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"Perfectly Properly Triable" in the United States: Is Extradition a Real and Significant Threat to Foreign Antitrust Offenders?[1]

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Imagine that you are a U.K. citizen who has been running a manufacturing business for several years in Windsor, England. One day, the U.K. authorities arrest you for violating U.S. antitrust laws by price-fixing; your own government then surrenders you to the United States, where you will be tried and sentenced for the alleged antitrust violations in the U.S. courts. As surreal as this scenario may sound, this is exactly what the Bow Street Magistrates' Court in London decided when it held that Ian P. Norris, a U.K. citizen and the former CEO of Morgan Crucible Company Plc, was extraditable for allegedly violating U.S. antitrust laws.[2] Although Mr. Norris eventually succeeded in convincing the House of Lords that he should not be extradited to the United States,[3] his five-year battle against

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[1] The term "perfectly properly triable" comes from Lord Justice Laws' opinion in Bermingham v. United States, [2006] EWHC 200 (Q.B. Admin), more commonly known as the *NatWest Three* case. The court found three British investment bankers extraditable to the United States on U.S. wire fraud charges, because there was a "significant United States dimension to the whole case" to make it "perfectly properly triable" in the United States. *Id.* at paras. 125, 129. After extradition, the three pleaded guilty in the Southern District Court of Texas to a single wire fraud charge as part of a plea bargain. Andrew Clark, *Natwest Three Plead Guilty to $7.3m Enron-linked Transatlantic Fraud*, GUARDIAN, Nov. 29, 2007, at 26.

[2] Norris v. Sec'y of State for the Home Dep't, [2006] EWHC 280 paras. 16–17 (Q.B. Admin).

[3] Norris v. Gov't of the United States, [2008] UKHL 16 (H.L.). The main issue that the House of Lords dealt with was the "dual criminality" (also called "double criminality") requirement. *Id.* para. 63. Reversing the lower courts' holdings on this issue, on Mar. 12, 2008, the House of Lords denied the extradition request since the United States government has not satisfied the dual criminality requirement. The Lords held that Norris' conduct in

extradition to the United States has been a serious concern among many U.K. business people.[4]

Seeking extradition of foreign officers in charge of foreign corporations for trial in the United States is one of the latest policies that the U.S. Department of Justice ("DOJ") has adopted to enforce U.S. antitrust laws internationally.[5] As a result, the world has become a much riskier place for foreign officers and executives, who, in the past, could practically ignore U.S. antitrust laws and still hide safely behind the protection of their own countries' borders.[6] The DOJ expects this "real and significant" threat[7] of extradition to incentivize foreign corporate officers to comply with U.S. antitrust laws by altering their conduct, and how they operate their

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question were not "at the material time . . . a criminal offence [sic] in [the United Kingdom] either at common law or under statute," and "[i]t was therefore wrong to have characterised [sic] his conduct as being party to a conspiracy to defraud . . . ." *Id.* It is important to note, however, that the ultimate outcome of the *Norris* case will not have a significant effect on the DOJ's policy of pursuing extradition of foreign antitrust offenders or on the arguments this Note makes. *See* Brian Byrne, Shaun Goodman & Ilya Shapiro, *Extending the Long Arm of US Antitrust Law: The Ian Norris Extradition Battle*, GLOBAL COMPETITION REVIEW, Dec./Jan. 2006, at 14; *UK Extradition*, FIN TIMES, Mar. 14, 2008, at 20 ("There is no evidence that the US crusade is slowing down."). If Norris has committed the alleged price-fixing *after* such conduct was criminalized in the United Kingdom, he would almost certainly have been extradited. See *infra* Part II.B. for general discussion on the dual criminality requirement.

[4] *See* Christopher Hope, *Norris Talks of His Nightmare at Last*, DAILY TELEGRAPH (London), Mar. 17, 2008, at 5 (noting that the firm representing Norris has "dealt with 'scores' of enquiries by worried British businessmen," and that "all British businessmen . . . should be thankful for Ian Norris" for winning the extradition battle).

[5] Scott D. Hammond, Update of the Antitrust Division's Criminal Enforcement Program 4 (Nov. 16, 2005) [*hereinafter* Hammond Address I], *available at* http://www.usdoj.gov/atr/public/speeches/213247.pdf.

[6] Barry A. Pupkin & Iain R. McPhie, *Antitrust Extradition: An Emerging Risk*, THE ANTITRUST COUNSELOR, July 2006, at 2. The *Norris* case illustrates a significant change from a few years ago, when the United States was unable to prosecute Sir Anthony Tennant, a British citizen, in an international price-fixing scheme. The scheme involved Sotheby's Holdings, Inc. and Christie's International Plc auction houses, which agreed to fix prices of sellers' commissions and cease negotiating discounts. The scheme was revealed when certain executives of Christie's reported the offensive conduct pursuant to the DOJ's Corporate Leniency Program. In May 2001, the United States indicted Alfred Taubman, former chairman of Sotheby's, and Sir Tennant, former chairman of Christie's, for violating U.S. antitrust laws. Taubman was convicted at trial in December 2001 and was sentenced to a year in prison, but Sir Tennant refused to submit to the U.S. jurisdiction. He still remains an international fugitive. *See* Scott D. Hammond, A Review of Recent Cases and Developments in the Antitrust Division's Criminal Enforcement Program 7–8 (Mar. 7, 2002), *available at* http://www.usdoj.gov/atr/public/speeches/10862.pdf; Byrne, Goodman & Shapiro, *supra* note 3, at 13.

[7] Scott D. Hammond, Charting New Waters in International Cartel Prosecutions 12 (Mar. 2, 2006) [*hereinafter* Hammond Address II], *available at* http://www.usdoj.gov/atr/public/speeches/214861.pdf.

businesses. However, the possible changes effected by the threat of extradition may take a more indirect form than one might suspect.[8] While some of the existing comments and publications seem to tout this new DOJ policy as a universal threat applicable to all foreign officers around the world,[9] there are inherent and practical limitations to international extradition that make it difficult to apply in most cases.[10] This Note will argue that the changes that the DOJ seeks to effect by implementing the new international enforcement policy may take place more indirectly and informally than through the use of international extradition per se.

This Note does not aim to discuss the appropriateness of the U.S. policy or the fairness of trying foreign citizens in the U.S. courts.[11] Rather, the purpose of this Note is to examine the use of international extradition by the United States as a means of international antitrust enforcement, and to analyze its effects on foreign corporate officers and foreign businesses. In doing so, this Note will show that: 1) international extradition is not as effective a tool in punishing foreign antitrust offenders as some commentators present it to be; 2) nonetheless, the perceived threat of extradition and criminal punishment in the United States will have meaningful deterrent effects in itself; and 3) therefore, the DOJ's policy will have a significant impact on foreign officers and their business practices,

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[8] *See, e.g.*, Pupkin & McPhie, *supra* note 6, at 4 ("A growing trend toward criminalization of antitrust offenses in other jurisdictions [outside the United States] could similarly increase the likelihood of antitrust extradition beyond the U.K."); Bradford Ockene & Jodi Ahlman, *Executives Beware—Extradition to the US for "White Collar" Criminal Allegations*, LEGAL AND FINANCIAL RISK (Lovells LLP, London, U.K.), Sept. 2006, at 12, 13 ("With its recent successes in the *Norris* and *NatWest Three* cases, it is likely that the DOJ will continue to expand its extradition requests to other foreign criminal activities that fall under US jurisdiction."), *available at* http://www.lovells.com/NR/rdonlyres/FF48D95D-0524-45CE-A315-B6224EB4C0CD/4387/3385_D1_LegalFinRiskNL.pdf; R. Hewitt Pate & Ray V. Hartwell, *Global Cartel Enforcement: Developing Issues*, ANTITRUST REVIEW OF THE AMERICAS 2007 ("The implications of the 'Norris case' are not limited to the U.K. The case signals that the [United States] is not going to sit back and let foreign executives remain at peace in their home jurisdictions.").

[9] There are, however, publications that are more cautious in evaluating the future impact of the *Norris* case. *See, e.g.*, Julian M. Joshua & Peter D. Camesasca, *An Antitrust NATO – the DoJ's "Foreign Policy" in the War Against International Cartels*, EUROPEAN ANTITRUST REVIEW 2006, Oct. 2005, at 16 ("Whether other European jurisdictions are as ready as the U.K. to extradite cartel suspects to the US is another unknown."); Byrne, Goodman & Shapiro, *supra* note 3, at 14 ("[Extradition] will not happen in every case, of course, but the justice department will act methodically to establish an extradition precedent and then expand it step by step.").

[10] *See infra* Part III.B.

[11] For a different scope and perspective on the same topic, see Jill Kaden Grant, Note, *Extradition as a Tool for United States Antitrust Enforcement: Implications of the U.K. Decision* Norris v. Secretary of State for the Home Department, 33 BROOK. J. INT'L L. 209 (2007); Richard Goldberger, Comment, *It's Just Not Cricket: Is the Principle of Reciprocity Being Honored in the U.S.-U.K. Extradition Treaty?*, 29 CARDOZO L. REV. 819 (2007).

albeit in a more indirect and informal way.

First, Part I of this Note describes the new DOJ policy of extraditing foreign officers to the United States for their alleged violations of U.S. antitrust laws, and the rationale behind the policy. Then Part II briefly examines how the United States applies the law of international extradition through extraterritorial application of its antitrust laws and liberal construction of the treaty provisions. Part III discusses the inherent and practical difficulties in requesting extradition of foreign antitrust offenders, and explains why international extradition may not be a viable tool for punishing foreign antitrust offenders. Part IV then argues that the DOJ policy may still have significant effects on the behaviors of foreign corporate officers and their business practices. By applying the deterrent theory of perceived criminal punishment to the U.S. antitrust enforcement policy, Part IV presents indirect and informal ways through which the DOJ can enforce U.S. antitrust laws and punish those foreign individuals who do not follow them. Finally, this Note concludes by suggesting the future impact and implications of the policy.

I. BACKGROUND: THE NEW DOJ ENFORCEMENT POLICY

Globalization of commerce has led to various instances where the activities of foreign or multinational companies can harm U.S. commerce.[12] The DOJ has long recognized this fact, and sought to enforce U.S. antitrust laws regardless of the location of the activities or the nationalities of the offenders.[13] Especially in the last decade, the focus on international antitrust enforcement has intensified significantly,[14] and most of the DOJ's

[12] Donald C. Klawiter, *Criminal Antitrust Comes to the Global Market*, 13 ST. JOHN'S J. LEGAL COMMENT. 201, 221 (1998) ("The business world continues to shrink daily with the opening and expansion of global markets. As the business cultures of diverse international companies meld together, there is substantial concern that industries will turn to the convenient, and usually illegal, practice of fixing prices and allocating territories, production or customers."); Jennifer Quinn, Comment, *Sherman Gets Judicial Authority to Go Global: Extraterritorial Jurisdictional Reach of U.S. Antitrust Laws are Expanded*, 32 J. MARSHALL L. REV. 141, 165 (1998) ("With the increasing significance of import and export trade on United States commerce . . . [anticompetitive] activities deny Americans their right to a free market economy by artificially raising prices and reducing the quality and quantity of goods. Our Nation's courts should not allow businesses to get away with this type of activity merely because they committed their acts in a foreign country.").

[13] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT GUIDELINES FOR INT'L OPERATIONS § 3.1 (Apr. 1995), *available at* http://www.usdoj.gov/atr/public/guidelines/internat.htm [*hereinafter* ANTITRUST ENFORCEMENT GUIDELINES]; *see* Quinn, *supra* note 12, at 142 ("It has been over fifty years since the Second Circuit determined that United States antitrust laws can, in certain circumstances, apply to wholly extraterritorial conduct."); *see also infra* Part II.A for a brief overview of the extraterritorial applicability of U.S. antitrust laws.

[14] Klawiter, *supra* note 12, at 201.

recent enforcement activities have been characterized by their "international flavor."[15] Because of the DOJ's aggressive stance on international enforcement of antitrust laws, foreign antitrust violators now face an increased risk of exposure to U.S. antitrust laws.[16] Illustratively, roughly half of the corporate defendants in antitrust cases brought by the DOJ since 1998 were foreign-based, including Belgium, France, Germany, Italy, Japan, South Korea, Mexico, South Africa, Switzerland, and United Kingdom—a noticeable increase from 1991, when only one percent of such defendants were foreign.[17]

A more alarming trend for the foreign corporate officers and executives, however, is the DOJ's strong support for the "more vigorous prosecution" of foreign individuals.[18] The DOJ seeks aggressively to punish antitrust offenses by prosecuting the officers and executives of the violating companies.[19] Accordingly, since 2001, nearly one-fourth of the individual defendants in the DOJ's antitrust cases have been foreign nationals.[20] Such an approach stems from the DOJ's belief that the most effective way to deter antitrust violations is to hold the individuals accountable and seek jail sentences for the violations.[21] This belief reflects the theory that the likelihood of jail time for antitrust violators provides a valuable deterrent function,[22] since 1) corporations can only commit antitrust violations through the active participation of individual officers and executives; and 2) these individuals choose to participate in violations only when the perceived benefit to be derived from such activities is greater than the potential cost.[23] When the possibility of individual criminal sanctions—especially the high likelihood of incarceration—is thrown into the cost-benefit analysis, the increased potential cost of participating in antitrust violations will be far greater than where there is no such individual

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[15] Laurence K. Gustafson, Brian M. Collins & Brian McKay, *Criminal Consequences of Anticompetitive Conduct*, 45 S. TEX. L. REV. 89, 90 (2003).

[16] Hammond Address I, *supra* note 5, at 3; *see* Klawiter, *supra* note 12, at 201 ("The [DOJ's] Antitrust Division leadership heralds the detection and criminal prosecution of international cartels as its highest enforcement priority . . . . The Division has seized every opportunity to extend, or at least stretch, the territorial reach of the U.S. antitrust laws . . . .")

[17] Hammond Address I, *supra* note 5, at 2–3; Gary R. Spratling, Are the Recent Titanic Fines in Antitrust Cases Just the Tip of the Iceberg? 3 (Mar. 6, 1998), *available at* http://www.usdoj.gov/atr/public/speeches/212581.pdf; Sheryl A. Brown & Christopher Kim, *Antitrust Violations*, 43 AM. CRIM. L. REV. 217, 251 (2006).

[18] Hammond Address II, *supra* note 7, at 1.

[19] *Id.* at 13. For the DOJ's emphasis on individual accountability in general, see Donald I. Baker, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging*, 69 GEO. WASH. L. REV. 693, 705 (2001).

[20] Hammond Address I, *supra* note 5, at 3.

[21] Hammond Address II, *supra* note 7, at 13.

[22] Edward Cavanagh, *Antitrust Remedies Revisited*, 84 OR. L. REV. 147, 166 (2005).

[23] Baker, *supra* note 19, at 698; Hammond Address II, *supra* note 7, at 13.

exposure.[24] For senior executives and corporate officers, then, this "perceived risk of incarceration" is critical to the decision-making processes involved in violating the antitrust laws.[25]

The same rationale applies to the international enforcement of antitrust laws as well. Because the DOJ's enforcement policy focuses on two goals—aggressive international enforcement and emphasis on individual accountability[26]—foreign executives now seem to recognize that not only their companies, but also the individuals in charge may face the risk of U.S. antitrust enforcement.[27] However, in order to turn this "perceived risk of incarceration" into an actual possibility, the United States still needed a way to bring foreign citizens to stand trial in U.S. courts.[28] The DOJ decided to utilize international extradition as a way to provide the necessary "teeth."[29] As a result, the DOJ has been actively seeking to extradite foreign officers and executives to the United States to stand trial for their alleged violations.[30]

Despite the DOJ's efforts, however, there has not been a single successful extradition for a violation of U.S. antitrust laws.[31] This meant that the "perceived risk of incarceration" failed to materialize with respect to foreign corporate officers, because extradition to the United States for an antitrust violation was, literally, unprecedented.[32] The *Norris* case could

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[24] Hammond Address II, *supra* note 7, at 13; Stephen Calkins, *Corporate Compliance and the Antitrust Agencies' Bi-Modal Penalties*, 60 LAW & CONTEMP. PROB. 127, 165–66 (1997) ("As a matter of theory and fact, penalizing individuals is singularly effective.").

[25] Baker, *supra* note 19, at 705. The article quotes a remark by a corporate executive that is apropos to the rationale: "as long as you are only talking about money, the company can at the end of the day take care of me . . . but once you begin talking about taking away my liberty, there is nothing that the company can do for me." *Id.*

[26] As a part of its policy to aggressively prosecute foreign individual antitrust offenders, it is noteworthy that the DOJ has eliminated the "no-jail" deal. "No-jail" deals were previously available to foreign nationals who provided timely cooperation in antitrust investigations as a way to avoid criminal punishment and incarceration. The DOJ now insists on jail sentences for all domestic and foreign defendants, notwithstanding their cooperation efforts. Hammond Address II, *supra* note 7, at 16.

[27] Baker, *supra* note 19, at 712.

[28] The *Christie's* case discussed in *supra* note 6 is illustrative; in this case, the United States indicted a U.K. citizen for price-fixing, but could not prosecute him criminally because he refused to submit to U.S. jurisdiction.

[29] *See* Joshua & Camesasca, *supra* note 9, at 11.

[30] Hammond Address I, *supra* note 5, at 4; *see also* Hammond Address II, *supra* note 7, at 10–12.

[31] Gustafson, Collins & McKay, *supra* note 15, at 97; Charles S. Stark, *International Cooperation in the Pursuit of Cartels*, 6 GEO. MASON L. REV. 533, 541 (1998) ("One thing that has never taken place so far is the extradition of a defendant from one country to another in an antitrust case . . . . I would not be surprised to see this occur in an antitrust case not too far in the future."). The *Norris* case came very close to being the first.

[32] Byrne, Goodman & Shapiro, *supra* note 3, at 13 (describing extradition as "one battle

have been the DOJ's first victory in the area of antitrust extradition.[33] When the lower courts' decision came out, the DOJ did not hesitate to herald *Norris* as the beginning of an emerging trend,[34] and referred to extradition as a "real and significant" threat to the foreign antitrust offenders.[35] As this Note will show below, however, the threat of extradition may certainly be significant, but not necessarily real.[36]

II. USE OF EXTRADITION LAWS BY THE UNITED STATES

Before discussing any implications of the *Norris* controversy and the possibility of extradition in future antitrust cases, it might be worthwhile to examine how the United States uses, or works around, the principles of international extradition law to enforce its own antitrust laws.[37] International extradition is a process by which a person accused of or convicted of crimes is surrendered by one country ("requested country") to another country that makes the request ("requesting country").[38] Assuming that all the procedural and evidentiary requirements for an extradition request are met,[39] there are still two substantial hurdles before the United

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[the DOJ] has not yet won").

[33] *See* Brown & Kim, *supra* note 17, at 254 (referring to the lower courts' decision in the *Norris* case as "the first attempt, and a successful one at that, by American prosecutors to extradite a foreign executive for price fixing").

[34] *See, e.g.*, Hammond Address I, *supra* note 5, at 4; Hammond Address II, *supra* note 7, at 12. *See also* Joshua & Camesasca, *supra* note 9, at 11 ("[T]he DoJ is quietly confident of the outcome, and regards the [*Norris*] decision as a precedent for further aggressive action against 'fugitives' who decline its invitation to face trial in US courts.").

[35] Hammond Address II, *supra* note 7, at 12.

[36] For a more detailed discussion of this threat of incarceration and its effects on the behaviors of foreign corporate officers, see *infra* Part IV.B.

[37] International extradition is a highly specialized area of law, and the vast jurisprudence that surrounds the subject is outside the scope of this Note. *See* M. CHERIF BASSIOUNI, *Preface and Introduction to the Fourth Edition* of INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE, at xiii (4th Ed. 2002) ("International extradition remains in a category of its own . . . ."). For general discussions on the subject of international extradition, see also MICHAEL ABBELL, EXTRADITION TO AND FROM THE UNITED STATES (Transnational Publishers 2001); Ethan A. Nadelmann, *The Evolution of United States Involvement in the International Rendition of Fugitive Criminals*, 25 N.Y.U. J. INT'L L. & POL. 813 (1993).

[38] BASSIOUNI, *supra* note 37, at 29; ARVINDER SAMBEI & JOHN R.W.D. JONES, EXTRADITION LAW HANDBOOK 1 (2005). For the purpose of this Note, the discussions will be limited to the extradition requests involving the *accused* antitrust offenders, and not the *convicted* antitrust offenders. Further, this Note focuses on the extradition requests that seek extradition of the requested country's own citizens, not that of a non-citizen from a third-party country.

[39] Procedural and evidentiary requirements are usually dictated by the terms of the extradition treaties and differ for each country. ABBELL, *supra* note 37, at 65, 331. Common procedural requirements include: formal notification of the extradition request, legalization of the extradition documents, translation of the extradition documents, and provision of the

States can request extradition of a foreign citizen from another country: 1) the United States must have jurisdiction over the person who has allegedly violated U.S. antitrust laws;[40] and 2) the alleged violation must be criminally punishable under the laws of both the United States and the requested country, *i.e.*, the "dual criminality" requirement.[41] In the antitrust law context, the first hurdle requires an examination of the extraterritorial application of U.S. antitrust laws, and the second hurdle involves an analysis of the "dual criminality" requirement under the extradition treaties.

A. Extraterritorial Application of U.S. Antitrust Laws

Extradition is based on an assumption that the interests of the requesting country were affected by the individual found in the requested country's territory, and the requesting country is able to extend its jurisdiction extraterritorially.[42] In other words, the foreign officers that the DOJ seeks to extradite must have allegedly violated U.S. antitrust laws.[43] The United States resolved this jurisdictional-reach issue by enacting federal laws that extend the reach of U.S. antitrust laws to acts committed entirely outside, but having adverse effects within, the U.S. territory.[44] Not

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supplementary documents. *Id.* at 344–55. Majority of the extradition treaties require "evidence of criminality as, according to the laws of the place where the . . . person so charged shall be found, would justify his apprehension and commitment for trial . . . ." *Id.* at 331–32. Traditionally, such treaties required the requesting country to establish a *prima facie* case before extradition, but more recent treaties require a less rigorous "probable cause" standard or even a lower evidentiary standard. *Id.*

[40] *See* SAMBEI & JONES, *supra* note 38, at 1–2; BASSIOUNI, *supra* note 37, at 313–16, 447–55.

[41] *See* BASSIOUNI, *supra* note 37, at 465–73; ABBELL, *supra* note 37, at 320–21.

[42] BASSIOUNI, *supra* note 37, at 313.

[43] Different treaties require varying evidentiary standards for allegation of violating U.S. criminal laws. *See supra* note 39. Oftentimes in practice, the evidentiary standard used by the United States becomes the "probable cause" standard used by the U.S. courts to issue an arrest warrant. Although such evidentiary requirement is not required under the new extradition treaty between the United States and the United Kingdom, for example, it is nonetheless a de facto standard, because an arrest warrant is one of the documents that need to be included in an extradition request. Extradition Treaty, U.S.-U.K., art. 8(3), Mar. 31, 2003, S. TREATY DOC. NO. 108–23 (2003); Fed. R. Crim. P. 4(a).

[44] Nadelmann, *supra* note 37, at 834; BASSIOUNI, *supra* note 37, at 447–48; *see* Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (2005). The U.S. federal laws extending its criminal jurisdiction extraterritorially are based primarily on the objective territorial theory, or the "effects" theory, and secondarily on the protective theory of jurisdiction. Nadelmann, *supra* note 37, at 834. Objective territorial theory is an extension of the territorial theory, under which the foreigners acting outside the country's territory are considered to have committed the offense inside the territory if the offense has certain effects or impacts within the territory. BASSIOUNI, *supra* note 37, at 323–25. This country is then said to have the objective territorial jurisdiction. *Id.* Other theories for asserting extraterritorial jurisdiction include: territorial (place of the conduct), active personality (nationality of the offender), passive personality (nationality of the victim), protective

surprisingly, the DOJ and the U.S. courts have "seized every opportunity" to apply U.S. antitrust laws to foreign anticompetitive activities that affected the U.S. markets.[45]

The DOJ applies the so-called "effects test" to determine whether U.S. antitrust laws should apply to foreign antitrust cases.[46] The "effects test" developed as a common law test to assert subject matter jurisdiction on foreign antitrust violations.[47] Judge Learned Hand introduced the test in *United States v. Alcoa*,[48] which was cited approvingly by the Supreme Court in *Hartford Fire Insurance Co. v. California*.[49] In the latter case, the Supreme Court applied U.S. antitrust laws to a London-based reinsurance company that participated in a conspiracy to coerce the U.S. primary insurers to limit their coverage of certain risks, because it was "well established" that U.S. antitrust laws applied to "foreign conduct that was meant to produce and did in fact produce" substantial effects in the U.S. insurance market.[50] Although the Court found the common law standard "well established," Congress enacted the Foreign Trade Antitrust Improvements Act[51] ("FTAIA") to provide a codified guidance to

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(national interest affected), and universal (international crime) theories. *Id.* at 315; SAMBEI & JONES, *supra* note 38, at 1–2.

[45] Klawiter, *supra* note 12, at 202.

[46] ANTITRUST ENFORCEMENT GUIDELINES, *supra* note 13, at §3.1.

[47] Lacey M. Donovan, Note, *Importing Plaintiffs: The Extraterritorial Scope of the Sherman Act After* Empagran, 91 IOWA L. REV. 719, 725–26 (2006). For general discussions on the history and development of the common law "effects test," see LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 970–85 (West Group 2000).

[48] U.S. v. Aluminum Co. of America, 148 F.2d 416, 444 (2d Cir. 1945). This ruling implicitly overruled the strict "place of conduct test" employed in *American Banana Co. v. United Fruit*, where Justice Holmes held that the Sherman Act applied only to conducts occurring inside the U.S. territory. Donovan, *supra* note 47, at 725–26; Wolfgang Wurmnest, *Foreign Private Plaintiffs, Global Conspiracies, and the Extraterritorial Application of U.S. Antitrust Law*, 28 HASTINGS INT'L & COMP. L. REV. 205, 210 (2005). *See* Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356–57 (1909).

[49] Wurmnest, *supra* note 48, at 210; *see* Hartford Fire Ins. Co. v. Cal., 509 U.S. 764, 796 (1993).

[50] *Hartford Fire*, 509 U.S. at 796.

[51] In a rather convoluted wording, the FTAIA provides that:

[The Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

such conduct has a direct, substantial, and reasonably foreseeable effect—

on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

such effect gives rise to a claim under [the Sherman Act], other than this section.

If [the Sherman Act] appl[ies] to such conduct only because of the operation of paragraph (1)(B), then [the Sherman Act] shall apply to such conduct only for injury to export business

determining whether U.S. antitrust laws apply to foreign conduct.[52] According to the test articulated by the FTAIA, all foreign conduct is excluded from the Sherman Act's reach as a general rule.[53] The Sherman Act applies to foreign conduct only when it has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce, and "such effect gives rise to a [Sherman Act] claim."[54] Because the FTAIA explicitly excludes domestic commerce and import commerce from its scope, the common law "effects test" still applies to the foreign import commerce; for most foreign commerce excluding import trades, however, the FTAIA test, not the common law test, determines whether or not U.S. antitrust laws apply.[55]

Two subsequent developments in the jurisdictional scope of U.S. antitrust laws are significant: the first development expanded the reach of U.S. antitrust laws to foreign criminal conduct;[56] and the second limited the reach from claims rising out of independent foreign harm.[57] In *Nippon Paper*, the First Circuit decided that purely foreign activities by a Japanese corporation to fix the price of thermal fax paper imported into the United

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in the United States.

15 U.S.C. § 6a (2008).

[52] Donovan, *supra* note 47, at 728–29; Richard W. Beckler & Matthew H. Kirtland, *Extraterritorial Application of U.S. Antitrust Law: What Is a "Direct, Substantial, and Reasonably Foreseeable Effect" Under the Foreign Trade Antitrust Improvements Act?*, 38 TEX. INT'L L.J. 11, 13–14 (2003).

[53] There is some confusion on whether the FTAIA merely codified the existing common law "effects test" or established a new standard. Makan Delrahim, *Drawing the Boundaries of the Sherman Act: Recent Developments in the Application of the Antitrust Laws to Foreign Conduct*, 61 N.Y.U. ANN. SURV. AM. L. 415, 418–19 (2005). What added to the confusion were the "inelegantly phrased" wording of the FTAIA and its seemingly clear aim of preventing U.S. antitrust laws from applying to U.S. exporters engaging in anticompetitive agreements that only affect foreign markets. *Id.* The Court recognized the confusion in *Hartford Fire*, noting that "[t]he FTAIA was intended to exempt from the Sherman Act export transactions that did not injure the United States economy . . . and it is unclear how it might apply to the conduct alleged here. Also unclear is whether the Act's 'direct, substantial, and reasonably foreseeable effect' standard amends existing law or merely codifies it." 509 U.S. at 796 n.23. Although legislative history does not provide a clear answer, either, commentators generally seem to agree that the FTAIA's purpose was to articulate the existing legal standard for applying U.S. antitrust laws to a purely foreign conduct. Delrahim, *supra*, at 419–20; *see* 1A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, para. 272h2 (2005). Therefore, Congress did not make substantive changes to the existing standards by enacting the FTAIA. Delrahim, *supra*, at 419–20.

[54] 15 U.S.C. § 6a; *see* F. Hoffman-LaRoche Ltd. v. Empagran S.A., 542 U.S. 155, 162 (2004) (interpreting the meaning of the FTAIA).

[55] Beckler & Kirtland, *supra* note 52, at 15; *see* 15 U.S.C. § 6a; ANTITRUST ENFORCEMENT GUIDELINES, *supra* note 13, at §3.1.

[56] United States v. Nippon Paper Industries Co., 109 F.3d 1 (1st Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998).

[57] *Empagran*, 542 U.S. at 155.

States could be found criminally liable.[58] Applying the "effects test" to the criminal conduct, the court found "no . . . tradition or rationale for drawing a criminal/civil distinction with regard to extraterritoriality," because both criminal and civil liabilities are based on the "same language in the same section of the same statute."[59] On the other hand, the Supreme Court imposed an important limitation to the extraterritorial application of U.S. antitrust laws by holding that the Sherman Act does not apply when the conduct in question only caused "independent foreign harm and that foreign harm alone [gave] rise to the plaintiff's claim."[60] In *Empagran*, the Court held that although the price-fixing conspiracy among the vitamin manufacturers and distributors had "significantly and adversely" affected both the foreign and domestic commerce, U.S. antitrust laws did not apply, because the adverse injury foreign vitamin purchasers complained of was independent of any adverse domestic effects.[61] On remand, the D.C. Circuit Court further clarified that in order to apply U.S. antitrust laws to a foreign injury claim, there must be proximate causation between the adverse effects on U.S. domestic commerce and the foreign injury complained of.[62]

B. Overcoming the Dual Criminality Requirement

Dual criminality refers to the substantive requirement of the extradition law that the offense for which the person is being extradited must be considered criminal under the laws of both the requested country and the requesting country.[63] The requirement of dual criminality is almost always found in extradition treaties, and its universal recognition has made it a "well-settled part of customary international law."[64] In the antitrust law context, the dual criminality requirement presents a considerable obstacle—to be able to extradite a foreign corporate officer, the requested country must also criminally punish the individual for the anticompetitive conduct in question.[65]

The DOJ attempts to make the dual criminality requirement easier to satisfy by convincing and influencing foreign governments through all

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[58] *Nippon Paper*, 109 F.3d at 1; Klawiter, *supra* note 12, at 210–11; Brown & Kim, *supra* note 17, at 254.

[59] *Nippon Paper*, 109 F.3d at 4, 7.

[60] *Empagran*, 542 U.S. at 165; *see* Donovan, *supra* note 47, at 733–34.

[61] *Empagran*, 542 U.S. at 164, 169.

[62] Empagran S.A. v. F. Hoffman-La Roche Ltd., 417 F.3d 1267, 1270–71 (D.C. Cir. 2005).

[63] BASSIOUNI, *supra* note 37, at 465–66; Jonathan O. Hafen, *International Extradition: Issues Arising Under the Dual Criminality Requirement*, 1992 B.Y.U. L. REV. 191, 191 (1992).

[64] Hafen, *supra* note 63, at 194; BASSIOUNI, *supra* note 37, at 469.

[65] *See* Hammond Address II, *supra* note 7, at 10 (discussing the recent criminalization of antitrust offenses in the United Kingdom and its effects on the DOJ's enforcement efforts).

stages of the extradition process. When the United States enters into extradition treaties with the foreign governments, the United States tries to cast the net wide when negotiating extraditable offenses by including as many categories of offenses as possible.[66] The United States often achieves this by agreeing on a pure "open-ended" dual criminality clause instead of enumerating specific offenses as extraditable.[67] A typical pure dual criminality clause defines extraditable offenses as "[a]n offense . . . [that] the conduct on which the offense is based is punishable under the laws in both States by deprivation of liberty for a period of one year or more or by a more severe penalty."[68] By using a pure dual criminality clause in extradition treaties, the United States avoids the need to renegotiate, ratify, and effect supplementary treaties whenever changes or developments in either country's criminal law require an update of the list of extraditable offenses.[69]

Another benefit of adopting a pure dual criminality clause is that such open-endedness allows the courts to be flexible in interpreting the dual criminality requirement.[70] U.S. courts will often interpret the terms of extradition treaties liberally to allow a more permissive reading of the dual criminality requirement.[71] This liberal method of interpretation, also known as the conduct-based theory of dual criminality[72] or *in abstracto* method of interpretation,[73] finds the dual criminality of the alleged offense satisfied when the conduct is deemed criminal in both countries regardless of the label or elements of such crime.[74] Further, as a general principle of interpretation, U.S. courts construe extradition treaties liberally to enforce the treaties and enlarge the parties' right to request extradition "in the interest of justice and friendly international relationships."[75]

Not only was the United States successful in adopting the principle of

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[66] Even some of the old treaties with a limited list of extraditable offenses are being supplemented or replaced with the pure dual criminality clauses. *See* Nadelmann, *supra* note 37, at 829–32.

[67] BASSIOUNI, *supra* note 37, at 481–82. *See* ABBELL, *supra* note 37, at 13; Nadelmann, *supra* note 37, at 829 (noting the trend of increasing breadth and inclusiveness of extraditable offenses in U.S. extradition treaties).

[68] Extradition Treaty, U.S.-U.K., *supra* note 43, art. 2.

[69] Nadelmann, *supra* note 37, at 830; U.S. DEP'T OF STATE, FACT SHEET: U.S.-U.K. EXTRADITION TREATY (Aug. 3, 2004), http://www.state.gov/p/eur/rls/fs/34885.htm.

[70] *See* Hafen, *supra* note 63, at 196 (discussing the general difficulty experienced by the courts in determining whether the dual criminality requirement is met).

[71] *Id.*

[72] Hammond Address II, *supra* note 7, at 12.

[73] Hafen, *supra* note 63, at 199–200.

[74] *Id.*; BASSIOUNI, *supra* note 37, at 472. *See* Factor v. Laubenheimer, 290 U.S. 276, 294 (1933).

[75] United States v. Lui, 110 F.3d 103, 110 (1st Cir. 1997) (citing *Factor*, 290 U.S. at 298).

liberal interpretation in a number of extradition treaties,[76] the United States was also successful in convincing the foreign courts to adopt the same interpretive method.[77] In the *Norris* case, for example, the U.K. Magistrates' Court used the conduct-based theory of dual criminality to determine whether price-fixing was an extraditable offense.[78] Although the alleged offense took place before price-fixing became a crime in the United Kingdom,[79] the court found that the dual criminality requirement was satisfied because the price-fixing charge was equivalent to common law conspiracy to defraud; in the court's view, which was later reversed by the House of Lords, the conduct involved in the alleged cartel agreement was, in essence, "dishonestly doing something prejudicial to another."[80]

Of course, satisfying the dual criminality requirement will not involve such interpretive techniques as described above if both the requesting country and the requested country explicitly criminalize the antitrust offenses by appropriate legislation.[81] The DOJ views this as the fundamental solution, and vigorously encourages other countries to follow the United States' lead in criminalizing antitrust offenses.[82] At the United States' urging, international organizations such as the Organization of Economic Co-operation and Development ("OECD") have issued statements of strong denunciation of cartel offenses and recommended that member-countries introduce and impose criminal sanctions against individual antitrust offenders.[83] However, while there clearly seems to be a

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[76] *See e.g.* Extradition Treaty, U.S.-U.K., *supra* note 43, art. 2(3) ("For the purposes of this Article, an offense shall be an extraditable offense: (a) whether or not the laws in the Requesting and Requested States place the offense within the same category of offenses or describe the offense by the same terminology . . . .").

[77] Hammond Address II, *supra* note 7, at 12.

[78] Norris v. Gov't of the United States, [2007] EWHC (Admin) 71 para. 39 (Eng.) (discussing the conduct-based interpretation taken by the district judge in *Gov't of the United States v. Ian P. Norris* (Bow St. Magis. Ct. 2005) (Eng.)).

[79] Price-fixing became a criminal offense in the United Kingdom with the enactment of the Enterprise Act 2002. *See infra* Part III.A.

[80] Hammond Address II, *supra* note 7, at 12.

[81] Joshua & Camesasca, *supra* note 9, at 11 ("[M]ost robust international cooperation instruments are only available as between those jurisdictions that treat cartels as a serious criminal offence . . . ."); Julian M. Joshua, *Extradition: The DOJ's New Foreign Policy Weapon*, COMPETITION LAW INSIGHT 13 (June 14, 2005) ("[S]ecuring recognition that cartel behaviour [sic] is criminal is the key to effective international co-operation in the antitrust area.").

[82] Pupkin & McPhie, *supra* note 6, at 5. *See* Baker, *supra* note 19, at 714 ("The United States has a long tradition of fairly broad and sometimes noisy support of antitrust law and [criminal] enforcement.").

[83] Joshua & Camesasca, *supra* note 9, at 11; Hammond Address II, *supra* note 7, at 2 (citing OECD, HARD CORE CARTELS: THIRD REPORT ON THE IMPLEMENTATION OF THE 1998 RECOMMENDATION 26–29 (2005) [hereinafter OECD REPORT]).

trend toward criminalization of individual antitrust offenders,[84] countries that provide criminal liabilities for antitrust offenses are still a "distinct minority."[85] Among those "minority" countries that criminalize antitrust offenses, only four countries—Australia, Canada, Germany, and the United States—had actually imposed criminal fines to individuals, and only two countries—Canada and the United States—had ever imposed jail sentences.[86] Even with increasing number of countries that criminalize antitrust offense, the United States is by far the most aggressive country to actually impose criminal sanctions on individuals.[87]

III. EXTRADITION MAY NOT BE A VIABLE SOLUTION TO INTERNATIONAL ANTITRUST ENFORCEMENT

The Magistrates' Court's decision in *Norris* was the first case in which a foreign court has ruled in favor of extraditing its own citizen to the United States on a U.S. antitrust charge.[88] As mentioned in the introduction, some regarded *Norris* as the harbinger of a new era in the DOJ's international antitrust enforcement.[89] Although the controversy and the eventual outcome in *Norris* were of considerable significance,[90] its practical effects on international antitrust enforcement of U.S. antitrust laws may not be so simple or straightforward.[91] This is due in part to the inherent and practical difficulties in satisfying the necessary elements of extradition in general, and antitrust extradition in particular. In order to understand why a similar success is not as easily attainable, it is important to examine first the reasons behind the DOJ's partial success in the United Kingdom.

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[84] OECD REPORT, *supra* note 83, at 28; Hammond Address II, *supra* note 7, at 2.

[85] OECD, HARD CORE CARTELS: RECENT PROGRESS AND CHALLENGES AHEAD 29 (2003) ("Not all countries consider that criminalizing cartel conduct is appropriate, however. Such a step may conflict with existing social or legal norms in a jurisdiction. It also has the effect of imposing a higher burden of proof on the prosecutor and it may make it more difficult to acquire evidence in certain circumstances, as additional procedural safeguards apply in criminal investigations."); *see also* Baker, *supra* note 19, at 693, 694 ("It is too early to tell whether the United States is simply a few years ahead of the other major countries in using criminal enforcement . . . or whether the United States has gone well beyond what most other leading industrial countries are willing to do . . . .").

[86] OECD, HARD CORE CARTELS, *supra* note 85, at 29.

[87] *Id.*

[88] Brown & Kim, *supra* note 17, at 254.

[89] *See supra* notes 8 & 34.

[90] *See e.g.* Joshua, *supra* note 81, at 12 ("Serious commentators will recognise [sic] that this ruling is one of the most significant developments in international antitrust enforcement . . . .").

[91] *See* Joshua & Camesasca, *supra* note 9.

A. Special U.S.-U.K. Circumstances Make Extradition Easier

In large part, controversy over the *Norris* case was the result of the new extradition treaty that the United States and the United Kingdom entered into in 2003.[92] The new treaty provided the pure dual criminality clause, which enabled the U.K. courts to construe extradition requirements liberally, and lowered the evidentiary standard significantly for extradition requests from the United States. Driven in part by the common will to fight international terrorism, one purpose of the new treaty was to ease the procedural difficulties in extradition process for both countries.[93] Both countries sought to achieve this goal by implementing the pure dual criminality clause[94] and lowering the evidentiary requirements for extradition requests.[95]

The liberal "conduct-based" interpretation by the U.K. court was the key to the DOJ's position in *Norris*, which argued that Norris was extraditable under common law even when the alleged price-fixing took place before the criminalization of such activities in the United Kingdom.[96] Such an interpretation was only possible because of the changes implemented by the new extradition treaty. As mentioned, the new treaty adopted a pure dual criminality clause rather than listing out the categories of extraditable offenses.[97] Under the new treaty, an offense was extraditable if it were criminally punishable by more than one year of imprisonment under the laws of both countries.[98] In addition to this open-ended form of the dual criminality requirement, the treaty also contained a provision that specifically allowed the courts to adopt a conduct-based interpretation[99]: an offense was extraditable whether or not it is placed under the "same category of offen[s]es or describe[d] . . . by the same terminology . . . ."[100] The recent criminalization of cartel offenses in the United Kingdom may also have been a significant factor in the court's ruling, as far as the criminalization represented an attitude change within

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[92] Extradition Treaty, U.S.-U.K., *supra* note 43. *See* Joshua & Camesasca, *supra* note 9, at 13 ("The signing of the new treaty . . . could have been tailor made for antitrust cases . . . .").

[93] Alistair Graham & Sona Ganatra, *Fraud and White Collar Crime: Beyond Borders*, LEGAL WEEK, June 1, 2006; Ockene & Ahlman, *supra* note 8, at 12. Alistair Graham was the solicitor at White & Case who represented Ian Norris.

[94] *Compare* Extradition Treaty, U.S.-U.K., *supra* note 43, art. 2(1) *with* Extradition Treaty, U.S.-U.K., art. 3(1), Jan. 21, 1972, S. TREATY DOC. NO. 94-12 (1972).

[95] *Compare* Extradition Treaty, U.S.-U.K., *supra* note 43, art. 8(3) *with* Extradition Treaty, U.S.-U.K., *supra* note 94, art. 7(3).

[96] Joshua & Camesasca, *supra* note 9, at 13.

[97] Extradition Treaty, U.S.-U.K., *supra* note 43, art. 2(1).

[98] *Id.*

[99] *See supra* Part II.B.

[100] Extradition Treaty, U.S.-U.K., *supra* note 43, art. 2(3)(a).

the U.K. government and the U.K. industry toward antitrust violations and the appropriate punishment for them.[101] Combined, these factors illustrate the unique circumstance which makes it easier for the U.K. government to extradite its own citizen.[102]

The new extradition treaty's reduced evidentiary requirement for extradition requests from the United States is another significant change that may influence the U.K. courts.[103] Under the new treaty, while the United Kingdom needs to support its extradition requests with information that provide a reasonable basis to believe that the person sought committed the alleged offense, the United States is under no such obligation.[104] This change, along with the subsequent legislation of the Extradition Act 2003 designating the United States a "Category 2 Country,"[105] removed the requirement that the United States provide *prima facie* evidence that the person being extradited committed the alleged crime.[106] In theory, this change allows a U.S. prosecutor to request extradition of a U.K. citizen simply by means of an arrest warrant and a charging document that sets out the allegations of extraditable crimes.[107]

Although they may be tangential, political and diplomatic factors cannot be ignored.[108] The U.K. government's friendly relationship with the United States and the common law legal systems of both countries may play a key role in the outcome of the U.K. extradition cases.[109] Due to the

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[101] Hammond Address II, *supra* note 7, at 10. *See* Enterprise Act 2002, Part 6, §§ 188, 190, *available at* http://www.opsi.gov.uk/Acts/acts2002/ukpga_20020040_en_17#pt6.

[102] This is an interesting development, since the U.K. government was initially very hostile toward the extraterritorial application of U.S. antitrust laws and the "effects test." *See* Wurmnest, *supra* note 48 at n.26.

[103] Joshua, *supra* note 81, at 12.

[104] Extradition Treaty, U.S.-U.K., *supra* note 43, art. 8(3)(c). However, in practice, the DOJ may still need to satisfy the "probable cause" standard for issuing an arrest warrant. *See supra* note 43.

[105] *See* Extradition Act 2003, Part 2, *available at* http://www.opsi.gov.uk/acts/acts2003/ukpga_20030041_en_6#pt2.

[106] *Cf.* Extradition Treaty, U.S.-U.K., *supra* note 94, art. 7(3)(requiring "such evidence as, according to the law of the requested Party, would justify his committal for trial if the offense had been committed in the territory of the requested Party . . . .").

[107] *Id.*; *see* Graham & Ganatra, supra note 93. This supposed "imbalance" of evidentiary requirements between the two countries has created an uproar and a series of protests in the United Kingdom. *See e.g.* Esther Addley, *What Do We Want? Well, a Glass of Champers After the Demo for Starters*, GUARDIAN, June 30, 2006, at 3; Julia Kollewe, *NatWest Three Face Extradition to US After Losing Final Appeal,* INDEPENDENT, June 28, 2006, at 36; Alistair Osborne, *Extradition Vote Shows Scant Regard for Citizens, Say Business Leaders*, DAILY TELEGRAPH, Oct. 26, 2006, at 3. Whether there really exists an imbalance in practice, however, is a matter for debate. *See* Goldberger, *supra* note 11, at 841–43.

[108] Blaxland v. Commonwealth Dir. of Pub. Prosecutions, 323 F.3d 1198, 1207 (9th Cir. 2003) (emphasizing that extradition is a diplomatic process and a matter of foreign policy).

[109] Byrne, Goodman & Shapiro, *supra* note 3, at 14.

diplomatic nature of extradition, there is a tendency among the countries to facilitate extradition requests by those countries with "closer political relations and similar legal systems."[110] As a result, extradition may be much more difficult with countries with fewer political ties and different legal systems.

B. Inherent and Practical Difficulties in Extradition Requests

Extradition requests for antitrust offenders may be much more difficult under other treaties. Lacking the special changes implemented in the new extradition treaty with the United Kingdom,[111] extraditing foreign antitrust offenders to the United States may present much higher hurdles.[112] Most of these difficulties stem from the inherent bilateral nature of the extradition treaties—what may work with one country (*e.g.* antitrust extradition from the United Kingdom) may not work with another (*e.g.* antitrust extradition from South Korea).[113] Extradition treaties with different countries are "separate and distinct from each other," and necessitate a case-by-case analysis for different countries and treaties.[114]

As a threshold matter, most extradition requests require an existing extradition treaty; even though the United States has entered into over 100 extradition treaties,[115] there still remain a number of countries that do not have a bilateral extradition treaty with the United States.[116] Without an extradition treaty, extradition is not considered as a binding obligation to most countries in the world.[117] Even for those countries that have extradition treaties with the United States, antitrust offenses may often fail to satisfy the dual criminality requirement. First, despite the "global movement toward individual accountability,"[118] the number of countries

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[110] BASSIOUNI, *supra* note 37, at xii.

[111] *See supra* Part III.A.

[112] *See* David J. Laing, *Extradition to the United States for Antitrust Offenses*, COMPETITION LAW INSIGHT, May 31, 2005 ("[I]t is true that Asian or African nationals still have relative impunity from extradition to the US for antitrust offences . . . .").

[113] Angelo M. Russo, Note, *The Development of Foreign Extradition Takes a Wrong Turn in Light of the Fugitive Disentitlement Doctrine: Ninth Circuit Vacates the Requirement of Probable Cause for a Provisional Arrest in* Parretti v. United States, 49 DEPAUL L. REV. 1041, 1046–48 (2000).

[114] *Id.*

[115] Joshua & Camesasca, *supra* note 9, at 12.

[116] *See* 18 U.S.C. § 3181 for the list of countries that have bilateral treaty relationships with the United States, *available at* http://www.state.gov/documents/organization/71600.pdf. For a detailed history and timeline of the U.S. extradition treaty relationships, see ABBELL, *supra* note 37, at 1–10.

[117] BASSIOUNI, *supra* note 37, at 37. Some argue, however, that comity, reciprocity, and universality can be the bases for extradition requests, particularly for certain international crimes. *Id.*

[118] Hammond Address II, *supra* note 7, at 2.

that actually imposes criminal sanctions against individuals remains very small.[119] Italy and Spain, for example, have the pure dual criminality clauses in their extradition treaties with the United States, but do not criminalize antitrust offenses.[120] On the other hand, some countries do criminalize antitrust offenses, but do not have pure dual criminality clauses and their lists of extraditable offenses do not include antitrust crimes—Norway and Brazil are examples of such countries.[121]

Another possible impediment to extraditing antitrust offenders is the nationality exception.[122] The nationality exception refers to a country's practice of refusing to extradite its own nationals to other countries.[123] Such exceptions are more common in civil law countries, which regard the non-extradition of citizens as an important legal principle.[124] In contrast, most common law countries reject the idea of the nationality exception as illegitimate,[125] and willingly extradite their own citizens for crimes committed elsewhere.[126] The U.S.-U.K. extradition treaty in *Norris* had a provision that specifically obligated the parties to extradite the fugitives regardless of their nationalities.[127] In other treaties with nationality exceptions, however, foreign governments may refuse to extradite their own citizens even when an antitrust violation is an extraditable offense under the dual criminality requirement. Although there are a number of countries that now criminalize antitrust violations—namely, Canada, Japan, the United Kingdom, Israel, Ireland, South Korea, and Australia[128]—the nationality

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[119] OECD REPORT, *supra* note 83, at 28; Joshua & Camesasca, *supra* note 9, at 11 ("The trend to criminalization continues, but is still resisted by many major nations.").

[120] Joshua & Camesasca, *supra* note 9, tbl.

[121] *Id.*

[122] *See, e.g.*, Extradition Treaty, U.S.-France, art. III, Apr. 23, 1996, S. TREATY DOC. NO. 105-13 (1997) (agreeing that the parties shall not be bound to extradite their own citizens).

[123] Michael Plachta, *(Non-)Extradition of Nationals: A Neverending Story?*, 13 EMORY INT'L L. REV. 77, 77 (1999).

[124] Nadelmann, *supra* note 37, at 847.

[125] *See* BASSIOUNI, *supra* note 37, at xii ("The notion of non-extradition of nationals has lost its historical justification and is now only a detriment to effective international cooperation in combating criminality."); Martin T. Mantron, *Extradition of Nationals*, 10 TEMPLE L.Q. 12, 24 (1935) ("It is a creature of national distrust, a relic of a more primitive order of civilization. It has no justification . . . and does not serve the ends of justice. It is a disruptive force in the system of international penal law."). *But see* Nadelmann, *supra* note 37, at 847 ("[C]ountries justify the non-extradition on various grounds, including a state's obligation to protect its own citizens, lack of confidence in the fairness of foreign judicial proceedings, the many disadvantages a defendant confronts in defending himself in a foreign country before a strange legal system, as well as the additional disadvantages posed by imprisonment in a foreign jail . . . ."). For general discussions on the subject, see Plachta, *supra* note 123.

[126] Nadelmann, *supra* note 37, at 847.

[127] Extradition Treaty, U.S.-U.K., *supra* note 43, art. 3.

[128] Hammond Address II, *supra* note 7, at 2.

exception leaves only Canada, Ireland, and the United Kingdom as countries where extradition of antitrust offenders may be possible.[129]

Since extradition is mostly a diplomatic process,[130] politics can be a "soft" factor that significantly affects the outcome of the extradition requests.[131] One such political factor has already been discussed[132]: countries will generally act more favorably toward extradition requests by governments of "closer political relations and similar legal systems."[133] In some cases, these political factors may be the only factors that matter, and reflect the political reality where the requested country's government makes extradition decisions based purely on political and diplomatic considerations.[134] For example, fear of hurting diplomatic relations with other countries may sway a government to accept an extradition request, whereas concern of appearing weak by submitting to an extradition request will lead to a denial.[135] Likewise, considerations of international comity and reciprocity can have major impacts as well—if the country requesting extradition has consistently granted incoming extradition requests in the past, it may receive positive responses to its own requests.[136] As a result, policy and expediency reasons may often dictate the outcome of extradition cases in today's global geopolitics.[137]

IV. POSSIBLE EFFECTS ON FOREIGN BUSINESS PRACTICES

As discussed above, extradition to the United States for violating U.S. antitrust laws may not be a direct possibility to most of the countries in the world for legal and political reasons.[138] However, the *threat* of extradition after *Norris* may have significant deterrent effects on foreign officers and executives considering violating U.S. antitrust laws. Prior to *Norris*, the "perceived risk of incarceration" had little deterrent effect, because there was a slim chance that a foreign antitrust offender would be extradited and

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[129] Joshua & Camesasca, *supra* note 9, at 12.

[130] *Blaxland*, 323 F.3d at 1207.

[131] M. Cherif Bassiouni, *Reforming International Extradition: Lessons of the Past for a Radical New Approach*, 25 LOY. L.A. INT'L & COMP. L. REV. 389, 401–02 (2003) (discussing the "politicization of extradition").

[132] *See supra* Part III.A.

[133] BASSIOUNI, *supra* note 37, at xii.

[134] *Id.* at 61; Todd M. Sailer, Comment, *The International Criminal Court: An Argument to Extend Its Jurisdiction to Terrorism and a Dismissal of U.S. Objections*, 13 TEMP. INT'L & COMP. L.J. 311, 327 (1999).

[135] Sailer, *supra* note 134, at 327.

[136] *See* Nadelmann, *supra* note 37, at 857 (noting that the United States has often rejected Mexico's extradition requests on the grounds of lack of reciprocity).

[137] John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1486–87 (1988).

[138] *See supra* Part III.

sentenced to a long-term imprisonment.[139] The *Norris* controversy may have changed that perception by enabling a small number of extradition-friendly countries like the United Kingdom to form a network of the DOJ's extradition outposts. By recruiting extradition allies who are willing to extradite when foreign antitrust offenders enter their territories, the perceived threat of incarceration for violating U.S. antitrust laws now carries a much higher risk and invokes legitimate fear in foreign officers.

A. Indirect Extradition and Informal Sanctions on Business Travel

Even when a foreign antitrust offender is protected from extradition to the United States by his or her own government, the threat of extradition by third-party countries is still significant through Interpol's Red Notice ("Red Notice"). The Red Notice was designed to work as an international "wanted" list of criminal fugitives that gave any of the member-countries the authority to arrest the fugitives if they are found inside any of the member-countries' borders.[140] The DOJ has adopted a policy of placing foreign antitrust offenders on the Red Notice in an effort to raise the stakes for international antitrust fugitives.[141]

In reality, this policy has not been very successful in extraditing foreign antitrust violators to the United States; so far, no fugitive has been extradited through the use of the Red Notice.[142] As a result, the Red Notice served minimal deterrence value. With the news of the *Norris* controversy and the network of countries that are friendly to the DOJ's extradition requests, there is now a strong possibility that even a foreign officer who resides in a country that does not extradite antitrust offenders to the United States might face extradition if he or she inadvertently travels to an Interpol member-country that would.[143] Although ultimately unsuccessful on its own terms, the development in the *Norris* case in effect gave credibility to the unsatisfactory scheme of the Red Notice.[144]

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[139] The *Norris* case was the closest that the DOJ came to antitrust extradition. *See supra* notes 31–35 and the accompanying text.

[140] Hammond Address II, *supra* note 7, at 9.

[141] *Id.*

[142] Gustafson, Collins & McKay, *supra* note 15, at 97.

[143] Hammond Address II, *supra* note 7, at 9; Byrne, Goodman & Shapiro, *supra* note 3, at 13–14; Joshua, *supra* note 81, at 13 ("With the US routinely placing indicted suspects on an Interpol red notice, traveling through Heathrow may prove a dangerous activity.").

[144] The *Van Cauwenberghe* case illustrates how the reinforced threat of the Red Notice may work in the future. U.S. v. Van Cauwenberghe, 827 F.2d 424 (9th Cir. 1987). *Van Cauwenberghe* involved a Belgian citizen who was indicted by the United States on a wire fraud charge. Because Belgium did not extradite its own nationals, the United States could not proceed against him. However, Van Cauwenberghe was arrested by Swiss authorities during his brief business trip to Switzerland, and subsequently extradited to the United States on a U.S. request. *Id.* Switzerland is among the countries that absolutely refuse to extradite

Informal sanctions on international business travel can also have significant effects on foreign business practices; active corporate officers and executives may feel tremendous pressure from the restrictions on international travel imposed by the Red Notice and the DOJ's border-watch program.[145] The border-watch program enables the DOJ to catch foreign antitrust violators who enter into the United States and detain them through the conclusion of their antitrust trials.[146] These risks and restrictions may even compel foreign officers of violating companies to voluntarily submit to, or enter into a plea agreement with, U.S. authorities.[147] Such voluntary submissions represent a significant development from previous cases where foreign officers agreed to plea bargains only when a no-jail deal was provided.[148]

B. Perceived Risk of Punishment Deters Antitrust Violations

The increased risk of punishment via extradition and the informal restrictions put on business activities are new variables that are likely to help deter foreign executives and officers from violating U.S. antitrust laws.[149] The perceived severity of standing trial in a foreign (U.S.) court

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their own citizens. Ethan A. Nadelmann, *The Role of the United States in the International Enforcement of Criminal Law*, 31 HARV. INT'L L.J. 37, 67 (1990).

[145] Byrne, Goodman & Shapiro, *supra* note 3, at 14.

[146] Hammond Address II, *supra* note 7, at 7–8. One of the recent victims to the border-watch program was David Carruthers, a British citizen residing in Costa Rica and Worcestershire, England, who served as the CEO of BetOnSports Plc. Roger Blitz, *David Carruthers: The Unlucky Gambler*, FIN. TIMES, July 22, 2006, *available at* http://www.ft.com/cms/s/69eebb30-18df-11db-b02f-0000779e2340.html. Although the case involved a charge of racketeering conspiracy under the U.S. Wire Wage Act, the arrest of David Carruthers by U.S. officials at Dallas airport while he was changing planes on his trip from London to Costa Rica demonstrates that careless international travel by foreign executives who have violated U.S. laws may subject them to substantial risk of arrest. Ockene & Ahlman, *supra* note 8, at 13.

[147] Byrne, Goodman & Shapiro, *supra* note 3, at 14 ("[T]he prospect of a lifetime of fear and uncertainty about being arrested while traveling, often coupled with pressure from the corporate employer, has actually made plea bargains an alternative to consider."). In March 2006, three South Korean executives from Samsung Electronics Co., Ltd. pleaded guilty and agreed to serve jail terms of seven to eight months, in addition to paying fines of $250,000 each, for participating in a DRAM price-fixing scheme. Hammond Address II, *supra* note 7, at 8. Although it is difficult to discern a trend of voluntary submission with a single post-*Norris* example, this case is significant because South Korea is one of the countries that do not extradite their own citizens. Extradition Treaty, U.S.-S. Korea, art. 3, June 9, 1998, S. TREATY DOC. NO. 106-2 (1999).

[148] Hammond Address II, *supra* note 7, at 16.

[149] Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 CRIME & JUST. 1, 13 (1998); Jeffrey Fagan, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*, 4 OHIO ST. J. CRIM. L. 255, 272 (2006) ("Research both with offenders and general population samples suggests that (subjectively) perceived risk weighs heavily on the decisions of would-be offenders to

with the possibility of imprisonment in a foreign (U.S.) jail will also add to the deterrent effect.[150] The perceived probability of punishment may increase when one considers the difficulty of arguing the propriety of extradition in the U.S. courts.[151] Once the court in the requested country has decided to extradite the fugitive, U.S. courts do not question its judgment and defer to the foreign court's decision.[152] Businesspersons naturally fear involvement with the criminal courts of their own country; the possibility of extradition adds to that fear the uncertainty and unfamiliarity of standing trial in a foreign court.[153] Such fear is not unfounded: the sentencing guidelines in the United States for antitrust violations are generally much more severe than other countries[154]; individuals may not be afforded bail, and may have to spend years in pre-trial detention until the court adjudicates.[155] Additionally, high defense costs, whether the defendant wins or loses, further aggravate the perceived severity of the punishment.[156] Possible jail-time in U.S. prisons, which are often characterized for "severe overcrowding, gang violence, physical and sexual abuse, racial harassment, excessive use of force by guards, poorly equipped facilities and generally poor conditions" is also not a pleasant prospect for foreign corporate officers.[157]

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engage in or avoid crime.").

[150] Nagin, *supra* note 149, at 13. While there seems to be a general agreement among social science and criminology scholars that the perceived *certainty* of punishment leads to deterrence of crime, the effectiveness of perceived *severity* of punishment on crime are still in dispute. *See, e.g.*, Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143, 147–55 (2003). However, the sort of severity that these literatures deal with is primarily variations in sentence severity within the "range . . . plausible in our present society." *Id.* at n.1. Trials and imprisonment in a foreign country may be a different kind of severity, since it deals with the severity in the "process" of punishment, and not the severity of the ultimate sentence itself. It may be the kind of severity that "when individual assessments of the cost of such sanctions are taken into account," may lead to the deterrence of crime. Nagin, *supra* note 149, at 13.

[151] *Van Cauwenberghe*, 827 F.2d at 429 (citing Johnson v. Browne, 205 U.S. 309, 316 (1907)).

[152] In *Van Cauwenberghe*, the court held that determining whether an offense is extraditable or not under the extradition treaty is within the sole purview of the requested state, and that U.S. courts will defer to the foreign court's decision. *Id.* Because the Swiss Federal Tribunal has already ruled on the matter, the defendant's argument regarding the propriety of his extradition under the dual criminality requirement was foreclosed. *Id.*

[153] Lindsay Connal & Edward Sparrow, *US/UK Extradition: Where Do We Go From Here?*, LITIGATION UPDATE (Ashurst, London, U.K.), May, 2006, at 4–5, *available at* http://www.ashurst.com/doc.aspx?id_Content=2479.

[154] In November 2005, the U.S. Sentencing Commission increased the maximum sentences for individuals convicted of the Sherman Act violations from three years to ten years. *See* U.S. SENTENCING GUIDELINES MANUAL § 2R1.1 (2007).

[155] Connal & Sparrow, *supra* note 153, at 5; Ockene & Ahlman, *supra* note 8, at 14.

[156] Connal & Sparrow, *supra* note 153, at 5.

[157] *Id.* White-collar criminals do not necessarily serve time at special "Club Fed" style

However, an imposition of criminal punishment itself does not automatically create the perception of risk that results in deterrent effects.[158] Instead, there are certain conditions that must exist for the DOJ's policy to have an influence on the behaviors of foreign officers: 1) foreign corporate officers must know the law; 2) the perceived cost of violation must be greater than the perceived benefits; and 3) the potential offenders must act rationally in making business decisions.[159] While studies in behavioral science literatures suggest that these conditions are often difficult to meet for potential criminals,[160] the same difficulties may not matter as much for corporate officers. First, unlike the typical criminals who "do not read law books" or are limited in their "ability to learn the law,"[161] corporate officers have sufficient resources and abilities to know the law. Anticompetitive business activities are treated as civil or criminal offenses in majority of the industrialized countries, and thus it is not unrealistic to expect that corporate officers are cognizant of the illegality involved in such activities.[162] Furthermore, in its relentless campaign to "transform global attitudes" toward antitrust enforcement, the DOJ officials tour around the world informing foreign government officials and corporate officers about the U.S. approach to foreign antitrust violations.[163] As the latest development in this aggressive campaign, the *Norris* case and its potential

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prisons; although white-collar criminals often make requests for cushier prisons, these requests are not always honored. Rather, longer and tougher prison time may await them. Thomas DiBiagio, Maryland's U.S. Attorney, spoke of a white-collar criminal who pleaded guilty to cooking the books at his bank: "He's not going to be at a halfway house or working on a golf course . . . . He'll be in with the bank robbers and drug dealers and other criminals because that is what he is." Jayne O'Donnell & Richard Willing, *Prison Time Gets Harder for White-Collar Crooks*, USA TODAY, May 12, 2003, at A1; Lacey Rose, *Blank Slate: Best Places To Go To Prison*, FORBES.COM, May 25, 2006, http://www.forbes.com /2006/04/17/best-prisons-federal_cx_lr_06slate_0418bestprisons.html?boxes=custom.

[158] Nagin, *supra* note 149, at 3, 15 (asking whether the perceptions of sanction threats are manipulable by policy); Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 951 (2003) (noting with skepticism the ability to deter crime by manipulating criminal laws and penalties). The DOJ's policy of extraditing foreign officers for violating U.S. antitrust laws is a manipulation of criminal law in two ways: first, for countries that do not criminalize anticompetitive activities, the DOJ policy effectively criminalizes such activities; and second, even for countries that do impose criminal liabilities, the policy introduces the U.S. criminal law and punishment to those activities.

[159] Robinson & Darley, *supra* note 158, at 953.

[160] Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural [sic] Science Investigation*, 24 OXFORD J. LEGAL STUD. 173, 174 (2004); *see also* Robinson & Darley, *supra* note 158, at 953.

[161] Robinson & Darley, *supra* note 158, at 954.

[162] *See* OECD REPORT, *supra* note 83, at 8–12.

[163] Joshua & Camesasca, *supra* note 9, at 11; *see, e.g.*, Thomas O. Barnett, Criminal Enforcement of Antitrust Laws: The U.S. Model (Sept. 14, 2006), *available at* http://www.usdoj.gov/atr/public/speeches/218336.pdf.

implications on foreign businesses have garnered world-wide attention[164] in forms of news-reports[165] and client notes published by law firms representing most of the large multinational corporations.[166] As for the second condition, the likelihood of jail-time for foreign antitrust violators significantly increases the perceived cost of violation over any perceived benefit to the corporation.[167] Compared to civil or criminal fines that are limited to the amount of money the defendant has,[168] covered by directors and officers liability insurance, or passed onto the company as the cost of business,[169] imprisonment is a direct cost to the individual that the monetary benefits to the company cannot easily offset.[170] For most corporate officers, then, any indirect compensation based on better economic performance by the company or chances of corporate advancement will not be enough to overcome the potential costs associated with his or her imprisonment.[171] Lastly, the conditions that may interfere with rational decision-making—

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[164] Byrne, Goodman & Shapiro, *supra* note 3, at 14 (noting that the *Norris* case has "already made many in the business and legal communities outside of the United States sit up and take note.").

[165] *See, e.g.*, Kerry Capell & Eamon Javers, *Handcuffs Across the Water*, BUSINESS WEEK, July 24, 2006, at 42; Russell Hotten, *'This is Not Just About Me'*, DAILY TELEGRAPH, Apr. 28, 2006, at 3; Anita Raghavan, *U.S. Gains More Antitrust Cooperation Abroad*, WALL ST. J., Dec. 22, 2005, at A1; Alan Cowell, *British Official Backs Transfer of 3 Bankers to U.S. for Trial*, N.Y. TIMES, May 25, 2005, at C6 (discussing *NatWest Three* and *Norris* cases); Bob Sherwood, *Extradition: They'll See You in Their Court*, FIN. TIMES, Mar. 2, 2006, at 11; James Kanter, *A New Aggression Against Cartels*, INT'L HERALD TRIB., Dec. 17, 2005, at 3; Elizabeth Colman & Michael Herman, *Norris Could Be Extradited in Two Months*, TIMES, Jan. 26, 2007, at 47.

[166] *See, e.g., Extradition Arrangement in the US and UK*, BRIEFING (Freshfields Bruckhaus Deringer, London, U.K.), July, 2006, *available at* http://www.freshfields.com /publications/pdfs/2006/16223.pdf; *Cartels and Extradition: Norris Case*, BRIEFING (Freshfields Bruckhaus Deringer, London, U.K.), Jan. 2007; *The NatWest Three—Lessons for UK Financial Services Firms*, REGULATORY BULLETIN (DLA Piper, London, U.K.), Aug., 2006; *US Flexes Extradition Powers*, INSIGHT (White & Case, London, U.K.), Oct., 2005. *See also* publications cited *supra* at notes 8–9.

[167] *See supra* Part I; Calkins, *supra* note 24, at 142–43; Cavanagh, *supra* note 22, at 166.

[168] Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Criminal Control*, 94 YALE L.J. 315, 331 (1984) ("[I]ncreasing the theoretical size of the fine produces no increase in deterrence, and we must therefore resort to imprisonment.").

[169] Baker, *supra* note 19, at 705.

[170] John C. Coffee, Jr., *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 AM. CRIM. L. REV. 419, 423 (1980) ("[T]he greater threat associated with incarcerative penalties cannot be efficiently offset simply by increasing the severity of authorized monetary penalties."); *see also* Steven D. Levitt, *Incentive Compatibility Constraints as an Explanation for the Use of Prison Sentences Instead of Fines*, 17 INT'L REV. L. & ECON. 179, 180 (1997) (explaining the need to impose prison sentences as a need to provide incentive to enforce fines under the threat of further punishment).

[171] Baker, *supra* note 19, at 698.

drug or alcohol use, impulsiveness, and risk-seeking behavior[172]—are less likely to appear in the corporate decision-making process.[173] The collective, calculative, and deliberative nature of the corporate decision-making process would be particularly amenable to sanction threats.[174] Empirical research supports this "rational choice" model of the corporate decision-making, especially when the punishment is targeted directly at the individual decision-makers.[175]

C. Other Influences on Foreign Business Practices

The DOJ's approach will not only deter foreign businesses from violating U.S. antitrust laws, but also influence them to take preventive measures in their business practices. With the possibility of the United States applying its antitrust laws extraterritorially, foreign companies and their officers will have to consider the anticompetitive consequences of their business activities in, or with, the United States and manage the risk accordingly.[176] Foreign officers, especially of those companies whose businesses are directed toward the U.S. markets, will need to familiarize themselves with the relevant U.S. laws and adopt practices to ensure compliance.[177] These foreign companies may also consider adjusting the coverage of their directors and officers liability insurances to include

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[172] Robinson & Darley, *supra* note 158, at 955.

[173] Kyle D. Logue, *Legal Transitions, Rational Expectations, and Legal Progress*, 13 J. CONTEMP. LEGAL ISSUES 211, 228 (2003) ("[O]ver the long run the decisions of corporate managers and of business decision-makers generally tend to be rational in the traditional sense; that is, they tend not to be subject to the same biases that plague individuals acting in their capacities as consumers, at least not to the same degree.").

[174] Raymond Paternoster & Sally Simpson, *Sanction Threats and Appeals to Morality: Testing a Rational Choice Model of Corporate Crime*, 30 LAW & SOC'Y REV. 549, 550–51 (1996) (citing researches by Chambliss, Kadish, Braithwaite and Geis, among others); John Braithwaite & Gilbert Geis, *On Theory and Action for Corporate Crime Control*, 28 CRIME AND DELINQUENCY 292, 300–02 (1982) ("[D]eterrence is doubtful with traditional crime, but may well be strong with corporate crime," among other reasons because "corporate crimes are almost never crimes of passion; they are not spontaneous or emotional, but calculated risks taken by rational actors. As such, they should be more amenable to control by policies based on the utilitarian assumptions of the deterrence doctrine.").

[175] Paternoster & Simpson, *supra* note 174, at 579. Note that some researchers find no support for the rational choice model in corporate decision-making process, because they focus on cases where the management's self-interest runs against the interest of the corporation; that is clearly not the case here. *See, e.g.*, John Braithwaite & Tony Makkai, *Testing an Expected Utility Model of Corporate Deterrence*, 25 LAW & SOC'Y REV. 7, 10 (1991). Even such researchers, however, admit that there are legitimate grounds for asserting that deterrent effects of perceived punishment are stronger in the corporate context than with individual criminality. *Id.* at 35.

[176] Ockene & Ahlman, *supra* note 8, at 13.

[177] *Id.* at 13–14; Sherwood, *supra* note 165.

extradition defense costs.[178]

V. CONCLUSION AND FURTHER IMPLICATIONS

At least in the United Kingdom, the future implications of the *Norris* case seem relatively clear—as the law currently stands, the DOJ will seek extradition of foreign antitrust offenders more aggressively and the U.K. authorities will respond cooperatively.[179] In this limited sense, the threat of extradition of foreign antitrust offenders may certainly be "real." Due to the differences in national policies and the terms used in extradition treaties, however, whether other countries are as willing as the United Kingdom to extradite alleged antitrust offenders to the United States is questionable at best.[180] It is possible that continued efforts by the DOJ to prosecute foreign officers and the global trend to criminalize antitrust offenses may lead to a more widespread use of extradition in the future.[181] As more countries treat anticompetitive activities as criminal offenses, the dual criminality requirement will be less of a problem for the United States. Some foreign courts may even utilize the conduct-based interpretation adopted by the Magistrates' Court in *Norris*, and find anticompetitive activities extraditable even without requiring an explicit criminalization.[182] To overcome the "nationality exception" hurdle, the United States is asserting political and diplomatic efforts to convince foreign countries to extradite their own citizens.[183] As a result, countries such as Bolivia and Argentina have signed new extradition treaties that require the extradition of their citizens.[184] Further, the non-extradition of citizens in civil law countries may no longer be an absolute principle: Italy is the most conspicuous among the civil law countries to allow extradition of its own citizens[185] and Latin American

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[178] Sherwood, *supra* note 165; Ockene & Ahlman, *supra* note 8, at 14.

[179] For the British government's position on the fairness of the extradition treaty between the United States and the United Kingdom, see the Prime Minster's responses to questions, *available at* http://www.publications.parliament.uk/pa/cm200506/cmhansrd/cm060712/debtext/60712-0885.htm; *see also* Campbell Presses Blair over 'Unfair' US Extradition Treaty, http://www.mingcampbell.org.uk/2006/07/05/campbell-presses-blair-over-unfair-us-extradition-treaty/#more-37.

[180] Joshua & Camesasca, *supra* note 9, at 16; *See supra* Part III.B.

[181] Hammond Address II, *supra* note 7, at 2; *see also* OECD REPORT, *supra* note 83, at 28.

[182] As in the U.S.-U.K. extradition treaty, most modern extradition treaties include a provision that deems an offense extraditable even if the laws of two countries do not describe the offense by the same terminology or place it under the same category.

[183] Memorandum from the Attorney General on International Extradition to All United States Attorneys, (Oct. 16, 1997), *available at* http://www.justice.gov/ag/readingroom/interextra.htm.

[184] *Id.*

[185] Nadelmann, *supra* note 37, at 851.

countries such as Colombia and Mexico have also begun to extradite their own citizens under considerable pressure from the United States.[186]

Even when extradition is not a direct possibility, the DOJ's approach to extradition and international antitrust enforcement will certainly affect how foreign companies conduct their businesses. As long as the "indirect" extradition is a plausible possibility, either through the Red Notice or the U.S. border-watch program, the informal restrictions on international travel and other business activities may compel foreign officers to voluntarily submit to the U.S. authorities. Further, the perceived threat of punishment may be high enough to affect the behaviors of corporate decision-makers, and deter foreign executives from violating U.S. antitrust laws. Managing the risk of extradition and taking preventive measures to comply with the relevant U.S. laws are also foreseeable post-*Norris* changes in foreign business practices. In sum, although extradition may not be a perfect legal tool to bring foreign antitrust offenders to justice, or even a direct threat to the foreign corporate officers of most countries, the practical effects of its availability may still be "significant."

[186] *Id.* at 852–57.