

Going It Alone

The Costs of Unilateral Law Enforcement

By Jim Walden and Matthew Benjamin

For the past six years, the Bush Administration has been embroiled in foreign policy disputes, leading some to claim that the United States has alienated our friends and damaged our credibility around the world. In particular, many critics condemn the Administration's controversial unilateralism. But one need not endorse unilateralism to observe that the mercurial and contrarian perspectives sometimes held by our allies also deserve a share of the blame. And as these perspectives have dogged U.S. diplomats at the negotiating table, so too have they affected U.S. enforcement and regulatory authorities.

For example, French courts recently resurrected their long-dormant blocking statute to slap away the unwanted hand of American law enforcement on its soil. In December 2007, the *Cour de Cassation* rejected the challenge of a French attorney trained in the U.S. to his criminal conviction and Euro 10,000 fine for attempting to gather evidence on behalf of the California Insurance Commissioner. See *Cour de Vassation, Chambre Criminelle* [Cass. crim.] [highest court of ordinary jurisdiction], Dec. 12, 2007, Bull. crim., No. 7168. This unprecedented criminal conviction — the first in the statute's history — may have been intended to forewarn U.S. authorities who attempt to conduct uncoordinated surrogate investigations. Moreover, it offers yet another

reminder that unilateralism begets protectionism, and visa versa. Global enforcement requires diplomacy.

Faced with an unsympathetic foreign audience, it is critical that U.S. authorities note instructive examples of multilateral cooperation. In this respect, the Antitrust Division of the Department of Justice (DOJ), which has adopted an cooperative strategy that has enabled it to negotiate new treaties and secure exceptional assistance in gathering evidence, serves as a model.

FOREIGN BLOCKING STATUTES: A PROTECTIONIST RESPONSE TO U.S. ANTITRUST ENFORCEMENT

Blocking statutes generally prohibit the disclosure of protected information, often in connection with judicial or administrative proceedings in other countries. The earliest blocking statutes were inspired by international hostility to particular areas of substantive American law, including federal antitrust law. In 1947, a federal court ordered 50 Canadian pulp and paper companies to produce documents in connection with the DOJ's Sherman Act investigation of the Canadian newsprint industry. Although these subpoenas were eventually withdrawn after negotiations between American and Canadian representatives, the Province of Ontario quickly adopted the Business Records Protection Act, the first criminal blocking statute. Its enactment clearly reflected the resentment of Ontario authorities regarding perceived territorial infringement; as the Premier of Ontario observed before Parliament, "I trust no citizen of the United States will forget that Canadians are just as proud of their own nationality and just as jealous of their own sovereignty as is any citizen of their own country." And when the DOJ attempted to investigate international petroleum and uranium cartels during the 1950s and 1970s, Great Britain, the Netherlands, Italy, and Australia enacted

blocking legislation to prohibit the removal of protected information.

Although most foreign governments enacted blocking statutes to counteract American investigations of anticompetitive behavior, these statutes began to affect private civil litigation. Indeed, in response to "perceived abuses in the extraterritorial application of United States antitrust laws," as well as American civil litigants' intrusive discovery demands, France enacted an expansive blocking statute in July 1980, Law No. 80-538. Article 1 prohibits French nationals and residents from communicating to foreign public authorities selected information capable of harming France. Article 1-*bis* prohibits any individual in France from requesting, investigating, or communicating protected information in connection with foreign judicial or administrative proceedings.

Thereafter, foreign litigants began to invoke blocking statutes as excuses to avoid their discovery obligations in civil cases involving some of the most sophisticated multinational corporations. And in theory, blocking statutes ought to protect foreign litigants from the more invasive aspects of American pre-trial discovery. However, federal district courts have consistently denigrated the importance of blocking statutes in transnational disputes, characterizing them as sham laws designed to afford litigants tactical weapons and bargaining chips in foreign courts.

THE ANTITRUST DIVISION FLIPS THE SCRIPT

Ironically, United States antitrust enforcement, which once inspired a proliferation of protectionist blocking statutes, is characterized today by intense international cooperation. As Scott Hammond, Deputy Assistant Attorney General for Criminal Enforcement in the Antitrust Division, observed: "International borders cannot serve as barri-

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ers to our ability to investigate. The Antitrust Division, like competition authorities around the world, strongly supports improving the ability of governments to share information in the investigation of hard core cartels." During the past decade, the Division has developed a strategy of multilateral global coordination to great effect. Recent successes include:

- Enhanced access to evidence and witnesses located in foreign countries, facilitated in part by the execution of search warrants by foreign law enforcement authorities;
- Antitrust cooperation agreements with Brazil, Israel, Japan, and Mexico, as well as its International Antitrust Enforcement Assistance Agreement with Australia;
- Increased legal uniformity achieved by the International Competition Network, a global network of antitrust authorities;
- An improved Mutual Legal Assistance Treaty with the United Kingdom, which includes cooperation provisions regarding antitrust enforcement;
- An industry-wide cartel investigation in 2003 coordinated across four jurisdictions by the Division, the European Commission, the Canadian Competition Bureau, and the Japanese Fair Trade Commission;
- December 2007 plea agreements with DOJ that "for the first time contemplate criminal prosecution and the imposition of jail time against individual cartel participants in multiple jurisdictions"; and
- The Division's consultation with the Chinese government regarding its comprehensive antitrust law, which becomes effective in August 2008.

SOME PEOPLE NEVER LEARN

In contrast to the Antitrust Division's instructive example of multilateral cooperation, the recent criminal enforcement of France's blocking statute to resist American law enforcement dramatically underscores the risks of uncoordinated government enforcement action. The Cour de Cassation refused last December to vacate the conviction and fine of the American-trained lawyer it called "Christopher X." for attempting to gather business-related information in France on behalf of the California Insurance Commissioner. Specifically, Christopher X was asked to interview a potential witness in France to develop evidence for the Commissioner's investigation, which included the U.S. Attorney's Office and the FBI, regarding the allegedly fraudulent acquisition of U.S. insurance company Executive Life.

Christopher X proceeded to contact the witness, and obtained substantive economic information in support of the Commissioner's investigation and related civil litigation. As a result, Christopher X was the first person ever to be convicted and fined for violating France's sweeping blocking statute.

In light of the unprecedented nature of the blocking statute enforcement action, it seems fair to ask: who was the real target, Christopher X or the California Insurance Commissioner? The enforcement action may have been motivated, at least in part, by a desire to resist the unwanted hand of American law enforcement, which tried to conduct a surrogate investigation through a French correspondent attorney. Alternatively, the Commissioner might have coordinated an interview of the potential witness pursuant to the U.S.-France Treaty on Mutual Legal Assistance in Criminal Matters. This Treaty obliges American and French authorities to offer each other "the widest measure of mutual assistance in investigations or proceedings in respect of criminal offenses" punishable under the laws of the requesting state. To date, the United States has signed bilateral MLATs with 58 foreign countries.

GLOBAL ENFORCEMENT REQUIRES GLOBAL COOPERATION

The criminal conviction of Christopher X should remind counsel acting on behalf of American regulatory authorities that global enforcement requires global cooperation. The Antitrust Division's multilateral successes over the past decade offer a clear alternative to enforcement actions that attempt to circumvent the formal procedures established by international law. Although American regulators may lose the element of surprise when coordinating with foreign authorities, a cooperative approach strengthens U.S. credibility, increases access to evidence and witnesses, and enhances global enforcement efforts.

Indeed, administrative agencies have begun to fashion various cooperative agreements in lieu of Hague Convention procedures, which apply only to judicial proceedings. In January 2007, the SEC and the College of Euronext Regulators negotiated a bilateral Memorandum of Understanding concerning consultation, cooperation, and the exchange of information related to market oversight. The parties explicitly acknowledged "their willingness to cooperate with each other in the interest of fulfilling their respective regulatory mandates." Moreover, the French accounting authority was recent-

ly empowered to exchange information with its international counterparts, including the U.S. Public Company Accounting Oversight Board. Meanwhile, the PCAOB recently hosted the first International Auditor Regulatory Institute, attended by representatives from auditor regulators and government agencies from more than 40 countries, after which Board Chairman Mark Olson observed that "communication and cooperation among regulators is critical to the successful functioning of the global capital markets."

CONCLUSION: A CHOICE GOING FORWARD

Uncoordinated enforcement action endangers hard-won progress. Should American regulatory authorities continue to conduct surrogate investigations through foreign attorneys, they may subject those attorneys to criminal liability under foreign blocking statutes. Furthermore, conduct generally disrespectful of foreign sovereignty engenders mistrust between international authorities and threatens to provoke protectionist measures like blocking statutes. For example, the French Data Protection Authority recently voiced its concern about increasingly aggressive U.S. discovery demands for personal information located in France.

U.S. antitrust enforcement, once the impetus for numerous foreign blocking statutes, now epitomizes the type of global cooperation necessary for effective law enforcement. But the past six years offer potent counterexamples that highlight the dangers of unilateralism and disrespect for foreign sovereignty — some relatively minor, like the California Insurance Commissioner's surrogate investigation, others far more consequential.

American enforcement agencies should observe the effects of both strategies, and choose wisely.

