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Expanding Extraterritorial Application of U.S. Antitrust Laws: What Are the Borders?

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I. Introduction

Fair or unfair, the application of U.S. antitrust laws to international trade has become increasingly important in a world that now embraces a global economy. Indeed, for many U.S. and non-U.S. entities and individuals, U.S. antitrust policy now governs international conduct and is the norm.

There is substantial basis for this belief. For one, the U.S. Department of Justice (DOJ) continues to broaden its global reach by targeting international cartel activity through criminal prosecutions and investigatory tactics abroad that often result in enormous fines and penalties. Since 1997, the Antitrust Division of the DOJ has obtained over \$2 billion dollars in criminal fines, over ninety percent resulting from the prosecution of international cartel activity.¹ Second, on the civil side of this expansion abroad, victims of alleged cartel activity increasingly look to the broadening scope of U.S. antitrust laws and U.S. class action provisions as an irresistible means to obtain treble damages, not obtainable elsewhere in the world.

These aggressive multinational enforcement activities present serious risks to foreign, as well as domestic, corporations and individuals who are often unaware of their exposure. Adding to these risks, courts in the U.S. have become more willing to expand the jurisdiction of the U.S. antitrust laws to conduct that occurs outside of the U.S., and in some instances, to suits brought in the U.S. by foreign plaintiffs. As a result, savvy multinational corporations use U.S. antitrust standards to govern their conduct.

This paper discusses the current status of U.S. case law in determining U.S. jurisdiction over international cartel activity wherever conducted, and the expanding reach of extraterritorial civil and criminal U.S. antitrust enforcement, and examines the practical implications of U.S. antitrust enforcement in the global marketplace.

II. The Changing Scope of Extraterritorial Jurisdiction of the U.S. Antitrust Laws

A. An Historical Perspective

The primary antitrust law that is applicable in an examination of foreign conduct is the mainstay of U.S. antitrust laws, the Sherman Act. The Sherman Act applies to “every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations” and to “every person who shall monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize” such trade or commerce.² The application of the Sherman Act to foreign trade and conduct abroad, however, has always been murky. The Foreign Trade Antitrust Improvements Act of 1982 (“FTAIA”), intended to clarify the extraterritorial reach of the U.S. antitrust laws, has in many ways contributed further to the uncertainty.

The purpose of the FTAIA was to establish a “single, objective test – the ‘direct, substantial and reasonably foreseeable effect’ test” to “serve as a simple and straightforward clarification of existing American -law”³ The FTAIA expressly “exempt[s] from the Sherman Act export transactions that did not injure the United States economy.”⁴ In addition, the FTAIA provides that before a U.S. District Court can apply the Sherman Act to foreign conduct abroad, it must first find that:

- (1) such conduct has a direct, substantial, and reasonably foreseeable effect on domestic trade or commerce; and
- (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of the Sherman Act.⁵

U.S. law has long presumed that, unless a contrary intent appears, legislation normally is meant to apply only within the territorial jurisdiction of the U.S. In interpreting the antitrust laws, however, U.S. courts gradually have overcome the presumption against extraterritoriality in cases where certain intended effects could be expected in the U.S.

The case law on foreign jurisdiction of the U.S. antitrust laws has expanded dramatically in recent years. To appreciate the developments, one must be familiar with earlier case law.

In *American Banana Co. v. United Fruit Co.*,⁶ the U.S. Supreme Court considered the application of the Sherman Act in a civil action involving conduct that occurred entirely in Central America and that had no discernable effect on imports into the U.S. The plaintiff, an Alabama corporation operating in the banana trade in Panama, alleged that the defendant, a New Jersey corporation in the banana trade, had long demonstrated an intent to prevent competition and monopolize the banana trade through its conduct abroad in acquiring competitors and entering into contracts to regulate quantities, as well as agreements to fix prices. At the time of the defendant's conduct, Panama was in the process of becoming an independent republic with certain territory remaining in de facto control of Costa Rica. The plaintiff alleged that the defendant instigated Costa Rican soldiers and officials to seize cargo supplies and a part of his plantation, and to stop plantation construction. The court found that "the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States, and within that of other states."⁷ The court further opined that

[w]ords having universal scope, such as "very contract in restraint of trade," "every person who shall monopolize," etc., will be taken, as a matter of course, to mean only everyone subject to such legislation, not all that the legislator subsequently may be able to catch.⁸

The Second Circuit presented a less restrictive view in *United States v. Aluminum Co. of America (ALCOA)*,⁹ by holding that the Sherman Act, properly interpreted, proscribed extraterritorial acts that were "intended to affect imports [into the United States] and did affect them."¹⁰ In *Alcoa*, the defendant Alcoa, a Pennsylvania company, and Aluminum Limited, an independent Canadian spin-off company of Alcoa, participated in a foreign cartel to restrict the price of aluminum products by a system of quotas and royalties for various countries, including the U.S. The cartel or "Alliance," as it was called, was incorporated in Switzerland and based on an agreement between Alcoa and Aluminum Limited as well as French, German, Swiss, and British aluminum producers. All "Alliance" agreement participants were also shareholders. The agreement, which was silent as to sales in the U.S., specifically provided that no shareholder was to buy, borrow, fabricate or sell aluminum produced by anyone not a shareholder absent consent by the "Alliance's" board. The court found an effect on U.S. aluminum imports in violation of the Sherman Act, in part because "a depressant upon production which applies generally may be

assumed, *certeris paribus*, to distribute its effect evenly upon all markets.”¹¹ In a widely followed opinion, Judge Learned Hand wrote that a “state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends.”¹² Under Alcoa’s “effects test,” jurisdiction turns on whether the cartel activities had an effect on U.S. commerce, and not where the conduct took place.

Nearly fifty years after *Alcoa*, the U.S. Supreme Court validated Judge Hand’s opinion in the landmark decision of *Hartford Fire Ins. Co. v. California*, mentioned above. The *Hartford Fire* Court deemed it “well established by now that the Sherman Act applies to foreign conduct that [1] was meant to produce and [2] did in fact produce some substantial effect in the United States.”¹³ Although the *Hartford Fire* decision was based primarily on the law of comity, the court endorsed the above two-part “substantial effects” test for determining jurisdiction.

In *Hartford Fire*, the defendants were four domestic U.S. primary insurance companies, two domestic trade associations, a domestic reinsurance broker, and foreign reinsurers based in London who allegedly engaged in various conspiracies to force certain primary insurers to alter the terms of their standard commercial general liability insurance policies in conformance with the policies for sale by the defendants in the U.S. The plaintiffs, nineteen U.S. states and numerous domestic private plaintiffs, claimed that the four primary insurer defendants encouraged “key actors” in the London reinsurance market, a market that indemnifies for North American risks, to withhold reinsurance for coverage written on industry standard forms (“1984 forms”) to which the four primary insurer defendants objected. Most primary insurers relied on both the standard form and the support services provided by the defendant trade associations. The London-based conduct caused the replacement of the 1984 forms with a form containing new provisions favoring the defendants in the U.S. In applying the “substantial effects” test, the court found that the “London-based reinsurers’ express purpose to affect U.S. commerce and the substantial nature of the effect produced, outweighed the supposed conflict [between U.S. and English law] and required the exercise of jurisdiction,” despite the alleged conduct occurring entirely in a foreign country, England.¹⁴ The decision in *Hartford Fire* remains today the most recent U.S. Supreme Court opinion on extraterritoriality.

One recent case not governed by the FTAIA illustrates the difficulties in determining antitrust jurisdiction over foreign conduct. In *Dee-K Enter., Inc. v. Heveafil Snd., Bhd.*,¹⁵ the foreign defendants, nine Southeast Asian producers of extruded rubber thread, were alleged to have engaged in a price-fixing conspiracy. The facts revealed that

The conspiracy was largely foreign with some domestic elements, but not limited to the United States import market. Indeed, the conspiracy mixed foreign and domestic elements in several respects: it included many participants with foreign affiliations, but a few who also had United States affiliations; acts that range[d] from a series of conspiratorial meetings, all held abroad, to routine communications, a few in the United States; and a target market [that] embrac[ed] dozens of nations including the United States.¹⁶

The plaintiffs, U.S. purchasers of rubber thread, argued at trial that the price fixing by the foreign producers had a substantial effect on the domestic U.S. market. The jury, using the two-part *Hartford Fire* substantial effects test, found that, although a conspiracy to fix prices was *intended* to affect the U.S. markets, it did not, in fact, have a substantial effect on these markets.

On appeal to the Fourth Circuit, the plaintiffs argued that the substantial effects standard of *Hartford Fire* applies only to conduct that is “wholly foreign” and did not govern foreign conspiracies that result in the sale of price-fixed goods directly into U.S. commerce, as was found here. The plaintiffs contended that a more lenient standard used in domestic claims applied instead. In determining which standard to apply, the Fourth Circuit examined whether the alleged antitrust violations were primarily foreign or primarily domestic. In particular, the court considered a full range of factors including: the nationality of the participants; the location of their acts; the target of their conduct; and the location of its effects.¹⁷ The Fourth Circuit found that the cartel’s links to the U.S. were outweighed by the global nature of the conspiracy, the formation of its agreements entirely outside the U.S., the targeting of a global market, and that all conspirator participants were foreign. Thus, it concluded that the alleged conspiracy was primarily foreign, and applying *Hartford Fire*, affirmed the ruling of the district court finding no substantial effect on U.S. commerce.

B. A Growing Controversy: Causal Connection Between Injury and Effect on U.S. Commerce.

U.S. courts have accepted conclusively the broad principle that alleged antitrust violations predicated on wholly foreign conduct that has an intended *and* substantial effect in the U.S. are within the jurisdictional reach of Section 1 of the Sherman Act. Recent court decisions, however, have focused on whether a plaintiff's claim must arise from the U.S. effect of the anticompetitive conduct in order to establish jurisdiction under the FTAIA. In other words, must the plaintiff demonstrate that his injury was caused by the alleged effect on U.S. commerce? U.S. courts remain split on this question, with the Second and Fifth Circuits issuing conflicting decisions. The U.S. Supreme Court has yet to resolve the issue.

1. Restrictive View: Cases Requiring Causal Connection Between Injury and Effect on U.S. Commerce

Under the Fifth Circuit's restrictive interpretation, based, in part, on the "plain meaning" of the statute, the Fifth Circuit stated in *Den Norske Statoil ASA v. HeereMac v.o.f.* that "the FTAIA requires more than a 'close relationship' between the domestic injury and the [foreign or domestic] plaintiff's claim; it demands that the domestic effect 'gives rise' to the claim."¹⁸ In *Den Norske*, the plaintiff, a Norwegian oil corporation, conducting its business solely in the North Sea, alleged that the defendants, providers of heavy-lift barge services in the North Sea, the Gulf of Mexico, and the Far East, conspired to fix bids and allocate customers, territories, and projects. The illegal conduct occurred entirely outside the U.S. The plaintiff, contending that it paid inflated prices for services in the North Sea, argued that the market for heavy lift services was a single, unified, global market that included the U.S. and therefore "gives rise" to any claim based upon the conspiracy. In rejecting this argument and thus, jurisdiction, the Fifth Circuit found an effect on U.S. commerce in the form of higher prices paid by U.S. companies for heavy-lift services in the Gulf of Mexico, but concluded that the plaintiff's injury did not stem from that effect. The court reasoned that the commerce giving rise to the foreign plaintiff's action was not U.S. commerce with foreign nations, but rather commerce between or among foreign nations. Thus, the plaintiff failed to meet the requirements under prong two of the FTAIA – that the effect on U.S. commerce gives rise to the plaintiff's claim.

Following a petition for certiorari to the U.S. Supreme Court, the U.S. antitrust agencies filed an amicus brief opposing certiorari and agreeing with the Fifth Circuit decision.¹⁹ In their brief, the agencies sided with the view “that the FTAIA requires that the anticompetitive effects on United States commerce must give rise to a plaintiff’s claimed injuries.”²⁰ The agencies reasoned that the text of the FTAIA contained “no hint of a statutory purpose to permit recovery where the situs of the injury is entirely foreign and the injury exclusively arises from a conspiracy’s effect on foreign commerce.” Moreover, the agencies argued that the Fifth Circuit view did not preclude the government from prosecuting violations of the FTAIA by global cartels because international cartel activities that have a “direct, substantial and reasonably foreseeable effect” on domestic commerce under prong one of the FTAIA, automatically “give rise” to a claim by the U.S. – as opposed to a private plaintiff that must demonstrate causality. The U.S. Supreme Court declined certiorari.²¹

The Fifth Circuit is not alone in its more restrictive interpretation of the FTAIA. For example, in *McGlinchy v. Shell Chemical Co.*,²² the Ninth Circuit reached a conclusion similar to *Den Norske*. In *McGlinchy*, the plaintiffs, a California-based distributor of resin abroad and its owner, alleged anticompetitive conduct by defendant, Shell Chemical Company and its London-based affiliates, in the form of concerted and unilateral refusal to deal in various foreign markets. The original contract between the parties covered the promotion and sale of polybutylene pipe resin exclusively in foreign markets. The plaintiffs claimed only antitrust injury to foreign customers or potential customers located in Southeast Asia. Moreover, nowhere in their complaint did the plaintiffs allege injury to the competitive markets for polybutylene. In rejecting subject matter jurisdiction, the Ninth Circuit found that the plaintiffs failed to allege either prong of the FTAIA and concluded that the claims related “only to foreign commerce without the requisite domestic anticompetitive effect.”²³ The court reasoned that to meet the requirements of the second prong, a plaintiff “must allege antitrust injury to the market or to competition in general, not merely injury to individuals or individual firms.”²⁴

Ferromin Int’l Trade Corp. v. UCAR Intern., Inc.,²⁵ is another decision supporting the Fifth Circuit view. The Eastern District of Pennsylvania held that, based on its plain language, “the FTAIA permits jurisdiction over antitrust claims of foreign plaintiffs who were injured in foreign marketplaces only where the complained-of conduct had a direct, substantial and

reasonably foreseeable effect on the domestic marketplace and that this anticompetitive effect on the domestic marketplace gave rise to their injuries.”²⁶

In *Ferromin*, twenty-six foreign company plaintiffs brought actions for alleged violations of the Sherman Act caused as a result of price fixing and market allocation in the worldwide market for graphite electrodes. The defendants were both foreign and domestic entities engaged in the manufacture and sale of graphite electrodes globally. The court found that of the \$229 million worth of graphite purchased by the plaintiffs during the alleged conspiracy period, nearly \$205 million of the alleged purchases had “no connection whatsoever to the United States--the electrodes were all manufactured outside the United States, shipped to plaintiffs' locations outside the United States, invoiced outside the United States and used in steel mills outside the United States.”²⁷ The court dismissed the claims of those plaintiffs who used graphite electrodes that were neither purchased nor manufactured in the U.S. The court, however, allowed jurisdiction for eleven of the plaintiffs who used graphite electrodes that were purchased, manufactured and invoiced from the U.S. The court reasoned that “[w]hile the mere fact that goods were manufactured in the United States is insufficient to establish jurisdiction under the FTAIA . . . we find that the fact that some of the electrodes these 11 plaintiffs purchased were invoiced in the United States satisfies the causal requirement that these 11 plaintiffs were injured as a result of higher prices for graphite electrodes in the United States market.”²⁸

2. Expansive View: Recent Cases Broadening U.S. Jurisdiction

In stark contrast to the view of the Fifth Circuit, the Second Circuit’s expansive interpretation of the FTAIA eliminates the requirement of a causal connection between injury and effect on U.S. commerce – thus allowing a plaintiff to sue for injuries that do *not* arise from the effects of anticompetitive conduct abroad on U.S. commerce as long as the conduct’s “domestic effect violated the substantive provisions of the Sherman Act.”²⁹

In *Kruman*, buyers and sellers of art auction items outside the U.S. sued the world’s two largest art auction houses for conspiring to fix prices in the U.S. and abroad for their auctioneering services, leading to inflated commissions. The Court found that under Second Circuit precedent, “anticompetitive conduct directed at foreign markets” has the requisite “effect” if it “injures domestic commerce by either (1) reducing the competitiveness of a

domestic market; or (2) making possible anticompetitive conduct directed at domestic commerce.”³⁰ The court reasoned that the language of the FTAIA had not changed the *National Bank of Canada* standard (not requiring that the “effect” on domestic commerce be the basis for the alleged injury) and that the FTAIA’s “give rise to a claim” language only requires that the “effect” on domestic commerce violate the substantive provisions of the Sherman Act.³¹ Thus, the Second Circuit held that the FTAIA did not shield the defendants’ conduct from scrutiny under the Sherman Act. Following reported settlement by the parties, the U.S. Supreme Court dismissed the defendants’ petition for certiorari.³²

Less than one year after the Second Circuit’s ruling in *Kruman*, the D.C. Circuit Court of Appeals took an intermediate interpretation of the FTAIA in *Empagran S.A., et al. v. F. Hoffman-LaRoche, Ltd., et al.*³³ Under the D.C. Circuit’s view, foreign purchasers injured in their foreign commerce solely by the effect of an alleged global price-fixing conspiracy could bring suit in U.S. federal courts so long as there was also *some* harm to a private party in the U.S. that the Sherman Act was intended to prevent. *Empagran* involved a private class action arising from the U.S. antitrust agencies’ prosecution of a global vitamin price-fixing cartel. The D.C. Circuit considered whether foreign companies that purchased products from various vitamin manufacturers involved in the cartels could bring a class action in the U.S. District Court to recover damages under the Sherman Act. Once again, all purchases were made outside the U.S.

The D.C. Circuit held that “where the anticompetitive conduct has the requisite effect on United States commerce, FTAIA permits suits by foreign plaintiffs who are injured solely by that conduct’s effect on foreign commerce. The anticompetitive conduct itself must violate the Sherman Act and the conduct’s harmful effect on the United States commerce must give rise to “‘a claim’ by someone, even if not the foreign plaintiff who is before the court.”³⁴ According to the D.C. Circuit, the “gives rise” requirement could be satisfied where some private person or entity suffers an injury (actual or threatened) “as a result of the U.S. effect of the defendant’s violation of the Sherman Act.”³⁵ The court followed the dissenting opinion of the Fifth Circuit’s Judge Higginbotham in *Den Norske*, which noted that “[i]f the drafters of FTAIA had wished to say ‘the claim’ instead of ‘a claim,’ they certainly would have.”³⁶ The court further relied on Judge Higginbotham’s argument on deterring cartel activity, noting that “[a]llowing suits by

those injured solely in foreign commerce, where the anticompetitive conduct also harmed U.S. commerce, forces the conspirator to internalize the full costs of his anticompetitive conduct.”³⁷

Once again, the U.S. antitrust agencies filed an amicus brief, this time supporting a rehearing *en banc* and opposing the views of the Second and D.C. Circuits. In their brief, the agencies disagreed with the Court’s literal reading of the FTAIA’s “‘a’ claim,” asserting that Congress did not intend to alter existing concepts of antitrust injury or antitrust standing. The agencies further disagreed with the rationale that an expansive interpretation of the FTAIA was necessary to deter international cartel activity and noted that such a broad view actually would impair its enforcement abilities. “By permitting suits for treble damages by overseas plaintiffs whose injuries arise from overseas conduct, the majority’s decision, if allowed to stand, would create a potential disincentive for corporations and individuals to report antitrust violations and seek leniency under the Corporate Leniency Policy or, when amnesty under the policy is unavailable, to cooperate with prosecutors by plea agreement.”³⁸ In addition, the agencies reasoned that an expansive interpretation would burden the federal courts in the U.S.³⁹ Ultimately, the D.C. Circuit denied the petition for rehearing *en banc*. The petitioners filed for a writ of certiorari in November 2003, which the U.S. Supreme Court granted on December 15, 2003.⁴⁰ The Court is expected to hear the case next April and issue a decision by late June 2004.

3. U.S. Supreme Court Review

Given the split among the Circuits and the potential impact on U.S. antitrust enforcement activities, the U.S. Supreme Court will need to be decisive. The policy considerations underlying the FTAIA appear to favor the restrictive view of the Fifth Circuit. Congress originally adopted the FTAIA to *limit*, rather than expand, the court’s subject matter jurisdiction under the Sherman Act. Prior to the FTAIA, American exporters could not compete effectively in foreign markets for the fear that their anticompetitive conduct abroad, albeit necessary to succeed in the foreign markets, could subject them to liability under the Sherman Act.⁴¹ Consequently, requiring a causal link between the injury and the domestic effect is arguably proper, given the fundamental purpose of the FTAIA, which is to protect American exporters from liability when conducting business transactions abroad by eliminating jurisdiction in the U.S.

C. U.S. Antitrust Agencies' Perspective

1. Agencies' Guidelines

On 5 April 1995, the Department of Justice (the "DOJ") and the Federal Trade Commission (the "FTC") released joint antitrust enforcement guidelines for International Operations (the "1995 International Guidelines") that set forth the agencies' current policies and priorities in this area. The 1995 International Guidelines assume that anticompetitive conduct that affects the U.S. or foreign commerce may violate the U.S. antitrust laws regardless of where such conduct occurs or the nationality of the parties involved. For example, the Guidelines state that imports into the U.S. by definition affect the U.S. domestic market directly and will therefore almost invariably provide the necessary intent. Whether they in fact produce the requisite substantial effect will depend on the facts of each case. For conduct involving foreign commerce other than direct imports, the 1995 International Guidelines state that direct, substantial and reasonably foreseeable effects on U.S. domestic or import commerce will apply to establish jurisdiction.

2. The 1995 International Guidelines – Illustrative Examples

The 1995 International Guidelines focus primarily on jurisdiction over foreign companies. In general, the examples indicate that the agencies will take a broad view of activities that fall under the purview of the U.S. antitrust laws. The agencies will assume jurisdiction over anticompetitive practices in foreign countries that are directed towards or hurt U.S. importers or exclude U.S. companies. The agencies believe that under *Hartford Fire* they have jurisdiction where a foreign cartel makes substantial sales directly into the U.S.⁴² The agencies also assert jurisdiction where the cartel members sell to an intermediary outside the U.S. that they know will resell the product into the U.S., even where the intermediary is not part of the cartel and is not controlled by the cartel.⁴³ The agencies further contend that jurisdiction arises where the cartel members agree to fix U.S. prices and undercut prevailing U.S. price levels to harm U.S. manufacturers, even where consumers may benefit from lower prices.⁴⁴ In addition, the agencies indicate there would be jurisdiction where a foreign cartel takes "all feasible" measures to keep U.S. competitors out of its country's market and the action is aimed at a U.S. exporter (direct and foreseeable effect on U.S. commerce) and results in foreclosure from

the that market (substantial effect on U.S. commerce).⁴⁵ Jurisdiction is also asserted by the agencies where international cartel participants are members of a trade association that develops standards often adopted by their country's regulatory authorities and agree to refuse to adopt any U.S. technology to boycott the distribution of U.S. equipment. The agencies, however, would not assert jurisdiction where the volume of trade of the product to the cartel's country was de minimus.⁴⁶

3. International Comity

International comity is a doctrine that counsels voluntary forbearance when a sovereign that has a legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law. In *Hartford Fire*, the U.S. Supreme Court limited the application of the principle by suggesting that comity concerns would operate to defeat the exercise of jurisdiction only in the few cases in which the law of the foreign sovereign *required* a defendant to act in a manner incompatible with the Sherman Act or in which full compliance with both statutory schemes was impossible. Because the conduct leading to antitrust liability was not mandated in the United Kingdom, the U.S. Supreme Court in *Hartford Fire* refused to apply rules of comity. Similarly, in *Nippon Paper*, discussed below, the conduct with which the defendant was charged was illegal under both Japanese and American law, thereby alleviating any concern about the defendant being buffeted between the laws of separate sovereigns.

The U.S. antitrust agencies employ comity considerations in determining whether to pursue a violation of the U.S. antitrust laws. After contacting the antitrust authority in the offender's home country, the U.S. agencies would consider whether that authority is in a better position to address the competition problem and is prepared to act, and in turn, whether the U.S. agencies would consider working cooperatively with the foreign authority or staying their own pending enforcement efforts by the foreign authority.

4. Jurisdiction in Criminal Prosecutions by the United States

In a groundbreaking decision, the First Circuit in *United States v. Nippon Paper Industries Co., Ltd.*,⁴⁷ extended the principle of extraterritoriality in *Hartford Fire* to a criminal

antitrust action. In *Nippon Paper*, a Japanese manufacturer of fax paper had met with various other co-conspirators in Japan and agreed to fix prices throughout North America. These companies then sold the paper in Japan to unaffiliated trading houses on the condition that they charge specified (inflated) prices for the paper when they resold it in the U.S. The trading houses then sold the fax paper to their U.S. subsidiaries that passed the higher prices on to U.S. consumers. The U.S. brought action alleging a substantial adverse effect on U.S. commerce and unreasonable restraint of trade in violation of Sherman Act. The First Circuit found that the Sherman Act applied to “wholly foreign” conduct. In rejecting the defendant’s comity-based argument, the court reasoned that “[w]e 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 defendants’] 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.”⁴⁸

Since *Nippon Paper*, the DOJ has built a successful track record of enforcing U.S. antitrust laws abroad. Some of the more recent cases further demonstrate the effectiveness of DOJ’s long arm approach. For example, in *U.S. v. Mitsubishi Corporation*,⁴⁹ the defendant, Mitsubishi Corporation, owned 50 percent of the stock of UCAR International, a U.S. producer of graphite electrodes. Mitsubishi aided in a price-fixing cartel among graphite electrode producers by encouraging UCAR to fix prices, facilitating cartel meetings, selling products for manufacturers at prices it knew to be fixed, and concealing the cartel from customers. Mitsubishi was convicted of aiding and abetting the five-year conspiracy to fix prices and allocate sales volumes. The court sentenced the company to a \$134 million fine, the fourth largest ever imposed in a U.S. antitrust case. *Mitsubishi* established that DOJ will “hold accountable parent companies, organizational shareholders, joint venture partners, and/or trading houses if they had knowledge of, aided, and profited from a cartel.”⁵⁰

In an investigation resulting in what remains today the highest in criminal fines, *United States v. F. Hoffman-La Roche Ltd.*⁵¹ involved an alleged conspiracy between Swiss pharmaceutical giant F. Hoffmann-La Roche (and its executives) and other manufacturers of vitamins to fix, raise, and maintain prices and allocate market shares of vitamins sold in the U.S. and elsewhere. In addition, the conspirators allegedly allocated contracts with customers for

vitamin premixes as well as rigged bids for those contracts in the U.S. The defendants pled guilty, leading to a record-setting \$500 million in fines for Hoffman-La Roche.

In another far-reaching case, DOJ investigated companies and individuals involved in Egyptian wastewater treatment activities. The targets of the investigation were companies and individuals who rigged bids on water construction contracts in Cairo that were funded by the U.S. Agency for International Development (USAID). The cartel involved bid rigging activities in the form of payoffs to co-conspirators in the millions of dollars aimed to restrain competition and raise prices on USAID projects. The DOJ brought actions against U.S.-based American International Contractors, Inc; Switzerland-based ABB Middle East & Africa Participations AG; German-based Phillip Holzmann AG; and Bilhar International Establishment of Liechtenstein. The resulting indictments brought a mix of both settlements and convictions totaling more than \$141 million in fines and \$10 million in restitution to the U.S. government. The case was significant in that, although the international cartel focused its activities solely in a foreign country, it still victimized U.S. taxpayers.

In a criminal action that ultimately led to the class action lawsuits in *Kruman*, DOJ investigated an price fixing scheme by the world's two dominant art auction houses in *U.S. v. Sotheby's Holdings, Inc.*⁵² The anticompetitive conduct involved top officials at both Sotheby's and Christie's, which together controlled over ninety percent of the world's auction business. The officials colluded to defraud sellers of art, antiques, and collectibles on the seller's commissions charged by the auction houses. Specifically, the activity limited competition for the sellers' goods through agreements by the officials of the two companies to raise commissions and cease negotiating discounts from the published rates. Christie's defected from the cartel through the DOJ's corporate leniency program. The convictions resulted in \$45 million in fines against Sotheby's.

More recently, in the last year DOJ investigated Arteva Specialties, S.a.r.l., d/b/a KoSa, a Luxembourg-based manufacturer of polyester staple with principal offices in the U.S. The investigation centered around a conspiracy by Arteva, its former executives, and unnamed co-conspirators, to fix prices and allocate customers in the North American market for polyester staple, a man-made petroleum-derived fiber use in the manufacture of textiles.⁵³ DOJ

determined that “the business activities of the defendant and its co-conspirators . . . were within the flow of, and substantially affected, interstate and foreign trade and commerce.”⁵⁴ The defendants eventually pled guilty, agreeing to pay \$28.5 million in fines.

III. Extraterritorial Imperialism in U.S. Antitrust Enforcement

In recent years, the U.S. Department of Justice has increased dramatically its aggressive targeting of international cartels. The prosecution of international cartel activities has produced record-setting fines and considerable publicity. The numbers are huge. For example, as indicated earlier, of the over \$2 billion dollars in criminal fines imposed by the DOJ since 1997, over ninety percent were obtained from the prosecution of international cartel activity.⁵⁵ Moreover, in thirty-three of the thirty-nine cases where DOJ’s Antitrust Division secured a fine of \$10 million or more, the corporate defendants were foreign-based, as shown by the DOJ chart set forth in Appendix A hereto. Increasingly, foreign nationals, including CEOs of major foreign corporations, pay individual fines and serve jail terms in the U.S. The average jail sentence in these cases reached a new high in FY 2002 of more than eighteen months and “[f]oreign defendants from Canada, Germany, Switzerland, Sweden and France have served prison sentences in US jails for violating US antitrust laws.”⁵⁶ At present, approximately fifty sitting U.S. grand juries are conducting investigations, and close to one-half of those investigations involve international cartel activity.⁵⁷

A. Global Cartel Enforcement Is Big Business

Aside from the strong deterrent effect of fines and jail sentences on cartel behavior, the DOJ recognizes that prosecuting domestic and foreign corporations and individuals for global conspiracies involving price-fixing, market division, and customer allocation, is a lucrative business that gets noticed on Capitol Hill and around the world. The record-setting fines and significant prison terms, especially for foreign corporations and individuals, has generated enormous publicity for the U.S. antitrust agencies and raised their profile and bragging rights among Congress and the international antitrust community.

The DOJ has prosecuted foreign executives from Belgium, Canada, France, Germany, Italy, Japan, Korea, Mexico, The Netherlands, South Africa, Sweden, Switzerland, United

Kingdom, and most recently Norway.⁵⁸ In the graphite electrodes prosecutions, for example, SGL Carbon's CEO, Robert Koehler, (a German citizen living in Germany), was fined \$10 million and had to travel to the U.S. to appear before a federal judge concerning the adequacy of his fine. In addition, two former top executives of UCAR International, Inc., Robert Krass and Robert Hart, each served prison terms and paid seven-figure fines. Similar individual penalties were levied in the DOJ's investigation of Sotheby's and Christie's auction houses. Sotheby's former Board Chairman, Alfred Taubmann, was convicted at trial for his role in the conspiracy and sentenced to a \$7.5 million fine and one year in prison. In the vitamin prosecutions, Hoffman-La Roche's former director of worldwide marketing (a Swiss citizen living in Switzerland) agreed to pay a \$100,000 fine and to serve a four-month prison term; the former president of Hoffman-La Roche's Vitamins Division, also a Swiss citizen and resident, agreed to pay a \$150,000 fine and to serve a five-month jail sentence. Six other foreign national corporate executives from Hoffman-La Roche and BASF served between three to five months in jail. Moreover, several foreign nationals who agreed to serve time in U.S. jails were from countries where the U.S. has no extradition treaty for antitrust crimes.

Recovery of huge criminal fines from participants in international cartels, and big headlines, were a hallmark of the administration of Joel Klein, Antitrust Division Chief from 1997 to 2000. Under the subsequent Division leadership of Charles James from 2001 to 2002, there was a sentiment that headlines about record fines may have gone a bit too far, and imposition of penalties was reined in to some degree (but not extinguished, by any means). The new head of the Antitrust Division, Hewitt Pate, confirmed by the U.S. Senate on 20 June 2003, has indicated that his administration will return to a heavy emphasis on criminal prosecutions and fines. Mr. Pate recently stated:

An effective anti-cartel enforcement program should be the top enforcement priority for every antitrust agency, and it will continue to be so for us We have continued our decade-long concentration of criminal resources on our international cartel program.⁵⁹

Moreover, the DOJ has advocated increasing the U.S. dollar amount for criminal fines under Section 1 of the Sherman Act from \$10 million to \$100 million.

Antitrust investigations into a given product market frequently lead to investigations in other related product markets - birds of a feather (and similar feathers) tend to flock together. Nearly half of the current roughly fifty sitting antitrust grand juries in the U.S. “were initiated by evidence obtained as a result of the investigation of a completely separate industry.”⁶⁰ The DOJ is an expert at discovering such new product conspiracies by dangling amnesty to the first confessor in the related industry and reduced penalties in the industry initially under investigation (known as "Amnesty Plus"). Indeed, the DOJ has made a very profitable science of pursuing this theory in the U.S. and internationally. This raises the stakes even higher for multinational corporations. Additional product lines and new co-conspirators create additional leverage for prosecution and fines for the antitrust authorities.

B. U.S. Reach is Global

The DOJ takes the position that it is irrelevant where the illegal conduct under U.S. law takes place – it only matters whether the conduct has *any* substantial effect on U.S. commerce. While the DOJ might take into account, in terms of intent or relative culpability, the fact that a foreign target of an antitrust investigation considered that its activities were legal under the law of its own nation and the countries in which it conspired, the fact remains that the DOJ will consider such corporations or individuals responsible for a conspiracy if there is a substantial effect on U.S. commerce. The DOJ also is likely to prosecute an allocation agreement whereby a foreign corporation with no U.S. sales, assets, or personnel agrees to sell its product only in Europe if, but for the agreement, that corporation would have competed in the U.S.

As a practical matter, the power of the DOJ over foreign corporations and nationals is immense. Businesses increasingly are multi-national and most have ties with the U.S., a fact of which the DOJ takes full advantage. If a corporation has a presence in the U.S., either through direct operations, subsidiaries, divisions, offices or assets, the DOJ may well assert jurisdiction over it. Moreover, even if a firm has no presence in the U.S., it must take into account future potential expansion of operations into the U.S.

The implications are just as serious for individuals. At first blush, a witness or target sought by the U.S. government who is a foreign national and resides abroad may ask why a foreign national in a foreign land, with few or no contacts in the U.S., should cooperate with a U.S. antitrust investigation. If the individual is employed by a company that does business in the U.S., however, the answer is often clear: if the individual travels to the U.S. on company business, then he or she must be concerned about being detained via a U.S. border watch. Even if the individual is an ex-employee of a corporation under investigation, he or she may be seeking new employment, and likely would not want to disclose to a potential employer that his or her travel must exclude one of the most economically desirable markets in the world. For retired employees, it may be that they have relatives or friends in the U.S. that they wish to visit, or they simply enjoy shopping in the Big Apple.

Technology has made border watches fairly easy and inexpensive. Any number of individuals can be put on the border watch for an indefinite period of time. Passports are checked within fractions of seconds at both the U.S. and Canadian borders to determine whether an individual is on a border watch. This is an important tool used by the DOJ to apprehend targets and witnesses and serve subpoenas.

The only individual who can plausibly ignore the seemingly global reach of the U.S. antitrust authorities is a foreign national who resides outside this country, who has not been served with a subpoena or other process in the U.S., and is willing to avoid travel to the U.S. Even then, however, circumstances always can change as to a person's need (or perceived need) to visit the U.S. In addition, if a person is a target and is indicted by the U.S., he or she must be concerned about possible extradition to this country, although to date the U.S. has never caused extradition from a foreign country for U.S. antitrust violations. Certain officials at the Antitrust Division have advocated that this precedent be broken. Also, in areas other than antitrust, U.S. criminal enforcement authorities have arranged with foreign officials to have individuals detained abroad and brought to the U.S. to appear before a U.S. court without the formality of extradition. In 2001, the Antitrust Division adopted a policy of placing indicted fugitives on a "Red Notice" list maintained by INTERPOL. Under this arrangement, INTERPOL member nations are requested to arrest fugitives with a view towards extradition.

C. Investigations Are Multi-Jurisdictional

Successful international cartel enforcement has led to increased international cooperation. Despite the DOJ's strong crackdown on international cartels, there are some limits to the DOJ's assertion of jurisdiction over foreign companies and individuals to enforce U.S. antitrust laws abroad. As noted above, comity is also a consideration. Hence, we see increased cooperation between the U.S., Canada, the EU, and an increasing number of other nations, including the United Kingdom, Mexico, Japan, Brazil, Israel, and Australia. This trend will continue, with information being exchanged and enforcement effected among more and more foreign jurisdictions.

One of the paradigm examples of international cooperation is simultaneous international "dawn" raids. The graphite electrodes investigation was the first occasion (June 1997) on which the U.S. and the EU antitrust authorities conducted simultaneous raids on several companies in the U.S. and Europe to seize corporate documents and other evidence. Since then, multi-jurisdictional orchestrated raids have become almost routine.

Also, "record" fines are contagious. If the DOJ obtains a "record" fine as to a global cartel, the antitrust authorities outside of the U.S. may not be satisfied with anything less than a corresponding "record" fine. Multi-national cartel investigations can create a penalty-feeding frenzy spread over several jurisdictions.

D. The Importance of Leniency Programs

Enacted in 1978 and substantially expanded in 1993, the DOJ's leniency program provides essentially that the DOJ will not prosecute the first corporation that qualifies for leniency by reporting its illegal conduct and cooperating fully with the DOJ, regardless of whether the defendant comes forward before or after an investigation has been initiated.⁶¹ Under the 1993 revisions, amnesty is automatic where there is no pre-existing investigation, unless the company is the "ringleader." Where an investigation is underway, amnesty still may be granted for cooperation. Very significantly, such amnesty from criminal prosecution is provided to all officers, directors, and employees who cooperate. These revisions, coupled with the policy that only the first company gets immunity, have sparked a surge in amnesty

applications, increasing from just one application per year to more than one per month. Indeed, the majority of major international investigations by the Antitrust Division have been aided by this program. While not without consequence, such as ensuing private treble damage actions, the opportunity to escape criminal prosecution is a powerful incentive to cooperate with authorities.

The U.S. is taking further steps to make its leniency program more attractive to cartel participants. Legislation recently reported out of the U.S. Senate Judiciary Committee enhances the program in a number of ways.⁶² First, it would increase the current three-year maximum jail sentence for cartel violations to a maximum of ten years. Second, the bill would increase the statutory maximum fines under the Sherman Act from \$350,000 to \$1 million for individuals and from \$10 million to \$100 million for corporations. Third, it proposes to limit damages that could be recovered from a corporation meeting the DOJ's strict criteria of its leniency program. This de-trebling would provide a further incentive for corporations to self-report violations. Moreover, all other conspirator companies would remain jointly and severally liable for treble damages. DOJ fully supports these new initiatives as noted recently by Hewitt Pate, "the time has come to consider measures to toughen our cartel enforcement program."⁶³

International antitrust enforcement activities have made antitrust leniency programs all the more important, as more countries model their programs after that of the DOJ. Canada, Brazil, the United Kingdom, Germany, France, Ireland, the Czech Republic, and Korea all now have some form of leniency program. Canada has modified its own immunity program to resemble closely the U.S. leniency program, including a "first in" provision. The EU's leniency program, adopted in 1996, also saw significant revision in 2002. The EU's new program is far more transparent and predictable, along the lines of the DOJ's program. Such convergence in policies has facilitated companies to come forward simultaneously in the U.S., Europe, and Canada.

The vitamin price-fixing investigation illustrates the importance of leniency programs. Rhône-Poulenc, the French pharmaceutical company, cooperated with the DOJ's investigation under the corporate leniency program and escaped fines in the U.S. According to the DOJ,

“the cooperation of Rhône-Poulenc, together with information provided by others, led directly to the charges filed . . . and the decision of the defendants not to contest the charge”⁶⁴ In contrast to Rhône-Poulenc, Hoffman-LaRoche and BASF paid a combined total of \$725 million in fines, and six Swiss and German executives from the two companies were convicted and served prison time.

The graphite electrodes investigation illustrates the escalating risks in delaying reporting to the DOJ. After a grant of amnesty to the first applicant, the second company to cooperate paid fines of \$32.5 million, followed by a third and a fourth company who paid fines respectively of \$110 million and \$135 million, respectively.

E. Coping with Multinational Investigations

Multinational investigations create enormous legal risks, multiple costs, and huge logistical problems for the companies involved. Investigational targets must worry about the DOJ; private treble damage actions in the U.S., including antitrust class actions, and shareholder and securities fraud suits; Canadian antitrust enforcement and private single-damage actions; EU civil prosecution and private actions in Europe (although historically nowhere near the same level as the U.S.); possible EU member state enforcement; and investigations by other foreign jurisdictions, such as Japan, Brazil, or Australia.

The difficulties for a corporation involved in multinational cartel activity are complicated by multi-jurisdictional enforcement and the differing methods and approaches to enforcement. The corporation also must decide what efforts and costs (including legal and travel expenses) it will undertake to protect and support its senior management and other employees that may have been involved in or witnessed illegal conduct. Particularly in criminal investigations, individuals may require separate antitrust counsel, and their interests may differ from those of the corporation and other employees. Thus, a corporation can be involved in a scenario where it is being investigated by three or more separate jurisdictions - either civilly or criminally or both - while it simultaneously must consider the interests of the corporation and its shareholders, and the interests of present and former employees. These issues are complicated further by what corrective or disciplinary actions a corporation must or

should take with respect to employees - both present employees and possibly former employees still accruing benefits from the company.

Furthermore, settlement and plea bargains with the various antitrust jurisdictions do not necessarily bring an end to this complex scenario. Settlements invariably will be conditioned on full cooperation by the company and the employees covered by the settlement, which typically involves full disclosure of information, the production of documents and the production of present (and sometimes former) employees.

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¹ See James M. Griffin, *The Modern Leniency Program After Ten Years, Remarks before the American Bar Association Section of Antitrust Law* (12 August 2003).

² 15 U.S.C. §§ 1-2 (1890).

³ H.R.Rep. No. 97-686, at 2.

⁴ *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993).

⁵ 15 U.S.C. § 6(a)(1)-(2).

⁶ 213 U.S. 347 (1908)

⁷ *Id.* at 355.

⁸ *Id.* at 357.

⁹ 148 F.2d 416 (2d Cir. 1945)

¹⁰ *Id.* at 444.

¹¹ *Id.*

¹² *Id.* at 443.

¹³ *Hartford Fire Ins. Co. v. California*, 509 U.S. at 796.

¹⁴ *Id.* at 797.

¹⁵ 299 F.3d 281 (4th Cir. 2002)

¹⁶ *Id.* at 287.

¹⁷ 299 F.3d at 294-95.

¹⁸ *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 427 (5th Cir. 2001).

¹⁹ Brief for the United States and the Federal Trade Commission as Amici Curiae, *Statoil ASA v. HeereMac v.o.f.*, 122 S. Ct. 1059 (2002) (No. 00-1842).

²⁰ *Id.*

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- ²¹ *Statoil ASA v. Heeremac V.O.F.*, 534 U.S. 1127 (2002).
- ²² 845 F.2d 802 (9th Cir. 1988).
- ²³ *Id.* at 815.
- ²⁴ *Id.*
- ²⁵ 153 F. Supp. 2d 700 (E.D. Pa. 2001).
- ²⁶ 153 F. Supp. 2d at 705.
- ²⁷ *Id.* at 702-03.
- ²⁸ *Id.* at 706 (citations omitted).
- ²⁹ *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 400 (2d Cir. 2002).
- ³⁰ 284 F.3d at 394 (citing the Second Circuit's pre-FTAIA holding in *National Bank of Canada v. Interbank Card Assoc.*, 666 F.2d 6, 8 (2d Cir. 1981), establishing a standard for jurisdictional review of foreign antitrust cases).
- ³¹ 284 F.3d at 399.
- ³² *Christie's Int'l v. Kruman*, No. 02-340, 2003 WL 21855875 (8 Aug. 2003).
- ³³ 315 F.3d 338 (D.C. Cir. 2003).
- ³⁴ 315 F.3d at 341.
- ³⁵ *Id.* at 352.
- ³⁶ *Den Norske*, 241 F.3d at 432.
- ³⁷ 315 F.3d at 357.
- ³⁸ Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Petition for Rehearing En Banc at 13, *Empagran S.A., et al. v. F. Hoffman-LaRoche, Ltd., et al.*, 315 F.3d 338 (D.C. Cir. 2003) (No. 01-7115).
- ³⁹ *Id.*
- ⁴⁰ *Empagran*, 315 F.3d 338 (D.C. Cir. 2003), *cert. granted*, 72 U.S.L.W. 3356 (U.S. Dec. 15, 2003) (No. 03-724).
- ⁴¹ *See, e.g., In re Copper Antitrust Litig.*, 117 F. Supp. 2d 875, 887 (W.D. Wis. 2000) (“Congress extends domestic jurisdiction to extraterritorial conduct only when the plaintiffs have been injured by the effects on the domestic market. This is consistent with the main purpose of the Foreign Trade Antitrust Improvements Act, which was to protect American exporters from liability under the Sherman Act where the exporters were operating abroad.”).
- ⁴² *See* U.S. Dep’t of Justice and Federal Trade Comm’n, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS § 3.11 (1995) (Illustrative Example A54).
- ⁴³ *Id.* at 3.121 (Illustrative Example B).
- ⁴⁴ *Id.* (Illustrative Example C).
- ⁴⁵ *Id.* at 3.122 (Illustrative Example D).
- ⁴⁶ *Id.* (Illustrative Example D).
- ⁴⁷ 1997 WL 109199 (1st Cir. 1997)
- ⁴⁸ *Id.* at 9.
- ⁴⁹ Crim. No. 00-033 (E.D. Pa. 2001).
- ⁵⁰ *See* Scott D. Hammond, *A Review of Recent Cases and Developments in the Antitrust Division’s Criminal Enforcement Program, Remarks before the American Bar Association Section of Antitrust Law* (7 March 2001), at 5, available at <http://www.usdoj.gov/atr/public/speeches/10862.htm>.

- ⁵¹ No. 3:99-CR-184-R (N.D. Tex. 1999).
- ⁵² No. 00 Cr.1081 (S.D.N.Y. 2000).
- ⁵³ *United States v. Arteva Specialties, S.a.r.l., d/b/a KoSa.*, 3:02CR229-V (E.D.N.C. 2002).
- ⁵⁴ DOJ Information Brief at 3, *Arteva Specialties*.
- ⁵⁵ See Griffin, note 1 *supra*, at 2.
- ⁵⁶ *Id.* at 3.
- ⁵⁷ *Id.* at 2.
- ⁵⁸ Griffin, note 1 *supra*, at 3; See also Press Release, U.S. Dept. of Justice, Norwegian Shipping Company and Two Executives Agree to Plead Guilty in International Parcel Tanker Shipping Investigation (29 Sept. 2003).
- ⁵⁹ R. Hewitt Pate, The DOJ International Antitrust Program – Maintaining Momentum, Remarks before the American Bar Association Section of Antitrust Law (6 February 2003), at 2, *available at* <http://www.usdoj.gov/atr/public/speeches/200736.htm>.
- ⁶⁰ Griffin, note 1 *supra*, at 9.
- ⁶¹ See DOJ Corporate Leniency Policy (1993), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,113.
- ⁶² See H.R. 1086, 108th Cong. (2003) (passed by the U.S. House of Representatives on June 10, 2003)
- ⁶³ R. Hewitt Pate, Vigorous and Principled Antitrust Enforcement: Priorities and Goals, Remarks before the American Bar Association Section of Antitrust Law (12 August 2003), at 3, *available at* <http://www.usdoj.gov/atr/public/speeches/201241.htm>. See also Makan Delrahim, Department of Justice Perspectives on International Antitrust Enforcement: Recent Legal Developments and Policy Implications, Remarks before the American Bar Association Section of Antitrust Law (18 November 2003), at 7-8, *available at* <http://www.usdoj.gov/atr/public/speeches/201509.htm> (the bill “in our view would go a long way to improving cartel enforcement.”).
- ⁶⁴ *Hoffman-LaRoche, BASF Plead Guilty*, 76 Antitrust & Trade Reg. Rep. (BNA) No. 1910, at 558 (20 May 1999).

APPENDIX A

ANTITRUST DIVISION Sherman Act Violations Yielding a Fine of \$10 Million or More

| Defendant (FY) | Product | Fine (\$ Millions) | Geographic Scope | Country |
|-----------------------------------|---------------------|-----------------------|---------------------|-------------|
| F. Hoffmann-La Roche, Ltd. (1999) | Vitamins | \$500 | International | Switzerland |
| BASF AG (1999) | Vitamins | \$225 | International | Germany |
| SGL Carbon AG (1999) | Graphite Electrodes | \$135 | International | Germany |
| Mitsubishi Corp. (2001) | Graphite Electrodes | \$134 | International | Japan |

| | | | | |
|---------------------------------------------------|---------------------------|--------|---------------|---------------|
| UCAR International, Inc. (1998) | Graphite Electrodes | \$110 | International | U.S. |
| Archer Daniels Midland Co. (1997) | Lysine & Citric Acid | \$100 | International | U.S. |
| Takeda Chemical Industries, Ltd. (1999) | Vitamins | \$72 | International | Japan |
| Bilhar International Establishment (2002) | Construction | \$54 | International | Liechtenstein |
| Daicel Chemical Industries, Ltd. (2000) | Sorbates | \$53 | International | Japan |
| ABB Middle East & Africa Participations AG (2001) | Construction | \$53 | International | Switzerland |
| Haarmann & Reimer Corp. (1997) | Citric Acid | \$50 | International | German Parent |
| HeereMac v.o.f. (1998) | Marine Construction | \$49 | International | Netherlands |
| Sotheby's Holdings Inc. (2001) | Fine Arts Auctions | \$45 | International | U.S. |
| Eisai Co., Ltd. (1999) | Vitamins | \$40 | International | Japan |
| Hoechst AG (1999) | Sorbates | \$36 | International | Germany |
| Showa Denko Carbon, Inc. (1998) | Graphite Electrodes | \$32.5 | International | Japan |
| Philipp Holzmann AG (2000) | Construction | \$30 | International | Germany |
| Arteva Specialties (2003) | Polyester Staple | \$28.5 | International | Luxembourg |
| Daiichi Pharmaceutical Co., Ltd. (1999) | Vitamins | \$25 | International | Japan |
| Nippon Gohsei (1999) | Sorbates | \$21 | International | Japan |
| Pfizer Inc. (1999) | Maltol/Sodium Erythorbate | \$20 | International | U.S. |

| | | | | |
|--------------------------------------------------|--------------------------|--------|---------------|---------------------|
| Fujisawa Pharmaceuticals Co. (1998) | Sodium Gluconate | \$20 | International | Japan |
| Dockwise N.V. (1998) | Marine Transportation | \$15 | International | Belgium |
| Dyno Nobel (1995) | Explosives | \$15 | Domestic | Norwegian Parent |
| F. Hoffmann-La Roche, Ltd. (1997) | Citric Acid | \$14 | International | Switzerland |
| Merck KgaA (2000) | Vitamins | \$14 | International | Germany |
| Degussa-Huls AG (2000) | Vitamins | \$13 | International | Germany |
| Akzo Nobel Chemicals, BV (2001) | Monochloroacetic Acid | \$12 | International | Netherlands |
| Ueno Fine Chemicals Ind., Ltd. (2001) | Sorbates | \$11 | International | Japan |
| Eastman Chemical Co. (1998) | Sorbates | \$11 | International | U.S. |
| Jungbunzlauer International AG (1997) | Citric Acid | \$11 | International | Switzerland |
| Lonza AG (1998) | Vitamins | \$10.5 | International | Switzerland |
| Morganite, Inc. (2003) | Carbon Products | \$10 | International | British parent |
| Akzo Nobel Chemicals, BV & Glucona, BV (1997) | Sodium Gluconate | \$10 | International | Netherlands |
| ICI Explosives (1995) | Explosives | \$10 | Domestic | British Parent |
| Mrs. Baird's Bakeries (1996) | Bread | \$10 | Domestic | U.S. |
| Ajinomoto Co., Inc. (1996) | Lysine | \$10 | International | Japan |
| Kyowa Hakko Kogyo, Co., Ltd. (1996) | Lysine | \$10 | International | Japan |

Source: <http://www.usdoj.gov/atr/public/criminal/12557.htm>