# Key Antitrust Issues Facing Chinese Companies Doing Business in the United States: Avoiding Cartel Problems[1]

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As the level of outbound direct investment by Chinese companies grows, those companies will need to understand the legal environment in the countries in which they operate or propose to operate. In the United States, it is especially important for companies to understand the antitrust laws, because of the severe consequences that can result from violations. The most important aspect of those laws is the prohibition of cartels: violations can result in prison terms, fines in the hundreds of millions of dollars, private lawsuits for sums equaling or exceeding the amount of criminal fines, and lawsuits under state as well as federal antitrust laws. Cartel law needs to be understood throughout the company, including by executives who never set foot in the United States. The recent jury verdicts against a Taiwanese liquid crystal display manufacturer in a criminal case, a Japanese liquid crystal display manufacturer in a civil case, and a Chinese vitamin C manufacturer in another civil case underscore the need for companies outside the United States to understand several things about U.S. antitrust law:

- Cartels are often discovered, despite the cartel members' belief that, for "cultural reasons" or otherwise, they will remain secret.
- The penalties are very substantial, especially when one adds in the damages paid in follow-on civil cases, in which the pressure to settle can be immense.
- Cartel members' attempts to conceal their conspiracies are frequently counterproductive.
- A company can be found liable even if the conduct took place outside the United States.
- A company can be found liable even if the conduct was encouraged by the company's government, if the government did not compel the conduct.
- Because trade associations are purely private entities in the United States, the fact that a trade association encouraged the conduct will not be viewed as governmental encouragement, let alone compulsion.

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[2] The views expressed here are my own and do not necessarily reflect those of any former or current employers or clients.

- Because private parties can bring suit even if the U.S. government does not, diplomatic considerations will not insulate a company from very substantial monetary liability.
- When U.S. lawyers recommend an antitrust compliance program, they are neither giving you government propaganda nor trying to run up your legal bills with unnecessary services. You will end up paying them a lot less money if you avoid trouble than if you try to clean up the mess after the fact.

There are other aspects of U.S. antitrust law as well, and this paper does not purport to be comprehensive.[3] An understanding of cartel law, however, will go a long way toward avoiding the most serious antitrust problem in the United States.

## I. What Is a Cartel?

Some antitrust violations are prosecuted only civilly in the United States; cartel agreements, however, are considered criminal. Cartel agreements include price-fixing (agreements by competitors on prices, price floors, or pricing formulae), output restrictions (production quotas), bid-rigging, and market division (agreements by competitors on the respective territories or customers for which they will compete). All of these violations are often loosely called "price-fixing," and all are considered "per se unlawful"—unlawful without proof of anticompetitive effect, and without the possibility of justification.

## II. How Are Cartels Discovered, and What Role Does the System of Punishment and Leniency Play?

Let us consider cartel discovery and penalties together, for they are related. Cartels, by definition, involve more than one wrongdoer. The antitrust authorities—in an approach pioneered by the United States but now adopted in many other countries—have learned to pit potential defendants against each other by offering freedom from prosecution ("leniency" or "amnesty"[4]) and other benefits to the first cartel member to cooperate with the government, as well as lesser benefits to early cooperators who are too late to be the leniency applicant. Before describing how these programs work and how effective they have proven, one must first understand something about the system of punishment and compensation applicable to cartel violations in the United States.

[3] Companies also need to understand the merger control regime, whether they contemplate acquisitions or joint ventures themselves or are simply concerned about the consequences of such transactions by others. In addition, the U.S. antitrust laws deal, among other things, with agreements between manufacturers and distributors as to the prices at which the distributors will sell, with agreements to raise entry barriers or otherwise make it easier for competitors to raise their prices, and with discrimination by sellers in the pricing provided to different customers.

[4] In Department of Justice Antitrust Division usage, the terms are equivalent.

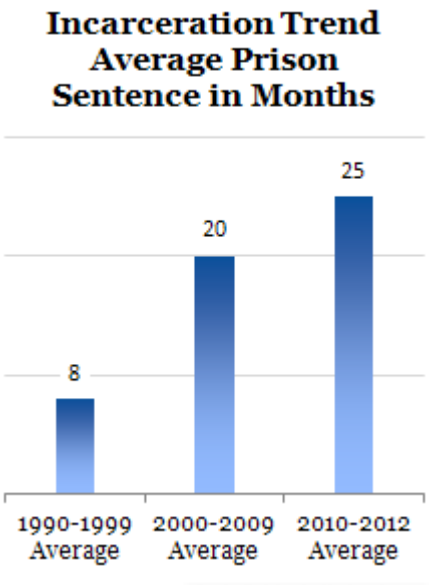
### *A. Criminal Punishment and Civil Compensation for Cartel Violations*

Price-fixing violations are punished severely in the United States, including by prison terms, criminal fines, private civil lawsuits under federal law, and governmental and private civil lawsuits under state laws.

#### *1. Prison Terms*

In the United States, individuals—not just the company—can be held liable for price-fixing violations, and the punishment for such violations includes prison terms, not just fines. The maximum allowable prison sentence for price-fixing is now ten years,[5] and the average sentence has been steadily ratcheting upward, as shown in this chart from the Justice Department's website:[6]

**Figure 1**




#### *2. Fines*

Corporate fines have also been marching steadily upward. As of December 2012, there were 100 fines of $10 million or more.[7] To conserve space, the following chart reproduces only the fines of $50 million or more, of which there were thirty-eight.

[5] Sherman Act § 1, 15 U.S.C. § 1, as amended by the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, Title 2, § 215, 118 Stat. 661, 668.
[6] http://www.justice.gov/atr/public/criminal/264101.html (last visited March 27, 2013).
[7] http://www.justice.gov/atr/public/criminal/sherman10.html (last visited March 27, 2013).

## Figure 2[8]

| ANTITRUST DIVISION<br>Sherman Act Violations Yielding a Corporate Fine of $50 Million or More | | | | |
|---|---|---|---|---|
| **Defendant (FY)** | **Product** | **Fine ($ Millions)** | **Geographic Scope** | **Country** |
| AU Optronics Corporation of Taiwan (2012) | Liquid Crystal Display (LCD) Panels | $500 | International | Taiwan |
| F. Hoffmann-La Roche, Ltd. (1999) | Vitamins | $500 | International | Switzerland |
| Yazaki Corporation (2012) | Automobile Parts | $470 | International | Japan |
| LG Display Co., Ltd LG Display America (2009) | Liquid Crystal Display (LCD) Panels | $400 | International | Korea |
| Société Air France and Koninklijke Luchtvaart Maatschappij, N.V. (2008) | Air Transportation (Cargo) | $350 | International | France (Société Air France) The Netherlands (KLM) |
| Korean Air Lines Co., Ltd. (2007) | Air Transportation (Cargo & Passenger) | $300 | International | Korea |
| British Airways PLC (2007) | Air Transportation (Cargo & Passenger) | $300 | International | UK |
| Samsung Electronics Company, Ltd. Samsung Semiconductor, Inc. (2006) | DRAM | $300 | International | Korea |
| BASF AG (1999) | Vitamins | $225 | International | Germany |
| CHI MEI Optoelectronics Corporation (2010) | Liquid Crystal Display (LCD) Panels | $220 | International | Taiwan |
| Furukawa Electric Co. Ltd. (2012) | Automotive Wire Harnesses & Related Products | $200 | International | Japan |
| Hynix Semiconductor Inc. (2005) | DRAM | $185 | International | Korea |
| Infineon Technologies AG (2004) | DRAM | $160 | International | Germany |
| SGL Carbon AG (1999) | Graphite Electrodes | $135 | International | Germany |
| Mitsubishi Corp. (2001) | Graphite Electrodes | $134 | International | Japan |
| Sharp Corporation (2009) | Liquid Crystal Display (LCD) Panels | $120 | International | Japan |
| Cargolux Airlines International S.A. (2009) | Air Transportation (Cargo) | $119 | International | Grand Duchy Of Luxembourg |
| Japan Airlines International Co. LTD (2008) | Air Transportation (Cargo) | $110 | International | Japan |
| UCAR International, Inc. (1998) | Graphite Electrodes | $110 | International | U.S. |
| LAN CARGO S.A. and AEROLINHAS BRASILEIRAS S.A. (2009) | Air Transportation (Cargo) | $109 | International | Lan Cargo (Chile) Aerolinhas (Brazil) |
| Archer Daniels Midland Co. (1996) | Lysine & Citric Acid | $100 | International | U.S. |

[8] This chart simply reproduces a portion of the chart found on the Justice Department's website at http://www.justice.gov/atr/public/criminal/sherman10.html. This article takes no position on whether the column heading "Country" is appropriate in all cases.

| ANTITRUST DIVISION<br>Sherman Act Violations Yielding a Corporate Fine of $50 Million or More | | | | |
|---|---|---|---|---|
| **Defendant (FY)** | **Product** | **Fine ($ Millions)** | **Geographic Scope** | **Country** |
| Embraco North America (2011) | Compressors | $91.8 | International | U.S |
| Elpida Memory, Inc. (2006) | DRAM | $84 | International | Japan |
| Dupont Dow Elastomers L.L.C. (2005) | Chloroprene Rubber | $84 | International | U.S. |
| Denso Corporation (2012) | Automobile Parts | $78 | International | Japan |
| All Nippon Airways Co., Ltd. (2011) | Air Transportation (Cargo & Passenger) | $73 | International | Japan |
| Takeda Chemical Industries, Ltd. (1999) | Vitamins | $72 | International | Japan |
| Bayer AG (2004) | Rubber Chemicals | $66 | International | Germany |
| Chunghwa Picture Tubes, Ltd. (2009) | Liquid Crystal Display (LCD) Panels | $65 | International | Taiwan |
| Qantas Airways Limited (2008) | Air Transportation (Cargo) | $61 | International | Australia |
| Cathay Pacific Airways Limited (2008) | Air Transportation (Cargo) | $60 | International | Hong Kong / Republic of China |
| 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 |
| SAS Cargo Group, A/S (2008) | Air Transportation (Cargo) | $52 | International | Denmark |
| Crompton (2004) | Rubber Chemicals | $50 | International | U.S. |
| Haarmann & Reimer Corp. (1997) | Citric Acid | $50 | International | German Parent |
| Asiana Airlines Inc. (2009) | Air Transportation (Cargo & Passenger) | $50 | International | Republic Of Korea |

### *3. Private Lawsuits Under Federal Law, and Governmental and Private Lawsuits Under State Laws*

Federal criminal prosecutions are usually followed by private civil lawsuits under federal and state law as well as prosecutions by state attorneys general. Quite often, the damages and fines paid in these follow-on cases exceed the fines paid in the federal criminal prosecution. For example, in the federal prosecutions involving the liquid crystal display conspiracy, four companies agreed to plead guilty and to pay more than $890 million in fines. Another company went to trial, was convicted, and was sentenced to a fine of $500 million. That case is now on appeal. In the follow-on civil cases, the defendants agreed to pay $473.35 million in the consolidated private class actions brought under federal law, and over $1 billion in the private

class and state governmental actions under various states' laws. But these figures do not include the damages sought by direct (e.g., Dell, HP, Nokia, and Sony) and indirect (e.g., Best Buy, Target, and Costco) purchasers that have opted out of the class actions. When these cases are resolved, the total amounts paid in the follow-on civil actions are likely to exceed significantly the fines paid in the federal criminal prosecutions.

One reason the amounts are so large in these follow-on cases is that the pressure to settle them can be immense. Not only are damages automatically trebled, but the defendants are jointly and severally liable for the damages, meaning that each one can be liable for the total harm caused by the entire conspiracy, less only what the plaintiff has already collected from other defendants.[9] There is no right of contribution, meaning that a defendant that pays more than its proportionate share cannot then collect a portion back from other defendants. Moreover, damages can be sought on behalf of large classes of purchasers in a single lawsuit. The way these factors combine is as follows. Suppose there are 100 direct purchasers, each injured in the amount of $10 million. That means that the total amount that can be recovered in the class action is $1 billion before trebling, or $3 billion after trebling. Suppose there are 10 defendants, and the first nine settle for a total of $500 million. If the last defendant goes to trial, it is potentially at risk for $2.5 billion, even if that defendant accounted for only a small fraction of the sales in the market. This is because each defendant is liable for the entire harm caused by the conspiracy, offset only by the amounts actually recovered from the other defendants. And the absence of a right of contribution means that a defendant forced to pay such disproportionate damages cannot force the other defendants to contribute to that damage award, even if the other defendants were far more significant players in the conspiracy. There is therefore great pressure not to be the "last one standing" in such a lawsuit.

Another reason for the total size of the follow-on liability is our system of dual federal and state enforcement. Under federal law, the "direct purchasers"—those that buy directly from the conspirators—can collect three times the entire amount of any overcharges caused by the conspiracy, even if they actually passed some of those overcharges on to their own customers. Meanwhile, under the laws of numerous states, "indirect purchasers"—those to whom such overcharges were allegedly passed on—can sue to collect a multiple of the overcharges they paid. State attorneys general have the power under federal law to sue for damages incurred by the state government, as well as to act as *parens patriae* to collect damages on behalf of natural persons that were direct purchasers (though not if such recoveries would duplicate other damages already awarded). Under the laws of many states, such state attorneys general have the power to collect such damages on behalf of indirect purchasers as well.

### *B. Leniency programs*

Under the U.S. Department of Justice leniency program, "a corporation can avoid criminal conviction and fines, and individuals can avoid criminal conviction, prison terms, and

[9] I describe below the exception that the law carves out for the "leniency applicant"—the whistleblower—which pays only single damages and is exempted from joint and several liability.

fines, by being the first to confess participation in a criminal antitrust violation, fully cooperating with the [Antitrust] Division [of the Department of Justice], and meeting other specified conditions."[10] In addition, the corporate leniency applicant gets benefits in private civil litigation, by paying only single damages instead of treble damages to private plaintiffs, and being freed from joint-and-several liability, if the applicant cooperates with the plaintiffs in their efforts to recover damages from the other cartel members.

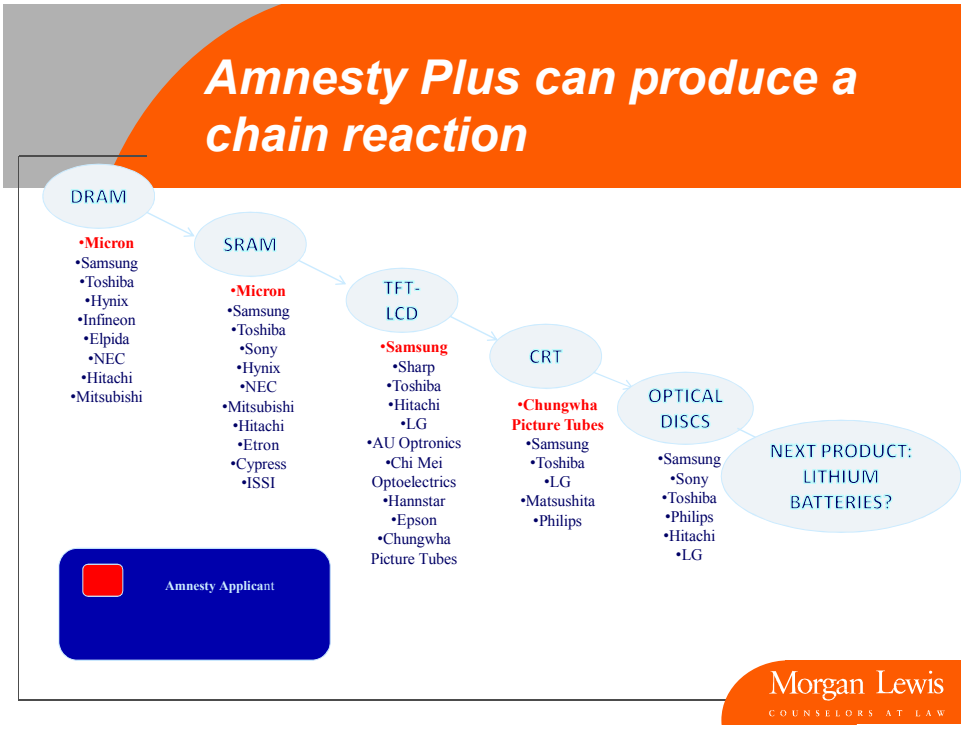
As the Justice Department's leniency program evolved, the Department added a new feature known as "Amnesty Plus." Under Amnesty Plus, a company that is too late to receive amnesty in one investigation is given an incentive to reveal to the Department the existence of price-fixing in a second market. If it is the first to reveal to the Department the existence of the second conspiracy, it not only receives amnesty with respect to the second conspiracy, but it also receives an additional discount with respect to the first conspiracy.

The "race to be the first" that Amnesty Plus sets up is, in a sense, even more intense than the race set up by the leniency program itself. Before any conspiracies have been discovered in an industry, the first company to discover a cartel may make that discovery quite by chance. Although it may seem odd to speak of a company "discovering" that it has been participating in a cartel—since by definition the officials that were actually participating in the conspiracy had been aware of it all along—it is usually the case either that (1) lower level employees are participating in a conspiracy without the knowledge of more senior employees or (2) more senior employees are aware of, or even participants in, the conspiracy, but the pressure to self-report to the Department of Justice only arises when the lawyers discover what has been going on and explain to senior management or to the Board the dire consequences that the company will face unless it self-reports. The accidental discovery may come about in a variety of ways. For example, Company A may acquire Company B, and in the course of due diligence, Company A's lawyers may discover that Company B has been engaged in a cartel. Or a company may conduct a compliance program, and learn from an employee that some company personnel have participated in a cartel. In that situation, there may be no other company in an immediate race to self-report. After an investigation of one conspiracy has begun, however, all of the companies that are the subject or target of that investigation will be aware of the benefits to be gained from Amnesty Plus, and will also be aware that all the other companies involved are also aware of those benefits. Once an investigation of one conspiracy has begun, therefore, the pressure to find other conspiracies—and to beat all the other targets in finding and reporting such conspiracies—will be intense.

The result can be a kind of chain reaction, in which defendants caught up in one prosecution scramble to become the amnesty applicant in other investigations, thus bringing to light far more violations than the Department could have discovered otherwise. The following diagram illustrates this phenomenon with respect to component manufacturers supplying the

[10] Scott D. Hammond & Belinda A. Barnett, Frequently Asked Questions Regarding The Antitrust Division's Leniency Program And Model Leniency Letters, (November 19, 2008), available at http://www.justice.gov/atr/public/criminal/239583.htm (last visited April 1, 2013).

computer industry. In most cases, the amnesty applicant was a company that was a defendant in a previous investigation:




Leniency and Amnesty Plus have proven to be very powerful tools for uncovering cartels. As the Deputy Assistant Attorney General in charge of the Antitrust Division's criminal enforcement program has stated, "[T]he majority of the [Antitrust] Division's major international investigations have been advanced through the cooperation of an amnesty [leniency] applicant."[11]

### *C. Do "Cultural Factors" Impede Whistle-Blowing?*

In a word, no. When talking to officials of companies in Asia these days, one sometimes hears the suggestion that companies there would never disclose the existence of a cartel to the government because to do so would involve a great loss of face in the industry and in the community. One heard similar sentiments in Europe a decade ago, and in the United States two decades ago. So far, it has never been the case that such "cultural factors" were sufficient to overcome the powerful incentives set up by leniency programs. In counseling clients, the only safe assumption is that cartels will be discovered and prosecuted.

As that realization begins to dawn in a particular community, two things tend to happen: initially, the number of conspiracies discovered and prosecuted tends to increase, as companies

[11] Scott D. Hammond, A Summary Overview Of The Antitrust Division's Criminal Enforcement Program, presentation to the New York State Bar Association Annual Meeting at 5 (January 23, 2003), available at http://www.justice.gov/atr/public/speeches/200686.pdf (last visited April 1, 2013).

began to realize how the system of prosecution and leniency works and race to be the first to self-report. But later, the number of conspiracies begins to fall, as companies implement better compliance programs and employees begin to pay closer attention. The chart of largest fines shown in the Figure 2 is interesting in that regard. Currently, the top of the chart is dominated by Asian companies. If one eliminates the fines imposed in the last eight or nine years, however, European companies would predominate. If one went back another decade or so (and expanded the chart well beyond the 38 or 100 largest fines, since fines were much smaller back then), U.S. companies would undoubtedly have predominated.

## III. What Lessons Can Be Learned From the AU Optronics and Toshiba LCD Cases?

### *A. AU Optronics*

#### *1. AUO Was the Only Company To Go To Trial*

AUO was the only indicted company that did not plead guilty, but instead went to trial. Presumably, that was because—having missed the opportunity to get full amnesty by being the leniency applicant, and having missed the opportunity to get a large discount for being an early cooperator—the terms it was being offered for a plea agreement with the Department of Justice were so onerous that AUO might end up better off not settling, even if it were to be found guilty. There is, therefore, no reason to second-guess the decision to go to trial. If there are lessons to be learned, they come earlier in the process: (1) when AUO first learned of the investigation in December 2006, moving more quickly to determine what had happened might have enabled AUO to get a discount for early cooperation (although by then it was already months behind even the second-in-the-door), and (2) even earlier, a good compliance program might either have prevented the violation or enabled AUO to learn of it early enough to gain full amnesty.

#### *2. AUO's Theory of Defense on Liability Faced an Uphill Struggle and Failed at Trial*

At the guilt phase, AUO faced a daunting task. There was documentary evidence that approximately sixty meetings of the conspirators—known as "Crystal Meetings"—had taken place, and that AUO had attended consistently. Other conspirators, which had pled guilty and agreed to cooperate in the government's investigation in exchange for reduced fines, supplied live witnesses to testify at trial. And the government presented evidence showing that the prices of the participants moved in virtual lockstep (even if AUO's prices were a consistent amount lower than those of the other participants).

AUO's theory, therefore, was (and had to be) that, although it faithfully attended the regular meetings with the conspirators, it never reached agreement with them. Instead, according to the defense, AUO attended the meetings in order to learn what the conspirators were doing so

that it could cheat them by undercutting their prices. Thus, according to AUO, when it promised to follow the agreed-upon cartel price, it was actually lying to the real conspirators, intending to compete vigorously against them. In support of this theory, AUO presented evidence that it never charged the "agreed" cartel price and that its price was always lower than the cartel price.

There are several difficulties with such an argument. First, it tells the jury, in essence, "you should believe me, and not the prosecutor, because I am a liar and a cheat, and the other conspirators should not have believed a word I said." It is fair to say that such an argument would be more appealing to an antitrust lawyer than it would be to the typical juror. Second, the judge's instructions to the jury cut several legs out from under this argument:

- The force of AUO's evidence that it never charged that the "agreed" cartel price was undermined by the jury instruction that "[i]f you should find that the defendants entered into an agreement to fix prices, the fact that the defendants or their coconspirators did not abide by it or that one or more of them may not have lived up to some aspect of the agreement is no defense."

- The argument that AUO vigorously competed against the cartel was undercut by the instruction that "[i]f the conspiracy charged in the indictment is proved, it is no defense that the conspirators actually competed with each other in some manner or that they did not conspire to eliminate all competition. Nor is it a defense that the conspirators did not attempt to collude with all of their competitors."

- Evidence that LCD market prices fell consistently and dramatically during the conspiracy period was diminished by an instruction "[t]hat defendants may not have been successful in achieving their objectives, is no defense."

In addition to these arguments attempting to undermine the significance of documents and testimony placing AUO officials at multiple meetings of the conspirators, AUO also tried to undermine the credibility of the live witnesses by suggesting that they would say whatever the prosecutors wanted them to say in exchange for lenient treatment with respect to their own participation in the conspiracy. That tactic, too, proved unconvincing to the jury.

After a U.S. trial is completed, it is commonplace for the lawyers to try to talk to the jurors and learn what they can about what the jurors found persuasive and what they did not. The jurors are under no obligation to talk, but they are free to do so. After the AUO trial, such interviews confirmed the impression that it would be extremely difficult to recover from the impact of documents such as the extensive minutes of the Crystal Meetings. The government's chart showing a lockstep progression in the conspirators' prices was also very powerful, even though prices were constantly declining, and even though AUO's prices were almost always

lower. And—probably because their testimony was consistent with the documentary evidence that the jurors could see for themselves—the credibility of cooperating witnesses was not undercut by the suggestion that they received lenient treatment in exchange for their testimony. The "cheating" defense was also severely undercut by the extensiveness of AUO's participation: consistent attendance at some sixty Crystal Meetings simply did not seem consistent with the defense that it was merely gathering information.

Another powerful factor undercutting AUO's defense was the extensive evidence of attempts to conceal the conduct. Documents presented during the trial contained instructions such as "do not copy," "do not forward," and "destroy after reading." Other documents suggested that the conspirators not meet at the office, that they enter and leave meetings separately, or that they meet in pairs rather than in groups. Such evidence inevitably suggests to the fact-finder that the defendants knew what they were doing was illegal. And if the defendants knew what they were doing was illegal, then it probably was illegal.

### *3. On the Amount of the Fine, There Was Good News and Bad News for the Government, with the Potential for Still More Bad News on Appeal*

In one respect, the outcome of the AUO trial clearly strengthened the hand of government prosecutors in future plea negotiations. Although the statutory maximum fine for a price-fixing violation is set at $100 million, the Department of Justice has routinely obtained much larger fines through plea agreements based on 18 U.S.C. § 3571(d). That statutory provision allows for the imposition of a fine up to twice the gain from an offense or twice the loss caused by the offense, "unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process." Corporate defense counsel have often argued, publicly or during plea negotiations, that, if a case actually went to trial, the government would not be able to avail itself of the doubling provisions of the alternative fine statute because proving the amount of pecuniary gain or pecuniary loss caused by a price-fixing offense would "unduly complicate or prolong the sentencing process."

The AUO trial put this proposition to the test. In order to establish a basis for the fine it sought, the government had to prove to the jury, beyond a reasonable doubt, the amount of the pecuniary gain or loss. But rather than presenting evidence and argument asking the jury to determine the exact amount of the gain or loss derived from the offense, the government simply sought to prove that the total cumulative gain to members of the price-fixing conspiracy exceeded $500 million. In this way, the government sought to lay the groundwork for a fine of $1 billion.

The strategy, therefore, was to show that the illegal gain vastly exceeded $500 million, so that whatever the real number was, it was no less than $500 million. In its argument, for example, the prosecutors said things like the following:

- "For these six Crystal Meeting companies that attended the Crystal Meetings during this period, their sales totaled, we heard from Dr. Leffler, over $23 billion. . . . Dr. Leffler told you that the illegal gain to AUO, AUOA, and these five other participants combined was billions of dollars; more than $500 million. However, the Indictment does not require the Government to prove billions of dollars in overcharges here. It uses a far more conservative number. We only have to prove it is at least $500 million."

- "Dr. Leffler found a gain of almost $53 a panel, on average, during this conspiracy period. That's ten times the profit necessary for you to find overcharge beyond a reasonable doubt of at least $500 million. Now, I know some of this evidence on overcharge is a little complicated. It's complicated to me, but that's why I say that the $500 million or more charge in the Indictment is a very, very conservative number. It should be very, very, easy for you to return a verdict on that issue in this case in favor of the Government."

Through this approach, the government sought to take what could have been an extraordinarily complicated issue for the jury and turn it into a straightforward and simple task. In this, it succeeded brilliantly.

But the news was less bright for the government in another respect. A linchpin of the government's leniency program, in addition to the huge benefits from reporting violations under the amnesty and Amnesty Plus programs, has been the benefits to be had for "second-in-the-door" cooperation. That is, a company that was too late to be the leniency applicant could still get a lower fine and fewer executives going to prison if it pled guilty early and cooperated with the government in providing documents and testimony that could be used to convict other defendants. That program could be put at risk, however, if a company that refused to cooperate and ended up going to trial received a sentence no worse than that imposed on early cooperators. Based on government statements during the sentencing phase of the AUO trial, that scenario may be exactly what came to pass in that case.

As noted above, the government sought a fine of $1 billion. The probation office recommended $500 million, and the government strenuously opposed that recommendation. According to the Government's Reply Memorandum before Sentencing:

> A $500 million fine would represent a nearly 50 percent discount off of AUO's minimum Guidelines fine. That would be nearly the same discount as what LG earned for self-reporting and providing substantial cooperation over six years ago. . . . [I]t would also harm the Division's ability to properly incentivize self-reporting and timely cooperation in future cases.

Nonetheless, the sentencing judge, noting that businesses should not be punished to the point of no longer being able to supply the world with important products, followed the probation office recommendation and imposed a fine of only $500 million. The Department ultimately decided not to pursue an appeal of the sentence.

Potentially, the news could get even worse for the government. AUO has appealed both its conviction and the sentence. On the sentence, it argues that the alternative fine provision authorizes only a fine based on the illicit gain by the defendant, not the entire conspiracy. Since the government only put on evidence of what all the conspirators had gained from the conspiracy, not AUO's individual gain, AUO argues that it can only be sentenced to the statutory maximum of $100 million. Alternatively, it argues that if the fine is to be based on the gain of the entire conspiracy, then it should be offset by the fines already paid by the other conspirators. If this were done, the maximum fine AUO could pay would be $285 million. Needless to say, the government opposes both of these arguments. As of this writing, the United States had filed its brief as appellee, but appellants' reply briefs were not yet due, and a ruling is still some time off.

### *B. Toshiba*

#### *1. Toshiba Was the Only Company To Go To Trial Against the Direct Purchaser Plaintiff Class*

Toshiba was not indicted for its alleged role in the LCD conspiracy, but it was nonetheless included as a defendant in the private civil suit brought by the direct purchaser class. Rather than settle, it elected to go to trial. The jury trial lasted six weeks and included 21 days of live and videotaped testimony. Toshiba's defense rested largely on the fact that that it did not attend the Crystal Meetings. According to the defense, the conspiracy was among Korean and Taiwanese producers, and involved commodity products that Toshiba had stopped producing. Indeed, the defense contended that Toshiba was not even invited to participate. Moreover, even if Toshiba did participate by pricing consistently with the cartel, its pricing could not have affected the direct purchaser class, because all of Toshiba's customers had opted out of the class action in order to bring their own suits.

#### 2. *Documented Efforts To Conceal Were Very Harmful To Toshiba at Trial*

On the other side of the ledger was the fact that Toshiba regularly received information about the agreed price levels from individual conspirators and that this information appeared to guide Toshiba's own pricing. Probably the most damning evidence, however, was the fact that, as shown in the documents, Toshiba employees appeared to be conscious of the improper nature of their own conduct and made efforts to conceal that conduct. One document, for example, stated: "A 3-company meeting (back room bid-rigging) is dangerous, so if you are going to do it, of course the other parties' offices cannot be used, so please make sure you go to a location in which people from the industry will absolutely not come."

### 3. *Sometimes You Get Lucky, and Sometimes You Make Some of Your Own Luck*

The jury verdict against Toshiba turned out not to be much of a loss at all, however. The direct purchaser plaintiffs had sought damages of $867 million against Toshiba, before trebling. The jury, without explanation, found Toshiba liable for $87 million before trebling, or approximately 10% of what the plaintiffs had sought. Toshiba then moved to set off the damage award by the settlements already paid by other defendants. Since those settlements exceeded the amount for which Toshiba had been found liable, Toshiba argued that the result should be zero damages. Against that baseline, plaintiffs and Toshiba negotiated a posttrial settlement under which Toshiba agreed to pay $30 million in exchange for dismissal with prejudice and release of claims.

While the jury does not explain the reasons for its award, a reasonable guess is that it was moved by the showing of Toshiba's relative lack of culpability in comparison to other conspirators. The jury would not have known, of course, that its award, after set-off, could result in zero damages. In that sense, Toshiba was lucky, but it also created the opportunity for this result by presenting a fairly sympathetic case.

## IV. Extraterritoriality

Once upon a time, many countries objected to U.S. assertion of jurisdiction over conduct that took place abroad. Now, however, almost every country asserts extraterritorial jurisdiction over conduct abroad that has significant effects within the territory. In the United States, the standard for asserting jurisdiction is whether the conduct has a "direct, substantial and reasonably foreseeable effect" on U.S. domestic or import commerce. While there has been a great deal of litigation over exactly what those terms mean, there is no doubt that conduct taking place entirely within one country can be subject to jurisdiction in another country if the requisite effect is shown.

Some executives wonder whether, as a practical matter, they can actually be caught and punished, even if a country can properly assert the jurisdiction to declare certain conduct illegal. If the company has assets in the United States, of course, the assets can be seized to satisfy fines or judgments. The answer with respect to punishment of individuals is a bit more complicated. If an individual resides in a country that would not extradite the individual to the United States for an antitrust offense, the individual could become a fugitive and remain outside the United States. He or she will be placed on a border watch, and will be arrested if he or she tries to enter the United States. The Department of Justice will also place the individual on a "Red Notice" list maintained by the International Criminal Police Organization (INTERPOL), in effect requesting that other INTERPOL nations arrest the individual, with a view toward extradition, if the individual is found. These restrictions on travel are often significant burdens on the individual's personal life, and may also be impediments to the running of the company's business if travel to

the U.S. or to other countries that would respect the INTERPOL notice is important to the business. These considerations have sometimes led foreign company officials to come to the United States voluntarily to serve prison sentences for antitrust crimes.

## V. Foreign Sovereign Compulsion

Where a price-fixing arrangement is not a voluntary private act, but instead is compelled by a government, such compulsion may be a defense to antitrust liability. Such a defense is extremely difficult to establish, however.

### *A. Encouragement by the Government Is Not Enough*

Since 1940, it has been clear that mere encouragement by government officials is not sufficient to establish a defense against antitrust charges. The case that established this proposition, *United States v. Socony-Vacuum Oil Co.*,[12] grew out of the U.S. government's encouragement of cartels during the early part of the New Deal. Defendants argued, among other things, that the cartel had been encouraged by government officials. The Supreme Court gave that argument short shrift:

> As to knowledge or acquiescence of officers of the Federal Government little need be said. The fact that Congress through utilization of the precise methods here employed could seek to reach the same objectives sought by respondents does not mean that respondents or any other group may do so without specific Congressional authority.[13]

In the Vitamin C litigation, in which several Chinese Vitamin C manufacturers were charged with price-fixing, defendants argued that the polite requests and suggestions of the former government official who headed the Vitamin C trade association actually amounted to governmental commands, and that the apparent politeness of his requests merely reflected a cultural difference between the United States and China. This argument was not persuasive to the jury, which returned a verdict in favor of plaintiffs. In addition to reflecting an American tendency to take words at face value, this result probably reflected the natural inclination of a judge or jury to discount self-serving statements made by a party at trial. Defendants were probably also hurt by statements that the Chinese government had made to the WTO, indicating that it had ceased controlling exports, in accordance with its obligations under the WTO.

### *B. A Trade Association Is Not the Equivalent of a Governmental Entity*

In the United States, a trade association is a purely private undertaking. Because such associations almost invariably involve gatherings of competitors, they are a frequent target of

[12] 310 U.S. 150 (1940).
[13] *Id*. at 225.

antitrust scrutiny. As a result, most trade associations in the United States have developed fairly elaborate procedures to ensure that members avoid conduct that could be condemned under the antitrust laws.

The fact that trade associations are familiar entities in the United States, that they are purely private organizations, and that they never provide any kind of insulation from antitrust liability undoubtedly also worked against defendants in the Vitamin C litigation.

### C. *Private Suits Are a Threat Even If the US Government Stays Its Hand*

The Vitamin C litigation was a private lawsuit, brought as a class action on behalf of purchasers of vitamin C. Unlike most cartels, the alleged Vitamin C cartel was not prosecuted by the U.S. government. Because the government does not explain why it decides not to bring a case, it is difficult to know for certain whether the Department of Justice accepted the foreign sovereign compulsion defense and concluded there was no antitrust violation, whether it feared there was litigation risk in trying to defeat the foreign sovereign compulsion defense, whether it stayed its hand for foreign-policy reasons, or whether it was influenced by some combination of these or other factors.

But the Vitamin C litigation demonstrates that merely avoiding government prosecution is not sufficient to escape very substantial monetary liability, given the system of private lawsuits in the United States.

## VI. Conclusion: How to Prevent Problems, and What to Do If They Nonetheless Occur

U.S. antitrust lawyers frequently recommend to their clients that the clients institute an antitrust compliance program. In general, the client's immediate suspicion is that either (1) the lawyer, who may be a former U.S. government official, has forgotten that he no longer works for the government, or (2) that the lawyer is trying to pad the legal bill by recommending unnecessary services. The lawyer's advice in these situations, however, is more accurately described as an act of generosity, akin to dentists' drastically reducing the demand for their services by advocating regular tooth brushing, flossing, and the use of fluoride. In truth, compliance programs are a huge bargain if they prevent even a single antitrust violation. But even if they fail to prevent violations, they may uncover the existence of them early enough for the client to take advantage of leniency programs in the United States and (now) many other countries.

But what should a company do if it nonetheless finds itself the subject of an investigation? First, the mere fact that an investigation has begun does not mean that amnesty is no longer available. One of the big changes to the leniency programs in the mid-1990s was to make amnesty available to the first company to cooperate, even if an investigation has already begun, if the Antitrust Division does not yet have sufficient evidence to prove a violation. It is

relatively costless to contact the Antitrust Division to find out if amnesty is still available, but it must be done quickly. Second, even if amnesty is no longer available, the company may still be able to secure significant benefits from "second-in-the-door" cooperation. In order to determine whether that course makes sense, a rapid and thorough internal investigation is essential. The more quickly a client cooperates with its own lawyers to carry this out, the wider an array of options it will be able to preserve. Third, the company must resist the temptation to destroy documents. More harm has been done to companies and their employees by document destruction than could possibly have been done by the documents themselves. Finally, the company must be willing to face reality. Dealing with an antitrust investigation is expensive and burdensome, but it can be made cheaper and less burdensome by complete candor and full cooperation with the company's own lawyers. Those lawyers really are on your side, and communications with them really can be protected in the United States by the attorney-client privilege. Such cooperation makes it possible to make intelligent choices about courses of action early on in an investigation, before various options start to be foreclosed.

Although antitrust law can seem strange and intimidating at first, the risks can be minimized and managed with careful planning and appropriate legal advice.