

# Extradition in International Antitrust Enforcement Cases

## Mark L. Krotoski

The U.S. Department of Justice's Antitrust Division began to focus on international anti-cartel enforcement in the 1990s.<sup>1</sup> Since then, the global reach of Sherman Act enforcement has expanded dramatically. The Antitrust Division now regularly investigates, prosecutes, and convicts foreign companies and executives based on cartel activities occurring largely outside the United States. The Antitrust Division has used a variety of law enforcement tools to advance its objective to "send a powerful signal that cartelists will not be allowed to hide behind borders."<sup>2</sup>

Since the latter 1990s, the Antitrust Division has focused on extradition as an essential part of its international enforcement efforts.<sup>3</sup> The use of this law enforcement tool has taken many years to develop and apply in Antitrust Division cases. Last year the Antitrust Division took another significant step in international enforcement, with the extradition of two foreign executives—an Italian national traveling in Germany indicted in a bid-rigging case and a Canadian national indicted on fraud charges arising from a bid-rigging scheme. The German extradition was the first successfully litigated extradition on an antitrust charge.<sup>4</sup>

In these recent cases, the Antitrust Division demonstrated its resolve to use the extradition process to prosecute executives abroad as part of its mission to enforce the Sherman Act. More extraditions likely will follow.<sup>5</sup> The credible threat of the successful use of the extradition process bears upon and enhances the reach of the Antitrust Division's international anti-cartel enforcement program.

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<sup>1</sup> See, e.g., Scott D. Hammond, Dep. Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Charting New Waters in International Cartel Prosecutions 1–2 (Mar. 2, 2006) (summarizing prior enforcement efforts), available at <http://www.justice.gov/atr/public/speeches/214861.pdf>.

<sup>2</sup> Thomas O. Barnett, Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Seven Steps to Better Cartel Enforcement 5–6 (June 2, 2006) (discussing the Norris extradition), available at <http://www.justice.gov/atr/public/speeches/216453.pdf>; see generally Mark Krotoski, *Essential Elements for an Effective Anti-Cartel Program*, CARTEL & CRIMINAL PRACTICE COMMITTEE NEWSL. 11, 32–34 (ABA Section of Antitrust Law), Spring 2014 (summarizing international law enforcement tools), available at [http://www.weil.com/~media/files/pdfs/ABA\\_Cartel\\_Criminal\\_Practice\\_Spring\\_%202014.pdf](http://www.weil.com/~media/files/pdfs/ABA_Cartel_Criminal_Practice_Spring_%202014.pdf).

<sup>3</sup> See, e.g., Gary R. Spratling, Dep. Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Negotiating the Waters of International Cartel Prosecutions 13–15 (Mar. 4, 1999) (noting model plea agreement changes to encourage extradition), available at <http://www.justice.gov/atr/public/speeches/2275.pdf>.

<sup>4</sup> Press Release, U.S. Dep't of Justice, First Ever Extradition on Antitrust Charge (Apr. 4, 2014), available at [http://www.justice.gov/atr/public/press\\_releases/2014/304888.htm](http://www.justice.gov/atr/public/press_releases/2014/304888.htm).

<sup>5</sup> See, e.g., Dan Gearino, *Massive Price-Fixing Among Auto-Parts Manufacturers Hurt U.S. Car Buyers*, COLUMBUS DISPATCH, Mar. 22, 2015 (Director of Criminal Enforcement Marvin N. Price, Jr. noting, in the auto parts investigation, that the Antitrust Division "will consider . . . extraditing" foreign nationals "from the country where they are located"), available at <http://www.dispatch.com/content/stories/business/2015/03/22/a-culture-of-collusion.html>; Pallavi Guniganti, *Obstruction Could Outweigh Antitrust for Indicted Mitsuba Execs*, GLOBAL COMPETITION REV. (Feb. 6, 2015) ("Two executives charged for obstruction of justice and price fixing may have set themselves up as the test case for the US to press Japan for extradition in the auto parts conspiracy.").

When considering extradition of a foreign executive, several factors are at issue, including whether an extradition treaty applies and, if so, which one; whether the applicable extradition treaty contains a “dual criminality” provision (which typically permits extradition only on the basis of criminal conduct qualifying as a serious offense that is punishable by a year or more in prison in both countries); whether other charges may be used to accomplish the extradition; whether charges have been filed under seal so that an unwitting executive might risk arrest while traveling to another country; and whether the executive will be held in custody.

### **Antitrust Division Prosecution and Extradition of Foreign Executives**

The Antitrust Division’s prosecution of foreign nationals who violate the Sherman Act reached a key turning point 16 years ago. In May 1999, in the vitamins investigation, Hoffmann-La Roche Ltd. pled guilty to violating the Sherman Act and was sentenced to pay a criminal fine of \$500 million. The company’s former director of worldwide marketing, a Swiss citizen, pled guilty and agreed to serve four months in prison and pay a \$100,000 fine. His conviction represented the first time a foreign executive agreed to serve time in a U.S. prison for his participation in an international cartel and “marked a watershed in the Antitrust Division’s prosecution of international cartels.”<sup>6</sup> Four other foreign executives pled guilty and agreed to prison terms in the investigation.

As a result of the success and strength of its criminal enforcement program abroad, the Antitrust Division recently has persuaded a substantial number of foreign nationals to voluntarily come to the United States to plead guilty to a Sherman Act violation and serve a federal prison term. Foreign executives may be willing to resolve an Antitrust Division investigation through a plea agreement in order to obtain certainty and closure in the criminal justice process. They avoid the risk of an unexpected arrest during travel based on an international arrest warrant.<sup>7</sup> A negotiated sentence typically is lower than one imposed following a trial conviction. In the Antitrust Division’s ongoing auto parts investigation, for example, dozens of foreign executives have negotiated plea agreements and have voluntarily come to the United States to serve prison terms.<sup>8</sup>

Extradition establishes a process, usually based on a treaty, under which one country agrees to deliver an individual charged with a covered offense to another country for criminal prosecu-

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<sup>6</sup> Scott D. Hammond, Dep. Ass’t Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, *The Evolution of Criminal Antitrust Enforcement over the Last Two Decades* 7 (Feb. 25, 2010), available at <http://www.justice.gov/atr/public/speeches/255515.pdf>; see also *Plea Agreement, United States v. Sommer*, No. 99-CR-201-R (N.D. Tex. May 20, 1999), available at <http://www.justice.gov/atr/cases/f2400/sommer.pdf>; *Information, United States v. Sommer*, No. 99-CR-201R (N.D. Tex. May 20, 1999), available at <http://www.justice.gov/atr/cases/f2400/2454.pdf>; Press Release, U.S. Dep’t of Justice, *Four Foreign Executives of Leading European Vitamin Firms Agree to Plead Guilty to Participating in International Vitamin Cartel* (Apr. 6, 2000), available at [http://www.justice.gov/atr/public/press\\_releases/2000/4494.htm](http://www.justice.gov/atr/public/press_releases/2000/4494.htm).

<sup>7</sup> An arrest warrant may be included as an Interpol Red Notice request which is used to notify 190 member countries to assist in locating and arresting the wanted person for extradition. A Red Notice is tantamount to an international arrest warrant. U.S. DEP’T OF JUSTICE, *CRIMINAL RESOURCE MANUAL 611* (Interpol Red Notices), available at <http://www.justice.gov/usam/criminal-resource-manual-611-interpol-red-notices>; see also *Interpol Notices* (explaining Red Notices and other notice forms), available at <http://www.interpol.int/INTERPOL-expertise/Notices>.

<sup>8</sup> See, e.g., Press Release, U.S. Dep’t of Justice, *Former President and Vice President of Diamond Electric Agree to Plead Guilty to Participating in Auto Parts Price-Fixing Conspiracy* (Jan. 31, 2014) (Dep. Ass’t Att’y Gen. Brent Snyder also noted, “The division’s ongoing investigation has resulted in more than two dozen executives serving prison time for their participation in illegal, auto parts conspiracies.”), available at [http://www.justice.gov/atr/public/press\\_releases/2014/303331.htm](http://www.justice.gov/atr/public/press_releases/2014/303331.htm). To date, most of the executives have been foreign nationals who have negotiated plea agreements. See, e.g., Press Release, U.S. Dep’t of Justice, *Continental Automotive Electronics and Continental Automotive Korea Agree to Plead Guilty to Bid Rigging on Instrument Panel Clusters* (Nov. 24, 2014) (“32 companies and 46 executives have been charged in the Justice Department’s ongoing investigation into the automotive parts industry. . . . Of the 46 individuals, 26 have been sentenced to serve time in U.S. prisons.”), available at [http://www.justice.gov/atr/public/press\\_releases/2014/310026.htm](http://www.justice.gov/atr/public/press_releases/2014/310026.htm).

tion. The United States presently has extradition treaties with more than 100 countries.<sup>9</sup> Because terms vary, each treaty is considered separately as an independent contract between two countries. The Antitrust Division's first successful extradition occurred in 2010. Since then, the Antitrust Division has extradited four individuals from four different countries including, in 2014, its first extradition based solely on antitrust charges.

### ***United States v. Piscioti: Extradition from Germany***

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In August 2010, Romano Piscioti, an Italian executive of marine hose manufacturer Parker ITR S.r.l. was charged in a one-count sealed indictment for rigging bids, fixing prices, and allocating market shares involving sales of marine hose. Nearly three years later, in June 2013, Piscioti was arrested while traveling in Frankfurt, Germany. After his arrest, his indictment was unsealed.<sup>10</sup> In the marine hose investigation, five companies, including Parker, and nine individuals pled guilty. Two individuals were acquitted at trial, and one German national remains at large.<sup>11</sup>

The extradition treaty between the United States and Germany contains a dual criminality provision that allows an individual to be extradited based on an offense that is subject to criminal penalties in both countries.<sup>12</sup> Under German law, however, no German may be extradited to a foreign country.<sup>13</sup>

Piscioti contested his extradition and remained in custody. In January 2014, the Higher Regional Court in Frankfurt concluded that the dual criminality requirement was satisfied. The bid-rigging charge constituted a criminal offense under section 298 of the German Criminal Code and under the Sherman Act. The German Federal Constitutional Court denied his appeal,<sup>14</sup> and he was ordered to be extradited. During the German extradition proceedings, he was held in custody for

<sup>9</sup> Treaties in Force, U.S. Dep't of State (Jan. 2013) (latest version listing extradition treaties), available at <http://www.state.gov/documents/organization/218912.pdf>; see also 18 U.S.C. § 3181 (note) (listing bilateral extradition agreements). In the U.S. Department of Justice, the Office of International Affairs in the Criminal Division reviews and approves requests for extradition in criminal cases. See U.S. ATTORNEY'S MANUAL § 9-15.210 (Role of the Office of International Affairs), available at <http://www.justice.gov/usam/usam-9-15000-international-extradition-and-related-matters#9-15.210>.

<sup>10</sup> Press Release, U.S. Dep't of Justice, *supra* note 4; Indictment, United States v. Piscioti, No. 10-CR-60232 (S.D. Fla. Aug. 26, 2010), available at <http://www.justice.gov/atr/cases/f304900/304914.pdf>; Order, United States v. Piscioti, No. 10-CR-60232 (S. D. Fla. Aug. 5, 2013), available at <http://www.justice.gov/atr/cases/f304900/304945.pdf>.

<sup>11</sup> Plea Agreement, United States v. Parker ITR S.r.l., No. H-10-75 (S.D. Tex. Mar. 25, 2010), available at <http://www.justice.gov/atr/cases/f257300/257358.pdf>; Shannon Henson, *Jury Finds 2 Not Guilty in Marine Hose Cartel*, LAW360 (Nov. 11, 2008); see also Press Release, U.S. Dep't of Justice, Marine Hose Executive Who Was Extradited to United States Pleads Guilty for Participating in Worldwide Bid-Rigging Conspiracy (Apr. 24, 2014) (summarizing investigation), available at [http://www.justice.gov/atr/public/press\\_releases/2014/305376.htm](http://www.justice.gov/atr/public/press_releases/2014/305376.htm).

<sup>12</sup> As the Supreme Court has described the dual criminality principle, "The law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions." *Collins v. Loisel*, 259 U.S. 309, 312 (1922); see also *United States v. Sensi*, 879 F.2d 888, 893 (D.C. Cir. 1989) (reviewing extradition treaty that "expressly embraces the double criminality principle of extradition law, which requires that the offense charged be punishable as a serious crime in both countries").

<sup>13</sup> GRUNDESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [Basic Law], May 23, 1949, Art. 16(2) (Ger.) (as amended Aug. 31, 1990 & Sept. 23, 1990), available at <http://www.constitution.org/cons/germany.txt>; see also Extradition Treaty, U.S.-Ger. June 20, 1978, 32 U.S.T. 1485, available at <http://www.mcabbassociates.com/Germany%20International%20Extradition%20Treaty%20with%20the%20United%20States.pdf>.

<sup>14</sup> See Oberlandsgericht [OLGZ] [Court of Appeals Frankfurt], Jan. 22, 2014, File No. 2 Ausl A 104/13 (Ger.), available at <http://www.lareda.hessenrecht.hessen.de/jportal/portal/t/s15/page/bslaredaprod.psm1?&doc.id=KORE213542014%3AJuris-r01&showdoccase=1&doc.part=L>; Bundesverfassungsgericht [BVerG] [Federal Constitutional Court], Feb. 17, 2014, 2 BvQ 4/14, available at <http://www.hrr-strafrecht.de/hrr/bverfg/14/2-bvq-4-14.php>; see also STRAFGESETZBUCH [STGB] [Criminal Code], Nov. 13, 1998, § 298 (Ger.), available at <http://www.iuscomp.org/gla/statutes/StGB.htm>.

9 months and 16 days. After his initial appearance in the U.S. District Court for the Southern District of Florida, Piscioti was detained. In April 2014, he pled guilty to one count of conspiring to rig bids, fix prices, and allocate market shares of marine hose.<sup>15</sup> The court sentenced him to 24 months in prison and imposed a \$50,000 fine. He received credit for his time in custody during the extradition proceedings, and his sentence was reduced by three months based on his cooperation.<sup>16</sup> In his plea agreement, he was allowed to seek a transfer of his confinement to Italy under the International Prisoner Transfer Program.<sup>17</sup>

### ***United States v. Bennett: Extradition from Canada***

In November 2014, the Antitrust Division announced the second extradition of the year, this time involving a Canadian national. On August 31, 2009, John Bennett and two others were charged in a sealed indictment alleging fraud, kickbacks, and bid rigging involving contracts at Environmental Protection Agency Superfund sites. The indictment was unsealed shortly afterward. Bennett, a former chief executive officer of Bennett Environmental Inc., a Canadian company, was charged with participating in a kickback-and-fraud conspiracy and major fraud against the United States.<sup>18</sup>

Two co-defendants were convicted. One pled guilty to participating in a kickback-and-fraud conspiracy and to committing fraud against the United States and was sentenced to 33 months in prison. The lead defendant was convicted by a jury on ten counts, including bid rigging, kickback, fraud, and related charges, and sentenced to 14 years in prison, the longest prison sentence ever imposed for an antitrust crime.<sup>19</sup> John Bennett's company, Bennett Environmental, entered a guilty plea to conspiring to defraud the EPA and was sentenced in December 2008 to a fine of \$1,000,000 and ordered to pay the EPA \$1,662,000 in restitution.<sup>20</sup> In the investigation, nine individuals and three companies have been convicted.

While the other defendants were prosecuted, the Antitrust Division pursued Bennett's extradition from Canada. The U.S.-Canada extradition treaty provides that "[e]xtradition shall be granted for conduct which constitutes an offense punishable by the laws of both Contracting Parties

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<sup>15</sup> Press Release, U.S. Dep't of Justice, *supra* note 11; *see also* Plea Agreement, United States v. Piscioti, No. 10-CR-60232 (S.D. Fla. Apr. 24, 2014), available at <http://www.justice.gov/atr/cases/f305500/305542.pdf>.

<sup>16</sup> Judgment, United States v. Piscioti, No. 10-CR-60232 (S.D. Fla. Apr. 25, 2014) (No. 25).

<sup>17</sup> Plea Agreement ¶ 15, United States v. Piscioti, No. 10-CR-60232 (S.D. Fla. Apr. 24, 2014), available at <http://www.justice.gov/atr/cases/f305500/305542.pdf>. Under the International Prisoner Transfer Program, foreign prisoners may apply to serve their federal sentences in their home countries. *See* <http://www.justice.gov/criminal/oeo/iptu/> (program overview); <http://www.justice.gov/criminal/oeo/iptu/guidelines.html> (guidelines for considering transfer applications).

<sup>18</sup> Indictment, United States v. McDonald, No. 09-CR-656 (D.N.J. Aug. 31, 2009), available at <http://www.justice.gov/atr/cases/f250100/250158.pdf>; Unsealing Order, McDonald (Sept. 11, 2009), available at <http://www.justice.gov/atr/cases/f250000/250011.pdf>; Press Release, U.S. 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](http://www.justice.gov/atr/public/press_releases/2009/249958.htm).

<sup>19</sup> Press Release, U.S. Dep't of Justice, Former Project Manager Sentenced to Serve Time in Prison for Role in Bid Rigging and Other Fraudulent Schemes Involving Two EPA Superfund Sites in New Jersey (Mar. 3, 2014), available at [http://www.justice.gov/atr/public/press\\_releases/2014/304133.pdf](http://www.justice.gov/atr/public/press_releases/2014/304133.pdf); *see also* Press Release, U.S. Dep't of Justice, Former Representative of Backfill Subcontractor Sentenced to 33 Months in Jail for Kickback and Fraud Scheme (Feb. 23, 2010), available at [http://www.justice.gov/atr/public/press\\_releases/2010/255575.pdf](http://www.justice.gov/atr/public/press_releases/2010/255575.pdf).

<sup>20</sup> Press Release, U.S. 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](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/f235700/235748.pdf>.

by imprisonment or other form of detention for a term exceeding one year or any greater punishment.”<sup>21</sup>

Bennett contested his extradition for more than five years. In February 2012, a Canadian Supreme Court Judge ordered his committal. In August 2012, the Canadian Minister of Justice ordered him to surrender to the United States. In April 2014, the Court of Appeal for British Columbia dismissed his appeal, deeming the U.S. charges to be equivalent to the Canadian offenses of fraud and conspiracy to commit fraud. On October 30, 2014, the Supreme Court of Canada declined to hear Bennett’s appeal. On November 14, 2014, Bennett was extradited to the United States.<sup>22</sup> Although the case involved a separate bid-rigging charge, the charges on which his extradition was based did not involve a Sherman Act violation.

Bennett appeared before the U.S. District Court for the District of New Jersey on November 17, 2014. He was detained initially but released a few weeks later on bail, with conditions that included posting a \$1 million secured appearance bond, house arrest under third-party custody, wearing a tracking device, and surrendering his passport.<sup>23</sup> His jury trial is scheduled for Fall 2015.

### ***United States v. Porath: Extradition from Israel***

In 2012, the Antitrust Division extradited an executive from Israel on bid-rigging and tax charges. In February 2010, David Porath, an owner of The Apache Group Inc., a re-insulation service company, was charged in the Southern District of New York in a sealed indictment containing three counts: (1) conspiring to rig bids on contracts for re-insulation services to New York Presbyterian Hospital (NYPH) from 2000 through March 2005; (2) conspiring to defraud the Internal Revenue Service; and (3) filing a false tax return. The indictment included a second defendant, who pled guilty in November 2010 to a scheme that created false tax deductions that would reduce Porath’s taxable income.<sup>24</sup> The charges were unsealed the next month.<sup>25</sup> When the charges were filed, Porath, who holds both U.S. and Israeli citizenship, was residing in Israel.

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<sup>21</sup> Protocol Amending the Treaty on Extradition, U.S.-Can., art. 1, Jan. 11, 1988 (1853 U.N.T.S. 407), available at <http://www.treaty-accord.gc.ca/text-texte.aspx?id=101349>; see generally Canada Dep’t of Justice, Extradition Requests to Canada (explaining process), available at <http://www.justice.gc.ca/eng/cj-jp/emla-eej/tocan-aucan.html>.

<sup>22</sup> Press Release, U.S. 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](http://www.justice.gov/atr/public/press_releases/2014/309928.pdf); see also United States v. Bennett, 2011 BCSC 1521 (Jan. 12, 2012) (corrected judgment summarizing early challenges), available at <http://caselaw.canada.globe24h.com/0/0/british-columbia/supreme-court-of-british-columbia/2011/11/10/united-states-v-bennett-2011-bcsc-1521.shtml>; 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/dock-regi-eng.aspx?cas=35839>.

<sup>23</sup> Order Setting Conditions of Release, United States v. Bennett, No. 09-CR-656 (D.N.J. Dec. 9, 2014) (No. 209). Later, the Order was modified to allow Bennett “to travel freely . . . between the hours of 10:00 a.m. and 3:00 pm” with a residence restriction “during all other hours.” Order Modifying Pretrial Release Conditions, United States v. Bennett, No. 09-CR-656 (D.N.J. Mar. 13, 2015) (No. 224).

<sup>24</sup> His co-defendant pled guilty to a conspiracy to defraud the IRS count. See Press Release, U.S. Dep’t of Justice, Pennsylvania Contractor Pleads Guilty to Tax Fraud Conspiracy (Nov. 17, 2010), available at [http://www.justice.gov/atr/public/press\\_releases/2010/264264.pdf](http://www.justice.gov/atr/public/press_releases/2010/264264.pdf).

<sup>25</sup> See Indictment, United States v. Porath, No. 10-CR-120 (S.D.N.Y. Feb. 18, 2010), available at <http://www.justice.gov/atr/cases/f257600/257638.pdf>; Order, United States v. Porath, No. 10-CR-120 (S.D.N.Y. Mar. 31, 2010) (unsealing indictment), available at <http://www.justice.gov/atr/cases/f257500/257557.pdf>; Press Release, U.S. Dep’t of Justice, Former Contractor Indicted in Bid-Rigging Conspiracy at New York City Hospital and for Tax Fraud (Mar. 31, 2010), available at [http://www.justice.gov/atr/public/press\\_releases/2010/257286.pdf](http://www.justice.gov/atr/public/press_releases/2010/257286.pdf).

The extradition treaty between Israel and the United States includes a dual criminality provision that provides for extradition for an offense that “is punishable under the laws in both Parties by deprivation of liberty for a period of one year or by a more severe penalty.”<sup>26</sup>

In January 2011, the Antitrust Division requested the extradition of Porath from Israel. On November 27, 2011, Porath was located and arrested in Israel. He was detained until December 19, 2011, when he was ordered held under house arrest. In January 2012, an Israeli magistrate determined that Porath could be extradited based on all charged offenses. Porath then elected to waive any appeal to the Israeli Supreme Court and consented to his extradition.<sup>27</sup>

On February 16, 2012, Porath was extradited to the United States. He was arraigned the next day and remained in custody. Nearly one year later, on February 6, 2013, he pled guilty to all three charges: conspiring to rig bids, conspiring to defraud the IRS, and filing a false tax return. The court sentenced him to time served (just under one year) and a term of one year of supervised release, and ordered him to pay a \$7,500 fine and \$652,770 in restitution. In the investigation, 15 individuals and 6 companies were convicted on bid-rigging, fraud, bribery, and tax offenses concerning contracts awarded by the NYPH facilities operations department.<sup>28</sup>

### ***United States v. Norris: Extradition from the United Kingdom***

After a six-and-a-half year battle, in 2010, the Antitrust Division extradited a British executive, who then was convicted at a jury trial. This case was the first in which the Antitrust Division successfully extradited an individual and, to date, was the most contentious, having involved contested litigation at each phase.

As part of the carbon graphite investigation, in November 2002, The Morgan Crucible Company PLC, a publicly held company based in England, pled guilty to two counts of witness tampering and document destruction and paid a \$1 million fine. On the same day, Morganite Inc., a subsidiary of The Morgan Crucible Company based in North Carolina, pled guilty to fixing the prices of carbon products and was ordered to pay a \$10 million fine.<sup>29</sup>

After the corporate convictions, in September 2004, Ian P. Norris, Chief Executive Officer of The Morgan Crucible Company PLC and a British citizen, was indicted on four counts: (1) a Sherman Act conspiracy to fix prices for carbon brushes and other carbon products; (2) a conspiracy to obstruct justice; (3) witness tampering; and (4) persuading a witness to destroy records.<sup>30</sup> The obstruction charges related to a script created by Norris for employees to use when questioned

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<sup>26</sup> Protocol Amending the Convention Between the United States of America and Israel of December 10, 1962, U.S.-Isr., art. 2, July 6, 2005, T.I.A.S. 07-110, available at <http://www.state.gov/documents/organization/171403.pdf>.

<sup>27</sup> Final Form Brief for the United States at 17, *United States v. Yaron*, No. 12-2889 (2d Cir. Dec. 13, 2013) (summarizing extradition proceedings), available at <http://www.justice.gov/atr/cases/f302300/302323.pdf>; see also Declaration of Patricia L. Petty, *United States v. Yaron*, No. 10-CR-363 (S.D.N.Y. Apr. 16, 2012) (No. 157) (statement of DOJ Office of International Affairs attorney, summarizing proceedings).

<sup>28</sup> Press Release, U.S. Dep’t of Justice, *Owner of Insulation Service Company Pleads Guilty to Million Dollar Bid-Rigging and Fraud Conspiracies at New York City Hospital* (July 11, 2012), available at [http://www.justice.gov/atr/public/press\\_releases/2012/285024.docx](http://www.justice.gov/atr/public/press_releases/2012/285024.docx).

<sup>29</sup> Plea Agreement, *United States v. Morganite, Inc.*, No. 02-CR-733 (E.D. Pa. Nov. 4, 2002), available at <http://www.justice.gov/atr/cases/f200400/200430.pdf>; Press Release, U.S. Dep’t of Justice, *U.S. Company and U.K. Parent to Plead Guilty to Charges Involving an International Electrical Carbon Products Cartel*, available at [http://www.justice.gov/atr/public/press\\_releases/2002/200423.pdf](http://www.justice.gov/atr/public/press_releases/2002/200423.pdf) (Nov. 4, 2002).

<sup>30</sup> Second Superseding Indictment, *United States v. Norris*, No. 03-632 (E.D. Pa. Sept. 28, 2004), available at <http://www.justice.gov/atr/cases/f206000/206064.pdf>; see also Press Release, U.S. Dep’t of Justice, *Four Former Executives of UK Corporation Charged with Obstructing Price-Fixing Investigation of the Carbon Products Industry* (Sept. 24, 2003), available at [http://www.justice.gov/atr/public/press\\_releases/2003/201287.pdf](http://www.justice.gov/atr/public/press_releases/2003/201287.pdf).

during the investigation. Ultimately, three subordinates pled guilty to obstruction-of-justice offenses.<sup>31</sup>

The Antitrust Division sought to extradite Norris on all charges. The effort commenced in September 2003, when the charges were filed, and continued until March 2010, when he was extradited. The extradition proceedings were vigorously contested. A central dispute was whether the provisions of the UK Extradition Act of 2003 would permit extradition based on the charged offenses.<sup>32</sup> The question was whether the antitrust conduct alleged to have been committed from 1989 until May 2000 was covered because it occurred before a “cartel offense” was established in section 188 of the Enterprise Act of 2002.

In early proceedings, the British courts concluded that the charges were covered by the applicable extradition treaty. Initially, in June 2005, the Bow Street Magistrates’ Court concluded that Norris could be extradited based on the antitrust and obstruction of justice offenses and, in September 2005, the British Secretary of State ordered his extradition. Norris pursued several appeals.<sup>33</sup> In March 2008, the House of Lords determined that Norris could not be extradited on the antitrust count and remitted the case for judicial determination on whether he could be extradited on the obstruction charges. The UK ultimately determined that Norris could be extradited only on the three obstruction-of-justice counts.<sup>34</sup> On March 23, 2010, Norris was extradited from the UK to the U.S. District Court for the Eastern District of Pennsylvania.

In July 2010, Norris proceeded to a jury trial. After a seven-day trial, the jury convicted him solely on the count of conspiring to obstruct justice, acquitting him on the remaining counts. The court sentenced him to serve 18 months in prison and a three-year term of supervised release, and ordered him to pay a \$25,000 fine.<sup>35</sup> The U.S. Court of Appeals for the Third Circuit affirmed his conviction on appeal.<sup>36</sup>

### Issues for Extradition Analysis

The four extradition cases demonstrate the resolve of the Antitrust Division to press for extradition and its readiness to litigate each phase of the case, if necessary. As Assistant Attorney General William Baer commented in connection with the *Pisciotti* case, the conviction “demonstrates the Antitrust Division’s ability to bring to justice those who violate antitrust laws, even when they attempt to avoid prosecution by remaining in foreign jurisdictions.”<sup>37</sup> In the *Norris* case, the Antitrust Division pursued extradition for six-and-a-half years, while extradition in the *Bennett*

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<sup>31</sup> Press Release, U.S. Dep’t of Justice, Former CEO of The Morgan Crucible Co. Sentenced to Serve 18 Months in Prison for Role in Conspiracy to Obstruct Justice (Dec. 10, 2010) (summarizing the convictions in the case), available at [http://www.justice.gov/atr/public/press\\_releases/2010/265028.pdf](http://www.justice.gov/atr/public/press_releases/2010/265028.pdf).

<sup>32</sup> Extradition Act 2003, available at [http://www.legislation.gov.uk/ukpga/2003/41/pdfs/ukpga\\_20030041\\_en.pdf](http://www.legislation.gov.uk/ukpga/2003/41/pdfs/ukpga_20030041_en.pdf).

<sup>33</sup> See generally Scott D. Hammond, *supra* note 1, at 11–12 (summarizing extradition efforts); Julian Joshua, *Implications of Norris for UK-U.S. Extradition and Future UK Cartel Prosecutions*, ANTITRUST SOURCE (June 2008) (same), [http://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/Jun08\\_Joshua6\\_26f.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Jun08_Joshua6_26f.pdf); *Norris v. United States* [2007] EWHC 71 (Admin) (Jan. 25, 2007) (denying appeal), available at <http://www.bailii.org/ew/cases/EWHC/Admin/2007/71.html>.

<sup>34</sup> *Norris v. United States*, [2008] UKHL 16, A.C. 920 (H.L.), available at <http://www.bailii.org/uk/cases/UKHL/2008/16.html>; Order for Extradition Pursuant to Section 93(4) of the Extradition Act 2003 (Sept. 22, 2008) (cited in *United States v. Norris*, No. 10-4658, 3 n.1 (3d Cir. Mar. 23, 2011) (noting limitation on extradition), available at <http://www.justice.gov/atr/cases/f268800/268813.pdf>).

<sup>35</sup> Press Release, U.S. Dep’t of Justice, *supra* note 31; Press Release, U.S. Dep’t of Justice, Former CEO of The Morgan Crucible Co. Found Guilty of Conspiracy to Obstruct Justice (July 27, 2010), available at [http://www.justice.gov/atr/public/press\\_releases/2010/260826.pdf](http://www.justice.gov/atr/public/press_releases/2010/260826.pdf).

<sup>36</sup> *United States v. Norris*, No. 10-4658 (3d Cir. Mar. 23, 2011), available at <http://www.justice.gov/atr/cases/f268800/268813.pdf>.

<sup>37</sup> Press Release, U.S. Dep’t of Justice, *supra* note 11.

case took more than five years. After extradition, two of the four cases—*Pisciotti* and *Porath*—resulted in negotiated plea agreements. In the *Norris* case, the Antitrust Division obtained a conviction at trial, which was affirmed on appeal. The *Bennett* case remains pending for trial.

The four cases highlight issues for consideration in the extradition of individual defendants to the United States in connection with antitrust offenses.

**Applicable Extradition Treaty.** The initial step is to determine whether an extradition treaty applies and, if so, which one. Although the United States has extradition treaties with more than 100 countries, it does not have such treaties with numerous others, including many in the Middle East, Africa, and parts of Asia. More than one extradition treaty may apply. The starting point is whether the United States has an extradition treaty with the defendant's country of residence. The *Norris* and *Bennett* extraditions were based on extradition treaties with the executives' native countries. Similarly, *Porath* held Israeli citizenship, in addition to U.S. citizenship, and was residing in Israel when he was arrested.

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Even those countries with which the United States has an extradition treaty may place limitations on the applicability of the treaty. For instance, some countries, such as Germany and Japan,<sup>38</sup> have laws barring the extradition of its nationals. In other instances, a treaty, such as those with South Korea and Australia, may permit the country to exercise its discretion in extraditing its nationals.<sup>39</sup>

Extradition treaties with the countries to which a defendant likely will travel also must be considered. Each potentially applicable treaty must be reviewed, as the terms often vary. The *Pisciotti* case highlights the risks of being extradited during international travel. As an Italian national traveling through Germany, *Pisciotti* discovered that he was subject to the extradition treaty between the United States and Germany based on a sealed U.S. indictment.

Travel carries additional risks. Scheduled flights can be unpredictable based on weather, mechanical, and other delays, which may result in re-routing to airports in other countries. If a flight is redirected to an airport in a country that has an extradition treaty with the United States, the defendant may be extradited pursuant to the terms of that treaty.

**Covered Offenses.** The next question is whether the applicable extradition treaty covers the charged offenses. If the applicable treaty contains an enumeration of specific covered offenses, extradition is possible only if the charged offense is listed. More commonly, however, extradition treaties have a dual criminality provision that permits extradition only for antitrust or other charged conduct that is criminalized in both countries. The dual criminality requirement was invoked and litigated, and found to have been satisfied, in both the *Pisciotti* and *Porath* cases.

The recent international trend has been to criminalize antitrust offenses.<sup>40</sup> As more countries criminalize antitrust offenses, the risk of extradition will expand to other jurisdictions. For extradi-

<sup>38</sup> Japan Law of Extradition, Art. 2(9), available at <http://www.moj.go.jp/ENGLISH/information/loe-01.html>.

<sup>39</sup> SEN. EXEC. REP. NO. 106-13, (Nov. 3, 1999) (report on extradition treaty with Republic of Korea) (noting that “[p]ermitting such broad discretion to extradite nationals is not the preferred U.S. requirement”), available at <http://www.gpo.gov/fdsys/pkg/CRPT-106erpt13/html/CRPT-106erpt13.htm>; Treaty on Extradition, U.S.-S. Kor., art. 3(1), Dec. 20, 1999, T.I.A.S. No. 12,962 (noting “the Requested State shall have the power to extradite” its own nationals “if, in its discretion, it be deemed proper to do so”), available at <http://www.state.gov/documents/organization/112483.pdf>; Treaty on Extradition, U.S. Austl., art V(1), May 8, 1976, 27 U.S.T. 957 (noting “the executive authority of each Contracting Party shall have the power to deliver” its own nationals “up if, in its discretion, it considers that it is proper to do so”), available at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/dfat/treaties/1976/10.html>.

<sup>40</sup> See generally Gregory C. Shaffer & Nathaniel H. Nesbitt, *Criminalizing Cartels: A Global Trend?* (Minnesota Legal Studies Research Paper Series No. 11–26, 26–29, June 6, 2011) (chronological listing of countries that have criminalized cartel conduct), available at <http://ssrn.com/abstract=1865971>.

tion from countries that do not criminalize cartel conduct, the Antitrust Division may be able to rely on other criminal charges that qualify for extradition, as demonstrated by the *Norris*, *Bennett*, and *Porath* cases. In *Norris*, although the executive was charged with Sherman Act violations and obstruction of justice, extradition was based solely on the three obstruction-of-justice charges, so *Norris* could be prosecuted in the United States only on the covered obstruction charges. In the *Bennett* case, although the lead defendant was convicted of bid rigging at trial, *Bennett's* extradition was based on charges of kickback-and-fraud conspiracy and major fraud against the United States. The *Porath* case demonstrates that the Antitrust Division may seek extradition on both Sherman Act and related charges, specifically tax charges. Of the four extraditions to date, only *Pisciotti's* was based solely on antitrust charges.

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**Nonpublic Charges.** Another issue is whether the charges filed by the Antitrust Division are public. If the charges are not public, a defendant residing abroad would be unaware of them and thus unable to assess whether the offenses might be covered by a particular extradition treaty.

A defendant may be extradited from a country other than his country of citizenship or residence. As demonstrated in the *Pisciotti* case, executives who travel internationally risk being arrested on an international arrest warrant based on unknown, pending charges. *Pisciotti* was extradited not from his native country, Italy, but from a foreign country, Germany, while he was traveling. Because he was not a German national, the German law barring extradition of Germans could not protect him. The indictment remained under seal for nearly three years until his arrest. After his arrest, the indictment was unsealed.

**Custody Status.** Custody status and length of custody are other factors to consider. Custody status is based largely on an assessment of the risk of flight. Custody may be imposed upon arrest in the country of extradition and is independently considered in the United States following extradition. Typically, the international nature of the charge and the defendant's meaningful ties to the United States, or lack thereof, are relevant factors for whether custody may be imposed.<sup>41</sup>

The length of detention can vary. *Pisciotti* remained in custody from the moment of his arrest at the airport in Germany through the extradition proceedings and through the U.S. court proceedings until his conviction and sentencing. Ultimately, he received credit in his federal sentence for the time he spent in custody during his extradition proceedings but he never was released. *Porath* was originally arrested in Israel and then held under house arrest during the extradition proceedings. Upon his extradition to the United States, he remained in custody during his federal court proceedings.

Finally, in some circumstances, an executive may be able to qualify for a transfer to his native country if the conditions of the International Prisoner Transfer Program are satisfied. For example, *Pisciotti's* plea agreement explicitly permitted him to apply to complete his sentence in Italy under the International Prisoner Transfer Program.

## Conclusion

The credible threat and ability to extradite foreign executives directly impacts the enforcement of the Sherman Act outside the United States. The four extraditions to date confirm the determination of the Antitrust Division to use this law enforcement tool.

<sup>41</sup> See generally 18 U.S.C. § 3142 (factors governing release or detention of a defendant pending trial); U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL 26 (Release and Detention Pending Judicial Proceedings) (discussing legal standards and relevant factors), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00026.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00026.htm).

Although extradition cases present unique challenges and delays, the Antitrust Division has demonstrated its resolve to pursue and litigate extradition issues for many years, if necessary. An increasing number of countries have criminalized antitrust violations, expanding the number of jurisdictions in which extradition may be pursued. Even when the other country that is party to an extradition treaty may not have criminalized antitrust violations, the Antitrust Division may consider other charged offenses as a vehicle for extradition. Continuing analysis of the issues in extradition cases is important, given the international nature of many antitrust cases and efforts to strictly enforce the U.S. antitrust laws abroad. ●