



# International Cartel Prosecutions: Practical Realities of Multi-National Prosecution/Defense Coordination

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# The Marine Hose Experience: International Anti-Cartel Enforcement Cooperation

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# The Marine Hose “Club”

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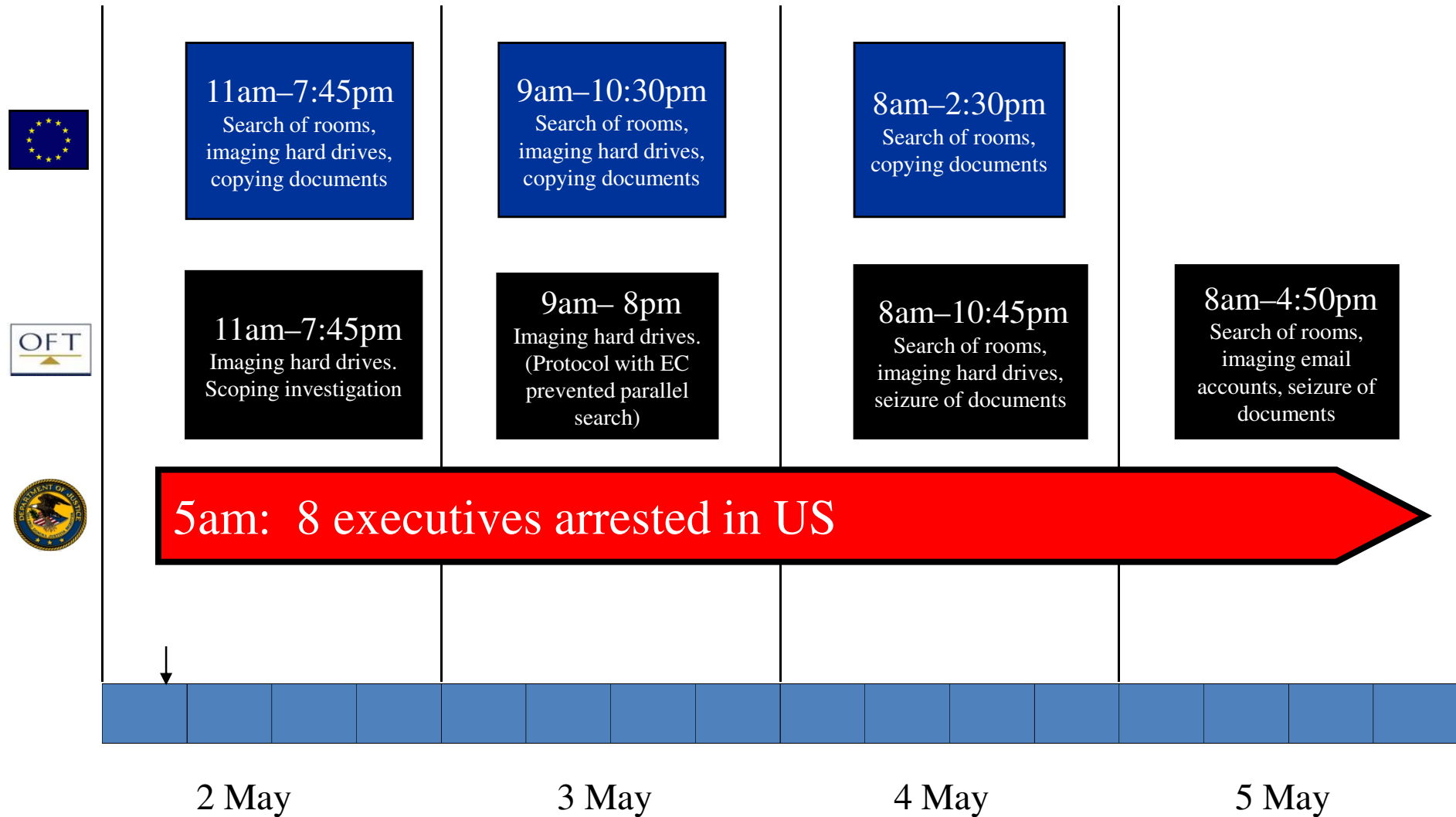
- An International Group
  - Yokohama Rubber Co./Bridgestone (Japan)
  - Parker ITR /Manuli (Italy)/Dunlop Oil and Marine (UK)
  - Coordinated by a UK consultant – PW Consulting, Peter Whittle
- The Agreements
  - Bid Rigging/Allocating Customers/Geographic markets
  - Exchanging sensitive business information
- The Enforcement Mechanism
  - Each had “historic” customers
  - On each bid, the Coordinator declared a “Champion” for the project
  - The others submitting higher bids than the Champion’s
- Started in 1986, but PW coordination began in 2000

# The Multi-National Coordinated Sting

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- Whistleblower – Yokohama Rubber Company
  - Simultaneously in 12/06
  - US, EC, Japan, Australia, Korea and Brazil
- YRC, at the behest of the DOJ/UK OFT, suggested an in-person meeting
  - Whittle set it up at the time of a trade show in Houston on May 1, 2007
  - The DOJ and FBI videotaped the cartel meeting
- The next day, the DOJ and the FBI
  - Arrested 8 executives and raided the companies' U.S. offices
  - One executive was arrested while changing planes in San Francisco
- The same day, the U.K.'s Office of Fair Trading and the E.C.,
  - Conducted coordinated raids of the European cartel members' offices
  - In coordination with local authorities across Europe

# Coordinated/Parallel Raids



# Unusual Features of the European Raids

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## Simultaneous

- Parallel raids by EC and OFT of same premises
  - EC – civil powers
  - OFT - criminal powers

## 'Chinese walls'

- ... in theory each regulator to observe an information barrier

## Scope

- 21 regulators, search of 14 rooms, imaging, search and seizure of IT belonging to 13 individuals

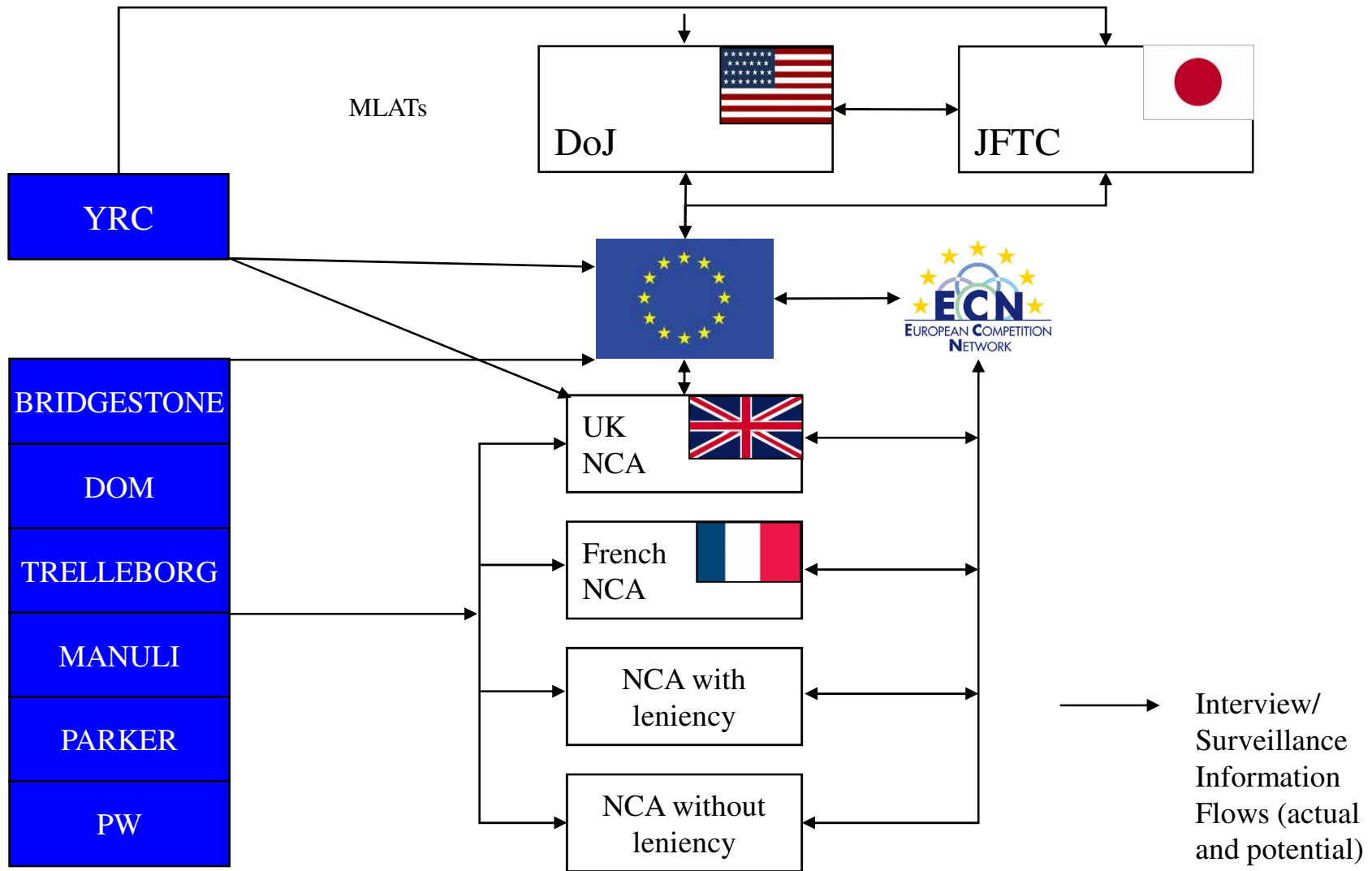
## Duration

- 4 days, outside business hours, into holiday weekend

## Domestic premises

- First UK dawn raid on domestic premises

# Investigative Cooperation: Information Sharing





# Confidentiality/Disclosure Concerns

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- Australia:
  - The OFT provided confidential documents to the ACCC for use in open court proceedings.
- Brazil:
  - Provides immediate access to file
- US:
  - Discovery in the US of EC materials
  - EC demands for US materials

# Coordinated US/UK Criminal Sentencing

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Peter Whittle	2.5 years	30 months; 7 years director disqualification; and £649,636 confiscated
Bryan Allison	2 years	24 months and 7 years director disqualification
David Brammar	20 months	20 months; 5 years director disqualification; £366,354

“Notwithstanding that the recommended sentence is based solely on effects in the US and that the UK cartel offense relates only to effects in the UK, the US agrees to recommend that, if this Court permits the defendant to **return to the UK** and defers sentencing in the US and a sentence of imprisonment is imposed for the UK cartel offense, that the period of imprisonment recommended be reduced by **one day for each day** of the total imprisonment imposed for the UK cartel offense” US Plea Bargain Agreements

# Many More Countries Now Have Criminal Sanctions – Jail for Individuals

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- US: 10 years
- Canada: 14 years
- UK: 5 years
- Ireland: 5 years
- Japan: 5 years
- Germany: 5 years
- Austria: 3 years
- France: 4 years
- Norway: 6 years
- Cyprus: 1 year
- Brazil: 5 years (more if aggravating circumstances)
- Russia: 7 years
- Estonia/Hungary/Romania/Slovenia: 3-5 years
- Australia: 10 years
- New Zealand: Considering
- South Africa: Considering
- China: No jail, but ??
- EU: Up to Members

# Interpol Red Notices!!!!

Scott Hammond, Deputy Assistant Attorney General for Criminal Enforcement Antitrust Division, U.S. Department of Justice:

In 2001, the Division adopted a policy of placing indicted fugitives on a "Red Notice" list maintained by INTERPOL.

A red notice watch is essentially an international "wanted" notice that, in many INTERPOL member nations, serves as a request that the subject be arrested, with a view toward extradition.

Multiple fugitive defendants have been apprehended through a Division INTERPOL red notice. The Division has sought, and will continue to seek, the extradition of fugitive defendants apprehended through the INTERPOL red notice watch wherever possible.

With the stiffening resolve that foreign governments are taking toward punishing cartel activity and their increased willingness to assist the United States in prosecuting cartel activity, the safe harbors for antitrust offenders are rapidly shrinking. 2/25/10 <http://www.justice.gov/atr/public/speeches/255515.htm>

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## INTERPOL Red Notice on Selvarasa Pathmanathan

THARMALINGAM Shanmugam Kumaran CONTROL No.: A-1590/S-2009

REQUESTING COUNTRY: SRI LANKA  
FILE No.: 1998/4743  
DATE OF PUBLICATION: 28 May 2009



CIRCULATION TO THE MEDIA (INCLUDING INTERNET) OF THE EXTRACTED VERSION OF THE RED NOTICE AS PUBLISHED ON INTERPOL'S PUBLIC WEB SITE: YES

FUGITIVE WANTED FOR PROSECUTION

### 1. IDENTITY PARTICULARS









PHOTOGRAPHED IN 1995 (LEFT)

WARNING: THIS PERSON MAY BE ARMED, DANGEROUS, SUICIDAL AND VIOLENT

- 1.1 PRESENT FAMILY NAME: THARMALINGAM
- 1.2 FAMILY NAME AT BIRTH: N/A
- 1.3 FORENAMES: Shanmugam Kumaran
- 1.4 SEX: M
- 1.5 DATE AND PLACE OF BIRTH: 6 April 1955 - Kankesanthurai, Jaffna, Sri Lanka
- 1.6 ALSO KNOWN AS: OTHER DATES OF BIRTH USED: DHARMALINGAM Kumaran; DHARMALINGAM Sadashivam; DHARMALINGAM Shanmugam Kumaran; JOSLY BEN JAMAN; K. PATHMANATHAN Shanmugam Kumaran; K. PATHMANATHAN Shanmugam Kumaran; K.P. KALUDAI; KHALID SAYED MOHAMED; KUMARAN Dharmalingam Shanmugam; KUMARAN Dharmalingam Shanmugam; KUMARAN T.S.; KUMARAN Tharmalingam Shanmugam; KUMARAN Tharmalingam Shanmugam; KUMARAN DARMALINGAM SHANMUGAM; KUMARAN DHARMALINGAM, born on 13 July 1954; KUMARAN THARMALINGAM Shanmugam; MURALIDARAN KANDASAMY; NATARAJAN N. Kumaran; PADMANABHA Kumaran; PADMANABHA Kirti K.; PADMANATHAN K.P.; PADMANATHAN Kumaran; PADMANATHAN Thumli Iyali Selvaraja; PADMANATHAN SELVARAJAH, born on 4 June 1955; PATHMANADAN Selvarajah; PATHMANATHAN K.P.; PATHMANATHAN Selvarajah; PATHMANATHAN Selvarajah, born on 4 June 1954; PERLADURAI, PETER NOEL ABRAHAM; PILLAI Kannika; SELVARAJAH Pathmanathan; T.S. KUMARAN; THARMALINGAM Kumaran; THARMALINGAM Shanmugam Kumaran; THARMALINGAM Shanmugam Kumaran; THARMALINGAM Shanmugam Kumaran, born on 6 April 1954; THARMALINGAM Shanmugam Kumaran, born on 13 July 1949; THARMALINGAM Shanmugam Kumaran, born on 4 June 1955; VENKARARAMAN RAM
- 1.7 FATHER'S FAMILY NAME AND FORENAMES: THARMALINGAM Selvarasa
- 1.8 MOTHER'S MAIDEN NAME AND FORENAMES: Sivapakiam
- 1.9 IDENTITY CONFIRMED
- 1.10 NATIONALITY: SRI LANKAN (CONFIRMED)

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# Differing Relative Fine Amounts

						
Yokohama Rubber	€ 0 Leniency	\$ 0 Amnesty	¥0	US \$ 0 Immunity	Ongoing	Ongoing
Manuli	€ 4.9m 30% Leniency	\$ 2 Mil	¥0 (but cease and desist order)	US \$ 0 (No bids)		
Parker	€ 25.6m Leniency Rejected/+30%	\$2.3 Mil (2/16/10)	¥0 (but cease and desist order)	US \$ 33x		
Bridgestone	€ 58.5m Leniency Rejected/+30%	Ongoing	¥2.4m (and cease and desist order)	US \$ 256x		\$1 Million Civil Settlement
Trelleborg	€ 24.5m	\$ 3.5 Mil	¥0 (but cease and desist order)	US \$ 40x		
Dunlop Oil and Marine	€ 18m	\$ 4.5 Mil	¥0 (but cease and desist order)	US \$ 117x		

# Competitors Will Communicate

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“People of the same trade seldom meet together ... but ... ends ... in contrivance to raise prices.” “It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty or justice.” Adam Smith, *The Wealth Of Nations* (1776)

EXECUTIVE RETREAT BY WILLIAM HAMILTON



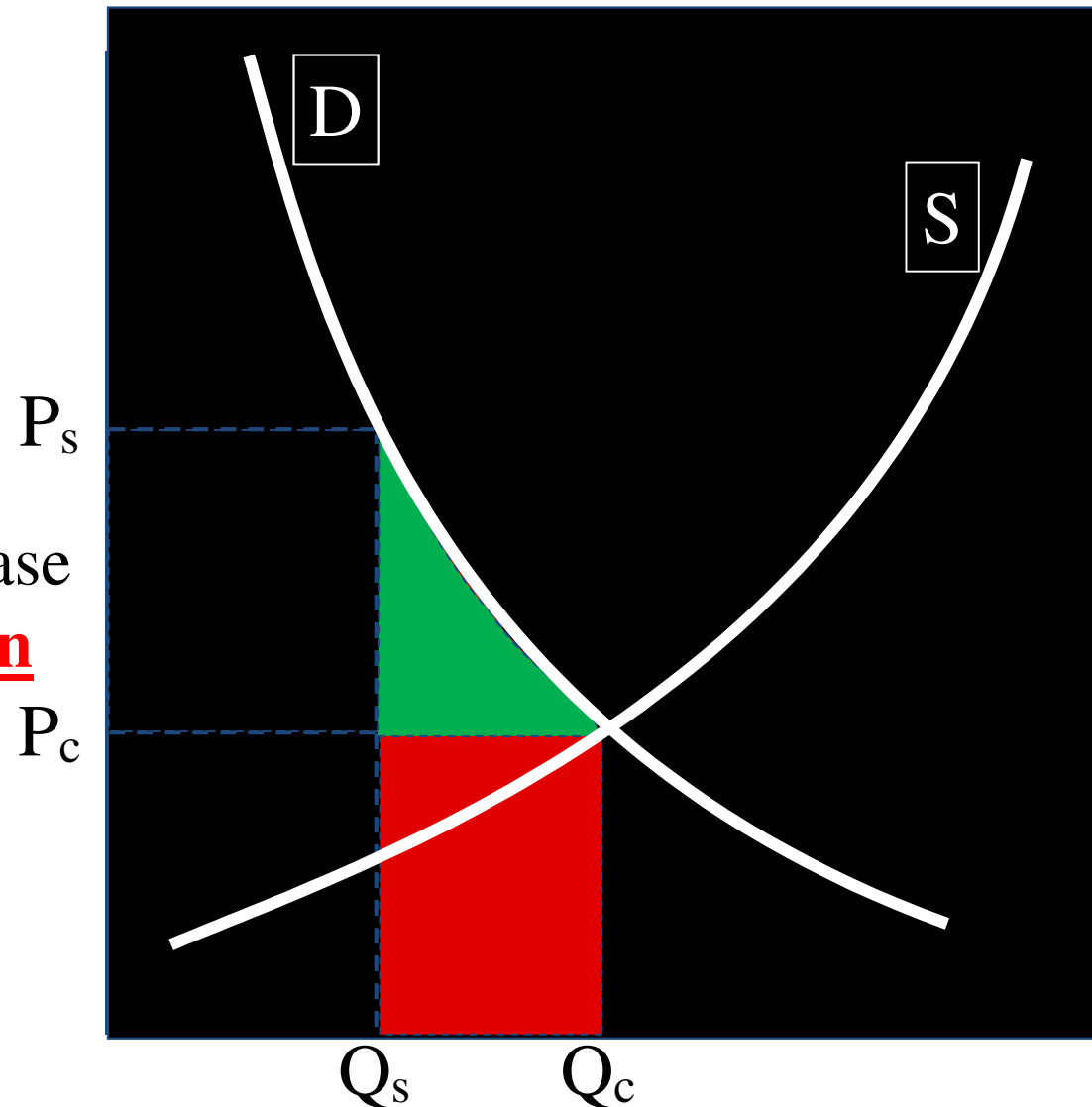
***"I love the beauty, the break from family life, and the camaraderie---but what will always make this place for me is the price-fixing."***

# Price Fixing Is NOT That Easy!!

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Antitrust  
Economics 101:

All else equal,  
price cannot increase  
without a reduction  
in output.



# EFFECTIVE Price Fixing Requires Coordination

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# BUT -- Who Is In the Room?

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"I started hearing about price fixing at ADM. People said it was fairly common."



“I Was A  
Corporate Mole  
for the FBI”

-- Mark Whitacre

# 50+ Leniency Programs -- Materially -- Increase the Risk of Detection





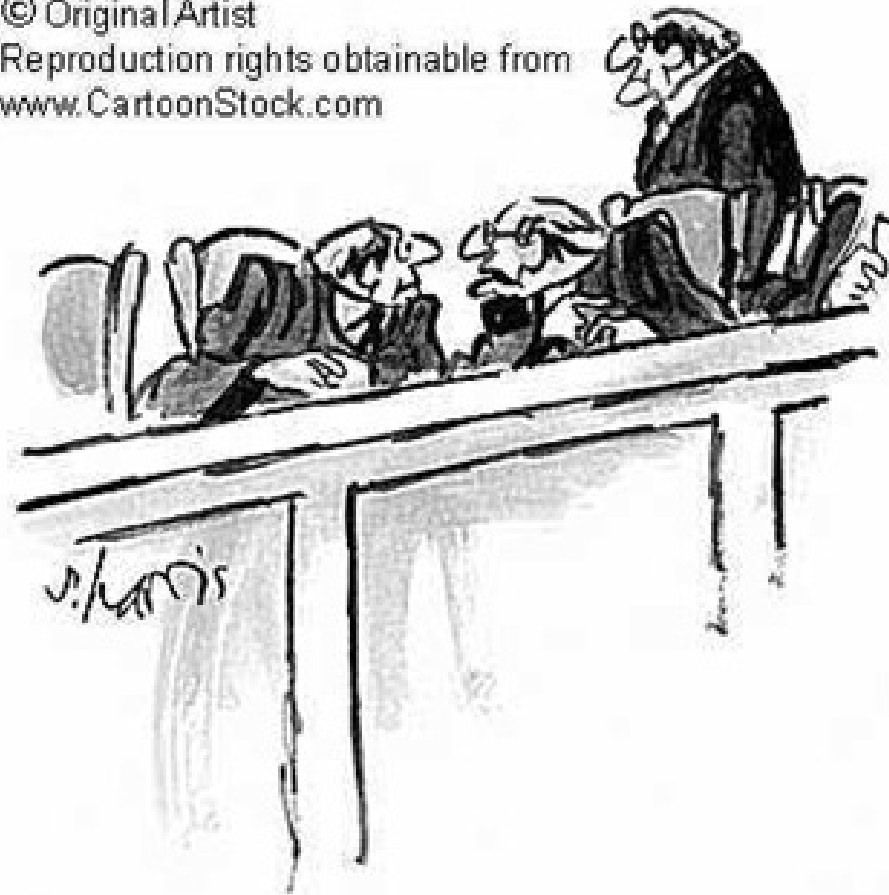
# Worldwide Anti-Cartel Enforcement Aggressiveness/Cooperation!



Can't We Just Say: "Nothing Happened"!!!



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"FRANKLY, I'M DUBIOUS ABOUT AMALGAMATED  
SMELTING AND REFINING PLEADING INNOCENT TO  
THEIR ANTI-TRUST VIOLATION DUE TO INSANITY."

# The Benefits and Risks of Leniency

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- “Pros” of Leniency

- No or lesser fine
- No jail for executives
- Encourages Compliance
- Enhances Customer Relations
- Allows Pre-emptive Civil Settlements
- Competitive Advantage

- “Cons” of Leniency

- Admissions of wrong doing in this/other mkts
- Burden/expense of cooperation
- Risk of losing leniency
- Private litigation burden/expense/damages
- Exposes Employees
- Anger competitors



# An Effective Leniency Program Requires Predictability

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- Scott Hammond (DOJ)
  - "There are **three** essential cornerstones that must be in place before a jurisdiction can successfully implement a leniency program.
    - **First**, ... **severe sanctions** for those who participate in hard core cartel activity and fail to self-report.
    - **Second**, organizations must perceive a **high risk of detection** ... if they do not self-report.
    - **Third**, there must be transparency and **predictability** to the greatest extent possible throughout a jurisdiction's cartel enforcement program, so that companies can predict with a high degree of certainty **how they will be treated if they seek leniency**,[.]
  - "Our Leniency Program ... [has] eliminated, to a great extent, the exercise of prosecutorial discretion in its application. ... [T]his is a very difficult thing to do, and we have had to swallow hard on a number of amnesty applicants that we would have preferred to prosecute."
  - "[R]ecall that we had roughly 15 years of experience with a ... Program that was designed to maintain a greater degree of prosecutorial discretion, and it simply **did not work**."
  - "Prospective amnesty applicants come forward in direct proportion to the **predictability** and **certainty** of whether they will be accepted into the program. "
  - "If a company **cannot** accurately predict how it will be treated as a result of its corporate confession, our experience suggests that it is far less likely to report its wrongdoing, especially where there is no ongoing government investigation. "
  - "Uncertainty in the qualification process will **kill** an amnesty program." <http://www.justice.gov/atr/public/speeches/255515.htm>

# The Lessons of *Stolt-Nielsen*

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- "It ill behooves government agents and prosecutors to enter into agreements of transactional immunity with [defendants], milk them of substantial leads and information that literally make the government's case then,
  - at the last moment, rely on some technical or relatively minor deficiency in performance to pull the rug from under the cooperating informant by claiming a breach and proceed to prosecute him in a slam-dunk case based largely on his own revelations.
  - Yet, this is precisely what we perceive to have happened here, and due process cannot abide such behavior ....'” 524 F. Supp. 2d 609, 628 (E.D. Pa. 2007)
- Amicus Comments to the US Supreme Court if withdrawal of immunity were to be upheld:
  - “[C]ompanies doing business in the U.S. **lose the benefits of predictable antitrust policy. The resulting confusion is a significant impediment to international trade.**” *Brief of The Grand Duchy of Luxembourg*
  - ““To maximize the incentive for defection and encourage cartels to break down more quickly, it is important not only that the first one to confess receives the best deal, **but also that the terms of the deal be as clear as possible at the outset.**”” *Brief of International Association of Independent Tank Owners (quoting OECD, Directorate for Financial Fiscal and Enterprise Affairs, Committee on Competition Law and Policy).*
  - “[T]he decision to self-report is a very difficult one, and whether a corporation decides to do so rests in large part on whether it has **confidence that the government will honor its promises.**” *Brief of Chamber of Commerce.*
  - “[T]he **perception in the business community of unjust and overzealous prosecutors eager to overturn bargained-for nonprosecution agreements would actually deter cooperation with government investigations.**” *Brief of the New England Legal Foundation.*

# Joint Defense/Judgment Sharing Agreements

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- Joint and Several Liability Gives Lethal Leverage to Claimants
  - No Implied Right of Contribution in the United States – 3X Damages
  - Contribution Rights in Europe BUT What If Settlements?
- A JSA Can Keep All Defendants In the Joint Defense
  - Each Defendant Retains the Right to Settle, provided
    - “The claimant(s) must ‘take out’ sales of settling defendant in seeking recovery from other non-settling defendants.”
- Claimants hate JSAs, but it has proved difficult to get all to sign
  - Determination of Sharing Percentages where market shares vary
  - Few Defendants want to give up their chance to get out early – cheap!!
  - Loss of leniency?

# THE BOTTOMLINE:



*“Would everyone check to see they have an attorney?  
I seem to have ended up with two.”*

