

Criminalizing cartels: a global trend?

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in Research Handbook on Comparative Competition Law,
eds. Arlen Duke, John Duns and Brendan Sweeney (Edgar Elgar, 2015)

1. Introduction

For most countries, competition law is a relatively recent phenomenon. In 1950, only ten jurisdictions had competition laws. Today more than 120 jurisdictions do and more than 80 of these systems have commenced since 1980.¹ Officials from these jurisdictions now interact regularly through networked organizations, such as the International Competition Network (ICN) and the Organization for Economic Cooperation and Development (OECD), as well as the United Nations Conference on Trade and Development (UNCTAD). There is no binding multilateral treaty mandating that countries have a competition law system that prescribes certain behavior, or create specialized institutions to enforce these prescriptions, although the North American Free Trade Agreement and a number of other free trade agreements signed by the United States (US) have short provisions that require countries to adopt and enforce laws against anticompetitive business conduct. Yet such prescriptions and institutions now exist in all major economies, creating what can be viewed as a transnational legal order, a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions.²

Combating international cartels is one of the central goals of this transnational legal order, and there appears to be greater normative convergence on this antitrust issue than any other among governments. Countries around the world have increased sanctions against cartels, including in many cases adopting criminal sanctions for the first time, with the term cartels now commonly harnessed to the unsavory epithet ‘hard core’ to signify cartels engaged in price fixing, output limitations, market divisions and bid-rigging.³ More than thirty countries have

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¹ Rachel Brandenburger, ‘The Many Facets of International Cooperation at the Antitrust Division’ (International Bar Association Midyear Conference, Madrid, Spain, June 15 2012) <<http://www.justice.gov/atr/public/speeches/284239.pdf>>; John Fingleton, ‘the International Competition Network: Planning for the Second Decade’ (9th Annual ICN Conference, Turkey, April 2010) <<http://www.internationalcompetitionnetwork.org/uploads/closing09.pdf>>.

² Gregory Shaffer, *Transnational Legal Process and State Change*, (2012) 37 Law and Social Inquiry 229; and Terence Halliday and Gregory Shaffer, ‘Transnational Legal Orders’ in Terence Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (Cambridge University Press 2015).

³ See for example Christopher Harding, ‘Business Collusion as a Criminological Phenomenon: Exploring the Global Criminalisation of Business Cartels’ (2006) 14 Critical Criminology 181, 182, 188 : ‘The closing years of the century then witnessed an apparent sea change.... Europe, and also jurisdictions elsewhere throughout the world,

criminalized cartel conduct in some form. All but five have done so since 1995 and over twenty since 2000, and the list is growing.⁴ Many states have initiated prosecutions, several have secured convictions, and a few have imposed jail time for these offenses. Others are significantly increasing the amount of fines for cartel behavior, such that they can be viewed in punitive terms, whether they are formally of a criminal or administrative law nature. Around sixty countries now combine enhanced sanctions with a leniency program pursuant to which the first to confess is immunized from public criminal or civil prosecution, adopting a carrot and stick approach to destabilizing and deterring cartels.

There is, in short, a global trend toward enhanced sanctions combined with common enforcement techniques. Former US Deputy Assistant Attorney General for Criminal Enforcement, Scott Hammond thus proclaimed, '[i]n the last two decades, the world has seen the proliferation of effective leniency programs, ever-increasing sanctions for cartel offenses, a growing global movement to hold individuals criminally accountable, and increased international cooperation among enforcers in cartel investigations.'⁵ Although the US remains the primary user of criminal law as an enforcement tool, and the enforcement record outside the US is relatively slim, the debate over criminalization is active.⁶ This debate reflects a general shift in government attitudes toward cartels which earlier were viewed in more benign (or even positive developmental) terms, since cartels could contribute to price stability and labor peace on account of the long-term employment that stable firms with ensured profit margins can offer.⁷

This state of affairs raises a series of questions. What spurred the trend toward increased sanctioning and criminalization of cartel activity? Has the move been almost entirely driven by criminalization evangelists such as the US Department of Justice (DOJ), working unilaterally, bilaterally, and through transnational networks? Is the primary explanation cognitive in terms of shared norms of being a 'modern' regulatory capitalist state, as stressed by global polity theory?⁸ Or does the shift simply reflect a rational response to the rise of international cartels operating in more than one jurisdiction as part of economic globalization? In other words, is the trend toward criminalization a functional response to regulatory difficulties that transcend national borders in an economically interdependent world, as rational institutionalist theory stresses? Or are organic, bottom-up, national processes also at work? Are we witnessing a change in ideological and

seemed to be engulfed by a project of criminalization.' For an excellent book on the phenomenon, see Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies Of An International Regulatory Movement* (Hart Publishing 2011).

⁴ See also Janet L McDavid and Megan Dixon, 'Antitrust Update: Criminal Antitrust Enforcement in a Down Economy' (2011) Antitrust update, 1011, 1015: 'There are now over 100 countries with antitrust regimes, and over two dozen that have criminalized cartel activity'. Reporting over 20: Caron Beaton-Wells, 'Cartel Criminalisation as Cultural Change: A Report from Findings of a Survey of the Australian Public' (*Japanese Fair Trade Commission* 5 October 2010) 6 < http://www.jftc.go.jp/en/international_relations/icn/yokohama-materials/pdf/1_3.pdf>.

⁵ Scott D Hammond, 'Criminal Policy Speeches: The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades' (*Department of Justice – Antitrust Division* 25 February 2010) 1 <<http://www.justice.gov/atr/public/speeches/speech-criminal.html>>.

⁶ Beaton-Wells (n 4) 6.

⁷ 'economic theorists and political leaders of the interwar period had often praised the potential value of cartels': David Gerber, *Global Competition Law: Law, Markets and Globalization* (Oxford University Press 2010) 178. See also Christopher Harding and Julia Joshua, *Regulating Cartels in Europe* (Oxford University Press 2010).

⁸ For an excellent assessment of different explanations of policy diffusion, see Beth Simmons, Frank Dobbin and Geoffrey Garrett (eds), *The Global Diffusion of Markets and Democracy* (Cambridge University Press 2008).

moral sensibilities around the globe regarding cartel conduct? What is the impact of formal legal change on actual practices within countries, both in terms of government investigations and private behavior? What are the mechanisms driving the criminalization of cartel activity and the enforcement of anti-cartel policies, and what are the primary obstacles to change? What, in sum, does the criminalization trend tell us about *transnational legal processes* and their limits?⁹

This Chapter reviews and assesses trends in the criminalization and enforcement of cartel offenses around the world, highlighting their notable features. It notes the change in focus in the US toward addressing international cartels in the 1990s, followed by a shift in focus toward criminal penalties, including jail time for foreign individuals. The US has advocated these changes in international fora, most notably the OECD and the ICN. It has been relatively successful in its efforts to convince countries to enhance sanctions against cartel activity, and to use new enforcement tools such as leniency programs. We thus note the role of US advocacy in these developments. Yet we do not attempt to answer whether the change is rational interest-based or cognitive, since we find that there is support for both explanations.¹⁰ Rather, we focus on developments in formal law compared to actual enforcement, the mechanism of diffusion through networks, and the challenges posed for formal criminalization policies to be applied. Criminalizing competition offenses and actually enforcing those prohibitions are two different propositions.

Part 2 addresses changes in the law—the ‘law on the books’—in a number of jurisdictions, starting with the US and the European Union (EU). It highlights the enactment around the globe of increasingly severe penalties against cartel activity, and the increased adoption of criminal sanctions, which follows the US lead. Part 3 examines enforcement trends in the US, the EU, and other countries, starting with the increased focus of US enforcement policy on international cartels and on the application of criminal sanctions against individuals. Part 4 addresses transnational cooperation efforts in combating cartels, focusing particularly on the role of the US-initiated ICN, as well as the ongoing substantive and peer-review work of the OECD. Part 5 examines two new developments regarding enforcement techniques, the enhanced threat of extradition for cartel activity on account of mutual criminalization, and the proliferation of leniency programs to destabilize cartels, which are used as a carrot to complement the stick of more severe sanctions. Part 6 addresses the central impediments to these trends, and in particular the challenge of obtaining sufficient social and political support for criminalizing cartel activity and the impact of different institutional legacies, especially where criminal and competition law responsibilities are divided among different authorities.

2. Legal change across countries: the law on the books

2.1 Overview of policy developments

While twenty years ago cartel prosecutions were largely the province of the US DOJ, a broad range of countries have now adopted enhanced sanctions against cartel offenses, including

⁹ For an analytic framework for assessing transnational legal processes and their impact, see Shaffer (n 2); Halliday and Shaffer (n 2). See also Harold Hongju Koh, ‘Bringing International Law Home’ (1998) 35 *Houston Law Review* 623.

¹⁰ To start, rational interest-based responses operate within particular cognitive frames, which affect the policy goals pursued.

criminal sanctions now being available in over thirty countries. Around thirty-five countries have criminalized cartel conduct in some form; most of them since the mid-1990s, and the list is growing. We compile these countries as of the end of 2012 in Table 1 at the end of this chapter, noting the date of criminalization, the conduct covered, and the sanctions provided. We also highlight those countries that appear to be more serious about criminal prosecution in practice, although in many cases we do not yet know how sanctions will be applied because of the novelty of the legal trend.

The leader in the move toward enhancing sanctions against cartels has been the US, now joined by the EU. Although the EU itself applies only administrative fines to undertakings and not individuals, these fines are punitive enough that EU Advocates-General view them as ‘quasi-criminal,’ and over half of the EU member states have criminalized at least some forms of cartel activity. More recently, other OECD countries have followed suit, as have the BRICS—Brazil, Russia, India, China and South Africa. As John Connor writes, ‘with the adoption of an antitrust law in China in 2007, virtually all the world’s leading economies have made cartels illegal.’¹¹ Whereas cartel activity earlier was not viewed as problematic, and seen as possibly even conducive, to national economic development, most leading economies have now significantly stiffened sanctions against cartels, reflecting a sense of social opprobrium, at least in the books. The trend toward punitive administrative sanctions has facilitated the move toward criminal sanctions as an enhanced deterrent.

Yet scholarly attempts to assess global patterns of criminalization are limited.¹² Christopher Harding rightly notes that any such attempt will necessarily be plagued by problems of definition and legislative complexity.¹³ Some systems, for example, prosecute cartel offenses as both administrative and criminal offenses. It thus may be difficult as a practical matter to disentangle administrative fines and surcharges from ‘criminal fines.’ The growing trend toward ‘criminalization’ (broadly construed) also masks crucial differences between jurisdictions. Harding concludes that empirical study reveals ‘very much a patchwork of criminalization’ involving local legal traits.¹⁴ Apart from Canada and the US, little of other countries’ ‘criminal legislation pre-dates the 1980s, and much of it has a more partial or tentative character.’¹⁵ For example, criminal sanctions can be imposed for bid-rigging in Austria, Germany, Hungary, Italy, and Poland, but such conduct can be viewed as more akin to fraud and thus distinct (for such jurisdictions) from that of cartel offenses. In some jurisdictions, only criminal fines may be imposed, and in many others, only fines are used in practice, so that they lack the social sanction and potential deterrence value of jail time. Canada, for example, prosecutes individuals, but even where successful, the individuals typically only receive a conditional sentence pursuant to which they provide community service.¹⁶ While European, Latin American, and Asian jurisdictions have all criminalized competition offenses, ‘there is no systematic pattern.’¹⁷

¹¹ John M Connor, ‘Latin America and the Control of International Cartels’, in Eleanor M Fox & D Daniel Sokol (eds), *Competition Law and Policy in Latin America* (Hart Publishing 2009) 291, 309.

¹² Outside of North America, this feature fits with the general paucity of academic attention to business crime. Harding’s 2006 study is directly on point: Harding (n 3) 198.

¹³ *ibid* 189.

¹⁴ *ibid*.

¹⁵ *ibid* 190.

¹⁶ Telephone Interview with Department of Justice (US) official (June 10, 2011).

¹⁷ Harding (n 3) 190.

Criminalization of cartel conduct is of a recent vintage, and more limited in scope, outside the US.¹⁸ Harding identified only nine countries in 2006 that are ‘to some extent self-consciously targeting cartel activity by means of criminal law within the context of the recent international campaign against cartels,’ listing Brazil, Canada, France, Germany, Ireland, Japan, Norway, the United Kingdom, and the US.¹⁹ This figure, however, has increased since then. An October 2010 Cartels Workshop organized by the ICN placed the figure at more than twenty countries,²⁰ we show that the figure was more than thirty in 2012, and the list is growing.

2.2 US Developments

The US has long been the global leader in aggressively pursuing competition policy.²¹ The US first extended the jurisdictional reach of its law to combat foreign-based cartels. As this move was insufficient, the US has since attempted to export anti-cartel policies and enforcement techniques abroad, in particular through the OECD and the ICN discussed in Part 4.

The US has criminalized agreements and conspiracies to restrict competition since 1890 with the passage of the original Sherman Antitrust Act, although it would be over seventy years before jail sentences for antitrust violations became common.²² Originally only a misdemeanor, violation of the Act became a felony in 1974. The US subjects both corporations and individuals to punishment, casting ‘[t]he net ... widely in terms of both conduct and persons.’²³ Cartel participants face large fines, possible imprisonment, and treble damages in civil actions. The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 significantly increased the maximum penalties for antitrust offenses.²⁴ The Act increased the maximum corporate fine from \$10 million to \$100 million; increased the maximum individual fine from \$350,000 to \$1 million; and raised the maximum jail sentence from three to ten years. The longest prison sentence for an individual to date has been sixty months.²⁵ If the top end of the range applicable under the US Sentencing Guidelines exceeds the statutory maximum, then an alternative sentencing provision available for federal felonies may be employed which can increase fines to

¹⁸ *ibid* 190–91.

¹⁹ *Ibid* 191.

²⁰ Beaton-Wells (n 4) 6.

²¹ Harding (n 3) 190.

²² Sherman Antitrust Act, ch. 647, §§ 1-8, 26 Stat. 209 (1890) (codified as amended at 15 USC. §§ 1-7 (1982)). The Act became law on July 2, 1890. See Donald Baker, ‘Why Is the United States So Different from the Rest of the World in Imposing Serious Criminal Sanctions on Individual Cartel Participants?’ (2011) 12 *Sedona Conference Journal* 301, 302-04. See generally John Herling, *The Great Price Conspiracy: The Story of the Antitrust Violations in the Electric Industry* (Greenwood Press 1962); detailing revival of criminal antitrust enforcement against nation-wide electrical equipment cartel in the early 1960s.

²³ Harding (n 3) 190.

²⁴ Pub. L. No. 108-237, 118 Stat. 661(2004) (codified as amended in scattered sections of 15 USC.).

²⁵ U.S. Dep’t of Justice, Press Release, Former Sea Star Line President Sentenced to Serve Five Years in Prison For Role in Price-Fixing Conspiracy Involving Coastal Freight Services Between the Continental United States and Puerto Rico, (Dec. 6, 2013), available at http://www.justice.gov/atr/public/press_releases/2013/302027.htm. Recently, the Department of Justice secured two-year prison sentences for two Japanese executives – the longest sentence of a foreign national who has submitted to the United States’ jurisdiction: Department of Justice, ‘Antitrust Division Update’ (*Department of Justice Website* 2013) <<http://www.justice.gov/atr/public/division-update/2013/criminal-program.html>>

twice the amount of harm caused or the gains derived.²⁶ The DOJ routinely invokes this provision to justify fines in excess of the statutory maximum. The largest criminal fine under this provision has been \$500 million.²⁷

The Antitrust Division of the DOJ relies heavily on its amnesty and leniency program in its criminal enforcement efforts.²⁸ The amnesty program grants automatic immunity from criminal prosecution if an entity or individual reports illegal conduct which the Antitrust Division was not previously aware of and truthfully cooperates with the Division in its investigation and any resulting prosecution. The cooperating entity must further not have been the ringleader of the cartel nor have coerced others to participate. Discretionary immunity or reduced sentences and fines are available to entities and individual who cannot meet the full criteria set forth above. To further induce cartel offenders to come forward, recent legislation also amended the leniency program to limit the civil damages exposure of an amnesty applicant from treble damages to the actual damages caused, in addition to providing immunity from criminal prosecution.

2.3 EU and EU Member State Developments

Historically, Europe has approached antitrust regulation very differently than the US. While the US approach has been characterized by criminalization and treble damage civil claims, Europe's approach had long been administrative, involving a more consensual process which was often based on voluntary adoption of practices, and which avoided penal sanctions and critical language suggesting moral approbation.²⁹ Europe's approach began to change in the early 1980s, and has since become increasingly 'American' in its tough-minded approach toward cartels, focusing on their adverse economic impact on consumers.³⁰ Although EU authorities are still unable to impose prison terms or fine individuals for antitrust violations, and there are significant constitutional and institutional limitations on their ability to do so, they have become much more aggressive in anti-cartel enforcement and there is now a debate as to the advisability of adding a criminal law component to EU competition policy.³¹

²⁶ Criminal Fine Improvements Act, Pub. L. No. 100-185, 101 Stat. 1279 (1987) (codified as amended at 18 USC 3571(d) (2006)). We thank Professor Caron Beaton-Wells for this point.

²⁷ 'DOJ AU Optronics Corporation Executive Convicted for Role in LCD Price-Fixing Conspiracy' (*Department of Justice Webstie* 18 September 2012) <http://www.justice.gov/atr/public/press_releases/2012/290399.htm>. AU Optronics was fined \$500 million, matching the largest fine imposed against a company violating US antitrust laws.

²⁸ Department of Justice (US) 'Corporate Leniency Policy' (Department of Justice 1993); Department of Justice 'Leniency Policy for Individuals' (Department of Justice 1994).

²⁹ Gerber *Global Competition Law* (n 7) 159–203; see generally David Gerber, *Law and Competition in 20th Century Europe* (Oxford University Press 1998).

³⁰ Harding (n 3) 186–87. Gerber noting 'growing confidence in the intellectual foundations of US-style substantive law analysis within the [EU] competition directorate': Gerber *Global Competition Law* (n 7) 201.

³¹ cf Ingeborg Simonsson, 'Criminalising Cartels in the EU: Is There a Case for Harmonisation', in Beaton-Wells and Ezrachi (eds) (n 3); Peter Whelan, 'A Principled Argument for Personal Criminal Sanctions as Punishments under EC Cartel Law' (2007) 4 *Competition Law Review* 7; Katalin J Cseres and others, *Criminalization of Competition Law Enforcement: Economic and Legal Implications for EU Member States* (Edward Elgar 2006).

The EU has significantly increased its penalties for cartel offenses in recent years to the extent that EU Advocate-Generals have called them ‘quasi-criminal.’³² EU authorities now can assess fines up to 30% of a company’s annual sales in connection with the prohibited activities multiplied by the number of years in which the offenses occurred. Fines also now include an ‘entry fee’—or automatic fixed penalty—of between 15-25% of the participant’s annual sales in the affected sector.³³ While the fines do not change the maximum penalty – 10 per cent of a company’s total turnover in the preceding business year (whether or not in connection with the prohibited activity – the revisions make it more likely that the fines will approach that limit.³⁴ Among the more significant developments in the EU are the refinement of its leniency program in 2006 and the establishment of its cartel settlement procedure in June 2008, in both cases following the US lead.³⁵ The leniency program, unlike the US model, is not backed by the threat of criminal sanction. Yet the program has proven crucial to uncovering cartels in Europe, with the majority of cases in recent years stemming from evidence obtained from a leniency applicant.³⁶ The settlement procedure is designed to streamline the EU’s handling of cartel cases and thus free resources for new investigations. The alleged cartelist is able to review the EU’s evidence against it and determine whether to acknowledge its involvement and accept liability for violations of EU competition law in EU territory. Cooperating parties receive an automatic 10% reduction in penalties pursuant to the settlement program, but can obtain full immunity if they are the first to confess pursuant to the leniency program.

The European Commission, through its Directorate-General for Competition (DG Comp), and EU national competition authorities established the European Competition Network (ECN) in 2004 to increase cooperation between EU and national authorities, and more effectively share enforcement tasks.³⁷ The underlying regulation also strengthened authorities’ investigatory powers by, for example, establishing their right to seal business premises and books or records, and to interview persons who may have useful information.³⁸ The ECN has helped competition

³² Opinion of Advocate General Kokott, Case C-97/08, *Akzo Nobel NV and Others v. Commission of the European Communities* [2009] ECR I-8237, 39: ‘The consequence of the sanctionative nature of measures imposed by competition authorities for punishing cartel offences - in particular fines - is that the area is at least akin to criminal law.’; Joined Opinions of Mr. Advocate General Vesterdorf, Case T-1/89, *Rhone-Poulenc SA v. Commission* [1991] ECR II-867, 3: referring to the ‘substance of the [competition] cases, which all broadly exhibit the characteristics of a criminal law case’. See also, noting the punitive and quasi-criminal nature of the penalties involved, Philip Marsden, ‘Checks and Balances: EU Competition Law and the Rule of Law’ (2009) 22 *Loyola Consumer Law Review* 51, 55.

³³ European Commission (EC) Guidelines On The Method Of Setting Fines Imposed Pursuant To Article 23(2)(A) Of Regulation No 1/2003 [2006] OJ C210 2.

³⁴ Gary R. Spratling & D Jarrett Arp, ‘International Cartel Investigations: Evaluating Options and Managing Risk in Multi-Jurisdictional Criminal Antitrust Investigations’ [2010] *Antitrust Counseling & Compliance* 229, 241–43, 338 <1788 PLI/Corp 229>.

³⁵ Harding and Joshua (n 7) 243; Commission Regulation (EC) 622/2008 amending Regulation (EC) No. 773/2004, as regards the conduct of Settlement Procedures in cartel cases [2008] OJ L171/3.

³⁶ See Edmond noting that all cases adopted in 2010 were via immunity applications: Charlotte Edmond, ‘For Whom the Whistle Blows’ (*Legal Week* 22 Sept 2011). See also Alan Riley, ‘The Modernisation of EU Anti-Cartel Enforcement: Will the Commission Grasp the Opportunity?’ (Special Report, Center for European Policy Studies January 2010) 5 <http://aei.pitt.edu/14570/1/Modernisation_Final_e-version.pdf>.

³⁷ Stephen Wilks, ‘The European Competition Network: what has changed?’ (Paper for EUSA Conference, Montreal, 17-19 May 2007) <<http://aei.pitt.edu/8067/1/wilks%2Ds%2D08h.pdf>>.

³⁸ See Chavez (n 16) 964–65. See also Council Regulation (EC) 1/2003 On the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, arts. 19, 20, [2003] OJ L 1, 14-15.

policy gain stature throughout the EU, and enhanced the authority of the DG Comp and the National Competition Authorities.³⁹

The major focus of sanctions for EU member state authorities likewise is the imposition of administrative fines against corporate enterprises, embedded in a juridical framework.⁴⁰ Starting in the late 1990s, and increasing more recently, however, some EU member states have begun to embark on a criminalization project. Over half of the EU member states now criminalize certain cartel offenses, including Austria, Belgium, Denmark, Estonia, France, Germany, Greece, Hungary, Ireland, Italy, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and the United Kingdom, and the list appears to be growing, although Austria, the Netherlands, and Luxembourg have decriminalized competition law (except for bid-rigging in Austria).⁴¹ As discussed in Part 3, however, how such criminalization initiatives will operate in practice remains in question as the policies remain circumscribed compared to the US model.

2.4 Developments in other Countries

In recent years, a wide range of other jurisdictions, at least formally, provide jail time for cartel offenses. Individuals now face potential imprisonment for cartel activity in Australia, Brazil, Canada, Iceland, Indonesia, Israel, Japan, Korea, Norway, Russia, Thailand, and Zambia, in addition to in the US and a majority of EU member states. Moreover, cartel participants are subject to complementary private civil damage actions in a growing number of countries, including Australia, Brazil, Canada, Japan, and New Zealand, as well as in Belgium, Germany, Ireland, and the United Kingdom within the European Union.

The global trend is toward providing for enhanced sanctions against cartels. Many OECD members (in addition to the US and EU member states) have stiffened penalties for engaging in cartel activities, which vary in their civil/administrative or criminal law nature. For example, Canada's Budget Implementation Act of 2009 substantially changed the criminal enforcement regime for cartel offenses by raising the maximum penalty from 5 to 14 years in prison and the maximum fine from \$10 to \$25 million. Price-fixing, market allocation, and output restrictions are now per se offenses under the law.⁴² And as of early 2012, an individual convicted and sentenced to prison under certain provisions of the act no longer enjoys the prospect of serving his or her sentence in the community.⁴³ Australia recently increased maximum fines to the

³⁹ Gerber (n 7) 190, 200.

⁴⁰ Ibid 182. In addition the European Union has issued a directive requiring member states to enact effective private damage remedies for competition violations into national law by the end of 2016. DIRECTIVE 2014/104/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=EN>.

⁴¹ Stating that more than half of all EU member states have some form of criminal sanctions for some forms of cartel conduct: Philipp Girardet, "What if Uncle Sam wants you?": Principles and Recent Practice Concerning US Extradition Requests in Cartel Cases' (2010) 1 Journal of European Competition Law and Practice 286, 287; Wouter Wils, 'Is Criminalization of EU Competition Law the Answer' in Cseres and Others (n 33) 60, 74.

⁴² Spratling and Arp (n 36) 250; Bill C-10, An Act to implement certain provisions of the budget tabled in Parliament on 27 January, 2009 and related to fiscal measures, 2nd Sess., 40th Parl., 2009 [hereinafter Bill C-10]. Bill C-10 became S.C. 2009, c. 2 upon passage through Parliament.

⁴³ Elisa Kearney and others, 'Canadian Government Restricts Availability of Conditional Sentences ("House Arrest")' *Mondaq* (20 March 2012)

greater of \$10 million or three times the value of the benefit derived from the cartel. Where value cannot be determined, the law provides for a fine of 10% of annual turnover.⁴⁴ In 2009, the Australian Parliament criminalized various cartel offenses, providing for up to 10 years in prison and a fine of \$220,000 (Aus), and New Zealand is in the process of following Australia in this respect.⁴⁵ In the summer of 2009, Japan increased criminal sanctions for cartel offenses, changing its maximum prison sentence for cartel conduct or bid-rigging from three to five years. Japan also raised the statute of limitations from three to five years, and restructured its new leniency program.⁴⁶ In 2005, Korea likewise revised its competition laws to increase fines against cartel participants from a maximum of 5% to a maximum of 10% of sales in related goods or services, and to facilitate use of a leniency program.⁴⁷ More recently, in 2011, Mexico's Congress approved a new law introducing criminal sanctions of up to ten years in prison for collusion, as well as the ability to engage in surprise inspections, known as 'dawn raids.'⁴⁸ Even Switzerland, 'where cartels were "endemic" to the economy,' has recently passed a law providing for administrative fines of up to 10% of a firm's total combined revenue for the preceding three years.⁴⁹

The BRIC countries have also stiffened penalties for engaging in cartel activities. Brazil has emerged as the new leader in Latin America in combating cartels. Since 2003, Brazil's competition system has eliminated overlapping functions, streamlined cartel investigations, and enhanced authorities' enforcement tools through granting them the power to conduct 'dawn raids' and to use the leverage provided by new leniency and settlement programs.⁵⁰ Federal and state prosecutors conduct cartel prosecutions, in cooperation with the agencies forming part of the Brazilian Competition Policy System (BCPS).⁵¹ The BCPS's anti-cartel program has grown steadily, especially since 2006.⁵² Brazil's program for criminally prosecuting cartels is recently among 'the most active of all countries,' and includes fines and prison sentences ranging from two to five years.⁵³ Brazil's leniency program, created in 2000, offers full immunity to the first cartel member to confess, or partial immunity where enforcers were already aware of the cartel. Brazil

<<http://www.mondaq.com/canada/x/169312/Antitrust+Competition/Canadian+Government+Restricts+Availability>>.

⁴⁴ Spratling and Arp (n 36) 243.

⁴⁵ A bill imposing criminal sanctions for cartel behavior was introduced into parliament in October 2011. Commerce (Cartels and Other Matters) Amendment Bill, 2011 No. 341-1, Digest No. 1942 (Oct. 13, 2011)

<<http://www.parliament.nz/NR/rdonlyres/C9A80483-8096-4CCF-941C-E2B346E6C844/208630/1942Commerce1.pdf>>: criminalizing price fixing, output restrictions, market allocation and bid rigging, and providing criminal penalties of, inter alia, up to seven years imprisonment for an individual. See also Chavez (n 16) 965–66; Ministry of Economic Development, 'New Zealand, Cartel Criminalisation Discussion Document' (*Ministry of Economic Development (NZ)* 2010) <<http://www.med.govt.nz/upload/70683/Cartel-Criminalisation.pdf>>.

⁴⁶ Spratling and Arp (n 36) 252, 309–10.

⁴⁷ *ibid* 243, 311.

⁴⁸ 'Monopolies in Mexico: Compete – Or Else' (*Economist* 7 May 2011) 41. See also Omar Guerrero Rodríguez and Alan C Ramírez, 'Mexican Competition Law Aligned Incentives for Effective Cartel Enforcement' (*Competition Policy International*, October 2012) <<https://www.competitionpolicyinternational.com/assets/Uploads/Cartel-Oct2012-Omar3.pdf>>.

⁴⁹ Chavez (n 16) 943.

⁵⁰ OECD 'Competition Law and Policy in Brazil: A Peer Review' (OECD 2010) 7.

⁵¹ *ibid* 7, 37.

⁵² *ibid* 14–15.

⁵³ *ibid* 18. See also Spratling and Arp (n 36) 253.

also introduced a Cartel Settlement Program under which competition authorities enter into settlements with companies that lost the race to apply for leniency. The settlement program led to a number of settlements since 2007.⁵⁴ Brazil has emerged as a regional expert in anti-cartel enforcement—having recently shared its growing expertise with Argentina, Chile, Paraguay, and El Salvador.⁵⁵ Brazil's competition authorities regularly engage in bilateral training and consultations with other national authorities.

Among the other BRICs, China's new anti-monopoly law went into effect in 2008, and in the summer of 2009, China's industry and commerce agency announced new procedures governing antitrust investigations and enforcement.⁵⁶ China's Anti-Monopoly Law does not expressly provide for criminal penalties, but other criminal law provisions can and have been used against cartel participants (such as for 'obstruction' of justice).⁵⁷ Similarly, under a law effective in late 2009, Russia now applies criminal sanctions for antitrust violations, and certain offenses are punishable by up to six years imprisonment.⁵⁸ In India, 'after a long and troubled gestation,'⁵⁹ a new competition act began to take effect in 2009 which stiffens sanctions, including fines of up to 10 percent of an enterprise's turnover,⁶⁰ and prison terms for obstruction of justice.⁶¹ Sometimes associated as one of the expanded 'BRICS,' South Africa also in 2009 enacted criminal liability for directors and managers for certain competition law offenses,⁶² and has now created a cartel division within its enforcement agency.⁶³ The impact of these legal changes, however, remains an open question in many countries for the reasons we discuss in Part 6.

3. Enforcement trends across countries

3.1 Overview of policy developments

The prevalence of cartels is difficult to measure. Conspiracies are meant to go undetected, and many, of course, do. Yet because of more robust law enforcement tools and shifting attitudes about cartels, authorities are detecting more cartels than in the past. While many countries have law on the books, to what extent do different jurisdictions effectively enforce those laws? Answering this question is difficult. As Harding observed, it is still too early

⁵⁴ OECD (n 52) 17.

⁵⁵ *ibid* 50–51.

⁵⁶ Brendan Pierson, 'China Adopts New Rules to Enforce Monopoly Law' (*Law 360* 9 June 2009) <<http://www.law360.com/articles/105392/china-adopts-new-rules-to-enforce-monopoly-law>>

⁵⁷ Jonathan Gowdy, 'China Issues New Anti-Monopoly Rules and Procedures on Pricing Conduct' *Mondaq* (20 January 2011) <<http://www.mondaq.in/article.asp?articleid=120258>>; Martyn Huckerby and others, China's Antitrust Tigers Grow Teeth *Mondaq* (1 September 2010) <<http://www.mondaq.com/x/108988/Trade+Regulation+Practices/Chinas+Antitrust+Tigers+Grow+Teeth>>.

⁵⁸ Spratling and Arp (n36) 254.

⁵⁹ Aditya Bhattacharjea, 'India's New Competition Law: A Comparative Assessment (2008) 4 Journal of Competition Law and Economics 609, 609.

⁶⁰ The Competition Act, 2002, No. 12 of 2003, art. 27.

⁶¹ *ibid* art 42. See also Bhattacharjea, (n 61) 626.

⁶² Competition Amendment Act of 2009 § 16 (S. Afr.). However, the Amendment Act provides that the President can determine when it enters into force; as of the beginning of 2015, it had not yet come into force.

⁶³ Noting appointment of official to the "newly established Cartels Division": 'Commission Appoints Head of Cartel Unit' (*AllAfrica.com* 6 May 2011).

to assess the impact of ‘the enforcement of criminal law relating to cartels, when so much of this is of recent origin,’ but ‘some indications at a more general and comparative level [suggest] that implementation and enforcement [do] not match the rhetoric of law enactment.’⁶⁴

Scholars and policymakers have attempted to get at the enforcement question in different ways. Economist John Connor has collected empirical data on enforcement in a large multi-jurisdictional sample.⁶⁵ The ICN and OECD offer survey evidence regarding the perspectives of cartel authorities.⁶⁶ Critically, however, empirical work on cartel enforcement can measure only *detected* cartels. One must therefore bear in mind that any conclusions drawing from this empirical work inevitably suffer from selection bias. Methodological difficulties notwithstanding, the overall global trend is toward enhanced enforcement, including higher fines and an increased emphasis on individual accountability with a view toward deterrence, although the level of enforcement varies significantly by jurisdiction as does its deterrent value.

Connor undertook, to our knowledge, the first attempt to assess quantitatively, using a large multi-jurisdictional sample, the magnitude and pattern of global antitrust sanctions imposed against ‘international cartels,’ by which he refers to cartels involving members from more than one country.⁶⁷ Connor presents data on such cartels discovered from 1990–2005 in a 2006 study, and maintains an annually-updated database of all publicly reported sanctions. He selects 1990 as a date that roughly captures the beginning of the current level of sanctions and the harmonization of antitrust laws among the US, EU, and Canada. From 1990 to 2005, authorities took a total of 387 legal actions against 260 international cartels. Legal action includes ‘the launching of an official investigation, the filing of a private antitrust damages suit, or the imposition of one or more legal sanctions.’⁶⁸ The US, Europe, and Canada commenced the vast majority of these legal actions—128, 101 (including action by both EU member states and the EU) and 56, respectively. In contrast, only seventeen actions were initiated in Asia, and only two in Latin America, against international cartels during this period. Authorities secured a total of 285 ‘convictions’ in these cases, which Connor defines to include consent decrees, settlement agreements, and warnings. He concludes that the data suggests that ‘antitrust authorities are by and large cautious about opening formal investigations in the sense that 90–95% of the cases investigated conclude with sanctions of some sort.’⁶⁹

⁶⁴ Harding (n 3) 190, 192.

⁶⁵ See for example John M Connor, ‘Effectiveness of Antitrust Sanctions on Modern International Cartels’ (2006) 6 *Journal of Industrial Competition and Trade* 195.

⁶⁶ ICN, ‘Trends and Developments in Cartel Enforcement’ (9th Annual ICN Conference, Istanbul, Turkey, 29 April 2010) (hereafter ‘ICN Trends’]. The survey highlights six recent changes impacting cartel enforcement across the globe: (1) increased penalties, (2) changes in investigative powers, (3) new violation provisions or new definitions of what constitutes cartel offenses, other significant changes or development, (4) changes in leniency programs, (5) shifting perceptions of the importance of cartel enforcement, and (6) the use of the ICN’s Cartel Enforcement Manual to advance cartel enforcement. Forty-three of forty-six respondents to the ICN survey, for example, noted that increased penalties have impacted cartel enforcement in that jurisdiction in the last ten years—the highest of any reported factor. Thirty-five respondents pointed to enhanced investigative powers and leniency provisions as a major development.

⁶⁷ Connor, ‘Effectiveness of Antitrust Sanctions’ (n 67) 197.

⁶⁸ *ibid* 199.

⁶⁹ Connor derived the 90-95% figure in view of the fact that of 102 legal actions without convictions, 81 were still underway at the time of publication and only 21 were dismissed: *ibid* 200.

More recently, Connor updates and summarizes the data through 2008 with a view to uncovering trends across countries over time.⁷⁰ Between January 1990 and November 2008, he finds that there were 516 ‘formal official investigations’ of suspected international cartels around the world, meaning that there were 129 new formal investigations (516-387) between 2005 and 2008 alone.⁷¹ This figure regarding ‘investigations’ includes cartels that were subject to raids, grand jury hearings, class actions, and indictments. At least 6,000 companies have been alleged or proven to be members of international cartels, including about 2,900 ultimate parent companies with known names and locations. At least 1,620 corporations have been fined.⁷² These cartels alone affected a total of around \$16 trillion in sales, with the largest number trading in industrial goods, followed by business and consumer services.⁷³ Connor finds that the trend across countries toward increased discovery of international cartels is pronounced, with rates of discovery being fifteen times higher in 2005–2008 than before 1994, and having steadily increased between those dates.⁷⁴

Enforcement patterns vary widely among states and regions. The number of indictments in the US and Canada peaked in the late 1990s, although this shift could suggest that past enforcement efforts and the use of criminal sanctions have been successful deterrents. At the same time, the severity of applied US sanctions has increased.⁷⁵ In parallel, the EU has commenced an increasingly large number of cases, resulting in increasingly high sanctions. National competition authorities within the EU have been the biggest prosecutors of international cartels since 2000, and collectively they surpass all other agencies in terms of the number of international cartels uncovered.⁷⁶ Other regions have also engaged in increased cartel enforcement, although cartel detections in Africa, Asia and Latin America are comparatively modest.⁷⁷

Total global penalties assessed against international cartels from 1990 to 2008 are approximately \$63.3 billion.⁷⁸ Government fines account for more than half of this total (\$35 billion), though private settlements stemming from civil suits (particularly from the US) are also significant, totaling approximately \$29 billion.⁷⁹ The European Commission has imposed the vast bulk of global fines, followed by national competition authorities within the EU, the US DOJ, and US state Attorneys General.⁸⁰ Far behind the US and EU, Korea leads the rest of the world in terms of fines imposed (with approximately \$750 million), followed by Africa (less

⁷⁰ John M Connor, ‘Cartels & Antitrust Portrayed: Private International Cartels from 1990 to 2008’ (American Antitrust Institution, Working Paper No. 09-06, 2009), <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1535131>.

⁷¹ For about 20% of the cartels, no adverse government decision or private settlement had been reached at the time of his review. Investigations in 32 of the 516 were closed without sanctions because of insufficient evidence. Email from John Connor (6 June 2011).

⁷² Connor ‘1990 to 2008’ (n 72) 5, 25.

⁷³ *ibid* 7, 12–14.

⁷⁴ *ibid* 18.

⁷⁵ *ibid* 17.

⁷⁶ *ibid* 8–9, 17, 20–21.

⁷⁷ See also *ibid* 17.

⁷⁸ *ibid* 51.

⁷⁹ *ibid*.

⁸⁰ *ibid* 55.

than \$500 million), Latin America (approximately \$300 million), other Asian countries, and Oceania, each with less than half of the Latin American total.⁸¹

Individuals increasingly risk being held accountable, especially in the US.⁸² At least 435 individual executives have been penalized, and 989 charged worldwide as of December 2008.⁸³ Americans account for nearly one third of all penalized executives.⁸⁴ Although the number of individuals charged in the US fluctuated between 1990–2008, the likelihood of sentences has become greater and the amount of fines and length of prison sentences have become increasingly severe since 1990.⁸⁵ The US however, remains ‘almost unique’ when it comes to prison sentences: only Israel is another significant jurisdiction in that respect, followed by Japan.⁸⁶

3.2 US Developments

The US has historically taken the global lead in cartel enforcement. In the last two decades, it has done so regarding international cartels and has increasingly focused on criminal sanctions since the late 1990s, including incarceration of foreign defendants.⁸⁷ The US reports that it has imposed more than 90% of fines in the past few years in connection with the prosecution of international cartel activity.⁸⁸

The result has been increasing US prosecution of foreign defendants. Connor’s data shows that in the US, ‘prior to 1995, less than 2% of corporations accused of criminal price fixing were foreign-based firms; after 1997, more than 50% were non-US corporations.’⁸⁹ The DOJ is typically investigating about fifty international cartels at any one time.⁹⁰ Total annual criminal fines increased dramatically starting in 1997, with a record of \$1.1 billion in FY 1999.⁹¹ Total criminal fines again exceeded \$1 billion in 2009 and 2012.⁹² Though the DOJ does not target particular geographic regions or industry sectors, recent years have seen particularly robust enforcement against Asian corporations. Since 2005, the DOJ has imposed cartel fines of \$10 million or greater on more companies headquartered in Asia than on those headquartered in every other country combined.⁹³

The Antitrust Division of the DOJ emphasizes ‘that the most effective way to deter and punish cartel activity is to hold culpable individuals accountable by seeking jail sentences.’⁹⁴ As

⁸¹ These figures are approximate. See *ibid* 71.

⁸² *ibid* 80–97.

⁸³ *ibid* 83–84.

⁸⁴ *ibid* 82.

⁸⁵ *ibid* 88–96

⁸⁶ *ibid* 82.

⁸⁷ John M Connor, ‘Global Antitrust Prosecutions of International Cartels: Focus on Asia’ (2008) 31 *World Competition* 575, 582. As noted above, Congress made violation of the Sherman Act a felony, rather than a misdemeanor, in 1974. There were some minor criminal domestic cases in the 1980s which helped lay the groundwork for the major international cases in the 1990s. We thank Spencer Waller for stressing this point.

⁸⁸ Chavez (n 16) 945.

⁸⁹ Connor, ‘Focus on Asia’ (n 89) 588.

⁹⁰ Hammond (n 5) 3.

⁹¹ Chavez (n 16) 959–60.

⁹² *ibid*. See also Department of Justice, Antitrust Division, ‘Spring 2012 Update’ (*Department of Justice (US)* 2012) <<http://www.justice.gov/atr/public/division-update/2012/criminal-program.html>>.

⁹³ Ron Knox, ‘The Longer Arm of the Law’ (*Global Competition Review* 2 October 2012) <<http://www.globalcompetitionreview.com/features/article/32398/the-longer-arm-law/>>.

⁹⁴ Hammond (n 5) 11.

one US official states, ‘our defendants routinely offer to pay large fines in lieu of going to jail, a plea that we reject, but they don’t offer to go to jail in lieu of paying a large fine.’⁹⁵ Connor reports that the DOJ secured prison sentences for a total of 284 individuals in cartel cases from 1990–2007, of which an increasing number and proportion are foreigners.⁹⁶ Since May 1999, nearly fifty foreign defendants have served or are serving prison sentences in the US for international cartel offenses or obstructing a cartel investigation.⁹⁷ The percentage of defendants sentenced to jail in cartel cases, and the number of individuals per corporate defendant, have increased. The 1990s saw an average of 37% of defendants involve a jail sentence, whereas the 2009 average was 80%.⁹⁸ Sentences are also getting harsher.⁹⁹ The DOJ achieved its highest average jail sentence for all defendants in fiscal year 2007, with an average sentence of thirty-one months. That same year, it imposed a record of 31,391 total jail days against individuals, mostly pursuant to guilty pleas.¹⁰⁰

3.3 The Vitamins Cases and their Impact

In the late 1990s, the US took the lead in a landmark case that had a significant impact on global anti-cartel practices. The ensuing cases in multiple jurisdictions illustrated the potentially grave consequences of cartel conduct for businesses, the public, and regulators. The prosecutions received significant media attention. The vitamins case grew out of the earlier lysine cartel which was captured on live video thanks to the informant Mark Whitaker, later portrayed in the 2009 motion picture ‘The Informant!’, starring Matt Damon. As US Deputy Assistant Attorney General Scott Hammond has observed, ‘the prosecution of the vitamin cartel ... helped [to] trigger a rethinking of the adequacy of competition laws around the world.’¹⁰¹

The vitamins cases began with a federal class action complaint in Alabama and a federal grand jury investigation in Texas. The December 1997 Alabama complaint alleged a conspiracy among the three major vitamins manufacturers to fix prices and allocate sales.¹⁰² In May 1999, the DOJ announced plea agreements involving major pharmaceutical manufacturer F Hoffmann-LaRoche Ltd and the German chemical manufacturer BASF Aktiengesellschaft. Stretching more than nine years, the conspiracy affected more than \$5 billion in commerce. The government’s

⁹⁵ R Hewitt Pate, ‘Criminal Policy Speeches: International Anti-Cartel Enforcement’ (*Department of Justice – Antitrust Division* 21 November 2004) <<http://www.justice.gov/atr/public/speeches/speech-criminal.html>> . We thank Bob Kudrle for this.

⁹⁶ John Connor, ‘Anti-Cartel Enforcement by the DOJ: An Appraisal’ (2008) 5 *Competition Law Review* 89, 111 .

⁹⁷ observing further that 102 US citizens have been sentenced to prison terms for cartel activity since 1999: Gregory J Werden and others , ‘Criminal Policy Speeches: Recidivism Eliminated: Cartel Enforcement in the United States Since 1999’ (*Department of Justice (US) – Antitrust Division* 22 September 2011) <<http://www.justice.gov/atr/public/speeches/speech-criminal.html>> 4-5: see also Hammond (n 5) 7.

⁹⁸ *ibid* 8; see also Connor ‘Anti-Cartel Enforcement by the DOJ’ (n 98) 111: noting the rise in the average number of individuals receiving prison sentences between 1990 and 2007.

⁹⁹ Noting an average of 8 months imprisonment between 1990-1999, a 19-month average between 2000-2009, and a 24-month average in 2010-2011: Department of Justice (US) Antitrust Division, ‘Spring 2012 Update’ (*Department of Justice (US)* 2012) <<http://www.justice.gov/atr/public/division-update/2012/criminal-program.html>> .

¹⁰⁰ Hammond (n 5) 7–8. See also Connor ‘Anti-Cartel Enforcement by the DOJ’ (n 98) 111: noting the increasing harshness of prison sentences.

¹⁰¹ Hammond (n 5) 9–10.

¹⁰² See Harry First, ‘The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law’ (2001) 68 *Antitrust Law Journal* 711, 713–14.

sentencing recommendation detailed an ‘extremely well organized operation,’ involving at least quarterly meetings and once a year meetings among high-level corporate officials to set an annual ‘budget’, and project global sales volumes and prices. The conspirators’ efforts to conceal the plot were extensive, including the destruction of most documents after meetings and the disguising of conspirators’ identities in those documents not destroyed.¹⁰³

Prosecutions in multiple countries followed the US litigation. In the end, the corporate cartelists agreed to pay unprecedented fines, globally totaling well over \$3 billion (in June 2010 USD). This total breaks down as follows: in the US, \$900 million in criminal fines and over \$1.1 billion in civil settlements; in the European Union, €790.5 million in fines; in Canada, \$94.7 million (Can.) in fines and a \$132.2 million national class action settlement; in Australia, \$26.5 million (Aus.) in fines and a \$30.5 million (Aus.) class action settlement (the first in Australia);¹⁰⁴ in Brazil, R\$17.6 million in fines.¹⁰⁵

The US DOJ criminally prosecuted twelve corporations and fourteen individuals. Eleven executives, including six Europeans, went to prison in the US. It was ‘the first time a foreign executive agreed to serve time in US prison for his participation in an international cartel.’¹⁰⁶ While other jurisdictions imposed then-record national fines (Canada, EU, Australia, and Korea, for example), only the US imposed jail time. Overall, the vitamins prosecution resulted in greater attention to anti-cartel enforcement around the globe, and spurred the DOJ to increase international anti-cartel cooperative efforts, as discussed in Part 4.

3.4 EU and EU member state developments

The EU initially tended to follow the US lead in sanctions against international cartels. The EU’s fines in cases involving the lysine, citric acid, vitamins, sodium gluconate, and graphite electrodes cartels lagged behind prosecutions in the US by two to five years.¹⁰⁷ For example, the US DOJ announced its first indictment in the citric acid conspiracy in 1996, whereas the EU announced its decision in that case in 2001.

Over time, however, the EU has steadily become more active in investigating and sanctioning cartels. Although the EU itself still does not impose a criminal law sanction for cartel activity, it has been increasingly aggressive in seeking large administrative fines. Many EU cartel prosecutions involve activity only in EU territory, whereas most of the US cases involve international or global cartels (that is, cartels involving perpetrators in more than one country, or foreign cartels whose activities have effects in more than one continent), suggesting two things. One, that the EU still faces significantly greater cartel activity within its own territory¹⁰⁸ and, two, that the US continues to engage in a more active extraterritorial approach to enforcement, on the other.

There has been ‘an explosion of enforcement’ against cartels in Europe since the mid-1990s, linked once more to the use of leniency programs.¹⁰⁹ Over 90% of EU fines against

¹⁰³ See *ibid* 714–15.

¹⁰⁴ Connor, ‘Focus on Asia’ (n 89) 594.

¹⁰⁵ Chavez (n 16) 936–37.

¹⁰⁶ Hammond (n 5) 7.

¹⁰⁷ Chavez (n 16) 960.

¹⁰⁸ For example, Connor notes that more than half of discovered cartels operated within Europe: Connor, ‘Effectiveness of Antitrust Sanctions’ (n 67) 9.

¹⁰⁹ Harding and Joshua (n 7) 145.

cartels have been imposed since 1995.¹¹⁰ The EU overtook the US in 1999 in terms of the amount of fines imposed. As of 2009, the EU had investigated more than 4,300 companies and penalized more than 1,550 of them with most penalties paid by European firms.¹¹¹ And those figures continue to grow.¹¹² Fines totaled €1.756 billion in 2001 and a record €3.334 billion in 2007. In 2012, the EU secured the highest cartel fine to date: approximately €1.471 billion in connection with the TV and computer monitor tubes cartel.¹¹³ Indeed, the amount in fines collected by the EU in recent years is many times the amount collected by the Antitrust Division of the DOJ (although it must be recalled that the DOJ also uses criminal sanctions, and the US system also includes more extensive private domestic damage suits).¹¹⁴

On 19 May 2010, the EU announced its first settlement under its 2008 settlement procedure, pursuant to which ten producers of Dynamic Random Access Memory (DRAM) chips, agreed to pay a total of €331,273,800 in fines.¹¹⁵ Participants received a 10% settlement discount for admitting fault and adhering to settlement procedures. Sixteen settlements have thus far been reached under the 2008 procedure.¹¹⁶

A few EU member states now impose criminal sanctions against cartels under domestic law, although a number limit criminal sanctions to the offence of bid rigging. Between October 2005 and December 2009, the Irish competition authority had secured thirty-three criminal convictions for cartel participants, although no one has gone to jail as the courts have uniformly suspended the prison sentences.¹¹⁷ This figure includes the first prison sentence in Europe for a non-bid rigging offense, a six-month suspended sentence for the central figure in a cartel involving the home heating oil industry.¹¹⁸ Ireland prosecuted a total of twenty-four individuals, and secured eighteen convictions, in connection with that cartel.¹¹⁹ Although Germany has only criminalized the offense of bid rigging, it indicted over 260 persons for this offense during the first eleven years of the statute (between 1998 and 2008), and more than 180 of these individuals were convicted, many of whom are serving jail time.¹²⁰ Even in tiny Estonia, authorities initiated

¹¹⁰ Connor, 'Focus on Asia' (n 89) 589.

¹¹¹ Connor, 'Effectiveness of Antitrust Sanctions' (n 67) 50.

¹¹² See generally European Commission 'Cartel Cases' (*European Commission Website*) <<http://ec.europa.eu/competition/cartels/cases/cases.html>>.

¹¹³ European Commission, 'Statistics' (European Commission 5 December 2012) <<http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>>.

¹¹⁴ Compare *ibid* with Antitrust Division, Department of Justice, 'Spring 2012 Update' (*Department of Justice* 2012) <<http://www.justice.gov/atr/public/division-update/2012/criminal-program.html>>. See also Spratling and Arp (n36) 237.

¹¹⁵ James Kanter, 'An Old Chip Cartel Case Is Brought to a Swift End' *New York times* (20 May 2010) B13.

¹¹⁶ For example European Commission, 'Antitrust: Commission Fines Producers of Water Management Products €13 million in Sixth Cartel Settlement' (*European Commission Website* June 27, 2012) (IP/2/704); European Commission 'Antitrust: Commission Fines Producers of Washing Powder €315.2 Million in Cartel Settlement Case' (*European Commission Website* 13 April 2011) (IP/11/473); European Commission, 'Antitrust: Commission Fines DRAM Producers €331 Million for Price Cartel, Reaches First Settlement in a Cartel Case' (*European Commission Website* 19 May 2010) (IP/10/586).

¹¹⁷ Patrick Massey and John D Cooke, 'Competition Offences in Ireland: The Regime and its Results', Beaton-Wells and Ezarchi (n 3) 120.

¹¹⁸ *ibid* 122; Spratling and Arp (n36) 251. The conviction came in the Spring of 2006.

¹¹⁹ 'Manager of Galway heating oil company sentenced for price-fixing', *Irish Times* (May 4, 2012) <<http://www.irishtimes.com/newspaper/ireland/2012/0504/1224315591378.html>>.

¹²⁰ Florian Wagner-von Papp, 'What If All Bid-Riggers Went To Prison and Nobody Noticed? Criminal Antitrust Law Enforcement in Germany', in Beaton-Wells and Ezarchi (n 3) 158.

eight criminal cases in 2009, three of which were referred to the public prosecutor for court proceedings. Estonia continues to prosecute several cartel cases each year and has been aided by its adoption of a leniency program in 2010.¹²¹

Finally, the United Kingdom (UK) has begun to prosecute cartelists under its 2002 Enterprise Act. The 2007 marine hose prosecution was the first price fixing case brought under the 2002 law, and resulted in the first criminal sanctions ever imposed for competition law violations in the United Kingdom. The U.K. sentenced three executives involved in the marine hose conspiracy to prison terms of thirty, twenty-four, and twenty months, following a US plea bargain (which made the prosecution much easier and the case thus unique).¹²² Soon after, in August 2008, the government charged four current and former British Airways executives with fixing prices of fuel surcharges for passenger flights.¹²³ That trial, however, collapsed in 2010 after a series of procedural and evidentiary failings on the part of the prosecution.¹²⁴ Many commentators view this episode as a severe setback for the criminalization agenda in the UK, calling into question its viability.¹²⁵ Wide-ranging reforms to the UK antitrust regime came into effect in 2014, including the creation of a new competition body and refinements to the definition of cartel activity that may facilitate future prosecutions.¹²⁶

3.5 Developments in other countries

Other countries around the world have adopted new competition laws to combat cartels, reorganized their national competition agencies and devoted more resources to anti-cartel enforcement. These changes are certainly encouraged, if not catalyzed, by increasing transgovernmental exchange among national antitrust authorities within a particular normative framework which portrays global cartel conspirators as evil, contemptuous of the law, and

¹²¹ Estonian Competition Authority, 'Annual Report 2010' (Estonian Competition Authority 2010) <http://www.konkurentsiamet.ee/public/AnnualReports_/ANNUAL_REPORT_2010_ECA.pdf>; Estonian Competition Authority, 'Annual Report 2009' (Estonian Competition Authority 2009) <http://www.konkurentsiamet.ee/public/AnnualReports_/Annual_Report_2009.pdf>

¹²² Donald Baker, 'An Enduring Antitrust Divide Across the Atlantic over Whether to Incarcerate Conspirators and When to Restrain Abusive Monopolists' (2009) 5 European Competition Journal 145, 165. See also Michael O'Kane, 'Does Prison Work for Cartelists? The View from Behind Bars' (2011) 56 Antitrust Bulliton 483: interview of defendant by his counsel in the marine hose litigation.

¹²³ Spratling and Arp (n36) 253.

¹²⁴ See Julian Joshua, 'Shooting the Messenger: Does the UK Criminal Cartel Offense Have a Future?' (*Antitrust Source* August 2010) 1-2 <http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Aug10_Joshua8_2f.authcheckdam.pdf>; describing factors leading to the collapse. Office of Fair Trading, 'Project Condor Board Review' (Office of Fair Trade 2010) 9-16 <http://www.oft.gov.uk/shared_of/board/2010/Project_Condor_Board_Review.pdf>; setting forth the Office of Fair Trading's explanation for the case's collapse following an internal investigation.

¹²⁵ See Joshua stating 'The collapse on 10 May 2010 of the first contested jury trial under the UK's lackluster criminal cartel regime was not only a humiliating public failure for the OFT, the investigating and prosecuting agency; it could also mark the beginning of the end of the whole criminalisation project.': Julian Joshua, 'DOA: Can the UK Cartel Offence Be Resuscitated?', in Beaton-Wells and Ezarchi (n 3) 129.

¹²⁶ See Competition & Markets Authority, <https://www.gov.uk/government/organisations/competition-and-markets-authority>.

exploitative of customers.¹²⁷ Countries around the world have been attracted by US and EU enforcement models and successful prosecutions.

Canada has become more active in prosecuting cartel participants, although the defendants have generally received a suspended sentence so the law has not had nearly the same bite as that of its North American neighbor. Nonetheless, from 1998 to 2008, Canada convicted eleven individuals of cartel offenses, nine were required to pay fines (between CDN\$10,000 and CDN\$250,000), and the other two received suspended prison sentences. The 2009 amendment to the Canadian Act creates a per se criminal prohibition against price fixing with a maximum sentence of fourteen years which could facilitate further criminal prosecutions.¹²⁸ Indeed, the last few years have witnessed a steep increase in conduct challenged by the country's antitrust enforcer.¹²⁹ After the amendments came into effect in March 2010, for example, companies implicated in a polyurethane foam cartel agreed to a fine of CDN\$2.5 million, for only five months of illegal conduct, under the law's new conspiracy provision.¹³⁰ In Australia, survey evidence suggests a majority of that country's public now views antitrust offenses in moral terms, following an extensive public-relations campaign by the Australian competition authority.¹³¹ The survey indicates that 42% of the public believe that cartel conduct should be a crime, and as of 2009 it now is.¹³² In addition to the fines imposed in connection with the vitamins cartel, Australian authorities fined six participants in the air transportation cartel in 2008 and initiated proceedings against participants in the marine hose cartel in June 2009.¹³³ Australia has since aggressively pursued civil penalties – securing fines in the tens of millions of dollars, for example, in connection with a cardboard box and air freight cartel. As of 2015,

¹²⁷ See Connor 'Latin America' (n 11) 310. For examples of such portrayal by US antitrust authorities, see Thomas O Barnett, 'Criminal Policy Speeches: Perspectives on Cartel Enforcement in the United States and Brazil' (*Department of Justice (US)* 28 April 2008) <<http://www.justice.gov/atr/public/speeches/speech-criminal.html>>; Hammond (n 5).

¹²⁸ Elisa Kearney and Mark Katz, 'Anti-Cartel Enforcement In Canada - Still More Bark Than Bite' (Davis 2009) 4–6. <<http://www.dwpv.com/en/Resources/Publications/2009/Article-Anti-Cartel-Enforcement-In-Canada-Still-More-Bark-Than-Bite>> .

¹²⁹ Ron Knox, 'Canada's Antitrust Bar, Global Competition Review' (*Global Competition Review* 6 November 2012) <<http://www.globalcompetitionreview.com/features/article/32530/canadas-antitrust-bar/>>.

¹³⁰ Competition Bureau, 'Backgrounder – Polyurethane Foam' (*Competition Bureau Website* 6 January 2012) <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02585.html>>. Additional charges filed under the old price-fixing conspiracy provision resulted in a fine of CDN\$10 million for fifteen months of illegal conduct: *ibid.* See also 'Canada Chocolate price-fixing: AP' *Washington Post* (Washington 6 June 2013) <http://www.washingtonpost.com/business/canada-charges-nestle-mars-with-fixing-chocolate-prices-fines-jail-time-for-execs-possible/2013/06/06/8bd9a15c-cedf-11e2-8573-3baeea6a2647_story.html>.

¹³¹ See Beaton-Wells noting that a greater percentage of respondents approved of punishment for moral reasons than for reasons of economic harm: Beaton-Wells (n 4) 17; See generally Melbourne Law School, 'Cartel Project' (*Melbourne Law School Website* 2014) <<http://cartel.law.unimelb.edu.au/go/project-news/project-survey>>; Compare Andreas Stephen, 'How Dishonesty Killed the Cartel Offence' (2011) 6 *Criminal Law Review* 446; Andreas Stephen, 'Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain' (2008) 5 *Competition Law Review* 123: analyzing effects of British public's failure to perceive cartels as morally blameworthy.

¹³² Beaton-Wells (n 4) 25.

¹³³ Chavez (n 16) 942.

however, the government has not yet initiated a criminal prosecution for cartel conduct under the new law.¹³⁴

Overall, Asian cartel enforcement has sharply increased, with approximately triple the number of investigations initiated in the 2005–2008 period compared to 1995–2004.¹³⁵ In 2002, South Korea fined participants in the graphite electrode cartel—the Korea Fair Trade Commission’s first assessment of fines against an international cartel since its creation in 1981.¹³⁶ Korea also imposed small fines on three of the sixteen vitamins cartels in 2003.¹³⁷ Korea’s leniency program is increasingly important; in 2010, the program played a role in 17 of 25 investigations leading to fines.¹³⁸ In 2007 Japan imposed prison sentences (ranging between eighteen months and three years) on five executives for bid rigging. The prosecution followed and was the first based upon a leniency application as part of Japan’s new leniency program.¹³⁹ Despite this enforcement activity, Asia is still a weak link in international enforcement given the size of Asian economies and the profit potential for cartels.¹⁴⁰

Since 2003, Latin American competition authorities have been increasingly active in anti-cartel activities, and ‘[b]y nearly all measures, Brazil has the largest and most effective anti-cartel authority in Latin America.’¹⁴¹ Brazil adopted a ‘National Anti-cartel Strategy’ (ENACC) in October 2009, as part of its second national Anti-Cartel Enforcement Day, in an effort to shape social perceptions of cartel activity and public awareness of government anti-cartel policies.¹⁴² The ENACC has since ‘evolved into a network of government and criminal enforcers, headed by a council created to coordinate administrative investigations and criminal prosecution.’¹⁴³ Brazil’s criminal enforcement efforts have been robust. Brazil fines more hard-core cartels annually and imposes higher average corporate cartel fines than any other country in the region; it is also alone in Latin America in regularly fining cartel managers.¹⁴⁴ Brazil fined participants of the vitamins cartel, and its Secretariat of Economic Law within the Justice Ministry has prosecuted participants in the air cargo and marine hose cartels.¹⁴⁵ Moreover, Brazilian antitrust authorities have succeeded in reaching a number of settlement agreements – in

¹³⁴ Sharon Henrick & Trish Henry, ‘Australia: Cartels’, (The Asia-Pacific Antitrust Review 2012): noting fines of A\$36 million and more than A\$52 million in connection with cardboard box cartel and air freight industry, respectively.

¹³⁵ Connor ‘Cartels & Antitrust Portrayed’ (n 72) 23. To be more precise, the term “investigations” here encompasses all government and private legal actions, including formal investigations, fines, damage suits, and consent decrees: *ibid* 16.

¹³⁶ Hwan Jeong, ‘Expansion in the Extraterritoriality of Korean Law’ (*Asia Law* September 2009) <<http://www.asialaw.com/Article/2330631/Competition-abroad.html?Print=true&Single=true>>; Chavez (n 16) 943.

¹³⁷ Connor, ‘Effectiveness of Antitrust Sanctions’ (n 67) 201; Jeong (n 138).

¹³⁸ Kim Da-ye, ‘Two Faces of Secret-for-Pardon Policy’, *Korea Times* (Seoul 29 July 2012), <2012 WLNR 15952389>; discussing differences between US and Korean leniency programs.

¹³⁹ Spratling and Arp (n 36) 242, 252.

¹⁴⁰ Connor, ‘Focus on Asia’ (n 89) 593.

¹⁴¹ Connor ‘Latin America’ (n 11) 315.

¹⁴² OECD (n 52) 19. The Enforcement Day program included senior enforcement officials from the US and EU: *ibid*.

¹⁴³ Bruno Peixoto, ‘Brazil: Cartels and Leniency - The Antitrust Review of the Americas’ (*Global Competition Review* 2013) <<http://www.globalcompetitionreview.com/reviews/46/sections/158/chapters/1809/brazil-cartels-leniency/>>.

¹⁴⁴ Connor ‘Latin America’ (n 11) 316.

¹⁴⁵ Chavez (n 16) 942–43.

connection with, for example, the marine hose, driving schools, and cement and beef cartels – pursuant to Brazil’s settlement program adopted in 2007.¹⁴⁶ As of mid-2012 more than 250 executives faced criminal penalties for cartel behavior, and the government had sentenced thirty-four to jail time ranging from two to five years.¹⁴⁷

Elsewhere in Latin America, Mexico—which has one of the largest and best-funded antitrust authorities in Latin America¹⁴⁸—fined participants in the citric acid cartel. Although Mexico’s competition authority has been preoccupied with mergers and monopoly cases, and has done little to attack cartels,¹⁴⁹ this situation could change following passage of a new antitrust law in 2011 which includes criminal sanctions and more substantial investigatory tools. Focusing mostly on merger control and abuse of dominance, Argentina’s and Chile’s cartel enforcement programs are relatively underdeveloped. Argentina generally prosecutes only one or two hard-core cartels per year and imposes negligible fines.¹⁵⁰

In the Middle East, Israel has been active in prosecuting cartel offenses, possibly reflecting closer normative ties to US antitrust policy. Israel secured jail sentences of between three and nine months for four executives and one economic advisor in its prosecution of a price-fixing and market division cartel involving the floor tile industry.¹⁵¹ Israel’s prosecution of cartel offenses in the liquefied petroleum gas market led to a plea agreement involving jail sentences and fines for three defendants, including a prison term for the CEO of one of Israel’s largest gas distribution companies.¹⁵² In more recent cases, Israeli authorities have even arrested executives implicated in cartel activity at the start of the investigation to prevent the executives from interfering.¹⁵³ Egypt’s first criminal cartel prosecution since the creation of its Department to Protect Competition and Prohibit Monopoly came in early 2008 against twenty cement company executives. By summer’s end, an Egyptian court convicted the executives, fining them the equivalent of \$1.9 million dollars each for price fixing and agreeing to divide the market.¹⁵⁴

4. International cooperation efforts

Transnational initiatives have spurred the diffusion of legal norms regarding cartels and enforcement techniques to uncover and deter them. Throughout the post-World War II era, the US has played a central role in global business regulation.¹⁵⁵ And so it has since the early 1990s in the global trend toward strengthening enforcement tools against cartel offenses, including the addition of criminal sanctions. The global trend coincided with the US DOJ’s aggressive stance toward international cartels dating from the early 1990s.¹⁵⁶ The US efforts were supported by a

¹⁴⁶ OECD (n 52) 11, 17.

¹⁴⁷ Peixoto (n 145). See also OECD (n 52) 18.

¹⁴⁸ Connor 'Latin America' (n 11) 317.

¹⁴⁹ *ibid* 318.

¹⁵⁰ *ibid* 316–17.

¹⁵¹ Spratling and Arp (n 36) 252.

¹⁵² *ibid*

¹⁵³ Katy Oglethorpe, 'Freshfields Panel Examines Global Cartel Enforcement Issues' (*Global Competition Review* 4 October 2012) <<http://www.globalcompetitionreview.com/news/article/32415/freshfields-panel-examines-global-cartel-enforcement-issues/>>.

¹⁵⁴ Spratling and Arp (n 36) 252–53.

¹⁵⁵ See John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press 2000); Daniel W Drezner, *All Politics is Global* (Princeton University Press 2007) 5–6; Shaffer (n 2).

¹⁵⁶ Harding (n 3) 194.

general ideological shift in government attitudes toward market competition following the fall of the Berlin Wall in 1989. The US has worked through a number of fora to foster the diffusion of anti-cartel norms, national institution building to address cartels, and transgovernmental cooperation efforts. It has worked particularly through the OECD, the ICN, bilateral treaties, memoranda of understanding, and informal relations.¹⁵⁷ The EU and EU member states have increasingly also played important roles.

4.1 OECD

The OECD has addressed competition issues going back to its Competition Law and Policy Committee in 1961.¹⁵⁸ Much of its efforts related to urging its members to cooperate in competition matters.¹⁵⁹ Its efforts significantly intensified against cartels in 1998 when the OECD issued its ‘Council Recommendation Concerning Effective Action against Hard Core Cartels’, constituting the first multilateral statement defining and condemning hard core cartels as pernicious. The OECD condemned ‘hard core cartels’ ‘as the most egregious violations of competition law.’¹⁶⁰ The second report on the Recommendation’s implementation concluded in similar terms that ‘cartels are unambiguously bad,’ and the third report cited with approval a 2004 US Supreme Court opinion that cartels are the ‘supreme evil of antitrust.’¹⁶¹

Under its anti-cartel program, the OECD sponsors meetings of national authorities, publishes policy briefs and booklets designed to encourage particular enforcement tools such as the use of leniency programs (discussed in Part 5.2), collects information on sanctions, and compiles lists of best practices.¹⁶² In parallel, the OECD (complemented by a parallel program in UNCTAD) issues peer review reports on individual countries’ efforts to detect, investigate, and prosecute domestic and international cartels.¹⁶³ It does so with the assistance of the countries’ national authorities who become key intermediaries for the conveyance of global anti-cartel norms and practices. The peer review process presses them to cast a critical eye on their own policies, and can provide leverage for them in domestic contests over policy reform. To expand its reach, the OECD established a broader Global Forum on Competition in 2001, and established regional competition centers in Eastern Europe and Asia while sponsoring a Latin American Competition Forum.¹⁶⁴

The OECD’s 2005 report on the implementation of its 1998 Recommendation noted ‘aggressive enforcement efforts at very high levels, finding [that] competition authorities in more

¹⁵⁷ Spencer Weber Waller, ‘The Internationalization of Antitrust Enforcement’ (1997) 77 Boston University Law Review 343.

¹⁵⁸ Hugh Hollman & William E. Kovacic, ‘The International Competition Network: Its Past, Current and Future Potential’ (2011) 20 Minnesota Journal of International Law 274.

¹⁵⁹ See for example ‘Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade (9C(95)130/FINAL)’ (OECD Website 27 July 1995) <<http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=192&InstrumentPID=188&Lang=en&Book=False>>

¹⁶⁰ OECD, ‘Hard Core Cartels: Third report on the implementation of the 1998 Council Recommendation 7’ (OECD 2005).

¹⁶¹ *ibid* 7, 8 (italics in original).

¹⁶² See Chavez (n 16) 963–64.

¹⁶³ Hollman and Kovacic (n 160). UNCTAD also engages in peer review exercises, and complements some of the OECD’s work within its own organizational focus dedicated to serving developing countries.

¹⁶⁴ Hollman and Kovacic (n 160)

countries than ever bring important cases that resulted in significant sanctions.’¹⁶⁵ The report concluded that ‘more countries are catching up and improving their enforcement regimes in line with developments in the most advanced jurisdictions,’ and that ‘[c]ooperation among authorities in investigations of cartels has reached unprecedented levels.’¹⁶⁶ The report detailed illustrative examples of cartel investigations, discussed efforts to raise public awareness of cartel-related harm, reviewed international efforts to cooperate in investigations and enforcement actions, and detailed best practices for formal information sharing.¹⁶⁷ It stressed, for example, that ‘[m]aking the public aware of the harm caused by cartels is an important part of a country’s overall effort to combat cartels,’ including through a ‘strong media relations programme,’ and it pointed to ‘[t]he programmes developed in Canada and the US’ as ‘good examples of what competition authorities can do to educate the public.’¹⁶⁸ The report noted the particular importance of ‘sanctions against natural persons, placing them at risk individually for their conduct,’ and included a subsection on ‘A Trend Towards Criminalisation.’¹⁶⁹

4.2 ICN

The ICN was created in 2001 under US-instigation following an announcement of fourteen competition agencies.¹⁷⁰ It is a network of competition law officials and non-governmental advisors who have so far come predominately from the private sector.¹⁷¹ As of May 2015, the ICN is comprised of 132 national, regional, and other territorial antitrust agencies operating in 119 jurisdictions, and the list continues to grow.¹⁷² It is now the central node for the diffusion and building of consensus around competition law norms and practices, facilitating the coordination of transnational regulatory efforts.¹⁷³ In 2004, the ICN created a Cartel Working Group. The Working Group’s mandate ‘is to address the challenges of anti-cartel enforcement across the entire range of ICN members and amongst agencies with differing levels of experience. At the heart of antitrust enforcement is the battle against hardcore cartels directed at price fixing, bid rigging, market sharing and market allocations.’¹⁷⁴ The Working Group contains sub-groups on legal frameworks and enforcement techniques and has produced (among other projects) an anti-cartel enforcement manual for its members’ use. Though the OECD did much of the early work on ‘hard core cartels,’ and continues to be important for policy analysis,

¹⁶⁵ OECD ‘Hard Core Cartels’ (n 163) 8.

¹⁶⁶ *ibid* 8, 30.

¹⁶⁷ *ibid* 12–35.

¹⁶⁸ *ibid* 8, 16, 18–19.

¹⁶⁹ *ibid* , 28 (*italics in original*).

¹⁷⁰ Eleanor Fox, ‘Linked-In: Antitrust and the Virtues of a Virtual Network’ (2009) 143 *International Law* 151, 160 . For a recent retrospective of the network, see Paul Lugard (ed), *The International Competition Network at Ten: Origins, Accomplishments and Aspirations* (Intersentia 2011).

¹⁷¹ Hollman and Kovacic (n 160).

¹⁷² See ICN, The International Competitions Network to Focus on its Membership Needs, May 1, 2015, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc1027.pdf> (last checked, June 5, 2015). For an earlier figure from 2010, see John Fingleton, ‘The International Competition Network: Planning for the Second Decade’ (ICN 9th Annual Conference, Istanbul, Turkey 27 Apr 2010) 2–3: giving a figure of 112 agencies from 99 jurisdictions in 2010.

¹⁷³ Hollman and Kovacic (n 160).

¹⁷⁴ ICN ‘Working Groups’, (*International Competition Network Website* 2014)

<<http://www.internationalcompetitionnetwork.org/working-groups/current/cartel.aspx>>

the ICN has served to diffuse ideas and build relationships among OECD and non-OECD regulators and practitioners.

The ICN's aim is to foster 'procedural and substantive convergence' of competition law policy through sustained interaction, capacity building, and the sharing of practices.¹⁷⁵ It facilitates deliberation among national competition authorities regarding preferred approaches to use against cartels, as well as to sort out differences.¹⁷⁶ The ICN produces practical guidance, such as the Manual on Anti-Cartel Enforcement Techniques, and organizes workshops and teleseminars, including an annual ICN Cartel Workshop. The Manual on Anti-Cartel Enforcement Techniques, for example, contains chapters on searches, raids and inspections; drafting and implementation of effective leniency programs; digital evidence gathering; cartel case initiation; investigative strategy; and interviewing techniques. In 2005, the Cartel Working Group published the paper 'Defining Hard Core Cartel Conduct, Effective Institutions, Effective Penalties'. The paper stresses 'the significance of the personal liability of the decision-makers,' and notes that '[s]ome agencies also emphasize the effectiveness of criminal sanctions as a deterrent.'¹⁷⁷

The ICN arguably has been successful in contributing to change in legislation and administrative practice across jurisdictions regarding cartels. ICN member agencies cite the ICN's Cartel Enforcement Manual as a crucial tool in developing national cartel enforcement strategies.¹⁷⁸ US Deputy Assistant Attorney General Scott Hammond points to the Cartel Working Group's annual workshops as particularly useful, providing a venue for anti-cartel enforcers to meet, learn from one another, and develop working relationships that form the basis for future cooperation.¹⁷⁹ These informal connections, he writes, have led to 'pick up the phone' cooperation between competition regulators in different jurisdictions over time.¹⁸⁰ The European Commission estimates that the ICN conducts 90% of its work by teleconference or email.¹⁸¹ Antitrust officials from national agencies around the world have increasingly shared resources and coordinated investigations, creating a sense of a shared professional enterprise. Coordinated activity has expanded greatly, including over the timing of raids and the execution of warrants.¹⁸²

The ICN complements bilateral cooperation among competition agencies and governments through anti-trust cooperation agreements and Mutual Legal Assistance Treaties (MLATs), which can be used against cartels. The US currently has either a cooperation agreement or MLAT with Australia, Brazil, Canada, Chile, China, Colombia, the EU, Germany, India, Italy, Israel, Japan, Mexico, Russia, and the United Kingdom.¹⁸³ National agencies, for

¹⁷⁵ 'Memorandum on the Establishment and Operation of the International Competition Network' (*International Competition Network Website* 2014)

<<http://www.internationalcompetitionnetwork.org/uploads/library/doc579.pdf>>

¹⁷⁶ Fingleton (n 174) 5–6.

¹⁷⁷ ICN 'Network Cartels Working Group, Defining Hard Core Cartel Conduct, Effective Institutions, Effective Penalties' (International Competition Network 2005) 3–4

<<http://www.internationalcompetitionnetwork.org/uploads/library/doc346.pdf>>

¹⁷⁸ ICN 'Trends' (n 68).

¹⁷⁹ Hammond (n 5) 14–15.

¹⁸⁰ *ibid* 15: discussing collaboration between US and UK regulators.

¹⁸¹ Chad Damro, 'The New Trade Politics and EU Competition Policy: Shopping for Convergence and Cooperation' (2006) 13 *Journal of European Public Policy* 867, 879.

¹⁸² Hammond (n 5) 15. See also Spratling and Arp (n 36) 255–61.

¹⁸³ Department of Justice (US) 'Antitrust Cooperation Agreements' (*Department of Justice (US) Website* 2014) <http://www.justice.gov/atr/public/international/int-arrangements.html>.

example, cooperated successfully to secure plea agreements in connection with the airlines cartel, and coordinated investigative efforts in connection with the marine hose cartel.¹⁸⁴ These agreements reflect the growing role of international coordination in cartel investigations.

Transnational legal norms are more likely to have impacts where they are clear, coherent, and deemed legitimate.¹⁸⁵ The ICN and OECD provide fora in which networks of national competition law officials participate. These international initiatives have expanded their access for officials from jurisdictions around the world. Although the OECD and ICN can be viewed as rivals, the norms that they have conveyed are coherent, and the documents that codify them are precise and elaborate.

The officials who participate in the ICN and OECD initiatives act as intermediaries between the national context and the global one.¹⁸⁶ Where they develop professional identities as competition law enforcers, and where they meaningfully participate in these transnational processes, they more likely view the documents that emerge from them to represent a legitimate expression of a transnational policy consensus. In such situations, they are more likely to actively press for concomitant domestic legal change and engage in enforcement efforts. It is through this web of global, regional and bilateral networks that anti-cartel enforcement ideas diffuse.

The OECD and ICN are just the most important among transgovernmental and transnational networks of legal norm diffusion. The broader network of international competition law and international competition law enforcers includes the UNCTAD that plays an important role for developing nations, as well as a wide variety of non-governmental and academic institutions, programs, and events. Non-governmental advisors representing business and consumer groups, academia, and the legal and economic professions are significantly involved in these processes, so that the processes are not simply 'transgovernmental,' but more broadly transnational. Diffused common norms through both public and private actors facilitate transgovernmental coordination, and the practical experience of successful coordination in a common enterprise, in turn, spurs further normative convergence across and within nation states.

5. Trends in Enforcement Techniques

Multilateral and bilateral cooperative efforts, such as through the ICN, OECD, and bilateral agreements, have circulated new enforcement tools to combat cartels. We address two, the facilitation of extradition through the criminalization of cartel activities; and the use of leniency programs to induce the breakup of cartels.

5.1 Extradition and the Case of Ian Norris

Extradition requires dual criminality.¹⁸⁷ This means that the offense at issue must be a crime in both jurisdictions. One consequence of the criminalization of cartel offenses is that more countries may extradite individuals for prosecution in other jurisdictions. The jurisdiction most likely seeking such extradition and most likely to imprison individuals is the US. If

¹⁸⁴ Hammond (n 5) 15–16.

¹⁸⁵ Shaffer (n 2).

¹⁸⁶ On intermediaries, see Bruce Carruthers and Terence C Halliday, 'Negotiating Globalization: Global Scripts and Intermediation in the Construction of Asian Insolvency Regimes' (2006) 31 *Law & Social Inquiry* 521, 537; Shaffer (n 2).

¹⁸⁷ Dual criminality, a requirement of most US extradition treaties, requires that the offense at issue must be a crime in both jurisdictions. See generally Girardet (n 43).

extradition to the US becomes easier, decisions for participants in cartels about international business travel become more complex.

In March 2010, Ian Norris became the first foreign national extradited to the US to face charges stemming from an antitrust investigation.¹⁸⁸ Norris obstructed the DOJ's investigation into a carbon components manufacturing cartel in which he participated. In November 2002, UK industrial manufacturer Morgan Crucible and its US subsidiary Morganite admitted to wrongdoing in connection with a price-fixing conspiracy. Norris headed Morgan Crucible during a part of the conspiracy and throughout the cover-up. The US indicted him on both counts, and alleged that his offenses were flagrant. He was found to have assembled a document-destruction task force whose sole purpose was to destroy evidence of the price-fixing conspiracy. That task force created a script, designed to mislead investigators, for use by Morgan-entity executives questioned about the conspiracy. After the DOJ investigation became public, Norris instructed his co-conspirators to use the script if questioned about the illicit meetings.

The DOJ's attempt to extradite Norris to the US initially failed. The House of Lords held in 2008 that price-fixing was not a crime at the time in question (as it is now in the UK), and thus the dual criminality requirement of the US-UK extradition treaty was not satisfied. The House of Lords nonetheless remanded the case on the question of whether extradition for obstruction of justice was proper. The lower courts rejected Norris's argument that extradition would violate the European Convention on Human Rights in view of his (and his wife's) age and poor health—a result unanimously affirmed on appeal by the UK Supreme Court (which in 2009 assumed the role of court of final resort from the House of Lords). The European Court of Human Rights rejected his appeal on human rights grounds in February of 2010. On March 23, 2010, the UK extradited Norris to the US to stand trial in the Eastern District of Pennsylvania.¹⁸⁹ A federal jury convicted him of conspiring to obstruct justice on July 27, 2010,¹⁹⁰ and in December 2010 a judge sentenced him to eighteen months in a US prison.¹⁹¹

The Norris extradition has not proved to be a one-off event. In 2014, a former marine hose executive was extradited from Germany to face charges of participating in a worldwide bid-rigging conspiracy making this the first extradition for a direct antitrust crime, rather than the obstruction of justice charges in the Norris case. Extraditions will likely become more commonplace as a growing number of countries criminalize cartel activity. As a result, avoiding travel to the US may no longer be sufficient to insulate cartel members from the prospect of spending time in a US prison. Even short of extradition, growing criminalization means substantial travel restrictions and the use of border controls and Interpol to monitor the location of defendants and fugitives.¹⁹²

¹⁸⁸ A good overview from which this summary is built can be found at Akin Gump Update, 'The Antitrust Division Succeeds in Its First-Ever Extradition of a Foreign National' (*Akin Gump* 26 March 2010) <<http://www.akingump.com/communicationcenter/newsalertdetail.aspx?pub=2442>>; see also, for example Julian M Joshua, Peter D Camesasca, Youngjin Jung, 'Extradition and Mutual Legal Assistance Treaties: Cartel Enforcement's Global Reach' (2008) 75 *Antitrust Law Journal* 353, 354-60.

¹⁸⁹ *ibid.*

¹⁹⁰ 'DOJ News Release on Ian Norris Conviction' (*Main justice* 27 July 2010), <<http://www.mainjustice.com/2010/07/27/doj-news-release-on-ian-norris-conviction/>>.

¹⁹¹ 'Former Morgan Crucible Chief Ian Norris Sentenced to 18 Months in US Jail', *The Telegraph* (London 10 Decembr 2010, <<http://www.telegraph.co.uk/finance/newsbysector/industry/engineering/8195756/Former-Morgan-Crucible-chief-Ian-Norris-sentenced-to-18-months-in-US-jail.html>>).

¹⁹² Hammond (n 5)14.

5.2 Leniency Programs

Antitrust officials point to the proliferation, convergence and coordination of leniency provisions to destabilize cartels as another major development in anti-cartel enforcement around the world. Leniency programs generally provide immunity to the first cartel member to admit liability and cooperate with authorities, with the aim of creating a ‘race to confess.’¹⁹³ They are used as a carrot to complement the stick of enhanced sanctions, such as criminalization or substantial fines. In some ways, they can be viewed as ‘a motor of penal expansion,’ as leniency becomes more attractive when the alternative of sanctions becomes more threatening.¹⁹⁴ The program was first developed in the US and has been zealously used there. Gary Spratling, former US Deputy Assistant Attorney General for cartel prosecution, reports that the use of leniency is linked to 90% of US cartel fines imposed since 1997.¹⁹⁵

The US has aggressively sought to promote leniency programs, and the ICN has publicized procedures to aid national competition agencies in implementing them. In 1990, only the US had a leniency program on the books. Today around 60 jurisdictions do,¹⁹⁶ including Australia, Brazil, Canada, Czech Republic, the EU, France, Germany, Ireland, Japan, South Korea, New Zealand, Sweden, and the UK.¹⁹⁷ The DOJ’s Hammond thus describes this phenomenon as ‘the single most significant development in cartel enforcement.’¹⁹⁸ The diffusion of leniency programs as an anti-cartel enforcement tool again attests to the normative power of the US model diffused through the ICN.

Nonetheless, some might question whether the parallel trend toward global criminalization should enhance or hamper the effectiveness of leniency programs.¹⁹⁹ While Hammond rightly stresses that the threat of harsh sanctions in a jurisdiction should induce cartel members to seek immunity, the cartel participant must also be wary of potential sanctions in other jurisdictions where the cartel’s activities have transnational effects. Where the potential sanction in another jurisdiction is penal, the participant’s decision may become more complicated, especially in light of institutional divergences for enforcing criminal sanctions and administering amnesty and leniency programs in different jurisdictions so that decisions may lie outside the control of a national antitrust authority.²⁰⁰

6. Impediments to Implementation: Social Norms and Institutional Structures

Notwithstanding the expansion of criminal provisions and the increasingly robust enforcement of cartel prohibitions around the world, actual enforcement will face severe

¹⁹³ ICN Cartel Working Group, ‘Anti-Cartel Enforcement Manual’ (ICN 2009) 2.

¹⁹⁴ Harding and Joshua (n 7) 297.

¹⁹⁵ Spratling and Arp (n 36) 287.

¹⁹⁶ Telephone Interview with US DOJ official (10 June 2011); see also Hammond (n 5) 2–3.

¹⁹⁷ Hammond (n 5) 2–3; see also Chavez (n 16) 968–78: listing jurisdictions and discussing the programs extensively.

¹⁹⁸ Hammond (n 5) 2–3.

¹⁹⁹ See Jason D Medinger, ‘Antitrust Leniency Programs: A Call for Increased Harmonization as Proliferating Programs Undermine Deterrence’ (2003) 52 Emory Law Journal 1439.

²⁰⁰ Jonathan T Schmidt, ‘Keeping US Courts Open to Foreign Antitrust Plaintiffs: A Hybrid Approach to the Effective Deterrence of International Cartels’ (2006) 31 Yale Journal of International Law 211, 232–40, 245–50.

practical limits in most jurisdictions. The implementation of transnational legal norms will ultimately depend on local factors, and in particular, domestic political and social attitudes regarding cartel behavior, and domestic institutional structures, capacities and legacies.²⁰¹

Cultural attitudes may be the single biggest hurdle to enforcement trends. Not all members of the public are convinced that cartel offenses merit the criminal penalty of jail time, which is advocated most vocally by the US. Criminalization implicates moral judgments that vary with socio-cultural context. US antitrust law has long exhibited a moral dimension, which facilitates the use of criminal sanctions against individuals in cartel cases.²⁰² In contrast, ‘there appears to be (at least outside North America) no strong feeling on the part of the wider public about the inherent criminality of price fixing and like practices.’²⁰³ National competition authorities outside of North America recognize this uphill battle and thus view public education about the evils of cartel offenses as a central component of their missions.²⁰⁴ Presentations in October 2010 by competition authorities from Australia and Japan at the ICN’s Cartel Workshop in Yokohama, Japan reflect this concern.²⁰⁵ The 2010 ICN survey extensively reports ‘factors influencing perception of importance of cartel enforcement.’²⁰⁶ To the extent that public opinion supporting criminalization is lacking in many jurisdictions, the transnational trend can be understood as more of a top-down than a bottom-up process. As a result, the impact at the time of implementation could be limited.

Another significant hurdle is institutional, involving particular institutional heritages, structures, and capacity challenges. Jurisdictions in Europe and Asia that have an institutional heritage of using administrative agencies that apply administrative fines against enterprises, as opposed to criminal sanctions against individuals, are unlikely to change significantly, at least in the short term. In addition, for most jurisdictions, criminal law enforcement involves a separate institution from cartel enforcement, creating institutional coordination challenges. A competition agency may wish to retain its monopoly on enforcement, and public prosecutors may not trust competition authorities. In contrast, the US entrusts both civil and criminal enforcement against cartels to a specialized division within the DOJ, which has created a particular institutional legacy that facilitates the use of criminal sanctions. Also, many competition systems are in their infancy and lack institutional capacity. Competition law is particularly recent in China and Egypt, for example, and it has recently undergone a major overhaul in states such as Brazil, India, and Mexico. Finally, there are jurisdiction-specific disincentives, such as constitutional and evidentiary hurdles, which complicate the pursuit of aggressive enforcement.²⁰⁷ In sum, both institutional legacies and political and social attitudes toward cartels will affect the application of anti-cartel law in practice, especially as regards criminalization. In many cases, we are skeptical that enforcement practice will meaningfully follow the spread of formal legal policies.

²⁰¹ Shaffer (n 2).

²⁰² Baker (n 124) 155, 158.

²⁰³ Harding (n 3) 197. See also Gerber noting the lack of cultural roots of competition policy in Japan: Gerber (n 7) 213, 217.

²⁰⁴ See Beaton-Wells noting the Australian competition authority’s extensive campaign in this respect: Beaton-Wells (n 4).

²⁰⁵ See *ibid*; Hideo Nakajima, Director General Investigation Bureau, Japan Fair Trade Commission, ‘Outreach Activities by the JFTC: Focusing on Cartel Awareness’ (5 October 2010) 9: discussing the ‘necessity of building up public support for cartel enforcement’.

²⁰⁶ See ICN ‘Trends’ (n 68) 53–65.

²⁰⁷ Harding (n 3) 193–94.

7. Conclusion

Countries in every region of the world, including virtually all of the world's leading economies, have significantly enhanced sanctions and, in a growing number of cases, criminalized cartel offenses, often only recently. Many states have initiated prosecutions, several have secured convictions, and a few have imposed jail time for these offenses. The US DOJ has played a central role as a unilateral enforcer against international cartels, as a collaborator with other national competition agencies in enforcement, and as an anti-cartel advocate in international fora. International venues such as the ICN now play an important role in offering guidance to national competition agencies, and in providing a forum for policy deliberation, information sharing, cooperation, and professional socialization. Harry First, former Chief of New York state's Antitrust Bureau, goes so far as to declare that we already 'have international law' [against cartels] without ever having adopted one at the international level.²⁰⁸

Since criminal law lies at the heart of state sovereignty, the global trend toward criminalization of cartel offenses is quite remarkable. Yet the criminalization and enforcement records outside the US are hardly uniform. Given the novelty of legal changes in so many countries, and the challenges of institutional capacity for many, we are skeptical regarding actual enforcement in many countries that have formally adopted enhanced sanctions. Even in states that have criminalized cartel offenses, lingering questions remain about the propriety of criminalization and imprisonment. Much of the criminalization trend thus appears to be a product of transnational enforcement interests more than of domestic bottom-up processes. While countries appear to be moving toward convergence on enhanced sanctions, including criminal penalties against individuals, national competition agencies outside of North America are—to borrow from Harold Koh—grappling with the task of bringing home transnational legal norms and practices for combating cartels.²⁰⁹

²⁰⁸ First (n 104) 727.

²⁰⁹ Koh (n 9).

TABLE 1: Criminalization of Cartel Conduct by Country,
Listed Chronologically

Country	Date ⁱ of Criminalization of Cartel Activities	Serious About Using Criminal Laws? ⁱⁱ	Criminal fines ⁱⁱⁱ	Imprisonment ^{iv}	Date of Competition Law
Canada ¹	1889	Yes (became more active in late 1990s)	Max. CDN\$25 million	Max. 14 years	1889 (new law in 1986)
United States ²	1890 (became a felony in 1974)	Yes (became more active in 1990s)	Corporation Max. US\$100 million or twice the gain from the illegal conduct or twice the loss to the victims; Individual Max. US\$1 million	Max. 10 years	1890
Italy ³	1930*	Yes (became more active in early 1990s)	Min. €103,00 Max. €1032,00	Min. 3 months Max. 5 years	1990
Poland ⁴	1932*	No	Administrative fines only	Max. 3 years	1990 (new law in 2007)
Japan ⁵	1947 (amended in 2005 to give investigatory powers)	Yes (became more active recently)	Max. 5 million yen	Max. 5 years	1947
France ⁶	1953 (became primarily civil in 1986)	No	Max. €75,000	Max. 4 years	1945 (new laws in 1986 and 2001)
Austria ⁷	1959* (originally criminalized all hard core cartels, in 2002 decriminalized except for bid rigging)	No	Administrative fines only	Max. 3 years	1951 (new laws in 1984 and 2005)
Norway ⁸	1960	Yes (became more active in the 1980s)	Amount of criminal fines not specified	Max. 6 years	1926 (new laws in 1993 and 2004)
Israel ⁹	1961	Yes (became more active in late 1990s)	Corporation Max. NIS 4 million plus NIS 28,000 for each day offence persists;	Max. 5 years	1959 (new law in 1988)

ⁱ All years are based upon the date the law was enacted

ⁱⁱ A country is deemed to meet this standard if it has prosecuted individuals under their criminal law, or, in the event that it has only recently criminalized cartel conduct, it has stressed that it is its intention to do so. This category involves, in part, a subjective judgment.

ⁱⁱⁱ All criminal fines are based upon penalties in the current law

^{iv} All terms of imprisonment are based upon penalties in the current law

			Individual Max. NIS 2 million plus NIS 14,000 for each day such offence persists.		
Spain ¹⁰	1973 (revision in 1995 separating general cartels and bid rigging)	No	Min. fine of 1 year (percentage of income determined by judge) Max. fine of 2 years	Min. 1 year Max. 3 years	1963 (new laws in 1989 and 2007)
Greece ¹¹	1977 (initially provided for imprisonment but later abolished and reinstated in 2009)	Yes	Min. €100,000 Max. €1,000,000	Min. 2 years	1977 (new law in 2011)
South Korea ¹²	1980	Yes (became more active in 2008)	Max. KRW 200 million	Max. 3 years	1980
Kenya ¹³	1988	No	Max. KES 10 million	Max. 5 years	1988 (new law in 2010)
Brazil ¹⁴	1990	Yes (became more active post-2003)	Min. 1/30 minimum wage Max. 1,800 times minimum wage	Min. 2 years Max. 5 years	1962 (new laws in 1990, 1991, and 1994)
Taiwan ¹⁵	1991 (amended in 1999 to only criminalize repeat offenders)	No	Max. TWD 100 million (but only if repeat offender)	Max. 3 years (but only if repeat offender)	1991
Iceland ¹⁶	1993	Yes (became more active in late 2000s)	Amount of criminal fines not specified	Max. 6 years	1993 (new law in 2005)
Slovakia ¹⁷	1993	No	Administrative fines only	Max. 6 years	1991 (new laws in 1994 and 2001)
Zambia ¹⁸	1994	No	Max. 500,000 penalty units (1 penalty unit is currently K180)	Max. 5 years	1994 (new law in 2010)
Slovenia ¹⁹	1995 (major revision was made to criminal law in 2008 but no prosecution to date)	No	Corporation Min. €50,000 Max. 200 times damage caused or illegal gain obtained Individual Min. 30 days of salary Max. 500 days of salary	Min. 6 months Max. 5 years	1993 (new law in 2008)
Ireland ²⁰	1996	Yes	Max. €4 million or 10% of revenue	Max. 10 years	1953 (new laws in 1991 and 2002)
Romania ²¹	1996	No	Min. 500 Max. 30,000	Min. 6 months Max. 3 years	1996

Russia ²²	1996	Yes (became more active in 2010)	Max. RUR 1 million or 5 years of salary	Max. 7 years	1991 (new law in 2006)
Denmark ²³	1997**	No	Amount of criminal fines not specified	None	1937 (new laws in 1990 and 1997)
Germany ²⁴	1997*	Yes	None	Max. 5 years	1923 (new law in 1958)
Indonesia ²⁵	1999	No	Min. Rp. 25 billion Max. Rp. 100 billion	Max. 6 months	1999
Thailand ²⁶	1999	No	Max. THB 6 million	Max. 3 years	1979 (new law in 1999)
Barbados ²⁷	2002	No	Corporation Max. BBD 500,000; Individual Max. BBD 150,000 (only imposed if fail to end cartel after warning)	Max. 6 months (only if fail to end after warning)	2002
Estonia ²⁸	2002	Yes	Corporation: Max. €16 million or 10% of revenue; Individual Min. 30 days of salary Max. 500 days of salary	Max. 3 years	1993 (new laws in 1998 and 2001)
United Kingdom ²⁹	2002	Yes	Unlimited fines	Max. 5 years	1948 (new laws in 1998 and 2002)
Hungary ³⁰	2005*	No	Administrative only	Max. 5 years	1990 (new law in 1996)
Australia ³¹	2009	Yes	Corporation Max. AUS\$ 10 million or 3 times the gain from the illegal conduct or, if that gain cannot be defined, 10% of revenue; Individual Max. AUS\$220,000	Max. 10 years	1906 (new laws in 1965, 1971, 1974, and 2010)
Czech Republic ³²	2009	Yes	Amount of criminal fines depends on damages	Min. 2 years Max. 8 years	1991 (new law in 2001)
South Africa ³³	2009***	Yes	Max. R 500,000	Max. 10 years	1955 (new laws in 1979 and 1998)
Mexico ³⁴	2011	Yes	Min. 1,000 days of salary Max. 3,000 days of salary	Min. 3 years Max. 10 years	1924 (new laws in 1992 and 2011)

* These countries have limited criminalization of cartel activity to bid rigging in public tenders. This Table provides an entry point for understanding the state of criminalization in countries. While we note those countries that criminalize only bid rigging, the Table does not break down countries in terms of whether the criminal offense focuses specifically on cartels or more broadly on competition law violations. The Table also does not note countries that have completely

decriminalized cartel violations, such as Finland, although the footnotes provide information as to countries which have decriminalized cartels except for bid rigging, such as Germany. The Table also does not note those jurisdictions where fines are formally administrative (and not criminal), but where their stringency can arguably be viewed as punitive and thus penal in practice, such as the European Union, Finland, Germany and the Netherlands.

** The countries only impose criminal fines and do not imprison violators.

*** South Africa passed legislation to criminalize cartel activity in 2009 but it has not yet gone into force because of Presidential inaction.

¹ Canada was the first country to criminalize cartels. See: Julian M Joshua and others, 'Extradition and Mutual Legal Assistance Treaties: Cartel Enforcement's Global Reach' (2008) 75 Antitrust law Journal 353, 378. Canada has frequently amended its Competition Act throughout the years. The first jail sentence did not take place until 1996. <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00960.html>. In 2009 the Act was amended by creating a per se criminal prohibition against agreements between competitors to fix prices.

http://www.dwpv.com/images/Anti-Cartel_Enforcement_in_Canada_-_Still_More_Bark_Than_Bite.pdf.

For the current Act see: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00148.html.

² The United States criminalizes cartels both under the Sherman Act, and under state statutes. See: <http://www.iclg.co.uk/khadmin/Publications/pdf/4131.pdf>. Violations of the Act were originally only a misdemeanor, but in 1974 Congress made violations a felony. See: <http://onlinelibrary.wiley.com.ezp2.lib.umn.edu/doi/10.1111/j.1465-7287.1989.tb00574.x/abstract>. The US DOJ first became increasingly more active in using criminal law in the 1990s. For the modern Act see: http://www.law.cornell.edu/uscode/html/uscode15/usc_sec_15_00000001---000-.html.

³ Article 353 of the Italian Criminal Code, adopted on October 19, 1930, criminalizes any colluding activity which may affect the result of public tender procedures. Bid rigging crimes, particularly in the construction industry, have been vigorously prosecuted since the Clean Hands political corruption scandal in the early 1990s. Email from Giulio Cesare Rizza of Cleary Gottlieb Steen & Hamilton LLP law firm to author (21 June 2011). See also: <http://www.iclg.co.uk/khadmin/Publications/pdf/4111.pdf>; and ABA SECTION OF ANTITRUST LAW, Competition Laws Outside the United States, 2d 2011.

⁴ For the Polish Act on Competition and Consumers, see: <http://www.uokik.gov.pl/download.php?plik=7618>.

Article 305 of the Polish Criminal Code criminalizes bid rigging in public tenders. See:

http://km.undp.sk/uploads/public/File/AC_Practitioners_Network/Poland_Penal_Code.pdf (1997 version in English). For the current version of the Penal Code in Polish see:

<http://www.legislationline.org/documents/section/criminal-codes/country/10>. See also:

http://www.iclg.co.uk/index.php?area=4&country_results=1&kh_publications_id=171&chapters_id=4119; and <http://www.oecd.org/dataoecd/37/29/34720956.pdf>. Bid rigging was first criminalized in the 1932 Criminal Code in Article 283. Email from Ewa Gojniczek of WKB Wiercinski, Kwiecinski, Baehr law firm, July 25, 2011

⁵ In 2005 the Japanese Antimonopoly Monopoly Act was amended to give compulsory investigatory powers to the Free Trade Commission. See Mitsuo Matsushita, 'Reforming the Enforcement of the Japanese Antimonopoly Law' (2010) 41 Loyola University Chicago Law Review 521; <http://www.oecd.org/dataoecd/22/18/33723798.pdf>; <http://www.oecd.org/dataoecd/22/18/33723798.pdf>. In 2009, Japan criminally convicted six former executives for cartel offenses. Also in 2009, Japan increased the maximum prison sentence for unfair restrictions from three years to five years. See: <http://www.omm.com/newsroom/publication.aspx?pub=865>. For the Japanese Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade, see http://www.jftc.go.jp/en/legislation_guidelines/index.html. For a good concise overview of the cartel landscape in Japan, see <http://www.iclg.co.uk/practice-areas/cartels-and-lenieny/cartels-&-lenieny-2013/japan>.

⁶ In France, enforcement under the competition acts of 1953 and 1958 were exclusively criminal. The laws were reformed in 1977 and again in 1986 which introduced the present French system which relies mostly on administrative sanctions; however, criminal sanctions are still available. See:

http://www.pspe.org.pl/dokumenty/137_IsCriminalizationofEUCompetitionLawtheAnswer.pdf.

For the Commercial Code see: <http://195.83.177.9/code/liste.phtml?lang=uk&c=32&r=3096>. The statute of limitations was extended in 2001, theoretically making it more feasible to criminally prosecute cartel cases.

See: <http://www.oecd.org/dataoecd/52/60/31415943.pdf>. See also:

http://www.pspe.org.pl/dokumenty/137_IsCriminalizationofEUCompetitionLawtheAnswer.pdf; ABA SECTION OF ANTITRUST LAW, Competition Laws Outside the United States, 2d 2011.

⁷ Section 168b of the Austrian Criminal Code criminalizes bid rigging; however, before the Competition Law was amended in 2002 Austria could impose criminal penalties for other cartel conduct. See:

<http://www.iclg.co.uk/khadmin/Publications/pdf/4095.pdf>. According to a general provision, section 37, a fine could be placed instead of the prison sentence for bid rigging. For the Criminal Code (in German) see:

<http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002296>.

- ⁸ Typical maximum imprisonment in Norway is 3 years; however, the maximum becomes 6 years for aggregating circumstances. In practice, authorities have only applied fines. For the Competition Act of 2004 see: <http://www.konkurransetilsynet.no/en/legislation/The-Competition-Act-of-2004/>. For the Competition Act of 1993 see: <http://www.konkurransetilsynet.no/en/legislation/The-Competition-Act-of-1993/>. An Act to Control Monopolistic Practices and Unwarranted Prices of 1926, see: ANTI-TRUST LAWS 281 (W. Friedman ed., 1956).
- ⁹ While there were a few criminal cases in the early 1980s, the Israeli Antitrust Law (both the 1959 and 1988 version) was not significantly enforced until the Israeli Antitrust Authority (IAA) was created in 1994. See: <http://www.oecd.org/dataoecd/34/37/2488835.pdf>. In the early 2000s the IAA went further by requesting the court to impose actual imprisonment, which the court imposed against the tile cartel. Email from Mazor Matzkevich of Epstein, Chomsky, Osnat & Co. Law Offices, July 10, 2011. The amount of criminal charges and the severity of the punishments increased in the late 1990s and early 2000s. See: <http://www.fbclawyers.com/FileServer/979d371dcfce94ade7ce2277174b2106.pdf>.
- The typical maximum imprisonment is 3 years unless certain defined aggravating factors are present, in which case the maximum is 5 years. For the Restrictive Trade Practices Law see: <http://eng-archive.antitrust.gov.il/ANTSearchItems.aspx?Subject=100209>. See also: <http://www.iclg.co.uk/khadmin/Publications/pdf/4110.pdf>.
- ¹⁰ Additionally, debarment and a general prohibition to contract with public administrations of between 3 and 5 years can be imposed. For the Spanish Competition Act, see: <http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=18425&Command=CoreDownload&Method=attachment>. Article 262 of the Spanish Penal Code criminalizes bid rigging in auctions and public tenders. Article 284 of the Spanish Penal Code criminalizes other types of cartels. For the Spanish Penal Code (in Spanish) see: http://www.mjusticia.gob.es/cs/Satellite/1292345163509?blobheader=application%2Fpdf&blobheadername1=Content-Disposition&blobheadervalue1=attachment%3B+filename%3DCriminal_Code_%28C%C3%B3digo_Penal%29.PDF. See also: <http://www.iclg.co.uk/khadmin/Publications/pdf/3365.pdf> and JULIAN O. VON KALINOWSKI, WORLD LAW OF COMPETITION OVERVIEW § 1.15[1] (1987).
- ¹¹ Greece recently enacted a new Competition Act (Law 3959/2011) which replaced Law 703/1977, and which created stiffer sentences focused on cartel offenses. For the new law (in Greek) see: <http://www.hellenicparliament.gr/UserFiles/bcc26661-143b-4f2d-8916-0e0e66ba4c50/p-proant-pap.pdf>. The previous Competition Act (Law 703/1977) provided for criminal fines. The initial text of the 1977 law also provided for imprisonment (of at least three months) for cartel violations, but (to our knowledge) no one was ever sentenced under it, and it was subsequently abolished until the sanction of imprisonment was re-introduced in August 2009 (Law 3784/2009 amending once again Law 703/1977. See also: <http://www.concurrences.com/IMG/pdf/ConsolidatedGreekCompetitionLaw.pdf>; http://ec.europa.eu/competition/ecn/brief/02_2011/el_act.pdf; and <http://www.iclg.co.uk/khadmin/Publications/pdf/4107.pdf>.
- ¹² In 1999, the Korean Omnibus Cartel Repeal Act removed legal exemptions for 20 cartels. See: <http://www.oecd.org/dataoecd/3/44/2497300.pdf>. While civil penalties have become increasingly common, criminal enforcement is still relatively rare. See: <http://www.iclg.co.uk/khadmin/Publications/pdf/4113.pdf>. In 2008, the Korean Free Trade Commission (KFTC) began to forward cartel offenders to the Korean Prosecutor's Office for criminal prosecution. See: http://www.justice.gov/atr/public/speeches/255515.htm#N_35_. The Korean Supreme Court has ruled that the KFTC must first recommend criminal charges to the Prosecutors Office for such charges to be valid. See: http://meetings.abanet.org/webupload/commupload/AT307000/otherlinks_files/at307000_newsletter_201103.pdf. For the Monopoly Regulation and Fair Trade Act see: http://eng.ftc.go.kr/files/static/Legal_Authority/Monopoly%20Regulation%20and%20Fair%20Trade%20Act_Aug%203%202007.pdf.
- ¹³ For the Kenyan Competition Act 2010 see: http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/CompetitionAct_No12of2010_.doc. For the Restrictive Trade Practices, Monopolies and Price Control Act 1988 see: http://www.treasury.go.ke/index.php?option=com_docman&task=cat_view&Itemid=54&gid=68&orderby=dmdat e_published&ascdesc=DESC. See also: <http://www.oecd.org/dataoecd/29/44/1832315.pdf>.
- ¹⁴ While the Brazilian Antitrust Law was originally passed in 1994, it was amended and strengthened both in 2000 and 2007. Brazilian competition authorities did not begin to focus on anti-cartel enforcement until 2003.

For the Brazilian Antitrust Law see: http://www.seae.fazenda.gov.br/document_center/legislation/brazilian-antitrust-law.pdf. See also:

http://www.iclg.co.uk/index.php?area=4&country_results=1&kh_publications_id=171&chapters_id=4097;
<http://www.heinonline.org.ezp1.lib.umn.edu/HOL/Page?page=929&handle=hein.journals/antibull40&collection=journals>; and <http://www.oecd.org/dataoecd/4/42/45154362.pdf>.

¹⁵ The current Taiwanese Competition Law only allows for criminal punishment for repeat offenders. For the Fair Trade Act of 2010, see: <http://www.ftc.gov.tw/internet/english/doc/docDetail.aspx?uid=644&docid=11057>. The Fair Trade Act of 1992 (enacted in 1991) allowed for the same criminal punishments to non-repeat offenders. See: <http://www.ftc.gov.tw/internet/english/doc/docDetail.aspx?uid=644&docid=1555>. For the Fair Trade Act of 1999, see: <http://www.ftc.gov.tw/internet/english/doc/docDetail.aspx?uid=644&docid=1554>. See also: <http://www.jftc.go.jp/eacpf/05/APECTrainingProgram2003/LINGin.pdf>; and <http://www.worldservicesgroup.com/publications.asp?action=article&artid=1709>. Taiwan introduced a leniency program in 2011 and announced its first decision under the program in late 2012. See <http://www.nortonrose.com/knowledge/publications/71263/competition-law-developments-in-east-asia-september-2012>.

¹⁶ For the Icelandic Competition Law No. 44/2005 see: http://www.wipo.int/wipolex/en/text.jsp?file_id=190678.

For the Competition Law No. 8/1993 see:

http://www.idnadarraduneyti.is/log-og-reglugerdir/Allar_Reglugerdir/nr/102. See also:

<http://www.oecd.org/dataoecd/32/31/2404778.pdf>.

¹⁷ The normal maximum punishment is three years in prison; however, if a competitor suffers serious damage then the penalty is two to six years of prison. See Section 250 of Penal Code (in Slovakian):

<http://www.zbierka.sk/Dokumenty/Download/37/Default.aspx>.

For the Slovak Act on Protection of Competition see: <http://www.antimon.gov.sk/files/30/2009/Act%20136-2001-novela-aj.rtf>. To date, no criminal charges have been brought by Slovakia's authorities. See:

<http://www.iclg.co.uk/khadmin/Publications/pdf/4122.pdf>.

¹⁸ The Zambian Competition and Consumer Protection Act 2010 per se criminalizes all horizontal agreements. See: http://www.parliament.gov.zm/index.php?option=com_docman&task=doc_view&gid=714.

For The Competition and Fair Trading Act of 1994 see:

<http://www.globalcompetitionforum.org/regions/africa/Zambia/COMPETITION%20andFAIR%20TRADING%20ACT.PDF>. For an explanation about the fine system see: <http://www.zra.org.zm/Penalties.php>.

¹⁹ Cartels in Slovenia were originally incriminated in 1995 when the Criminal Code was enacted; however, the effectiveness was diminished because of its poor definition. In 2008, a new Criminal Code was enacted which substantially amended the wording to its current form in Article 225. See:

<http://www.policija.si/eng/images/stories/Legislation/pdf/CriminalCode2009.pdf>. To our knowledge, no one has been criminally prosecuted for a hard core offense, although in 2010 the Competition Protection Office provided documents to the state prosecutor regarding a cartel of Slovenian operators of ski lifts accused of fixing the prices of ski tickets for ten years. Email from Tjaša Lahovnik of Odvetniki Šelih & partnerji law firm, June 21, 2011. For the Slovenian Act on the Prevention of the Restriction of Competition see:

http://www.uvk.gov.si/fileadmin/uvk.gov.si/pageuploads/ZPOmK_neuradno_precisceno_besedilo_ang.pdf.

See also:

http://www.iclg.co.uk/index.php?area=4&country_results=1&kh_publications_id=171&chapters_id=4123.

²⁰ The Irish Competition Act of 2002 increased maximum fines and imprisonment. See:

<http://www.irishstatutebook.ie/2002/en/act/pub/0014/print.html#partii-sec11>. See also:

<http://www.calvani.com/TerrysFiles/Articles/Irish%20Cartel%20Enforcement-Fordham%202004.pdf>; and

<http://www.tara.tcd.ie/bitstream/2262/11978/1/LyonsP0507.pdf>. In 2006, Ireland became the first EU country to impose a prison sentence for a cartel activity besides bid rigging. See: http://www.efc.ie/full-publications.php?id_publications=99.

At the end of 2010, there had been 33 criminal convictions (18 undertakings and 15 individuals) for hard core cartel offenses. See:

<http://www.tca.ie/images/uploaded/documents/2010%20Annual%20Report.pdf>.

For the Competition Act of 1996 see: http://www.irishstatutebook.ie/plweb-cgi/fastweb?state_id=1270120620&view=ag-

[view&numhitsfound=1&query_rule=%28%28\\$query3%29%29%3Alegtitle&query3=Competition%20%28Amendment%29%20Act%201996&docid=53018&docdb=Acts&dbname=Acts&dbname=SI&sorting=none&operator=and&TemplateName=predoc.tmpl&setCookie=1](http://www.irishstatutebook.ie/plweb-cgi/fastweb?state_id=1270120620&view=ag-view&numhitsfound=1&query_rule=%28%28$query3%29%29%3Alegtitle&query3=Competition%20%28Amendment%29%20Act%201996&docid=53018&docdb=Acts&dbname=Acts&dbname=SI&sorting=none&operator=and&TemplateName=predoc.tmpl&setCookie=1). In July 2012, amendments to the Competition Act came into force that, inter alia, doubled potential prison time to ten years.: Peter Whelan, 'Ireland Offers a Glimmer of Hope for European Cartel Criminalisation' (*Competition Policy Blog*, 26 July 2012)

http://www.ftc.gov.bb/index.php?option=com_content&task=blogcategory&id=39&Itemid=89<http://www.ftc.gov.bb/library/CAP326C.pdf>. For the Act, see: <http://www.ftc.gov.bb/library/CAP326C.pdf>.

²⁸ Section 400 of the Estonian Penal Code, which imposes criminal sanctions for actions preventing free competition, was enacted in 2002 and amended in 2010. From 2008 to 2009, 14 criminal procedures were brought against hard core cartels. See: http://www.konkurentsiamet.ee/public/AnnualReports/_Annual_Report_2009.pdf; and <http://www.konkurentsiamet.ee/file.php?14445>. For the Competition Act, see:

http://www.konkurentsiamet.ee/public/competition_act_july_2006.pdf. See also: <http://www.iclg.co.uk/khadmin/Publications/pdf/3309.pdf>; http://www.konkurentsiamet.ee/public/AnnualReports/_Annual_Report_2009.pdf; http://www.konkurentsiamet.ee/public/AnnualReports/_Annual_Report_2009.pdf.

²⁹ The British Enterprise Act makes it a criminal offence only if an individual dishonestly agrees with one or more other persons to make or implement, or to cause to be made or implemented, arrangements between at least two undertakings involving any of the following: price fixing, market sharing, limiting supply or production, and bid rigging. See: <http://www.legislation.gov.uk/ukpga/2002/40/contents>; <http://www.ofi.gov.uk/about-the-ofi/legal-powers/legal/competition-act-1998/>; <http://www.iclg.co.uk/khadmin/Publications/pdf/4130.pdf>; and <http://ld.practicallaw.com/2-504-4903#a996632>.

³⁰ In 2005, Article 296/B was added to the Hungarian Criminal Code, criminalizing cartels in public procurement procedures and concession tenders. See: http://www.wipo.int/clea/docs_new/pdf/en/hu/hu019en.pdf.

For the Hungarian Prohibition of Unfair and Restrictive Market Prices 1997 see:

http://www.gvh.hu/gvh/alpha?do=2&st=2&pg=129&m5_doc=4244&m176_act=2.

For the Act LXXXVII of 1990 on Price Setting see:

http://www.gvh.hu/domain2/files/modules/module25/pdf/Jogi_Magyar_Egyeb_torveny_Artorveny_a.pdf

See also: http://www.iclg.co.uk/index.php?area=4&country_results=1&kh_publications_id=126&chapters_id=3320; and http://heinonline.org/HOL/Page?handle=hein.journals/mjil15&div=30&g_sent=1&collection=journals.

³¹ For the Australian Competition and Consumer Act see: <http://www.australiancompetitionlaw.org/overview.html>.

See also: <http://www.australiancompetitionlaw.org/legislation/1906aipa.html>; and

<http://www.iclg.co.uk/khadmin/Publications/pdf/4094.pdf>.

³² In 2009, the Czech Criminal Code was revised and added Article 248, making participation in a cartel an explicit criminal offense. See: <http://www.schoenherr.eu/news-publications/pdfs/schoenherr%20public%20competition%20enforcement%20review%20czechrepublic>; and

http://www.iclg.co.uk/index.php?area=4&country_results=1&kh_publications_id=126&chapters_id=3306.

Imprisonment is available only if the damage or profit of the acting person was above 5 Mio CZK or the cartel led to the insolvency of a third party. Email from Arthur Braun of Braun law firm July 4, 2011. The Criminal Code (1961) Article 127 had generally criminalized breach of business rules and could have applied to competition laws; however, it was never used to convict someone who violated competition laws. See:

<http://www.mondaq.com/article.asp?articleid=77290>.

³³ The South African Competition Amendment Act was amended in 2009 to include criminal liability; however, the Act provides that the President can determine when it enters into force, and as of the close of 2012, it has not yet come into force. See: <http://www.iclg.co.uk/khadmin/Publications/pdf/4124.pdf>.

³⁴ Article 234 of Mexico's current Competition Law criminalizes cartels. See:

<http://www.cfc.gob.mx/images/stories/Leyes/compendio2011conreformas.pdf>; and

<http://www.mexico.vg/mexicos-economy/calderon-competition-law/4500>. The 1857 Mexican Constitution contained a provision which banned monopolies. Antitrust statutes were first passed in 1924, 1931, and 1934. See: ABA SECTION OF ANTITRUST LAW, Competition Laws Outside the United States, 2D 2011.