The American Antitrust Institute

International Cartels

Moderator: Gary R. Spratling**,** Partner, Gibson, Dunn & Crutcher
John M. Connor, Professor of Industrial Economics, Purdue University
Paul Malric-Smith, European Commission, Competition Directorate, Head of Cartel Unit
Charles Wright, Partner, Siskinds, LLP

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Gary Spratling introduced the session by stating that the theme of antitrust without a center, the overall theme of the symposium would be continued in this breakout session. This theme has significant implications for government enforcers, private plaintiffs and defense counsel.

An overriding question with regard to international cartels is whether there should be convergence in standards and procedures, noting that there are important differences between jurisdictions, despite the goal of harmonization.

Mr. Spratling noted that there has been a dramatic increase in enforcement between 1993 and 2008 due in large part, though not exclusively, to the revised DOJ corporate leniency policy initiated in 1993. The period '93-08 tells a compelling story about self reporting by companies, the number and size of prosecutions, jail sentences and exportation (of cases?) to other countries. Some representative statistics, for example include that in 1993 average leniency appeals were one a year whereas in 2008 they were two a month, for a 25 fold increase. Also, in 1993 active international cartel investigations numbered 3, while in 2008 they numbered 50. From passage of the Sherman Act until 1993 there were 162 foreign defendants; since 1993 there have been 250 foreign defendants. In 1993 total fines equaled $42 million whereas in 2008 they were $700 million, and already in June, 2009 they equaled $970 million. Average jail sentences in 1993 were 11 months; in 2008 the average was 25 months, down from the previous years' average of 31 months. In 1993 the highest jail sentence was 2 years; in 2008 it was 10 years. In 1993 only two countries, the US and Canada, had amnesty policies in place; today there are more than 40 immunity policies in place around the world and there are immunity appeals every day from companies that are self reporting.

The factors contributing to these changes include the revised leniency policy, the marker system, immigration relief, watershed cases such as GE and Vitamins, the missionary work of antitrust officials, the placement of fugitive defendants on Interpol's red watch network and the concept of waivers.

Professor Connor noted that cartels were not previously identified as international and that international cases are more difficult to prosecute because they are more complex and sophisticated, they involve much larger volumes of commerce, more resources are needed to conduct investigations, the subjects and targets are located in several countries on different continents, it's difficult to gather evidence and these cases place a huge premium on cooperation with foreign officials.

Charles Wright asked whether current trends suggest that enforcement will be tougher over the next period and how much difference does a different administration play in terms of enforcement. Prof. Connor indicated that prosecutions are unaffected by who's in the White House and that when it comes to international cartels, no matter what end of the political spectrum the Assistant Attorney General in charge of antitrust enforcement will always view international cartels as hard core criminal conduct. And that there are basically no difference in the prosecution practices of differing Democrats and Republicans. He stressed that this is with respect to int'l cartel prosecution.

Connor added that the growth of government anti cartel enforcement has gone from one hub to two and then to enforcers around the world. In 1940 the DOJ was the only agency enforcing anti-cartel policy. In 1960 prosecutions in the EU began to take off. In the late 1980's Canada, Japan, Taiwan, Australia and Israel became more active with tougher laws overall. In the last ten years South Africa has joined the league of enforcers and is going "great guns". In addition there are 10 national competition authorities inside the member states of the EU which are also actively pursuing prosecutions.

Rates of discovery internationally are also much higher now than in the past. The latest statistic indicates that there are on average 50 international cartels discovered per year.

Penalties also tell the story. Within the EU, National Competition Authorities (NCAs) are now discovering 20 international cartels a year. Enforcement in Asia is also intensifying with Korea leading the way. To date penalties imposed have reached $63 billion, of which 55% are fines and 45% are settlements and 75% of those penalties have been imposed since 2004. Two-thirds of the fines are from EU authorities (EC and NCAs), with EC fines being greater than U.S. every year since 1999. Two-thirds of the penalties are paid by European firms, with the rest mainly U.S., Japanese and Korean.

Paul Malric-Smith raised the question whether or not there are more cartels or are we just better at finding them is a tough one to answer. Professor Connor indicated that the multi-polar enforcement system certainly accounts for a large share of the increase in discoveries. And the fact that there is competition among the competition agencies accounts for a lot as well. A remarkable study in the American Economic Review[i] shows that the DOJ amnesty program has resulted in a 60% increase in the discovery of all cartels. To be sure globalization has put price pressure on firms. Charles Wright asked if there is evidence that this is slowing down cartel formation. Connor replied that the answer to that is hard to say. Increased enforcement could be forcing overcharges to decline, but it's also possible that it's forcing cartels to go under the radar. So, they could be harder to detect, but there could be a disincentive to form cartels as well.

The critical importance of coordination among enforcement authorities was also highlighted. Paul Malric-Smith indicated that aiding the enforcement of anti-cartel policy is the fact that there is lots of contact now between enforcement agencies as well as ongoing discussions about how to improve such coordination. Authorities are also cooperating bi-laterally and multi-laterally. Before leniency, it was considered a miracle to have an enforcement action in the UK and the US at the same time. It was noted that every cartel prosecuted in the EU is an international cartel, but some of the most recent investigation is have been global, involving 2-3 continents.

Private Civil Cases for damages related to international cartel conduct are in the very early stages of geographic dispersion. Wright indicated that his firm has been involved in a number of cases – at least 20-25, with settlements in about 15 of them. Canada has class actions as well as contingency fees. And Australia has a distorted form of contingency fees, although the illegal behavior has to take place inside Australia. Malric-Smith indicated that the antitrust community has been watching development of efforts in England. These cases have huge expenses associated with them without a mechanism to aggregate them or to allow contingency fees. With respect to criminal prosecution, Spratling noted that such cases are currently proceeding on six continents. Since 1990, 980 individuals have been either fined or imprisoned for all cartels. The U.S. is still the "king of cartel imprisonment," but significant numbers of individuals are being sentenced or imprisoned in other jurisdictions, such as Israel, Canada, UK, Egypt and others. The percentage number of individuals charged and in prison has increased, and totals 70 in the last four years. However, the number of fugitives in international cartel cases is also rising, indicating a disturbing trend. It was also noted that there are limits to the use of imprisonment.

The importance of convergence on standards, procedures and sanctions internationally was discussed next. It was acknowledged that a lot is being done in this area but it was also acknowledged that a "one size fits all" system of enforcement might not be most desirable. With regard to international agreements, more cooperation and sharing of evidence is always a desirable thing to do, but it's not always possible. Out of respect for international comity the adoption of double jeopardy is poorly regarded. And with regard to corporate fines, each system is looking after its own interest, and most system of fines have some relation to turnover that pertains to that jurisdiction, leading the panelists to conclude it's best if each jurisdiction is able "to do its own thing." In the future as countries are trying to work out these issues and develop an integrated international defense strategy the potential for reciprocal or interdependent dispositions that provide credit in one jurisdiction for time spent in incarceration in another jurisdiction becomes very important in the cooperation analysis.

There have been benefits from these actions in the micro sense, for example in industries with prosecutions there have been dramatic decreases in prices. Some studies show no price effects, but it's easy to rely on bad data. One study, a good study of German cartels found that that German companies not in cartels were more efficient and sold their goods at a lower price. It's also true that long term cartels generally cheat on each other.

Finally the question of recognition of judgments was raised. Not all international cartels are that big, and involve maybe two countries. Should those findings be copied to other jurisdictions?

Professor Connor said it's true that if you look at cartels convicted in the U.S. in the last ten years or so they actually received penalties that exceeded the profits they made, but they made so much of their profits outside of the U.S., and enforcement outside of the U.S. was so weak, the end result is that global cartels are bad for victims because they don't really perceive a global disincentive. Gary Spratling countered by saying if you look at finding experience in last ten years inside the EC the numbers are in the stratosphere. Fines on cartels in the EC can be more than twelve times actual profit. Companies are paying in combined fines far beyond the profits they made. Spratling added that it's important to remember that fines in the U.S. start at twenty percent of commerce, whereas the EC starts 30 percent and adds onto that significantly. In one case a company said that their fine equaled the entire volume of commerce, note: not profit, but commerce.

[i] Miller, Nathan H. Strategic Leniency and Cartel Enforcement. *American Economic Review* 99 (June 2009): 750-768.