Westlaw Journal
ANTITRUST
Litigation News and Analysis • Legislation • Regulation • Expert Commentary
VOLUME 23, ISSUE 5 / SEPTEMBER 2015

EXPERT ANALYSIS

The Impact of Cross-Border Cartel Enforcement Challenges Confronting the United States on the Americas

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As cartel investigations become increasingly global, competition authorities around the world face a common challenge: how to effectively prosecute foreign actors whose criminal conduct affects their soil.

The United States, the world's leading cartel enforcer, is losing the battle to prosecute foreign individuals because it has limited ability to pursue them abroad. As emerging countries in the Americas and elsewhere seek to build up their cartel enforcement laws, they should arm themselves with the legal and practical tools the United States lacks to reach wrongdoers abroad.

In recent years, the Americas have increasingly voiced their commitment to cracking down on cartel conduct by adopting new competition laws or strengthening existing ones. The strength of those laws, and whether those countries exercise them to their fullest extent, has not always matched the rhetoric.

Canada has long been active in international cartel enforcement, but it has taken a backseat to the United States and secured fewer corporate fines and guilty pleas. Brazil has shown signs of becoming more active on enforcement in Latin America since its adoption of stronger laws in 2012.

While these changes are significant, Brazil continues to be reactive rather than proactive in its investigations. It is also hampered by inefficient procedures that drag proceedings on for years. For the rest of Latin America, antitrust cartel enforcement is not yet a reality. Most of these countries have — at most — a skeletal program in place, and some have no competition laws at all. Few have initiated cartel investigations with implications beyond their own borders.

The increasingly global nature of cartel investigations poses a true test of American countries' cartel enforcement capabilities. These complex, international investigations require countries to bridge the gap of disparate competition laws to collect evidence across borders and bring individuals abroad to justice.

As Canada, Brazil and other countries in the Americas take part in future international cartel investigations, they should note the significant challenges facing the world's most established cartel enforcer: the United States.

Although U.S. antitrust laws have broad extraterritorial reach, practical constraints limit the United States' ability to gather evidence abroad. The United States also faces diplomatic challenges in extraditing individuals charged with antitrust violations, thus limiting its ability to prosecute foreign cartel conduct. As the Americas become more engaged in international cartel investigations, these countries will face similar challenges if they too seek extraterritorial application of their laws.

CARTEL ENFORCEMENT IN THE AMERICAS

United States: Increasing challenges

The United States has long played a leadership role in cartel enforcement. United States law criminalizes cartel conduct of both companies and individuals, and it imposes steep penalties violations. Companies may be fined up to $100 million, or twice the gain or loss realized by the conspiracy. Individuals face up to 10 years in prison and a $1 million fine.

The U.S. Department of Justice has increased its focus on international cartels, and it has coordinated efforts with the European Union and other jurisdictions to investigate cartel activity in the air cargo, freight forwarding and auto parts industries. The collaboration involves coordinated dawn raids and information-sharing through mutual assistance agreements.

In 2014 the DOJ extracted $1.3 billion in corporate criminal fines. Most were related to international cartel investigations of the auto parts industry and Libor interest rate manipulation schemes.

Libor refers to the London Interbank Offered Rate, a common benchmark used to make adjustments to rates for loans.

Notwithstanding the DOJ's success in securing significant corporate fines, it has faced growing challenges in pursuing the increasing number of prosecution targets who reside beyond United States jurisdiction.

The increasingly global nature of cartel investigations poses a true test of American countries' cartel enforcement capabilities.

In 2014, only 12 individuals were sentenced to jail time for their involvement in international cartel conduct, which is down from 28 in 2013. The DOJ also has dozens of outstanding indictments against foreign nationals in the auto parts investigation, but it has little ability to enforce them. As explained more fully below, the United States faces legal and practical hurdles in gaining testimony and other evidence abroad as investigations become increasingly cross-border.

Canada: A secondary player

Canada has a long history of international cartel enforcement, and it is an important U.S. ally in antitrust investigations. However, Canada's competition bureau typically has played a secondary role in most of the major international cartel investigations of the past decade. In fact, it generally becomes involved in international cartel enforcement efforts only after companies under investigation in the United States come forward to seek leniency with the Canadian Competition Bureau.

Canada criminalizes cartel conduct for companies and individuals. Both may be subject to a criminal fine of up to CA$25 million ($20 million) per count, and individuals face up to 14 years in prison.

Despite its stringent potential penalties, Canada rarely imposes maximum punish-ment for companies or their executives. For example, it has not charged or secured guilty pleas from any individuals involved in the international auto parts investigation, even though its competition laws arguably have broad extraterritorial reach. The number of corporate fines levied and their amounts also lag well behind the United States. Canada has imposed fines of CA$56 million on seven auto parts manufacturers. By comparison, the United States has secured $2.5 billion from 35 companies.

Similarly, in the air cargo investigation, Canada levied fines against nine companies, totaling CA$25 million, whereas the United States fined 22 companies more than $1.8 billion. None of the fines Canada imposed in the auto parts or air cargo investigations came close to approaching the country's maximum penalty.

Brazil: A reactive enforcer

In 2012, Brazil implemented a new competition law that was aimed, in part, at strengthening and streamlining cartel enforcement. The new law consolidated disparate competition agencies into a single authority called the Administrative Council for Economic Defense, known as CADE. It further called for boosting CADE staff.

In addition, Brazil modified its fines policy for companies and their executives and revised its leniency policy to clarify that leaders of a given cartel may qualify for leniency.

Brazil has since implemented regulations that encourage companies to settle early on by setting predetermined fine reductions depending on when the party comes forward. In return, the government requires companies to admit involvement in the conduct and cooperate in the ongoing investigation.

Since the law was implemented, Brazil has increased its international cartel enforcement efforts, albeit with limited success. For example, it has imposed fines in several international investigations over the past three years, including the air cargo and marine hose investigations. However, the fines are notably less than those imposed in leading jurisdictions.

For example, Brazil ultimately netted only 192.8 million real ($74.5 million), in the air cargo investigation compared with $1.8 billion by the United States and 799 million euros ($1.1 billion). The CADE has also entered into settlement agreements with companies involved in the international freight forwarding, TFT/LCD and DRAM investigations, likely because of the new incentivized settlement program.

Despite this progress, Brazil continues to be reactive rather than proactive. For example, the CADE announced July 2 that it was initiating an investigation into whether banks have manipulated foreign exchange rates affecting the Brazilian real. This announcement came a month after five major banks agreed to pay both the United States and United Kingdom $5.6 billion to settle claims that they had manipulated foreign exchange markets in the so-called forex investigation, which has been ongoing in the United States and other jurisdictions for at least two years.

Brazil did not launch a formal investigation into the auto parts industry until 2014, despite the fact that the global investigation began in February 2010 with coordinated dawn raids conducted by the United States, the European Union and Japan. Since then, it has opened administrative proceedings related to only seven auto parts, with the most recent proceeding against auto parts makers Takata Corp. and Autoliv announced in July.

Brazil's prosecution of international cartels is also hampered by its cumbersome legal process and long delays. The freight-forwarding investigation is a prime example of the red tape that bogs down Brazil's ability to timely and effectively resolve investigations.

Brazil issued a technical note, or complaint, in 2009, naming dozens of companies and individuals as defendants in its ongoing freight-forwarding investigation. However, the administrative proceeding remained at a standstill for more than four years, as Brazil was required to serve the complaint on all of the defendants before moving forward. Brazilian law does not allow the competition authority to sever successfully served defendants and proceed with the case in phases. As a result, the large corporate defendants who accepted service early on were forced to wait until Brazil served every individual international defendant before responding to the allegations. Six years after it began, the freight-forwarding proceeding is still in its infancy — and it is likely to continue for years.

Brazil only recently concluded its marine hose investigation, which was launched in 2007 following dawn raids and arrests by the United States, the European Union and the United Kingdom. While Brazil has made significant progress in improving the efficiency of cartel enforcement, it has a way to go before it can be considered a global leader.

The Justice Department has faced growing challenges in prosecuting the increasing number of individuals who reside beyond United States jurisdiction.

Other Latin American countries

Cartel enforcement in the remainder of Latin America is nascent at best. Guatemala has no competition law, and many other Latin American competition authorities are still in their infancy. Countries that have begun to test their cartel laws — such as Chile, Colombia, Peru and Uruguay — have done so largely on the domestic front. Colombia has signaled its interest in promoting international cooperation by signing mutual assistance agreements with the United States and other Latin American countries.

Mexico is the only country in the Americas other than Brazil that coordinates with international enforcers on global cartel investigations. In 2014, Mexico followed other jurisdictions in imposing significant fines against manufacturers of refrigerator compressors equivalent to $17 million. Mexico also demonstrated its commitment to cartel enforcement by adopting new legislation to make cartel conduct a criminal offense and increase its competition authority's investigative authority.

KEY CHALLENGES

Uncertainty of extraterritorial reach

Brazil has increased its international cartel enforcement effort, albeit with limited success. Its prosecution of international cartels is hampered by its cumbersome legal process and long delays.

The United States' antitrust laws have a broad extraterritorial reach. The Sherman Act, which criminalizes cartel conduct, provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[1]

Under the Foreign Trade Antitrust Improvements Act, any conduct that "has a direct, substantial, and reasonably foreseeable effect" on United States commerce and that "gives rise to a claim under [Section 1 of the Sherman Act]" falls within the prosecutorial jurisdiction of the DOJ.[2]

The precise meaning of the FTAIA's cryptic language and the conduct that it reaches are, not surprisingly, unclear. Of particular concern to antitrust practitioners and their clients is how to determine what constitutes a "direct" impact on United States commerce. The 9th U.S. Circuit Court of Appeals held in *United States v. Hsiung* that an effect is direct only "if it follows as an immediate consequence of the defendant's activity."[3]

Under that narrow view, the United States' ability to prosecute foreign cartel conduct is quite limited. In fact, the DOJ has argued that the 9th Circuit's definition may cripple the United States' antitrust enforcement abilities.[4] The DOJ has instead advocated for a more flexible, proximate-cause standard.[5]

A decision from the 7th U.S. Circuit Court of Appeals provided the government's sought-after flexibility. In *Motorola Mobility LLC v. AU Optronics Corp.*,[6] the 7th Circuit applied a proximate-cause standard, holding that an effect on United States commerce is indirect and therefore beyond United States jurisdiction only if the foreign price-fixing "filters through many layers and finally causes a few ripples in the United States."[7]

Under *Motorola Mobility*, the narrow definition of "indirect effect" gives the DOJ more power to investigate and prosecute overseas cartel conduct. In fact, the court expressly preserved the government's ability to prosecute such conduct even if the conduct does not provide grounds for a civil suit.[8]

The U.S. Supreme Court recently declined to hear appeals in *Hsiung* and *Motorola*, thus preserving the current state of uncertainty regarding the scope of the DOJ's ability to prosecute overseas cartel conduct.

Barriers to evidence-gathering

Regardless of how the FTAIA's "direct" requirement is interpreted, the Sherman Act undoubtedly reaches foreign cartel conduct. The DOJ's ongoing auto parts cartel probe, for instance, has almost exclusively targeted Japanese corporations and Japanese nationals based on actions taken in Japan. Many of the DOJ's other major investigations, such as air cargo, TFT/LCD panels and freight-forwarding, likewise focused on foreign cartel conduct.

The DOJ's investigations thus often require law enforcement to gather evidence located in other countries. When focusing on the Americas, the government's need to collect evidence abroad imposes practical limitations on its ability to investigate and prosecute foreign cartel conduct.

To facilitate cross-border cartel investigations, enforcement authorities in the United States have sought international cooperation. In certain parts of the Americas, the United States has successfully done so.

The United States and Canada, for example, have long collaborated on antitrust investigations and prosecutions through bilateral antitrust cooperation agreements and a mutual legal assistance treaty. As a result, the United States and Canadian authorities have conducted coordinated raids, executed searches on behalf of each other and generally worked together towards more effective antitrust enforcement.

The United States' cooperation with antitrust enforcement authorities elsewhere is more limited. Other than Canada, the United States has executed bilateral antitrust cooperation agreements with only four American countries — Brazil, Chile, Colombia and Mexico. Among those four, only Brazil is an active cartel enforcer. Furthermore, these four bilateral cooperation agreements are largely toothless, mandating very little in the way of actual cooperation.

Cartel enforcement in much of Latin America is nascent at best.

In addition to the four agreements, the United States has signed bilateral mutual legal assistance treaties, or MLATs, with 19 American nations. It is also party to the Inter-American Convention on Mutual Legal Assistance, which has been ratified by 13 additional American states. Under an MLAT, the United States can ask the designated central authority of the treaty partner for assistance in gathering evidence in a criminal investigation, including searches and seizures, subpoenas for documents or testimony, and witness interviews. In the United States, the statute of limitations for a crime can be tolled while the request is pending.

Although these treaties promote general cooperation by providing mechanisms for cross-border evidence gathering in criminal cases, their impact on antitrust investigations in the Americas is limited. A handful of American countries still have not executed an MLAT with the United States, and over half of the 19 existing bilateral MLATs are with small island nations that are unlikely to be involved in international cartel enforcement.

Even if an active cartel enforcer, like Brazil, does have an MLAT with the United States, such treaties often contain exceptions under which foreign authorities are not required to act, including when the conduct at issue would not violate the criminal laws of the foreign jurisdiction. Furthermore, the process of requesting assistance under an MLAT can be slow and cumbersome.

International cooperation in cartel investigations is even more difficult without an MLAT. Without such treaties, requests for assistance must be made through letters rogatory, which are essentially requests from a United States court to a foreign court seeking international judicial assistance.

Even when such requests can be issued, they must comply with numerous procedural requirements that vary by jurisdiction. Because letters rogatory are based predominately on the international legal principles of comity and reciprocity, compliance with them falls within the discretion of the receiving court. Consequently, obtaining assistance through a letter rogatory is time-consuming and unpredictable.

In short, although the Sherman Act has a broad extraterritorial reach in theory, in practice the United States' ability to investigate cartel conduct occurring abroad is much more limited.

Roadblocks to extradition

Equally limited is the United States' ability to prosecute foreign cartelists. Even if the DOJ is able to investigate foreign cartel conduct and bring charges against individuals living abroad, those individuals may choose not to voluntarily submit to U.S. jurisdiction.

In those cases, the DOJ's ability to successfully prosecute the individuals will hinge on the willingness of foreign officials to extradite them. That willingness is hardly guaranteed. The DOJ has acknowledged that it faces an uphill battle in extraditing foreign nationals on antitrust charges.[9]

The DOJ has had limited success in extraditing individuals in antitrust cases. In November 2014, the agency extradited a Canadian national, John Bennett, in a case involving alleged anti-competitive conduct. Bennett, however, was extradited on fraud charges rather than on antitrust charges. In fact, the Antitrust Division has secured only one extradition on pure antitrust charges, and the unusual facts of that case provide little precedential value. Romano Pisciotti, an Italian national, was indicted under seal in the DOJ's investigation into price-fixing in the marine hose industry.

The DOJ was unable to extradite Pisciotti from his home country because Italy did not criminalize cartel conduct at the time. The agency was only able to secure Pisciotti's extradition when, some three years later, he travelled to Germany and was detained pursuant to an Interpol "Red Notice." Before the Pisciotti extradition, the DOJ had failed to secure the indictment of British national Ian Norris from the United Kingdom solely on price-fixing charges stemming from the department's air cargo investigation. The U.K. ultimately extradited Norris on obstruction-of-justice charges.

The DOJ also appears to be losing the battle to prosecute foreign executives who refuse to plead guilty in the auto parts investigation. While almost all criminal defendants charged with a crime plead guilty, barely more than half charged in the auto parts probe have done so. Of the 55 individuals who have been charged in that investigation, 25 — all foreign nationals — have been indicted because they refused to plead guilty. Only two of these executives have voluntarily submitted to United States jurisdiction and appeared in a United States courtroom. The DOJ has yet to extradite any of the others.

The DOJ is likely to have similar difficulty extraditing individuals from American countries. Although the United States has executed extradition treaties with 34 American nations, including active antitrust enforcers like Canada and Brazil, many of those treaties contain significant limitations. Some do not provide for extradition in antitrust cases.

Others contain exceptions under which foreign authorities are not required to act, including when the conduct at issue would not constitute a criminal offense under the laws of the foreign jurisdiction, when the statute of limitations has run in either country, and when the individual sought is a citizen of the country from which he would be extradited. Many Latin American countries have historically refused to extradite their own nationals. Some, including Brazil, are constitutionally prohibited from doing so.

Even if an individual could be extradited from an American country for cartel conduct, securing that extradition still requires diplomatic negotiations and formal proceedings in the extraditing country. The process may be costly and time-consuming, and success is far from guaranteed.

CONCLUSION

As emerging countries in the Americas and throughout the world seek to build their cartel enforcement capabilities, they are likely to face many of the same practical and legal constraints that limit the United States' ability to investigate and prosecute cartel conduct abroad. These countries should take heed of hurdles the United States has increasingly faced in cross-border investigations.

NOTES

[1] 15 U.S.C. § 1.

[2] *See id.* at § 6a.

[3] *United States v. Hsiung,* 758 F.3d 1074, 1094 (9th Cir. 2014).

[4] *See* Brief for United States and the Federal Trade Commission as Amici Curiae Supporting Neither Party at 6, *Motorola Mobility LLC v. AU Optronics Corp.,* No. 14-8003 (7th Cir. Sept. 5, 2014).

[5] *See id.* at 11-20.

[6] *Motorola Mobility LLC v. AU Optronics Corp.,* 775 F.3d 816 (7th Cir. 2015), *cert. denied,* No. 14-1122, 2015 WL 1206313 (June 15, 2015).

[7] *Id.* at 819 (quoting *Minn-Chem Inc. v. Agrium Inc.,* 683 F.3d 845, 860 (7th Cir. 2012); accord *Lotes Co. Ltd. v. Hon Hai Precision Indus. Co. Ltd. et al.,* 753 F.3d 395, 410 (2d Cir. 2014) (requiring a "reasonably proximate causal nexus")).

[8] *Id.* at 825-27.

[9] Memorandum of Understanding Between the Antitrust Division, U.S. Department of Justice and the Immigration and Naturalization Service, U.S. Department of Justice (Mar. 15, 1996), http://www.justice.gov/atr/public/criminal/9951.pdf.

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