



Prosecuting Cartels With Extra-Territorial Dimensions:

Challenges and Practical Solutions from a U.S. Perspective

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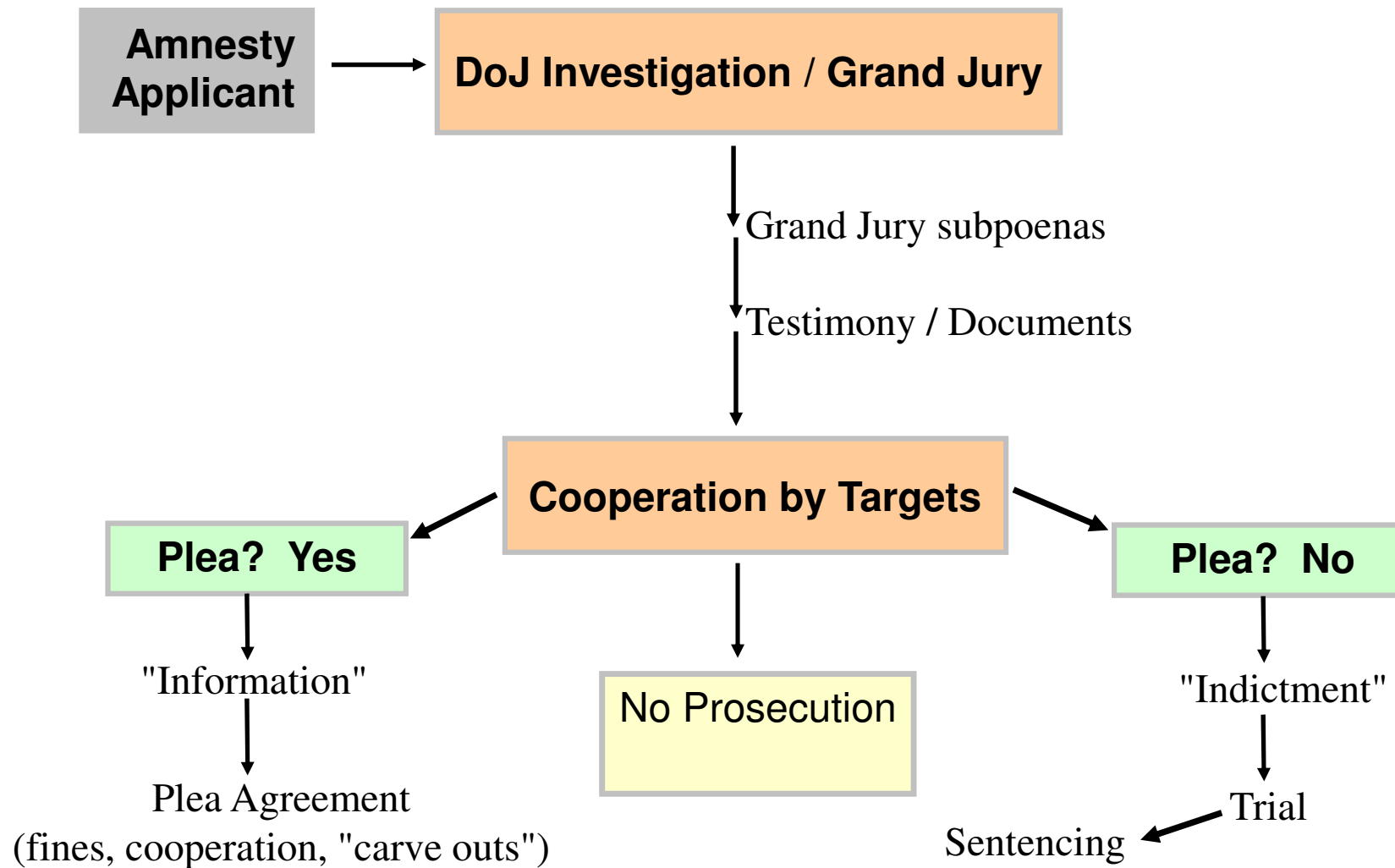
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OVERVIEW

- I. Procedural Challenges/Obstacles for Cartel Investigations in the U.S.
 - Foreign-based companies vs. foreign individuals
 - Weapons and solutions available to U.S. Department of Justice
- II. Case Study: U.S. DoJ Investigation of Refrigerator Compressor Cartel

I. U.S. Procedures for Cartel Investigations and Prosecution



Challenge 1: Obtaining U.S. Jurisdiction Over Foreign Companies

- Companies: Not a major challenge for DoJ
 - Most companies have operations (subsidiaries, etc.) located in U.S.
 - Even if no physical presence, most companies have or *intend to have* significant contacts with U.S.
- *Example:* DoJ indictment against DeBeers (1993)



"DeBeers Agrees to Guilty Plea to Re-enter U.S. Market" (July 2004)

Challenge 2: Access to Foreign-Located Documents

- DoJ grand jury subpoenas are limited to compulsory production of company documents located in the U.S.
 - Country-to-country assistance still has limits
 - International Antitrust Enforcement Act (IAEAA)
 - U.S.-Australia Mutual Assistance Agreement

Practical Solutions for U.S. DoJ:

- "Cooperation" with DoJ *requires* production of foreign-based documents
 - Translation issues
- "Piggyback" on discovery by plaintiffs in civil litigation
 - Rules of Civil Procedure allow discovery of foreign-based documents
 - DoJ subpoenas U.S. law firms who maintain copies of documents produced

Challenge 3: Access to Foreign-Based Company Witnesses (Non-Targets)

- All foreign individuals, including lower-level employees, cannot be compelled to testify or appear before Grand Jury

Practical Solutions:

- Cooperation Credit to companies who make foreign employees available
- "Queen for a day" passes to enter U.S.
- Individuals "Carved In" to Company Plea Agreement
 - Immunized from prosecution if they cooperate with DoJ

Challenge 4: Prosecution of Foreign-Based Executives (Targets)

- Biggest cartel enforcement challenge for DoJ
- Extradition to U.S. still not a big threat to foreign-based executives. **Why?**
 - Requirement of "dual criminality" in most extradition treaties -- antitrust violation must be a *crime* in both countries
 - Some extradition treaties limit extradition through list of extraditable crimes
 - Many extradition treaties protect a country's own citizens from extradition

Extradition to the U.S. for Antitrust Crimes?

Country	US Extradition Treaty in force	Criminalisation	Law	Penalty	US Extradition: Dual Criminality or list	Extradition possible for Price Fixing	Extradition of own Nationals to US
BRAZIL	Dec. 17, 1964	Yes	Law 8137 (1990)	Imprisonment (2 to 5 years) and fine	List of offenses in Treaty	NO	NO OBLIGATION

Australia	May 8, 1976	Yes	Sections 44ZZRF & 44ZZRG Trade Practices Amendment Act 2009	Imprisonment for up to 10 years	Dual criminality, if punishable by 1 year in both	No	No obligation
Belgium	Sept. 1, 1997	No	n/a	n/a	Dual criminality (1 year)	No	No obligation
Canada	Mar. 22, 1976	Yes	s 45 Competition Act	Imprisonment up to 5 years	Dual criminality (1 year)	Yes	Obligation
France	Feb. 1, 2002	Yes	Art L420-6 Commercial Code	Imprisonment up to 4 years	Dual criminality (1 year)	Yes	No obligation
Germany	Mar. 11, 1993	(Yes) bid-rigging only	§ 263, 298 Criminal Code	Imprisonment up to 5 years	Dual criminality (1 year)	Bid rigging only	No obligation
Ireland	Dec. 15, 1984	Yes	ss 4, 8 Competition Act 2002	Imprisonment up to 5 years	Dual criminality (1 year)	Yes	Obligation*
Italy	Sept. 24, 1984	No	n/a	n/a	Dual criminality (1 year)	No	Obligation

* U.S.-Ireland treaty makes extradition discretionary when authorities of Requested State decide not to prosecute.

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Japan	Mar. 26, 1980	Yes	Anti-Monopoly Law	Imprisonment up to 5 years	List includes "unfair business transactions"	Likely yes	No obligation
Netherlands	Sep. 15, 1983	No	n/a	n/a	Dual criminality (1 year)	No	No obligation
Korea	Dec. 20, 1999	Yes	Monopoly Regulation and Fair Trade Act	Imprisonment up to 3 years	Dual criminality (1 year)	Yes	No obligation
South Africa	June 25, 2001	Yes	Section 73A, Competition Act 1998	Imprisonment up to 10 years	Dual criminality (1 year)	Yes	Obligation
Spain	June 16, 1971	No	n/a	n/a	Dual criminality (1 year)	No	No obligation
Switzerland	Sept. 10, 1997	Violation of prohibition order only	Art. 54 Federal Law on Cartels	Fines only, no imprisonment	Dual criminality (1 year)	No	Obligation unless Switzerland prosecutes
UK	Apr. 26, 2007	Yes	S. 188 Enterprise Act 2002	Imprisonment up to 5 years	Dual criminality (1 year)	Yes	Obligation

Note: Countries allowing extradition to U.S. for price fixing offences shaded.

Practical Solutions: Getting Foreign Targets to the U.S. -- A Mixture of "Carrots" and "Sticks"

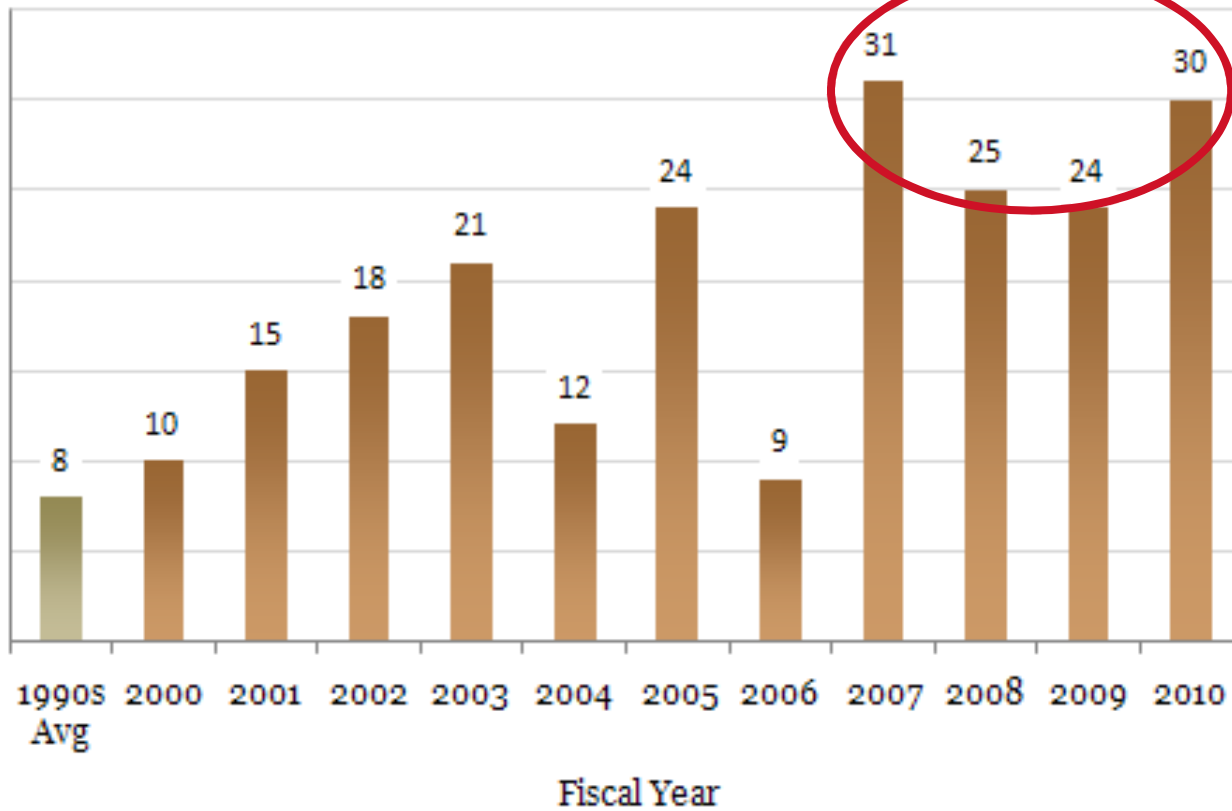


- Reduced jailed sentences compared to domestic individuals
- Minimal monetary fines
- No deportation from US after service of jail time

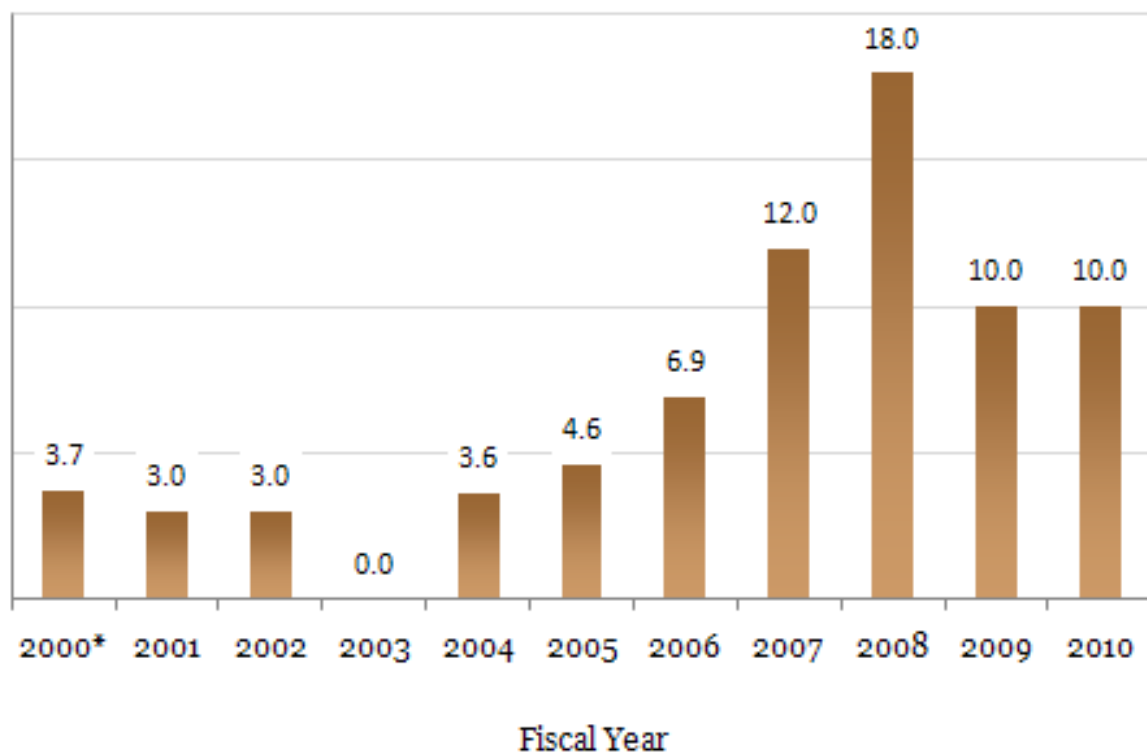


- Indictment
- U.S. Border Watch
- Interpol-Red Notice
- Extradition risk

Incarceration Trend Average Prison Sentence in Months



Average Prison Months Imposed on Foreign Defendants in International Cartel Cases**



* The first foreign national incarcerated for engaging in international cartel activity targeting U.S. consumers was sentenced in 1999.

** Includes defendants charged with 15 U.S.C. § 1 and/or obstruction offenses.

Interpol hunts ex-SAS Cargo executive

01.09.2009 | SAS Cargo's former US sales director, Jan Lillieborg, is on the run from Interpol for trying to cover up evidence of price-fixing.

SAS Cargo's former vice-president global sales, Jan Lillieborg (pictured), is on the run from Interpol for allegedly trying to cover up evidence of price-fixing.



Lillieborg has been indicted on three counts by the US Department of Justice. Of these, two counts were under Title 18 of the Federal Criminal Code – obstruction of justice, and conspiracy to obstruct justice. He was also indicted on one count under Title 15 of price fixing under the Sherman Anti-Trust Act.

Timothy Pfiel, previously SAS Cargo's area director of sales and marketing for the Americas, spent six months in a Federal prison following his conviction for his part in helping to fix cargo prices between 15 airlines, including SAS, from 2002 to 2006. He testified that Lillieborg ordered the destruction of documents relating to those charges on the same day that the Danish Competition Council raided the company's Copenhagen offices in February 2006.

With the law breathing down Lillieborg's neck, subsequent employer Green Cargo fired him, according to spokesman Mats Hollander, because "you can't function as an executive at Green Cargo with an Interpol search hanging over your head".

Now Lillieborg can't be found and Interpol are working on the assumption that he has gone on the run to escape prison time in the US.

SAS has already paid a kr294 million (US\$56.5 million) fine for its part in cargo price-fixing but is likely to have to pay another one when the European Commission completes its own ongoing investigation.

« News

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II. Case Study: U.S. Investigation of Refrigerator Compressor Industry

- Leniency application across jurisdictions by Brazilian company
- Coordinated raids by antitrust authorities in Brazil, U.S., Germany, Denmark, and Italy
- Five companies targeted in U.S. investigation
 - 2 Brazilian manufacturers
 - 1 Japanese manufacturer
 - 2 European manufacturers

II. U.S. Investigation of Refrigerator Compressor Industry *(cont'd)*

- All high-level individuals targeted by DoJ located ex-U.S.
 - 3-4 in Brazil
 - 2-3 in Japan
 - 3-4 in Europe
- Guilty pleas by 3 of 4 non-amnesty companies
 - Significant (>\$ 150 mm in cumulative) fines: Embraco, Matsushita, Danfoss

What about the individuals?

II. U.S. Investigation of Refrigerator Compressor Industry *(cont'd)*

- Indictments of only 2 foreign executives
- DoJ unable or agreeable to no prosecution of other foreign executives
- No plea agreements or jail time by individuals
- Factors:
 - Extradition treaties lacked teeth
 - Evidentiary hurdles without foreign executives
 - Document translation issues
 - Age of indicted executives?



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