

CPI's Cartel Column Presents:

# On the Alleged Disproportionate Sentencing of Cartel Managers

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## Introduction

In a recent *Commentary*, four experienced antitrust attorneys opine that U.S. imprisonment-sentencing practices are unjustly severe and disproportionate (see Kapoor et al. 2016). In particular they charge that “...Japanese businesspeople have ... received harsher treatment compared to other perpetrators of similar or worse misconduct...” (ibid.). Kapoor et al. infer sentencing discrimination from anecdotal evidence drawn from a large, sprawling global cartel, *Auto Parts* (see Connor 2012). *Auto Parts* is hardly representative of the U.S. Government’s campaign against international cartels that began in the early 1990s.<sup>1</sup>

There are contrary opinions from equally experienced antitrust counsel. Klawiter (2012: 99) avers that up to 2007 at least, non-U.S. executives who were resident abroad normally received a sentencing “discount” if they traveled from abroad to accept the jurisdiction of U.S. courts for sentencing purposes; the usual prison sentence in these cases was six to eight months in prison. After 2006, if an executive was arrested in the United States, he would receive no discount. Many of the *Auto-Parts* cartel executives lived and worked in the United States; if arrested on U.S. territory, they too might receive systematically longer sentences.

There are no publications that draw on broad samples and that address this gap in beliefs. The purpose of this note is to examine whether Japanese or other non-U.S. cartel managers are in fact sentenced disproportionately by U.S. courts for the same antitrust crimes compared to U.S. managers. To do so, I will draw upon a comprehensive legal-economic data set of international cartels<sup>2</sup> that includes all available information on sentencing of individuals since 1990 (Connor 2014). Besides aggregate comparisons of U.S. and Japanese cartel sentences, I examine economic factors that may explain differences in sentencing.

## Cartel Prison Penalties by Nationality

Table 1 displays the sentencing records of 355 individuals indicted by the U.S. DOJ for international price fixing, including 66 who are known or apparent fugitives. The observations are divided into three subsamples that are likely to be drawn from different populations of penalized executives: prison-only, fines only and both prison and fines.

First, looking at the 26 cases in which only prison sentences were imposed, five Japanese executives were incarcerated on average 15.5 months.<sup>3</sup> The remaining 20 non-Japanese cartel managers were sentenced to 27.6 months in prison, while U.S. executives are the most severely penalized – an average of 30.7 months. For this sample, there is no evidence of anti-Japanese discrimination.

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<sup>1</sup> For example, of the 294 Japanese executives indicted by the United States for international price fixing in all industries since 1990, 79 (27%) have been Japanese nationals. However, of the 64 individuals indicted in *Auto Parts* everywhere in the world, 59 (92%) are Japanese, and the ratio is nearly as high for those indicted in *Auto Parts* by the United States.

<sup>2</sup> International cartels are those operated by participants from two or more countries. The participants may be indicted companies (where corporate headquarters determines “nationality”) or individuals that are found guilty. The PIC data set incorporates only international cartels.

<sup>3</sup> I compute *mean* averages, but the results do not change if the *median* average is substituted.

Second, looking at the 39 examples of executives that were fined only, Japanese cartel managers paid on average \$16,800 per person, well below the average U.S. fine of \$58,064.<sup>4</sup> European executives paid the most (\$81,036), and Americans paid just average fines (\$57,633). Again, based on the size of cartel fines imposed, there is no evidence of discrimination against non-U.S. persons.

Third, I examine the largest sample of 224 cartel managers on which both fines and prison were imposed. This set of cartel executives were the most serious offenders, upon which 91% of total cartel fines and 88% of the prison-months were imposed overall. As far as the fines go, Japanese executive again received among the lowest fines (\$102,000 on average) – merely one-tenth the average fines on the non-Japanese individual offenders. Other Asian cartelists (most from Korea and Taiwan) were also fined one-fifth of the sample average.<sup>5</sup> In contrast, Americans were made to pay an average of \$524,000 per person and Europeans an average of \$4.7 million! As was true of the other samples, if differences in fines imposed are evidence of discrimination by U.S. courts, it is *Europeans* who may have the right to complain.

<b>Table 1. U.S. Sentencing of Cartel Managers, 1990-June 2016</b>					
Nationality	Paid Fines (No.)	Fines Paid (\$ Million )	Prison Imposed (No.)	Prison (Months)	Fugitive
<b>No fines (Prison only):</b>					
U.S.	0	0	16	491	0
W. Europe	0	0	2	36	0
Japan	0	0	6	93	0
Other Asia	0	0	2	24	0
Other	0	0	0	0	0
<b>Sub-Total</b>	<b>0</b>	<b>0</b>	<b>26</b>	<b>644</b>	<b>0</b>
<b>Fines only:</b>					
U.S.	18	10.374	0	0	0
W. Europe	14	11.345	0	0	0
Japan	5	0.840	0	0	0
Other Asia	1	0.075	0	0	0
Other	1	0.020	0	0	0
<b>Sub-Total</b>	<b>39</b>	<b>22.654</b>	<b>0</b>	<b>0</b>	<b>0</b>
<b>Fines &amp; Prison:</b>					
U.S.	107	56.092	107	2786.0	0
W. Europe	34	160.190	34	1192.5	0

<sup>4</sup> I include mandatory restitution along with regular fines.

<sup>5</sup> Not only were Asian executives' fines systematically lower, there is survey evidence that Asian employers of cartel managers typically paid their manager's fines from corporate funds; American companies do not bail out their employees in such matters (Connor and Lande 2012).

Japan	44	4.500	44	672.0	0
Other Asia	29	5.464	29	516.0	0
Other	10	0.205	10	122.0	0
<b>Sub-Total</b>	<b>224</b>	<b>220.594</b>	<b>224</b>	<b>4,514.5</b>	<b>0</b>
<b>Fugitives:</b>					
U.S.	0	0	0	0	3
W. Europe	0	0	0	0	25
Japan	0	0	0	0	24
Other Asia	0	0	0	0	14
Other	0	0	0	0	1
<b>Sub-Total</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>66</b>
<b>Sample Totals</b>	<b>263</b>		<b>250</b>		<b>66</b>
Source: John M. Connor, <i>Private International Cartels</i> data set (July 2016). Excel spreadsheet available from author on request.					
Note: There were 294 executives who were either fined or imprisoned.					

Regarding the length of prison sentences for hard-core price fixing, 44 Japanese executives were sentenced to an average of 15.3 months in prison for conspiring on prices, well below the average for all 224 cartelists of 20.2 months. (Other Asian cartelists were handed down sentences of 17.8 months in jail). Americans and Europeans were sentenced to prison for 26 and 35 months, respectively. It is clear from this evidence that U.S. prosecutors and courts judged that Americans and Europeans were guilty of more serious infractions of the Sherman Act than were Asian employees.

Finally, I would be remiss if I did not comment on the pattern of cartel *fugitives* (bottom Table 1). The DOJ has minimal problems catching U.S. citizens who are indicted for criminal price fixing. However, foreigners are another matter. Because of weak extradition agreements or lack of cooperation by non-U.S. courts in antitrust matters, the great majority (63 of 66) of indicted cartel managers who remain fugitives from U.S. justice are foreign nationals. Of those 63 fugitives, 38% are Japanese and 22% are from other Asian nations. Because more than 90% of individuals indicted for criminal price fixing are found guilty, the practical consequence is that the great majority of Asian fugitives are likely guilty of the crimes charged, yet they suffer no penal consequences.

In sum, based on the broad sweep of 26 years' data of U.S. sentencing decisions for 355 individuals presented here, it is untrue that Japanese or other Asian executives are punished more severely for cartel violations than other nationalities. Asian executives charged with criminal price fixing pay on average *lower* fines and serve *shorter* prison sentences than other nationalities. Moreover, charged Asian executives tend to disproportionately benefit from fugitive status.

In claiming prosecutorial bias, Kapoor et al. (2016) err by relying on anecdotes derived from one recent, and highly unusual international-cartel case, *Auto Parts*. The victims of this cartel were a mix of U.S. and Japanese auto-assembly firms and, through the pass-on of overcharges, their customers. Penal sentences leverage the deterrence power associated

with corporate fines and other civil penalties. Not only are Japanese-imposed fines in *Auto Parts* small and their system of private damages practically non-existent, but the few, short prison sentences issued by the KFTC have all been commuted to non-custodial penalties by Japan’s courts. Instead of extolling the deterrence benefits of U.S. prison sentences on *Asian* executives for *Asian* auto markets, Kapoor et al (2016) seemingly display a lack of empathy for the economic welfare of Asian auto buyers.

### Trends in Cartel Prison Penalties

Individual penalties in the United States for price fixing have climbed in order to provide significant deterrence (Klawiter 2012). In 2004, Congress more than tripled the maximum fines and prison sentences for convicted cartel managers (ibid. p. 97). Courts have become increasingly intolerant of evidence they review that often depicts an “atmosphere of general lawlessness” exhibited by corporate leaders that engage in price conspiracies (Klawiter 2012: 101).

Just to be sure that the alleged penal bias has not evolved in more recent U.S. antitrust-policy regimes, in Table 2, I examine the temporal pattern of individual cartel penalties. The Table displays the mean average sentences imposed per person for criminal price fixing from 1990 to 2015, broken into three periods. For the entire 26 years, monetary fines for Asian cartel managers are one-fourth the amounts extracted from North American executives, and that ratio has if anything grew wider over time. European executives are the most heavily fined overall and in two of the three sub-periods.

<b>Table 2. Average U.S. Sentencing of Cartel Managers, by Time Period</b>				
Measure: Nationality	1990-99	2000-2009	2010-2015	Total
<b>Fines (\$ thousand):</b>				
Asian	134	10 <sup>b</sup>	125	125
European	610	131	9,508 <sup>a</sup>	3,263
U.S. and Canada	188	637	586	509
<b>Prison (months):</b>				
Asian	10.000 <sup>b</sup>	10.000 <sup>b</sup>	16.179	15.878
European	36.500 <sup>b</sup>	5.225	17.474	12.438
U.S. and Canada	23.280	26.600	27.209	26.117
a) Includes one exceptionally large mandatory restitution of \$149 million in the UK. b) Cell has three or fewer observations. Source: John M. Connor, <i>Private International Cartels</i> data set (July 2016). Excel spreadsheet available from author on request.				

Regarding prison sentences, the average lengths are 40% to 60% lower for non-U.S. executives than for North American cartel employees. And in the most recent sub-period 2010-2015, Asian executives are sentenced to prison sentences that are 40% shorter than North American nationals. (There were few Asian nationals sentenced for cartel crimes before 2010, so averages may be unreliable).

In sum, displaying individual cartel penalties over time does not change the previous conclusions based on the whole 26 years of data. Japanese and other Asian cartelists have lower fines and shorter prison sentences imposed by U.S. courts than are imposed on either European or North American nationals.<sup>6</sup>

### Is Reduced Severity of Asian Cartelists Warranted?

Klawiter (2012) may be correct that U.S. prosecutors regularly offer reduced sentences to non-U.S. residents indicted for price fixing as an inducement to travel voluntarily to a U.S. jurisdiction for sentencing, but this does not square with the finding that European executives are systematically sentenced more severely than Asian ones.

Table 3 may offer an explanation of the greater severity of sentences imposed on European cartelists. As in most jurisdictions, U.S. penalties are loosely tied to the affected jurisdictional sales of the cartels.<sup>7</sup> During 1990-2015, European individuals participated in cartels with the greatest average affected commerce, followed by American participants. (However, this pattern does not hold for all the sub-periods.) Thus, the lower average fines on Asian executives is likely due in part to their participation in smaller, less injurious cartels; and vice-versa for European cartelists.

<b>Table 3. Average Cartel Commerce, by Nationality of Managers and by Time Period</b>				
Measure: Manager Nationality	1990- 1999	2000- 2009	2010-2015	Total
<b>U.S. Affected Commerce<sup>a</sup></b>	<i>\$ million per person</i>			
Asian	553	26,292	16,193,418 <sup>b</sup>	15,258
European	1689	77,409	291,334,134 <sup>c</sup>	38,372,073
U.S. and Canada	452	298,799	5,956	208,683
a) Available for 89% of the observations. b) Does not include estimates for most of the many <i>Auto Parts</i> cartel sales. c) Includes several UK bankers and preliminary, likely high, sales' estimates. Source: John M. Connor, <i>Private International Cartels</i> data set (July 2016). Excel spreadsheet available from author on request.				

<sup>6</sup> The one exception is prison sentence in 2000-2009, during which Asian prison sentences were longer than European. But there are too few Asian cases to make this comparison statistically valid.

<sup>7</sup> Connor and Miller (2013) demonstrate this for *corporate* cartel fines. This study did find evidence of disproportionately severe sentencing of U.S. companies by the EC.

## Conclusions

Expert opinion of antitrust practitioners is divided as to whether U.S. courts hand down more severe sentences on foreigners guilty of criminal price fixing compared to U.S. cartelists. The opinions in support of discrimination appear to be based on a small number of sentences imposed in quite recent international cartels.

In this note, I analyze 513 sentencing decisions imposed by U.S. courts on 294 executives of various nationalities convicted of criminal price fixing during 1990-2015. Based on an analysis of this large sample, there is no evidence that Japanese or other Asian employees of international cartelists were on average treated more severely than executives from other nations. Japanese defendants on average paid fines that were 70% lower and received prison sentences that were 40% shorter than those given to Americans. These ratios persisted in the past six years. Moreover, these differences are understated because Asian cartelists are far more likely to become fugitives than are domestic cartelists. Suggestions that U.S. prosecutors discriminate against Asian cartel managers are unfounded.

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