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The Rise of ROW Anti-Cartel Enforcement

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I. INTRODUCTION

International hard-core cartels are typically the most injurious price-fixing offenses, yet they are also the most difficult to prosecute. Detecting collusion and assembling evidence that lies outside an antitrust authority's jurisdiction, combating large well-lawyered multinational corporations, and imposing effective remedies are challenging when faced for the first time.

Effective anti-cartel enforcement began in the United States about a century ago, beginning with purely domestic cartels. Then, in the mid 1940s, the Antitrust Division of the Department of Justice ("DOJ") extracted *nolo* pleas from about 40 international cartels.² Because of a number of prosecutorial hurdles, the first U.S. prosecutions that resulted in criminal fines imposed on international cartels did not begin until the late 1980s.³ The only other jurisdiction that had fined an international hard-core cartel was the European Union through its Commission ("EC").⁴

By several measures, these two jurisdictions virtually monopolized the business of fining international cartels in the 1990. Partly as a consequence, many geographically widespread international cartels escaped having their collusive profits disgorged by the young competition-law authorities in Africa, Asia, and Latin America. That is, the absence of anti-cartel enforcement in the rest of the world ("ROW") contributed to sup-optimal deterrence.

The ROW antitrust authorities have made extraordinarily rapid progress in punishing international price-fixing. Building in part on legal innovations made by the DOJ and EC, many of these newer authorities are close to matching the effectiveness of the two crucibles of anti-cartel enforcement. Indeed, in early 2015, a law-firm's report—widely cited in the antitrust

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² Allen & Ovary, *Global Cartel Enforcement: 2014 Year in Review*, available at [<http://www.allenoverly.com/publications/en-gb/Pages/Global-Cartel-Enforcement--2014-Year-in-Review-.aspx>]. International cartels have participants from more than one country or directed their activities mainly outside their home countries.

³ A brief survey of U.S. and EU anti-cartel enforcement may be found in pp. 67-78 in JOHN M. CONNOR, *GLOBAL PRICE FIXING: 2ND EDITION*, (2007). My candidate for the first convicted international cartel is the little-known *Specialty Steel ("Oil Country") Tubes* cartel prosecuted by the DOJ in March 1990; the German company Mannesmann AG paid a U.S. \$170,000 fine.

⁴ The first cartel fines imposed by the European Commission were against the highly durable *Quinine* (1913-1965) and *Dyestuffs* global cartels in July 1969 (see CHRISTOPHER HARDING & JULIAN JOSHUA, *REGULATING CARTELS IN EUROPE: SECOND EDITION*, 123-126 (2010)). However, a consistent fining policy against EU cartels began to bear fruit with decisions in 1984-1986, notably the *Peroxygen* case in 1984 (*id.* at 133).

news—made the startling assertion that the ROW agencies had accounted for half of all the world’s announced antitrust fines.⁵

In this article, I will examine the rise of ROW cartel enforcement over the past 25 years in greater detail and with more indicators than previous publications.

II. DATA SOURCE

I primarily employ a subset of the latest edition (January 2015) of the *Private International Cartels* spreadsheet, a comprehensive collection of legal-economic data on cartels discovered since January 1990.⁶ This data source encompasses the names and locations of more than 1,100 international cartels that have been investigated or punished for hard-core price fixing.⁷ The subset is the 813 cartels that have been sanctioned by one or more of the world’s competition law authorities.

III. FROM LOCAL TO INTERNATIONAL ENFORCEMENT

As mentioned above, it took more than 50 years after the passage of the Sherman Act before the DOJ tackled international cartels in a serious fashion; and it was not until *Lysine* fines in 1995 that the DOJ began its current campaign against international price-fixers. Similarly, with two unusual exceptions, the EC waited 27 years to issue a decision after the Treaty of Rome was signed to fine an international cartel. The other most mature antitrust authorities, Germany and Japan, held off fining international cartels for 52 and 42 years, respectively (Table 1).

The next wave of cartel prosecutions was initiated by the EU’s national competition authorities (“NCAs”), and this trend started well before the official European Competition Network (“ECN”) was formally established in December 2002. Indeed, even before the end of 2001, when their authority to do so was unclear, no less than 11 NCAs had penalized international cartels (Table 1). By 2009, another 12 NCAs had joined the club, which now comprises nearly all of the EU’s Member States.

The younger ROW authorities followed the same pattern as their older sister agencies by first applying their new competition laws to purely domestic price-fixing and bid-rigging schemes. The first conviction of an international cartel by one of the ROW jurisdictions appears to have been the *Soda Ash* export cartel by India in 1996; the same cartel would be successfully penalized by South Africa and Botswana in 2008. For about U.S. \$1 million, they obtained substantial relief for their farmers through lower fertilizer prices.

A trickle of such convictions in the late 1990s turned into a flood in the 2000s. Table 1 lists 29 first decisions involving fines on international cartels by antitrust authorities located in

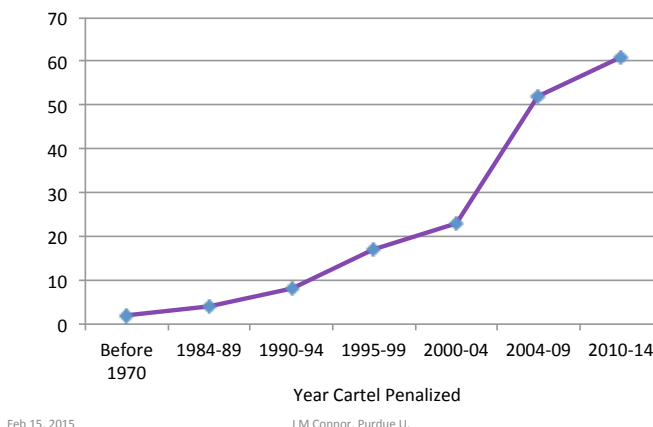
⁵ Allen & Overy, *Cartel Enforcement* (January 6, 2015), cited by the *Global Competition Review* (January 7, 2015), the *Financial Times* (January 6, 2015), and many other news sources. The data in this article are confined to international cartel fines, not all antitrust fines.

⁶ As legal definitions of those violations vary across jurisdictions, I depend on the local antitrust authorities’ definitions and legal standards to decide which cartels to include.

⁷ A posted working paper explains the details of this data set. See John M. Connor, *The Private International Cartels (PIC) Data Set: Guide and Summary Statistics, 1990-2013: SSRN Working Paper*. (August 9, 2014), available at [<http://ssrn.com/abstract=2478271>].

Africa, Asia, and Latin America. Most of them were added since 2005. The ROW agencies now comprise about half of the 61 such authorities worldwide (Fig. 1).

1. Cumulative Number of Authorities Worldwide, by Year They First Penalized an Intl. Cartel



The Competition Commission of Singapore (“CCS”) provides a good recent example of a new authority emerging from one with purely local concerns to one ready to punish collusion begun and continuing offshore. Established in January 2005, the CCS spent its first nine years focused on combatting local-market collusion, such as pest control, construction, bus, and employment services. In its short life, the CCS was able to institute a full range of cartel-detection systems: amnesty, amnesty-plus, and whistleblower bounties. In late 2014, the CCS had 19 amnesty applications awaiting decisions. On December 2013, it announced its first penalties on an international cartel, imposing fines on several Japanese bearings manufacturers; the CCS fined its second international cartel of freight forwarders in 2014.

Fining international cartels is a big step forward in maturation for ROW jurisdictions. First, introducing leniency programs, whistle-blower bounties, extraterritorial reach, and criminal penalties may be incompatible with existing national laws or the authority’s mandate.

Second, the typical international cartel is a multinational firm with ready access to sophisticated legal advice. The civil servants who populate the ROW antitrust authorities, many of them with few of the specialized legal and economic skills found in leading international law firms and consultancies, often find pushback from defendants and the business community daunting. Defendants spend large resources appealing authorities’ decisions to judges with little familiarity with the nation’s antitrust laws. Seemingly endless appeals processes in many ROW jurisdictions make collecting fines in the ROWs very difficult compared to the U.S. and EU jurisdictions.⁸

⁸ The fine recipients normally appeal the EC’s cartel-fine decisions because the European Courts are very good at finding procedural errors in fine computations that favor the defendants. Fines are reduced on average about 10 percent. Appeals of U.S. plea agreements are unknown because the agreements explicitly remove the right to appeal.

Third, given the frequently high degree of government ownership in the ROW economies, competition authorities there tend to have numerous adversarial relationships with government-owned firms involved in collusion. While fining such firms may have odd welfare consequences, winning antitrust cases involving national champions may add to the authorities' luster.

Fourth, the business communities in the ROW are often untutored in the principles of antitrust, as are local prosecutors and judges. Thus, needed advocacy programs in the ROW nations have been produced on a compressed schedule.

I have described progress by ROW antitrust authorities as one of catch-up in adopting the proven prosecutorial practices of the Trans-Atlantic antitrust authorities. There are, however, instances in which ROW antitrust authorities have been first movers. Perhaps the best example is the adoption of bounties for individual whistle-blowers who present antitrust authorities with ample evidence of collusion by their employer.

South Korea has been in the forefront in developing and successfully implementing whistleblower bounties. The KFTC began paying whistleblowers in May 2005, but only after an adverse decision is rendered.⁹ Cash payments can assist these executives deal with the inevitable loss of income that follows from ratting on their employer. The United Kingdom adopted a similar policy in 2008.¹⁰ Both programs may be setting their whistleblower rewards too low.¹¹

IV. INTERNATIONAL CARTEL PENALTIES RISING

The modern era of antitrust enforcement against international cartels began in the late 1980s in the European Union and the early 1990s in the United States. Over the past quarter century, fines imposed have risen to levels unimaginable in the early 1990s when fines worldwide averaged less than \$100 million per year (Figure 2). Then, in October 1996, U.S. Attorney General Janet Reno "sent a message worldwide" by imposing a \$100-million criminal fine on one company for its involvement in two global price-fixing conspiracies. Moreover, 31 months later, Attorney General Joel Klein announced a \$500-million fine on Hoffmann-La Roche for its leading role in the global *Bulk Vitamins* cartel.¹²

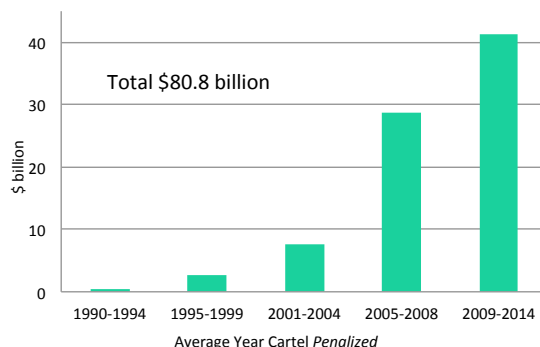
⁹ See, *Korea Pays Whistleblowers*, GLOBAL COMPETITION REV. (May 17, 2005). On the high costs of being a whistleblower, see C. FRED ALFORD, WHISTLEBLOWERS: BROKEN LIVES AND ORGANIZATIONAL POWER (2002).

¹⁰ *OFT to Pay Whistleblowers*, GLOBAL COMPETITION REV. (February 29, 2008).

¹¹ See, *Rewarding Whistleblowers*, GLOBAL COMPETITION REV. (March 1, 2008).

¹² See CONNOR, *supra* note 3.

2. Imposed Global Fines Rising



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These huge fines opened the floodgates for a succeeding stream of big cartel fines. During 1995-1999, international cartel fines more than quintupled on an average annual basis. Subsequent rises in semi-decade fining rates have not been that high, but risen they have. In the past five years 2009-2014, cartel fines have averaged an impressive \$8.3 billion annually, and the decisions of the ROW authorities have contributed mightily to the ever-increasing fine levels.

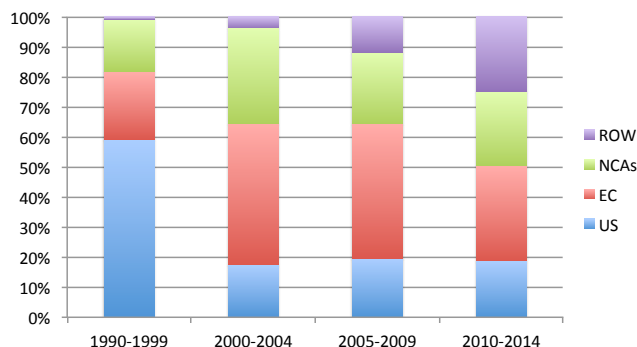
V. THE SHARE OF THE ROW IS RISING

In the 25 years since January 1990, international cartel fines imposed by antitrust authorities have totaled \$80.1 billion, of which the United States accounted for 20.5 percent, the EC 37.6 percent, EU NCAs 24.6 percent, and the ROW 17.3 percent.¹³ These aggregates obscure large changes in these geographic distributions over time.

In the 1990s, the DOJ and the EC accounted for more than 80 percent of the globe's fines imposed on international cartels, and the EU's NCAs imposed nearly all the rest. ROW authorities' fines barely registered. However, in the past ten to 15 years, the ROW share has impressively ballooned. ROW authorities have issued about 1200 decisions that have mandated monetary fines for cartel participants. The ROW share of all fines in 2010-2014 (24.9 percent) was seven times higher than in 2000-2004 (3.7 percent).

¹³ The penalties reported here exclude cases brought by the state attorneys general and reported private damages paid of at least U.S. \$50 billion, almost all of them approved by U.S. and Canadian courts. Adding fines and settlements together gives the United States and Canada a 53 percent share of monetary penalties over the past quarter century.

3. Shares of Cartel Fines, 1990-2014



Most of the growth in ROW fine levels has occurred in a dozen large, middle-income nations. India, Korea, China, Brazil, and some smaller jurisdictions have led the way upward in imposing cartel fines.

Cartel fines by ROW competition authorities go from strength to strength. In 2001, ROW fines reached a milestone, surpassing \$100 million for the first time. In 2005, ROW fines surpassed \$500 million, and since 2009 aggregate fines have exceeded \$1 billion in all but one year. In the past ten years, ROW fines exceeded those of U.S. Government agencies in five of those years. However, ROW fines have never surpassed the EC's cartel fines.

The growth in ROW cartel fines is due almost entirely to an increasing number of decisions and the attendant increase in the number of cartelists being fined. Somewhat surprisingly, the ROW authorities have been unafraid to impose fines equal in size per company to their American and European cousins. Cartel fines 1990-2014 averaged about \$13 million per corporation in North America and \$10 million in other regions.¹⁴

Although the recent growth of cartel fines in the ROW is impressive, there are at least three important differences between these authorities and the more established antitrust agencies. First, the ROW fines are less severe than those from North America and Europe. By "severity" I mean the ratio of cartel fines relative to the cartel's affected sales in the jurisdiction. It is clear from the data shown in Table 2 that fine-severity ratios are highly skewed. Thus, it is better to focus on the median as the better measure of central tendency. The median fine in the ROW (146 observations) is 1.2 percent of sales. This median is roughly 70 to 80 percent lower than the medians for U.S. and EC fines, but it is only about 25 percent lower than the severity of EU NCA fines. The ROW fine severity is about half the median severity of the 598 "total" observations. (Note that sales of the global cartels usually encompass several continents.)

¹⁴ Recall that our fines data are not corrected for inflation. Because ROW fines are from a more recent period on average than the U.S. and EU fines, in real terms ROW fines may be slightly smaller than those from the European Union.

Second, in the ROW there is a vast gulf between fines imposed (or announced) and fines collected. DOJ annual statistics report the amounts collected. While granting installment payment plans to defendants is now commonplace, over time collected fines statistics tend to equate with the announced fines in press releases or plea agreements. So too with the EC and its NCAs, which rarely have to take a company to court for non-payment of a fine decreed.

While compliance with cartel decisions is also high in Japan, Korea, and a few other ROW jurisdictions, non-payment or greatly delayed payments are known to be common in Brazil, India, and many other jurisdictions where appeals are easy and even routine for defendants. For example, a decision of the Brazilian antitrust authority in 2005 to fine a large number of drug companies was still under appeal in 2015. Another example comes from India, where appeals courts are notoriously slow to act. In a public speech in 2014, the Chairperson of the Competition Commission of India stated that delays by penalized firms had reduced the recovery of fines by the Commission to about 8 percent of the amount of fines announced.¹⁵ This percentage may be an extreme one, or it may be representative of collection difficulties in many new jurisdictions.

Third, almost all of the ROW jurisdictions, even those with criminal antitrust laws, eschew the use of prison sentences for cartel managers. Like EU law, most ROW jurisdictions follow administrative procedures and issue civil fees, surcharges, and the like to corporate cartelists; they have no provisions for individual penalties on cartel managers.

However, Japan has a criminal law, and several Asian nations (notably South Korea and Taiwan) adopted the Japanese legal model in their antitrust regulations. While the Japan FTC has, through its Justice Ministry, obtained quite a few prison sentences for cartel crimes since the 1950s, the courts have commuted all of them to home arrests or community service. Until 2014, this was also the situation in Korea; a Korean court sent a bid-rigger to a long prison sentence in late 2014. Brazil also has a criminal code for antitrust offenses, but it issues only fines to cartel managers. Finally, Australia, New Zealand, South Africa, Israel, and many British Commonwealth nations have elements of the Common Law in their antitrust statutes. Except for Israel, which has imposed incarceration on several price-fixers, the Common-Law nations in the ROW rarely use prison sentences for cartel crimes.

The DOJ is unique in the world for its regular implementation of prison sentences for cartel violations since 1960. It has indicted more than 1,000 cartel managers since 1990, of which more than half received prison sentences. An innovation in 1999 was the incarceration of non-resident foreigners for cartel crimes; scores of such non-U.S. executives have been jailed. Extradition has proven to be more difficult, so scores of other non-resident cartel managers have opted to be fugitives.

Unlike the European Union, which is having an extended debate on criminalization of their competition laws, there is no widespread discussion of criminalization in the ROW nations.

¹⁵ Press Trust of India, *Competition Commission of India Recovers Just Rs. 1,000 Crore of Rs. 12,000 Crore So Far*, (November 19, 2014). [http://articles.economictimes.indiatimes.com/2014-11-19/news/56265816_1_fair-trade-norms-competition-commission-crore-penalties].

Except for a small bit of free riding on DOJ incarceration decisions, deterrence there will have to depend largely on corporate fines for the foreseeable future.

VI. CONCLUDING OBSERVATIONS

Perhaps inspired by the examples of the DOJ and the EC in the 1990s, ROW antitrust authorities have ramped up the number of cartel decisions and the size of their fines. In a sense, the last geographic piece of the cartel-enforcement puzzle is now in place. With cartel detection and penalization very largely globalized now, deterrence of global cartels has marginally improved.

The growing share of global fines imposed on cartels by authorities in Africa, Asia, and Latin America (the “ROW”) shows no signs of slowing down. Japan, and most of the Asian Tigers, seem increasingly able and willing to impose record fines on cartels. In Latin America, Brazil, Mexico, and Chile are in the vanguard of the anti-cartel bandwagon. Except for South Africa, Israel, and a handful of other small or new authorities, African and West Asian nations by and large have failed to make the important leap into dealing with international cartels.

Since 2000, the DOJ has muddled along with a nearly constant share of 20 percent of the world’s international cartel fines. Its fines have been rising, but no faster than the world’s growth. Instead, the DOJ shifted gears around 2000-2002 by placing far greater reliance on the threat of incarceration of cartel managers. True to its word, the DOJ on average has extracted guilty pleas from a larger number of executives per firm indicted, and it has successfully lengthened the periods of imprisonment. Indeed, because of the DOJ’s relentless pursuit of non-U.S. executives, a good case can be made that it is the Antitrust Policeman to the World.

Since 2000, the EC’s share of global cartel fines has been the largest of the four types and has greatly exceeded the DOJ’s share. However, especially in the past five years, despite spectacular cartel fines, in terms of total fines imposed the EC too has been supplanted by the EU’s NCAs and the ROW authorities.

Apart from the rules governing highway driving, I can think of no other example of voluntary adoption of international standards by governments than the trends discussed in this paper. Without the benefit of an international treaty or formal world conference, nearly all the leading nations in North America, Europe, and the rest of the world now have antitrust authorities with remarkably similar anti-cartel rules and monetary remedies.

Table 1. Landmark International Cartel Fine Decisions, by Year

Authority	Cartel Market	Date	Notes
US DOJ	Dyestuffs and about 40 others	Nov. 1944	<i>U.S. v. General Dyestuffs Corp.</i> (SDNY)
EC	Quinine, Dyestuffs	July 1969	Unusual; spurred by prior U.S. legal actions and information
EC	Peroxygen	Nov. 1984	Self-directed EC
France	Public Works	Nov. 1989	1 st EU NCA
Italy	Insurance, non-life	June 1994	
Czech Rep.	Coffee Distribution	Nov. 1994	
Hungary	Coffee Distribution	Dec. 1994	
U.S. NAAG	Pesticides	1994	Very few more NAAG or AG cases
Norway	Cardboard	Dec. 1995	1 st non-EU, W. European NCA (EFTA)
India	Soda Ash	1996	1 st ROW prosecution
Mexico	Lysine	Aug. 1998	1 st in Latin America
Australia	Polyurethane foam	Nov. 1998	1 st in Oceania
UK	Copper	1998	
So. Korea	Beer	May 1999	1 st in Asia
Japan	Petroleum, military	Nov. 1999	2 nd in Asia
Germany	Concrete, eastern	Nov. 1999	
Latvia	Air route	Dec. 1999	1 st Eastern European NCA
Sweden	Gasoline	June 2000	
Taiwan	Sutures	2000	
Spain	Gasoline	June 2001	
Netherlands	Gasoline	June 2002	
Israel	Diamond transport	April 2003	
World Bank	School furniture	Jan. 2004	
Finland	Asphalt	Mar. 2004	
New York AG	Insurance Brokerage	Jan. 2005	
Iceland	Petroleum Distrib.	Jan. 2005	
Portugal	Diabetes testing	Jan. 2005	
Romania	Cement	May 2005	
Kazakhstan	Petroleum brokers	July 2005	
Argentina	Cement	July 2005	
Armenia	Air route	Oct. 2005	
Switzerland	Interchange fees	Dec. 2005	
Slovakia	Construction, road	Jan. 2006	
New Zealand	Wood chemicals	April 2006	
Brazil	Vitamins	Mar. 2007	
Columbia	Mobile phone fee	Aug. 2007	
El Salvador	Petroleum	Oct. 2007	
Indonesia	Mobile phone fee	Nov. 2007	
Greece	Milk	Dec. 2007	
Austria	Elevators	Dec. 2007	
Egypt	Cement	Jan. 2008	
Estonia	Rail freight	Mar. 2008	
Florida AG	Cruise Lines	April 2008	

Pakistan	Bank rates	April 2008	
Chile	Medical oxygen	June 2008	
Bulgaria	Insurance, auto	July 2008	
So. Africa	Soda Ash	Sept. 2008	Also represented Botswana
Russia	Fuel	Nov. 2008	
Belgium	Plasticizer	April 2009	
Lithuania	Electronic products	Oct. 2009	
Poland	Cement	Oct. 2009	
Cyprus	Fuel Distribution	Nov. 2009	
Saudi Arabia	Medical gasses	May 2010	
Viet Nam	Insurance, auto	Aug 2010	
Michigan AG	Ice	Mar. 2011	
Nigeria	Air route	Feb. 2012	
Turkey	Cement	April 2012	
Ukraine	Timber auction	June 2012	
Singapore	Bearings	Dec. 2013	
Hong Kong	HIBOR	Mar. 2014	
China	Contact lenses	May 2014	
Mauritius	Beer	June 2014	
Total 61			

Table 2. Average Fine Severity by Region of Antitrust Authority, 1990-2014

Region	Number of Observations	Ratio of Fines to Affected Sales (%)	
		Mean	Median
USA	93	16.7	4.3
EC	125	11.3	6.4
EU NCAs	213	32.1	1.6
ROW	146	13.2	1.18
Total	598	21.4	2.3