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Extradition and antitrust law: Businessmen involved in global cartels extradited to foreign countries

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The European Union perspective

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The United States perspective

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Cartels and Canada: Exploring the past and the future of extradition under Canadian law

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ABSTRACT

As more jurisdictions criminalise cartel conduct and increase cooperation with other enforcement regimes, the threat of extradition in global cartel cases is becoming more and more real. The successful extraditions, directly or indirectly related to cartel charges, so far have involved five countries: the United Kingdom (2010), Israel (2012), Germany (2014), Canada (2014) and Bulgaria (2016). These five extraditions have involved citizens from five countries: the United Kingdom, the United States (based on a dual citizenship), Italy, Canada and Israel. On the other hand, no extradition has been sought from Japan until today even if dozens of Japanese executives remains fugitives for the US justice. The nationality of the defendant may prevent extradition—but not when they travel, and no one is really safe.

Au fur et à mesure que les juridictions criminalisent les cartels qui violent le droit de la concurrence et augmentent leur coopération avec les autres pays, la menace de l'extradition dans les affaires mondiales de cartel devient de plus en plus réelle. Les extraditions réussies, directement ou indirectement liées aux charges de cartel, ont impliqué jusqu'à présent cinq pays: le Royaume-Uni (2010), l'Israël (2012), l'Allemagne (2014), le Canada (2014) et la Bulgarie (2016). Ces cinq extraditions ont impliqué des citoyens de cinq pays: le Royaume-Uni, les États-Unis (basé sur une double citoyenneté), l'Italie, le Canada et l'Israël.

D'autre part, aucune extradition n'a été demandée au Japon même si des dizaines de cadres japonais restent, aux yeux de la justice américaine, des fugitifs. La nationalité de l'accusé(e) peut empêcher l'extradition, mais pas lorsque la personne voyage, par conséquent personne n'est vraiment à l'abri.

The European Union perspective*

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I. Extradition matters

1. The global enforcement of antitrust laws prohibiting cartels is greatly affected by the extent to which extradition is a realistic prospect.¹ As more jurisdictions criminalise cartel conduct and increase cooperation with other enforcement regimes, the threat of extradition in global cartel cases is becoming more and more real. Indeed, the United States Department of Justice (DOJ) has now secured its first litigated extradition on antitrust charges: Romano Piscioti, an Italian

* This article expresses the authors' views and does not engage their firm or their clients. It is one of a series of contributions on extradition from the perspective of different jurisdictions coordinated by the law firm Hogan Lovells International LLP.

1 C. Thomas and G. De Stefano, Extradition & Antitrust: Cautionary Tales for Global Cartel Compliance, *MLex AB Extra*, September 2016, available at: https://awards.concurrences.com/IMG/pdf/extradition_and_antitrust_thomas_and_de_stefano.pdf.

national, was extradited from Germany (where he was catching a connecting flight) on cartel charges related to the marine hose cartel.

2. The successful extradition of a fugitive for an antitrust violation is no simple matter. First of all, there must be an extradition treaty between the requesting and the requested jurisdiction. Secondly, the alleged antitrust violation must be considered punishable under the criminal laws of both jurisdictions (this is the double-criminality requirement). Lastly, the nationality of the individual concerned may prevent or reduce the chance of extradition, because several jurisdictions have laws that prevent the extradition of their own citizens.

3. Even if business people live in a country that will not extradite them, if they travel to or through another country, they will increasingly face the risk of extradition. The European experience is the perfect illustration.

II. First businessman extradited from Europe on cartel charges

4. In 2014, Romano Pisciotti, an Italian national, was extradited from Germany to the United States for bid rigging, price fixing and allocating market shares for the sale of marine hoses used to transport oil to and from ships.² The European Commission had also investigated the marine hose case³ and, according to the EU General Court, Mr. Pisciotti's company had played a coordinating role in the matter.⁴

5. This marked the first and so far only litigated extradition on a cartel charge. That said, the US government had already demonstrated its ability to extradite individuals from Europe on counts that are closely related to cartel law violations.⁵ For example, in 2010, the DOJ secured the extradition from the United Kingdom of Ian Norris, a retired British CEO, on obstruction of justice charges relating to an antitrust investigation in the carbon and graphite products cartel, after a multi-year battle. Mr. Norris was convicted of the same charge in the US, and sentenced to one and a half years of imprisonment.⁶

2 DOJ case file, available at: <https://www.justice.gov/atr/case/us-v-romano-pisciotti>.

3 European Commission decision of 28 January 2009, at para. 64, available at: http://ec.europa.eu/competition/antitrust/cases/dec_docs/39406/39406_1902_1.pdf.

4 Case T-146/09 RENV, *Parker Hannifin Manufacturing and Other v. Commission*, ECLI:EU:T:2016:411, para. 106–7 and 118.

5 For further details on these cases, see *Extradition & Antitrust: Cautionary Tales for Global Cartel Compliance*, *MLex AB Extra*, September 2016, cited above.

6 In 2016, Yuval Marshak, an Israeli executive, was extradited from Bulgaria to face charges that he defrauded foreign military financing by, for example, falsifying bid documents to make it appear that certain contracts had been competitively bid when they had not. He pleaded guilty and was sentenced to 30 months in prison in 2017. See DOJ press releases of 13 March and 12 June 2017, available at: <https://www.justice.gov/opa/pr/israeli-executive-pleads-guilty-defrauding-foreign-military-financing-program> and <https://www.justice.gov/opa/pr/israeli-executive-sentenced-prison-defrauding-foreign-military-financing-program>.

6. Behind the DOJ's success in the marine hose case, there is of course the story of an individual. Romano Pisciotti was unaware of having been placed on an Interpol Red Notice when he was stopped by the German police while catching a connecting flight in Frankfurt. Indeed, Mr. Pisciotti's indictment was "under seal" i.e., filed with a court without becoming a matter of public record. A few years earlier, Mr. Pisciotti had been arrested in Switzerland but released within hours when that country determined it would not extradite him. And he had travelled to the UK, where he had two days of interviews with prosecutors at the US embassy (the DOJ had issued a letter of "safe passage," giving Mr. Pisciotti assurance that he would not be arrested).

7. Mr. Pisciotti fought his extradition for almost ten months: before the courts in Frankfurt, the German Constitutional Court, the Italian courts, the Court of Justice of the EU, and the European Court of Human Rights.⁷ He was eventually extradited from Germany to the US. Once on US soil, Mr. Pisciotti pleaded guilty to the DOJ's charges, resulting in a two-year period of imprisonment and a \$50,000 criminal fine.

8. Mr. Pisciotti's story underlines the reality that faces extradited white-collar fugitives. After his extradition, he cooperated with investigators and pleaded guilty: but he still spent over two years in custody, including several months in a room with around forty inmates and a single corner toilet, with the lights on for twenty-one hours a day. While the DOJ credited him for the nine months that he had spent in custody in Germany pending his extradition, his actual release date was more than one month later than the scheduled date because the US prison management lost his passport. Mr. Pisciotti could not be returned to his home country, Italy, for completion of his sentence even though his plea agreement allowed for this option (as do several extradition treaties and the Council of Europe Convention on the Transfer of Sentenced Persons).⁸ The explanation is simply that the Italian Ministry of Justice had to wait too long for documentation from the US regarding the case. Today, Mr. Pisciotti is unemployed.

7 For further details on these cases, see *Extradition & Antitrust: Cautionary Tales for Global Cartel Compliance*, *MLex AB Extra*, September 2016, cited above.

8 The Law Library of US Congress offers statistics, available at: <http://blogs.loc.gov/law/2016/03/new-resource-covers-the-laws-of-157-countries-on-the-extradition-of-citizens>.

III. Cartel criminalisation increases the likelihood of extradition from Europe

9. Antitrust agencies in countries that treat cartel conduct as a criminal offence—in particular the United States—rely on extradition to prosecute foreign nationals.⁹ Interpol’s International Notice system—namely, its Red Notices—is a key aspect of successful extradition by the US authorities.¹⁰ The Interpol’s website contains a few examples or Red Notices,¹¹ although most indictments remain under seal so that the fugitive is not aware of their status and can be apprehended while travelling, as happened to Mr. Piscioti. All EU Member States are members of Interpol.

10. But to successfully extradite a fugitive for an antitrust violation is no easy task. First, there must be an existing extradition treaty. The presence of an extradition treaty can be largely assumed in most jurisdictions. For example, the US has treaties with all but a very few countries.¹² There are other conditions such as the double criminality requirement: the alleged antitrust violation must be considered punishable under the criminal laws of both the requesting and the surrendering jurisdictions.

11. Historically very few jurisdictions criminalised cartel conduct, leaving the DOJ unable to pursue extradition in the case of most if not all fugitives. But cartel violations are today a criminal offence in several jurisdictions around the globe. And Europe is part of this trend towards criminalisation.

12. Cartels are a criminal offence in EU Member States such as Denmark and the United Kingdom, as well as—at least in theory—France and Greece. Moreover, according to the European Commission, “*criminal or quasi-criminal fines are imposed in five Member States: Denmark, Estonia, Germany, Ireland and Slovenia.*”¹³ Several Member States have criminalised aspects of cartel conduct: for example, in Austria, Germany and Italy, bid rigging is a criminal offence, and cartels involving conduct that amounts to fraud can be prosecuted more generally in Europe. Romano Piscioti was accused amongst other things of bid rigging, which is a criminal offence in Germany.¹⁴ Finally, it is worth noting that the US-EU Extradition Agreement which entered into force in 2010 provides that the requested state may, at its discretion, grant extradition even if its laws do not provide for the punishment of an offence committed outside its territory in similar circumstances.¹⁵

IV. Nationality of the defendant may prevent extradition—but not when they travel

13. The nationality of the defendant may prevent or reduce the chance of extradition, because several jurisdictions have laws that prevent the extradition of their own citizens.¹⁶

9 The US government’s practice is to insist on jail sentences for all defendants, domestic and foreign: see the speech by Brent Snyder (former acting assistant attorney general), Individual Accountability for Antitrust Crimes, 19 February 2016, available at: <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-yale-global-antitrust>.

10 C. Hampton, Interpol as an antitrust tool, *Competition Law Insight*, 15 April 2014. See also the Interpol’s website, available at: <http://www.interpol.int/Interpol-expertise/Notices>; and the DOJ Attorneys’ Manual, section on Red Notices, available at: <https://www.justice.gov/usam/criminal-resource-manual-611-interpol-red-notices>.

11 It is possible to search the Interpol’s website (available at: <http://www.interpol.int/notice/search/wanted>) by inserting the search term “Sherman” in the “free text” field to obtain a few Red Notices for cartel cases.

12 A list of the US extradition treaties is available at: <http://www.state.gov/s/l/treaty/faqs/70138.htm>.

13 European Commission’s staff working document Impact Assessment, accompanying the document Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, 22 March 2017, available at: http://ec.europa.eu/competition/antitrust/impact_assessment_annexes_en.pdf, p. 21.

14 Mr. Piscioti was accused of engaging in a bid-rigging conspiracy, and therefore he was extraditable from Germany, a country where bid rigging (but not price fixing or other collusive conduct) is a criminal offence. Bid rigging may be a criminal offence also in Italy, but the Italian government would not extradite Mr. Piscioti because he was an Italian citizen.

15 Article 4(4) of the Agreement on extradition between the European Union and the United States of America (OJ L 181, 19.7.2003, pp. 27–33, available at: [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22003A0719\(01\)&qid=1472817060507&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22003A0719(01)&qid=1472817060507&from=EN)) entered into force in 2010. It supplements the bilateral extradition treaties between EU Member States and the US. As a matter of EU law, the Member States are obliged to comply, in their bilateral relationships with the United States, with the requirements flowing from the EU-US agreement (see the Handbook on the practical application of the EU-US Mutual Legal Assistance and Extradition Agreements published by the Council of the European Union in March 2011, available at: <http://www.statewatch.org/news/2011/mar/eu-council-eu-usa-mla-handbook-8024-11.pdf>).

16 The Law Library of US Congress has published a chart containing information on the terms that apply to the extradition of citizens in 157 jurisdictions around the globe. The statistics are available at: <http://www.loc.gov/law/help/extradition-of-citizens/chart.php?loc=bloglaw>. Of the countries surveyed, 60 were found to have laws that prevent the extradition of their own citizens. Other requirements may apply in different countries, or they may have a provision that simply allows a government minister to refuse the extradition of a citizen.

14. Indeed, Mr. Piscioti would have not been extradited by Germany had he been a German citizen. In an ironic twist, the German authorities currently decline to extradite one of his alleged co-conspirators who has been charged with identical crimes, and who today remains at large as a US-indicted fugitive in Germany.¹⁷

15. For exactly this reason, the Piscioti extradition saga is still very much alive today. Mr. Piscioti is convinced that his extradition was unfair and discriminatory because the German government extradited him as a non-German citizen, while refusing to do the same for a German executive at another company allegedly involved in the same marine hose cartel. Mr. Piscioti initiated proceedings before the Regional Court of Berlin claiming damages from the German state. The Berlin Court has decided to stay the proceedings and refer the case to the Court of Justice of the EU for a ruling on whether it is compatible with the principle of non-discrimination under EU law that Germany extradites an Italian citizen to the US under cartel charges while at the same time refusing to do the same with its own nationals.¹⁸ The forthcoming Court of Justice ruling this issue will be the next episode of the saga of Mr. Piscioti, although a recent judgment in another case, *Petruhhin*, offers some insight into what may happen.

16. In 2016, the Court of Justice of the EU ruled on a parallel case concerning an Estonian national arrested in Latvia in connection with organised drug-trafficking, and whose extradition was sought by Russia. The court ruled that laws enabling a state to prosecute its own nationals even for offences committed outside the national territory could justify a refusal to extradite those nationals that does not apply to citizens of another EU Member State. According to the Court of Justice, extradition for non-nationals avoids a risk of impunity that does not exist for nationals in these circumstances.¹⁹

17. Subject to what the Court of Justice may say in the Mr. Piscioti's case,²⁰ this judgment suggests that those EU Member States that refuse to extradite their citizens for cartel offences are likely to continue to do so. That said, it is worth noting that the Court of Justice held in the *Petruhhin* case that, before extraditing the citizen of another Member State to a third country, the requested

Member State should inform that other Member State so that they may if they choose issue a European arrest warrant, with a view to prosecuting the individual themselves. That European arrest warrant would be given priority over the third country extradition request.

18. In the Court of Justice hearing on 12 July 2017 in the case of Mr. Piscioti, the counsel to Germany disclosed that the German government had contacted the country of citizenship of Mr. Piscioti, Italy (thus meeting the “Petruhhin mechanism”), which however did not require a warrant for its own citizen. Advocate General Yves Bot, who will publish a legal opinion on Mr. Piscioti's case on 24 October 2017, asked about the different treatment between Mr. Piscioti and Mr. Bangert, the German citizen involved in the same cartel, suggesting that Germany might have prosecuted him to clarify why it had found him not guilty “for the sake of appearances”.²¹

V. The extradition threat should prompt compliance

19. Mr. Piscioti has become the example of how far the long arm of the US government can reach. It should also be recognised that other jurisdictions besides the US have criminalised cartel conduct, and thus they might follow the same extradition strategy in the future.

20. Despite all the hurdles described above, extradition is a very real prospect. Even if executives live in a country that will not extradite, if they travel to another country, they are increasingly at risk of extradition.²² After all, in the case of Mr. Piscioti, the Red Notice list worked.

21. In the past, business people in Europe would surely have an idea that what they were doing could be considered a violation of antitrust laws, but perhaps they had less appreciation of—or concern about—the implications for themselves. The prospect of extradition, Red Notices and jail is now a real factor of which firms caught up in cartel investigations need to take into account as they plan their defence in the EU. But the more fundamental lesson is about the importance of compliance. After seeing Mr. Piscioti's experience, executives in Europe would be right to conclude that the only safe way to avoid jail is rigorously to avoid all involvement in cartel conduct. ■

17 See the US DOJ press release, available at: <https://www.justice.gov/opa/pr/former-marine-hose-executive-who-was-extradited-united-states-pleads-guilty-participating>. This German businessman, formerly associated with Dunlop Marine and Oil Ltd., has declared to the press that he received a notification from the Hamburg prosecutor that he would not be extradited, see *MLex* article of 21 May 2014, US wins one extradition, but dozens of alleged price fixers remain out of reach. He was also held in Spain but not extradited to the US, see *MLex* article of 17 March 2015, Failed arrest, embassy interview smoothed way for Piscioti extradition.

18 Case C-191/16, Request for a preliminary ruling from the Landgericht Berlin lodged on 5 April 2016, *Romano Piscioti v. Bundesrepublik Deutschland*, OJ 2016/C 270/33.

19 C-182/15, *Aleksei Petruhhin*, ECLI:EU:C:2016:630, para. 31.

20 We note that Mr. Piscioti was not residing in Germany, as Mr. Petruhhin was in Latvia, but was only passing through Germany in order to catch a flight. Another case, relating to an Austrian doctor sentenced to life imprisonment in Dubai for mercy killing, is also pending before the Court of Justice: C-473/15, *Peter Schottböfer & Florian Steiner GbR v. Eugen Adelsmayr*, request for preliminary ruling from the Bezirksgericht Linz (Austria), 7 September 2015.

21 See *MLex* article of 12 July 2017, Top EU judges review cartel executive's fight against German extradition.

22 Bill Baer, assistant attorney general for the Antitrust Division (today acting associate attorney general) stated that: “Even if you're not extradited immediately from your home country, you may not be able to travel for fear you'll get stopped (...) and detained somewhere else until we can sort out whether extradition is appropriate,” see interview of 15 May 2015, available at: <http://www.law360.com/articles/656850/exclusive-doj-s-baer-promises-more-extradition-fights>.

The United States perspective*

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1. Over the past decade, the aggressive enforcement of US criminal antitrust laws by the United States Department of Justice (“DOJ”) has focused largely on extraterritorial conduct.¹ In addition to prosecuting an increasing number of foreign companies and executives, the DOJ has appeared to become more aggressive in pursuing extradition for violations of criminal antitrust laws. This appearance of aggressiveness belies the fact that DOJ has only pursued extradition in a select few cases, indicating a hesitancy to seek extradition except in those cases in which there is a strong chance of success.² With the global proliferation of criminal cartel laws and an increase in cooperation amongst global enforcement agencies, however, the threat of extradition grows. Despite the current hesitancy to seek extradition, DOJ is likely to pursue extradition in criminal antitrust cases with greater frequency in the future, as DOJ becomes emboldened by its mounting successes and the global criminal antitrust enforcement landscape becomes more favorable. While indicted foreign nationals once could stay safely outside of DOJ’s reach with little threat of extradition to the United States, the landscape is rapidly changing and fewer safe havens exist to shield indicted defendants from extradition to the US.

I. Increasing global criminal enforcement increases the likelihood of successful extradition to the United States

2. There are two requirements that must be met in order to successfully extradite a fugitive to the US: an existing extradition treaty and dual criminality. The existence of an extradition treaty can largely be assumed, as the US has treaties with all but a handful of nations.³ As a result, the likelihood DOJ successfully pursues extradition in a criminal antitrust case often hinges on whether there is dual criminality. A person may be extradited only when his or her actions constitute an offense in both the requesting and requested countries.

3. Historically, very few countries had criminal cartel laws. DOJ was therefore unable to pursue extradition in most, if not all, fugitive cases. Recently, however, there has been an increase in the criminalization of cartel conduct. In 1990, only thirteen countries had laws that criminalized some or all cartel conduct. Today, however, more than thirty countries impose criminal liability for cartel activities, including major economies, such as Australia, Brazil, Canada, Germany, Israel, Japan, Mexico, South Korea, the United Kingdom and Russia. Criminalization is clearly on the rise.

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1 It is well established that the federal antitrust laws apply to foreign conduct that has a substantial and intended effect in the United States. See Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (Sherman Act); see also *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993); *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 9 (1st Cir. 1997); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 444 (2d Cir. 1945).

2 For example, despite prosecuting dozens of Japanese executives in the past fifteen years, and despite the fact that extradition from Japan is possible under existing laws, DOJ has not sought extradition in any case against a Japanese executive. This suggests that DOJ is waiting for the right test case, the one with the greatest likelihood of success, before seeking extradition.

3 The US has bilateral extradition agreements with 107 nations. <https://www.state.gov/documents/organization/71600.pdf>

4. Of course, issues can arise in assessing dual criminality. Although cartel prohibitions are increasingly prevalent globally, not all criminal antitrust laws are identical. For example, while more than half of EU Member States and all of the BRICS nations (Brazil, Russia, India, China, and South Africa) have criminalized cartel conduct in some form, several of these nations provide criminal sanctions only for bid rigging. In these jurisdictions, unless the DOJ has alleged bid rigging as part of the offense, there would be no dual criminality and thus no possibility of extradition. Additionally, although dual criminality is increasingly common, the nationality of the defendant could still prevent extradition. Some nations, such as Brazil, Germany, Japan, and South Korea, limit the extradition of their citizens by treaty or by statute. Finally, the extradition process is an inherently diplomatic and political process. Frequently the ultimate determination regarding extradition rests with a politician. Extradition determinations can vary substantially depending upon the political climate and relationship between the two nations.

5. Even assuming that DOJ is likely to succeed in an extradition request, DOJ must consider the strength of its case. Extradition is a time-consuming process. It can take years for an individual to be extradited to the United States. In the interim, DOJ's criminal case, which will be tried once the defendant arrives in the US, becomes increasingly stale and more difficult to win. Undoubtedly DOJ only wants to pursue extradition, and expend the tremendous resources it takes to pursue extradition, in those cases it expects to ultimately win at trial.

II. Recent successful extraditions to the US

1. Yuval Marshak

6. In October 2016, the DOJ successfully secured the extradition from Bulgaria of an Israeli citizen.⁴ Yuval Marshak, a former owner and executive of an Israel-based defense contractor, allegedly participated in multiple schemes between 2009 and 2013 to defraud the United States Foreign Military Financing program and used a company in the United States to launder some of the proceeds of his fraud.⁵ His extradition was based on fraud charges for allegedly falsifying bid documents.⁶ Marshak was charged with wire fraud, mail fraud, major fraud against the United States, and international money laundering.⁷ On March 13, 2017, Marshak pleaded guilty

4 Press Release, US Dep't of Justice, Israeli Executive Extradited and Arraigned on Fraud Charges Involving the Foreign Military Financing Program (Oct. 14, 2016), available at <https://www.justice.gov/opa/pr/israeli-executive-extradited-and-arraigned-fraud-charges-involving-foreign-military-financing>.

5 Id.

6 Id.

7 Indictment, *United States v. Marshak*, No. 3:16 CR 11 (D. Conn. Jan. 1, 2016).

to one count of mail fraud, two counts of wire fraud, and one count of major fraud against the United States.⁸ On June 12, 2017 Marshak was sentenced to 30 months in prison.⁹

2. John Bennett

7. In November 2014, John Bennett, a Canadian national, was extradited to the US from Canada.¹⁰ In 2009, Bennett and two others were charged in an indictment alleging fraud, kickbacks, and bid rigging involving contracts at US Environmental Protection Agency (EPA) Superfund sites.¹¹ Bennett was chairman and chief executive of Bennett Environmental, a Canada-based soil remediation company, which had been convicted in 2008 of conspiracy to defraud the EPA at a New Jersey Superfund site, and was sentenced in December 2008 to a fine of \$1,000,000 and ordered to pay the EPA \$1,662,000 in restitution.¹²

8. Bennett was indicted in 2009 and contested his extradition in Canadian courts for more than five years. In April 2014, the Court of Appeal for British Columbia dismissed his appeal, deeming the US charges to be equivalent to the Canadian offenses of fraud and conspiracy to commit fraud, and the Supreme Court of Canada declined to hear Bennett's appeal.¹³ On November 14, 2014, Bennett was extradited to the United States to stand trial. Although DOJ's case against Bennett involved a distinct bid-rigging charge, the charges on which the Canadian courts based his extradition were not Sherman Act violations.

9. In March 2016, after a three-week trial in federal court in Newark, New Jersey, Bennett was convicted of committing major fraud against the United States and

8 Press Release, US Dep't of Justice, Israeli Executive Pleads Guilty to Defrauding the Foreign Military Financing Program (Mar. 13, 2017), available at <https://www.justice.gov/opa/pr/israeli-executive-pleads-guilty-defrauding-foreign-military-financing-program>.

9 Press Release, US Dep't of Justice, Israeli Executive Sentenced to Prison for Defrauding the Foreign Military Financing Program (Jun. 12, 2017), available at <https://www.justice.gov/opa/pr/israeli-executive-sentenced-prison-defrauding-foreign-military-financing-program>

10 Press Release, US Dep't of Justice, Canadian Executive Extradited on Major Fraud Charges Involving a New Jersey Environmental Protection Agency Superfund Site (Nov. 17, 2014), available at http://www.justice.gov/atr/public/press_releases/2014/309928.pdf.

11 Press Release, US Dep't of Justice, Three Individuals Indicted for Roles in Conspiracy Schemes Involving Two U.S. Environmental Protection Agency Superfund Sites in New Jersey (Sept. 11, 2009), available at http://www.justice.gov/atr/public/press_releases/2009/249958.htm.

12 Press Release, US Dep't of Justice, Bennett Environmental Inc. Pleads Guilty to Defrauding the U.S. Environmental Protection Agency (July 31, 2008), available at http://www.justice.gov/atr/public/press_releases/2008/235656.pdf; see also Plea Agreement, *United States v. Bennett Environmental, Inc.*, No. 08-CR-534 (D.N.J. July 31, 2008), available at <http://www.justice.gov/atr/cases/1235700/235748.pdf>.

13 *United States v. Bennett*, 2014 BCCA 145 (Apr. 14, 2014), available at <http://www.courts.gov.bc.ca/jdb-txt/CA/14/01/2014BCCA0145.htm>; *Bennett v. Attorney General of Canada*, No. 35839 (S.C.C.) (case docket), available at <http://www.scc-csc.gc.ca/case-dossier/info/dockregi-eng.aspx?cas=35839>.

conspiring to pay kickbacks.¹⁴ Bennett was sentenced to sixty-three months in prison, two years of supervised release, a \$12,500 fine, and \$3.8 million in restitution.¹⁵

3. Romano Piscioti

10. Romano Piscioti is an Italian national and a former executive with Parker ITR, a rubber hose manufacturer headquartered in Italy. According to court documents filed by the DOJ in that investigation, several marine hose producers conspired to fix prices, rig bids, and allocate market share between them, harming competition and inflating prices. Five companies, including Parker ITR, and eight other individuals were convicted in the rubber hose cartel investigation prior to Piscioti's extradition.

11. Piscioti was indicted under seal in August 2012, and was placed on Interpol Red Notice. Piscioti was arrested in Germany in April 2013 and was extradited to the US nine months later. He subsequently pleaded guilty to a one-count indictment, and was sentenced to two years in prison. His extradition garnered headlines around the world as it was the first time the DOJ had successfully extradited a foreign national solely for breaking US antitrust laws.

4. Ian Norris

12. While Piscioti was the first foreign national successfully extradited to the US for criminal antitrust violations, the extradition of British national Ian Norris from the UK in 2010 put executives on notice of the risks associated with engaging in cartel conduct. Norris, a retired English executive in the Morgan Crucible Company, was extradited to the US in March 2010.

13. Although DOJ sought to extradite Norris for price fixing and obstruction of justice, in March 2008, the House of Lords ruled that he could not be extradited for price fixing because it was not a criminal offense in the UK at the time the alleged conduct occurred. Norris escaped extradition for price fixing, but he was ultimately extradited for and convicted of obstruction of justice in the US. He was sentenced to eighteen months' imprisonment.

¹⁴ Press Release, US Dep't of Justice, Former CEO of Canadian Hazardous Waste Treatment Company Convicted of Conspiracy to Pay Kickbacks and Committing Major Fraud against the United States (Mar. 16, 2016), available at <https://www.justice.gov/opa/pr/former-ceo-canadian-hazardous-waste-treatment-company-convicted-conspiracy-pay-kickbacks-and>.

¹⁵ Press Release, US Dep't of Justice, Former CEO of Canadian Hazardous Waste Treatment Company Sentenced to Serve 63 Months in Prison for Role in Kickback and Fraud Schemes Against the United States (Aug. 9, 2016), available at <https://www.justice.gov/opa/pr/former-ceo-canadian-hazardous-waste-treatment-company-sentenced-serve-63-months-prison-role>.

5. David Porath

14. Another recent case involving extradition for cartel conduct is that of David Porath. Porath, an Israeli national, owned a New York City-based insulation company. From 2000 through 2005, he was involved in a bid-rigging conspiracy related to asbestos abatement, air monitoring, and general construction at facilities operated by New York Presbyterian Hospitals (NYPH). In total, fifteen individuals and six companies were convicted in the federal antitrust investigation of the NYPH facilities operations department.

15. Porath was indicted under seal in February 2010 and arrested in Israel in November 2010. An Israeli magistrate declared Porath extraditable. Porath waived appeal and consented to voluntary extradition. He was extradited to the US in February 2012 to face charges of bid rigging, as well as tax fraud and false subscription offenses. Porath pleaded guilty in July 2012 and was sentenced to time served, one year of probation, and restitution.

III. Expectations moving forward

16. In recent years, DOJ has increased its efforts to extradite fugitive defendants to the US for prosecution. Although there have recently been several notable successful efforts to extradite individual defendants in Antitrust Division cases, the vast majority of these extraditions have not been for antitrust violations. Moreover, these successes are very modest in comparison to the large number of fugitives in Antitrust Division cases. DOJ is obviously very careful in selecting cases for extradition, which suggests some uncertainty as to the likelihood of success. It is clear that the threat of extradition to the US for criminal antitrust violations has increased, but is still not significant, despite DOJ's recent extradition headlines.

17. Nevertheless, DOJ has made clear its intentions to pursue fugitive defendants in cartel cases and to extradite in some circumstances. Given the recent proliferation of criminal antitrust laws, DOJ will have more opportunities to pursue extradition in the future. While individuals indicted by the Antitrust Division could previously assume that they were not extraditable, they should now be concerned that there are fewer safe havens. For these individuals, the world is changing. As signaled by Deputy Assistant Attorney General Brent Snyder, the head of criminal enforcement at the division, "*You may believe that you live in a country that will not extradite to the United States, but if you travel to another country, you are going to increasingly be at a high risk of being extradited to the United States.*"¹⁶ Indeed, it is entirely possible that while a fugitive is safe from extradition from his home

¹⁶ <https://www.law360.com/articles/545218/doj-official-warns-extradition-safe-havens-fading>.

country today, he will not be tomorrow. Undoubtedly, the DOJ is taking notice of the changing legal landscape, and cartel defense attorneys must do so as well.

18. Further, DOJ publicly announced its intent to prioritize the prosecution of employees and executives responsible for the criminal conduct of companies in the Yates Memorandum of September 2015. While the Antitrust Division had already consistently prosecuted individuals, DOJ officials have announced that DOJ expects to carve out (and, therefore, prosecute) “*more and more individuals*” in light of the Yates Memorandum’s directives. More individual prosecutions mean more opportunities for the DOJ to seek extradition.

19. In the short-term, the antitrust legal community should expect that the DOJ will be considering—at the time charges are filed—the possibility of extradition. The likelihood of extradition will inform the prosecutor’s decision whether to seal an indictment. Red Notice will almost certainly be employed.

20. Going forward, it is entirely possible that the DOJ will draft charging instruments with the possibility of extradition, and the dual criminality principle, in mind. For example, in cases where extradition will likely be pursued, the DOJ may elect to include or highlight any relevant bid rigging in indictments, in the hopes that there will be an opportunity to extradite from a jurisdiction with criminal bid-rigging laws, as occurred with Piscioti. Or, where appropriate, the DOJ can charge related conduct more likely to fulfill dual criminality requirements, as occurred with Bennett and Marshak. Going forward, there can be little doubt that the Antitrust Division will be preparing antitrust cases with an eye toward the possibility of extradition, and the chances are increasing that the DOJ will be able to successfully do so. Moreover, as the world loses safe havens for cartel offenders, the DOJ gains leverage in negotiating with foreign executives accused of engaging in cartel conduct. And if those executives choose to avoid US jurisdiction, DOJ will be looking for a chance to extradite them to the US. The question remains, however, whether the case is one of the few in which DOJ feels confident of success. ■

The Japanese perspective*

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I. Repercussions of Mr. Piscioti's case

1. The news of Mr. Romano Piscioti's arrest in Germany and his eventual extradition to the United States undoubtedly gave serious pause to dozens of Japanese individuals who stayed in Japan under risk of being subject to a potential extradition request from the US Department of Justice ("DOJ"). His case illustrated that extradition on account of an antitrust law violation is no longer a theoretical risk and further demonstrated how determined the DOJ is to make a case to extradite a foreign national to the US. In that sense, the DOJ's victory in Mr. Piscioti's case not only hit close to home for those Japanese individuals who chose to be treated as "fugitives" by the United States for life but also might have affected others' decision-making in pipeline cases as to whether they will voluntarily submit themselves to the jurisdiction of the United States and plead guilty.

2. Did Mr. Piscioti's case really open up the door for a new era of extradition? It is too early to say; however, even with the DOJ's victory in his case, as far as Japan is concerned, the author doubts that the general behaviour of Japanese individuals who are "carved out" from their companies' plea agreements with the DOJ will significantly change in the immediate future because extraditing a Japanese national for an antitrust law violation remains no easy task for the DOJ due to a number of legal uncertainties and potentially available defences by Japanese individuals under Japanese extradition law.

II. Sentiment of Japanese executives and rationale for not coming forward

3. In the first place, it is worth mentioning what the typical perception and reaction of Japanese business people are to cartels before and after a cartel investigation starts. Unfortunately, it is often the case that some Japanese business people somehow have their own narrow interpretation of the concept of a "cartel" and associate "cartels" only with bid rigging and very obvious price fixing. Accordingly, they tend to continue long-standing competitor communications (that can be later found by competition authorities to be a cartel agreement) without questioning the legality thereof, based on the misunderstanding that their conduct has not yet crossed the boundary of legality.

4. It is not certain why this typical misunderstanding is prevalent, but it may have to do with the fact that typical enforcement actions against cartels by the Japan Fair Trade Commission ("JFTC") used to be in connection with domestic bid-rigging cases.

5. With the JFTC's intensive crackdown on cartels in recent years (especially after the introduction of the leniency regime in 2006), such misunderstanding has been gradually fading away. However, one still sometimes observes the regret of those who just followed their predecessors' practice and took it for granted as part of their job responsibilities. In purely domestic cartel cases, those individuals still do not usually have to confront their own criminal liability because criminal enforcement

This article expresses the author's views and does not represent the views of his firm or the firm's clients. It is one of a series of contributions on extradition from the perspective of different jurisdictions coordinated by the law firm Hogan Lovells International LLP.

of antitrust law against individuals is not very common¹⁷ in Japan. However, when it comes to international cartel cases, they along with their companies may find themselves under criminal investigation and having to face the possibility of significant liability.

6. Against this background, international cartel investigations, especially the DOJ's criminal investigation, come as a total surprise to those individuals; and, after their initial shock, the vast majority of Japanese nationals targeted by the DOJ for antitrust law violations choose to stay in Japan without voluntarily making a plea deal with the DOJ and serving a prison term in the United States. While too much of a generalisation can be misleading, it seems that those Japanese individuals decide not to make a plea agreement with the DOJ taking into account one or more of the factors below.

1. Limited disadvantages and inconveniences of staying in Japan for life

7. First, the domicile of those accused most usually has been and will likely remain Japan.

8. Second, as high-ranking executives in Japan are often in their late 50s or 60s (or even older as the investigation may come up several years after the fact), their retirement (typically between ages 60 and 65 years) is quickly approaching. The vocational and personal disadvantages and inconveniences of not being able to travel outside Japan are relatively limited as compared to those of a younger age.

2. No or minor advantages of coming forward to serve prison terms

9. First, the expected ordeal of serving a prison term of a year or two in the United States is obviously an important factor.

10. Second, the reputational risk of being labelled a "criminal" can be substantial. There is no upside for the accused to complete the prison terms in the United States because their career prospects are likely to significantly worsen with the stigma of having been a convicted criminal.

¹⁷ The JFTC's accusation is the prerequisite for the public prosecutors' office to start criminal investigations on offences under the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (Act No. 54 of April 14, 1947, as amended) ("Japanese Antimonopoly Act"). According to the JFTC's statistics (as of March 31, 2016), there have only been twenty-two cases where the JFTC filed an accusation with the public prosecutors' office since the enactment of the Japanese Antimonopoly Act in 1947. The JFTC's publicly announced criminal accusation policy provides that the JFTC will file an accusation for (i) cases of price fixing, supply restriction, market allocation, bid rigging, joint boycott or private monopolisation that the JFTC considers egregious and having an extensive, serious effect on the life of the people or (ii) repeated offences for which the goal of the antimonopoly law cannot be met merely by the JFTC's administrative disposition.

3. Emotional resistance to voluntarily accept the legal consequences under foreign laws

11. First, those accused cannot accept the legal characterisation of their conduct in Japan under the "effects doctrine" as having an impact in foreign jurisdictions.

12. Second, they may feel that it is not fair that they be subject to the United States' severe criminal enforcement policy of sending foreign individuals to prison without suspended sentences whilst the Japanese government's criminal enforcement of antitrust law against individuals is not very common and, if there is criminal enforcement at all, first-time offenders have never failed to receive suspended sentences in Japanese criminal courts.

4. Track record of extradition based on antitrust law violations

13. Importantly, no one has ever been extradited from Japan to the United States for an antitrust law violation. It is not very clear whether the DOJ can overcome all the legal requirements and uncertainties to successfully extradite a Japanese national to the United States for an antitrust law violation, as further described below in detail.

III. Extradition law in Japan

14. The basic statute regarding extradition of criminals from Japan is the Act of Extradition (Act No. 68 of July 21, 1953) ("Extradition Act"). The Extradition Act provides for the procedures of extradition that the government of Japan, the public prosecutors' office and the court must go through if a foreign country requests the extradition of a fugitive located in Japan.

1. Procedure under the Extradition Act

15. To summarise, when a foreign country's request for extradition comes to Japan via diplomatic channels to the Minister of Foreign Affairs, such request will be forwarded to the Minister of Justice. The Minister of Justice will judge not only whether or not it is possible to satisfy the requirement of extradition but also whether or not it is appropriate to extradite the fugitive, it being within the minister's purview to stop such procedure. If the Minister of Justice considers that the request should proceed, he

or she will order the superintending prosecutor of the Tokyo High Public Prosecutors Office to directly apply to the Tokyo High Court for examination of whether the given request for extradition satisfies the requisite legal standard and the fugitive can thus be extradited. Even if the Tokyo High Court then finds that the legal standard is met and the fugitive can be extradited, the Minister of Justice may still have discretion to stop the procedure when he or she determines that the extradition of the fugitive is not appropriate. If the Minister of Justice considers that extradition is appropriate after the Tokyo High Court's finding, then extradition eventually takes place.

2. The Extradition Act and superseding treaties

16. However, the Extradition Act itself explicitly prohibits the government of Japan from extraditing a fugitive if he or she is a Japanese national unless otherwise provided by a separate extradition treaty between Japan and the relevant foreign country or foreign countries. Therefore, as for the issue of whether a Japanese national can be extradited, such treaties come into play and the procedure described above is modified to the extent such treaties override the relevant provision of the Extradition Act.

17. There are currently only two separate extradition treaties in this regard that supersede the exception for Japanese nationals (and other parts of the procedural and substantive requirements under the Extradition Act): one is the Treaty on Extradition between Japan and the United States of America, which took effect in 1980 ("Japan-US Treaty"), and the other is the Treaty on Extradition between Japan and the Republic of Korea (which took effect in 2002). Here we focus on the Japan-US Treaty.

IV. Japan-US Treaty

18. The Japan-US Treaty is a bilateral agreement between Japan and the United States. Except for the fact that extradition of a Japanese national is possible¹⁸ and not categorically denied, the elements of the Japan-US Treaty are not significantly different from those of the Extradition Act. The below sets forth a summary of key provisions of the Japan-US Treaty that may be in focus if and when the DOJ actually tries to extradite a Japanese national for cartel offences.

18 According to the Ministry of Justice's White Papers on Crime (fiscal year 2015 version and fiscal year 2016 version), in the period of 2005 through 2015, thirteen individuals were actually extradited from Japan. While those White Papers on Crime provide no specific information as to the nationality of such fugitives and how many of those cases were in response to requests from the United States, at least two of them in 2005 were Japanese nationals (who allegedly filed false claims with a 9/11 terrorist attack victims fund and received money from the fund) and were extradited to the United States, based on the newspaper articles (A. Shimbun and M. Shimbun, dated October 13, 2005). The English version of the White Papers on Crime is available at: http://hakusyo1.moj.go.jp/en/nendo_nfm.html.

1. Dual criminality and type of offences covered by the Japan-US Treaty

19. Offences to which extradition by the Japan-US Treaty may apply must be (i) listed in the Schedule to the Treaty and (ii) punishable by both the laws of Japan and the United States by death, life imprisonment, or by deprivation of liberty for a period of more than one year (Article II, para. 1 of Japan-US Treaty). The Schedule of the Japan-US Treaty lists the type of offences to which it is applicable and clearly includes "[a]n offense against the laws relating to prohibition of private monopolization and unfair business transactions."¹⁹ Because the Japanese Antimonopoly Act provides for punishment of up to five years of imprisonment with work and/or a fine of up to JPY 5 million for cartel activity,²⁰ which covers both bid rigging and price fixing. Therefore, it is clear that an offence for cartel activity is covered by the Japan-US Treaty.

2. Probable cause requirement

20. In order to extradite a person from Japan, the United States needs to prove either that (i) there is probable cause to suspect that the person has committed the offence in question or (ii) the person was convicted by a court in the United States.²¹

3. Statute of limitation

21. Article IV of the Japan-US Treaty has a non-exhaustive list of circumstances where extradition will not be granted. Among those circumstances, probably the most important one in light of the DOJ's request for extradition for an antitrust law violation is the statute of limitation, which is described in more detail below.

4. Discretion by the requested party's government

22. Article IV of the Japan-US Treaty reiterates that the party that receives a request for extradition from the other is not bound to extradite its own nationals and that both countries have the power to extradite their own nationals in their discretion.

19 Item 45.

20 Defined as "Unreasonable Restraint of Trade." See Article 89, para. 1, Item 1, and Article 92 of the Japanese Antimonopoly Act.

21 Article III of the Japan-US Treaty.

V. Potential arguments and Legal challenges of DOJ to extradite a Japanese national

23. This section discusses the key requirements necessary to permit extradition of a Japanese national for a cartel offence per the DOJ's request as well as issues and defences that the fugitive in question may present. As laid out below, even though the relevant laws of two countries may on their face look similar and the requirements of the Japan-US Treaty may seem to be satisfied, the manner by which criminal court judges in Japan review evidence and find facts can be challenging and unexpected for DOJ staff attorneys.

1. Dual criminality

24. As briefly touched upon above, accusations against individuals by the JFTC for a cartel offence and ensuing criminal enforcement by the public prosecutors' office are rare in Japan. Furthermore, if and when an individual is indicted and found guilty by the criminal court, first-time offenders will almost certainly receive a suspended sentence. Against this background, a Japanese national whom the DOJ requests be extradited for an antitrust law violation might argue that the dual criminality requirement under the Japan-US Treaty is in effect lacking because the circumstances of the criminal enforcement of the Japanese antitrust law is in stark contrast to that of an individual accused of violating US antitrust law (with more intense criminal enforcement having virtually no prospect of imposing a suspended sentence). This argument is unlikely to succeed before the Tokyo High Court because it would be difficult to identify the degree of intensity of criminal enforcement with respect to the criminality at issue. There is no precedent on point; however, the Tokyo High Court has made no distinction between white-collar crimes and other crimes in interpreting the dual criminality requirement, even though it is also true that first-time white-collar offenders more often receive a suspended sentence.

25. Another potential argument that a Japanese national whom the DOJ requests be extradited for an antitrust law violation might raise is the lack of an accusation by the JFTC in Japan since an accusation is the prerequisite for the public prosecutors' office to start a criminal investigation against that individual (that will potentially lead to indictment and then judgement on the punishment). Again, there is no precedent exactly on point; however, this argument is not a reasonable interpretation of dual criminality under the Japan-US Treaty because the current practice is that once the JFTC files an accusation with the public prosecutors' office,

the public prosecutors' office will then almost always indict the individual in question, in which case, the DOJ's request for extradition will never be granted since the Japan-US Treaty explicitly prescribes that extradition is not to be granted when the individual has been already prosecuted (in Japan) by the requested party.

2. Probable cause

26. The wording of the "*probable cause to suspect*" provision under the Japan-US Treaty as part of the requirement to grant extradition is, on its face, the same as that of the requirement of issuing an ordinary arrest warrant by judges pursuant to the Criminal Procedure Act of Japan. However, while the request for issuing an arrest warrant is rarely rejected by judges partly because of the urgency of arresting a suspect, "*probable cause to suspect*" in the context of extradition will be very carefully scrutinised by the Tokyo High Court, as was done in a 2004 leading case.²² In such case, the United States alleged that the Japanese national in question (Mr. Okamoto), a Japanese Alzheimer's disease researcher who returned to Japan from the United States, committed industrial espionage. The Tokyo High Court, after thoroughly reviewing the factual background and circumstances, denied the existence of "*probable cause*" and rejected the request for extradition. Although it would be very difficult for a Japanese national who allegedly violated Section 1 of the Sherman Act to dispute the legality of his or her conduct because the Sherman Act is based on so-called "per se illegal" rules, the Japanese national may have a better chance of success in challenging how solid and robust evidence has been collected to support the "*probable cause to suspect*" requirement, especially with respect to the alleged formation of the agreement or conspiracy under Section 1 of the Sherman Act, because Japanese criminal court judges tend to more meticulously review evidence in cartel cases than typical jurors in the United States.

3. Statute of limitation

27. The most important defence for a Japanese national subject to a request for extradition is the lapse of the statute of limitation of five years²³ for offences under the Japanese Antimonopoly Act (for conduct ended prior to January 1, 2010, the old statute of limitation of three years will apply), which limitation begins to run at the time when the criminal act has ceased. The statute of limitation for an offence of Section 1 of the Sherman Act is similarly five years and begins to run after the termination of the conspiracy—namely, from the point at which the purpose of the conspiracy has been achieved or abandoned. Both look similar to each other. However, in reality, Japanese criminal court judges might find the duration of agreement to be more limited (without taking a blanket approach of finding a single and continuous

22 Tokyo High Court's ruling on March 29, 2004.

23 Item 5, para. 2 of Section 250 of the Criminal Procedure Act of Japan.

agreement) than the DOJ expects and therefore allow the statute of limitation to commence earlier. The theory of complicity may delay the commencement of the statute of limitation. But, depending on the degree of involvement of the Japanese national in question in the agreement throughout the alleged duration of the agreement (for example, he or she was no longer involved in the conspiracy in recent years although his or her company was continuously engaged in the conspiracy), the Japanese criminal court could take a view in favour of the Japanese national.

4. Discretion by the Minister of Justice

28. As described above, the Minister of Justice has broad discretion throughout the extradition procedure. The Minister can even deny an extradition request with respect to a Japanese national from the United States even though the Tokyo High Court has found that the requirements of extradition under the Extradition Act and Japan-US Treaty have all been met.²⁴ In that regard, the two possibly weak arguments at the level of dual criminality (as introduced above) could meet with some success if persuasively presented to the Minister of Justice because (i) it is generally quite rare in Japan that a first-time white-collar offender²⁵ will actually be sent to prison and (ii) the JFTC has considered that criminal enforcement against such Japanese national is not necessary in that particular case.

29. However, it is doubtful that a Japanese national can rely much on the exercise of the discretion of the Minister of Justice as a last resort since it is more likely that before the request from the United States officially comes, there would be unofficial preparation and feasibility studies between the prosecutors of the Japanese government and the DOJ's staff attorneys at a working level, and the Minister of Justice might have already received the related reports. Under such circumstances, the Minister of Justice would likely refrain from exercising his or her discretion to reject the request because that would not only negate the preparation work but also harm the spirit of the Japan-US Treaty that made the extradition of the Japanese national possible.

VI. Final remark

30. Even though there are hurdles and challenges that the DOJ must overcome to extradite a Japanese national, extradition certainly is a powerful threat and a strong deterrent. The DOJ has built a virtual spider web via Interpol Red Notices and sealed indictments and has sent its staff attorneys to civil class actions in the United States thereby collecting information about where and when its target key individuals would be deposited by plaintiffs. No one can tell at this moment whether in the near future the DOJ means to make a model case of extradition of a Japanese national. However, one thing for certain is that, as was the case with Mr. Piscioti, the DOJ is always prepared to seize the moment when the target individual is off-guard in a third-party country under the assumption that the risk of extradition is not substantial. ■

²⁴ There has been no case where the Minister of Justice has denied a request after the Tokyo High Court's ruling that the requirements were met.

²⁵ Furthermore, unlike cases of embezzlement or Ponzi schemes where sometimes imprisonment without a suspended sentence is meted out, lay persons in Japan may not see any direct harm to the economy, especially in cases of price fixing (rather than bid rigging).

The Israeli perspective*

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I. Introduction

1. For the past few years, we have been witnessing a worldwide increase in extradition requests for wanted persons in antitrust cases. Israel is no exception to that trend, and there are already examples to Israeli nationals that were sentenced to imprisonment for antitrust violations outside of Israel, following successful extradition proceedings. This trend is expected to intensify, taking into account the legal situation regarding antitrust laws and extradition laws in Israel.

2. This paper shall analyze the legal framework in Israel for the extradition of individuals accused of antitrust violations. As will be further detailed, the Israeli law neither precludes economical offenses as non-extraditable offenses, nor distinguishes between such offenses and other “regular” offenses for purposes of extradition proceedings. Moreover, the Israeli law does not even require that an antitrust violator shall be extradited on account of an antitrust (or economical) offense, and allows to extradite such an individual on account of any offense that is extraditable (i.e., that meets certain criteria of severity) while charging him or her in the requesting state for antitrust law violations.

3. While there were a few examples in the past of cases in which Israel requested other jurisdictions to extradite individuals on account of economical offenses,¹ this paper shall focus on proceedings in which the extradition of an individual is being requested from Israel, or where the wanted person is an Israeli national (even if his or her extradition is being requested from a country that is not Israel). This choice is made in light of the circumstances of two notable cases in which two Israeli nationals were extradited to the United States (one from Israel and the other from Bulgaria). These two cases serve as a focal

point to this paper, due to their recent conclusion and the fact that they involved specific antitrust violations (rather than other “economical” offenses).

4. The structure of this paper will be as follows: part II will describe the legal framework that governs antitrust in Israel. Part III will describe the legal framework that governs extradition proceedings in Israel, and will explain how Israel’s obligation under public international law integrates within it. Part IV will describe the legal procedure for extradition proceedings in Israel. Part V will describe the two above-mentioned cases in which Israeli nationals were extradited to the United States on account of antitrust violations. Part VI will provide our conclusions.

II. Antitrust law in Israel

5. The primary legislation that governs issues of antitrust and competition in Israel is the Restrictive Trade Practices Law 5748-1988 (the “RTP Law”), the main goals of which are to prevent harms to competition and to the public. The RTP Law defines and regulates various restrictive trade practices, such as restrictive arrangements, monopolies and mergers, the execution of which, without obtaining the relevant permits or approvals (when such permits or approvals are required), will constitute a breach of the RTP Law, and may be criminally indicted.

6. Other violations of the RTP Law that may be criminally punishable are, *inter alia*, a breach of terms and conditions imposed by the general director of the Israeli Antitrust Authority (the “IAA”) or by the Antitrust Tribunal (the “Tribunal”), or a failure to provide material to the IAA in response to an information request duly handed by the IAA. The RTP Law also determines the structure and powers between the different organs that form the Israeli Antitrust System—the IAA, the general director of the IAA, and the specialized Tribunal.²

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¹ See, e.g., Cr. A. 6350/93 *The State of Israel v. Goldin* [1995] (Isr.).

² See OECD, Country Studies: Israel – Accession Report on Competition Law and Policy (2011), available at: <https://www.oecd.org/competition/50104572.pdf> (last visited: May 16, 2017).

7. The IAA, which is managed by the general director, was formed in 1994 as an independent agency, and executes the powers and instructions of the general director. The general director holds an impressive array of tools to execute his or her mandate, including the power to impose administrative fines for infringements of the RTP Law, determine and declare that certain practices or operations constitute a breach of the RTP Law (such determinations constitute a prima facie evidence in legal proceedings, and are often used by claimants in civil cases they bring against the objects of the determination), to object to mergers or restrictive arrangements or to approve them upon conditions, to provide advisory opinions to regulators and legislators, etc.

8. Within the context of criminal enforcement against non-competitive behavior, the IAA powers are held in the following manner—the IAA's investigation department is in charge of investigating any alleged violations of the RTP Law that may lead to criminal indictments. The head of the investigation department is supervised by the general director. However, when the investigation is concluded, its findings are transferred to the legal department of the IAA, which prosecutors are the legal representatives of, and answer to, Israel's attorney general (whose direct representative in the IAA is the legal counsel of the IAA), and not to the general director. Accordingly, criminal indictments are brought before the Israeli courts³ by the attorney general and via his representatives from the IAA.

9. As will be further detailed, the RTP Law (and other relevant laws) criminalizes many aspects of non-competitive conduct and provides a comprehensive legal basis for the efficient prosecution of such conduct.

10. First and foremost, the RTP Law prohibits creating any kind of a restrictive arrangement, except where such an arrangement was permitted in accordance of the RTP Law. Article 2(a) of the RTP Law defines a restrictive arrangement as an arrangement entered into by persons conducting business, pursuant to which at least one of the parties restricts itself in a manner likely to prevent or reduce business competition. Furthermore, hard-core cartel behavior (e.g., price fixing, bid rigging, market allocation, etc.) is per se illegal, and constitutes, under Article 2(b) of the RTP Law, a conclusive presumption for the constitution of illegal restrictive arrangement.⁴

11. The RTP Law also forbids monopolies⁵ from abusing their monopolistic position, *inter alia* by way of unreasonable objection to supply, charging unfair prices or conditioning the supply of the monopolistic product/service in unreasonable conditions.

12. Additional breaches of the RTP Law are, *inter alia*, a failure to file merger notices when such filing is required,⁶ not complying with a condition stipulated for the approval of a merger or a restrictive arrangement,⁷ or a breach of conditions or decrees imposed or given, respectively, by the Tribunal.⁸

13. Moreover, certain breaches of the RTP Law, such as bid rigging, may result other offenses, such as the obtainment of something by deceit.⁹

14. While the direct parties (either corporations or individuals) to RTP Law infringements are naturally exposed to enforcement measures, Article 48 of the RTP Law broadens the circle of potential accused, by stipulating that if an offense under the RTP Law is committed by a corporation, every active manager, non-limited partner, or senior managerial employee responsible for the relevant field, that serves in such corporation (at the time when the offense took place) shall also be indicted for such an offense.

15. Offenses under the RTP Law and other applicable laws to antitrust criminal cases provide substantial maximum fines and prison terms for convicted criminals. For example, the maximum punishment for the main offenses under the RTP Law (i.e., offenses that deal directly with non-competitive behavior) is three years imprisonment, or five years if the offense has been committed in aggravated circumstances.¹⁰

16. The IAA has exercised its authority and submitted severe criminal indictments against both individuals and corporations, particularly in cartel cases that involved per se violations. The courts, however, have been hitherto somewhat reluctant to order significant prison terms in criminal cases. For example, in a recent high-profile case that involved a cartel between Israel's major bread manufacturers (which included price fixing and market division) the Supreme Court, on appeal, reduced the sentences of two primary defendants to only six months imprisonment (of which three months shall be served as community service).¹¹

17. It is worth mentioning that although, theoretically, any breach of the RTP Law may lead to criminal indictments, in practice the IAA would only indict in cases of hard-core cartels, lines of businesses set or recommended by trade unions and breaches of conditions imposed by the general director. Other breaches of the RTP Law would be usually subject to administrative measures, such as the imposition of fines, and determinations. As will be discussed below, this situation may raise interesting

³ In accordance with Article 51(a)(1)(a) of the Courts Law 5744-1984, criminal antitrust cases are brought before the District Courts of Israel (and not the IAA Tribunal). If either party appeals then the case is brought before the Supreme Court.

⁴ Such presumptions shall only apply to horizontal arrangements, see: Cr. A. 5823/14 *Shufersal et al. v. State of Israel* [2015] (Isr.).

⁵ Article 26(a) of the RTP Law defines a monopoly as a person that holds more than 50% of the supply or purchase in a relevant market.

⁶ Article 47(a)(3) of the RTP Law.

⁷ Article 47(a)(4) of the RTP Law.

⁸ Article 47(a)(5), 47(a)(6) of the RTP Law.

⁹ Article 415 of the Penal Law, 5737-1977 (the "Penal Law").

¹⁰ It should be noted that lesser infringements of the RTP Law may lead to up to one year of imprisonment.

¹¹ See Cr. A. 1656/16 *Davidovich v. the State of Israel* [2016] (Isr.).

questions in case of submission of a request to extradite Israeli nationals based on antitrust charges that are practically not enforced in Israel by criminal measures.

III. The legal framework for extradition under Israeli law

18. The legal framework that governs extradition proceedings in Israel is comprised of two main complementing elements:

– First, Israel’s domestic laws on extradition, which include Israel’s Extradition Law, 5714-1954 (the “Extradition Law”), the Extradition Regulations (Law Procedures and Rules of Evidence in Petitions) 5731-1970 (the “Extradition Regulations”), and Israel’s Attorney General’s guidelines on extradition¹² (the “Attorney General’s Guidelines”), as well as the applicable case law and jurisprudence on the matter;

– Second, public international law, which primarily includes the extradition conventions and treaties to which Israel is a signatory, and to a lesser extent the rules of customary international law.¹³

19. The normative hierarchy between these two elements is derived from the general principles by which Israel integrates the norms of public international law into its own legal system. Broadly speaking, Israel distinguishes between norms of conventional law derived from treaties and norms of customary international law.¹⁴ The courts of Israel enforce norms of conventional international law domestically only to the extent that such norms have been incorporated in Israel’s domestic law by legislation, whereas norms of customary international law apply automatically and constitute an integral part of Israeli law except where they are inconsistent with express domestic legislation. In addition, where there is a potential conflict between Israeli law and public international law (conventional or customary), the courts of Israel will attempt to interpret the Israeli law in a fashion coherent with public international law.¹⁵

12 Hanchayot Hayoetz Hamishpati Lamemshala (Guidelines of the Attorney General) 4.6000 (60.207) (1.10.1973; amended on 3.7.2002).

13 Under Israeli law the rules of customary public international law apply and constitute an integral part of Israeli law, unless an express contradictory legislative provision exists. See M. S. Gal, Extra-Territorial Application of Antitrust – The Case of a Small Economy (Israel), *New York University Law and Economics Working Papers* 1, 3 (2009), available at: http://lst.nellco.org/cgi/viewcontent.cgi?article=1172&context=nyu_lewp (last visited: May 13, 2017) (“Gal”).

14 D. Barak-Erez, The International Law of Human Rights and Constitutional Law: a Case Study of an expanding dialogue, 2-*ICON – International Journal of Constitutional Law* 611, 614 (2004), available at: <http://www.tau.ac.il/law/barakerez/articals/icon.pdf> (last visited: May 16, 2017).

15 Gal, *supra* fn. 13, p. 3.

20. In light of the above, any analysis of extradition proceedings under Israeli law must begin with the provisions of the Extradition Law. According to Article 1 of the Extradition Law, no person present in Israel shall be extradited to another country, except in compliance with the Extradition Law. This Article ensures the supremacy of the Extradition Law over the norms of both conventional and customary public international law wherever a contradiction may arise. The provisions of any extradition treaty or convention Israel is a signatory to, as well as the rules of customary international law, shall apply only insofar that such provisions and rules do not contradict the Extradition Law.

21. The notion of Israel’s domestic laws supremacy over its international obligations was notoriously exemplified in the *Sheinbein* case.¹⁶ On September 16, 1987, Samuel Sheinbein and Aaron Benjamin Needle brutally murdered Alfredo Enrique Tello in Aspen Hill, Maryland. Sheinbein, who had resided all of his life in the United States, evaded apprehension by the Maryland police and fled to Israel. Once in Israel, he applied to, and received, Israeli citizenship, to which he was automatically eligible by being Jewish and a son to an Israeli citizen (his father held dual US-Israeli citizenship). In accordance with Israel’s Nationality Law, 5712-1952 (the “Nationality Law”), Sheinbein’s newly acquired citizenship was deemed to be in effect from the date of his birth.¹⁷ The United States submitted an extradition request to Israel, based on an extradition treaty between the United States and Israel that obligated Israel to extradite Sheinbein. However, at the time, the Extradition Law banned the extradition of Israeli citizens on offenses committed outside of Israel, unless such offenses took place before the acquirement of the Israeli citizenship.

22. The District Court of Jerusalem determined that Sheinbein was extraditable to the United States based on the aforementioned treaty. It held that as Sheinbein had no meaningful connections to Israel, he was not an Israeli citizen for the purposes of the Extradition Law and therefore the Extradition Law does not apply (making him immune to extradition proceedings). However, following Sheinbein’s appeal, the Israeli Supreme Court reversed the judgment. The Supreme Court rejected the District Court’s opinion that Sheinbein was not an Israeli citizen for the purpose of the Extradition Law, and determined that the Extradition Law does apply, and that therefore Sheinbein cannot be extradited to the United States even if that results in a violation of Israel’s international obligations.¹⁸

23. As noted above, the Extradition Law holds supremacy over Israel’s obligations under international law, and yet it does condition any extradition proceeding on the existence of a bilateral agreement between Israel and the

16 Cr. A. 6182/98 Sheinbein v. The Attorney General [1999] (Isr.).

17 See Article 4(a)(2) of the Nationality Law.

18 The Extradition Law was later amended to avoid this legal outcome, so that only individuals that were both Israeli citizens and residents at the time of the crime shall not be extradited (see Article 1A of the Extradition Law).

requesting state, or a multilateral convention that both parties are signatories to. To date, Israel has bilateral treaties for extradition with the United States, Canada, Australia, Swaziland and the Republic of the Fiji Islands, and is also a signatory to the multilateral European Convention on Extradition. As aforementioned, the courts of Israel shall apply the relevant treaty or convention in the appropriate extradition proceeding insofar that it does not contradict the domestic laws of Israel.

24. Even if there is a valid extradition treaty or covenant between Israel and the requesting state, the Extradition Law stipulates that the authority to extradite is subject to discretion,¹⁹ and a decision shall be made in accordance with certain conditions and considerations.

25. First, the Extradition Law demands that the wanted person be accused or found guilty of an “extradition offense” in the requesting state.²⁰ An “extradition offense” is defined in the Extradition Law as an offense which—if committed in Israel—would have made the offender liable to at least one year of imprisonment.²¹ This, of course, embodies the well-known principle of “double criminality” which many jurisdictions require in extradition proceedings.

26. It should be noted that the language of the above-mentioned definition does not preclude economical offenses as non-extraditable. Like other countries, Israel did use to have, in the past, a policy not to extradite persons wanted for economical offenses. Israel has, however, abandoned that policy and no longer enforces it.²² Nevertheless, according to the Attorney General’s Guidelines, Israel will consider, *inter alia*, the reciprocity of the requesting state in that regard (i.e., whether the requesting state extradites wanted persons for economical offenses).²³

27. It should also be emphasized that within the context of Israeli Antitrust law, the requirement that the extradition offense be of a minimum severity holds little significance. Not only that all of the offenses under the RTP Law carry a maximum punishment of at least one year, but there are also many other offenses of sufficient severity under additional Israeli laws (i.e., the Penal Law) that may be used for the extradition of individuals in antitrust cases.²⁴

28. It is worth noting (as was mentioned above), that many offenses under the RTP Law, that are theoretically subject to criminal enforcement measures, will not, in practice, lead to criminal indictments, as these are usually preserved for hard-core cartels and other types of blunt restrictive arrangements or breaches of conditions. The general director has even issued guidelines, clarifying a set of offenses that will usually lead to administrative—rather than criminal—enforcement measures. Accordingly, it is possible that an extradition request would be filed based on an antitrust offense that is punishable in Israel by one year (or more) of imprisonment and therefore falls within the boundaries of the Extradition Law, while in practice such a breach of the RTP Law would not be criminally enforced in Israel. The Extradition Law does not exclude such circumstances; however, it may be reasonably assumed that such circumstances would be taken into account in the relevant case, and moreover—the applicability of the Extradition Law in such cases may be challenged, based on a claim that such offenses do not really meet the “double criminality” requirement.

29. Second, the Extradition Law also requires that a certain burden of proof is met before a wanted person is deemed extraditable. Either that the wanted person be lawfully charged with an extradition offense in the requesting state, or that there will be sufficient evidence for putting him or her on trial for such an offense in Israel.²⁵ With regard to the latter option, the Supreme Court of Israel has construed this requirement rather flexibly, emphasizing that where a court faces an extradition request, it is not required to examine the reliability or weight of the evidence in support of that request, provided that, *prima facie*, the evidence is not without any merit.²⁶ It should also be noted that the court may declare, without the examination of the evidence, that a wanted person is extraditable where the wanted person so requested.²⁷

30. Third, the Extradition Law stipulates that Israel shall maintain reciprocity on questions of extradition, unless the Minister of Justice decided otherwise. This requirement of reciprocity, however, was construed narrowly in numerous decisions made by the Supreme Court of Israel, in which it was held that a requested foreign state may fulfill the requirement not only by extraditing wanted persons but also by prosecuting them in its own courts (in accordance with the principle of “*aut dedere aut judicare*”).²⁸ For example, the Israeli Supreme Court held in a recent case²⁹ that even though France does not extradite its own citizens to foreign countries, Israel is entitled to extradite its own citizens to France, because France prosecutes such citizens in its own courts.³⁰

19 Article 2a(a) of the Extradition Law.

20 Article 2a(a)(2) of the Extradition Law.

21 Article 2(a) of the Extradition Law

22 The Knesset’s (Israeli Parliament) Research Center, The Conditions for Extradition and its Limitations – Comparative Overview 28–29 (9.5.2012), available at (in Hebrew): http://main.knesset.gov.il/Activity/Info/LegalDepartmentSurveys/Survey/090512_2.pdf (last visited on 16.5.2017) (the “Knesset’s Comparative Overview”).

23 Article B4 of the Attorney General’s Guidelines.

24 See Article 2(b) of the Extradition Law; A common offense that may be used in order to extradite individuals in Antitrust cases is “*obtainment of anything by deceit*” under Article 415 of the Penal Law, which—as mentioned above—may apply mostly in cases of bid rigging.

25 Article 9(a) of the Extradition Law.

26 See Cr. A. 3234/10 *Anonymous v. The Attorney General*, para. 11 [2011] (Isr.); See also Cr. A. 6717/09 *Ozifa et al. v. The Attorney General*, para. 9 [2010] (Isr.).

27 Article 9(b) of the Extradition Law.

28 The Knesset’s Comparative Overview, *supra* fn. 22, p. 81.

29 Cr. A. 3234/10 *Anonymous v. The Attorney General* [2011] (Isr.).

30 *Id.* para. 19.

31. Last, even though Israel does not prohibit the extradition of its own citizens to other countries, the Extradition Law does impose several rather unique limitations in that regard. For instance, Israel will not allow the extradition of a wanted person where there are reasons to suspect that the extradition request was submitted out of discrimination because of the wanted person's race or religion,³¹ or where acceding to extradition request is liable to violate the public order or a vital interest of Israel.³²

IV. The legal procedure for extraditing individuals from Israel to other countries

32. An extradition request on behalf of a requesting state shall be submitted to the Israeli Minister of Justice, who may order that the wanted person to be brought before the District Court of Jerusalem, in order to determine whether the wanted person is extraditable. The petition to the District Court of Jerusalem shall be submitted by the attorney general or by his representatives.³³ The wanted person and the attorney general both have a right to appeal to the Supreme Court against the District Court's decision on the petition.³⁴ If the wanted person has been declared extraditable, then the applicable court may order that he or she be kept in custody until his or her extradition.³⁵

33. The declaration that a wanted person is extraditable shall be given final effect, if the period of appeal has passed and no appeal was submitted, or if an appeal was submitted but was rejected.³⁶ If the wanted person was not extradited or was not moved beyond the borders of Israel within sixty days after the day on which the declaration that he or she is extraditable received final effect, then the declaration shall be made void, unless its effect was extended.³⁷

31 Article 2b(a)2 of the Extradition Law

32 Article 2b(a)8 of the Extradition Law

33 Article 3(a) and 3(b) of the Extradition Law; on November 24, 2005, the state attorney, the head of the Department of International Affairs at the office of the state attorney, and the superintendent on International Affairs at the office of the state attorney were so authorized by the attorney general. See Reshumot Yalkut Hapirsimum (The Official Gazette) 5466 (5.12.2005) at page 712, available at (in Hebrew): https://www.nevo.co.il/Law_word/law10/yalkut-5466.pdf (last visited on 16.5.2017).

34 Article 13 of the Extradition Law.

35 Article 15 of the Extradition Law. According to Article C1 of the Attorney General's Guidelines, the attorney general's representative is required to request that the wanted person shall be held in custody until his extradition.

36 Article 14 of the Extradition Law.

37 Article 19(a) of the Extradition Law. According to Article 19(b) of the Extradition Law, if the wanted person was put on trial in Israel or serves a sentence in Israel for another offense, then the period during which he or she serves his or her sentence or stands trial shall not be taken into account for the sixty days said in Article 19(a) of the Extradition Law.

V. Extradition of Israeli nationals based on antitrust law grounds

34. There are just a few cases of extradition of Israeli nationals, that were charged outside of Israel *inter alia* in antitrust law offenses. While the small number of cases cannot be the basis of a well-developed case law and cannot be translated into a well-established understanding of the legal situation and future outcomes of cases, it may well show that economical offenders (including when their offenses are based on antitrust grounds) are not immune from extradition from Israel, and will not enjoy the support or defense of Israel only for their nationality.

1. The extradition of David Porath from Israel to the US

35. In February 2010, David Porath, the sole owner of the Apache Group Inc., a re-insulation service company, was charged in the Southern District of New York in a sealed indictment on three counts: (1) conspiring to rig bids on contracts for re-insulation services to New York Presbyterian Hospital (NYPH) in the years 2000–2005; (2) conspiring to defraud the Internal Revenue Service (IRS); and (3) filing a false tax return.³⁸ Porath, a citizen of both the US and Israel, resided in Israel when the charges were filed.³⁹ The indictment was unsealed in March 2010.⁴⁰

36. In January 2011, the US government submitted a request to Israel's Minister of Justice for the extradition of Porath to the United States.⁴¹ On November 27, 2011, Porath was located and arrested in Israel,⁴² and Israel's attorney general submitted a petition to the District Court of Jerusalem to determine that Porath was extraditable to the United States.⁴³ In January 2012,

38 See Indictment, *United States v. Porath*, No. 10-CR-12 (S.D.N.Y. Feb. 18, 2010), available at: <https://www.justice.gov/atr/case-document/indictment-112> (last visited on 16.5.2017).

39 See the DOJ Press Release dated July 11, 2012, available at: <https://www.justice.gov/opa/pr/owner-insulation-service-company-pleads-guilty-million-dollar-bid-rigging-and-fraud> (last visited on 16.5.2017).

40 See the DOJ Press Release dated March 31, 2010, available at: <https://www.justice.gov/opa/pr/former-contractor-indicted-bid-rigging-conspiracy-new-york-city-hospital-and-tax-fraud> (last visited on 16.5.2017).

41 Extradition File (Jerusalem) 49432-11-11 *The Attorney General v. David Porath*, para. 2 [27.11.2011] (Isr.).

42 See Final Form Brief for the United States in the case of *United States of America v. Michael Yaron et al.* (13.12.2013) p. 17, available at: <https://www.justice.gov/atr/case-document/file/516921/download> (last visited on 16.5.2017).

43 See *supra* fn. 40.

the District Court of Jerusalem determined that Porath could be extradited on all three counts.⁴⁴ Porath then consented to his extradition and elected to waive any appeal to the Supreme Court, and on February 16, 2012, he was extradited to the United States and ordered to remain in custody.⁴⁵

37. On February 6, 2013, Porath pleaded guilty to all three counts. He was sentenced to time served (just under one year), a term of one year of supervised release, and ordered to pay a \$7,500 fine and \$652,770 in restitution.⁴⁶

2. The Extradition of Yuval Marshak from Bulgaria to the US

38. On January 21, 2016, Yuval Marshak, an Israeli national, was charged in the United States in a five-count indictment, according to which he participated in multiple schemes to defraud the foreign military funding program (“FMF”)⁴⁷ between 2009 and 2013, and among other things engaged in money laundering related to “*falsified bid documents to make it appear that certain FMF contracts had been competitively bid when they had not.*”⁴⁸

39. Marshak’s five-count indictment included two counts of wire fraud, one count of mail fraud, one count of major fraud against the United States and one count of international money laundering. The wire and mail fraud charges carry a maximum penalty of twenty years in prison and \$250,000 fine. The major fraud against the United States count carries a maximum penalty of ten years in prison and a \$1 million fine, and the international money laundering count carries a maximum penalty of twenty years in prison and a \$500,000 fine.⁴⁹

40. The case was prosecuted by the United States Department of Justice’s Antitrust Division’s NY Office.

41. Marshak stayed in Bulgaria while the charges against him were submitted. The Interpol later issued a Red Notice for Marshak’s apprehension,⁵⁰ which allowed the Bulgarian authorities to arrest him and later led, in October 2016, to his extradition from Bulgaria to the

United States. After Marshak made his initial appearance in the District Court of Connecticut, he was immediately detained.

42. On March 13, 2017, Marshak has pleaded guilty to all of the counts brought against him, with the exception of international money laundering.⁵¹ On June 12, 2017, Marshak was sentenced to 30 months in prison, was ordered to pay restitution to the U.S. Department of Defense in the amount of \$41,170 and pay a criminal fine of \$7,500.⁵²

43. While no extradition procedure took place in Israel, not only that the Israeli authorities haven’t supported Marshak, but rather—the Israeli Ministry of Defense assisted the Antitrust Division in the case.

3. Discussion

44. The cases of Porath and Marshak illustrate several aspects of Israel’s law and policy with regard to extradition proceedings that include antitrust offenses.

45. First, Israeli nationals that violated antitrust laws (or committed other economical offenses) might be extradited, whether they are currently in Israel or in other countries. The *Porath* case demonstrates that Israel will not avoid from supporting extradition requests based on economical offenses.

46. Second, Israel is not to be expected to support its nationals against extradition requests, only because of their nationality. In the *Marshak* case, as shown above, Israel not only avoided from taking any procedure to delay or prevent his extradition from Bulgaria to the United States—but even assisted the Antitrust Division in its case against Marshak. Assuming that Israel was aware of the Red Notice issued by Interpol against Marshak, it also avoided from alerting him on that (as opposed to other cases, where Israel may alert its nationals to arrest warrants that are brought against them abroad, especially in cases brought against soldiers and officers in the IDF, on grounds of alleged “war crimes”).

47. It should be noted, though, that in both cases the charges included bid rigging—a practice that also in Israel should have resulted in a severe indictment. These cases cannot teach us what would be the position of the Israeli authorities and legal agencies in cases of antitrust offenses that are practically not being criminally sanctioned in Israel.

44 See *supra* fn. 41, p. 17.

45 See *supra* fn. 38.

46 *Id.*

47 The FMF is a program under which the United States spends billions of dollars each year, to provide foreign countries (including Israel) with funds that must be used to purchase American-made military goods and services.

48 See the DOJ Press Release dated October 14, 2016, available at: <https://www.justice.gov/opa/pr/israeli-executive-extradited-and-arraigned-fraud-charges-involving-foreign-military-financing> (last visited 16.5.2017).

49 *Id.*

50 See R. B. Hesse, *The Measure of Success: Criminal Antitrust Enforcement During the Obama Administration in Justice*, presented at the 26th Annual Golden State Antitrust, UCL and Privacy Law Institute (3.11.2016), available at: <https://www.justice.gov/opa/speech/file/908301/download>.

51 See the DOJ Press Release dated October 14, 2016, available at: <https://www.justice.gov/opa/pr/israeli-executive-pleads-guilty-defrauding-foreign-military-financing-program> (last visited 16.5.2017).

52 See the DOJ Press Release dated June 12, 2017, available at: <https://www.justice.gov/opa/pr/israeli-executive-sentenced-prison-defrauding-foreign-military-financing-program> (last visited 9.7.2017).

48. Third, the *Porath* case may also indicate that a full extradition procedure, even in economical offenses cases, might take a considerable period of time. In the *Porath* case, approximately two years passed from the date of his charge (February 2010) to the date of his extradition to the United States (February 2012). Had Porath not elected to waive his right to appeal against his extradition to the Israeli Supreme Court, his extradition proceedings would probably have been substantially longer.

VI. Conclusion

49. Extradition has become a real and tangible threat to executives charged with non-competitive conduct. The ever-increasing number of jurisdictions that now criminalize such conduct—together with the increase in cooperation between antitrust agencies around the globe to prosecute such individuals—brings forth a world in which there are fewer safe havens from antitrust enforcement.

50. As we showed above, Israel's extradition laws do not exclude extradition of Israeli nationals that were charged with economical offenses, including antitrust offenses. Israel also abandoned its past policy, not to extradite nationals that were charged with economical offenses.

Moreover, the fact that any breach of the RTP Law is theoretically subject to at least one year of imprisonment makes any charge based on antitrust laws abroad extraditable. This situation, of course, duplicates the risk of Israeli nationals that have breached the antitrust laws outside of Israel—to be extradited by Israel.

51. While in hard-core cartel cases this outcome would be understood, it is more questionable in cases of antitrust offenses that in practice never lead to criminal indictments in Israel. In such cases it may be argued that de facto such offenses should not be regarded as criminal offenses in Israel at all.

52. Anyway, Israel is but a small piece of the global puzzle. Being a small economy in a complex geopolitical region, its high dependency on its international relations makes it in Israel's best interest to comply with international standards in that regard. This was shown in the *Sheinbein* case, which ultimately resulted in the Extradition Law being amended due to the diplomatic hardships that Israel experienced with the United States following the case. In light of this, it is highly likely that Israel will continue its cooperation with the international community in extraditing wanted persons for antitrust offenses. ■

Cartels and Canada: Exploring the past and the future of extradition under Canadian law*

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1. If, say, twenty-five years ago, someone had described an international competition law enforcement world where enforcement authorities from multiple fiercely independent countries would come together to share best practices, coordinate investigations and even—perish the thought—defer to another jurisdiction, incredulity would have been the reaction. But the days of such coordination and cooperation are well upon us, and clearly that trend will continue. More countries have cartel laws than ever before, and the stigmatization of price fixing and other cartel behaviour has gone from a largely United States construct to an accepted way of looking at economic conduct across the globe.

2. It is in this context that developments in extradition law and practice must be considered. For it is one thing to accept suggestions from another country about what kind of laws to have; it is perhaps another to turn over one's nationals to that foreign country in order to face prosecution under foreign laws. The issues which arise in that situation are even more vexing by reason of the international (or at least transnational) nature of a great deal of cartel activity, with the result that anticompetitive conduct can often have impact on commerce in more than one jurisdiction. In those circumstances, sorting out who should prosecute and where, and under whose laws, creates challenging legal, policy and jurisdictional questions.

3. Any examination of the Canadian perspective necessarily engages the relationship between Canada and the United States, with whom we share the world's longest undefended border. To be sure, there are special considerations in that almost-familial relationship, particularly when the “big brother” US has a somewhat different legal culture and perspective on the appropriate penalties for economic crimes. Looking more globally, Canada has lots of relationships with lots of countries, and the matter of extradition—both to and from Canada—raises a host of interesting questions and calls for ongoing monitoring as international commerce expands and global laws and attitudes converge.

I. Canadian cartel law

1. A brief history

4. Canada is responsible for the world's first modern competition law statute.¹ Despite its smaller size and less developed system of government at the time, Canada introduced its first piece of competition legislation in 1889, one year before its American neighbour.² Titled “An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade,” but better known as the Anti-Combines Act, the Act responded to a growing trend among Canadian businesses in the second half of the 19th century to form a variety of cartels, trade associations and joint ventures that were unpopular with the Canadian public during the hardships of the Long Depression.³ The conspiracy provision in the Anti-Combines Act created a criminal offence.

5. The Anti-Combines Act was replaced four times throughout succeeding decades. In 1986, a major overhaul of the legislation took place, becoming the Competition Act, which remains in force today.⁴ The Competition Act was said to reflect contemporary

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1 C. P. Hoffman, A Reappraisal of the Canadian Anti-Combines Act of 1889, (2013) 39:1 *Queen's LJ* at 127 (“Hoffman”).

2 A. Gourley, A Report on Canada's Conspiracy Law: 1889–2001 and Beyond, August 2001 at 2 online: [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/gourleyrep.pdf/\\$FILE/gourleyrep.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/gourleyrep.pdf/$FILE/gourleyrep.pdf).

3 Hoffman, *supra* note 1 at 131.

4 Library of Parliament, Review of Canada's Competition Regime, 30 June 2004 at 1, online: <https://lop.parl.ca/content/lop/ResearchPublications/tips/pdf/tip114-e.pdf>.

economic thinking coupled with a balanced approach to enforcement. While the need for incremental and timely reforms aimed at meeting the needs of an ever-changing market led to some legislative changes in the intervening years,⁵ the most significant amendments to Canadian competition law since the Competition Act was enacted occurred in 2009, including a very significant change to the conspiracy provision. A large impetus for those amendments was the increasing recognition by Canada and its partners of the need for greater legal symmetry and cooperation between authorities combatting hard core cartels.⁶ The 2009 amendments saw Canada's cartel law move from a "partial rule of reason" offence⁷ to a *per se* offence, thereby creating alignment with its US analogue.

2. The Canadian conspiracy offence

6. The cartel provision of the Competition Act is found in section 45, described by the Canadian Competition Bureau (the administrative agency charged with investigating cartel offences) as "*the cornerstone provision of the Competition Act.*"⁸ Canadian criminal conspiracy law essentially prohibits three forms of cartels: price fixing, market allocation, and output restriction.⁹ The law states that every person who, with a competitor of that person with respect to a product, conspires, agrees or arranges to engage in such conduct is guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding fourteen years or to a fine not exceeding \$25 million, or to both.¹⁰ The Competition Act also contains the criminal offence of bid rigging.¹¹

7. Canada has a very active investigative and prosecutorial regime for competition law violations. The Competition Bureau employs some 400 people and addresses not just criminal conduct but also civilly reviewable conduct such as mergers, competitor collaborations, and abuse of dominance. Cartel offences are investigated by the Competition Bureau but are prosecuted by an independent prosecution director, through the Public Prosecution Service of Canada (PPSC). Cartel offences in Canada are tried in a criminal court on the standard of proof of beyond a reasonable doubt. Most cartel

dispositions in Canada are the result of negotiated guilty pleas, including in the context of international cartels with coordinated resolutions with antitrust authorities worldwide.

8. Canada also has immunity (for those who seek favourable treatment by being the first to report a cartel violation) and leniency (for those who come later but cooperate with the Bureau) programmes, which (as in other international jurisdictions) are a powerful tool in the Bureau's investigative and the PPSC's prosecutorial arsenal.

9. Living immediately to the north of the world's most aggressive white-collar crime enforcers leads to comparisons that can be seen as unfavourable: Canada simply has a less aggressive enforcement regime and a somewhat "kinder, gentler" judiciary, and the reality is that our legal culture calls for a more restrained approach to violations of even the criminal law regarding economic conduct (and, for that matter, crimes in general). That said, recent years have seen Canadian courts accept with some gusto the notion that white-collar crimes should be treated with great seriousness by the judiciary and should result in penal consequences.¹² The creation of high stakes has led and will continue to lead to more contested criminal matters, where the contested prosecution record is not as stellar as the Bureau and PPSC would like it to be.

II. Extradition law in Canada

1. Extradition by Canada

10. An examination of extradition law as it relates to Canada is much more focused on extradition proceedings from Canada, as opposed to extradition sought by the Government of Canada. Canada does not typically seek extradition of a foreign national to Canada to face criminal cartel charges under the Canadian Competition Act.

11. A rare example of the extradition process being undertaken by Canada dates back to 1995, when misleading advertising charges (an offence under the Competition Act) were laid against a US resident. The Attorney General of Canada made an extradition request to the US, and an arrest warrant was issued. Prior to any judicial determination, the individual waived his rights to an extradition hearing and attorned to the jurisdiction of the Canadian court by appearing and pleading guilty to the offence in Canada.¹³ There are other examples

5 Ibid.

6 See Organization for Cooperation and Economic Development, Recommendation of the Council concerning Effective Action against Hard Core Cartels, 13 May 1998 online: <https://www.oecd.org/daf/competition/2350130.pdf>. Note: Canada implemented the 1998 recommendations as part of its update to s. 45 of the Competition Act.

7 As described by the Supreme Court of Canada: *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606.

8 Competition Bureau of Canada, Investigating Cartels, 5 November 2015 online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_02760.html.

9 Competition Act, R.S.C. 1985, c. C-34 (the "Act"), section 45(1)(a), (b) and (c) respectively.

10 Ibid. at s 45(2).

11 Ibid. at s. 47.

12 For example, *Canada v. Maxzone Auto Parts (Canada) Corp.*, [2012] F.C.J. No. 1206 (Federal Court).

13 Competition Bureau, News Release: Thomas Liquidation Inc. Fined \$130,000 for One Count of Misleading Advertising under the Competition Act, February 7, 1995.

of foreign nationals attorning in Canada, but no cases involving contested extraditions to Canada for cartel offences.

12. A search for public expressions by the Competition Bureau or the PPSC or the Government of Canada of an intention to use extradition as an enforcement tool comes up empty-handed. In the view of this author, this is a result of several factors, chief among them the reality of life as the close neighbour of the United States, where business patterns and the flow of commerce are such that wrongdoers who are US citizens are likely to have engaged in cartel conduct on both sides of the Canada-US border, such that the wrongdoer will face the full wrath of the US Department of Justice and its quest for individual responsibility in the form of months—if not years—of jail time for price fixing. Having a duplicative Canadian cartel prosecution in such circumstances seems the essence of overkill and not the best expenditure of what we are constantly reminded are scarce prosecutorial and judicial resources.

13. The same reasoning also applies in many ways to cartelists who are not US citizens but are engaged in international cartel behaviour: it is extremely rare that an international cartel formed by (for example) Japanese nationals would impact commerce in Canada without also affecting commerce in the US. In such a case, it is far more likely that the US enforcers would seek extradition of the Japanese nationals to the US for prosecution there; for Canada to “pile on” with its own extradition proceedings is simply not the usual way of proceeding.

14. Thus, Canada’s enforcement culture, unlike that of the US, does not see extradition as an important tool in the cartel enforcement arsenal. While a foreign national engaged in cartel conduct with a connection to Canada definitely bears the legal risk that extradition proceedings by Canada could be brought, the practical risk is currently low.

2. Extradition from Canada

15. The “other direction”—proceedings taken by a foreign government seeking extradition of a Canadian national in respect of cartel conduct—is a more realistic prospect, as a practical matter. Here too, however, success comes slowly and at significant effort, time and expense.

16. The extradition process in Canada engages “*important considerations of policy, justice and international law and practice.*”¹⁴ Canada’s Extradition Act¹⁵ provides the legal basis on which to extradite persons located in Canada who are sought by one of Canada’s “*extradition partners.*”

17. Extradition partners come from three sources: (a) countries with which Canada has an extradition agreement (bilateral treaties or multilateral conventions);

(b) countries with which Canada has entered into a case-specific agreement; or (c) countries or international courts set out in the schedule to the Extradition Act. Canada has multiple extradition partners, including many countries that form the world’s economic hubs. Canada has concluded some 49 bilateral extradition treaties, and there are 31 countries noted in the Extradition Act’s schedule.¹⁶ Those numbers include close to half of the 193 member states recognized by the United Nations, over half of the G20 member states, and all G7 states.

18. As in other countries, dual criminality is a feature of Canadian extradition law: the Extradition Act permits extradition to other jurisdictions where an offence is punishable by imprisonment of at least two years in both countries or as otherwise specified in the relevant extradition treaty.¹⁷ By way of example, the Extradition Treaty between the United States of America and Canada allows for extradition of persons charged or convicted of a number of offences including conspiracy and bid-rigging offences.¹⁸

19. There are three key stages to the Canadian extradition process:

– Upon request from one of its extradition partners, the Canadian Minister of Justice makes a preliminary determination of whether the foreign aspect of the minimum punishment and dual criminality requirements are met. If they are, the minister authorizes the commencement of extradition proceedings in a Canadian court (known as a committal hearing) by issuing an Authority to Proceed (“ATP”). The ATP is sent to the attorney general, who may then apply *ex parte* for an arrest warrant, the procedures for which are governed by the Criminal Code (Canada), including bail if applicable.

– Where an ATP has been issued, the Canadian court must determine whether there is sufficient evidence to justify the person’s committal for extradition.

– Where the person is committed for extradition, the Minister of Justice must personally decide whether to order the person’s surrender to the foreign state.

20. The steps were succinctly described by the Supreme Court of Canada: “*The process of extradition from Canada has two stages: a judicial one and an executive one. The first stage consists of a committal hearing at which a committal judge assesses the evidence and determines (1) whether it discloses a prima facie case that the alleged conduct constitutes a crime both in the requesting state and in Canada and that the crime is the type of crime*

14 G. Williams, *Venue and the Ambit of Criminal Law* (1965) 81 *L.Q.R.* 276 at 276.

15 S.C. 1999, c. 18 (the “Extradition Act”).

16 Global Affairs Canada, *Treaty List*, 3 March 2014 online: <http://www.treaty-accord.gc.ca/result-resultat.aspx?type=1>.

17 Extradition Act, s. 3(1)(a).

18 Treaty on Extradition between the Government of Canada and the Government of the United States of America, CTS 1976 No. 3 at Art. 2(2).

contemplated in the bilateral treaty; and (2) whether it establishes on a balance of probabilities that the person before the court is in fact the person whose extradition is sought. In addition, s. 25 of the Extradition Act (...) empowers the committal judge to grant a remedy for any infringement of the fugitive's Charter rights that may occur at the committal stage[.]”¹⁹

21. If the evidence is insufficient, the person whose extradition is sought (referred to as the “fugitive”) is discharged. If the fugitive is committed for surrender, he or she has a right to appeal the order of committal within thirty days of the date of committal.²⁰ An order of committal triggers the executive aspect of the extradition process, whereby the Minister of Justice makes the final decision of whether the fugitive should be surrendered.²¹

III. Extradition and competition-related offences

22. While not quite as scarce as any mention of Canada seeking extradition of foreign cartelists to face charges in a Canadian court, there is still a paucity of public commentary regarding the prospects of future extraditions from Canada for cartel offences. Nonetheless, there is a handful of recent examples of extradition for offences that at least touch on competition law which suggest that the Canadian Government is favourably inclined.

1. Telemarketing scams

23. In 2008, the Competition Bureau proudly announced²² convictions in a US court of three Canadian nationals (two of whom had pleaded guilty and one of whom was found guilty) who had engaged in a telemarketing scheme. The Bureau proclaimed this to be its first investigation that had resulted in an extradition. The extradition followed investigations into a deceptive telemarketing scheme that defrauded close to 40,000 American consumers while generating approximately \$8 million for three fraudsters.²³

19 *Lake v. Canada (Minister of Justice)*, 2008 SCC 23 at para. 21, internal cites omitted.

20 Extradition Act, at ss. 38(2)–49.

21 *United States v. Dynar*, [1997] 2 S.C.R. 462 at para 118.

22 Competition Bureau, Canadian Scammers Extradited to the U.S. Receive Lengthy Prison Sentences, 30 July 2008 online: www.canada.ca/en/news/archive/2008/07/canadian-scammers-extradited-receive-lengthy-prison-sentences.html.

23 *Ibid.*

24. While the offences charged were not cartel offences, deceptive marketing and misrepresentation can fall under the criminal provisions of the Competition Act.

25. The accused were arrested in 2002 and charged with offences under the Competition Act and the Canadian Criminal Code. A formal request for extradition from the US Department of Justice followed in 2003. After exhausting all levels of appeal, the accused were extradited to the US in 2007, and convicted in 2008. The two who pleaded guilty were sentenced to a combined fifty-seven years in prison and ordered to pay \$5 million in restitution, and the third received a fifteen-year prison sentence.²⁴

26. A similar course of conduct and result occurred in 2014, where a Toronto man, Paul Price, was convicted in an Illinois court and sentenced to 10 years in prison for his role in an advanced fee credit card scam that defrauded tens of thousands of US consumers. Mr. Price, his ex-wife, and others, through companies operating in “boiler room” settings (including in Toronto), telephoned US residents with poor credit histories and offered to help them obtain Visa or MasterCard credit cards for an advanced fee of several hundred dollars; those companies had no relationship with Visa and MasterCard. The investigation was a joint effort by various enforcement branches on both sides of the Canada-US border, and eleven individuals (some of whom were US citizens) were charged. Some Canadian nationals waived extradition and some were caught as they entered the US from Canada; Mr. Price and his wife were extradited to the US to face trial after litigating extradition and other issues at length in Canada.²⁵

27. As noted, these offences fall under the Competition Act but are not cartel violations. It seems clear that in the area of consumer fraud, the Government of Canada is favourably disposed to extradition to the US.

2. The *John Bennett* case: Getting closer to a cartel

28. A more recent case suggests that extradition for an actual cartel offence may not be too far away. In late 2014, John Bennett, a Canadian national, was extradited to the United States from Canada to face charges of fraud, kickbacks and bid rigging.

29. In 2009, Bennett and two others were indicted in the US for fraudulent conduct involving contracts at US Environmental Protection Agency sites. Bennett had become a major player in the contaminated soil cleanup

24 *Ibid.* It appears that the strategy of pleading guilty led to a worse prison outcome, I could not help but notice.

25 Competition Bureau, Toronto man receives 10 years in U.S. prison following cross-border fraud investigation, January 31, 2014, online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03654.html>; see also U.S. Department of Justice, U.S. Attorney's Office for the Southern District of Illinois, Canadian Man Sentenced for Consumer Fraud, January 17, 2014, online: <https://www.justice.gov/usao-sdil/pr/canadian-man-sentenced-consumer-fraud>.

business, having built his company over the course of forty years. Bennett fought his extradition in the Canadian courts for many years. Ultimately, the Supreme Court of Canada refused to hear an appeal from the decision of the British Columbia Court of Appeal²⁶ confirming that the requirements for extradition had been met, and on November 14, 2014 Bennett was extradited to the US. In 2016, Bennett was convicted in a US court and was sentenced to sixty-three months in prison.²⁷

IV. Where to from here?

30. There can be no doubt that convergence, coordination and cooperation are watchwords for the international competition law enforcement community. As the Head of Canada's Competition Bureau, John Pecman, put it in an address to the North American Antitrust Authorities Conference, "*our goal is simple—deepen our working relationships with key international partners.*"²⁸

31. How such expressions translate into real life behaviour remains a work in progress. While the United States has been enormously successful in exporting US-style exuberance when it comes to criminalizing cartel conduct and ruthlessly seeking periods of incarceration, there remains some reluctance to turn over Canadian nationals to the US prosecutors when there are Canadian aspects to the conduct which are more properly considered by a Canadian court through a Canadian prosecution. As noted, the Canada–US relationship is somewhat unique and tends to be the focus when considering the interplay between enforcement activities across jurisdictions which might engage extradition considerations.

32. That said, there is no question the world is getting smaller²⁹ and the coordination and cooperation of those who work to catch the "bad guys" has paid off and is likely to increase. Whether, in that context, Canada seeks extradition of foreign nationals for violations of Canadian competition law, and whether it responds positively to efforts to do the same from other countries, bears watching with some interest over the coming years. ■

²⁶ *United States v. Bennett*, 2014 BCCA 145; *Bennett v. Attorney General of Canada*, No. 35839 (S.C.C.).

²⁷ The US Department of Justice, Former CEO of Canadian Hazardous Waste Treatment Company Sentenced to Serve 63 months in Prison for Role in Kickback and Fraud Schemes Against the United States, 9 August 2016 online: www.justice.gov/opa/pr/former-ceo-canadian-hazardous-waste-treatment-company-sentenced-serve-63-months-prison-role.

²⁸ J. Pecman, Better Together — The Importance of Cooperation Amongst Competition Authorities, 21 May 2015 online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsl/eng/03940.html.

²⁹ Not actually, but you know.

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