees of companies under investigation, have knowledge of the activities under investigation, even if those individuals were not targets of the antitrust investigation.\textsuperscript{22} Individuals who are potential grand jury witnesses may be stopped and detained upon their entry into the United States. When detained by the INS agents at the border, these individuals could assist investigations in a number of ways: (1) they may be interviewed about the subject matter of the investigation; (2) they may be served with a corporate or individual subpoena for testimony before the grand jury or for corporate or individual records located abroad; or (3) they could potentially be detained — and imprisoned — until a grand jury appearance is arranged. While most witnesses fall within the first two categories, the prospect of awaiting your grand jury appearance in a federal detention facility is generally so disturbing that it deters affected individuals from conducting business within the U.S. borders.

These border watches are powerful disincentives for European, Asian or Latin American executives traveling to the United States. Because of these border stops, antitrust counsel now

foreign citizen defendants did not serve jail time, their sentences required only the payment of fines. \textit{See International Conspiracies, supra} note 1, at *1 (noting fines that officials from foreign companies were ordered to pay); \textit{Justice Department's Ongoing Probe Into the Food and Feed Additives Industry Yields Second Largest Fine Ever}, Dep't of Justice News Release, Jan. 29, 1997, \textit{available in} 1997 WL 38106, at *1-2 (describing how executives and general managers of foreign corporations were subject to extensive criminal antitrust fines).


\textsuperscript{22} \textit{See Donovan, supra} note 21, at 207 (demonstrating counsel's fears of exposing clients to arrest or detention because of U.S. border watch). \textit{See generally International Conspiracies, supra} note 1, at *1 (noting statement of Joel I. Klein, Assistant Attorney General for Antitrust, that "violators of our antitrust laws who are beyond our borders should not feel safe from prosecution"); Assistant Attorney General Anne K. Bingham's Statement Upon the President's Signing of the International Antitrust Enforcement Assistance Act (Nov. 2, 1994), \textit{available in} 1994 WL 601956, at *1 (defining Act's purpose to allow full cooperation between DOJ, FTC, and foreign antitrust enforcement agencies).
routinely advise clients to keep executives, who have knowledge of matters under investigation, out of the United States unless they can be certain the individual is not on the border watch.\textsuperscript{23} Restricting the travel of corporate executives is a very high price for a corporation to pay because key corporate figures will not be able to visit customers or corporate operations in the United States.\textsuperscript{24}

Foreign corporations have also entered into plea agreements with the Division that are unrelated to the border watches. These agreements provide all employees (and in some cases former employees) with the opportunity to cooperate with the Antitrust Division in exchange for the promise of free passage into and out of the United States. Essentially, if an employee makes himself available and testifies truthfully and completely, that employee is guaranteed free passage without the threat of detention or additional interrogation. This type of leverage has already provided the Division with many important witnesses that were previously not amenable to cooperation. In fact, these provisions were contained in the citric acid and lysine plea agreements to find additional witnesses within the companies.\textsuperscript{25}

These new enforcement procedures have made it easier for the Division to obtain foreign evidence, both documentary and testimonial. The well-planned strategy executed in the food and feed additive cases demonstrates that the Division has learned the lessons of the GE case. As the international cartel investigative

\textsuperscript{23} See Donovan, supra note 21, at 207 (stating corporate counsel should be careful not to subject clients to arrest or detention while traveling in United States); Squeri, supra note 4, at 576 (warning that company counsel should inform essential personnel of pending antitrust criminal investigations and consequences of travel to United States); A. Paul Victor & Randolph W. Tritell, Antitrust Considerations for U.S. Firms Doing Business Abroad, in 14TH ANNUAL INSTITUTE FOR CORPORATE COUNSEL: DOING BUSINESS AND INVESTING ABROAD, at 193, 193 (PLI Corp. L. & Practice Course Handbook Series No. 752, 1991) (noting that U.S. firms doing business abroad face increasing array of antitrust regulations that must be considered in international business planning).

\textsuperscript{24} Additionally, the border watches may have a negative effect on former employees of a target company. For example, former employees of the foreign company required to do business in the United States can be constrained in their new careers by their inability to travel to the United States. Moreover, former employees who are stopped, but not threatened with prosecution, are often quite anxious to cooperate with the Department of Justice in exchange for free passage. The Antitrust Division prosecutors clearly see these former employees who must travel to the United States as excellent potential witnesses.

\textsuperscript{25} See Bayer Unit Agrees to $50 Million Fine in Citric Acid Price Fixing Probe, ANDREWS ANTITRUST LITIG. REP. 8, 8 (Feb. 1997) (describing plea arrangements with Bayer executive as part of citric acid investigations).
process expands, the Division will undoubtedly continue to develop new techniques and initiatives on a case-by-case basis. Practically speaking, this initiative should be a cause of major concern for foreign and U.S. companies and individuals under investigation, that were previously protected by the old jurisdictional barriers.

C. The Courts Have Expanded the Jurisdictional Scope of the Criminal Antitrust Law

On March 17, 1997, a U.S. federal appeals court removed a major area of uncertainty about the criminal prosecution of foreign corporations and their employees under the U.S. antitrust laws. The U.S. Court of Appeals for the First Circuit decided that Nippon Paper Industries Co., Ltd., a Japanese corporation, could be found criminally liable for violating the U.S. antitrust laws even though the company had no operations or personnel in the United States and the alleged price-fixing activities occurred completely outside the United States. In reaching this conclusion, the court stated that, "wholly foreign conduct which has an intended and substantial effect in the United States" is subject to U.S. antitrust laws.

The Nippon Paper case involved Japanese fax paper manufacturers who allegedly fixed the price of thermal fax paper sold in North America. Every fact giving rise to the cause of action transpired in Japan: (1) all of the co-conspirators were Japanese companies; (2) all of the meetings at which prices were allegedly discussed took place in Japan; (3) all sales to distributors (with requirements that the paper be resold in North America at specified prices) occurred in Japan; and (4) all of the monitoring

26 See United States v. Nippon Paper Indus., 109 F.3d 1, 4 (1st Cir. 1997), cert. denied, 118 S. Ct. 685 (1998) (expanding Hartford Fire holding such that activities committed abroad having substantial and intended effects within United States may form basis for criminal prosecution under section one of Sherman Act). See generally David S. Copeland, An Overview of Antitrust Enforcement and an Introduction to the Antitrust Laws Regarding Relationships Among Competitors, in BASIC ANTITRUST LAW, at 7, 102 (PLI Corp. L. & Practice Course Handbook Series No. 865, 1994) (declaring that U.S. courts have jurisdiction over foreign persons or corporations engaged in conduct that is anticompetitive in United States).

27 See Nippon Paper, 109 F. 3d at 1 (1st Cir. 1997) (holding actions committed abroad which have actual, substantial and foreseeable effect within United States may form basis for criminal prosecution under Section one of Sherman Act).

28 See Nippon Paper, 109 F. 3d at 1.
activity of the alleged conspiracy was done in Japan. Relying on these facts, the trial court dismissed the indictment, holding that the criminal reach of the Sherman Act does not extend to activities that take place entirely outside of the United States.\textsuperscript{29} The First Circuit reversed, however, following and expanding the Supreme Court’s 1993 decision in \textit{Hartford Fire Ins. Co. v. California.}\textsuperscript{30} In \textit{Hartford Fire}, the court held that a foreign defendant can be held civilly liable for conspiratorial conduct that occurred entirely outside the United States. Since criminal and civil liability under the Sherman Act are based on the same clause in the same statute, the Court of Appeals reasoned that Congress must have intended to allow the U.S. Government to prosecute the foreign criminal activity as well.\textsuperscript{31}

Further, the Court rejected arguments that it should abstain from exercising jurisdiction on the basis of international comity, stating that a nation’s decision to prosecute wholly foreign conduct is discretionary. The Court reasoned that the growth of international comity in the antitrust sphere had been “stunted” by the Supreme Court’s decision in \textit{Hartford Fire}. In \textit{Hartford Fire}, the Court suggested that a comity analysis was appropriate only in those few cases in which the law of the foreign government required the defendant to act in a manner incompatible with the Sherman Act, or in which full compliance with both statutory regimes was impossible.\textsuperscript{32} The Court found that the plea for

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\item 509 U.S. 764, 764 (1993) (holding district court should not have refused to exercise Sherman Act jurisdiction over foreign reinsurers under principles of national comity).
\item See Nippon Paper, 109 F.3d at 5 (analyzing same language of Sherman Act as applying to both civil and criminal prosecutions); see also United States v. Thompson/Center Arms Co., 504 U.S. 505, 518 n.10 (1992) (rejecting idea that statutory language with both civil and criminal implications should not be used by courts in both civil and criminal prosecutions).
\item See Andreas F. Lowenfeld, \textit{Conflict, Balancing of Interests and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case}, 89 AM. J. INT'L L. 42, 51 (1995). The author of the portion of the RESTATEMENT (THIRD) (1987) relied upon by the majority in \textit{Hartford Fire}, has explained that the majority “misunderstood” the approach of the RESTATEMENT (THIRD), and has stated:

\begin{itemize}
\item In determining whether state A should exercise jurisdiction over an activity significantly linked to state B, one important question, in my submission, is whether B has a demonstrable system of values and priorities different from those of state A that would be impaired by the application of the law of A. I am not suggesting that, if the answer to this question is yes, A must stay its hand. The magnitude of A’s interest, the effect of the challenged activity within A, the intention of the actors, and the other factors that I hope will not disappear from view remain important. But conflict
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comity was weaker in the Nippon case than in Hartford Fire because, in Hartford Fire, the challenged conduct was lawful in England. In contrast, this case addressed conduct that was illegal in both the U.S. and Japan.

Reviewing the specific provisions of the Restatement of Foreign Relations Law, the Nippon Paper Court held that the indictment met the general test of "reasonableness" because it alleged a price fixing conspiracy within the United States:

We see no tenable reason why principles of comity should shield the defendant from prosecution. We live in an age of international commerce, where decisions reached in one corner of the world can reverberate around the globe in less time than it takes to tell the tale. Thus, a ruling in [the defendant's] favor would create perverse incentives for those who would use nefarious means to influence markets in the United States, rewarding them for erecting as many territorial firewalls as possible between cause and effect.

This ruling could not have come at a better time for the Antitrust Division. For three years, Division leaders had been pursuing international cartel behavior relentlessly and have aggressively expanded the investigation and prosecution of international cartel conduct. Nippon Paper effectively removed the last major jurisdictional hurdle of the U.S. antitrust laws.

The Supreme Court denied certiorari in Nippon Paper. A major showdown over this issue is not likely, however, unless a better factual test is devised. On the facts of Nippon Paper, the Antitrust Division has its mandate to pursue international cases and it will certainly continue to do so. For the immediate future, foreign corporate boards and executives should be aware that Antitrust Division cartel investigations will continue to pose a

is not just about commands: it is also about interests, values and competing priorities. All of these need to be taken into account in arriving at a rational allocation of jurisdiction in a world of nation-states.

Id.

34 See Nippon Paper, 109 F. 3d at 5.
35 See Spratling, supra note 8 (addressing criminal antitrust enforcement against international cartels); Antitrust in a More Conservative Congress, No. 3 Antitrust Bull. 541, 552 (1996) (prosecution of international price-fixing cartels is top priority of Division's criminal enforcement program).
significant threat, notwithstanding the fact that all of the allegedly anticompetitive behavior occurred outside U.S. borders.

D. International Agreements Have Provided More Avenues for the Antitrust Division to Obtain Substantial Cooperation

As with other aspects of its cartel wars, the Antitrust Division has enlisted, and is obtaining, the cooperation of former adversaries in this war, specifically, the sovereign governments of many nations.

Slowly, and primarily behind the scenes, the United States has sought to develop additional mutual legal assistance treaties and cooperation agreements with many other countries and international agencies. It has utilized the Organization for Economic Cooperation and Development ("OECD"), as well as participating in bilateral discussions with many countries to establish various cooperation agreements. Negotiations have focused on making global antitrust enforcement more efficient and on increasing information exchanges among antitrust authorities.

The European Commission and the U.S. antitrust authorities have signed a "positive comity" agreement,37 that represents a further elaboration on the principles of "positive comity" set forth in Article V of the 1991 EC/U.S. Antitrust Cooperation Agreement.38 The agreement creates a presumption that one party will not take action against anticompetitive conduct that does


not directly harm it or that principally occurs in or is directed towards the other. Instead, the party that decides to defer enforcement of its own laws for one of these reasons will request that the other party investigate and, if appropriate, sanction the conduct. The agreement seeks to make global competition enforcement more efficient by placing primary enforcement responsibility in the hands of the country most harmed by the international cartel behavior.  

In addition to the positive comity agreements, the U.S. Government is also negotiating agreements with other Governments, pursuant to the 1994 International Antitrust Enforcement Assistance Act, to greatly expand the exchange of information among antitrust enforcement authorities around the world. The first such agreement, with Australia, was announced on April 17, 1997. That agreement allows U.S. and Australian antitrust authorities to “assist one another and to cooperate on a reciprocal basis in providing or obtaining antitrust” evidence. However, domestic confidentiality laws are still applicable and limit the scope of exchangeable information.

While these arrangements are extremely important building blocks for fighting future cartels, the current successes of the Antitrust Division has resulted from “cartel-specific agreements” where the United States and other governments have shared information, coordinated enforcement actions, such as execution of searches for documents, assisted in locating and contacting witnesses and similar initiatives. Although none of these activi-

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ties has the force of a treaty or even the stature of a cooperation agreement, these informal arrangements can open the door to cooperation and lead to the discovery of important evidence. The simultaneous execution of search warrants, in the United States and abroad, for example, has now occurred several times, involving the Canadian authorities and EC and national competition agencies of several European countries. Similarly, foreign governments have assisted the United States in finding witnesses abroad. The prospect of facing investigation in the United States, Canada, the EC, and even Japan has occurred in major cartel investigations in the past two years. In this area, the United States has proposed to the OECD that it work toward an agreed recommendation to member countries to enforce laws prohibiting cartel activity, and to enter bilateral or multilateral agreements to share investigative information in such cases.43

Despite the fact that these cooperation agreements are beginning to solve some of the Antitrust Division's evidentiary problems, they are only limited successes to date. In many situations, the Antitrust Division is still thwarted in its attempt to obtain evidence found in other countries and to arrange for witnesses to testify in its proceedings.

Finally, the Antitrust Division has been requesting voluntary production of foreign located documents that the Antitrust Division subpoenas from the U.S. subsidiaries of foreign corporations. The basis of these requests is that the Antitrust Division will be able to obtain these documents through international discovery or with the assistance of national competition authorities if the party does not provide them voluntarily. Over the past few years, there have been situations where the Antitrust Division has obtained documents from foreign governments through dawn raids. Clearly, the Antitrust Division is making a significant effort to obtain assistance from other nations as a means to persuade companies to comply voluntarily with its subpoenas. It is still too early to tell whether these initiatives will be effective and how often other nations will assist the United States against their own citizens. The simple fact is that foreign governments have been cooperative with the U.S. authorities who are seeking

43 See Spratling, supra note 10, at *5-6 (discussing incentives for multi-national agreement regarding shared investigations).
criminal antitrust prosecutions of their citizens. Five years ago, such cooperation would have been impossible.

II. THE FUTURE OF INTERNATIONAL CARTEL INVESTIGATIONS

This analysis of international cartel investigations takes place in mid-stream. The Antitrust Division has had some enormous successes and currently has a considerable pipeline filled with international cartel investigations. The public does not know the identity of most of these matters since the Division properly does not release information about on-going criminal investigations. We do know, however, from speeches and statements by the Division's leadership that over thirty grand juries are investigating international cartel matters. Those investigations represent at least 30%, and probably over 50% of all the criminal investigative activities being conducted under the antitrust laws today. This is truly monumental considering that there were virtually no such cartel investigations in 1991 or 1992. This trend is likely to continue.

The impact of these investigations and cases on future enforcement, on international cooperation, and on deterrence are substantial issues that will clearly play themselves out over the next five years. Given the early success of the Antitrust Division's program it is possible at this point to make some preliminary comments on these investigations and cases and their impact on promoting and enhancing competition.

A. Proportionality

In evaluating armed conflicts, philosophers and theologians have long analyzed the doctrine of proportionality as a guide to the propriety of combatants' actions. Similarly, the Antitrust Division must remain vigilant to launch prosecutions that are appropriate to the offense. Importantly, the Antitrust Division must continue to focus its enforcement actions specifically on conduct directly affecting the U.S. market. In many of these in-

ternational cases, the agreements among competitors were much broader than the U.S. market for these products, although the U.S. market was clearly part of the agreement. It is imperative, therefore, that the Antitrust Division leadership define these cases in terms of their impact on the U.S. consumer. The more tangential the connection to U.S. commerce is or the more indirect the evidence of a conspiracy involving U.S. commerce is, the more likely it will be for the Antitrust Division to lose credibility with the judiciary and with its foreign sovereign partners in competition law enforcement. For example, if the Antitrust Division relentlessly pursues small European or Asian companies that have a tangential role in a global conspiracy and have truly *de minimis* sales in the United States, other nations may react negatively and stop cooperating with the Antitrust Division. Clearly, the prosecutors must pursue conspiracies, wherever they are found, that impact the U.S. market; they need not implicate every corporate official who, at one time or another, sold some product into the United States. If the conspiracy is overwhelmingly a European arrangement, why not invoke the principle of positive comity and refer the matter to the EC? Such actions would strengthen the international enforcement scheme, even if it is not a U.S. prosecution. Several foreign competition authorities have already expressed concern that the United States is overreaching in marginal investigations. The Antitrust Division does not want that criticism to ring true in those matters.

Similarly, U.S. enforcement officials must be realistic when assessing the effect of conspiracies on the U.S. economy. Suggestions that antitrust prosecutors count the volume of *worldwide* commerce in calculating fines or prison sentences under the U.S. Sentencing Guidelines is serious overreaching. The U.S. Sentencing Guidelines should properly reach U.S. commerce, not all worldwide commerce of the companies. Attempting to punish companies for the world’s commerce may harm relationships with international enforcement partners that may seek to bring their own enforcement actions, only to find that the company is making an ability to pay argument based on the high fines and damages paid in the United States. It would be ironic if the opportunities of foreign governments to bring effective antitrust
enforcement actions are compromised by their earlier assistance to U.S. enforcement authorities in the same matter.

The amount of U.S. commerce affected in the international cartel cases is significant enough without trying to argue that all the world’s sales should be part of the Sentencing Guidelines formula. Overextending the amount of commerce in these investigations may have negative consequences because: (1) the corporate defendants in these actions will believe they are being treated unfairly; (2) their companies will be weakened financially under the fines and damages paid to each government and each plaintiff; and (3) as a result, they will not be able to compete aggressively or, even worse, could be forced out of business. This would be a perverse result in the name of competition law enforcement. Additionally, foreign-based corporations with sales outposts in the United States, a minimal connection to subject matter jurisdiction in the United States, may decide that doing business in the United States is not worth the risk. This could lead to the equally perverse result that aggressive enforcement of the U.S. antitrust laws actually reduces competition in domestic markets, thereby placing U.S. consumers at a distinct competitive disadvantage.

Consequently, the Antitrust Division must respond to these issues in designing an effective enforcement strategy. It has considered and resolved these issues prudently in past situations knowing that while it is easy to propose severe sentences, it is not as easy to repair a market weakened by a cure that is worse than the illness. Proportionality, therefore, is an important principle for the Antitrust Division to apply to mention the credibility of its enforcement program throughout the world.

B. Equitable Treatment

A major equitable problem that the U.S. enforcement authorities are facing in the international cartel cases is the disparate treatment of U.S. corporations and citizens convicted of criminal antitrust violations from that of non-U.S. citizens convicted of the same conduct. Based on the results of recent international cartel cases, it appears quite clear that U.S. citizens, as well as uncooperative foreign citizens, face substantially greater risks than foreign citizens who choose to cooperate with the Antitrust
Division. For example, in several of the recent cartel cases, the foreign citizens who pled guilty and cooperated with the Antitrust Division were fined anywhere between $75,000 and $225,000 and did not face incarceration. If these individual defendants had been U.S. citizens, however, the Antitrust Division would have recommended substantial jail sentences of 24 months or more.

Foreign citizens have received far more lenient treatment for two reasons. First, the U.S. authorities could not obtain subject matter jurisdiction over those citizens unless they agreed to submit to the jurisdiction of the U.S. government or were caught by a border watch. Because of this legal barrier, and because of the need to obtain evidence from abroad, foreign citizens must be given some incentive to come to the United States to submit to the charges and cooperate with the authorities. Second, U.S. citizens should be more respectful of U.S. antitrust laws and more faithful to them; therefore, if they break the law they should be treated far more harshly than foreign citizens who are less familiar with U.S. law. While both of these arguments have appeal, they do nothing to eliminate the disparity between a sentence for U.S. citizens as opposed to their European or Asian counterparts. Assume, for example, that a foreign citizen is the ringleader and entices a U.S. businessman to join the cartel. It is quite likely that the foreign citizen can cooperate, pay a fine and obtain free passage to the United States, while his U.S. counterpart, cooperating on the same day, and being less culpable, could serve eighteen months to three years in jail.

One result of this dilemma may be that fewer U.S. citizens will cooperate and more will proceed to trial. The Antitrust Division will then face difficult trials where foreign citizens are the chief government witnesses testifying against U.S. citizens. This does not present the most attractive enforcement picture to a jury. In fact, this scenario was played out in the thermal fax paper trial of *U.S. v. Appleton Papers, Inc.* There, the principal witness for the United States was a Japanese citizen testifying against a U.S. citizen defendant. Although there were other issues in the case, the jury took little time to acquit the U.S. citizen and his

company.

What can the Antitrust Division do then to level the playing field between the U.S. and foreign citizens? Should the Division provide U.S. citizens who cooperate with the same type of deal that his foreign counterpart is offered? Should the government insist on jail time for the non-U.S. citizens where both are equally culpable?

The disparate treatment of U.S. citizens and foreign defendants has been raised in cases and investigations since Appleton. As more of these cases are brought, however, this disparity will increasingly come into focus. This is an issue that the Antitrust Division leadership and the courts must resolve on a case-by-case basis. Perhaps the Antitrust Division will conclude that foreign executives who are the ringleaders or organizers of the conspiracies must be treated in the same manner as their U.S. counterparts, even if it sacrifices their cooperation or that of their corporations. The Antitrust Division and the judiciary certainly have the ability to develop creative solutions to these matters to achieve a just and equitable result.

C. Education

The greatest disadvantage that foreign companies and their officials face in assessing the risk under the U.S. antitrust laws is the lack of knowledge about the current enforcement environment. European and Asian citizens, while generally aware of the tough competition laws in the United States, generally do not appreciate how far the Antitrust Division has gone in these cases or how helpful their own governments have been in assisting the United States in criminal investigations. European and Asian executives have literally been in a state of shock in situations where their own governments have compelled information from them to assist the United States. While the publicity surrounding the food and feed additives cases has been helpful, it is far from sufficient to educate the international businessman. It is critically important, therefore, that the Antitrust Division, its sovereign partners around the world, and antitrust and competition counsel around the world, inform the international businesses community about the consequences and risks of engaging in anticompetitive behavior. Multinational companies can no
longer issue compliance policies that instruct their executives to follow the law of the country where they are located. United States executives must also be counseled about the extent to which U.S. law can reach conduct in other parts of the world. Many U.S. and European companies still naively believe that if you meet your competitors outside of the United States and outside of an EU member country, you are safe. Both U.S. and non-U.S. executives must be educated by a new type of antitrust compliance program that uses the food and feed additives prosecutions as a case study.

Every corporation that does business globally must explain the lessons of the recent cartel cases to its executives. It is clear in the current cases that executives are not only ignorant of these developments, but they are shocked and stunned by the state of enforcement today.

CONCLUSION

The business world continues to shrink daily with the opening and expansion of global markets. As the business cultures of diverse international companies meld together, there is substantial concern that industries will turn to the convenient, and usually illegal, practice of fixing prices and allocating territories, production or customers. United States companies should know better and must be more vigilant in situations where they can be enticed into joining a conspiracy or a "club," even if, on the surface, it applies only to non-U.S. commerce. Foreign companies, that are traditionally more comfortable with discussions of price and restrictions of output, should work with their legal advisors in the United States and abroad to comply with U.S. antitrust law as a condition of doing any business in the United States. This is the only prudent course of action. If the companies are in the midst of an ongoing price agreement or other cartel relationship, they should withdraw immediately to mitigate their exposure to criminal and civil actions. Their counsel should then assist them in how to deal with continuing possibilities of investigation or prosecution. These are delicate and difficult issues that U.S. antitrust counsel and European and Asian competition counsel must help a company navigate successfully.
Clearly, this international cartel enforcement program will continue into the new millennium, considering the major successes and the enormous impact it has had in a very short time period. Ultimately, however, the Antitrust Division’s goal is not the detection of hundreds of international cartel cases, it is the elimination of international cartels that harm competition in the United States and around the world. That is the work yet to be done.