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**“CHARTING NEW WATERS
IN INTERNATIONAL CARTEL PROSECUTIONS”**

By:

SCOTT D. HAMMOND
Deputy Assistant Attorney General
for Criminal Enforcement
Antitrust Division
U.S. Department of Justice

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CHARTING NEW WATERS IN INTERNATIONAL CARTEL PROSECUTIONS

I. Introduction

In March 1999, the Antitrust Division issued a speech at this conference entitled *Negotiating the Waters of International Cartel Prosecutions*.¹ The speech marked a new era of international anti-cartel enforcement, an era that had begun in earnest in 1996 with the prosecution of the international lysine cartel. The new wave of prosecutions of international cartels and foreign defendants had generated a host of unprecedented and challenging issues. Issues such as calculating an international cartel's volume of affected commerce under the U.S. Sentencing Guidelines, overcoming immigration and travel restrictions placed on cooperating foreign nationals with antitrust convictions, and achieving proportionality in the treatment of similarly situated foreign and domestic defendants were addressed in *Negotiating the Waters*. The Division set forth how these and other novel issues would be dealt with in the negotiation of plea agreements with corporate and individual defendants. Now, seven years later, it is instructive to examine how the Division's international cartel enforcement program has evolved since those policies were first considered.

Negotiating the Waters largely focused on policies impacting corporate plea agreements. However, the most significant trend in the evolution of international anti-cartel enforcement since 1999 has been the more vigorous prosecution of foreign nationals who violate U.S. antitrust laws. For example, in 1999, few would have predicted the elimination of the "no-jail" deal for early cooperating foreign nationals (which was announced in *Negotiating the Waters*) or the real possibility of the extradition of an antitrust defendant. In March 1999, no foreign national had served time in a U.S. jail as a result of his or her participation in an international cartel. Today, twenty foreign nationals – from Japan and multiple European countries, including France, Germany, the Netherlands, Norway, Sweden, Switzerland, and the United Kingdom – have served time in U.S. jails as a result of the Division's international cartel investigations. And just yesterday, cases against four additional foreign nationals from Korea were filed that include agreed-upon jail

¹ Gary R. Spratling, *Negotiating the Waters of International Cartel Prosecutions - Antitrust Division Policies Relating to Plea Agreements in International Cases*, Speech Before the ABA Criminal Justice Section's Thirteenth Annual National Institute on White Collar Crime (Mar. 4, 1999), *available at* <http://www.usdoj.gov/atr/public/speeches/2275.htm> (hereinafter *Negotiating the Waters*).

recommendations. Also, in 2005, the first extradition order for a foreign national indicted on a U.S. antitrust charge was obtained from a foreign court.

This paper explores the growing emphasis on individual accountability in the United States and abroad, the reasons behind it, and the resulting changes in Division policies and strategies aimed at executives who victimize American businesses and consumers by engaging in international cartel offenses.

II. The Changing Tide of International Cartel Enforcement

A. The Global Movement Toward Individual Accountability

Antitrust authorities around the world have become increasingly aggressive in investigating and sanctioning cartels that victimize their consumers. Seemingly with each passing day, the antitrust community learns of a foreign government that has enacted a new antitrust law, created a new cartel investigative unit, or obtained a record antitrust penalty. In particular, many nations are following the Division's successful "carrot and stick" approach and developing voluntary disclosure programs that mimic the Division's Corporate Leniency Policy and reward self-reporting, while simultaneously imposing stiffer sanctions for companies and executives who lose the race for leniency.²

Foreign authorities are increasingly turning their focus toward the criminal prosecution and punishment of corporate executives involved in cartels. The OECD, in its third hard-core cartel report issued in 2005, recommended that governments consider the introduction and imposition of criminal sanctions against individuals to enhance deterrence and incentives to cooperate through leniency programs.³ A number of nations on at least five continents – including Canada, Japan, the United Kingdom, Israel, Ireland, Korea, and Australia – already have, or are in the process of adopting, laws providing for criminal sanctions. Some of these jurisdictions provided for even greater maximum jail terms than the United States did until the recent passage of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004. Recent developments in Australia, Japan, Israel, and Ireland are prime examples of the global trend toward greater individual accountability.

² Scott D. Hammond, Cornerstones of an Effective Leniency Program, Speech Before the ICN Workshop on Leniency Programs (Nov. 22-23, 2004), *available at* <http://www.usdoj.gov/atr/public/speeches/206611.htm>.

³ OECD Competition Committee, *Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendation* (Dec. 15, 2005), *available at* www.oecd.org/competition.

1. Australia

In February 2005, the Australian Government announced that it would seek to amend its competition law to introduce criminal penalties for cartel offenses, including jail sentences for individuals.⁴ The proposed legislation provides for a maximum five year jail term and a maximum fine of \$220,000 for individuals, as well as a maximum corporate fine of the greatest of \$10 million, three times the benefit from the cartel, or, where the benefit cannot be readily determined, 10 per cent of annual turnover of the company and its related entities. The passage of the pending legislation will complement recent changes in Australia's leniency program that provide for greater opportunities and incentives for companies to self-report and qualify for full immunity. On September 5, 2005, the Australian Competition and Consumer Commission (ACCC) implemented an Immunity Policy for Cartel Conduct, replacing its prior Leniency Policy.⁵ The Immunity Policy allows for oral applications and full immunity to the first qualifying applicant. The expanded policy allows for placement of a marker allowing potential applicants to secure their place in the "queue" while they complete internal investigations, and full immunity even after an investigation has begun, so long as the ACCC has not yet received legal advice that it has enough evidence to commence proceedings in relation to that cartel. Previously full immunity was available only if the ACCC was unaware of the cartel when the participant self-reported.

2. Japan

In May 2005, the Japanese Fair Trade Commission (JFTC) cracked what many have described as the highest profile cartel case in the last 30 years in Japan, involving bid rigging on billions of dollars of steel bridge construction projects ordered by the government. As many as 49 companies participated in the bid-rigging conspiracy, and the JFTC initiated a record number of criminal prosecutions against 26 companies, as well as 13 corporate officials, for their involvement in the cartel. This high-profile prosecution set the stage for a number of major revisions to Japan's Antimonopoly Act, which became effective in January 2006. The amendments include a substantial increase in the administrative fine that the JFTC imposes on cartel participants, authority for the JFTC to obtain compulsory search warrants in investigations of cartel conduct that is likely to be prosecuted

⁴ Press Release, Treasurer of Commonwealth of Australia, Criminal Penalties for Serious Cartel Behaviour (Feb. 2, 2005), *available at* <http://www.treasurer.gov.au/tsr/content/pressreleases/2005/004.asp>.

⁵ The ACCC's new Immunity Policy is available at <http://www.accc.gov.au/content/index.phtml/itemId/706275>.

criminally, and the introduction of a Corporate Leniency Program.⁶ In addition to eliminating the administrative fine for the first company that reports its involvement in a cartel prior to the commencement of a JFTC investigation, the JFTC has announced that it will not file criminal accusations against the company or its cooperating employees.⁷ These amendments, combined with the creation of a new Criminal Investigation Department within the JFTC's Investigation Bureau, signal a new era of increased accountability for companies and executives that decide to engage in hard-core cartel violations in Japan.

3. Israel

The Israel Antitrust Authority (IAA) was not established until 1994, but is already a strong advocate of jail sanctions for individuals.⁸ The IAA routinely prosecutes individuals engaged in cartels and has sought jail time for these executives. Due to the fact that many of the cartels the IAA has prosecuted operated before Israeli's antitrust law was widely enforced, many of the jail sentences it has obtained have been commuted to community service. Other jail sentences have been suspended in their entirety, to be served only if the defendant engages in a repeat offense.

Jail sentences were imposed and served, however, in the IAA's floor tile cartel investigation. From 1999 to 2002, the IAA prosecuted a sophisticated fourteen year cartel among virtually all Israeli manufacturers of floor tiles, who fixed prices and divided the market for floor tiles. The cartel even hired an economic advisor to enforce the cartel, who required that cartel members submit reports to him, and who also received complaints regarding cartel breaches, arbitrated disputes among cartel members, and sanctioned cheaters. The executive

⁶ See Press Release, JFTC, The Bill to Amend the Antimonopoly Act Approved (Apr. 20, 2005), *available at* <http://www.jftc.go.jp/e-page/pressreleases/2005/April/050420.pdf>. The full amended Antimonopoly Act can be found at http://www.jftc.go.jp/e-page/legislation/ama/amended_ama.pdf.

⁷ See JFTC, The Fair Trade Commission's Policy on Criminal Accusation and Compulsory Investigation of Criminal Cases Regarding Antimonopoly Violations (Oct. 7, 2005), *available at* http://www.jftc.go.jp/e-page/legislation/ama/policy_on_criminalaccusation.pdf.

⁸ Under Israel's Restrictive Trade Practices Law, cartel offenders are subject to three years of imprisonment, or if aggravating circumstances are present, five years. The Restrictive Trade Practices Law can be found at <http://www.antitrust.gov.il/Antitrust/en-US/LawandRegulations/RestrictiveTradePracticesLaw.htm>.

of the leading company in the cartel received a nine month jail sentence, the economic advisor received a eight month jail sentence, the executive of the second largest company in the cartel received a seven month jail sentence, and two other executives received five and three month jail sentences. Additional suspended jail sentences were imposed that were to be served after the original jail sentences if a repeat offense occurred, thereby providing motivation not to engage in cartels in the future. In denying an appeal of the alleged severity of the nine month sentence, the Israeli Supreme Court established that the proper sentence for economic felonies is jail under the rationale that cartelists do not get engage in cartels because of economic or social duress but rather they pursue 'easy' profits at the public's expense.⁹

4. Ireland

On February 28, 2006, what some are claiming is the first European criminal trial carrying the possibility of a jail sentence for price fixing began in Ireland.¹⁰ In 2004, the Irish Director of Public Prosecutions charged 24 defendants in 11 districts courts across the west of Ireland with price fixing in the home heating oil industry, following an investigation by the Irish Competition Agency that included multiple raids. Three of those defendants, including two individuals, were scheduled to begin trial in Galway this week.¹¹ One of the charged individuals and his company entered guilty pleas on the first day of trial, and the trial is now proceeding against the remaining individual.¹² The charges were brought under Ireland's 1996 Competition Act, which carries a maximum jail sentence of two years in prison and fines of up to the greater of 3.8 million Euros or 10% of turnover. The Competition Act was revised in 2002, and prosecutions brought under the new Act carry more substantial penalties, including a maximum jail sentence of five years.¹³

⁹ Isr. Antitrust Authority, *Annual Report on Competition Policy Developments in Israel - 2002*, at 14-15, available at <http://www.antitrust.gov.il/Antitrust/en-US/PublicInformation/>.

¹⁰ Caroline O'Doherty, *Trial Over Alleged Heating Oil Price-Fixing To Make Legal History*, IRISH EXAMINER, Feb. 28, 2006, at 5.

¹¹ *Id.*

¹² *Allegations of Home Oil Price-Fixing*, IRISH TIMES, Mar. 1, 2006, available at newsbank.com. Sentencing is scheduled later in March for the two defendants who pled guilty this week and another individual who entered a guilty plea last fall.

¹³ The 2002 Competition Act can be found at <http://www.tca.ie>.

B. Sea Change in International Cooperation

The Division's recent success in prosecuting foreign nationals who violate the U.S. antitrust laws has been aided by the changing attitudes around the world regarding the harm caused by cartels and the resulting increased cooperation provided by foreign authorities. When the Division began detecting international cartels in the early to mid-1990s, Division prosecutors were routinely told that they would have to wait a year or so to receive a response to a foreign assistance request. They were also told not to be surprised if, once a response finally was received, the answer was simply that no assistance would be forthcoming. Those days are gone. Multinational cooperation has made a 180-degree turn. Now antitrust authorities have a "pick-up-the-phone" attitude and are searching for ways to cooperate with each other. Antitrust enforcers around the world have taken a page from the cartel handbook by "harmonizing" their efforts.¹⁴ In addition, since *Negotiating the Waters* was issued, the Division has entered formal antitrust cooperation agreements with Brazil, Israel, Japan, and Mexico and the first international antitrust enforcement assistance agreement with Australia.¹⁵

One event that helped spark the acceleration in international cooperation was the creation of the International Anti-Cartel Enforcement Workshop. The Division hosted the first workshop in the fall of 1999 in Washington, D.C. The Workshop has since become an annual event, with subsequent conferences in the

¹⁴ Scott D. Hammond, A Review of Recent Cases and Developments in the Antitrust Division's Criminal Enforcement Program, Speech Before The Conference Board's 2002 Antitrust Conference: Antitrust Issues in Today's Economy (Mar. 7, 2002), *available at* <http://www.usdoj.gov/atr/public/speeches/10862.htm>. *See also* Andrew Clark, *Airlines Accused of Using 9/11 as Excuse to Overcharge for Freight*, *GUARDIAN* (U.K.), Feb. 16, 2006, at 25, *available at* 2006 WLNR 2647924 (discussing coordinated action by EC, U.K., U.S., Canadian, and Korean authorities); Press Release, European Commission, Statement on Inspections at Producers of Heat Stabilisers as well as Impact Modifiers and Processing Aids - International Cooperation on Inspections (Feb. 13, 2003) (discussing coordinated action by EC, U.S., Japanese, and Canadian authorities), *available at* <http://europa.eu.int/rapid/>.

¹⁵ The cooperation agreements complement agreements previously reached with Australia, Canada, the European Communities, and Germany, fostering investigative and technical assistance among the United States and those governments. The International Antitrust Enforcement Assistance Agreement with Australia is a comprehensive antitrust mutual legal assistance agreement, which allows the two countries to exchange evidence and assist each other's civil and criminal antitrust investigative efforts.

United Kingdom, Canada, Brazil, Belgium, Australia, and South Korea. These conferences bring together antitrust prosecutors from around the globe to share best practices and to establish cooperative relationships, which are later put to use in cartel investigations.

In 2004, the fight against cartels became even more globalized when the International Competition Network joined the effort by establishing a Cartel Working Group. The Working Group addresses legal, investigative, and conceptual challenges faced by antitrust authorities around the world. The ICN has become the host of the annual International Anti-Cartel Enforcement Workshop and has also hosted workshops on creating effective leniency programs and electronic evidence gathering.

C. Improved Use of Investigative and Prosecutorial Tools Directed Against Individuals

In addition to improved investigative assistance and coordination with foreign authorities, the Division's arsenal of tools in international cartel investigations now includes the use of border watches, Interpol Red Notices, and extradition requests. These tools are assisting the Division in gathering evidence, in shrinking the safe harbors for executives who have engaged in cartel offenses, and in providing strong incentives for those executives to accept responsibility and cooperate with Division investigations.

1. Border Watches

In international cartel investigations, the Division's practice is to put foreign witnesses and defendants on border watches to detect their entry into the United States. Many foreign witnesses entering the United States have been detected through the use of border watches; in some instances, information obtained from such witnesses has led directly to the filing of cartel cases. If a foreign national detected on a border watch is interviewed and lies about his knowledge of, or participation in, a cartel, he risks false statement or obstruction charges as well as antitrust charges. Furthermore, if an individual is served with a subpoena to testify before a U.S. grand jury but leaves the country without returning to testify, he risks being indicted for criminal contempt.¹⁶

If a fugitive defendant is caught on a border watch, the Division would likely seek to have him detained until and through the conclusion of his antitrust trial. Of

¹⁶ See Indictment, *United States v. Vincenzo Oliveri*, Crim. No. H-98-424 (S.D. Tex. filed Oct. 19, 1998), *available at* <http://www.usdoj.gov/atr/cases/f2100/2116.htm>.

course, most defendants who choose to become fugitives also choose to remain outside the United States, and thus escape detection on a U.S. border watch. However, the restriction on a defendant's travel to the United States is often a significant and unacceptable burden on the defendant's business and personal life. This travel restriction has contributed to the decision of many individual defendants to accept responsibility for their cartel offenses, plead guilty, and negotiate plea agreements with the Division that include a preadjudication of their immigration status and ability to travel to the United States. This preadjudication process, which is provided for in the Division's 1996 Memorandum of Understanding with the Immigration and Naturalization Service,¹⁷ is now administered by the Department of Homeland Security.¹⁸

¹⁷ See Memorandum of Understanding Between the Antitrust Division United States Department of Justice and The Immigration and Naturalization Service United States Department of Justice (Mar. 15, 1996), *available at* <http://www.usdoj.gov/atr/public/criminal/9951.htm>. See also *Negotiating the Waters*, *supra* note 1, § IV(B), for a discussion of the INS MOU.

¹⁸ The Division, in coordination with the Department of Homeland Security, has recently revised its model immigration preadjudication language used in plea agreements with foreign nationals to the following:

(a) Subject to the full and continuing cooperation of the defendant, as described in Paragraph . . . of this Plea Agreement, and upon the Court's acceptance of the defendant's guilty plea and imposition of sentence in this case, the United States agrees not to seek to remove the defendant from the United States under Sections 238 and 240 of the Immigration and Nationality Act, 8 U.S.C. §§ 1228 and 1229a, based upon the defendant's guilty plea and conviction in this case, should the defendant apply for or obtain admission to the United States as a nonimmigrant (hereinafter referred to as the "agreement not to seek to remove the defendant"). The agreement not to seek to remove the defendant is the equivalent of an agreement not to exclude the defendant from admission to the United States as a nonimmigrant or to deport the defendant from the United States. (Immigration and Nationality Act, § 240(e)(2), 8 U.S.C. § 1229a(e)(2)).

(b) The Antitrust Division of the United States Department of Justice has consulted with United States Immigration and Customs Enforcement ("ICE") on behalf of the United States Department of Homeland Security ("DHS"). ICE, on behalf of DHS and in consultation with the United States Department of State, has agreed to the inclusion in this Plea Agreement of this agreement not to seek to remove the defendant. The Secretary of DHS has delegated to ICE the authority to enter this agreement

2. Interpol Red Notices

In 2001, the Division raised the stakes for fugitives even further by adopting a policy of placing fugitives on a “Red Notice” list maintained by the International Criminal Police Organization (Interpol). A Red Notice is essentially an international “wanted” notice that many of Interpol’s 184 member countries recognize as the basis for a provisional arrest with a view toward extradition. The Division will seek to extradite any fugitive defendant apprehended through the Interpol Red Notice Watch.

Thus, due to the use of the Interpol Red Notice, even if a fugitive resides in a country that would not extradite the defendant to the United States for an antitrust offense, the fugitive still runs the risk of being extradited if he travels outside of his home country. If the defendant travels to a third country where he is on a Red Notice list, that country may choose to detain the defendant and entertain an extradition request from the United States.¹⁹ Thus, a fugitive is not only restricted from traveling to the United States, but also runs the risk of detainment and extradition every time he crosses an international border. Of course, the changing attitudes abroad toward holding individuals accountable for cartel offenses make

on behalf of DHS.

(c) So that the defendant will be able to obtain any nonimmigrant visa that he may need to travel to the United States, DHS and the Visa Office, United States Department of State, have concurred in the granting of a nonimmigrant waiver of the defendant’s inadmissibility. This waiver will remain in effect so long as this agreement not to seek to remove the defendant remains in effect. While the waiver remains in effect, the Department of State will not deny the defendant’s application for a nonimmigrant visa on the basis of the defendant’s guilty plea and conviction in this case, and DHS will not deny his application for admission as a nonimmigrant on the basis of his guilty plea and conviction in this case. . . .

See Plea Agreement ¶ 16, *United States v. Dae Soo Kim*, No. CR 06-0126 PJH (N.D. Cal. filed Mar. 1, 2006); Plea Agreement ¶ 16, *United States v. Chae Kyun Chung*, No. CR 06-0126 PJH (N.D. Cal. filed Mar. 1, 2006); Plea Agreement ¶ 16, *United States v. Kun Chul Suh*, No. CR 06-0126 PJH (N.D. Cal. filed Mar. 1, 2006); Plea Agreement ¶ 16, *United States v. Choon Yub Choi*, No. CR 06-0126 PJH (N.D. Cal. filed Mar. 1, 2006).

¹⁹ *See* Dalip Singh, *Japanese Held*, THE TELEGRAPH (India), Dec. 22, 2002, available at http://telegraphindia.com/1021222/asp/nation/story_1505528.asp (discussing arrest of antitrust fugitive by Delhi Interpol).

predicting which countries will extradite for cartel activity and which will not a dicey and precarious task for the international fugitive.

3. Extradition

In 1999, many would have scoffed at a prediction that, only six years later, a foreign court would rule that a U.S. antitrust charge is an extraditable offense. It is fitting, however, that a U.K. court was the first to do so. The development of the U.K.'s anti-cartel policies over the last few years, including its policies toward corporate executives, has exemplified the evolution in international anti-cartel enforcement that has occurred since 1999. At that time, the United Kingdom would not assist U.S. antitrust investigations pursuant to a Mutual Legal Assistant Treaty (MLAT) request. But, over the last six years, the United Kingdom has become one of the strongest advocates in the international fight against cartels. In 2000, the British government implemented a new competition law that prohibited cartels and other anti-competitive behavior, giving the Office of Fair Trading new investigative powers and expanding resources for detecting cartel activity. The new powers included the creation of a corporate leniency program modeled after the Division's Leniency Program. The Competition Act also imposed stiff fines for companies involved in cartels. In 2001, the United Kingdom removed a side letter provision that had excluded antitrust assistance from the U.S.-U.K. MLAT. Then, in 2002, the U.K. Enterprise Act was passed, introducing criminal sanctions of up to five years in prison and an unlimited fine, effective in June 2003, for individuals who engage in hard-core cartels.

Not only have attitudes changed within the British government, but also representatives of British industry have agreed that cartels are a form of theft and that individuals, as well as companies, should be prosecuted. For example, in 2001, the Director General of the British Chambers of Commerce voiced his support for the proposed criminal penalties against corporate executives as follows:

If there is a guiding principle that dictates the way we do business in the UK it is that it should be conducted fairly. Anti-competitive practices create weak markets, protect the inefficient, deprive us of choice, stifle innovation and support bad practice.

They defraud consumers and break the will of those business people who work hard to pursue their ambitions - the kinds of business people who are my members. . . .

It is right that managers should also face sanctions, because they can gain significantly if the companies they work for make excess profits - it feeds through into executive bonuses and share options.

Those operating a cartel are engaging in theft and should face a similar sanction. . . .²⁰

Actions in the United Kingdom against international cartels extended to the extradition front in 2005 when, in June of last year, a British magistrates' court found a U.S. defendant extraditable on an antitrust charge.²¹ The magistrates' court then referred the case to the U.K. Home Secretary for his decision on whether the defendant should be extradited. In September 2005, the U.K. Home Secretary ordered the defendant's extradition.²²

The magistrates' court (and the Home Secretary) found the defendant extraditable not just on obstruction of justice charges but also on price fixing. The court made this finding despite the fact that the antitrust offense was alleged to have been committed from 1989 until at least May 2000, before antitrust offenses were criminalized in the United Kingdom. The 2003 U.S.-U.K. extradition treaty and the 2003 U.K. Extradition Act both contain a dual criminality requirement.²³

²⁰ David Lennan, *Cartel Crooks Belong in Jail The Government is Right to Impose a Heavy Sanction on Managers Who Collude Against Customers, Believes David Lennan*, FIN. TIMES, Nov. 2, 2001, at 19.

²¹ *The Government of the United States of America v. Ian P. Norris* (Bow St. Magis. Ct. 2005).

²² At the time of this writing, appeals in the Norris extradition case are pending in the High Court of Justice.

²³ The extradition treaty provides that “[a]n offense shall be an extraditable offense if the conduct on which the offense is based is punishable under the laws in both States by deprivation of liberty for a period of one year or more or by a more severe penalty.” Extradition Treaty, U.S.-U.K., art. 2(1), Mar. 31, 2003, S. TREATY DOC. 108-23, 2003 WL 23527406. The U.K. Extradition Act 2003 provides that conduct is an extradition offense if:

the conduct would constitute an offence under the law of the relevant part of the United Kingdom punishable with imprisonment or another form of detention for a term of 12 months or a greater punishment if it occurred in that part of the United Kingdom [and] the conduct is so punishable under the law of the category 2 territory [where the conduct occurs] (however it is described in that law).

Sec. 137(2)(b)-(c).

The court found the dual criminality requirement in the U.K. Extradition Act satisfied, ruling that:

[t]he so-called ‘double criminality rule’ does not require me to find a UK criminal offence to match the US offence. It requires a consideration of the defendant’s conduct that has led to the foreign charge and then determine whether that conduct, had it occurred in the UK, would amount to a UK offence carrying 12 months imprisonment or greater punishment.²⁴

The court also found that if a cartel agreement involved “*dishonestly* doing something *prejudicial to another*” the cartel agreement would ordinarily constitute a U.K. common law criminal conspiracy to defraud. The court further found that the defendant could be prosecuted for a conspiracy to defraud “as the described conduct amount[ed] to a ‘dishonest cartel,’” and thus the price-fixing charge was an extraditable offense.

The use of a conduct-based theory of dual criminality to obtain extradition from countries where antitrust offenses are not criminal offenses is likely to come up again. Modern U.S. extradition treaties, including the 2003 U.S.-U.K. Extradition Treaty, usually provide that dual criminality does not require that the acts constituting a crime in both States be denominated as the same offense in both States.²⁵ In today’s enforcement environment, one can see that extradition is a real and significant threat for antitrust fugitives.

²⁴ Note also that the 2003 U.S.-U.K. Extradition Treaty provides that:

[A]n offense shall be an extraditable offense:

(a) whether or not the laws in the Requesting and Requested States place the offense within the same category of offenses or describe the offense by the same terminology

Art. 2(3)(a).

²⁵ See Thomas G. Snow, *The Investigation and Prosecution of White Collar Crime: International Challenges and the Legal Tools Available to Address Them*, 11 WM. & MARY BILL OF RTS. J. 209, 235-36 nn. 118-19 (2002-2003).

D. Jail Sentences As The Most Effective Deterrent

It is indisputable that the most effective deterrent to cartel offenses is to impose jail sentences on the individuals who commit them. Corporations only commit cartel offenses through individuals, so executives as well as their employers need to be deterred from engaging in such conduct. Hard-core cartel offenses are premeditated offenses committed by highly educated executives. Before deciding whether to commit the offense, those executives weigh the risk and consequences of detection against the potential financial rewards of colluding. When an executive believes that incarceration is a possible consequence of engaging in cartel activity, he is far more likely to be deterred from committing the violation than if there is no individual exposure. This conclusion is not simply based on theories of human behavior or common sense. We have first-hand accounts from cartel members of how the presence or absence of individual sanctions has directly resulted in actual deterrence and continued competition in the U.S. market and failed deterrence, collusion, and great financial harm in foreign markets.

We have uncovered international cartels that operated profitably and illegally in Europe, Asia, and elsewhere around the world, but did not expand their collusion to the United States solely because the executives decided it was not worth the risk of going to jail. I am referring to cartels that had every opportunity to target U.S. consumers. The cartel members sold in the U.S. market, and they were already getting together and fixing prices everywhere else they sold. Indeed, in some cases, the U.S. market was the largest and potentially most profitable, but the collusive conduct still ceased at the border. Why? The answer, from the mouths of the cartel members and verified by our investigators, is that the executives did not want to risk getting caught and going to jail in the United States.

Many individual defendants have offered – unsuccessfully – to pay higher fines in an attempt to escape jail sentences or at least secure a shorter jail sentence. On the other hand, defendants never offer to spend more time in jail in order to lower their fines. As one corporate executive aptly put it: “[A]s long as you are only talking about money, the company can at the end of the day take care of me . . . but once you begin talking about taking away my liberty, there is nothing that the company can do for me.”²⁶

²⁶ Donald I. Baker, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging*, 69 GEO. WASH. L. REV. 693, 705 (Oct./Dec. 2001).

E. Action By Congress and the U.S. Sentencing Commission Lengthens Jail Sentences For Antitrust Crimes

The risks to executives who engage in cartel activity are rising exponentially as a result of the recent increase in the maximum jail sentence and Sentencing Guidelines for antitrust crimes. Recognizing the need to adequately deter antitrust crimes and to bring antitrust penalties in line with those for other white-collar crimes, Congress more than tripled the Sherman Act maximum jail term in June 2004, from three years to ten years.²⁷ The legislation reflects Congressional recognition that, despite the increasing seriousness of cartel offenses, the maximum Sherman Act jail sentence had not kept pace with the penalties available for other white-collar crimes. Securities violations, mail and wire fraud, bribery, embezzlement of public funds, procurement fraud, obstruction of justice, and money laundering all had substantially greater maximum jail sentences than did the Sherman Act. In fact, the mail fraud and wire fraud statutes authorized a maximum jail sentence for *attempted* cartel activity that utilized the mails or interstate wire transmissions, which was almost seven times greater than the maximum jail sentence allowed for *completed* cartel activity under the Sherman Act.

Today, executives who would engage in cartel behavior need to be deterred more than ever. The commerce, and the commensurate harm, affected by international cartels are enormous and growing. Since the Division began focusing on the prosecution of international cartels, we have prosecuted cartels affecting hundreds of millions and billions of dollars of commerce. When the lysine cartel was discovered in the early to mid-1990s, the cartel was the largest, most serious cartel the Division had prosecuted, involving a volume of commerce of more than *\$450 million*. Today such large-scale international cartels seem nearly commonplace, and we have prosecuted numerous international cartels affecting far greater volumes of commerce. For example, the rubber chemicals cartel involved more than *\$1 billion* in commerce; the graphite electrode cartel over *\$1.6 billion* of commerce; the DRAM cartel over *\$4.5 billion* in commerce; and the vitamin cartel well over *\$5 billion* of commerce. While these amounts are staggering, they take into account only the U.S. commerce affected by these global cartels. The true measure of the harm and seriousness of these crimes is much greater than that reflected in these figures.²⁸

²⁷ Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, Title 2, § 215, 118 Stat. 661, 668.

²⁸ In *Negotiating the Waters*, the Division announced that it normally would use the defendant's volume of affected U.S. commerce in calculating the defendant's

In November 2005, the U.S. Sentencing Commission followed Congress' lead by increasing penalties allowed under the antitrust Sentencing Guideline to account for the new Sherman Act maximum and the enormous volumes of commerce affected by international cartels. Prior to the November 2005 amendment, the largest volume of commerce enhancement for an individual under the antitrust guideline – U.S.S.G. §2R1.1 – was \$100 million; the maximum jail term provided for was 33 months. Now §2R1.1 contains multiple volume of commerce enhancements more than \$100 million. Specifically, there are now additional enhancements for affected volumes of commerce over \$250 million, \$500 million, \$1 billion, and \$1.5 billion, and the maximum jail term provided for under the newly amended §2R1.1 is *nine years*.²⁹ These higher volume of commerce

Guidelines range. However, the Division stated in *Negotiating the Waters* that foreign sales could be taken into account in two ways if the defendant's affected U.S. commerce understated the seriousness of the defendant's role in the offense and the impact of the defendant's conduct on U.S. victims. First, the defendant's foreign sales could simply be added to its volume of commerce calculation under U.S.S.G. §§2R1.1(d)(1). Second, the defendant's foreign sales could be treated as a U.S.S.G. §5K2.0 aggravating factor requiring an upward departure in the Guidelines range. *Negotiating the Waters*, *supra* note 1, § V(A). In practice, the Division has used foreign sales only as an aggravating factor requiring an increase in the fine. *See* Plea Agreement, *United States v. HeereMac, v.o.f.*, Crim. No. 97-CR-0869 (N.D. Ill. 1997); Plea Agreement, *United States v. Roquette Freres*, Crim. No. CR 97-00356 (N.D. Cal. 1997). Moreover, the Division has since announced that it will consider only a defendant's domestic sales in calculating a defendant's volume of affected commerce under U.S.S.G. §§2R1.1(d)(1) and 8C2.4(a)-(b). *See* Brief for the United States and the Federal Trade Commission As Amici Curiae at 8-10, *Statoil ASA v. HeereMac V.O.F.*, 534 U.S. 1127 (2002) (No. 00-1842), *available at* <http://www.usdoj.gov/atr/cases/f9800/9844.pdf>.

²⁹ A higher maximum jail term for an antitrust defendant is possible under the Guidelines with the addition of adjustments from other Guidelines' sections, such a role in the offense enhancement under U.S.S.G. §3B1.1 or an obstruction enhancement under U.S.S.G. §3C1.1. Of course, the maximum Guidelines sentence would be capped by the Sherman Act maximum. *See* U.S.S.G. §5G1.1. For a discussion of the impact on antitrust sentencing of *United States v. Booker*, 543 U.S. 220 (2005), which changed the nature of the U.S. Sentencing Guidelines from mandatory to advisory, *see* Scott D. Hammond, *Antitrust Sentencing in the Post-Booker Era: Risks Remain High for Non-Cooperating Defendants*, Speech Before the ABA Section of Antitrust Law Spring Meeting (Mar. 30, 2005), *available at* <http://www.usdoj.gov/atr/public/speeches/208354.htm>.

adjustments will be a major factor in the sentencing of individuals who participated in cartel activity on or after November 1, 2005.

F. The Elimination of the No-Jail Deal

When *Negotiating the Waters* was written, it was possible for some foreign defendants to obtain a “no-jail” sentencing recommendation. Such a deal was available for foreign nationals who offered valuable cooperation against remaining co-conspirators and over whom we had no reasonable means of obtaining personal jurisdiction. The foreign national had to offer timely cooperation that could advance the investigation, and no U.S. co-conspirator of equal or lesser culpability could have entered a plea agreement calling for jail time or have been sentenced to jail time.³⁰ When the Division began prosecuting international cartels, just convincing a foreign national to submit to U.S. jurisdiction and plead guilty was a major achievement. A no-jail deal was at times necessary for the Division to secure access to an important foreign witness or key foreign-located documents.

As discussed earlier, however, the dramatic increase in international cooperation and our improved use of investigative tools over the last few years has caused a significant shift in the negotiating balance. The Division now has much greater leverage in negotiating plea agreements with foreign nationals. Thus, the no-jail deal for early cooperating foreign nationals announced in *Negotiating the Waters* has become a relic of the past, albeit in a short period of time. The Division now insists on jail sentences for *all defendants* – domestic and foreign. We will not agree to a “no-jail” sentence for any defendant, and our practice is not to remain silent at sentencing if a defendant argues for a no-jail sentence.

The antitrust bar and business community understand that the Division is serious about its policy of insisting on jail sentences for both U.S. and foreign defendants. This realization provides further incentive for corporations to apply for leniency so that their cooperating executives will receive non-prosecution coverage. And if leniency is no longer available in an investigation, the Division’s insistence on jail terms is encouraging executives to come in early to cooperate to minimize their jail time and companies to come in early to minimize the number of individual carve outs who could be subject to jail sentences.

³⁰ *Negotiating the Waters*, *supra* note 1, §§ IV(A) and VII(B); Scott D. Hammond, When Calculating The Costs And Benefits Of Applying For Corporate Amnesty, How Do You Put A Price Tag On An Individual’s Freedom?, Speech Before the ABA Criminal Justice Section Fifteenth Annual National Institute on White Collar Crime at § III(B)(2) (Mar. 8, 2001), *available at* <http://www.usdoj.gov/atr/public/speeches/7647.htm>.

G. Increases In the Number Of Executives Subject To Prosecution – The Division’s Carve-Out Policy

The Division is also raising the stakes for individuals who engage in cartel offenses by carving out more culpable employees from the non-prosecution protection of our corporate plea agreements. When the Division’s wave of international cartel prosecutions began in the mid-1990s with the lysine, citric acid, and sodium gluconate cartel prosecutions, for the most part, the Division carved out only a *single* employee from the corporate plea agreements. Notably, Negotiating the Waters did not even discuss a carve-out policy. The one carved-out individual would be excluded from the cooperation and non-prosecution provisions of corporate plea agreements and was typically offered a no-jail deal. We provided such lenient treatment for individuals because we were cracking a new breed of cartels and such treatment was deemed necessary to get access to foreign-located witnesses and documents.

Again, as the Division gained experience investigating and prosecuting international cartels and as our ability to obtain investigative assistance from foreign governments improved, we began insisting on a greater number of carve outs as the price for entering into a corporate plea resolution. Beginning in May 1999, with the BASF and Hoffmann-La Roche vitamin plea agreements, we carved out four individuals from each plea agreement. Also in May 1999, we filed our first plea agreement with a European national that expressly provided for an agreed-upon jail recommendation.³¹

Now the Division routinely excludes multiple individuals from the non-prosecution coverage of corporate plea agreements. Individuals excluded from the non-prosecution coverage can include culpable employees, employees who refuse to cooperate with the Division’s investigation, and employees against whom the Division is still developing evidence. The Division will insist at the beginning of corporate plea negotiations – if it has not done so earlier in the investigation – that those individuals obtain separate counsel. The Division will then deal with their separate counsel regarding resolutions for the individuals. If a company and its employees wait to come forward to cooperate, the cooperation will be less valuable

³¹ Plea Agreement, *United States v. Dr. Kuno Sommer*, Cr. No. 3:99-CR-201-R (N.D. Tex. 1999), *available at* <http://www.usdoj.gov/atr/cases/f2400/sommer.pdf>. As noted above, twenty foreign executives – from Japan and eight European countries – have now served time in U.S. jails as a result of the Division’s international cartel investigations. In addition, yesterday in our DRAM investigation, the Division filed cases against four Korean nationals which include agreed-upon jail recommendations ranging from five months to eight months incarceration.

and a greater number of executives will face significant jail time. For example, in the rubber chemicals investigation, Crompton, which began to cooperate within days after the issuance of grand jury subpoenas, had *three* individuals carved out from its plea agreement. The next company to plead in that investigation, Bayer, had *five* individuals carved out of its plea agreement. A similar crescendo occurred in our DRAM investigation: Infineon had *four* individuals carved out of its plea agreement; Hynix had *five* carve outs; and Samsung had *seven*.

III. Conclusion

Although the Division is carving out more executives for prosecution today than it did in the 1990s, the high-level involvement of top executives in international cartel activity has remained relatively constant over time. What has changed is the diminishing leverage of foreign executives to avoid prosecution and incarceration. Today, it is the Division that has gained the upper hand due to the use of border watches and Red Notices, the real possibility of extradition, the assistance and coordination offered by foreign authorities, and most recently, the specter of longer jail sentences for international fugitives who are caught and returned to the United States. The Division, therefore, no longer needs to make the concessions of the past – such as no-jail deals – to negotiate plea agreements with foreign-based companies and their executives. As a result, we are moving closer to our ultimate goal of treating similarly situated foreign cartel members no differently than their U.S. co-conspirators.