

## Criminalizing Cartels: A Global Trend?

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# CRIMINALIZING CARTELS: A GLOBAL TREND?

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## ABSTRACT

Countries in virtually every region of the world are criminalizing cartel offenses. Many have initiated prosecutions, several have secured convictions, and a few have imposed jail time. Yet outside the United States the enforcement record is hardly uniform, and the debate about cartel criminalization is far from resolved. This situation raises a host of questions. What spurred the trend toward cartel criminalization? Have the changes been driven primarily by criminalization evangelists such as the United States Department of Justice, whether working bilaterally or through transnational networks? Are organic, bottom-up, national processes also at work, suggesting changing moral sensibilities regarding cartel conduct? To what extent have formal legal changes been accompanied by enhanced enforcement? This Essay tackles these questions through a review of criminalization and enforcement developments in the United States, Europe, and around the world. While the emerging legal landscape of anti-cartel activity is complex and varies significantly by jurisdiction, the clear trend is toward increased criminalization, as well as more robust enforcement, including collaboration among national antitrust authorities through informal transgovernmental networks. The trends, however, are not uniform, and the implementation of formal legal changes is an open question in light of divergent institutional contexts and social attitudes regarding cartels.

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## INTRODUCTION

For most countries, competition law is a relatively recent phenomenon. In 1950, only ten jurisdictions had competition laws. Today more than 110 jurisdictions do, and more than 80 of these systems have commenced since 1980.<sup>1</sup> 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 international treaty mandating that countries have a competition law system which prescribes certain behavior, or create specialized institutions to enforce these prescriptions. Yet such prescriptions and institutions now exist in all major economies, creating what can be viewed as a *transnational legal order*, “a collection of more or less codified transnational legal norms and associated institutions within a given functional domain.”<sup>2</sup>

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.<sup>3</sup> More than thirty countries have criminalized cartel conduct in some form. All but five have done so since 1995 and over twenty since 2000, and the list is growing.<sup>4</sup> 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 and 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. U.S. Deputy Assistant Attorney General for Criminal Enforcement Scott Hammond thus proclaims, “[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.”<sup>5</sup> Although the United States remains the primary user of criminal law as an enforcement tool, and the enforcement record outside the United States is relatively slim, the debate over

1 See U.N. Conference on Trade and Development, Directory of Competition Authorities, TD/B/COM.2/CLP/56 (Feb. 8, 2007), available at [http://www.unctad.org/en/docs/c2clpd56\\_en.pdf](http://www.unctad.org/en/docs/c2clpd56_en.pdf).

2 Gregory Shaffer, *Transnational Legal Process and State Change*, LAW & SOC. INQUIRY (forthcoming 2012).

3 See, e.g., Christopher Harding, *Business Collusion as a Criminological Phenomenon: Exploring the Global Criminalisation of Business Cartels*, 14 CRITICAL CRIMINOLOGY 181, 182, 188 (2006) (“The closing years of the century then witnessed an apparent sea change.... Europe, and also jurisdictions elsewhere throughout the world, seemed to be engulfed by a project of criminalization.”). For an excellent book on the phenomenon, see CRIMINALISING CARTELS: CRITICAL STUDIES OF AN INTERNATIONAL REGULATORY MOVEMENT (Caron Beaton-Wells & Ariel Ezrachi eds., 2011).

4 See also Janet L. McDavid & Megan Dixon, *Antitrust Update: Criminal Antitrust Enforcement in a Down Economy*, in ANTITRUST INSTITUTE 2011, at 1011, 1015 (Corp. L. & Practice Course Handbook Ser. No. 1862, 2011) (“There are now over 100 countries with antitrust regimes, and over two dozen that have criminalized cartel activity”); Caron Beaton-Wells, “Cartel Criminalisation as Cultural Change: A Report from Findings of a Survey of the Australian Public,” at 6 (Oct. 5, 2010), available at [http://www.jftc.go.jp/en/international\\_relations/icn/yokohama-materials/pdf/1\\_3.pdf](http://www.jftc.go.jp/en/international_relations/icn/yokohama-materials/pdf/1_3.pdf) (reporting over 20).

5 Scott D. Hammond, Deputy Assistant Att’y Gen. for Criminal Enforcement, Antitrust Div., U.S. Dep’t of Justice, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades* 1 (Feb. 25, 2010).

criminalization is active.<sup>6</sup> 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.<sup>7</sup>

This state of affairs raises several 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 United States (U.S.) Department of Justice (DOJ), working 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?<sup>8</sup> 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? That is, is the primary explanation a functional response to regulatory issues which transcend national borders in an economically interdependent world, as stressed by rational institutionalist theory? Are organic, bottom-up, national processes also at work? Are we witnessing a change in ideological and 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? In short, 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?<sup>9</sup>

This Essay 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 United States toward addressing international cartels in the 1990s, followed by a shift in focus toward criminal penalties, including jail time for foreign individuals. The U.S. has advocated these changes in international fora, most notably the Organization for Economic Cooperation and Development (OECD) and the International Competition Network (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 U.S. 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. (To start, rational interest-based responses operate within particular cognitive frames, which affect the policy goals pursued). Rather, we focus on developments in formal law in comparison with 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 I addresses changes in the law—the “law on the books”—in a number of jurisdictions, starting with the United States and the European Union (E.U.), highlighting the enactment around the globe of increasingly severe penalties against cartel activity, and the increased adoption of criminal sanctions, which follows the U.S. lead. Part II examines enforcement trends in the United States, the European Union and other countries, starting

6 Beaton-Wells, *supra* note 4, at 6.

7 DAVID GERBER, *GLOBAL COMPETITION LAW: LAW, MARKETS AND GLOBALIZATION* 178 (2010) (“economic theorists and political leaders of the interwar period had often praised the potential value of cartels”); *see also* CHRISTOPHER HARDING & JULIA JOSHUA, *REGULATING CARTELS IN EUROPE* (2010).

8 For an excellent assessment of different explanations of policy diffusion, *see* *THE GLOBAL DIFFUSION OF MARKETS AND DEMOCRACY* (Beth Simmons, Frank Dobbin & Geoffrey Garrett, eds., 2008).

9 For an analytic framework for assessing transnational legal processes and their impact, *see* Shaffer, *supra* note 2; *see also* Harold Hongju Koh, *Bringing International Law Home*, 35 *HOUS. L. REV.* 623 (1998).

with the increased focus of U.S. enforcement policy on international cartels and on the application of criminal sanctions against individuals. Part III addresses transnational cooperation efforts in combating cartels, focusing particularly on the role of the U.S.-initiated ICN, as well as the ongoing substantive and peer-review work of the OECD. Part IV 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 V 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.

## 1. Legal Change across Countries: The Law in the Books

### A. Overview of Policy Developments

While ten years ago cartel prosecutions were largely the province of the U.S. Department of Justice, a broad range of countries have now adopted enhanced sanctions against cartel offenses, including 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 in a table in the online version of this paper, noting the date of criminalization, the conduct covered, and the sanctions provided.<sup>10</sup> We also highlight those countries that appear to be more serious about criminal prosecution in practice, although 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 United States, now joined by the European Union. Although the E.U. itself applies only administrative fines, these fines are punitive enough that E.U. Advocates-General view them as “quasi-criminal,” and over half of the E.U. 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.”<sup>11</sup> 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.<sup>12</sup> Christopher Harding rightly notes that any such attempt will necessarily be plagued by problems of definition and legislative complexity.<sup>13</sup> 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.”

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<sup>10</sup> See online version at <http://ssrn.com/abstract=1865971>.

<sup>11</sup> John M. Connor, *Latin America and the Control of International Cartels*, in *COMPETITION LAW AND POLICY IN LATIN AMERICA* 291, 309 (Eleanor M. Fox & D. Daniel Sokol eds., 2009).

<sup>12</sup> Outside of North America, this feature fits with the general paucity of academic attention to business crime. Harding, *supra* note 3, at 198. Harding’s 2006 study is directly on point.

<sup>13</sup> *Id.* at 189.

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.<sup>14</sup> Apart from Canada and the United States, little of other countries’ “criminal legislation pre-dates the 1980s, and much of it has a more partial or tentative character.” 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.<sup>15</sup> 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.<sup>16</sup> While European, Latin American, and Asian jurisdictions have all criminalized competition offenses, “there is no systematic pattern.”<sup>17</sup>

Criminalization of cartel conduct is of a recent vintage, and of more limited in scope, outside the U.S.<sup>18</sup> 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 United States.<sup>19</sup> This figure, however, has increased in the last five years. An October 2010 Cartels Workshop organized by the International Competition Network (ICN) placed the figure at more than twenty countries,<sup>20</sup> we now show that the figure is at over thirty, and the list is growing.

## B. U.S. Developments

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

The United States 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.<sup>22</sup> The U.S. subjects both corporations and individuals to punishment, casting “[t]he net ... widely in terms of both conduct and persons.”<sup>23</sup> The United States subjects participants in cartels to 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.<sup>24</sup> The Act increased the maximum corporate

<sup>14</sup> *Id.*

<sup>15</sup> *Cf.* J. Anthony Chavez, *International Cartel Enforcement: Creating a Fear of Detection*, Corporate Law and Practice Handbook, 1811 PLI/Corp 929, at 965–66 (May–June 2010).

<sup>16</sup> Telephone Interview with U.S. DOJ official (June 10, 2011).

<sup>17</sup> Harding, *supra* note 3, at 190.

<sup>18</sup> *Id.* at 190–91. In sum, and perhaps unsurprisingly, from a comparative perspective much of the emerging criminal competition law is “unsystematic, uncoordinated, and local rather than international in its origin.”

<sup>19</sup> *Id.* at 191.

<sup>20</sup> Beaton-Wells, *supra* note 4, at 6.

<sup>21</sup> Harding, *supra* note 3, at 190.

<sup>22</sup> Sherman Antitrust Act, ch. 647, §§ 1–8, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 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?* 3 (Oct. 28, 2010) (unpublished Sedona Conference manuscript) (on file with author).

<sup>23</sup> Harding, *supra* note 3, at 190.

<sup>24</sup> Pub. L. No. 108-237, 118 Stat. 661(2004) (codified as amended in scattered sections of 15 U.S.C.).

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. If the top end of the range applicable under the U.S. Sentencing Guidelines exceeds the statutory maximum, then an alternative sentencing provision available for federal felonies may be employed which can increase fines to twice the amount of harm caused or the gains derived.<sup>25</sup> This provision is routinely invoked by the DOJ to justify fines in excess of the statutory maximum. To induce cartel offenders to come forward, the Act also amends the leniency program to limit the civil damages exposure of an amnesty applicant from treble damages to the damages caused, in addition to providing immunity from criminal prosecution.<sup>26</sup>

### C. E.U. and E.U. Member State Developments

Historically, Europe has approached antitrust regulation very differently than the United States. While the U.S. approach has been characterized by criminalization and punitive 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.<sup>27</sup> 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.<sup>28</sup> Although E.U. authorities are still unable to impose prison terms 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 E.U. competition policy.<sup>29</sup>

The E.U. has significantly increased its penalties for cartel offenses in recent years to the extent that E.U. Advocate-Generals have called them "quasi-criminal."<sup>30</sup> E.U. 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.<sup>31</sup> While the fines do not change the maximum penalty—10% of a company's total turnover in the preceding business year (i.e. whether or not in connection with the prohibited activity)—the revisions make it more likely that the fines will approach that limit.<sup>32</sup>

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

26 Gary R. Spratling & D. Jarrett Arp, *International Cartel Investigations: Evaluating Options and Managing Risk in Multi-Jurisdictional Criminal Antitrust Investigations*, Antitrust Counseling & Compliance, 1788 PLI/Corp 229, 241-42, 338 (Feb. 9, 2010).

27 See GERBER, *supra* note 7, at 159-203; see generally DAVID GERBER, LAW AND COMPETITION IN 20th CENTURY EUROPE (1998).

28 Harding, *supra* note 3, at 186-87; GERBER, *supra* note 7, at 201 (noting "growing confidence in the intellectual foundations of US-style substantive law analysis within the [E.U.] competition directorate").

29 Cf. Ingeborg Simonsson, *Criminalising Cartels in the EU: Is There a Case for Harmonisation, in CRIMINALISING CARTELS, supra* note 3; Peter Whelan, *A Principled Argument for Personal Criminal Sanctions as Punishments under EC Cartel Law*, 4 COMPETITION L. REV. 7 (2007); CRIMINALIZATION OF COMPETITION LAW ENFORCEMENT: ECONOMIC AND LEGAL IMPLICATIONS FOR EU MEMBER STATES (Katalin J. Cseres et al., eds., 2006).

30 Opinion of Advocate General Kokott, Case C-97/08, Akzo Nobel NV and Others v. Commission of the European Communities, Paragraph 39, 2009 E.C.R. I-8237 ("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, Paragraph 3, 1991 E.C.R. II-867, (referring to the "substance of the [competition] cases, which all broadly exhibit the characteristics of a criminal law case"); see also Philip Marsden, *Checks and Balances: EU Competition Law and the Rule of Law*, 22 LOY. CONSUMER L. REV. 51, 55 (2009) (noting the punitive and quasi-criminal nature of the penalties involved).

31 Guidelines On The Method Of Setting Fines Imposed Pursuant To Article 23(2)(A) Of Regulation No 1/2003, 2006 O.J. (C 210) 2 (EC).

32 Spratling & Arp, *supra* note 26, at 242-43.



Among the more significant developments in the E.U. 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 U.S. lead.<sup>33</sup> The leniency program faces the challenge of lacking the clear simplicity of the U.S. model of being backed by the threat of criminal sanction. The settlement procedure is designed to streamline the E.U.'s handling of cartel cases and thus free resources for new investigations. The alleged cartelist is able to review the E.U.'s evidence against it and determine whether to acknowledge its involvement and accept liability for violations of E.U. competition law in E.U. 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 E.U. national competition authorities established the European Competition Network (ECN) in 2004 to increase cooperation between E.U. and national authorities, and more effectively share enforcement tasks. 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.<sup>34</sup> The ECN has helped competition policy gain stature throughout the E.U., and enhanced the authority of the DG Comp.<sup>35</sup>

The major focus of sanctions for E.U. member state authorities likewise is the imposition of administrative fines against corporate enterprises, embedded in a juridical framework.<sup>36</sup> Starting in the late 1990s, and increasing more recently, however, some E.U. member states have begun to embark on a criminalization project. Over half of the E.U. 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).<sup>37</sup> How such criminalization initiatives will operate in practice, however, remains in question, as discussed in Part III, as the policies remain circumscribed as compared to the U.S. model.

#### D. 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 U.S. and a majority of E.U. 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 E.U.

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33 HARDING & JOSHUA, *supra* note 7, at 243; Commission Regulation (EC) No. 622/2008, 2008 O.J. (L 171) 3 (amending Regulation (EC) No. 773/2004, as regards the conduct of Settlement Procedures in cartel cases).

34 See Chavez, *supra* note 15, at 964–65; see also Council Regulation 1/2003, On the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, arts. 19, 20, 2003 O.J. (L 1) 1, 14–15 (EC).

35 GERBER, *supra* note 7, at 190, 200.

36 *Id.* at 182.

37 Philipp Girardet, 'What if Uncle Sam wants you?': Principles and Recent Practice Concerning U.S. Extradition Requests in Cartel Cases, 1 J. EUR. COMP. L. & PRAC. 286, 287 (2010) (stating that more than half of all E.U. member states have some form of criminal sanctions for some forms of cartel conduct); Wouter Wils, *Is Criminalization of EU Competition Law the Answer, in CRIMINALIZATION OF COMPETITION LAW ENFORCEMENT*, *supra* note 29, at 60, 74.

The global trend is toward providing for enhanced sanctions against cartels. Many OECD members (in addition to the U.S. and E.U. 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.<sup>38</sup> Australia recently increased maximum fines to the 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.<sup>39</sup> 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 appears to be in the process of following Australia in this respect.<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup> Most 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."<sup>43</sup> 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.<sup>44</sup> The Swiss law also creates a leniency program, a common feature of recent legal reforms that we discuss in Part IV.

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.<sup>45</sup> Federal and state prosecutors conduct cartel prosecutions, in cooperation with the agencies forming part of the Brazilian Competition Policy System (BCPS).<sup>46</sup> The BCPS's anti-cartel program has grown steadily, especially since 2006.<sup>47</sup> 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.<sup>48</sup> 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 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.<sup>49</sup> Brazil has emerged as a regional expert in anti-cartel enforcement—having recently shared its growing expertise with Argentina, Chile, Paraguay, and El Salvador.<sup>50</sup> Brazil's competition authorities regularly engage in bilateral training and consultations with other national authorities.

38 Spratling & Arp, *supra* note 26, at 250.

39 *Id.* at 243.

40 Chavez, *supra* note 15, at 965–66; MINISTRY OF ECONOMIC DEVELOPMENT, NEW ZEALAND, CARTEL CRIMINALISATION DISCUSSION DOCUMENT (2010), available at <http://www.med.govt.nz/upload/70683/Cartel-Criminalisation.pdf>.

41 Spratling & Arp, *supra* note 26, at 252, 309–10.

42 *Id.* at 243, 311.

43 *Monopolies in Mexico: Compete—Or Else*, ECONOMIST, May 7, 2011, at 41.

44 Chavez, *supra* note 15, at 943.

45 OECD, COMPETITION LAW AND POLICY IN BRAZIL: A PEER REVIEW 7 (2010).

46 *Id.* at 7, 37.

47 *Id.* at 14–15.

48 *Id.* at 18; see also Spratling & Arp, *supra* note 26, at 253.

49 OECD, *supra* note 45, at 17.

50 *Id.* at 50–51.

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.<sup>51</sup> 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).<sup>52</sup> Similarly, under a law effective in late 2009, Russia now applies criminal sanctions for antitrust violations. Certain offenses are punishable by up to six years imprisonment.<sup>53</sup> In India, "after a long and troubled gestation,"<sup>54</sup> 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,<sup>55</sup> and prison terms for obstruction of justice.<sup>56</sup> 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,<sup>57</sup> and has now created a cartel division within its enforcement agency.<sup>58</sup> The impact of these legal changes, however, remains an open question in many countries for the reasons we discuss in Part V.

## II. Enforcement Trends across Countries

### A. 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 early 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."<sup>59</sup>

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.<sup>60</sup> The ICN and OECD offer survey evidence regarding the perspectives of cartel authorities.<sup>61</sup> 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 suffers from selection bias. Methodological difficulties notwithstanding, the overall global trend is toward enhanced enforcement, including

51 Brendan Pierson, *China Adopts New Rules to Enforce Monopoly Law*, LAW360 (June 9, 2009).

52 See Jonathan Gowdy, *China Issues New Anti-Monopoly Rules and Procedures on Pricing Conduct*, Mondaq, Jan. 20, 2011, available at <http://www.mondaq.in/article.asp?articleid=120258>; Martyn Huckerby et al., *China's Antitrust Tigers Grow Teeth*, Mondaq, Sept. 1, 2010, available at 2010 WLNR 17372836.

53 Spratling & Arp, *supra* note 26, at 254.

54 Aditya Bhattacharjea, *India's New Competition Law: A Comparative Assessment*, 4 J. COMPETITION L. & ECON. 609, 609 (2008).

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

56 *Id.* art. 42; see also Bhattacharjea, *supra* note 54, at 626.

57 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 2011, it had not yet come into force. Global Legal Group, *The International Comparative Legal Guide to Cartels & Leniency* 218 (2011), available at <http://www.iclg.co.uk/khadmin/Publications/pdf/4124.pdf>.

58 *Commission Appoints Head of Cartel Unit*, ALLAFRICA.COM, May 6, 2011 (noting appointment of official to the "newly established Cartels Division").

59 Harding, *supra* note 3, at 190, 192.

60 See, e.g., John M. Connor, *Effectiveness of Antitrust Sanctions on Modern International Cartels*, 6 J. INDUS. COMPETITION TRADE 195 (2006) [hereinafter Connor 2006].

61 ICN, *Trends and Developments in Cartel Enforcement*, 9th Annual ICN Conference, Istanbul (Apr. 29, 2010) [hereinafter 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.

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.<sup>62</sup> 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 anti-trust laws among the U.S., E.U., 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.”<sup>63</sup> The United States, Europe, and Canada commenced the vast majority of these legal actions—128, 101 (including action by both E.U. member states and the E.U.) 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.”<sup>64</sup>

More recently, Connor updates and summarizes the data through 2008 with a view to uncovering trends across countries over time.<sup>65</sup> 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.<sup>66</sup> 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.<sup>67</sup> 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.<sup>68</sup> 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.<sup>69</sup>

Enforcement patterns vary widely among states and regions. The number of indictments in the United States 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; the severity of applied U.S. sanctions, for example, has increased.<sup>70</sup>

62 Connor 2006, *supra* note 60, at 197.

63 *Id.* at 199.

64 *Id.* at 200. The 90-95% figure is obtained from that fact that of 102 legal actions without convictions, 81 were still underway at the time of publication and only 21 were dismissed.

65 See John M. Connor, *Cartels & Antitrust Portrayed: Private International Cartels from 1990 to 2008* (Am. Antitrust Inst., Working Paper No. 09-06, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1535131](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1535131) [hereinafter Connor 2009].

66 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 (June 6, 2011) (on file with author).

67 Connor 2009, *supra* note 65, at 5, 25.

68 *Id.* at 7, 12–14.

69 *Id.* at 18.

70 *Id.* at 17.

The E.U. has commenced an increasingly large number of cases, resulting in increasingly high sanctions. National competition authorities within the E.U. 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.<sup>71</sup> Other regions have also engaged in increased cartel enforcement, although cartel detections in Africa, Asia and Latin America are comparatively modest.<sup>72</sup>

Total global penalties assessed against international cartels from 1990 to 2008 are approximately \$63.3 billion.<sup>73</sup> Government fines account for more than half of this total (\$35 billion), though private settlements stemming from civil suits (particularly from the U.S.) are also significant—totaling approximately \$29 billion.<sup>74</sup> The vast bulk of global fines have been imposed by the European Commission, national competition authorities within the E.U., and the U.S. DOJ, followed by U.S. state Attorneys General.<sup>75</sup> Far behind the U.S. and E.U., Korea leads the rest of the world in terms of fines imposed (with approximately \$750 million), followed by Africa (less than \$500 million), Latin America (approximately \$300 million), other Asian countries, and Oceania, each with less than half of the Latin American total.<sup>76</sup>

Individuals increasingly risk being held accountable, especially in the United States.<sup>77</sup> At least 435 individual executives have been penalized, and 989 charged worldwide as of December 2008.<sup>78</sup> Americans account for nearly one third of all penalized executives.<sup>79</sup> Although the number of individuals charged in the United States 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.<sup>80</sup> The United States however, remains “almost unique” when it comes to prison sentences: only Israel is another significant jurisdiction in that respect, followed by Japan.<sup>81</sup>

## B. U.S. Developments

The United States 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.<sup>82</sup> The United States reports that it has imposed more than 90% of fines in the past few years in connection with the prosecution of international cartel activity.<sup>83</sup> The result has been increasing U.S. prosecution of foreign defendants. Connor's data shows that in the U.S., “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.”<sup>84</sup> The DOJ is typically investigating about fifty international cartels at any one time.<sup>85</sup> Total

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71 *Id.* at 8–9, 17, 20–21.

72 *See id.* at 17.

73 *Id.* at 51.

74 *Id.*

75 *Id.* at 55.

76 These figures are approximate. *See id.* at 71.

77 *Id.* at 80–97.

78 *Id.* at 83–84.

79 *Id.* at 82.

80 *Id.* at 84, 88–96

81 *Id.* at 82.

82 John M. Connor, *Global Antitrust Prosecutions of International Cartels: Focus on Asia*, 31 *WORLD COMPETITION* 575, 582 (2008). In 1974, Congress made violation of the Sherman Act a felony, where it earlier was only a misdemeanor. 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.

83 Chavez, *supra* note 15, at 945.

84 Connor, *supra* note 82, at 588.

85 Hammond, *supra* note 5, at 3.

annual criminal fines increased dramatically starting in 1997, with a record of \$1.1 billion in FY 1999.<sup>86</sup> Total criminal fines again exceeded \$1 billion in 2009.<sup>87</sup>

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.”<sup>88</sup> As one U.S. 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.”<sup>89</sup> 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.<sup>90</sup> Since May 1999, more than forty foreign defendants have served or are serving prison sentences in the United States for international cartel offenses or obstructing a cartel investigation.<sup>91</sup> The percentage of defendants sentenced to jail in cartel cases, and the number per corporate defendant, have increased. The 1990s saw an average of 37% of defendants involve a jail sentence, whereas the 2009 average was 80%.<sup>92</sup> Sentences are also getting harsher. 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.<sup>93</sup>

### C. The Vitamins Cases and their Impact

In the late 1990s, the United States 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 parallel lysine cartel was captured on live video thanks to the informant Mark Whitaker, later captured in the 2009 motion picture *The Informant!*, starring Matt Damon. As U.S. 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.”<sup>94</sup>

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.<sup>95</sup> In May 1999, the Department of Justice 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 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 documents after meetings and the disguising of conspirators’ identities in remaining documents.<sup>96</sup>

86 Chavez, *supra* note 15, at 959–60.

87 *Id.*

88 Hammond, *supra* note 5, at 11.

89 R. Hewitt Pate, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, International Anti-Cartel Enforcement (Nov. 21, 2004). We thank Bob Kudrle for this.

90 John Connor, *Anti-Cartel Enforcement by the DOJ: An Appraisal*, 5 COMPETITION L. REV. 89, 111 (2008).

91 Hammond, *supra* note 5, at 7.

92 *Id.* at 8; see also Connor, *supra* note 90, at 111 (noting the rise in the average number of individuals receiving prison sentences between 1990 and 2007).

93 Hammond, *supra* note 5, at 7–8; see also Connor, *supra* note 90, at 111 (noting the increasing harshness of prison sentences).

94 Hammond, *supra* note 5, at 9–10.

95 See Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 ANTITRUST L. J. 711, 713–14 (2001).

96 See *id.* at 714–15.

Prosecutions in multiple countries followed the U.S. 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 United States, \$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);<sup>97</sup> in Brazil, R\$17.6 million in fines.<sup>98</sup>

The U.S. Justice Department criminally prosecuted twelve corporations and fourteen individuals. Eleven executives—including six Europeans—went to prison in the United States. It was “the first time a foreign executive agreed to serve time in U.S. prison for his participation in an international cartel.”<sup>99</sup> While other jurisdictions imposed then-record national fines (Canada, E.U., Australia, and Korea, for example), only the United States imposed jail time. Overall, the vitamins prosecution spurred greater attention to anti-cartel enforcement around the globe, and spurred the DOJ to increase international anti-cartel cooperative efforts, as discussed in Part III.

#### D. E.U. and E.U. Member State Developments

The E.U. initially tended to follow the U.S. lead in sanctions against international cartels. The E.U.’s fines in cases involving the lysine, citric acid, vitamins, sodium gluconate, and graphite electrodes cartels lagged behind prosecutions in the United States by two to five years.<sup>100</sup> For example, the U.S. DOJ announced its first indictment in the citric acid conspiracy in 1996, whereas the E.U. announced its decision in that case in 2001.

Over time, the E.U. has steadily become more active in investigating and sanctioning cartels. Although the E.U. itself still does not include a criminal law sanction, it has been increasingly aggressive in seeking large administrative fines. Many E.U. cartel prosecutions involve activity only in E.U. territory, whereas most of the U.S. 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 that the E.U. still faces significantly greater cartel activity within its own territory, on the one hand,<sup>101</sup> and that the U.S. 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.<sup>102</sup> Over 90% of E.U. fines against cartels have been imposed since 1995.<sup>103</sup> The E.U. overtook the U.S. in 1999 in terms of the amount of government fines imposed. In total, the E.U. has investigated over 4,300 companies and penalized over 1,550, with most penalties paid by European firms.<sup>104</sup> Fines totaled €1.756 billion in 2001 and a record €3.334 billion in 2007. The aggregate amount in fines collected by the E.U. in the last five years (as of February 2010) is over five

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97 Connor, *supra* note 82, at 594.

98 Chavez, *supra* note 15, at 936–37.

99 Hammond, *supra* note 5, at 7.

100 Chavez, *supra* note 15, at 960.

101 For example, Connor notes that more than half of discovered cartels operated within Europe. Connor 2009, *supra* note 65, at 9.

102 HARDING & JOSHUA, *supra* note 7, at 145.

103 Connor, *supra* note 82, at 589.

104 Connor 2009, *supra* note 65, at 50.

times the amount collected by the Antitrust Division of the DOJ during that time (although it must be recalled that the DOJ also uses criminal sanctions, and the U.S. system also includes private domestic damage suits).<sup>105</sup>

On May 19, 2010, the E.U. 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.<sup>10</sup> Participants received a 10% settlement discount for admitting fault and adhering to settlement procedures. However, with only three settlements reached since its adoption, the E.U. settlement procedure remains in its infancy.<sup>10</sup>

A few E.U. 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.<sup>108</sup> 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.<sup>109</sup> 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 for jail time.<sup>110</sup> Even in tiny Estonia, authorities initiated eight criminal cases in 2009, three of which were referred to the public prosecutor for court proceedings, and this figure is likely to increase following the country's adoption of a leniency program in 2010.<sup>111</sup>

Finally, the United Kingdom (U.K.) 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 U.S. plea bargain (which made the prosecution much easier and the case thus unique).<sup>112</sup> Soon after, in August 2008, the government charged four current and former British Airways executives with fixing prices of fuel surcharges for passenger flights.<sup>113</sup> That trial, however, collapsed in 2010 after it was found that the government had withheld exculpatory evidence. Many commentators view this episode as a severe setback for criminalizing cartels in the U.K., calling into question its viability.<sup>114</sup>

105 Spratling & Arp, *supra* note 26, at 237.

106 James Kanter, *An Old Chip Cartel Case Is Brought to a Swift End*, N.Y. TIMES, May 20, 2010, at B13.

107 Press Release, European Comm'n, Antitrust: Commission Fines DRAM Producers €331 Million for Price Cartel; Reaches First Settlement in a Cartel Case (May 19, 2010) (IP/10/586); Press Release, European Comm'n, Antitrust: Commission Fines Producers of Washing Powder €315.2 Million in Cartel Settlement Case (Apr. 13, 2011) (IP/11/473).

108 Patrick Massey & John D. Cooke, *Competition Offences in Ireland: The Regime and its Results*, in CRIMINALISING CARTELS, *supra* note 3, at 120.

109 *Id.* at 122; Spratling & Arp, *supra* note 26, at 251. The conviction came in the Spring of 2006.

110 Florian Wagner-von Papp, *What If All Bid-Riggers Went To Prison and Nobody Noticed? Criminal Antitrust Law Enforcement in Germany*, in CRIMINALISING CARTELS, *supra* note 3, at 158.

111 ESTONIAN COMPETITION AUTHORITY, ANNUAL REPORT (2009), available at [http://www.konkurentsiamet.ee/public/AnnualReports/Annual\\_Report\\_2009.pdf](http://www.konkurentsiamet.ee/public/AnnualReports/Annual_Report_2009.pdf).

112 Donald Baker, *An Enduring Antitrust Divide Across the Atlantic over Whether to Incarcerate Conspirators and When to Restrain Abusive Monopolists*, 5 EUR. COMPETITION J. 145, 165 (2009).

113 Spratling & Arp, *supra* note 26, at 253.

114 See Julian Joshua, *DOA: Can the UK Cartel Offence Be Resuscitated?*, in CRIMINALISING CARTELS, *supra* note 3, at 129 ("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.")



### E. 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 exploitative of customers.<sup>115</sup> Countries around the world have been attracted by U.S. and E.U. 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 in 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 which could facilitate further criminal prosecutions.<sup>116</sup> 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.<sup>117</sup> The survey indicates that 42% of the public believe that cartel conduct should be a crime, and since 2009 it now is.<sup>118</sup> 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.<sup>119</sup>

Overall, Asian cartel enforcement has sharply increased, with approximately triple the number of investigations initiated in the 2005–2008 period compared to 1995–2004.<sup>120</sup> 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.<sup>121</sup> Korea also imposed small fines on three of the sixteen vitamins cartels in 2003.<sup>122</sup> 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.<sup>123</sup> Nonetheless, Asia is still viewed as a weak link in international enforcement given the size of Asian economies and thus the profit potential for cartels.<sup>124</sup>

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.”<sup>125</sup> Brazil fines more hard-core cartels annually and imposes higher average corporate cartel fines than any other country in the

115 See Connor, *supra* note 11, at 310. For examples of such portrayal by U.S. antitrust authorities, see Thomas O. Barnett, Assistant Att’y General, Antitrust Division, U.S. Dept’t of Justice, Perspectives on Cartel Enforcement in the United States and Brazil (Apr. 28, 2008); Hammond, *supra* note 3.

116 ELISA KEARNEY & MARK KATZ, ANTI-CARTEL ENFORCEMENT IN CANADA - STILL MORE BARK THAN BITE 4–6 (2009).

117 Beaton-Wells, *supra* note 4, at 17 (noting that a greater percentage of respondents approved of punishment for moral reasons than for reasons of economic harm). See generally Cartel Project, Melbourne Law School, <http://cartel.law.unimelb.edu.au/gol/project-news/project-survey>.

118 Beaton-Wells, *supra* note 4, at 25.

119 Chavez, *supra* note 15, at 942.

120 Connor 2009, *supra* note 65, at 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. *Id.* at 16.

121 Hwan Jeong, *Expansion in the Extraterritoriality of Korean Law*, ASIALAW, Sept. 2009, available at

<http://www.asialaw.com/Article/2330631/Competition-abroad.html?Print=true&Single=true>; Chavez, *supra* note 15, at 943.

122 Connor 2006, *supra* note 60, at 201; Jeong, *supra* note 121.

123 Spratling & Arp, *supra* note 26, at 242, 252.

124 Connor, *supra* note 82, at 593.

125 Connor, *supra* note 11, at 315.

region; it is also alone in Latin America in regularly fining cartel managers.<sup>126</sup> 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.<sup>127</sup> An early 2010 OECD report notes that Brazilian antitrust authorities have reached five settlement agreements to date pursuant to Brazil's settlement program adopted in 2007—the marine hose, compressors, driving schools, cement and beef cartels.<sup>128</sup>

Brazilian authorities were prosecuting or formally investigating under criminal law more than 100 executives in connection with alleged cartel offenses as of late 2009.<sup>129</sup> In 2006 and 2007, Brazilian courts sentenced ten executives “to prison terms ranging from two-and-a-half to five years.”<sup>130</sup> Authorities reported that, as of early 2010, thirty-four individuals had been convicted in the country since its anti-cartel program was initiated.<sup>131</sup> Most of these convictions were for local or regional conspiracies, especially retail fuel cartels. Ten individuals received jail sentences, although (to our knowledge) none of these sentences have been served as of late 2010, as the cases were on appeal. Brazil adopted a “National Anti-cartel Strategy” 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.<sup>132</sup> The Enforcement Day program included senior enforcement officials from the U.S. and E.U.<sup>133</sup>

Elsewhere in Latin America, Mexico—which has one of the largest and best-funded antitrust authorities in Latin America<sup>134</sup>—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,<sup>135</sup> this situation could change following passage of a new antitrust law in 2011 which includes criminal sanctions. Focusing mostly on merger control, Argentina's and Chile's antitrust authorities are relatively underdeveloped. Argentina generally prosecutes only one or two hard-core cartels per year and imposes negligible fines.<sup>136</sup>

In the Middle East, Israel has been active in prosecuting cartel offenses, possibly reflecting closer normative ties to U.S. 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.<sup>137</sup> 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.<sup>138</sup> 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.<sup>139</sup>

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126 *Id.* at 316.

127 Chavez, *supra* note 15, at 942–43.

128 OECD, *supra* note 45, at 11, 17.

129 *Id.* at 18; Spratling & Arp, *supra* note 26, at 253.

130 Spratling & Arp, *supra* note 26, at 253.

131 OECD, *supra* note 40, at 18.

132 *Id.* at 19.

133 *Id.*

134 Connor, *supra* note 11, at 317.

135 *Id.* at 318.

136 *Id.* at 316–17.

137 Spratling & Arp, *supra* note 26, at 252.

138 *Id.*

139 *Id.* at 252–53.

### III. 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 United States has played a central role in global business regulation.<sup>140</sup> 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 U.S. Department of Justice's aggressive stance toward international cartels dating from the early 1990s.<sup>141</sup> The U.S. efforts were supported by a general ideological shift in government attitudes toward market competition following the fall of the Berlin Wall in 1989. The U.S. 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 Organization for Economic Cooperation and Development (OECD), the International Competition Network (ICN), bilateral treaties and informal relations. The E.U. and E.U. member states have increasingly also played important roles.

The OECD has addressed competition issues going back to its Competition Law and Policy Committee in 1961.<sup>142</sup> 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 anti-cartel program aimed to develop competition policy across jurisdictions towards international hard core cartels which the OECD condemned "as the most egregious violations of competition law."<sup>143</sup> 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 U.S. Supreme Court opinion that cartels are the "*supreme evil of antitrust.*"<sup>144</sup>

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 IV), collects information on sanctions, and compiles lists of best practices.<sup>145</sup> 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.<sup>146</sup> 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.<sup>147</sup>

140 See JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (2000); DANIEL W. DREZNER, *ALL POLITICS IS GLOBAL* 5–6 (2007); Shaffer, *supra* note 2.

141 Harding, *supra* note 3, at 194.

142 Hugh Hollman & William E. Kovacic, *The International Competition Network: Its Past, Current and Future Potential*, 20 MINN. J. INT'L L. (forthcoming 2011).

143 OECD, REPORT: HARD CORE CARTELS: THIRD REPORT ON THE IMPLEMENTATION OF THE 1998 COUNCIL RECOMMENDATION 7 (2005) [hereinafter OECD CARTEL REPORT].

144 *Id.* at 7, 8 (italics in original).

145 See Chavez, *supra* note 15, at 963–64.

146 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. Hollman & Kovacic, *supra* note 142.

147 Hollman & Kovacic, *supra* note 142.

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 countries than ever bring important cases that resulted in significant sanctions."<sup>148</sup> 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."<sup>149</sup> 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.<sup>150</sup> 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 United States" as "good examples of what competition authorities can do to educate the public."<sup>151</sup> 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*."<sup>152</sup>

The ICN was created in 2001 under U.S.-instigation following an announcement of fourteen competition agencies.<sup>153</sup> It is a network of competition law officials and non-governmental advisors who have so far come predominately from the private sector.<sup>154</sup> The ICN is currently comprised of around 117 national antitrust agencies operating in 103 jurisdictions, and the list continues to grow.<sup>155</sup> 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.<sup>156</sup> In 2004, the ICN created a Cartel Working Group which contains sub-groups on legal frameworks and enforcement techniques. Though the OECD did much of the early work on "hard core cartels," and continues to be important for policy analysis, 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.<sup>157</sup> It facilitates deliberation among national competition authorities regarding preferred approaches to use against cartels, as well as to sort out differences.<sup>158</sup> 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*

148 OECD CARTEL REPORT, *supra* note 143, at 8.

149 *Id.* at 8, 30.

150 *Id.* at 12–35.

151 *Id.* at 8, 16, 18–19.

152 *Id.* at 26, 28 (italics in original).

153 Eleanor Fox, *Linked-In: Antitrust and the Virtues of a Virtual Network*, 143 INT'L LAW. 151, 160 (2009). For a recent retrospective of the network, see THE INTERNATIONAL COMPETITION NETWORK AT TEN: ORIGINS, ACCOMPLISHMENTS AND ASPIRATIONS (2011).

154 Hollman and Kovacic, *supra* note 142.

155 Comments of Hugh Hollman, a member of the ICN's Agency Effectiveness Working Group (May 7, 2011); see also John Fingleton, Chief Exec., Office of Fair Trading, United Kingdom, *The International Competition Network: Planning for the Second Decade 2–3* (Apr. 27, 2010) (giving a figure of 112 agencies from 99 jurisdictions in 2010).

156 Hollman & Kovacic, *supra* note 142.

157 Memorandum on the Establishment and Operation of the International Competition Network, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc579.pdf>.

158 Fingleton, *supra* note 155, at 5–6.

*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.”<sup>159</sup>

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.<sup>160</sup> U.S. 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.<sup>161</sup> These informal connections, he writes, have led to “pick up the phone” cooperation between competition regulators in different jurisdictions over time.<sup>162</sup> The European Commission estimates that the ICN conducts 90% of its work by teleconference or email.<sup>163</sup> 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 extended to the timing of raids and the execution of warrants.<sup>164</sup>

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 United States currently has either a cooperation agreement or MLAT with Australia, Brazil, Canada, the EU, Germany, Italy, Israel, Japan, Mexico, and the United Kingdom.<sup>165</sup> National agencies, for example, cooperated successfully to secure plea agreements in connection with the airlines cartel, and coordinated investigative efforts in connection with the marine hose cartel.<sup>166</sup> 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.<sup>167</sup> 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.<sup>168</sup> 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. Diffused common norms

159 INT’L COMP. NETWORK CARTELS WORKING GROUP, DEFINING HARD CORE CARTEL CONDUCT, EFFECTIVE INSTITUTIONS, EFFECTIVE PENALTIES 3–4 (2005), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc346.pdf>.

160 ICN Trends, *supra* note 61.

161 Hammond, *supra* note 5, at 14–15.

162 *Id.* at 15 (discussing collaboration between US and UK regulators).

163 Chad Damro, *The New Trade Politics and EU Competition Policy: Shopping for Convergence and Co-operation*, 13 J. EUR. PUB. POL. 867, 879 (2006).

164 Hammond, *supra* note 5, at 15; see also Spratling & Arp, *supra* note 26, at 255–61.

165 Chavez, *supra* note 15, at 962.

166 Hammond, *supra* note 5, at 15–16.

167 Shaffer, *supra* note 2.

168 On intermediaries, see Bruce Carruthers & Terence C. Halliday, *Negotiating Globalization: Global Scripts and Intermediation in the Construction of Asian Insolvency Regimes*, 31 LAW & SOC. INQUIRY 521, 537 (2006); Shaffer, *supra* note 2.

facilitate transgovernmental coordination, and the practical experience of successful coordination in a common enterprise, in turn, spurs further normative convergence.

#### IV. 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.

##### A. Extradition and the Case of Ian Norris

Because extradition requires dual criminality,<sup>169</sup> 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 United States. If extradition to the United States 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 United States to face charges stemming from an antitrust investigation.<sup>170</sup> 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 U.S. 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 U.S. 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 Justice Department's attempt to extradite Norris to the United States 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 U.K.), and thus the dual criminality requirement of the U.S.-U.K. 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 U.K. 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 U.K. extradited Norris to the U.S. to stand trial in the Eastern District of Pennsylvania.<sup>171</sup> A federal jury convicted him of conspiring to obstruct justice on July 27, 2010,<sup>172</sup> and in December 2010 a judge sentenced him to eighteen months in a U.S. prison.<sup>173</sup>

169 Dual criminality, a requirement of most U.S. extradition treaties, requires that the offense at issue must be a crime in both jurisdictions. See generally Girardet, *supra* note 37.

170 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 (Mar. 26, 2010), available at <http://www.akingump.com/communicationcenter/newsalertdetail.aspx?pub=2442>.

171 *Id.*

172 DOJ News Release on Ian Norris Conviction, (July 27, 2010), available at <http://www.mainjustice.com/2010/07/27/doj-news-release-on-ian-norris-conviction/>.

173 *Former Morgan Crucible Chief Ian Norris Sentenced to 18 Months in US Jail*, UK TELEGRAPH, Dec. 10, 2010, available at <http://www.telegraph.co.uk/finance/newsbysector/industry/engineering/8195756/Former-Morgan-Crucible-chief-Ian-Norris-sentenced-to-18-months-in-US-jail.html>.

The Norris extradition is unlikely to be a one-off event. The Justice Department marshaled considerable effort and resources to ensure that Norris faced a jury trial in the United States—perhaps not surprising in view of the Department’s rhetoric about the importance of bringing cartelists to justice. As a growing number of countries criminalize cartel activity, extraditions will be facilitated. For those cartel members who simply avoided travel to the U.S. in earlier years, business could be rendered more difficult.

### B. 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.”<sup>174</sup> They are used as a carrot to complement the stick of enhanced sanctions, such as criminalization. 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.<sup>175</sup> The program was first developed in the United States and has been zealously used there. Gary Spratling, former U.S. Deputy Assistant Attorney General for cartel prosecution, reports that the use of leniency is linked to 90% of U.S. cartel fines imposed since 1997.<sup>176</sup>

The United States 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 United States had a leniency program on the books. Today around 60 jurisdictions do,<sup>177</sup> including Australia, Brazil, Canada, Czech Republic, E.U., France, Germany, Ireland, Japan, South Korea, New Zealand, Sweden, and the UK.<sup>178</sup> The DOJ’s Hammond thus describes this phenomenon as “the single most significant development in cartel enforcement.”<sup>179</sup> The diffusion of leniency programs as an anti-cartel enforcement tool again attests to the normative power of the U.S. 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. 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 in different jurisdictions so that decisions may lie outside the control of a national antitrust authority.

### V. 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 practical limits in most jurisdictions. The implementation of transnational legal norms will

174 INT’L COMP. NETWORK, CARTEL WORKING GROUP, ANTI-CARTEL ENFORCEMENT MANUAL 2 (2009).

175 HARDING & JOSHUA, *supra* note 7, at 297.

176 Spratling & Arp, *supra* note 26, at 287.

177 Telephone Interview with U.S. DOJ official (June 10, 2011); *see also* Hammond, *supra* note 5, at 2–3.

178 Hammond, *supra* note 5, at 2–3; *see also* Chavez, *supra* note 15, 968–78 (listing jurisdictions and discussing the programs extensively).

179 Hammond, *supra* note 5, at 2–3

ultimately depend on local factors, and in particular, domestic political and social attitudes regarding cartel behavior, and domestic institutional structures, capacities and legacies.<sup>180</sup>

Cultural attitudes may be the single biggest hurdle to enforcement trends. Not all publics are convinced that cartel offenses merit the criminal penalty of jail time, which is advocated most vocally by the United States. Criminalization implicates moral judgments that vary with socio-cultural context. U.S. antitrust law has long exhibited a moral dimension, which facilitates the use of criminal sanctions against individuals in cartel cases.<sup>181</sup> 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.”<sup>182</sup> 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.<sup>183</sup> Presentations in October 2010 by competition authorities from Australia and Japan at the ICN’s Cartel Workshop in Yokohama, Japan reflect this concern.<sup>184</sup> The 2010 ICN survey extensively reports “factors influencing perception of importance of cartel enforcement.”<sup>185</sup> 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 U.S. 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.<sup>186</sup> 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.

## 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

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180 Shaffer, *supra* note 2.

181 Baker, *supra* note 112, at 155, 158.

182 Harding, *supra* note 3, at 197; *see also* GERBER, *supra* note 7, at 213, 217 (noting the lack of cultural roots of competition policy in Japan).

183 *See* Beaton-Wells, *supra* note 4 (noting the Australian competition authority’s extensive campaign in this respect).

184 *See id.*; Hideo Nakajima, Dir. Gen., Investigation Bureau, Japan Fair Trade Commission, Outreach Activities by the JFTC: Focusing on Cartel Awareness, at 9 (Oct. 5, 2010) (discussing the “necessity of building up public support for cartel enforcement”).

185 *See* ICN Trends, *supra* note 61, at 53–65.

186 *See* Harding, *supra* note 3, at 193–94.



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 U.S. 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, Chief of New York state's Antitrust Bureau, thus goes so far as to declare that we already "have international 'law' [against cartels] without ever having adopted one at the international level."<sup>187</sup>

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 United States 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.<sup>188</sup> The process is one to be followed.

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187 First, *supra* note 95, at 727.

188 Koh, *supra* note 9.