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# Cartel Enforcement at the Antitrust Division, U.S. Department of Justice, 1990-2007

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### **I. INTRODUCTION**

**T**he purpose of this article is to assess the efforts of the U.S. Department of Justice's Antitrust Division ("DOJ") to detect and penalize criminal price fixing, which is nearly equivalent to prosecutions of hard-core cartel conduct. To do so, I collected scores of indicators of policy performance that cover the years 1990 to 2007.<sup>1</sup> These are, for the most part, traditional indicators that have been used in previous legal-economic assessments and cited by DOJ officials in speeches about the agency's progress.<sup>2</sup> However, because of the rising importance of prosecutions of international cartels, additional attention is directed toward such cartels and the anti-cartel activities of by non-U.S. competition-law authorities. To guide the present assessment, I adopt the well accepted "optimal deterrence" framework.

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<sup>1</sup> Tabulated details of these data with a more elaborate analysis may be found in: John Connor, The United States Department of Justice Antitrust Division's Cartel Enforcement: Appraisal and Proposals: SSRN Working Paper (April 26, 2008), available at <http://ssrn.com/abstract=1130204>].

<sup>2</sup> For example, Joseph C. Gallo et al. *Department of Justice Antitrust Enforcement, 1955-1997: An Empirical Study*, 17 REV. OF INDUS. ORG. 75-133, (2000).

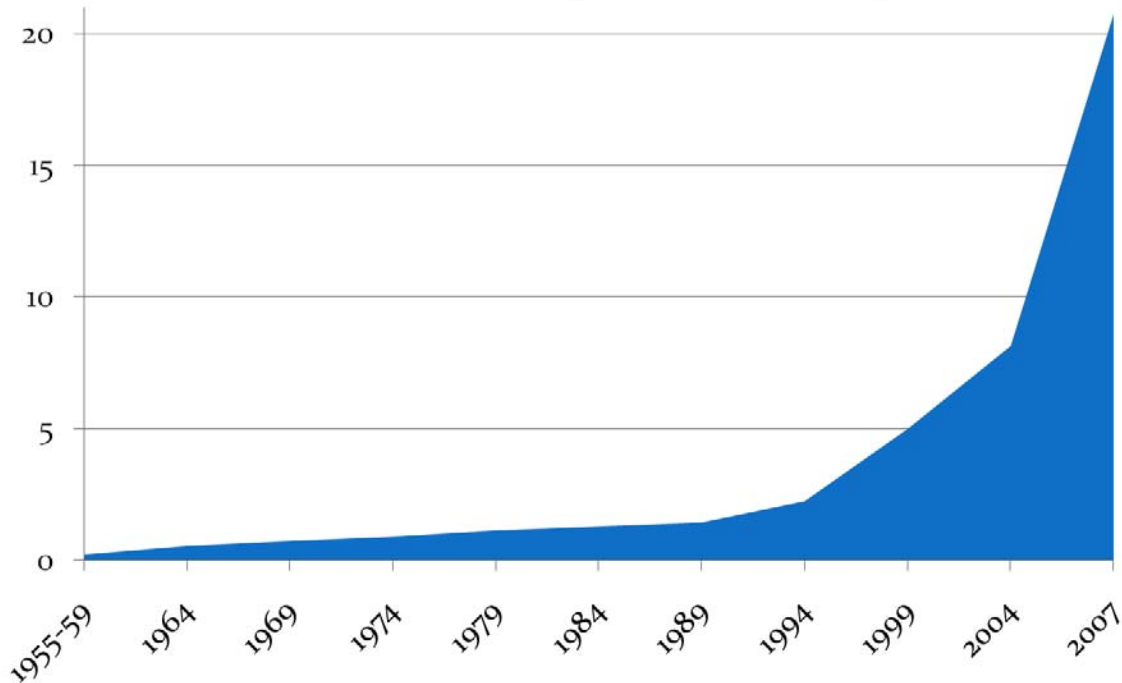
A key assumption of this paper is that U.S. and world monetary penalties are generally below an optimally deterring level. Although this assumption is not universally accepted by the private bar, it is broadly supported by academic legal-economic scholars of cartels<sup>3</sup> and by DOJ officials themselves.<sup>4</sup> Briefly, evidence in favor of sub-optimality follows from paradoxical trends. In spite of large and accelerating monetary sanctions imposed on cartels, both cartel detection rates and recidivism are high and continuing. Cartel sanctions, both government fines and private settlements, have grown rapidly in the United States and Western Europe, particularly since the mid 1990s. By the end of 2007, accumulated cartel sanctions had reached \$21 billion (Figure 1).

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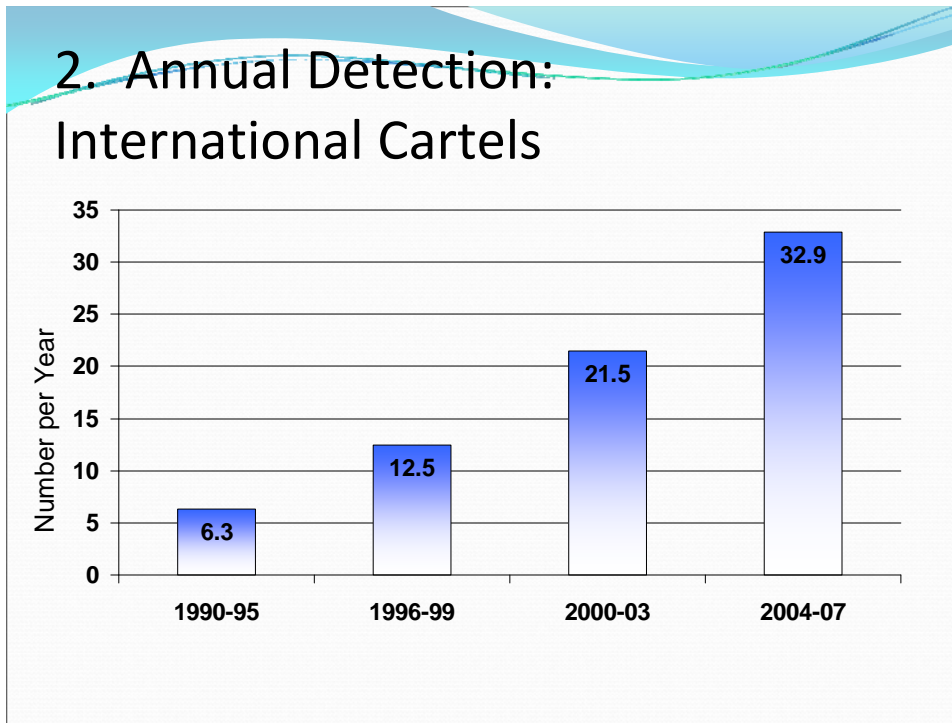
<sup>3</sup> For a review of this literature, see John Connor, Optimal Deterrence and Private International Cartels: SSRN Working Paper (April 2007) *available at* [\[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=787927\]](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=787927).

<sup>4</sup> Mr. Scott D. Hammond, the Antitrust Division's Deputy Assistant Attorney General for Criminal Enforcement, concurred on the sub-optimality of cartel sanctions (June 2008), *remarks recorded and available at* [http://www.antitrustinstitute.org/archives/files/20080618\\_pv\\_aai061808panel2\\_062320081620.mp3](http://www.antitrustinstitute.org/archives/files/20080618_pv_aai061808panel2_062320081620.mp3).

## 1. Accumulated U.S. & European Cartel Fines (\$2007 billion)



At the same time, instead of leveling off or declining, the world's antitrust authorities are discovering more and more hard-core cartels each year. The annual rate of detection in 2004-07 was five times higher than in 1990-95 (Figure 2).



While some of this increase may be attributed to an increase in the number of antitrust authorities and or their abilities to detect hidden cartels, much of the rise in the rate of detection is believed to be due to rising numbers of cartel formations in the years preceding discovery. In addition, cartel recidivism is up. Since 1990, more than 200 companies have been found guilty of participation in two or more international cartels; more than 50 companies have participated in five or more cartels. Additional evidence comes from EU cartel decisions. Since 1998, the year in which the first fining guidelines were put in place, 31% of all EU cartel decisions contain a recidivist. If monetary sanctions were optimal, recidivism would be rarely observed.

## II. MAJOR FEATURES OF THE DOJ'S ENFORCEMENT RECORD

I examine four dimensions of U.S. cartels enforcement: budgeted resources, case

handling, corporate penalties, and sanctions imposed on individuals. Where possible, I average these data for the years 1990-94, 1995-99, 2000-04, and 2005-07. While generally speaking the DOJ does a very good job of prosecuting cartelists, available indicators of enforcement effort and success are mixed.

### *A. Enforcement Resources*

DOJ officials frequently stress that anti-cartel enforcement is the agency's "number-one" priority, yet in truth resources are slim. In the past ten years, roughly 210 to 240 employees of the DOJ worked on cartels.<sup>5</sup> This represents about 28% of the Antitrust Division's workforce and 29% of its budget. After deep cuts in the early 1980s, the DOJ's antitrust budget, corrected for inflation, rose by 7% per annum in 1990-2002, but has been virtually constant during 2002-07. Compared to many active antitrust authorities around the world, in an international context the DOJ's antitrust resources are quite low relative to the size of the U.S. economy and its responsibilities.

### *B. Case Handling*

In 1993, the DOJ became the world's first antitrust authority to implement a virtually automatic (i.e., nondiscretionary) corporate leniency program, an innovation that has been widely emulated around the world. Since the late 1990s, the DOJ has been receiving two cartel leniency applications per month. However, the success of that program has not translated into a corresponding rise in cartel cases. The DOJ opens formal investigations of hard-core cartels by empanelling a grand jury. During 1995-2007, about 30 to 40 grand juries were opened by the DOJ in most years, with no obvious

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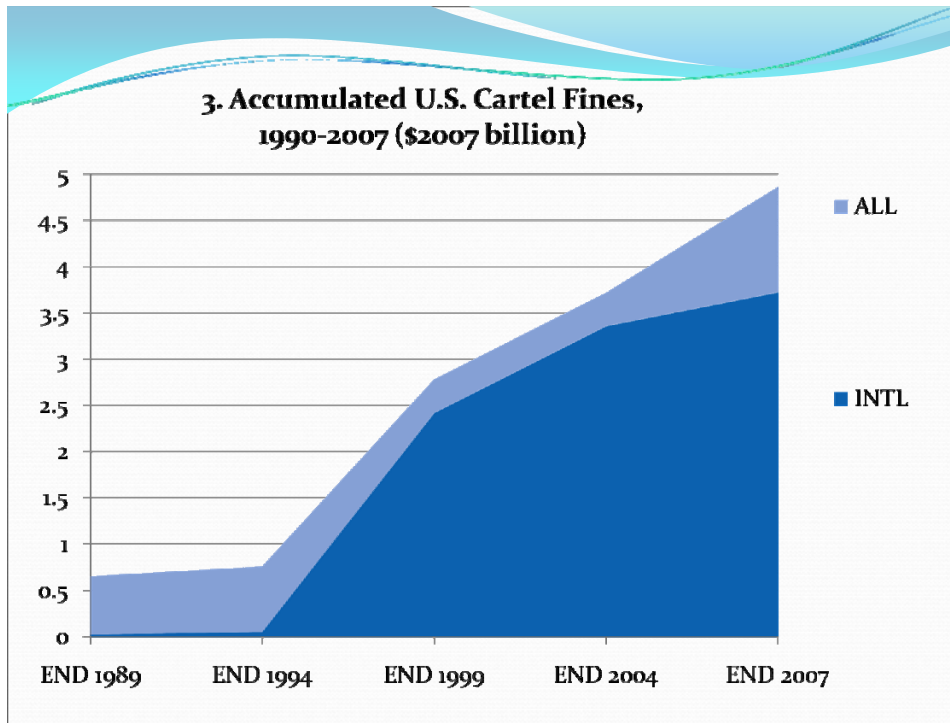
<sup>5</sup> The U.S. Federal Trade Commission has no role in criminal prosecutions of cartels.

upward trend. In fact, the number of criminal cartel cases filed has declined in each period, from an average of 68 per year in the early 1990s to 22 per year during 2005-07.

The DOJ handles nearly all cartel convictions by negotiating court-approved guilty pleas. Fewer than ten companies have been convicted for cartel offenses at trial in the past two decades. For this reason, the DOJ has won an average of 97% of all cartel cases since 1990 and very few appeals are lodged in the courts over fines or other penalties imposed.

### *C. Corporate Sanctions*

Fewer case filings have led to fewer corporate fines. The number of corporations fined for criminal cartel violations declined throughout 1990-2007: from an average of 59 per year in 1990-94 to 16 in 2005-07. However, the severity of DOJ fines has increased enormously. The size of U.S. cartel fines increased from an average of \$28 million per year in 1990-94 to \$560 million in 2005-07 (Figure 3). Moreover, the size of fines per company also increased from \$0.5 million in 1990-94 to \$36 million in 2005-07.

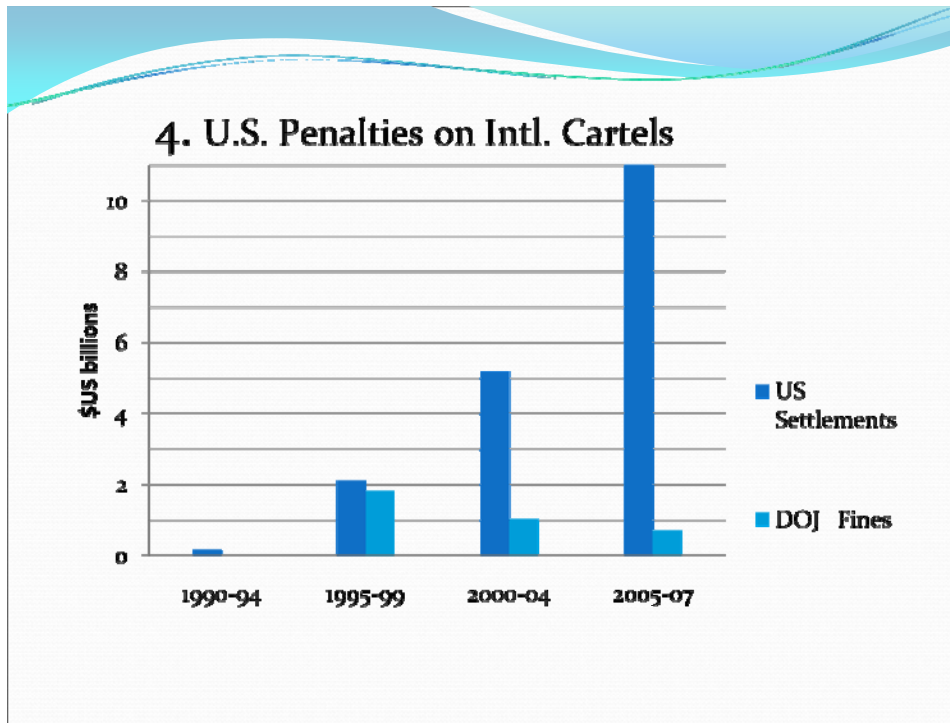


Note: As of end of year.

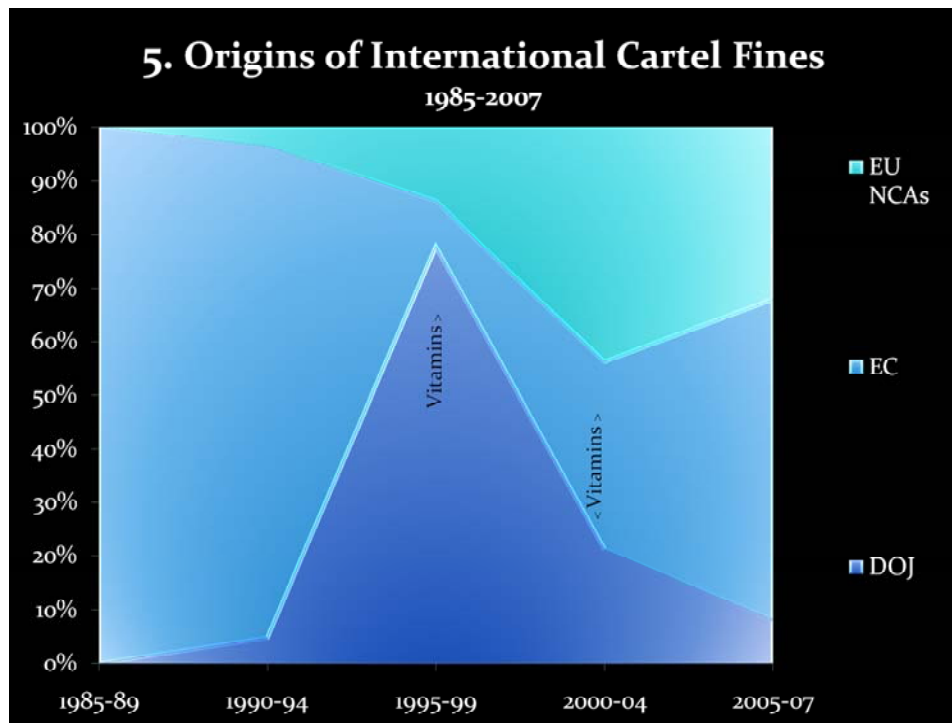
Consequently, total U.S. corporate cartel fines reached nearly \$5 billion in constant dollars at the end of 2007. In 1995, the DOJ began to prosecute international cartels for nearly the first time in its history. During 1990-2007, 95% of the value of imposed cartel fines came from members of international conspiracies.

Until the late 1980s, the DOJ was nearly the sole source of cartel penalties in the world. However, two developments have diminished the deterrence impact from DOJ's fines. First, DOJ fines have become increasingly outweighed by private settlements. During 1990-2007, DOJ fines on corporate members of international cartels comprised only 17% of total U.S. cartel penalties. From near equality in 1995-99, private damages grew to become more than 15 times DOJ fines in 2005-07 (Figure 4).





Second, DOJ fines are beginning to play a minor role among all antitrust authorities. DOJ fines in most periods are generally a minor portion of all governments' fines (i.e., those of the EC and its National Competition Authorities ("NCAs")) on hard-core international cartels (Figure 5). The only exception was 1995-99, which included the year when the DOJ imposed record fines on the global vitamins cartel.



#### *D. The DOJ Is the World Leader in Sanctioning Cartel Executives*

There is one aspect of cartel deterrence in which the DOJ is peerless. Through the end of 2007, it was nearly unique in the world in punishing cartel managers with imprisonment.<sup>6</sup> Like the number of companies, the number of individuals *charged* with cartel crimes by the DOJ is falling (from an average of 48 per year in the 1990s to 41 in the 2000s) as is the number of individuals *fined* (from 31 annually in the 1990s to 21 annually in the 2000s). Also, the DOJ faces difficulties with extraditing cartel suspects who reside abroad; there are dozens of indicted cartelists who remain fugitives. Nevertheless, the number of cartel managers imprisoned in the United States is rising: from an average of 13 per year in the 1990s to 19 per year in the 2000s. Moreover,

<sup>6</sup> Canada imposed a prison sentence on one manager and Israel imposed several. In other countries like Germany and Australia where price-fixing is a personal crime, only fines are used.

imprisonment is getting longer: from 9 months in 1990s to 18 months in the 2000s.

Amazingly, a significant portion of convicted cartel executives travel from safe locations abroad to submit to U.S. courts.

### **III. SUMMARY AND RECOMMENDATIONS**

The DOJ deserves good marks for its cartel-enforcement activities, especially for the surge that occurred in 1995-1999 and its continuing focus on international cartels. The larger cartel fines, increased individual penalties, greater detection of cartels, and leadership among international antitrust authorities all are evidence of success. There are, however, signs that the DOJ may be severely resource-constrained and that the vigor of enforcement has languished in the past eight years.

In 2008 the American Antitrust Institute appointed a broad-based committee of antitrust experts to develop recommendations for policy changes that ought to improve the deterrence power of the DOJ's anti-cartel program.<sup>7</sup> Some of the most straightforward suggestions are:

1. use global- instead of domestic-affected sales for base fine calculations;
2. start guilty plea negotiations at the top of the U.S. Sentencing Guidelines' range instead of the bottom;
3. reduce fine discounts for late arriving companies applying for partial leniency; and
4. study the effectiveness of individual whistleblower bounties used in the UK and Korea.

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<sup>7</sup> Countering the Evil of Cartels, in *THE NEXT ANTITRUST AGENDA*, (Albert Foer ed.) (forthcoming November 2008). The committee included several individuals with many decades of experience in prosecuting or defending cartels. All recommendations were approved by the Directors of AAI.

Other recommendations might require additional resources or changes in laws.

For example:

5. improve the agency's bargaining power by bring one or two corporate cartelists to trial each year;
6. expand technical assistance to new antitrust authorities in less developed countries ("LDCs");
7. perform studies of the dynamic effects of cartel conduct;
8. double the "10% overcharge presumption" in the U.S. Sentencing Guidelines;
9. raise the Sherman fine cap from \$100 million to \$1 billion; and
10. double the Division's budget by 2016.