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Your Money And Your Life: The Export of U.S. Antitrust Remedies

Harry First
New York University School of Law

ABSTRACT

Substantive antitrust law has spread around the world. This has been a rather amazing turn of events in our post-cold war era, with more than 100 jurisdictions now claiming some form of antitrust legislation. Even though there is no global treaty framework for antitrust (similar, for example, to the TRIPs agreement for intellectual property), there does now appear to be broad international consensus on the basic principles of competition policy.

Substantive antitrust law may be one of the United States’ more popular legal exports, but how does the rest of the world view two very important remedy aspects of the U.S. antitrust enforcement system, private treble-damages suits for antitrust violations and incarceration of antitrust violators? As is well known, in the United States we take your money and your life. Conventional wisdom is that other countries do not.

This paper argues that not only are these two remedies in fact good exports, but that non-U.S. jurisdictions are increasingly coming to accept them, as shown in a study presented in this chapter. This trend should not be surprising because the policy arguments in their favor make good sense.

The paper begins with a discussion of the history of the acceptance of these remedies in the United States. The next part presents a study focused on thirteen enforcing jurisdictions, representing a cross-section of large and small economies located in different parts of the world, examining the spread of these remedies. The paper concludes with an assessment of the wisdom of adopting the two remedies, not only in the jurisdictions covered in the study but also in other jurisdictions.

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KEYWORDS: Antitrust, Section 1, price fixing, cartels, imprisonment, competition law, private actions, imprisonment, criminalization, treble damages, deterrence, compensation, remedies, international antitrust, leniency, enforcement institutions

JEL Codes: K14, K21, K41, K42, L40, L41
Substantive antitrust law has spread around the world. This has been a rather amazing turn of events in our post-cold war era, with more than 100 jurisdictions now claiming some form of antitrust legislation. Even though there is no global treaty framework for antitrust (similar, for example, to the TRIPs agreement for intellectual property), there does now appear to be broad international consensus on the basic principles of competition policy.

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I. The History of Incarceration and Private Damages in the United States

The case in the United States for criminal punishment in antitrust has generally been made on utilitarian deterrence grounds. Commentators have argued that incarceration is a necessary criminal punishment in addition to corporate or individual fines because monetary payments can easily be perceived as prices—just another cost of doing business. Jail time, on the other hand, is hard to monetize, and few in the business world are willing to view it as a cost of doing business, to be traded off for higher profits. As one antitrust enforcer has said, violators may be willing to pay a larger fine to avoid jail, but they have never offered to serve a longer jail sentence in return for a smaller fine.
The consensus view that imprisonment is an appropriate remedy was slow to emerge in the United States.\textsuperscript{4} Criminal antitrust cases have been pursued from the earliest days of the Sherman Act,\textsuperscript{5} but the first sentence of imprisonment was not imposed until almost twenty years after the Act’s passage.\textsuperscript{6} For the first part of the twentieth century, the imposition of imprisonment was generally rare,\textsuperscript{7} so much so that the 30-day sentences of seven executives in the 1960s heavy electrical generating equipment price fixing case drew national press attention.\textsuperscript{8}

A consensus that criminalization and imprisonment are appropriate began to emerge in the 1970s, when Sherman Act violations became felonies and the maximum term of imprisonment increased to three years, and took real hold in the 1980s. In 1980, fifty-five criminal prosecutions were brought (nearly double the previous year); in 1984, there were 100 criminal prosecutions; in 1988 there were eighty-seven.\textsuperscript{9} Although these prosecutions could be criticized for focusing on “small fry,” for example, local road-paving and electrical contractors, nevertheless, the effort to use the criminal sanction and seek imprisonment was a serious one and furthered the shift in the moral judgment that price fixing should be viewed as crime.\textsuperscript{10}
This shift in attitude was in keeping with a broader view that U.S. courts had been too lenient on white collar criminals generally, a position that was reflected in the 1987 federal sentencing guidelines.11 These Guidelines required sentences of imprisonment for first-time white collar criminals who in the past had escaped imprisonment. Judges were required to follow the Guidelines, except in certain exceptional cases, and the Guidelines’ requirements substantially altered sentencing practices in antitrust cases. Sentences of imprisonment for criminal antitrust cases gradually became common. Average sentences today are now approximately two years.12

The case for private damages rests on two grounds, compensation and deterrence, although commentators and courts in the United States today generally stress the deterrence rationale.13 The treble-damages multiplier can similarly be justified on both grounds, either as an incentive for injured parties to sue for compensation or as a (rough) way to insure that defendants are appropriately deterred by forcing them to account not only for their injury to purchasers or competitors but also for the deadweight welfare loss their conduct causes.
Receptivity toward the private action was mixed in the early days of the Sherman Act. A small number of cases were filed early-on exploring the issues raised by the private action. Lower courts were generally skeptical of plaintiffs’ arguments, although the Supreme Court was not. As with incarceration, by mid-century the private treble-damages remedy was generally considered to be ineffective.

This view began to change in the 1960s. First, a well-publicized bid-rigging criminal prosecution against electrical equipment manufacturers led to successful follow-on private treble damages actions with large recoveries for plaintiffs and their attorneys. Next, the Warren Court showed particular willingness to see private actions as part of a system of antitrust enforcement, playing an important public enforcement role in addition to its core function of compensation. Criminal antitrust enforcement and penalties were still relatively low (although both would soon increase), leaving it to private parties to fill the deterrence gap. As late as 1979, when the Supreme Court’s composition had changed from Warren Court days, the Court still saw the private action as “a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.” Finally, this period saw the growth of class actions and a
sophisticated private plaintiffs’ bar, making it easier to bring cases on behalf of large groups of injured consumers.

The result of these forces was a dramatic increase in the use of private actions. In 1960 there were 228 private antitrust cases filed in the United States; in 1980 there were nearly 1500.18 From the mid-1960s until 1980, there were approximately sixteen times more private cases filed than public cases. Although the ratio of private to public cases dropped in the 1980s, as did the number of cases, private filings increased again in the 1990s and they continue to be substantially higher than the number of cases the federal enforcement agencies file.19 Recent monetary recoveries by private plaintiffs have also been substantial, with a number of settlements in the hundreds of millions of dollars and a few in the billions.

The reaction of courts and commentators to the private action, however, has come to diverge from their reaction to imprisonment. There is no indication today of retrenchment with regard to imprisonment, but there has been substantial resistance to private actions, with the courts resorting to various procedural devices to make it harder to win a private suit.20 Commentators, as well, have expressed skepticism about the wisdom of the private action.21 Nevertheless, Congress has not yet responded in any
significant way to change the default view that private treble damages should be available to those injured in their business or property by antitrust violations.

II. The Spread of Remedies Outside the United States

To what extent have the remedies of incarceration and private damages suits been adopted in antitrust systems outside the United States? The study presented in this chapter examines thirteen enforcing jurisdictions, with different-sized economies located in different regions of the world, in an effort to gain some insight into this question.22

The overall status of private damages suits and incarceration in the chosen jurisdictions is presented in summary form in Table 1. It illustrates three important points regarding the spread of the private damages remedy in these jurisdictions.

[Table 1 here.]

First, all the jurisdictions, with the exception of the European Union itself, have some form of private action but reject a damages multiplier for their private actions.23 Although the lack of a Europe-wide private action is important, the failure to date of the European Commission to achieve this goal does not leave Europeans without this remedy. Member states can
provide for private damages suits for breach of competition law in their domestic courts, which the two European jurisdictions in the study do (Germany and the United Kingdom\textsuperscript{24}). Thus we can still conclude that there is a high degree of unanimity among the countries in the study on the two basic policy choices regarding private damages suits.

Second, the record for the imprisonment remedy is less unanimous than for private actions. Three important jurisdictions (the European Union, India, and China) do not provide for imprisonment at all\textsuperscript{25}. Three other jurisdictions (Brazil, Germany, and Chile) do not include an imprisonment remedy in their competition laws, but prosecutors have used (or are trying to use) other criminal laws with imprisonment remedies against cartel offenders\textsuperscript{26}. Even with this somewhat mixed record, however, there is more overall unanimity than might otherwise have been expected—ten of the thirteen jurisdictions provide for imprisonment for core cartel offenses under some statute.

Third, the actual use of these remedies is generally weak. There is a recent movement toward an increase in private litigation, for example, in Australia, Canada, Israel, and, to a more limited extent, in the UK\textsuperscript{27}, but private litigation is rarer in the other jurisdictions in the study\textsuperscript{28}. 
Imprisonment is even less well-used. In many of the jurisdictions in the study the availability of an imprisonment penalty is too recent to provide any data on its imposition, but in the rest, jail sentences, even when imposed, have most often been suspended.29

Table 2 examines competition law changes in the first decade of the twenty-first century. The Table illustrates two important trends.

First, there is a rather remarkable trend in adopting competition law changes relating to these two remedies. During the 2000s ten of the thirteen jurisdictions in the study enacted competition law changes affecting either the private right of action or imprisonment. Two important jurisdictions, India and China, adopted major legal revisions to their entire competition law regimes. Both included some form of private action, although neither included an imprisonment remedy.30

Second, at the end of the decade there was a distinct movement towards the imprisonment remedy. In 2009, Australia and South Africa added new statutory provisions providing for imprisonment,31 Canada refocused its criminal statute on per se cartel offenses and increased the maximum term from five to fourteen years,32 and Japan increased the
maximum jail time for criminal violations of its Antimonopoly Act from
three years to five, making it less likely that a jail sentence would be
suspended. The only imprisonment outlier in the study during this period is
Chile, which repealed its criminal provision in 2003, at the same time making
follow-on civil actions easier to bring. But even this example is not as much
of an outlier as it might otherwise seem. Prosecutors are making efforts to
use other criminal provisions in Chilean law to prosecute cartels and bills
have been introduced in the legislature to reinstitute the criminal provision in
Chile’s competition law.

What might explain the spread of these two remedies? One possibility
is that the phenomenon would be linked to the size of the economy. Another
possibility is that the adoption of these remedies is related to a jurisdiction’s
legal traditions or culture. Table 3 indicates, however, that neither size nor
legal culture explains the spread of the two remedies in the studied
jurisdictions.

[Table 3 here]

Although there are likely individual political economy stories
explaining the legal changes in each of these countries, there may also be a
relatively simple explanation for the general movement toward these two
remedies—the time of adoption. As Table 2 shows, the 2000s were a vibrant period for statutory changes in competition law. As jurisdictions considered these changes they also had the experience of other jurisdictions to draw on, particularly the United States, which has been an evangelist for incarceration while providing a cautionary tale for private remedies. This evangelism may partly explain the movement (not unanimous, of course) toward incarceration that we see in Table 2;\textsuperscript{36} and the concern about perceived excesses in private actions in the United States may partly explain the unanimous rejection of treble damages in the studied jurisdictions.\textsuperscript{37} Thus, the overall trends shown in the three Tables lend some support to a Brandeisian experimentalist view of institutional design, where some legal regimes act as “economic laboratories” and other legal regimes learn from their experience,\textsuperscript{38} a phenomenon that has been described as a “last mover advantage.”\textsuperscript{39}

Although there is a general trend toward both incarceration and private actions, there are important institutional variations among the jurisdictions that can affect the effectiveness of both remedies. Tables 4 and 5 set out some of the key variations.

If a jurisdiction decides to provide for incarceration of competition law violators, one of the first questions of institutional design that must be
addressed is whether the competition agency will be responsible for bringing the criminal prosecutions. In the United States, the Antitrust Division, as part of the Justice Department, has been given this responsibility, but this is more the result of historical development than a conscious design to centralize civil and criminal enforcement.

[Table 4 here.]

As Table 4 indicates, the U.S. institutional structure is replicated in only one of the jurisdictions in the study (Israel) and partially replicated in another (the UK competition agency has concurrent authority with a public prosecutor, the Serious Frauds Office\textsuperscript{40}). The dominant model, found in the seven remaining jurisdictions, is to have the public prosecutor bring the case. In three of these jurisdictions the prosecutor can act only on reference from the competition authority (which has the sole responsibility for investigating the alleged illegal conduct and deciding whether to make a criminal reference); in the other four the prosecutor has independent authority.\textsuperscript{41}

Is there any link between these institutional arrangements and the results of criminal prosecutions? Two hypotheses can be suggested. The first is a bureaucratic incentives hypotheses. Splitting responsibility for cartel prosecution between the competition agency and a public prosecutor, but
allowing the competition agency to control the institution of prosecution through the referral power, might incentivize the agency to retain control of, and thereby take credit for, bringing the cartel cases they think appropriate. This would mean weaker criminal enforcement. The second, a prosecutorial competence hypothesis, might be that the farming out of cartel cases to a generalized public prosecutor could result in a downplaying of these prosecutions. Public prosecutors are likely to have priorities other than competition law violations; competition law violators are less dangerous than other offenders and consequently less in need of incarceration; and public prosecutors have a weaker understanding of competition law principles than of traditional crimes of violence. This, too, would suggest weak criminal enforcement. If both hypotheses are borne out, the solution might be to combine criminal and civil enforcement in a single agency.

The data in this study call into question the prosecutorial competence hypothesis and lend some support to the bureaucratic incentives hypothesis. With regard to prosecutorial competence, countries in the study in which the competition agency lacks the reference power, and therefore cannot stop the public prosecutor from prosecuting cartels, actually appear to have the strongest criminal cartel enforcement and the greatest chance at imposing
imprisonment. Consistently with the bureaucratic incentives hypothesis, however, countries in which the competition agency has the referral power and can control the prosecutor have the weakest criminal enforcement.

Brazil is a good example. Brazil is perhaps the most active criminal enforcement regime in the study; criminal prosecutions are relatively frequent and jail terms for cartel offenses have been imposed. Brazil’s competition law provides for civil fines for organizations and individuals, but does not include a criminal provision. Instead, criminal cartel behavior is prosecuted under the Economic Crimes Law, which prosecutors have authority to invoke without regard to what the competition agency does (or does not do). Although Brazilian competition agencies now routinely ask prosecutors to open investigations into cartel matters that the competition agency is looking at, and also get help from prosecutors in investigating these matters, prosecutors do frequently bring cases on their own, without working with the competition agency.

Germany is in a similar institutional position. The competition agency can impose civil fines against organizations and individuals, but public prosecutors operate under a separate bid-rigging statute which only they have the authority to invoke. Similarly to Brazil, prosecutors there have obtained
a relatively large number of convictions (although actual jail time remains rare).\footnote{48}

Chile presents a similar institutional structure, but a more modest outcome. Chile decriminalized its antitrust law in 2003, but in 2011 the public prosecutor brought criminal charges against executives of three pharmacy chains for fixing prices, using provisions of the criminal code dealing with fraud.\footnote{49} This is a rare prosecution, but it shows a willingness of the public prosecutor to take on price fixing behavior.

By contrast, in Japan, where the competition agency controls the bringing of criminal cases under Japan’s competition law, criminal prosecutions have been rare and imprisonment has yet to be imposed.\footnote{50} The results are similar in Korea, where the antitrust enforcement authority has exclusive referral authority, criminal prosecutions have been relatively rare, and imprisonment has not been imposed in cases where convictions have been obtained.\footnote{51}

These results thus call into question the fear that public prosecutors will not be interested in bringing cartel cases or will not be successful when they do. If anything, the institutional competence appears to run in favor of the public prosecutor rather against it. In some ways this is not surprising.
After all, public prosecutors are more familiar than the competition agency with the special procedural requirements of a criminal prosecution and have more familiarity with the investigation of criminal law matters. A competition agency taking on such tasks might very well lack sufficient experience to do them well. Indeed, support for this concern can be drawn from the UK competition authority’s trial mistakes in its first contested criminal prosecution,\textsuperscript{52} the scarcity of criminal prosecutions in Israel (the Israel competition agency has de facto exclusive authority to bring criminal cartel cases\textsuperscript{53}), and the mismanagement of cartel investigations by Japan’s competition agency.\textsuperscript{54}

The grant of independent authority to a public prosecutor, however, does create an institutional problem that agencies with an integrated prosecutorial function do not face. As Table 4 indicates, there has been widespread adoption of the U.S. practice of granting amnesty (or some degree of leniency) to firms that inform the competition agency of their participation in cartel activities—nearly every agency in the study has some form of this program. The problem is that agency amnesty programs do not legally bind the prosecutor. If the prosecutor does not (or cannot) recognize agency amnesty agreements, the effectiveness of such agreements could be undercut
because disclosures made to a competition agency under an amnesty agreement will necessarily include information about culpable company employees. If those culpable employees are the ones making the decision on seeking amnesty, they might very well decide against amnesty in the first place.

It is difficult to tell whether this potential problem has in fact adversely affected the utility of amnesty agreements. In a number of the countries in the study, public prosecutors co-manage the amnesty process and are involved in the amnesty discussions.\textsuperscript{55} In others, public prosecutors have publicly declared that they will honor the competition agency’s leniency decision even though they are not technically required to do so.\textsuperscript{56} If actual imprisonment of individuals does increase, however, the problems of split authority over amnesty may increase, particularly in jurisdictions where the public prosecutor does not recognize the concept, as is true in Germany in our sample.\textsuperscript{57}

Table 5 isolates four institutional factors that might affect the private remedy’s effectiveness.

[Table 5 here.]
The first important factor parallels the referral power in criminal prosecutions: Can an injured party bring a damages action even if the competition agency has not acted (a “stand-alone right”) or is the cause of action dependent on the competition agency’s finding that the competition act has been violated? The latter approach, of course, gives the competition agency more control over enforcement policy and the scope of competition law, similar to the ability to control the criminal prosecution referral.

The jurisdictions in the study follow varied approaches. Most follow the U.S. model of creating a stand-alone private right of action for damages as part of the competition law itself, the exercise of which does not depend on prior action by the enforcement agency, but there are significant deviations. India and the UK allow private damages suits under the competition law to be brought only before their competition appellate tribunals, and then only after a competition agency finding of a violation. Japan and South Africa permit suits under competition law to be brought in civil court, but only after a finding of a violation of the competition law by the competition agency (in the former) or by the competition tribunal (in the latter).
Not permitting a stand-alone action may put a strong damper on private litigation over competition law violations, but it does not necessarily end such litigation. In a number of jurisdictions in the study competition law violations are considered torts and can be litigated in civil court under general tort law. Both Japan and the UK, for example, permit suits under general tort law for violations of their competition laws (or for violations of the EC Treaty, in the case of the UK) and in both countries there are procedural advantages to using general tort law.62

Whether stand-alone actions are permitted or not, nearly all the jurisdictions in the study provide a variety of procedural advantages to plaintiffs that bring suit under the competition law. Many jurisdictions provide some degree of preclusion once the competition agency makes a finding of a violation, whether by making the finding prima facie proof of a violation 63 or making it binding as to liability.64 Other jurisdictions lower the burden of proof of intent in private cases brought under the competition act 65 or allow evidence from the administrative proceeding to assist in the computation of damages.66

Despite these procedural advantages, private litigation remains relatively infrequent and the litigation that does occur is generally brought by
business firms rather than consumers.\cite{footnote67} One likely reason for the lack of consumer claims is the difficulty in bringing actions that aggregate claims on behalf of large numbers of claimants, each of whom may have suffered only a small amount of damage. As Table 5 indicates, two of the jurisdictions in the study have no mechanism for representative actions to aggregate claims. Four of the jurisdictions have some form of restricted representative actions, generally either allowing plaintiffs to opt-in to a single action or allowing a specified public representative to bring an action to create a fund for claimants.\cite{footnote68} One of those jurisdictions, Germany, creatively allows for the transfer of damages claims to a third party that may then enforce them collectively; using this provision, a company called “Cartel Damage Claims Holding SA” has brought suit in several cases involving multiple purchasers.\cite{footnote69} None of these mechanisms, however, is effective at remedying an injury done to a dispersed class of plaintiffs that cannot be assembled prior to filing suit.

The lack of a full opt-out class action mechanism may not, in itself, explain the paucity of private competition law litigation. Four of the countries in the study arguably have liberal rules allowing broad representative actions, but in none of them has a significant number of class
This may indicate that factors outside the scope of this study (lack of lawyers and judges trained in competition law, lack of a damages multiplier, lack of tools for discovering evidence, or the general expense of civil litigation) may be more salient with regard to insuring a full recovery of damages by those injured by competition law violations.

Conclusion

The major finding of the study presented in this chapter is that the jurisdictions in the study are moving closer to the two remedies that have been important features of U.S. antitrust enforcement: imprisonment and private damages. Actual imprisonment of antitrust offenders remains rare, but there is general consensus on making cartel violations criminal offenses and offering leniency as a device to destabilize cartels and increase enforcement. Private litigation is not yet wide-spread, but all of the countries in the study have private rights of action, most have stand-alone rights that can be pursued by injured parties without leave of the enforcement agency, and private parties do benefit in various ways from an enforcement agency’s prior finding of a violation.

Oddly, the outlier in the study is the EU itself, where there is no Community-wide criminal provision or private right of action. Specific
problems with implementing each remedy might explain the current state of affairs. The competition provisions of the Treaty apply only to “undertakings,” not individuals, and the Commission has no statutory power to impose imprisonment.71 Private actions must be brought in Member State courts, whose procedures and legal traditions vary enormously. Mandating some sort of effective private action across the twenty-seven different countries that make up the EU is a daunting task, and the Commission, despite its apparently positive view of a Community-wide private right, has been unable to bridge this gap.72 Thus, the task of implementing such rights is currently being left to the Member States themselves which, if the trends detailed in this study prevail, will likely move toward adopting and implementing both remedies.

Are these two remedies appropriate for broad adoption? The answer is yes. To the extent that a jurisdiction is serious about competition policy, the logic of both remedies is compelling. Deterrence of violations and compensation of victims are good ideas, ones which are not country-specific; the remedies advance both. Until we find out that they do not, it is hard to argue against them.
Of course, in any country both remedies sit within a broader legal and institutional framework. Each country’s civil and criminal procedures will affect how these remedies get carried out; as discussed above, institutional variance may affect efficacy. Indeed, the appropriate use of both remedies will depend strongly on the institutional infrastructure available to carry them out. A compensation-based private damages remedy may fail if recoveries are not distributed, in some way, to those injured by the violation.\textsuperscript{73} The use of criminal sanctions may produce unjust results unless there are substantial due process protections for the accused, including a commitment to greater transparency than many jurisdictions currently afford.

It also may take time in individual jurisdictions to understand fully how competition law violations harm individual consumers or competitors, or to accept the view that certain competition law violations should be labeled “crime” and deserving of the severe penalty of imprisonment. But, as discussed above, both ideas were not immediately popular in the United States either. There is no reason to expect immediate full-fledged acceptance elsewhere.

Brandeisian institutional experimentation continues, of course, and learning is not a one-way street. Perhaps the universal rejection of treble-
damages will cause the United States to look more closely at this feature and come up with a better way to incentivize private litigation, to the extent that such incentives are still necessary in the United States. Or perhaps the United States will look more closely at the terms of imprisonment we impose on antitrust violators and examine whether this costly sanction has become excessive. One thing is clear, however. Experimentation in antitrust remedies is now a global enterprise, not confined to any single jurisdiction.
<table>
<thead>
<tr>
<th>Enforcement Agency</th>
<th>PRIVATE ENFORCEMENT</th>
<th>CRIMINAL ENFORCEMENT</th>
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<td>Damages awarded?</td>
<td>Treble?</td>
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<td>United Kingdom</td>
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Table 2. Major Statutory Changes, 2000-2010

<table>
<thead>
<tr>
<th>Year</th>
<th>Country</th>
<th>Private Enforcement</th>
<th>Criminal Enforcement</th>
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<tbody>
<tr>
<td>2002</td>
<td>India</td>
<td>New competition law statute; creates private right</td>
<td></td>
</tr>
<tr>
<td>2003</td>
<td>United Kingdom</td>
<td></td>
<td>Amends 1958 statute to create first criminal offense</td>
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<tr>
<td></td>
<td>Chile</td>
<td>Adds follow-on benefits to competition law statute</td>
<td>Repeals criminal provision in competition law statute</td>
</tr>
<tr>
<td>2005</td>
<td>Germany</td>
<td>Major statutory change</td>
<td></td>
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<tr>
<td></td>
<td>Korea</td>
<td>Major statutory change</td>
<td></td>
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<tr>
<td>2008</td>
<td>China</td>
<td>New competition law statute; creates private right</td>
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<tr>
<td>2009</td>
<td>Australia</td>
<td></td>
<td>Adds criminal penalty</td>
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<tr>
<td></td>
<td>Canada</td>
<td></td>
<td>Major statutory change</td>
</tr>
<tr>
<td></td>
<td>Japan</td>
<td></td>
<td>Increases imprisonment to 5 years</td>
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<tr>
<td></td>
<td>South Africa</td>
<td></td>
<td>Adds criminal provision; not yet in force</td>
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</table>
Table 3. Enforcing Jurisdictions, by GDP and legal tradition

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Private Right</th>
<th>Jail</th>
<th>GDP</th>
<th>Legal Tradition</th>
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<td>Brazil</td>
<td>Yes</td>
<td>Yes</td>
<td>7</td>
<td>X</td>
</tr>
<tr>
<td>India</td>
<td>Yes</td>
<td>No</td>
<td>9</td>
<td>X</td>
</tr>
<tr>
<td>Canada</td>
<td>Yes</td>
<td>Yes</td>
<td>10</td>
<td>X</td>
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<tr>
<td>Korea</td>
<td>Yes</td>
<td>Yes</td>
<td>14</td>
<td>X</td>
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<tr>
<td>Australia</td>
<td>Yes</td>
<td>Yes</td>
<td>15</td>
<td>X</td>
</tr>
<tr>
<td>South Africa</td>
<td>Yes</td>
<td>Yes</td>
<td>28</td>
<td>X</td>
</tr>
<tr>
<td>Israel</td>
<td>Yes</td>
<td>Yes</td>
<td>41</td>
<td>X</td>
</tr>
<tr>
<td>Chile</td>
<td>Yes</td>
<td>No</td>
<td>43</td>
<td>X</td>
</tr>
</tbody>
</table>


* EU would have largest GDP if it were a single country
Table 4. Institutional Variance: Imprisonment

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Separate Prosecutor</th>
<th>Leniency Program</th>
<th>Administrative Organizational Fines</th>
<th>Scope</th>
<th>Separate Statute</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Broad</td>
<td>Narrow</td>
</tr>
<tr>
<td>Australia</td>
<td>Yes, on reference</td>
<td>Co-managed w/prosecutor</td>
<td>Yes</td>
<td>X</td>
<td>Not necessary</td>
</tr>
<tr>
<td>Brazil</td>
<td>Yes</td>
<td>Co-managed w/prosecutor</td>
<td>Yes</td>
<td>X</td>
<td>Yes</td>
</tr>
<tr>
<td>Canada</td>
<td>Yes, on reference</td>
<td>Co-managed w/prosecutor</td>
<td>Yes</td>
<td>X</td>
<td>No</td>
</tr>
<tr>
<td>Chile</td>
<td>Yes</td>
<td>Yes (Civil)</td>
<td>Yes</td>
<td>X</td>
<td>Uncertain application</td>
</tr>
<tr>
<td>China</td>
<td>N/A</td>
<td>N/A</td>
<td>Yes</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>European Union</td>
<td>N/A</td>
<td>Yes (Civil)</td>
<td>Yes</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Germany</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>X</td>
<td>Yes</td>
</tr>
<tr>
<td>India</td>
<td>N/A</td>
<td>Yes</td>
<td>Yes</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Israel</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>X</td>
<td>No</td>
</tr>
<tr>
<td>Japan</td>
<td>Yes, on reference</td>
<td>Yes</td>
<td>Yes</td>
<td>X</td>
<td>Yes</td>
</tr>
<tr>
<td>Korea</td>
<td>Yes, on reference</td>
<td>Yes</td>
<td>Yes</td>
<td>X</td>
<td>No</td>
</tr>
<tr>
<td>South Africa*</td>
<td>Yes</td>
<td>To be co-managed w/prosecutor</td>
<td>Yes</td>
<td>X</td>
<td>Not necessary</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>Concurr-</td>
<td>Co-managed, where appropriate</td>
<td>Yes</td>
<td>X</td>
<td>No</td>
</tr>
</tbody>
</table>

* Criminal provision not yet in force.
** Concurrent in England, Wales, and Northern Ireland; prosecution only by public prosecutor in Scotland
Table 5. Institutional Variance: Private Damages

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Stand Alone Right</th>
<th>Procedural Benefits</th>
<th>Claim Aggregation</th>
<th>Use of Other Statutes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Not necessary</td>
</tr>
<tr>
<td>Brazil</td>
<td>Yes</td>
<td>Uncertain</td>
<td>Restricted</td>
<td>Not used</td>
</tr>
<tr>
<td>Canada</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes, added claims</td>
</tr>
<tr>
<td>Chile</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Not used</td>
</tr>
<tr>
<td>China</td>
<td>Yes</td>
<td>Uncertain</td>
<td>Uncertain</td>
<td>Uncertain</td>
</tr>
<tr>
<td>European Union</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>Member state law</td>
</tr>
<tr>
<td>Germany</td>
<td>Yes</td>
<td>Yes</td>
<td>Restricted</td>
<td>Not used</td>
</tr>
<tr>
<td>India</td>
<td>No</td>
<td>Yes</td>
<td>Restricted</td>
<td>Not used</td>
</tr>
<tr>
<td>Israel</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Not necessary</td>
</tr>
<tr>
<td>Japan</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Korea</td>
<td>Yes</td>
<td>Yes</td>
<td>Restricted</td>
<td>Yes</td>
</tr>
<tr>
<td>South Africa</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Not used</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>
Endnotes

* Charles L. Denison Professor of Law, New York University School of Law.

I thank Kojiro Fujii, Jorge Grunberg, Aris Gulapa, and Maria Jose Henriquez, NYU LL.M.’s, for their excellent research assistance. A research grant from the Filomen D’Agostino and Max E. Greenberg Research Fund at New York University School of Law provided financial assistance for this chapter.

1 As of 2011, the membership of the International Competition Network consisted of competition authorities from 106 jurisdictions. This does not include China, which is not an ICN member.


4 This consensus on criminalization is limited to price fixing, bid rigging, and territorial allocations among competitors. See, e.g., Gregory J. Werden & Marilyn J. Simon, Why Price Fixers Should Go to Prison, 32 Antitrust Bull. 917 (1987).
The earliest criminal case involving a manufactured product appears to be Moore v. United States, prosecuted in 1894. See Albert H. Walker, History of the Sherman Law of the United States of America 108 (1910). One earlier criminal case, United States v. Cassidy, was a Section 1 criminal prosecution for taking part in the Debs railroad strike; the defendant was discharged after the jurors split. See id. at 103.

The first case of imprisonment appears to be United States v. American Naval Stores, 172 F 455 (S.D. Ga. 1909) (two of five convicted individual defendants sentenced to jail for three months; each of the five defendants fined $17,500). Their convictions were subsequently vacated in United States v. Nash, 229 U.S. 273 (1913) (error in the charge). See Walker, supra note 5, at 272. On the early unwillingness to impose imprisonment, see In Re Charge to the Grand Jury, 151 F. 834, 846 (E.D. Ga. 1907) (no jail sentence on guilty plea; judge accepted their assurance “that they would not again violate the laws against combinations in restraint of trade.”

Criminal prosecutions, whether of individuals or corporations were generally low in the first half-century of the Sherman Act. See Richard A. Posner, A Statistical Study of Antitrust Enforcement, 13 J. Law & Econ. 365, 385 (1970) (Table 15) (173 criminal prosecutions, less than 3 1/2 criminal
cases per year).


do so.


14 See Atlanta v. Chattanooga Foundry & Pipeworks, 203 U.S. 390, 399 (1906) (construing state statute of limitations so as to be sure to give redress “to the sufferer”).


19 See B. Zorina Kahn, Symposium on Antitrust, 9 Cornell J. Law & Pub. Pol. 133, 137 (1999) (Figure 1).


The term “enforcing jurisdictions” is used rather than “countries” because the European Union fits into the former category but not the latter.

Some jurisdictions outside the study provide damages multipliers that are discretionary with the court. See, e.g., Taiwan: Fair Trade Act, Art. 32 (up to treble damages for intentional violations); Turkey: Act No. 4054, Art. 58 (discretionary treble damages for concerted practices).

Germany: Act Against Restraints of Competition, Art. 33(3) (intentional or
negligent violations); United Kingdom: Competition Act of 1998, as amended by the Enterprise Act of 2002, sec. 47A.

25 In China prosecutions for bid rigging are possible under the criminal code, Article 233, promulgated originally in 1997, but it is unclear whether this provision is being enforced since the adoption of the Antimonopoly Law. See Xiaoye Wang & Jessica Su, The Early Development of Anti-Monopoly Law Enforcement in China: Discourse and Institutions at 5 (2011) (criminal statute applies if circumstances are serious; conviction could lead to fines, detention, and up to three years imprisonment) (unpublished draft).

26 For discussion, see infra notes 44-49 and accompanying text.


Korea: See Hwang Lee & Byung Geon Lee, Korea, in International Handbook, supra note 27, at 542 (gradual increase in private litigation, with 12-16 cases
pending at the end of 2008).


See First & Shiraishi, Global Norms: Japan, supra note 29, at 5; Kozo Kawai, Futaba Hirano, & Kojiro Fujii, Japan, in Public Competition Enforcement Review, supra note 30, at 243.


See id. at 5. See also Ron Knox, Chile Charges Pharma Executives With Cartel Crimes, Global Competition Review, Mar. 18, 2011.

See Caron Beaton-Wells, Criminalising Cartels: Australia’s Slow Conversion, 31 World Competition 205, 205-06 (2008) (decision to criminalize cartels in Australia follows worldwide trend “led by the United
States”).

37 See, e.g., Neelie Kroes, European Commissioner for Competition Policy, Address at ALDE Conference: Collective Redress – Delivering Justice for Victims at 4 (Mar. 4, 2009), available at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/88&format=HTML&aged=0&language=EN&guiLanguage=en (“I would like to assure you we are not proposing anything like the US system. Not at all. We are striking a European model that protects against excesses and unmeritorious litigation… Clearly, we do not want an excessive litigation culture.”)

38 See New State Ice v. Liebmann, 285 U.S. 262, 386-87 (1932) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”) (Brandeis, J. dissenting). For discussion of the theory that developments in competition law require continuous learning, see Wolfgang Kerber & Oliver Budzinski, Competition of Competition Laws: Mission Impossible?, in Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy 31, 37-39 (Richard A. Epstein & Michael S. Greve, eds., 2004).

40 For the allocation of authority between the two, see Memorandum Of Understanding Between the Office of Fair Trading and the Director of the Serious Fraud Office, October 2003, OFT 547.

41 The investigation/reference model is complicated in two of the jurisdictions in the study. Chile has no criminal provision in its competition law, but the prosecutor has attempted to exercise its authority under general criminal fraud law to bring a criminal cartel case. *See supra* notes 34-35 and accompanying text. Japan’s Antimonopoly Act requires a reference from the Japan Fair Trade Commission to the public prosecutor for any criminal prosecution under the Act, see Antimonopoly Act Arts. 74, 96, but the public prosecutor has independent authority to enforce other criminal statutes that can be applied to bid rigging of government contracts. For a rare example of the exercise of this authority, see Harry First, *Antitrust Enforcement in Japan*, 64 Antitrust L.J. 137, 168 (1995) (Public Prosecutor’s successful criminal prosecution of bid rigging).
I thank Professor Maarten Schinkel, of the University of Amsterdam, for suggesting this bureaucratic incentive effect, advanced as an explanation for the unwillingness of the Dutch Competition Authority to refer important cartel cases to the Dutch prosecutor for criminal prosecution.

See Von-Papp, supra note 29, at 175 (Germany).

See OECD Peer Review Report, supra note 29, at 18-19 (in a “few short years” Brazil developed “one of the most active” programs in the area of criminal competition law enforcement) (activity between 2002 and 2009). Nevertheless, no defendant has yet served a sentence of imprisonment. See supra note 29.

See id. at 19.

See id. at 18-19.

See Von-Papp, supra note 29, at 165.

See id. at 169 (jail terms suspended in all but one case).

See Agüero & Montt, Chile, supra note 34, at 5-6.

See note 29, supra. The JFTC recently revised its investigative procedures so that it can prosecute cartels more effectively, which may lead to an increase in criminal prosecutions. Interview with Tetsuya Nagasawa, Partner, Attorney-at-Law, Oh-Ebashi LPC & Partners, Tokyo, Japan, Aug. 9, 2011.
51 See Monopoly Regulation and Fair Trade Act (“MRFTA”), Art. 71; KFTC Annual Report 2011 (English version) at 22 n.7. For data on prosecutions, see KFTC Annual Report 2011 at 245 (4 referrals in 2010); KFTC Annual Report 2010 at 99 (English version) (5 referrals in 2009). See also Hur & Rhee, supra note 29, at 6 (“individuals have only been given suspended prison sentences or probation”).

52 See Julian Joshua, DOA: Can the UK Cartel Offense be Resuscitated?, in Criminalising Cartels, supra note 29, at 129, 140-41 (describing prosecution of four British Airways’ executives).

53 Email to the Author from Professor Michal Gal, University of Haifa School of Law, Nov. 27, 2011. See also Restrictive Trade Practices Law § 46 (investigative authority); Annual Report On Competition Policy Developments In Israel, January 2008-April 2009 (discussing one indictment and one conviction during the period).


55 Australia: See Memorandum of Understanding Between the CDPP and
ACCC Regarding Serious Cartel Conduct, §7.2 (July 2009) (prosecutor decides on immunity based on prosecutorial policy, after recommendation from competition authority); Beaton-Wells, *Opportunities and Challenges*, supra note 31, at 190-91 (describing prosecutor’s “far more conservative approach” to negotiations with cooperating parties). Brazil: *See* Antitrust Law, Art. 35-C (leniency agreement prevents criminal case from being brought to court), OECD Peer Review, *supra* note 29, at 18 (antitrust agency asks prosecutors to sign leniency agreements so that leniency applicant will not be subject to parallel criminal prosecution). Canada: D. Martin Low & Casey W. Hallady, *Redesigning a Criminal Cartel Regime: The Canadian Conversion*, in *Criminalising Cartels*, supra note 29, at 100-101 (describing relationship between competition authority and prosecutor; grant of immunity ultimately decided by prosecutor).

56 *See* First & Shiraishi, *Japan Country Study*, *supra* note 29, at 18 (statement made during Diet session).

57 *See* Von-Papp, *supra* note 29, at 176 (“immunity provisions for criminal offenses are not unknown, but they are regarded with deep suspicion”).

58 Korea changed its statute in 2005 to create a stand-alone action, in the hopes of increasing the number of private suits. *See* Hwang Lee & Byung
Geon Lee, *Korea, supra* note 28, at 543.

59 **India:** See *The Competition Act § 53N.* **United Kingdom:** *Competition Act of 1998,* as amended by the *Enterprise Act of 2002,* sec. 47A.

60 *See Japan Antimonopoly Act,* Arts. 25, 26.

61 *See Competition Act,* § 65.

62 *See First & Shiraishi, Global Norms: Japan, supra* note 29, at 6; *Scott & Simpson, England and Wales, supra* note 27, at 42-43 (courts willing to exercise broad territorial jurisdiction and provide injunctive relief in addition to damages).

63 *See, e.g.,* Australia: *Trade Practices Act §83* (prima facie effect of findings in competition agency proceedings). **Israel:** *Restrictive Trade Practices Law §43 (e)* (“The General Director’s Determination shall constitute *prima facie* proof of its subject matter in any legal procedure.”).

64 *See, e.g.,* Chile: *Competition Act,* Art. 30 (civil court “shall base its ruling” on the conduct established by the *Competition Tribunal*). Germany: *Act Against Restraints of Competition,* §33(4) (court bound by final decision by competition authority in Germany, other EU countries, or the *European Commission* finding infringement). **South Africa:** *Competition Act,* § 65(2) (prior determination of issues by *Competition Tribunal* or *Competition*
Appeal Court binding on civil court). UK: Competition Act § 58A(3) (courts bound by Office of Fair Trade or Competition Appeal Tribunal infringement decision).

65 See, e.g., Japan: Antimonopoly Act Art. 25(2) (making violation strict liability; suit can be brought only after JFTC finding of violation). Korea: MRFTA Art. 56 (shifting burden of proof on intent to defendant).

66 See, e.g., Korea: MRFTA, Arts. 56(2), 57 (court shall decide damages “based on the result of [the KFTC’s] evidentiary investigation”).

67 See, e.g., Dellavedova et al., supra note 27, at 501 (private actions “regular part” of Australian competition law landscape, but generally limited to competitor v. competitor or commercial buyer v. commercial seller); Niv Zecker, Michal Gal, & Yariv Han, Israel, in International Yearbook, supra note 27, at 515 (in Israel, most private antitrust claims center around contract disputes).

68 Brazil: Bruno L Peixoto, Brazil, in Private Enforcement, supra note 27, at 24-25 (public collective actions for damages brought by, e.g., government agencies, to create fund under which injured parties may collect). Germany: Act Against Restraints of Competition, §33(2) (representative actions by certain associations available for injunction only); India: Competition Act §
53N(4) (opt-in form of class action). Korea: Lee & Lee, supra note 28, at 545-46 (opt-in mechanism allowing multiple parties to bring damages action jointly).

69 See Michael Dietrich & Marco Hartmann-Ruppel, Germany, in Private Enforcement, supra note 27, at 95. For a description of the company’s efforts to obtain recovery from the German cement cartel, see http://www.carteldamageclaims.com/German%20Cement (suit on behalf of 36 purchasers of cement, claiming damages of € 176 million).

70 Canada: See Iacobucci & Trebilcock, supra note 27, at 13 (class actions for criminal violations allowable under provincial laws; 24 brought between 2004 and 2010). South Africa: Kasturi Moodaliyar, South Africa, in International Handbook, supra note 27, at 558-59 (no class action suit for damages under Competition Law reported as of 2010). UK: See Vincent Smith, Anthony Maton, & Scott Campbell, England and Wales, in International Handbook, supra note 27, at 303 (narrow construction given to opt-out class actions, which have been “relatively infrequent”).


72 For a review of those efforts and a discussion of possible reasons for the
lack of success so far, see Robert O’Donoghue, *Europe’s Long March Towards Antitrust Damages Actions*, CPI Antitrust Chronicle, April 2011 (describing the Commission as taking “a rather languid course with no clear end-point in sight.” *id. at 2*).

73 Daniel Crane forcefully argues that compensation is an impossible goal to achieve even in the United States. *See* Crane, *supra* note 13, at 678-90.