

## The Volume of Commerce Enigma

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For more than ten years, the U.S. Department of Justice Antitrust Division has enjoyed a sustained period of astronomical fines against corporate antitrust defendants. Before 1994, the record for the largest corporate fine ever imposed for a single Sherman Act count stood at \$6 million.<sup>1</sup> Since 1995, there have been at least fifty-six Sherman Act violations yielding corporate fines of at least \$10 million, with eleven of those yielding fines of \$100 million or more.<sup>2</sup> In 1999, F. Hoffman-La Roche was fined \$500 million for its participation in the vitamins cartel, and the last few years have seen fines of \$300 million to Samsung, British Airways, and Korean Air.<sup>3</sup> More astronomical fines are surely on the horizon.

In large part, the Division's success in obtaining these huge fines is due to the alternative fine provision in 18 U.S.C. Section 3571, which arguably allows the Division to obtain fines in excess of the Sherman Act maximum—now \$100 million—up to “twice the gross gain or loss caused by the conspiracy.”<sup>4</sup> But while this statute and the Sherman Act define the uppermost limit for corporate fines, they do not prescribe the mechanism for determining the actual fine in any given case. For that, the Division uses the United States Sentencing Guidelines (USSG) in the same way today as it did before the Supreme Court's *Booker* decision, which made the USSG advisory.<sup>5</sup>

The fine calculation for corporations is a multi-step process. The first step is determining the “base fine.” USSG Section 2R1.1 sets the base fine at “20 percent of the volume of affected com-

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<sup>1</sup> Scott D. Hammond, Recent Developments, Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program, Speech Before the ABA Section of Antitrust Law Spring Meeting 12 (Mar. 26, 2008) [hereinafter Recent Developments], available at <http://www.usdoj.gov/atr/public/speeches/232716.pdf>.

<sup>2</sup> See Antitrust Division Chart of Sherman Act Violations Yielding a Corporate Fine of \$10 Million or More (listing fifty-six such violations between 1995 and August 2007) [hereinafter Antitrust Division Chart], available at <http://www.usdoj.gov/atr/public/criminal/225540.pdf>.

<sup>3</sup> See Press Release, U.S. Dep't of Justice, Samsung Agrees to Plead Guilty and to Pay \$300 Million Criminal Fine for Role in Price Fixing Conspiracy (Oct. 13, 2005), available at [http://www.usdoj.gov/atr/public/press\\_releases/2005/212002.pdf](http://www.usdoj.gov/atr/public/press_releases/2005/212002.pdf); Press Release, U.S. Dep't of Justice, British Airways Plc And Korean Air Lines Co. Ltd. Agree to Plead Guilty and Pay Criminal Fines Totaling \$600 Million for Fixing Prices on Passenger and Cargo Flights (Aug. 1, 2007), available at [http://www.usdoj.gov/opa/pr/2007/August/07\\_at\\_569.html](http://www.usdoj.gov/opa/pr/2007/August/07_at_569.html).

<sup>4</sup> See Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 215, 118 Stat. 665, 668 (2004); Hammond, Recent Developments, *supra* note 1, at 1–2 (noting the year 2007 as having generated the second highest total annual fines).

We say “arguably” because the Division's right to get fines in excess of the Sherman Act statutory maximum has never been legally tested. There are substantial arguments and some precedent for the position that the statutory maximum should trump the Division's efforts to use the Alternative Sentencing Provisions. See Tefft W. Smith, James H. Mutchnik & Scott M. Abeles, *Finding the Right Price*, LEGAL TIMES, Dec. 15, 2003, at 32; Tefft W. Smith, James H. Mutchnik & Scott M. Abeles, *Harder to Prosecute?*, LEGAL TIMES, July 12, 2004.

<sup>5</sup> See *United States v. Booker*, 543 U.S. 220 (2005); see also *Kimbrough v. United States*, 128 S. Ct. 558, 564 (2007) (“In accord with 18 U.S.C. § 3553(a), the Guidelines, formerly mandatory, now serve as one factor among several courts must consider in determining an appropriate sentence.”); Scott D. Hammond, Testimony Before the United States Sentencing Commission Concerning Proposed 2005 Amendments to § 2R1.1 at 3 (Apr. 12, 2005, available at <http://www.usdoj.gov/atr/public/testimony/208546.pdf>) (“*Booker* certainly has raised a number of issues concerning the federal sentencing process and the Sentencing Guidelines, but questioning the fundamental soundness of the Guidelines themselves or the Commission's practices regarding promulgating and amending the Guidelines are not among them.”).

merce.” After the base fine is set, the sentencing court determines minimum and maximum “multipliers”—numbers between 0.75 and 4.0—that are generated by reference to a “culpability score.”<sup>6</sup> A “fine range” is then calculated by multiplying the “base fine” by the “multipliers.”<sup>7</sup>

Given that the starting point of the fine calculation is determined entirely by the “volume of affected commerce” (VOC) concept, one might expect this to be a carefully defined term in the USSG, in policy statements from the Division, or in case precedent. In fact, however, the USSG and its commentary do not offer any explanation of how to calculate the VOC, other than to note in Section 2R1.1 that “the volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in goods or services that were affected by the violation.” Likewise, the Division has given scant guidance, while the case law is scarce and inconsistent.

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The absence of *any* definition of VOC, much less a precise one, is puzzling. The concept of VOC is not self-evident, especially in the context of a globally integrating international economy. According to the Division, “[i]nternational cartel investigations account for over 40% of the Division’s grand jury investigations.”<sup>8</sup> More importantly, a vast majority (52 out of 56) of the Sherman Act violations producing the biggest fines involve international cartels, and most (46 out of 56) corporate defendants in those cases are foreign.<sup>9</sup>

The Division’s efforts to clarify the meaning of VOC as applied to international cartels and foreign defendants are not sufficient. In a 2008 panel program on this issue—transparency in the VOC calculation—the DOJ explained its complex methodology for calculating VOC in its high-profile air cargo cartel investigation. This explanation came some seven months after the Division announced the first plea agreement with an air cargo cartel participant. Moreover, it appears that the air cargo “methodology” was chosen because it produced a VOC calculation that the Division and the first pleading carrier could agree upon. Thus, its general applicability is limited by its ad-hoc genesis.

For defendants caught up in international cartels, anticipating the Division’s calculation of VOC remains a difficult task. This lack of transparency, and the aggressive positions taken by the Division on the issue, cause companies to be reluctant to cooperate with the Division and negotiate a plea agreement. As a result, the lack of clarity as to what does or does not constitute VOC is a disservice to those defendants and to the Division.

### **Courts Have Not Allowed the Division Free Reign in Calculating VOC**

To this point, VOC has not been an extensively litigated concept, and, as a result, there are very few cases addressing VOC. However, the courts that have taken up the issue have grappled with the question of what the Division must prove to include a sale within VOC.

On one end of the spectrum, in *Hayter Oil* the Sixth Circuit permitted a presumption that “affected” commerce was all sales “during the period of the conspiracy, without regard to whether individual sales were made at the target price.”<sup>10</sup> *Hayter Oil* has been criticized by a number of com-

<sup>6</sup> See USSG § 8C2.6; see also *id.* § 8C2.5 (determining culpability score by several factors, including the extent and level of involvement of certain corporate executives, the corporation’s past antitrust history, and the corporation’s cooperation with the investigation).

<sup>7</sup> See USSG § 8C2.7.

<sup>8</sup> Hammond, Recent Developments, *supra* note 1, at 17.

<sup>9</sup> See Antitrust Division Chart, *supra* note 2.

<sup>10</sup> *United States v. Hayter Oil Co.*, 51 F.3d 1265, 1273 (6th Cir. 1995).

mentators,<sup>11</sup> and the Second Circuit, in *United States v. SKW Metals & Alloys, Inc.*, rejected its expansive approach, explaining that “a price-fixing conspiracy that fails to influence market transactions, notwithstanding overt acts sufficient to support criminal responsibility has affected no sales within the meaning of the Guidelines.”<sup>12</sup> For instance, “[i]f the conspiracy was a non-starter, or if during the course of the conspiracy there were intervals when the illegal agreement was ineffectual and had no effect or influence on prices, then sales in those intervals are not ‘affected by’ the illegal agreement, and should be excluded from the volume of commerce calculation.”<sup>13</sup> *SKW Metals* thus stands for the proposition that only sales above the market price (whether or not at or above the conspirators’ target price) should be included in VOC.

The Seventh Circuit, in *United States v. Andreas*,<sup>14</sup> preserved *SKW*’s focus on the Government’s burden to prove an affect on commerce. Noting that “the purpose of the § 2R1.1 enhancement is to gauge the harm inflicted by the illegal agreement,” the *Andreas* court concluded that “sales that were entirely unaffected did not harm consumers and therefore should not be counted for sentencing because they would not reflect the scale or scope of the offense.”<sup>15</sup> However, the court also observed that “few if any factors in the world of economics can be held in strict isolation,” so “the presumption must be that all sales during the period of the conspiracy have been affected by the illegal agreement.”<sup>16</sup> This presumption is, of course, a rebuttable one, and the government bears the ultimate burden of proof.<sup>17</sup>

One element common to all three of these cases, however, is that only sales within the United States were counted within the VOC calculation. Thus, the conclusions to be drawn from the scant available case law are that—even before *Booker*—the courts were searching for the right burden to place on the government for proving VOC, and the balance of authority required the Division to prove an effect on the sales to begin to calculate the VOC. In a post-*Booker* world where the government must prove sentencing factors by at least a preponderance of the evidence, we believe that, if put to the test, the Division will have to prove not just that its requested VOC was “affected” by the conspiracy, but that the sales sought to be included within VOC actually fall within the jurisdictional reach of the Sherman Act.

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<sup>11</sup> See, e.g., Henry D. Fincher, *Fining The Market: The Bumbling Price-Fixer and the Antitrust Guideline*, 8 FED. SENT. R. 244 (1996); Anne Marie Herron, *The Antitrust Sentencing Guideline: Deterring Crime by Clarifying the Volume of Commerce Muddle*, 51 EMORY L.J. 929, 945–48 (2002).

<sup>12</sup> *United States v. SKW Metals & Alloys, Inc.*, 195 F.3d 83, 91 (2d Cir. 1999).

<sup>13</sup> *Id.* at 91.

<sup>14</sup> *United States v. Andreas*, 216 F.3d 645 (7th Cir. 2000).

<sup>15</sup> *Id.* at 677–78.

<sup>16</sup> *Id.* at 678.

<sup>17</sup> Other commentators have in the past looked upon the *Andreas* formulation approvingly (see Herron, *supra* note 11, at 953), and we note here that it is likely the most consistent with the Supreme Court’s recent opinion in *Rita*, which held that a district court is entitled to attach a rebuttable presumption of reasonableness to sentences imposed within the applicable Guidelines’ range. See *Rita v. United States*, 127 S. Ct. 2456 (2007) (reasoning that a rebuttable presumption is not binding and does not infringe on the right to a jury). Indeed, the DOJ acknowledged in the DRAM cases that certain sales may not be included in VOC, even if those sales took place during the period of the conspiracy. In the *Hynix Semiconductor Inc.* case, for instance, the joint sentencing memorandum states that “[b]ecause of factors unique to Hynix, th[e] volume of commerce calculation excludes commerce during the 14-month period October 2000 through November 2001,” even though the period of the conspiracy was April 1999 through June 2002. Sentencing Memorandum at 3, 5, *United States v. Hynix Semiconductor Inc.*, No. CR 05-249 (PJH) (N.D. Cal. May 4, 2005). The DRAM “price war” credits within the charged conspiracy period suggest that the *Andreas* presumption was either ignored or the DRAM defendants that received the credit overcame the presumption. We are left to guess without specific guidance from the parties or the DOJ.

### Division Guidance Focuses on Domestic Commerce

In line with these considerations, in 1999, the Division's then chief of criminal enforcement, Gary Spratling, announced that the Antitrust Division "will normally use the volume of *U.S. commerce* affected by the defendant's participation in a conspiracy when calculating that defendant's Sentencing Guidelines' fine range."<sup>18</sup> Consistent with this announcement, in 2002, the U.S. Government filed an amicus brief on petition for certiorari in *Statoil ASA v. Heeremac V.O.F.*, stating that "[i]t is the policy of the United States to calculate the Base Fine by using *only the domestic commerce* affected by the illegal scheme, and in all but two of the dozens of international cartel cases prosecuted, fines obtained by the government were based *solely on domestic commerce*."<sup>19</sup>

More recently, the Division asserted that "domestic sales" should be used to calculate VOC for purposes of setting the fine range, but that foreign sales can be considered to determine the exact level of the fine within that range. The Division's position is that in circumstances where 20 percent of domestic sales would understate the impact of a defendant's conduct on U.S. victims, "the Division has used foreign sales only as an aggravating factor requiring an increase in the fine."<sup>20</sup> Implicit in these policy pronouncements is a recognition by the Division that foreign sales are not commerce within its jurisdiction to regulate, which is a necessary position for the Division in light of other countries' competition laws.

With this precedent, we would expect the consensus position to be that only domestic sales be counted. Unfortunately, as many of the practitioners who have faced this issue in international cartel cases have recognized, there is no consensus. That is because, as with most things, the devil is in the details. Precisely what constitutes "U.S." or "domestic" commerce is a constant struggle between defense lawyers and the Division.

**What Constitutes "Domestic Commerce" Is Unclear.** To illustrate the potential ambiguities of VOC under the Sherman Act, consider a foreign widget manufacturer with a U.S. sales division that is responsible for selling to consumers throughout North and South America. The foreign manufacturer makes the widgets, which it transfers to its sales division in a nominal "sale" at a pre-arranged and consistent transfer price, set primarily for tax and internal accounting allocation purposes. The sales division then re-sells the widgets to end users throughout the Americas and, in doing so, books its own profit—calculated as the contract or transaction price over the transfer price "paid" by the sales division in the intra-company transaction.

To complicate things further, one can easily conjure up a host of other variables:

- Perhaps the domestic selling entity is not a division, but a wholly-owned subsidiary of the foreign manufacturer.
- Perhaps the customer's purchase order issues from a U.S. affiliate but the product is to be shipped to a South American subsidiary.

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<sup>18</sup> Gary R. Spratling, Negotiating the Waters of International Cartel Prosecutions: Antitrust Division Policies Relating to Plea Agreements in International Cases, Speech Before the 13th Annual National Institute on White Collar Crime 18 (Mar. 4, 1999), available at <http://www.usdoj.gov/atr/public/speeches/2275.pdf> (emphasis added).

<sup>19</sup> No. 00-1842, 2002 WL 32157022 (Jan. 3, 2002) (emphasis added).

<sup>20</sup> See Scott D. Hammond, Charting New Waters in International Cartel Prosecutions, Speech Before the Twentieth Annual National Institute on White Collar Crime 14–15 n.28 (Mar. 2, 2006), available at <http://www.usdoj.gov/atr/public/speeches/214861.pdf>. For two cases in which the Division has used worldwide sales as an aggravating factor, see *Statoil ASA v. Heeremac V.O.F.*, No. 00-1842, 2002 WL 32157022 (Jan. 3, 2002), and *United States v. Roquette Freres*, Crim. No. CR 97-00356 (N.D. Cal. 1997).

- Perhaps some of the sales documents are negotiated and signed in a foreign country, while others are consummated in the United States.
- Perhaps some of the widgets are shipped directly from the foreign manufacturer to the South American end-users, never touching U.S. soil, while others are briefly stored in the sales division's domestic warehouse.

What combination of elements results in sales that should be factored into the foreign defendant's VOC? Potentially relevant factors may include: (1) location of, and relationships between, the manufacturing and sales arms of the defendant; (2) location of, and relationships between, the purchasing and end-user branches of the buyer; (3) location of the invoiced entity; (4) location of the bank accounts to and from which money is transferred in the transaction; (5) location of contract negotiations and signing; and (6) physical transfer of the product, including entry of the product into the United States.<sup>21</sup> The relative weight, if any, of these factors has never been articulated by the Division.

The Division's recent plea agreement with Qantas—stemming from the Division's Air Cargo investigation—is a recent example of the confusion. According to the agreement, “[t]he volume of affected commerce [\$244.4 million] does not include commerce related to the defendant's cargo shipments on routes into the United States.”<sup>22</sup> That is not to say that the Division agreed with Qantas's “position that any agreements reached with competitors with respect to cargo shipments on routes into the United States should not be included in the defendant's volume of affected commerce calculation.”<sup>23</sup> To the contrary, the Division argued “that a Guidelines fine calculation that fails to account for cargo shipments into the United States affected by the conspiracy charged in the Information would understate the seriousness of, and the harm caused to U.S. victims by, the offense and would not provide just punishment.”<sup>24</sup>

Despite its stated position, the Division ultimately accepted a definition of VOC—and thus a base fine—according to the defendant's methodology. Strangely, the Division accepted a VOC definition with which it does not agree because of the “complexity of litigating the issues.”

The Division recently explained its approach to air cargo VOC at the 2008 ABA Antitrust Law Section Spring Meeting. The Deputy Assistant Attorney General in charge of the Division's criminal enforcement regime, Scott Hammond, while participating on a panel program entitled “Sentencing Issues in Today's Global Economy” with one of the authors of this article, made transparent what we could only surmise from *Qantas* and the other air cargo convictions. Mr. Hammond's comments, in our opinion, however, only highlight the ad-hoc, case-specific approach to determining VOC that might be useful to the subjects of that investigation, but to few others.

Mr. Hammond confirmed that the Division (and the cargo defendants) agreed VOC would include only U.S. outbound shipments. The reason, although not entirely clear, appears to be that outbound shipments were what the Division and the defendants thought were most closely within the Division's jurisdictional reach. Yet, contracting for air cargo services is a complex, Byzantine system, where middlemen (called freight forwarders) sit between the carrier and the person looking to move his or her goods from Point A to Point B. The questions arising from the Division's

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<sup>21</sup> This list is not intended to be exhaustive. Indeed, the point is that, in today's complex global economy, the list of *potentially* relevant factors is nearly limitless. It is therefore all the more important that *actually* relevant factors be defined.

<sup>22</sup> Plea Agreement at 7, *United States v. Qantas Airways Ltd.*, No. 07-322 (D.D.C. Jan. 14, 2008).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 7–8.

“choice” for calculating VOC in the air cargo cases are numerous: Which flights are imports, exports, or purely domestic commerce, and how does that impact the VOC determination? Should we assume from Qantas that to be included in the VOC calculation the sale must originate in the United States? Was it the location of the customer/purchaser that mattered? Was *Qantas* a “wheels up” or “wheels down” approach?

To explain what really went on with the *Qantas* plea, Mr. Hammond took the opportunity at the ABA Spring Meeting to publicly set forth the following complex methodology for the treatment of in-bound shipments as an “aggravating factor” necessitating an upward adjustment:

In calculating the upward adjustment, the Division considered the company’s revenue from cartelized U.S. inbound shipments. In this [hypothetical] example, U.S. inbound commerce represents 57% of the company’s total U.S. inbound and outbound commerce. Rounding downward, the Division used the midpoint (50%) of the Guidelines fine range as the starting point . . .<sup>25</sup>

*[T]he Division could explain which factors it believes to be most relevant to determining whether a particular transaction may be included within the VOC determination.*

Thus, in that example, the Division’s VOC and sentencing method looked like this:

Minimum Guideline Fine (outbound only)	\$168 million
50% Upward Adjustment for Harm to U.S. Inbound	\$84 million
Fine before Cooperation Discount	\$252 million
Subtract 30% Cooperation Discount	(\$76 million)
<b>Total Fine</b>	<b>\$176 million</b>

Mr. Hammond’s transparency with respect to the air cargo VOC and sentencing “methodology,” though admirable, is limited; it exists as a “methodology” only because the first carrier to plead guilty thought it was a good deal. The point remains that the VOC-derived base fine in *Qantas* was computed solely on outbound U.S. cargo flights, using inbound flights as an aggravating factor, and that the Division has produced little guidance as to why that is the correct approach. Left unexplained is the rule, law, or even policy support for it. The Division will follow that methodology in subsequent air cargo plea agreements because of its success with it in this case. The problem is that it may not help in other matters.

What is needed is clear, generally applicable guidance from the Division on the subject. The ABA Spring Meeting panel discussion on VOC was an important step in the right direction. More is needed: The Division should publicly state the factors it believes are most significant in assessing whether a transaction falls within VOC and clarify the jurisdictional basis for calculating VOC in international cartel cases. While prospectively providing definitive answers in light of the highly variable factual scenarios is not possible, the Division could explain which factors it believes to be most relevant to determining whether a particular transaction may be included within the VOC determination.

If the Division cannot provide such guidance, the alternative—that the VOC calculation will remain a free-for-all, with every case *sui generis*—should be acknowledged. To date, the Division has allowed itself the flexibility to assert different positions in different cases without acknowledging any inconsistencies. This has cast a shadow on the transparency of the plea-negotiation process and has led to inconsistent results—results based in part on international, if not “foreign” commerce, despite the Division’s public statements to the contrary.

<sup>25</sup> Scott D. Hammond, Sentencing Issues in Today’s Global Economy, Speech Before the ABA Section of Antitrust Law (Mar. 26, 2008).

In setting forth the factors for determining the VOC in its cases, the Division needs to be mindful that the reach of the Sherman Act, as established in *Empagran*, does not extend to injury only to markets beyond our borders. We offer some proposals for how to approach factors to be used in calculating VOC.

**VOC Must Take into Account the Division's U.S. Jurisdiction, as Well as Comity Among the Ever-Increasing Number of Nations that Enforce Competition Laws.** The landmark *Empagran* case set significant limits on the jurisdictional reach of the Sherman Act in cases involving international cartels and therefore necessarily limits the potential scope of VOC as well.<sup>26</sup> At issue in *Empagran* was the interpretation of the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA),<sup>27</sup> which defines the jurisdictional boundaries of the Sherman Act in cases involving international trade or commerce. As explained by the *Empagran* Court, “[t]he FTAIA seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements (say, joint-selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets.”<sup>28</sup>

One of the principal grounds for the *Empagran* Court's decision was comity.<sup>29</sup> The Court first noted that “[n]o one denies that America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial affairs.”<sup>30</sup> Such interference, the Court explained, could be justified to the extent that foreign anticompetitive conduct causes domestic injury.<sup>31</sup> “But why,” the Court asked, “is it reasonable to apply [U.S. antitrust] laws to foreign conduct *insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?*”<sup>32</sup> The Court could find no good answer, and so held that the Sherman Act should be construed not to cover solely foreign injuries.<sup>33</sup> These same concepts apply in the criminal context and manifest themselves perhaps most directly in the calculation of VOC.

In an international cartel case, the defendant's U.S. fine will not exist in a vacuum, especially given the current landscape of sharply escalating foreign enforcement. The European Commission's fines for conduct affecting Europe are now frequently larger than U.S. fines.<sup>34</sup> Countries in Asia and Oceania, plus Canada, have increased their maximum fines.<sup>35</sup> And recently, Brazil has become an active enforcer. Indeed, as the Division has recognized:

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 commu-

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<sup>26</sup> *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

<sup>27</sup> 15 U.S.C. § 6a.

<sup>28</sup> *Empagran*, 542 U.S. at 161.

<sup>29</sup> *See id.* at 164 (holding that statutes must be construed “to avoid unreasonable interference with the sovereign authority of other nations”); *see also id.* at 169–73 (holding that another basis for its decision was that the Sherman Act had never before been applied to redress foreign injury).

<sup>30</sup> *Id.* at 165.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 166.

<sup>34</sup> *See, e.g.*, Press Release, European Commission, Competition: Commission Fines Members of Lifts and Escalators Cartels over 990 million (Feb. 21, 2007), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/209&format=HTML>; Press Release, European Commission, Competition: Commission Fines Members of Gas Insulated Switchgear Cartel over 750 Million Euros (Jan. 24, 2007), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/80&format=HTML&aged=0&language=EN&guiLanguage=en>.

<sup>35</sup> Hammond, Charting New Waters, *supra* note 20, at 2.

nity learns of a foreign government that has enacted a new antitrust law, created a new cartel investigative unit, or obtained a record antitrust penalty.<sup>36</sup>

To the extent that the Division's VOC calculations would sweep in commerce attributable to the countries that are now actively enforcing competition laws, defendants run the risk of paying portions of multiple fines that are based on the same underlying sales. Beyond this "double counting" issue, foreign nations understandably bristle against the notion that the United States applies its antitrust laws to commerce occurring within their borders, or affecting their citizens and companies.<sup>37</sup> In light of all this, the *Empagran* Court's concern for comity among nations seems all the more relevant, and all the more applicable to the proper measure of VOC.

Consistent with the notion of comity, an approach for determining U.S. commerce should focus, as a starting point, on the nationality and residency of the affected customers. And in line with this guiding principle, an approach that considers only U.S. customers taking delivery in the United States can already be found in Division precedent. For example, in 2005, in the DRAM cases, the Division consistently agreed to calculate defendants' VOC by aggregating sales to original equipment manufacturers (OEMs) actually located and taking delivery in the United States.<sup>38</sup> Similarly, during the *Hydrogen Peroxide* investigation in 2006, the Division based VOC on sales within the United States. In the plea agreement for *United States v. Solvay S.A.*,<sup>39</sup> the Division explained that the basis for Solvay's VOC was its sales to U.S. customers.<sup>40</sup> Likewise, in the plea agreement for *United States v. Akzo Nobel Chemicals Int'l B.V.*,<sup>41</sup> the Division explained that Akzo Nobel's VOC was based upon sales to "U.S. customers."

The *Chloroprene Rubber* case in 2005 led to the Division's filing a plea agreement in *United States v. Dupont Dow Elastomers, LLC*,<sup>42</sup> in which the Division again calculated VOC based on sales to "U.S. Customers." And the *Fine Art Auction* case in 2004, the plea agreement and sentencing memorandum in *United States v. Sotheby's Holdings, Inc.*,<sup>43</sup> indicate that VOC was based on commissions made on auction sales in the United States. This was true even though the defendant participated in an international conspiracy involving worldwide sales over \$11.6 billion during the relevant time.

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<sup>36</sup> *Id.*

<sup>37</sup> For instance, the governments of Germany, Belgium, Canada, Japan, the UK, Ireland, and the Netherlands all filed briefs as amicus curiae in *Empagran*, arguing against U.S. interference in the antitrust regulation of sovereign nations.

<sup>38</sup> See Joint Sentencing Memorandum at 3, *United States v. Samsung Elec. Co.*, No. CR 05-0643 (PJH) (N.D. Cal. Nov. 22, 2005), available at <http://www.usdoj.gov/atr/cases/samsung.htm> ("During the relevant period, Samsung's DRAM sales, directly affected by the conspiracy, to OEMs in the United States totaled \$1.2 billion."); Plea Agreement at 3-4, *United States v. Elpida Memory, Inc.*, No. CR 06-0059 (PJH) (N.D. Cal. Mar. 22, 2006), available at <http://www.usdoj.gov/atr/cases/elpida.htm> ("During the Relevant Period, the DRAM sales made by Defendant, and its Corporate Founders, directly affected by the conspiracy, to OEMs in the United States totaled \$425 million in the aggregate."); Plea Agreement at 3, *United States v. Hynix Semiconductor Inc.*, No. CR 05-249 (PJH) (N.D. Cal. May 11, 2005), available at <http://www.usdoj.gov/atr/cases/hynix.htm> ("During the relevant period, Hynix's DRAM sales, directly affected by the conspiracy, to OEMs in the United States totaled \$839 million."); Joint Sentencing Memorandum at 3, *United States v. Infineon Tech. AG*, No. 04-299 (PJH) (N.D. Cal. Oct. 8, 2004) ("During the relevant period, Infineon's DRAM sales, directly affected by the conspiracy, to OEMs in the United States totaled \$1.05 billion.").

<sup>39</sup> No. CR 06-0159 (N.D. Cal. Apr. 20, 2006), available at <http://www.usdoj.gov/atr/cases/f216000/216082.htm>.

<sup>40</sup> Available at <http://www.usdoj.gov/atr/cases/solvay.htm> (emphasis added).

<sup>41</sup> No. CR 06-0160 (N.D. Cal. May 17, 2006), available at <http://www.usdoj.gov/atr/cases/f216300/216369.htm>.

<sup>42</sup> No. 05-0036 (MHP) (N.D. Cal. Mar. 29, 2005), available at <http://www.usdoj.gov/atr/cases/f209200/209230.htm>.

<sup>43</sup> No. 1081 (LAK) (S.D.N.Y. 2004).

The trial of Mitsubishi stemming from the Graphite Electrodes investigation resulted in a similar calculation methodology. Having obtained a conviction, the Division's Sentencing Memorandum in support of its joint sentencing recommendation calculated the portion of Mitsubishi's fine stemming from its role as a sales agent of Tokai Carbon by looking to the "only United States customer during the duration of the conspiracy."<sup>44</sup> Thus, even after a successful trial, the Division sought to impose a fine on Mitsubishi based only on sales to U.S. customers.

Finally, the Division recently re-emphasized its focus on sales to U.S. purchasers in a press release related to air cargo conspiracy plea agreements. On August 1, 2007, Associate Attorney General William W. Mercer stated that the Division's current investigative and prosecutorial focus is to "ensure that *American consumers and businesses* are not harmed by illegal cartel activities" and that "*American consumers and businesses*" won't "pick[] up the tab."<sup>45</sup>

All of this illustrates to us that the DOJ has already taken the position in its plea agreements that its conception of domestic commerce uses the nationality and residency of the affected customers as a touchstone for determining the issue. Publicly stating that is the case, following that position consistently in plea negotiations, and articulating other relevant factors the Division considers is appropriate, long overdue, and, put simply, the right thing to do.

In doing so, the Division should enumerate the factors that will lead to enhancement or reduction of the VOC calculation. In terms of the variables listed above, the end-user focus dictated by jurisdictional and comity considerations leads to the following conclusions:

- The nationality, residence, and internal structure of the defendant are relevant factors, but should not conclusively determine whether the defendant's actions harmed domestic commerce.
- By contrast, the location of, and relationships between, the purchasing and end-user branches of the buyer should be of greater critical consequence. The fact that the transaction touched the United States in a nominal way does not mean that domestic commerce was affected. Where, for example, a foreign purchaser uses a U.S.-based purchasing entity, the invoiced entity and the end-user will be different, and the invoiced entity may be from the United States. Because the end-user of the product is foreign, the sale should be treated as a foreign sale.
- Location of contract negotiations and signing should be of very little consequence. In today's global marketplace, contract negotiations can take place at the location of the seller, the location of the end-user, some other location, over the phone, and on-line. Where the contract of sale is negotiated says little, if anything, about whose consumers were harmed by anticompetitive pricing.
- Physical transfer of the product should serve as powerful evidence of the end-user's location. If products touch U.S. soil and title is considered to transfer then, a rebuttable presumption might arise that the sale affected domestic commerce. By contrast, products that never touch U.S. soil cannot fall into the hands of a domestic end-user, and so should not affect domestic commerce. Accordingly, a *conclusive* presumption should then arise that the sale did not affect domestic commerce, and so should not be included in VOC.

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<sup>44</sup> Sentencing Memorandum of the United States at 4, *United States v. Mitsubishi Corp.*, No. 00-033 (MK) (E.D. Pa. Apr. 19, 2001), available at <http://www.usdoj.gov/atr/cases/indx216.htm>.

<sup>45</sup> See DOJ Press Release, *supra* note 3 (emphases added).

### The Necessity and Benefits of Transparency and Certainty

Certainly, getting to the “right” answer to the VOC enigma is a noble goal. Even more important, however, is that the Division generate a consistent answer, and in a transparent manner. That is, the Division should articulate the factors that will enter into its determination of which sales will be included in VOC where the defendant is a participant in a worldwide antitrust conspiracy. Doing so would serve not only the fairness interests of antitrust defendants, but also the deterrence and enforcement initiatives of the Division.

First, a lack of certainty and transparency in the calculation of VOC—which in turn creates a lack of transparency in sentencing—is unfair to antitrust defendants. Such unfairness is a risk to the Division as much as it is a concern to defendants. In the wake of the recent opinions in *Gall v. United States*,<sup>46</sup> and *Kimbrough v. United States*,<sup>47</sup> in which the Supreme Court reinforced the wide latitude judges have to depart downward from the sentence calculations of the USSG, district courts have a clear mandate to reduce sentences they perceive to have been arrived at in an arbitrary manner.

Second, certainty and transparency are essential to accomplish the deterrence goals of criminal sentencing. As the Comments to USSG Section 2R1.1 explain, “Tying the offense level to the scale or scope of the offense is important in order to ensure that the sanction is in fact punitive and that there is an incentive to desist from a violation once it has begun.” An antitrust conspirator that knows precisely what type of sales will lead to an increased fine has a strong incentive to cease such sales. By contrast, unclear standards as to VOC may lead to over- or under-deterrence of anticompetitive conduct as defendants struggle to distinguish harmful from harmless conduct.

Third, as the Division has long recognized, a transparent process encourages “[p]rospective cooperating parties [to] come forward in direct proportion to the predictability and certainty of their treatment following cooperation.”<sup>48</sup> Thus, transparency is critical to the success of the Division’s Corporate Leniency Program, which depends on the cooperation of defendants. Refining VOC standards will further the Division’s priority of enacting “transparent policies on sentencing and calculating fines” to encourage cooperation.<sup>49</sup>

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Whatever the factors—and we have listed several potential considerations—guidance and some ground rules the Division will follow to decide the issue are needed. Manipulation of VOC and VOC determinations made on an ad hoc basis do not further the Division’s long-term goals of a transparent process, nor do they allow the defense practitioner to counsel with sufficient clarity.

In the event that the Division simply cannot, or will not, resolve the outstanding VOC controversy, it should acknowledge as much. At least such an announcement would achieve minimal transparency, and put the antitrust bar on notice that VOC will be an issue calling for advocacy in each and every case. ●

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<sup>46</sup> 128 S. Ct. 586 (2007).

<sup>47</sup> 128 S. Ct. 558 (2007).

<sup>48</sup> Gary R. Sprattling, Transparency in Enforcement Maximizes Cooperation from Antitrust Offenders, Speech Before Fordham University Law Institute 26th Annual Conference on International Antitrust Law & Policy 1 (Oct. 15, 1999), available at <http://www.usdoj.gov/atr/public/speeches/3952.pdf>.

<sup>49</sup> See Scott D. Hammond, Cornerstones of an Effective Leniency Program, Speech Before the ICN Workshop on Leniency Programs 18 (Nov. 22–23, 2004), available at <http://www.usdoj.gov/atr/public/speeches/206611.pdf> (listing transparency as one of the three hallmarks of an effective leniency program); see also Sprattling, *supra* note 48, at 7.