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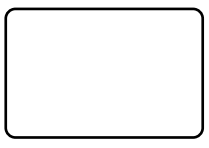

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International cartel investigations in the United States

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Introduction

Until recently, large, cross-border cartel investigations of alleged price fixing in major industries, including air cargo, freight forwarding, thin film transistor liquid crystal display (TFT/LCD) panels, auto parts, and manipulation of the London Interbank Offered Rate (LIBOR) and foreign exchange rates (FOREX) were the focus of antitrust regulators around the globe. The United States has long played a leadership role in cartel enforcement and has encouraged other countries to increase enforcement against cartel conduct. The United States Department of Justice (DOJ or the Department) has coordinated efforts with the European Union and other jurisdictions to investigate cartel activity, including dawn raids and information sharing.

However, the DOJ has not launched a new major, cross-border cartel investigation in over a year. The auto parts investigation has nearly wound down, and the capacitors investigation has not expanded to the far-reaching scope onlookers had anticipated. As a result, corporate fines have dropped dramatically, from a high of US$3.89 billion in FY 2015 to only US$321 million in FY 2016. In addition, prosecutions of corporate executives have declined dramatically as the DOJ has turned its attention to smaller, domestic investigations over the past year.

Without the United States to lead a major, cross-border investigation, the rest of the Americas likewise have turned their focus inward. Canada continues to investigate cartel allegations, although it has taken a backseat to the United States and secured fewer corporate fines and guilty pleas. The only fines levied by Canada in cross-border investigations in the past year have been in the online wall poster investigation, in which Amazon.com was fined for its involvement in the price-fixing scheme.

Brazil has become more active since its adoption of a more stringent competition regime in 2012. However, Brazil continues to be hampered by inefficient procedures that drag proceedings on for years without resolution. Its focus also largely remains domestic, as Brazil's competition authority, CADE, has become swept up in the historic 'Operation Carwash' investigation into corruption within the state-owned oil company, Petrobras.

For the rest of the Americas, however, cross-border enforcement is not yet a reality. In 2016, Chile enacted a law against 'hard-core' cartels that increases fines, creates a leniency programme and facilitates private litigation. The law came into effect in June 2017. Argentina has introduced, but not yet enacted, similar legislation. These legislative efforts demonstrate that many countries in the Americas have nascent enforcement regimes at best, and some have no competition laws on the books at all.

Few countries in the Americas aside from the United States, Canada and Brazil have initiated cartel investigations with implications beyond their borders. Most recently, in a sign that Mexico may be flexing its cartel enforcement muscle, its antitrust authority fined five international shippers for participating in a cross-border price-fixing scheme related to international shipping for vehicle carrier services. However, Mexico still has a long way to go before it can be viewed as a leader in international cartel enforcement.

This chapter focuses on the challenges the United States faces in pursuing cross-border cartel investigations, which also carry implications for other countries in the Americas. Although US antitrust laws have broad extraterritorial reach in theory, 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 Canada, Brazil and other countries in the Americas become more engaged in international cartel investigations, these countries will likely face similar challenges.

Key challenges confronting the United States in its cross-border cartel investigations

US antitrust laws have broad extraterritorial reach

The United States' antitrust laws have broad extraterritorial reach. The Sherman Act, which criminalises cartel conduct, provides that: 'Every 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 (FTAIA), 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.[3] Of particular concern to antitrust practitioners and their clients is how to determine what constitutes a 'direct' effect on United States commerce. The United States Court of Appeals for the Ninth Circuit has held that an effect is direct only 'if it follows as an immediate consequence of the defendant's activity'.[4] Under that narrow view, the United States' ability to prosecute foreign cartel conduct would be quite limited. In fact, the DOJ has argued that the Ninth Circuit's definition may cripple the United States' antitrust enforcement abilities.[5] The Department has instead advocated a more flexible, proximate-cause standard.[6]

A decision from the United States Court of Appeals for the Seventh Circuit provided the government's sought-after flexibility. In *Motorola Mobility LLC v AU Optronics Corp*,[7] the Seventh 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'.[8] Under *Motorola Mobility*, the narrow definition of 'indirect effect' gives the DOJ a greater ability to investigate and prosecute cartel conduct occurring abroad. In fact, the Court expressly preserved the government's ability to prosecute such conduct even if that same conduct is deemed unfit for a civil suit.[9]

The Supreme Court recently declined to consider the circuit split over the FTAIA and its impact on the Sherman Act, leaving the FTAIA's meaning muddled. To be sure, however, the DOJ prosecutors continue to insist that the US government has broad latitude to pursue anticompetitive conduct that occurs abroad.

Cross-border evidence gathering is constrained by practical difficulties

Regardless of how the FTAIA's 'direct' requirement is interpreted, the Sherman Act undoubtedly reaches cartel conduct that occurs abroad. The DOJ's ongoing auto parts cartel probe, for instance, has almost exclusively targeted Japanese corporations and Japanese nationals who have engaged in cartel conduct largely in Japan. Many of the Department's other major investigations – such as air cargo, TFT/LCD panels, and freight forwarding – likewise focused on foreign cartel conduct. The Department'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 focused on achieving greater 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. From the early, informal communications channels and conflict-management mechanisms established by the Fulton-Rogers Understanding of 1959 and the Mitchell-Basford Understanding of 1969, to the bilateral antitrust cooperation agreements and the mutual legal assistance treaty that entered into force in the 1980s and 1990s, the United States and Canada have built a strong collaborative relationship in cartel enforcement. As a result of this cooperation, US and Canadian authorities have conducted coordinated raids, executed searches on behalf of each other, and generally worked together towards more effective antitrust enforcement. Indeed, since the late 1980s, 'the emphasis has been on how the United States and Canada can mutually reinforce one another's efforts in antitrust enforcement.'[10]

The United States' cooperation with antitrust enforcement authorities elsewhere in the Americas, however, 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. Only Brazil has a track record as an active cartel enforcer,[11] and Colombia has only recently strengthened its cartel enforcement regulations and begun imposing fines of significance in cartel cases. Furthermore, these four bilateral cooperation agreements are largely toothless, mandating very little in the way of actual cooperation.[12]

In addition to the four bilateral cooperation agreements, the United States has signed bilateral mutual legal assistance treaties (MLATs) with 19 American nations and is party to the Inter-American Convention on Mutual Legal Assistance, which has been ratified by 13 additional American states.[13] Under an MLAT, the United States can make a request to 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.[14] In the United States, the statute of limitations for a crime can be tolled while the request for assistance is pending.[15]

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 bilateral MLATs that do exist are with small island nations 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,[16] including when the conduct at issue would not constitute a criminal offence under the laws of the foreign jurisdiction.[17] 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. In the absence of such treaties, requests for assistance must be made through letters rogatory from a United States court to a foreign court seeking international judicial assistance. Typically, a letter rogatory cannot be used to gather evidence during the investigative stage of a criminal proceeding. Even when such requests can be issued, they must comply with numerous procedural requirements, which vary by jurisdiction. In addition, 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.[18]

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.

The United States struggles to extradite individuals for antitrust violations

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 US 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.[19]

The Department has had limited success in extraditing individuals in antitrust cases. In October 2016, the Department extradited an Israeli national, Yuval Marshak, in a case involving anticompetitive conduct in bidding for contracts under the US Foreign Military Financing program. However, the Department was only able to secure Marshak's extradition on fraud charges, rather than antitrust charges.[20] Similarly, in November 2014, the Department extradited a Canadian national, John Bennett, in a case involving alleged anticompetitive conduct. Bennett, however, was extradited on fraud charges, rather than purely on antitrust charges.[21] 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 criminalise cartel conduct at the time. The DOJ 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 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 UK ultimately extradited Norris, but on obstruction of justice, rather than antitrust, charges.

Furthermore, foreign executives are increasingly refusing to plead guilty as they become aware of the DOJ's limited ability to pursue them abroad. That trend began with the auto parts investigation. Of the 65 individuals who have been charged in that investigation as of June 2017, 34 – all foreign nationals – have been indicted because they refused to plead guilty.[22] Only two of these executives located abroad have voluntarily submitted to US jurisdiction and appeared in a US courtroom. The DOJ has yet to extradite any of the others, and as the investigation winds down, it is increasingly unlikely. The trend away from foreign executives pleading guilty has become even more pronounced in more recent cross-border investigations, such as capacitors and FOREX.

The Department 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.[23] Some do not provide for extradition in antitrust cases.[24] Others contain exceptions under which foreign authorities are not required to act, including when the conduct at issue would not constitute a criminal offence under the laws of the foreign jurisdiction,[25] when the statute of limitations has run in either country,[26] and when the individual sought is a citizen of the country from which he or she would be extradited.[27] Furthermore, many Latin American countries have historically refused to extradite their own nationals.[28] Some, including Brazil, are constitutionally prohibited from doing so.[29]

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.

Collateral consequences of criminal cartel investigations can be severe

Criminal antitrust investigations and prosecutions in the United States can have numerous collateral consequences for the companies and individuals involved. Because the United States is a leader in cartel enforcement, its investigations can spur other jurisdictions to action, resulting in a cascade of criminal liability as investigations expand across the globe. In addition, cartel investigations targeting one industry or business unit may uncover related conduct in other industries and business units. Companies with diverse businesses operating in many spheres may become embroiled in these spin-off investigations.

Government contractors in the United States face other potential collateral consequences. Notably, if a government contractor is convicted of antitrust violations, it can be suspended or debarred from pursuing other government contracts.[30]

Perhaps of greater concern to many companies and individuals involved in cartel investigations is the risk of follow-on civil litigation. In the United States, civil plaintiffs often piggyback off the DOJ's investigations and sue companies and individuals that have already been prosecuted criminally. Civil plaintiffs can have great success by sharing the government's discovery, by targeting companies and individuals who have already admitted their guilt, and by using criminal fines as a benchmark for damages calculations. And because direct purchasers can seek treble damages in the United States, follow-on civil litigation poses an enormous financial risk to companies and individuals.

The Seventh Circuit's decision in *Motorola Mobility* has helped reduce some of that potential civil exposure. In *Motorola Mobility*, the court held that Motorola could not bring a civil suit against AU Optronics for cartel conduct occurring abroad, even though the DOJ had been able to prosecute AU Optronics under the Sherman Act.[31] This decision may be useful precedent for companies trying to fend off follow-on civil litigation.

Conclusion

As Canada, Brazil and other American countries continue to build their cartel enforcement capabilities and their focus on international cartel conduct, 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 USC section 1.
2 See id. section 6a.
3 See, eg, *Motorola Mobility LLC v AU Optronics Corp*, 775 F.3d 816, 818–25 (7th Cir. 2015); *United States v Hui Hsiung*, 758 F.3d 1074, 1091–94 (9th Cir. 2014); *Lotes Co v Hon Hai Precision Indus Co*, 753 F.3d 395, 409–15 (2d Cir. 2014); *Minn-Chem, Inc v Agrium Inc*, 683 F.3d 845, 847 (7th Cir. 2012); *United States v LSL Biotechs*, 379 F.3d 672, 680 (9th Cir. 2004).
4 *LSL Biotechs*, 379 F.3d at 680 (citing *Rep of Argentina v Weltover, Inc*, 504 US 607, 618 (1992)); accord *Hsiung*, 758 F.3d at 1091–94.
5 See Brief for United States and the Federal Trade Commission as Amici Curiae in Support of Neither Party at 6, *Motorola Mobility LLC v AU Optronics Corp*, No. 14-8003 (7th Cir. 5 September 2014), ECF No. 92.
6 See id. at 11–20.
7 *Motorola Mobility*, 775 F.3d 816 (7th Cir. 2014).
8 Id. at 819 (quoting *Minn-Chem*, 683 F.3d at 860); accord *Lotes*, 753 F.3d at 410 (requiring a 'reasonably proximate causal nexus').
9 *Motorola Mobility*, 775 F.3d at 825–27.
10 US Department of Justice, Improving Bilateral Antitrust Cooperation, Remarks by Charles S Stark at a Conference on Competition Policy in the Global Trading System: Perspectives from Japan, the United States, and the European Union at 2 (23 June 2000), available at www.justice.gov/atr/public/speeches/5075.pdf.
11 US Department of Justice, Antitrust Cooperation Agreements, available at www.justice.gov/atr/public/international/int-arrangements.html (last visited 22 April 2015).
12 Of the four agreements, Mexico's appears to be the most robust, requiring (i) notification of certain enforcement activities or participation in certain proceedings, (ii) cooperation in evidence gathering, (iii) cooperation in information sharing, and (iv) periodic meetings among enforcement authorities to exchange information on current competition enforcement efforts and priorities. See Agreement between the Government of the United States of America and the Government of the United Mexican States regarding the Application of Their Competition Laws, articles II–IV & IX (11 July 2000), available at www.justice.gov/atr/icpac/5145.pdf. The other three treaties require, at most, only (i) notification of certain enforcement activities and (ii) periodic meetings among enforcement authorities to exchange information on current competition enforcement efforts and priorities. See Agreement

between the Government of the United States of America and the Government of the Federative Republic of Brazil regarding Cooperation between Their Competition Authorities in the Enforcement of Their Competition Laws, articles II & VIII (26 October 1999), available at www.justice.gov/atr/public/international/3776.pdf; Agreement on Antitrust Cooperation between the United States Department of Justice and the United States Federal Trade Commission, on the one part, and the Fiscalia Nacional Economica of Chile, of the other part, article VI (31 March 2011), available at www.justice.gov/atr/public/international/docs/269195.pdf; Agreement on Antitrust Cooperation between the United States Department of Justice and the United States Federal Trade Commission, of the one part, and the Superintendency of Industry and Commerce of Colombia, of the other part, article VI (5 September 2014), available at www.justice.gov/atr/cases/f309000/309025.pdf.

13 US Department of State, Bureau of International Narcotics and Law Enforcement Affairs, 2014 International Narcotics Control Strategy Report, available at www.state.gov/j/inl/rls/nrcrpt/2014/vol2/222469.htm (last visited 22 April 2015); Inter-American Convention on Mutual Assistance in Criminal Matters (23 May 1992), available at www.oas.org/juridico/english/Sigs/a-55.html.

14 See generally Markus Funk, 'Mutual Legal Assistance Treaties and Letters Rogatory: A Guide for Judges' in *Federal Judicial Center International Litigation Guide*, 3-8 (2014), available at www.fjc.gov/public/pdf.nsf/lookup/mlat-lr-guide-funk-fjc-2014.pdf/$file/mlat-lr-guide-funk-fjc-2014.pdf (Guide for Judges).

15 18 USC section 3292(a).

16 See, eg, Treaty Between the Government of the United States of America and the Government of the Federative Republic of Brazil on Mutual Legal Assistance in Criminal Matters, Art. 3 (14 October 1997), available at www.state.gov/documents/organization/106962.pdf; Treaty on Cooperation Between the United States of America and the United Mexican States for Mutual Legal Assistance, article 1 (9 December 1987), available at www.oas.org/juridico/mla/en/traites/en_traites-mla-usa-mex.pdf; Treaty Between the Government of the United States of America and the Government of Canada on Mutual Legal Assistance in Criminal Matters, article V (18 March 1985), available at www.oas.org/juridico/mla/en/traites/en_traites-mla-usa-can.pdf.

17 See, eg, Inter-American Convention on Mutual Assistance in Criminal Matters, article 5 (23 May 1992), available at www.oas.org/juridico/english/treaties/a-55.html.

18 Charles Doyle, Extraterritorial Application of American Criminal Law, Congressional Research Service, at 24 (15 February 2012), available at www.fas.org/sgp/crs/misc/94-166.pdf (last visited 11 February 2015); accord Guide for Judges, at 3, 17-22.

19 Memorandum of Understanding between the Antitrust Division, United Sates Department of Justice and the Immigration and Naturalization Service, United States Department of Justice (15 March 1996), available at www.justice.gov/atr/public/criminal/9951.pdf.

20 US Department of Justice, Israeli Executive Extradited and Arraigned on Fraud Charges Involving the Foreign Military Financing Program (14 October 2016), available at www.justice.gov/opa/pr/israeli-executive-extradited-and-arraigned-fraud-charges-involving-foreign-military-financing.

21 US Department of Justice, Canadian Executive Extradited on Major Fraud Charges Involving a New Jersey Environmental Protection Agency Superfund Site (17 November 2014), available at www.justice.gov/atr/public/press_releases/2014/309928.htm.

22 For a complete list of individuals charged in the DOJ's ongoing auto parts investigation, please visit: http://millerchevalier.com/sites/default/files/resources/Misc/Individuals-Charged-in-DOJs-Auto-Parts-Investigation.pdf.

23 A list of the United States' extradition treaties is published in 18 USC section 3181, and can be accessed at www.gpo.gov/fdsys/pkg/USCODE-2013-title18/pdf/USCODE-2013-title18-partII-chap209-sec3181.pdf.

24 Eg, Treaty on Extradition Between the Government of Canada and the Government of the United States of America, articles 1-2 and Schedule (3 December 1971), available at www.oas.org/juridico/mla/en/traites/en_traites-ext-can-usa4.html (US-Canada Extradition Treaty); Extradition Treaty and Additional Protocol Between the United States of America and Brazil, articles I-II (13 January 1961), available at www.oas.org/juridico/mla/en/traites/en_traites-ext-usa-bra.pdf (US-Brazil Extradition Treaty).

25 Eg, US-Canada Extradition Treaty, article 2; US-Brazil Extradition Treaty, articles III-IV.

26 Eg, US-Canada Extradition Treaty, article 4; US-Brazil Extradition Treaty, article V.

27 Eg, US-Brazil Treaty, article VII; Additional Protocol to the Treaty of Extradition of 13 January 1961, between the United States of America and the United States of Brazil, article I (13 January 1961), available at www.oas.org/juridico/mla/en/traites/en_traites-ext-usa-bra.pdf (last visited 2 April 2015).

28 Comments from Sen. Joe Biden, S. Exec. Rep. No. 107-12, at 2 (17 October 2002), available at www.gpo.gov/fdsys/pkg/CRPT-107erpt12/pdf/CRPT-107erpt12.pdf.

29 Constitution of Brazil, article 5(LI) (1988), available at www.constituteproject.org/constitution/Brazil_2014.pdf?lang=en.

30 See 10 USC section 2408; 48 CFR section 252.203-7001; FAR sections 9.406-2, 9.407-2; US Department of Justice, Antitrust Division, Antitrust Division Manual, Chapters II(B)(7), VII(E)(3) (5th ed. March 2014), available at www.justice.gov/atr/public/divisionmanual/atrdivman.pdf. Government contractors in Canada likewise risk debarment for antitrust crimes. See Public Works and Government Services of Canada, PWGSC's Integrity Framework (25 March 2015), available at www.tpsgc-pwgsc.gc.ca/ci-if/ci-if-eng.html; Peter Franklyn, Antitrust Advisory: Implications of the Federal Debarment Policy for Government-Contracting Entities (26 January 2015), available at www.osler.com/NewsResources/Antitrust-Advisory-Implications-of-the-Debarment-Policy-for-Government-Contracting-Entities/. And under Brazil's new antitrust laws, companies and individuals – regardless of whether they are government contractors – can be debarred for up to five years. See Brazil Competition Law, articles 36, 38, Law No. 12.529/11 (November 2011).

31 *Motorola Mobility*, 775 F.3d at 818-27.

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Lauren Briggerman is a member of Miller & Chevalier's litigation department. Ms Briggerman focuses her practice on criminal and civil matters, including government and internal investigations, white-collar criminal defence, global antitrust and competition and complex commercial litigation. In particular, she has developed expertise in global cartel investigations. She has a successful track record in defending several companies and numerous executives in some of the most notable international cartel investigations in recent years, including those involving the auto parts, air cargo, freight forwarding and pharmaceutical industries. In addition, she has experience in complex civil litigation. She served on the trial team defending two former executives of IndyMac Bank who were sued by the Federal Deposit Insurance Corporation for their alleged involvement in making negligent loans to homebuilders.

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