

Extradition of Japanese Nationals: A Growing Threat in U.S. Prosecutions of International Cartels?

By: Michael McGovern, Kaede Toh, and Michael Jo¹

I. Introduction

Until recently, the conventional wisdom held that extradition of a Japanese national accused by the United States of an antitrust or other white-collar offense was an unlikely prospect. For example, in 1995, in the wake of the cover-up of \$1.1 billion in trading losses that engulfed Daiwa Bank, Ltd., a lawyer with Tokyo's Chiyoda Law Office remarked that he would be surprised "if Japan gave in easily" to extradition requests involving white-collar crimes; the prospect of sending elite Japanese bankers to America's "mean jails" would be too much for the country to bear politically.² Similarly, in 1996, another Japanese attorney dismissed the possibility of extradition for Yasuo Hamanaka, the infamous "Mr. Copper" who had lost \$2.6 billion trading for Sumitomo Corporation: "Unlike murder, what Hamanaka did would not be considered an outright threat to the social order of any country."³

That era may now be over. In April 2014, the United States Department of Justice ("DOJ") announced the United States' first-ever extradition of a foreign national on antitrust charges. Romano Piscioti, an Italian executive of marine hose manufacturer Parker ITR S.r.l, was extradited to the United States from Germany, where he had been arrested while traveling on business.⁴ A month later, in a little-noticed development, an appellate court in the Canadian province of British Columbia cleared the way for the extradition to the United States of John A. Bennett, a Canadian national accused of orchestrating a kick-back and bid-rigging scheme.⁵

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² Norihoko Shirouzu, *U.S. May be Hard Pressed on Daiwa Case – Japan Likely to Squelch Attempts to Extradite Former Branch Employees*, ASIAN WALL ST. J., Nov. 14, 1995.

³ *Hamanaka Likely to Elude Extradition*, DOW JONES TELERATE ENERGY SERVICE, June 19, 1996. Hamanaka ended up serving seven years' imprisonment in Japan and was released in 2005. Yoshifumi Takemoto, *Hamaka, Out of Jail, 'Amazed' at Copper Prices*, BLOOMBERG.COM, Dec. 6, 2005, available at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aERBG3FANNMw>.

⁴ Press Release, DOJ, Office of Public Affairs, First Ever Extradition on Antitrust Charge: Former Marine Hose Executive Extradited from Germany to Face Charges of Participating in Worldwide Bid-Rigging Conspiracy (April 4, 2014), available at <http://www.justice.gov/opa/pr/2014/April/14-at-340.html>. The DOJ had previously extradited Ian P. Norris, a citizen of the United Kingdom and the former CEO of the Morgan Crucible Company plc, in March 2010, as part of the DOJ's investigation of the carbon products cartel. However, Norris was extradited on obstruction of justice charges, not price-fixing charges. At the time, commentators concluded that extradition of foreign nationals on antitrust charges remained unlikely. See James A. Wilson, *Extradition: The New Sword or the Mouse that Roared?*, THE ANTITRUST SOURCE (April 2011), available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/apr11-wilson_4-20f.authcheckdam.pdf.

⁵ *United States v. Bennett*, 2014 BCCA 145 (Can.), available at <http://www.courts.gov.bc.ca/jdb-txt/CA/14/01/2014BCCA0145.htm>. Bennett was charged with defrauding the United States and conspiracy, but he was not charged with an antitrust offense, even though one of his co-conspirators was charged with bid-rigging under Section 1 of the Sherman Act. See Indictment at 1-10, *United States v. McDonald, et al.*, No. 09-cv-656 (JAG) (D.N.J. Aug. 31, 2009), available at <http://www.justice.gov/atr/cases/f250100/250158.pdf>. Thus, it is not correct to

Meanwhile, Japanese authorities are likewise cracking down on cartel conduct in Japan. The Secretary General of the Japan Fair Trade Commission (“JFTC”), Hideo Nakajima, noted recently that public sentiment in Japan against cartels is “gradually . . . getting bigger and bigger.”⁶

Will the DOJ’s zealous pursuit of international cartels, combined with Japan’s increasing enforcement of its antimonopoly laws, result in the first extradition of a Japanese national to the United States for an antitrust offense? What do these recent trends presage for the approximately 20 Japanese nationals who are said to be fugitives in Japan facing pending U.S. antitrust charges—none of whom has yet been extradited—or for those executives who have yet to be charged in the DOJ’s ever-expanding cartel investigations? This article will assess the actual risk of extradition for Japanese executives charged by the U.S. with antitrust offenses and will analyze three arguments that could defeat extradition: (a) the lapse of the statute of limitations under Japanese law; (b) the lack of probable cause to establish the offense for which extradition is pursued; and (c) the lack of dual criminality, a principle that requires that extradition be for conduct that is a crime under the laws of both the requesting and requested countries. This article examines not only the antitrust regulatory regimes in both Japan and the United States, but also the law governing extradition requests made to Japan and the existing precedent of Japan’s responses to extradition requests made by the United States.

II. Antitrust Laws in Japan and the United States

A. *Japanese Antitrust Law and Its Relative Lack of Criminal Enforcement*

The Japanese anti-competition law, the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade, was enacted in July 1947 and is commonly known as the Antimonopoly Act (“AMA”).⁷ The JFTC is tasked with enforcing the AMA and related laws. The AMA prohibits private monopolization, unreasonable restraint of trade, and unfair trade practices. It provides criminal penalties for those who have (a) effected private monopolization or an unreasonable restraint of trade, or (b) effected substantial restraint of competition in any particular field of trade.⁸ The JFTC has the authority to investigate criminal violations, but it does not have the authority to prosecute them. If the JFTC uncovers a criminal violation of the AMA, it typically refers the matter to the Public Prosecutor’s Office (“PPO”) by filing a formal accusation with the PPO.⁹ Both individuals and corporations may be criminally prosecuted. The maximum penalty for individuals is five years’ imprisonment and a ¥5 million fine.¹⁰

say that Bennett was extradited on antitrust charges, even though the Antitrust Division sought his extradition and the alleged conduct involved bid-rigging. Compare W. Michael G. Osborne, *US Obtains First Ever Extradition from Canada on Antitrust Charges*, THE LITIGATOR (May 13, 2014), available at <http://www.thelitigator.ca/2014/05/us-obtains-first-ever-extradition-from-canada-on-antitrust-charges/>.

⁶ Melissa Lipman, *DOJ Official Warns Extradition ‘Safe Havens’ Fading*, LAW360 (June 5, 2014), available at <http://www.law360.com/articles/545218/doj-official-warns-extradition-safe-havens-fading>.

⁷ Shiteki dokusen no kinshi oyobi kōsei torihiki no kakuho ni kansuru hōritsu [Law Concerning Prohibition of Private Monopoly and Protection of Fair Trade], Law No. 54 of 1947 (Japan).

⁸ AMA art. 89.

⁹ JFTC, MEASURES AGAINST ILLEGAL ACTS, http://www.jftc.go.jp/en/about_jftc/role.files/1009role_3.pdf.

¹⁰ AMA art. 89.

Over the last decade, the JFTC has signaled its intent to enforce the AMA more vigorously. In 2008 Kazuhiko Takeshima, a former Chairman of the JFTC, declared that the agency “intends to continue rigorously and actively countering price-fixing cartels and bid-rigging practices, including government-facilitated bid-rigging” and “[to] deal swiftly and effectively with unfair trade practices that may cause unfair disadvantages to small and medium-sized enterprises, including practices involving the abuse of superior bargaining positions and sales at unjustly low prices.”¹¹ Takeshima also commented that there was an “obvious” need to “further strengthen fair competition rules.”¹² The 2009 amendments to the AMA, passed by the Japanese Diet on June 3, 2009, allow the JFTC to impose larger administrative fines on companies engaged in cartels and on certain types of unilateral conduct. The amendments also increased – from three to five years – the maximum prison sentences for individuals convicted of participating in a cartel.

Nonetheless, criminal enforcement of the AMA is still the exception rather than the rule for bid-rigging and cartel activities. Moreover, in the few cases that have resulted in criminal charges against individual defendants, no Japanese court has ever sentenced an individual to imprisonment for a violation of the AMA.¹³

B. *U.S. Antitrust Law and Its International Reach*

In the United States, the Sherman Antitrust Act forbids the restraint and monopoly of trade.¹⁴ Section 1 of the Act states that any person who “shall make a contract or engage in any combination or conspiracy [in restraint of trade or commerce] shall be deemed guilty of a felony.” Under Section 2, any person who “shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be guilty of a felony.” Individuals found to have violated Sections 1 or 2 may be punished by a fine not exceeding \$1 million dollars, imprisonment not exceeding ten years, or both.

¹¹ JFTC, MESSAGE FROM CHAIRMAN TAKESHIMA, <http://www.jftc.go.jp/en/pressreleases/yearly-2009/jan/individual-000141.html> (January 5, 2009); see also *Japan Fair Trade Commission: Aggressively Tackling Cartels, Bid-Rigging, & Monopolization*, THE CPI ANTITRUST JOURNAL, May 2010.

¹² JFTC, FOR FAIR AND FREE MARKET COMPETITION, http://www.jftc.go.jp/en/about_jftc/role.files/1009role_1.pdf, at 4.

¹³ JAPAN, MINISTRY OF JUSTICE (“MOJ”), 2012 WHITE PAPER ON CRIME, available at <http://hakusyo1.moj.go.jp/jp/60/nfm/excel/shiryo1-07.xls>; Shigeki Kusunoki, *Shaping an Anti-Monopoly Law Sanction Regime Against Cartels or Bid Collusion: A Perspective on Japan’s Choice*, 79 U. DET. MERCY L. REV. 399, 406, 408 (2002) (suggesting that judges suspend sentences because “there appears to be no clear consensus in Japanese society that violations against competition as an economic norm are sufficient justifications to require actual imprisonment”); Masaaki Kotabe and Kent W. Wheeler, ANTICOMPETITIVE PRACTICES IN JAPAN: THEIR IMPACT ON THE PERFORMANCE OF FOREIGN FIRMS 78 (1996); Antitrust Deterrence in the United States and Japan: Remarks by Stuart M. Chemtob, Special Counsel for International Trade, Antitrust Division, U.S. Dept. of Justice (June 23, 2000), available at <http://www.justice.gov/atr/public/speeches/5076.htm> (“Even after successful criminal prosecution, however, the sentences imposed by the Tokyo High Court have not been particularly severe. Although all convicted individuals have received jail sentences, in all cases, with no exceptions, the court has suspended the sentence.”).

¹⁴ 15 U.S.C. §§ 1-7.

The Antitrust Division of the DOJ has actively pursued international cartel conduct under the Sherman Act. The Division's numerous enforcement actions against Japanese companies and individuals have largely focused on the auto parts industry, resulting in "the largest criminal investigation the Division has ever pursued, both in terms of its scope and the potential volume of commerce affected."¹⁵ At least 52 individuals have been charged and 33 companies have pleaded guilty or agreed to plead guilty in the government's ongoing investigation into the auto parts industry.¹⁶ The products in question have run the gamut from seatbelts and airbags to bearings and air conditioning systems.¹⁷ Major companies prosecuted by the Division have included Denso, Panasonic, and Mitsubishi Electric.¹⁸ In January 2012, Japanese wire harness supplier Yazaki Corporation agreed to pay a \$470 million fine for price-fixing and bid-rigging, one of the largest criminal fines obtained by the Division for a violation of the Sherman Act.¹⁹ To date, the DOJ's investigation into the auto parts industry has yielded more than \$2.4 billion in fines.²⁰

The DOJ's recent push against international cartels, especially those in which Japanese companies and individuals allegedly participated, has recently extended to other industries adjacent to the automotive industry, including the automotive ocean shipping industry. For example, in September 2014, the DOJ announced that "K" Line (Kawasaki Kisen Kaisha Ltd.) would plead guilty and pay a \$67.7 million fine for antitrust violations relating to automotive ocean shipping.²¹ Three months later, NYK Line (Nippon Yusen Kabushiki Kaisha) agreed to plead guilty to similar charges and pay a \$59.4 million fine.²²

C. Failure to Submit to U.S. Jurisdiction Means Being Labeled a "Fugitive"

¹⁵ Sharis A. Pozen, Acting Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Remarks As Prepared For Delivery By Acting Assistant Attorney General Sharis A. Pozen At The Briefing On Department's Enforcement Action In Auto Parts Industry (Jan. 30, 2012), *available at* http://www.justice.gov/atr/public/press_releases/2012/279740.htm.

¹⁶ Press Release, DOJ, Antitrust Division, Two Former Japanese Automotive Parts Manufacturer Executives Indicted for Roles in Conspiracy to Fix Prices and for Obstruction of Justice (Feb. 5, 2015), *available at* http://www.justice.gov/atr/public/press_releases/2015/311686.pdf.

¹⁷ See DOJ, ANTITRUST DIVISION, COMPANIES AND INDIVIDUALS CHARGED IN AUTO PARTS INVESTIGATION (AS OF 9/26/13), *available at* http://www.justice.gov/atr/public/press_releases/2013/300969b.pdf.

¹⁸ *Id.*

¹⁹ Press Release, DOJ, Office of Public Affairs, Yazaki Corp., Denso Corp. and Four Yazaki Executives Agree to Plead Guilty to Automobile Parts Price-Fixing and Bid-Rigging Conspiracies (Jan. 30, 2012), *available at* <http://www.justice.gov/opa/pr/2012/January/12-at-128.html>.

²⁰ Press Release, DOJ, Office of Public Affairs, Aisin Seiki Co. Ltd. Agrees to Plead Guilty to Customer Allocation on Automobile Parts Installed in U.S. Cars (Nov. 14, 2014), *available at* http://www.justice.gov/atr/public/press_releases/2014/309854.pdf.

²¹ Press Release, DOJ, Office of Public Affairs, Japanese Company Agrees to Plead Guilty to Price Fixing on Ocean Shipping Services for Cars and Trucks (Sept. 29, 2014), *available at* <http://www.justice.gov/opa/pr/japanese-company-agrees-plead-guilty-price-fixing-ocean-shipping-services-cars-and-trucks>. The first guilty plea in the DOJ's antitrust investigation of the automotive shipping industry involved a Chilean corporation, CSAV. See Press Release, Office of Public Affairs, South American Company Agrees to Plead Guilty to Price Fixing on Ocean Shipping Services for Cars and Trucks (Feb. 27, 2014), *available at* <http://www.justice.gov/opa/pr/south-american-company-agrees-plead-guilty-price-fixing-ocean-shipping-services-cars-and>.

²² Press Release, DOJ, Office of Public Affairs, Third Company Agrees to Plead Guilty to Price Fixing on Ocean Shipping Services for Cars and Trucks (Dec. 29, 2014), *available at* <http://www.justice.gov/opa/pr/third-company-agrees-plead-guilty-price-fixing-ocean-shipping-services-cars-and-trucks>.

Japanese executives who have been criminally charged by DOJ for antitrust violations generally must choose between (a) voluntarily submitting to U.S. jurisdiction and serving a prison sentence that typically lasts one to two years or (b) being labeled a “fugitive” while remaining within Japan’s borders to avoid arrest during international travel.

News reports estimate that over 20 Japanese executives are currently serving prison sentences in the U.S. for their involvement in auto parts cartels.²³ The most obvious reason for submitting to U.S. jurisdiction is that an Interpol Red Notice ordinarily will be issued for an individual who refuses to submit to U.S. jurisdiction, notifying Interpol member countries that the individual is wanted for extradition.²⁴ Although each country has its own rules regarding whether to arrest or detain a listed individual, the threat of arrest or detention while traveling poses practical difficulties for an individual who is working in international business. Instead of living in perpetual fear of arrest, many Japanese businessmen choose to turn themselves in, hoping to negotiate a shorter sentence in exchange for cooperation and to return to the workforce afterward.

But other Japanese nationals elect to remain “fugitives” rather than face U.S. antitrust charges. A 2012 law review article estimated that a total of 47 individuals of varying nationalities who were charged in the United States with international price fixing during the period 1990-2009 are fugitives.²⁵ At least 19 of these 47 individuals appear to be Japanese nationals.²⁶ While the DOJ is reluctant to trumpet any news pertaining to such individuals, several can be identified from media sources and even the DOJ’s own documents. One example is Kazutoshi Yamada, a Japanese citizen and former executive at Ajinomoto Corporation. Charged with conspiring to fix prices for lysine, Yamada was indicted in 1996 but never appeared at trial, while his co-conspirators were convicted and sentenced to prison terms between 24 and 30 months.²⁷ Although the *Chicago Tribune* quoted a Japanese official stating that his government would consider extraditing Yamada if asked, he apparently has not been extradited.²⁸ A second Ajinomoto executive, Tamon Tanabe, was detained for several months in India in 2002 while the U.S. attempted to extradite him. The extradition request was ultimately unsuccessful, and Tanabe was released.²⁹

²³ カルテル被告、米へ引渡しも：日本側の対策急務、日本経済新聞（5月4日2014年）、
<http://www.nikkei.com/article/DGXNZO70755840T00C14A5TCJ000/>.

²⁴ See generally DOJ, EXECUTIVE OFFICE OF U.S. ATTORNEYS, U.S. ATTORNEYS’ CRIMINAL RESOURCE MANUAL, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/15mcrm.htm.

²⁵ John M. Connor, Robert H. Lande, *Cartels As Rational Business Strategy: Crime Pays*, 34 CARDOZO L. REV. 427, 466 (2012).

²⁶ John M. Connor, *Problems with Prison in International Cartel Cases* (June 20, 2011), at 27, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2166414.

²⁷ *United States v. Andreas*, 216 F.3d 645, 650 n.1 (7th Cir. 2000). A FY 1999 DOJ report also labeled Yamada a fugitive. DOJ, ANTITRUST DIVISION, ANNUAL REPORT: FY 1999, at 29, available at <http://www.justice.gov/atr/public/4523.pdf>.

²⁸ See Nancy Millman, *Japan Could Extradite Defendant*, CHICAGO TRIBUNE (Dec. 29, 1996), available at http://articles.chicagotribune.com/1996-12-28/business/9612280023_1_extradite-ajinomoto-criminal-price-fixing-charges.

²⁹ J. William Rowley, et al., *Increasing the Bite Behind the Bark: Extradition in Antitrust Cases*, 8 BUS. L. INT’L 298, 309 (2007).

While extradition for an antitrust offense has never been successfully pursued against a Japanese national, a growing trend of international cooperation suggests that Japan may now be more receptive to extradition for such offenses. Japan has signed mutual legal assistance treaties with the U.S., Korea, China, Hong Kong, the E.U., and Russia, reflecting its intent to cooperate with international criminal investigations and prosecutions.³⁰ In 2008, the former Chairman of the JFTC proclaimed that it was “important to actively establish and strengthen cooperation with overseas competition authorities in diverse frameworks.”³¹ Meanwhile, the DOJ is signaling a new focus on extradition after its recent successes in the *Pisciotti* and *Bennett* cases. Brent Snyder, the Antitrust Division’s Deputy Assistant Attorney General for Criminal Enforcement, cautioned in June 2014 that foreign executives charged in the U.S. should think twice before seeking “safe havens” abroad.³² The recent escalation of U.S. enforcement actions against Japanese companies and executives may soon test the level of international cooperation that Japan is willing to provide.

III. Legal Framework Governing Extradition

In order for a U.S. request for extradition from Japan to succeed, the U.S. must be able to meet certain requirements under Japan’s extradition law and the bilateral extradition treaty between the countries. Litigation of these requirements proceeds through separate levels of administrative and judicial review.

A. Requirements for Extradition between the U.S. and Japan

Two laws govern extradition from Japan: the Act of Extradition of 1953 (“Extradition Act”) and the Treaty on Extradition between the U.S. and Japan. The Extradition Act sets forth the guidelines for extradition and restricts the extradition of individuals under certain circumstances.³³ Extradition is unavailable:

- If the offense for which extradition is requested is a political offense;
- When a conviction or execution of punishment would be impossible under Japanese law due to any legal defense or other restriction, such as the statute of limitations;
- When there is no probable cause to suspect that the individual committed the offense for which extradition is requested (unless the individual has already been convicted of that offense in the United States);
- When there is a criminal case for the same offense or conduct already pending in a court of Japan, or such case has become final;
- When the individual has been convicted, sentenced, or is awaiting trial in Japan for another offense that is not yet resolved or complete; or

³⁰ MOJ, MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS, <http://www.moj.go.jp/ENGLISH/information/liai0002.html>.

³¹ JFTC, MESSAGE FROM CHAIRMAN TAKESHIMA, <http://www.jftc.go.jp/en/pressreleases/yearly-2009/jan/individual-000141.html>.

³² Melissa Lipman, *DOJ Official Warns Extradition ‘Safe Havens’ Fading*, LAW 360 (June 5, 2014), available at <http://www.law360.com/articles/545218/doj-official-warns-extradition-safe-havens-fading>.

³³ Tōbō Hanzainin Hikiwatashi Hō [Act of Extradition], Act No. 68 of July 21, 1953 (Japan).

- When the fugitive is a Japanese national, unless otherwise provided for by an extradition treaty.

Where an extradition treaty exists, as between the U.S. and Japan, its provisions supersede any contrary language in the Extradition Act.³⁴ The Treaty of Extradition between the U.S. and Japan was enacted on March 26, 1980, and proclaims that each country “undertakes to extradite” to the other “any person found in its territory and sought by the other Party for prosecution, for trial, or to execute punishment for any offense[.]”³⁵ Extradition for certain types of offenses, including antitrust offenses, is authorized only where the offense is punishable by the laws of both countries by death, life imprisonment, or “deprivation of liberty” for a period of more than one year.

The Treaty also carves out certain exceptions from extradition, including:

- When the offense for which extradition is requested is a political offense or the request is made with a view to prosecute or punish a person for a political offense; or
- Where Japan can exercise, or has exercised, jurisdiction over the offense and there are reasons under Japanese law, such as the lapse of time, that would bar prosecution.³⁶

Like the Extradition Act, the Treaty contains a probable cause requirement. Extradition is potentially available only if there is probable cause to believe that the person sought committed the offense charged or is the person who already has been convicted in the United States of the offense in question.³⁷ A request for extradition must be accompanied by certain documents, including a statement of the facts of the case, as well as “such evidence as would provide probable cause to suspect, according to the laws of the requested Party, that the person sought has committed the offense for which extradition is requested.”³⁸

Although the Extradition Act states that a Japanese national shall not be extradited in the absence of an extradition treaty, Article V of the Extradition Treaty merely states that a requested party shall not be bound to extradite its own nationals. In other words, as between the U.S. and Japan, each country has ample discretion to determine whether to extradite its own nationals.

Pursuant to the rule of “specialty,” which is incorporated into the Extradition Treaty, if an individual is extradited, he or she may be prosecuted and punished only for the offense for which extradition was granted. Exceptions apply if the individual voluntarily chooses to submit to the requesting country’s jurisdiction.³⁹ Thus, if the U.S. extradites a Japanese national on a charge of violating the Sherman Act, it cannot thereafter prosecute that individual for some other federal offense allegedly committed prior to extradition.

³⁴ *Id.*

³⁵ TIAS 9625, 31 U.S.T. 892; 1978 U.S.T. LEXIS 301, Article I, in force March 26, 1980, *available at* <http://internationalextraditionblog.files.wordpress.com/2011/03/japan.pdf>.

³⁶ *Id.* art. IV.

³⁷ *Id.* art. III.

³⁸ *Id.* art. VIII.

³⁹ *Id.* art. VII.

B. Determinations Made by the Minister of Justice and the Tokyo High Court

A request for extradition from Japan must be made in writing via diplomatic channels and directed to the Minister of Foreign Affairs, who forwards the request to the Minister of Justice.⁴⁰ Unless the Minister of Justice determines that the Extradition Act bars extradition, the Minister of Justice will order the Superintending Prosecutor of the Tokyo High Court PPO to apply directly to the Tokyo High Court for examination of whether the individual in question can be extradited. If and when the Tokyo High Court rules that an individual can be extradited, the Minister of Justice will make the final determination and decide whether extradition is appropriate. If all procedures are met, the Minister may order the Tokyo High Court PPO to extradite the fugitive, and the extradition will occur within thirty days from the date of the Minister's order.

In June 2014, the *Nihon Keizai Shinbun* interviewed Shinsuke Okuno, the former Senior Vice-Minister of Justice, regarding potential extradition requests from the U.S. for those involved in international cartels.⁴¹ Although the Senior Vice-Minister would not say whether any such requests had been made, he was less than supportive of the Japanese executives who may face extradition in the future. Voicing what he claimed to be his personal opinion, Senior Vice-Minister Okuno stated that those who violated the antitrust laws could not help but to be labeled a criminal. Nor did he see any need to clarify the standard for extradition from Japan to the U.S. with respect to antitrust violations, although he acknowledged that further considerations may be necessary if and when “successive” requests for the extradition of cartel members occur. If Senior Vice-Minister Okuno's views correspond with official policy, the Tokyo High Court may be the only hope for Japanese nationals currently living as so-called fugitives if and when the United States initiates extradition proceedings against them.

The Tokyo High Court's role in reviewing extradition requests differs from that of the Minister of Justice. In a 1990 court opinion involving the extradition of airplane hijacker Zhang Zehnhai to China, the Court noted that its role was not to judge whether extradition was “appropriate”—a determination for the Minister of Justice—but rather to determine whether any of the extradition exceptions applied.⁴² Whereas the Minister of Justice took a holistic view of the matter, including political considerations, the Court's role was merely to apply the law. Because hijacking was punishable in both China and Japan, the Court ordered Zhang's extradition, rejecting his argument that he would face a sentence far longer than that prescribed by the Convention for the Suppression of Unlawful Seizure of Aircraft, which was signed by both countries.

C. Lessons Learned from Japan's Past Extraditions

⁴⁰ Act of Extradition, *supra* note 33.

⁴¹ 日本経済新聞、国際カルテル 日本企業の対策は、違反回避する判断力を、奥野法務副大臣に聞く、2014年6月2日。

⁴² 平成2(て)37 逃亡犯罪人引渡審査請求事件 平成2年4月20日 東京高等裁判所；see *China Hijacker Returned From Japan to Beijing*, LOS ANGELES TIMES (April 29, 1990) available at http://articles.latimes.com/1990-04-29/news/mn-503_1_air-china.

Ten individuals were extradited from Japan to the United States and other countries between 2003 and 2012.⁴³ Because the Ministry of Justice (“MOJ”) does not identify all extradition requests received, it is unclear how many requests were received, how many failed, and how many were made by the U.S. According to *The Japan Times*, a refusal to extradite in 2004 was the “first time that a Japanese court had turned down a U.S. extradition demand.”⁴⁴

Only a handful of Tokyo High Court decisions discussing the issue of extradition have been published. These cases reflect the fact that the Court does not appear to distinguish between white-collar and other defendants facing extradition, as illustrated in the following cases:

- In 1986, the High Court ordered the extradition of a Japanese national to the U.S. on copyright infringement charges stemming from the creation of false replicas of computer game devices.⁴⁵
- In October 2005, the High Court agreed to extradite two Japanese citizens to the U.S. to face charges that they swindled thousands of dollars from U.S. aid organizations by falsely claiming that they were victims of the September 11, 2001 terrorist attacks. One defendant had received \$12,750 from the aid organizations, and the other had received about \$2,500.⁴⁶
- In 2007, the High Court ordered the extradition of a Chinese national, Yuan Tongshun, to China to face charges of embezzling public funds.⁴⁷ Yuan was 40 years old at the time and residing in the city of Osaka.⁴⁸
- In June 2007, the High Court ruled that an Indian computer expert, Radjatta Patkar, 44 years old, should be extradited to Hawaii on charges of extorting a government official.⁴⁹
- In 2010, the High Court agreed to the extradition of a Singapore national, 23 years old, to the U.S., on charges of credit card fraud.⁵⁰ The individual, Khris St. Ives Dulay Lu, used credit card information to steal approximately \$249,327 in products and services.⁵¹

⁴³平成25年版 犯罪白書 第7編/第4章/第2節/3, http://hakusyo1.moj.go.jp/jp/60/nfm/n_60_2_7_4_2_3.html.

⁴⁴ Editorial: *Lessons from the Okamoto Case*, JAPAN TIMES (Apr. 2, 2004), available at http://www.japantimes.co.jp/opinion/2004/04/02/editorials/lessons-from-the-okamoto-case/#.U5cdr_ldXDU. The Okamoto case is discussed in greater detail, *infra*.

⁴⁵ カルテル被告、米への引渡しも東京側の対策急務、日本経済新聞、2014年5月4日、電子版。

⁴⁶ *Japan Extradites 2 to U.S. in Alleged 9/11 Fraud*, CHICAGO TRIBUNE (Oct. 26, 2005).

⁴⁷ See David Lague, *China Seeks Extradition Packs in Spite of Death Penalty*, NEW YORK TIMES (May 29, 2007), available at http://www.nytimes.com/2007/05/28/world/asia/28cnd-china.html?pagewanted=print&_r=0; *Japan Extradites Chinese Wanted for Embezzlement*, JAPAN TIMES (May 13, 2007), available at <http://www.japantimes.co.jp/news/2007/05/13/national/japan-extradites-chinese-wanted-for-embezzlement/#.U5caFPldXDU>.

⁴⁸ Le Tian, *Japan to Extradite Criminal Suspect*, CHINA DAILY (May 10, 2007), available at http://www.chinadaily.com.cn/china/2007-05/10/content_869294.htm.

⁴⁹ Rick Daysog, *Plea Deal Worked Out in Awana Extortion Case*, THE HONOLULU ADVERTISER (July 6, 2007); Richard Borreca, *Indian Man Charged in Attempted Extortion of Awana*, HONOLULU STAR-BULLETIN (June 13, 2007).

⁵⁰ 米への身柄引き渡し妥当 FBI 摘発の男、東京高裁決定、日本経済新聞電子版、2012年8月31日。

⁵¹ *Man Sentenced to Federal Prison for Credit Card Fraud and Aggravated Identity Theft*, TARGETED NEWS SERVICE (Dec. 6, 2011).

It is unclear whether, in considering an extradition request, the Tokyo High Court distinguishes between Japanese citizens and those of other nationalities. While it is possible that leniency for Japanese nationals is afforded by the Tokyo High Court, the Court has refrained from even mentioning the defendants' nationalities in publicly available opinions.

For instance, in a March 30, 1989 opinion, the Tokyo High Court found that Helen Chow was subject to extradition on a charge of conspiracy to import over 100 grams of heroin into the United States. The Court's opinion made no reference to Ms. Chow's nationality.⁵² News sources identified her as a companion to a major drug trafficker named Johnny Kon, but it remains unclear whether she was a U.S. national.⁵³ And in March 2004, the Tokyo High Court denied a U.S. request for the extradition of Takashi Okamoto, a researcher charged with economic espionage.⁵⁴ The Court's opinion contained no discussion of Okamoto's Japanese nationality. Instead, the court determined that there was no probable cause to believe that Okamoto was liable for economic espionage. Accordingly, the Court determined that extradition was not appropriate.

III. Arguments Against Extradition

As discussed in Section II, *supra*, the U.S. faces various legal hurdles in securing the extradition of Japanese nationals. This Section analyzes three arguments that Japanese nationals accused of U.S. antitrust law violations may use to contest extradition: (a) expiration of the statute of limitations under Japanese law; (b) a lack of probable cause; and (c) a lack of dual criminality.

A. *The Statute of Limitations Exception*

Article 250 of the Japanese Code of Criminal Procedure governs the statute of limitations for criminal offenses not involving the death of another. For such crimes carrying a maximum sentence of less than five years' imprisonment, the statute of limitations is three years, and for crimes carrying a maximum sentence of less than ten years' imprisonment, the statute of limitations is five years.⁵⁵ The 2009 amendments to the AMA, which increased the maximum prison sentence for antitrust offenses from three years to five years, became effective as of January 1, 2010.⁵⁶ Thus, any antitrust offense completed on or before December 31, 2009, would carry a three-year statute of limitations, while any such offense committed on or after January 1, 2010, would carry a five-year statute of limitations. The limitations period ceases to run upon the filing of a criminal charge against the individual or one of his or her accomplices. If a final decision is rendered against the accomplice(s), the limitations period would run again.⁵⁷

⁵² 平成16(て)44 逃亡犯罪人引渡審査請求事件 平成16年3月30日 東京高等裁判所.

⁵³ Marvine Howe, *Drug Smuggler Pleads Guilty in Heroin Case*, NEW YORK TIMES (April 15, 1989), available at <http://www.nytimes.com/1989/04/15/nyregion/drug-smuggler-pleads-guilty-in-heroin-case.html>.

⁵⁴ 平成16(て)20 逃亡犯罪人引渡審査請求事件 平成16年3月29日 東京高等裁判所

⁵⁵ KEISOHŌ (C. CRIM. PRO.), art. 250 (Japan).

⁵⁶ JFTC, Q&A REGARDING 2009 AMENDMENTS, www.jftc.go.jp/dk/kaisei/h21kaisei/qa.html.

⁵⁷ KEISOHŌ, art. 254.

The statute of limitations for U.S. criminal antitrust offenses is five years.⁵⁸ Therefore, defendants who can show that they fall under the three-year statute of limitations in Japan and that the Japanese statute of limitations has run can defeat extradition on that basis.⁵⁹

Note, however, that the Code of Criminal Procedure starts the clock when the criminal act has *concluded*, which may be difficult to prove in an antitrust case.⁶⁰ Moreover, some Japanese courts have held that criminal antitrust violations conclude not when the behavior restricting competition ceases, but instead when competition in the market is no longer restricted (*i.e.*, when the effects of anticompetitive conduct have ceased).⁶¹

Finally, Japanese law allows for tolling if (a) the defendant flees Japan or (b) the defendant hides from authorities so that charges cannot be served upon him.⁶² While there appear to be no public applications of this provision, it does not appear that fleeing *to* Japan would toll the statute of limitations.

B. *The Probable Cause Requirement*

Both the Extradition Act and Extradition Treaty require a finding of probable cause to believe that the individual requested for extradition committed the crime charged or is the same individual who has been convicted of that crime.⁶³ Thus, a defendant facing extradition can argue that the U.S. has failed to meet this burden of proof.

The Tokyo High Court has on occasion questioned the U.S.'s showing of probable cause. In 2004, it rejected the DOJ's request to extradite Takashi Okamoto, a Japanese national. Okamoto, a researcher studying Alzheimer's Disease, was charged in the U.S. with economic espionage for taking laboratory samples from the U.S. to Japan. The Court ruled that there was insufficient evidence to support a finding of probable cause to believe the defendant was guilty.⁶⁴ While the prosecutor's office argued that there was probable cause to believe that Okamoto's conduct constituted a crime under Japanese law, the court stated that the correct inquiry was whether there was probable cause under U.S. law, not Japanese law.

It should be noted that Okamoto had contacted the DOJ on at least three occasions offering an explanation of his conduct. The DOJ would not hear him and went ahead with an indictment. To the Japanese court, this refusal appeared to cast doubt on the DOJ's statement of facts. In the future, the DOJ will likely take greater care to ensure that it has adequate proof of wrongful conduct before requesting an extradition. Nonetheless, a Japanese court that is

⁵⁸ 18 U.S.C. § 3282.

⁵⁹ See Act of Extradition, *supra* note 33, art. 2; Yukiko Yamada, *Beikoku de Sotsui Sareta Nihonjin Karuteru Ihansha no Migara Hikiwatashiha?*, ASAHI JUDICIARY (Feb. 8, 2012), <http://judiciary.asahi.com/outlook/2012013100006.html> (suggesting that this is the case).

⁶⁰ KEISOHŌ, art. 253.

⁶¹ 和泉澤衛、カルテル・入札談合に係る終了時期等について—途中離脱：行政事案と刑事事案をめぐって、第23・24合併号現代法学2013年2月、14-15.

⁶² KEISOHŌ, art. 255.

⁶³ Act of Extradition, *supra* note 33, art. 2-6.

⁶⁴ 平成16(て)20 逃亡犯罪人引渡審査請求事件 平成16年3月29日 東京高等裁判. See *Court Rejects U.S. Request for Extradition in Industrial Spy Case*, JAPAN TIMES (March 30, 2004).

reluctant to order the extradition of an individual to face severe penalties in the U.S. for cartel involvement likely will be inclined to scrutinize this factor closely.

C. The Dual Criminality Requirement

There is a colorable argument that extradition should be denied in cases of U.S. antitrust enforcement because Japan does not enforce criminal punishment for antitrust violations. The principle of dual criminality states that an individual cannot be extradited unless the crime charged in the requesting country is also a crime under the laws of the country in which the defendant is held.⁶⁵ But Japanese courts have yet to actually sentence an individual under the AMA, and published opinions indicate that jail time would not be imposed even where the individual was actively involved in antitrust violations.

1. Japanese and U.S. Antitrust Statutes Compared

As discussed in Section II, *supra*, the antitrust statutes in Japan and the U.S. are similar. Both allow for the criminal prosecution of individuals involved in unreasonable restraints of trade or monopolistic behavior. Both allow for terms of imprisonment longer than one year, as required by the Extradition Treaty. Therefore, at least on their face, the statutes arguably meet the dual criminality requirement.

2. Understanding Japan's Reluctance to Enforce Custodial Punishment

Nevertheless, no Japanese court has ever sentenced an individual to imprisonment for an antitrust offense. Although no express policy or law explains why, it appears that the Japanese courts are, in practice, far more lenient in dealing with antitrust defendants than are the U.S. courts.

Japanese law vests the courts with broad discretion to suspend criminal sentences. Courts may suspend a criminal sentence as long as the defendant has not (a) been sentenced to imprisonment for a period of more than three years or (b) received a fine of more than 500,000 yen. The defendant must not have been sentenced to a previous prison sentence or a greater punishment; if so, the court must find other mitigating circumstances as outlined in the Penal Code in order to suspend the sentence.⁶⁶ The Penal Code makes no distinction for white-collar offenses or antitrust violations.

If a court were to order the maximum criminal sentence now possible under the AMA—five years—it would not be able to suspend the sentence. This has yet to happen. Instead, the courts have routinely imposed sentences of less than five years and agreed to suspend each sentence.

⁶⁵ The dual criminality requirement has been used before to defeat an extradition request from the DOJ on antitrust charges. In March 2008, the United Kingdom's House of Lords (then the country's highest court) ruled that Ian P. Norris, a British executive charged by the DOJ in connection with the carbon products cartel, could not be extradited because price fixing was not a criminal offense in the United Kingdom at the time he was alleged to have committed it. Norris was eventually extradited on obstruction of justice charges. Price-fixing is now a criminal offense in the United Kingdom under Section 188 of the Enterprise Act of 2002. See Wilson, *Extradition: The New Sword or the Mouse that Roared?*, *supra* note 4.

⁶⁶ KEIHŌ (PEN. C.), art. 25.

In an opinion rendered on March 29, 2006, the Osaka district court sentenced one defendant to a term of two years and six months, and a second defendant to a term of one year and six months, but suspended both sentences for four and three years respectively.⁶⁷ The defendants were accused of conspiring to rig bids for waste disposal facilities. The first defendant and the corporation were found to have violated Articles 95 and 89 of the AMA; the second defendant was found only to have violated the Penal Code, sections 60 and 198.

The district court spent a large part of its opinion noting the severity of the conduct in question, involving at least ten other companies and a defendant who continued with the scheme even after questioning by JFTC officials. But the court also listed a multitude of factors that cut against a more severe penalty. The company had enacted compliance procedures, admitted to wrongdoing, dismissed its directors, and received a fine from the JFTC and disciplinary action from regional umbrella organizations—all reasons for mitigating the company's liability. As for the individual defendants, the court stated that they had engaged in the scheme after it had started, and had not acted for personal gain. Both defendants had engaged in bribery at the suggestion of the other party, expressed remorse for their actions, admitted to their conduct, received disciplinary action from the company, and had no prior criminal history. Moreover, both defendants' wives submitted affidavits in support of their husbands. The court also noted that the second defendant had acted upon the first defendant's directions and was in a subservient role at the company. Based on these mitigating factors, both individual defendants received suspended sentences.

That same year, in a decision rendered on October 15th, the Nagoya district court ruled similarly against five individual defendants in another bid-rigging case. The defendants were accused of bid-rigging for construction contracts in Nagoya, including subway construction.⁶⁸ The first sentence was suspended for five years, the rest for three years. All defendants were found guilty of violating AMA Articles 89 and 95, among other laws.

Again, the Nagoya district court started by acknowledging the severity of the conduct involved, stating that the total amount at stake in the projects was over 400 million yen, and that the bid-rigging scheme had been going on for over 30 years. Nevertheless, the court found that there were many mitigating factors in the defendants' favor. For instance, the court noted that the first defendant became involved in a pre-existing scheme set in place by his employer, expressed remorse, admitted to his involvement, declared all cash and gifts wrongfully received, paid back taxes, sold his house, donated over 500,000 yen to nonprofit organizations, and had no prior criminal history. Furthermore, the first defendant was 71 years old and not in good health.⁶⁹ His wife had stated that she wanted to help him reform. The court stated that, in light of all the mitigating factors, the first defendant's sentence should be suspended.

⁶⁷ 平成18(わ)3317、私的独占の禁止及び公正取引の確保に関する法律違反、贈賄被告事件、平成19年3月29日、大阪地方裁判所第5刑事部。

⁶⁸ 平成18(わ)2883、談合、私的独占の禁止及び公正取引の確保に関する法律違反被告事件、平成19年10月15日、名古屋地方裁判所刑事第3部。

⁶⁹ It should be noted that age does not appear to inhibit the DOJ from seeking extradition; Romano Piscioti, the Italian national who was extradited from Germany, is 61 years old. See Docket, Case No. 10-CR-60232-JIC-1 (S.D. Fla. 2014), available at http://www.appliantitrust.com/02_criminal/extradition/marine_hose/pisciotti_sdfla_docket_sheet.pdf.

As for the other four defendants, most had acted in their capacity as employees and had acted only within a pre-existing scheme. The court found that these defendants had not acted with intent to personally benefit. Each had expressed remorse in court, had no prior record (except for one who was fined for an incident of battery at work), and had been released from their jobs. Each had a wife who either submitted an affidavit in support or pleaded in court for a forgiving sentence, promising to support her husband. One defendant pledged to spend the rest of his life doing volunteer work. For each of these defendants, the court also found that suspension of the sentence was warranted.

As recently as February 4, 2015, the Tokyo District Court suspended the sentences of two former executives of NTN Corporation, a Japanese bearings manufacturer, who were charged with participating in a cartel to fix the price of ball bearings. Masashi Honma, age 65, received a sentence of 18 months' imprisonment for his involvement. Katsuhiko Iwamoto, age 63, received a sentence of 12 months' imprisonment. Honma was a director at the company; Iwamoto was a deputy general manager in the Industrial Machinery Division. Unlike the 2006 cases, neither defendant admitted to the charges—yet the court still suspended their sentences.⁷⁰

In the Osaka and Nagoya district courts' opinions, the courts strongly condemned the defendants for their acts, yet seized on every possible argument to show that they deserved suspended sentences.⁷¹ The opinions, as well as the recent decision regarding the NTN executives, seem to reflect a sentiment that individual employees should not be jailed for acts done at the behest of their employer, regardless of the amount of involvement they had in the scheme.

3. The Tokyo High Court's Interpretation of Dual Criminality

The extradition laws do not elaborate on how a crime may be found to have met the dual criminality requirement. But the Tokyo High Court has stated that the intent behind the dual criminality requirement is to penalize conduct that would be a crime under Japanese law, even if the letter of the law does not match up between the charged crime and its Japanese counterpart.

In a March 30, 1989 opinion, for instance, the Tokyo High Court noted that conspiracy to traffic heroin, without more, would not be a crime in Japan.⁷² The U.S. indictment for conspiracy did not list any overt acts against the defendant, Helen Chow, but the court refused to find that there was no dual criminality. Because elements of criminal offenses may be structured differently in different countries, it was necessary to look at the overall conduct of the defendant

⁷⁰ NTN 元取締役ら有罪 東京地裁判決、軸受け価格カルテル、日本経済新聞（2月4日2015年）、http://www.nikkei.com/article/DGXLASDG04H4U_U5A200C1CC1000/.

⁷¹ In another case, decided on September 15, 2009, the Tokyo district court found six former sales executives at galvanized steel sheet companies guilty of violating the AMA and participating in a price-fixing cartel. Galvanized steel sheets commanded a market of approximately 100 billion yen at the time, and the actions of the individuals and the three companies at which they worked were deemed to have a wide-ranging effect on the nation. Yet the sentences ranged from ten months to a year, with a stay of execution of three years in each case. *See Japan Fair Trade Commission: Aggressively Tackling Cartels, Bid-Rigging, & Monopolization*, THE CPI ANTITRUST JOURNAL, May 2010 (1).

⁷² 平成1（て）44 逃亡犯罪人引渡審査請求事件 平成1年3月30日 東京高等裁判所

and to determine whether anything within that conduct would be a crime under the laws of Japan. In this case, the court determined that Chow could be found liable under Japanese law for at least aiding and abetting the trafficking of heroin and could have faced imprisonment for up to three years. Finding that no exceptions to extradition applied, the court ordered Chow's extradition.

This opinion suggests that the Tokyo High Court may take a flexible approach to the dual criminality requirement. Even if elements of the crimes do not strictly match up, the court is willing to look at the facts as a whole to determine whether there is any criminal conduct in violation of Japanese law. In other words, the High Court appears to apply what scholars and practitioners of international law call the *in abstracto* method of interpreting the dual criminality requirement, appraising the criminality of the activity itself, rather than the *in concreto* method, which requires that the label and the elements of the offense correspond in the laws of both the requesting and requested states.⁷³

4. *Evaluating the Argument that Dual Criminality Does Not Exist*

A defendant facing extradition in Japan for an antitrust offense may be able to argue that there is no dual criminality where Japanese courts, in practice, never impose a prison sentence under the AMA. The Extradition Treaty between the U.S. and Japan requires that the crime in question be punishable by imprisonment of over one year under the laws of both countries. Although the AMA technically allows for that, in practice all sentences are suspended and imprisonment of one year is never actually enforced. Where the actual sentences imposed differ so significantly between the U.S. and Japan, dual criminality arguably does not exist.

There are three potential problems with this argument. First, the Japanese practice of suspending the sentences of white-collar offenders appears to be a matter of practice rather than pursuant to law or express policy. The existing court opinions rest their conclusions on the individual circumstances of each case, and there is no guarantee that courts will continue to suspend sentences for AMA violations. Based on the courts' language emphasizing the lack of each defendant's prior criminal record, it is possible that a repeat offender will receive an actual prison sentence.

Second, nothing in Japanese law, court opinions, or government publications answers the question of whether the dual criminality requirement is determined by the law on its face, or the law as applied. The Tokyo High Court views its role as effectuating the purpose behind the dual criminality principle, but this cuts both ways. In the March 30, 1989 opinion regarding Helen Chow, the Tokyo High Court looked beyond the strict elements of the crimes in question. This may mean that the court would evaluate whether the conduct is something that, in actual practice, is treated as a crime under Japanese law. But in the April 20, 1990 court opinion regarding Zhang Zehnhai, the Tokyo High Court noted that its role was not to question whether the ultimate sentence that would be imposed in Chinese courts for hijacking would be in excess of that prescribed by Japanese law. Instead, it was sufficient that the conduct in question was a crime under both laws as stated. This may suggest that the court would not look beyond the language of the AMA to the actual sentences imposed, even where the actual sentences imposed involve no custodial term.

⁷³ See, e.g., GEOFF GILBERT, RESPONDING TO INTERNATIONAL CRIME 105-09 (2006).

Third, both the MOJ and JFTC, at least outwardly, favor increased enforcement of cartel conduct and increased cooperation with international agencies. Former Senior Vice-Minister Okuno's statements to the *Nihon Keizai Shinbun* suggest that, in the face of increased political pressure from the U.S. and a high level of scrutiny internationally, the MOJ may not be particularly sympathetic to Japanese executives who are alleged to have engaged in cartel conduct. A growing sentiment against cartels within Japan, as well as international pressure, may affect the ultimate outcome.

Even at the Tokyo High Court, the opinions rendered thus far in extradition cases have been far from clear. There is no reliable authority for asserting that the Japanese practice of not sentencing first-time white collar offenders, *by itself*, means that the dual criminality requirement is not met.⁷⁴

V. Conclusion

The Antitrust Division's extradition of Romano Piscioti may represent a "new era" in international cartel enforcement, but much uncertainty remains.⁷⁵ For one thing, the precedential weight of the Piscioti extradition is limited by its unique circumstances. Though Piscioti is an Italian national, he was arrested in and extradited from Germany; if he were a German national, the German Constitution would have prohibited his extradition to any country outside Europe.⁷⁶ Likewise, the case of John Bennett has its own idiosyncracies. Though the Division sought his extradition and his co-conspirators were indicted on antitrust charges, he was indicted only on fraud and conspiracy charges, not on any charge of violating the Sherman Act.⁷⁷ Moreover, he was charged with defrauding the U.S. government, and the investigation involved several federal agencies working with the Antitrust Division.⁷⁸

In short, the Division has not yet succeeded in extraditing a foreign national from that individual's home country solely on antitrust charges. Whether the Division would successfully secure the extradition of a Japanese national from Japan depends on a number of unresolved legal and political questions. Will Japan's tougher stance on prosecuting cartel conduct

⁷⁴ One commentator has suggested an alternative argument: that where the JFTC has not filed a criminal accusation against an individual charged with antitrust offenses by the DOJ, extradition is not available. Because the Antimonopoly Act vests the JFTC with the power to investigate and initiate criminal charges only by means of filing a formal accusation with the PPO, the lack of an accusation means that the act in question could not be prosecuted in Japan—and thus that there is no dual criminality. It is unclear whether the Tokyo High Court would adopt such a strict reading of the law, requiring that a prosecution actually be initiated by Japan before extradition could be permitted. See Yoshiya Usami, *Why Did They Cross the Pacific? Extradition: A Real Threat to Cartelists?*, AAI Working Paper No. 14-01, at 7 (March 20, 2014), available at <http://www.antitrustinstitute.org/sites/default/files/AAIWP1401.pdf> (making this and other arguments).

⁷⁵ See, e.g., Patrick Linehan & Rachel Peck, *A New Era in Cartel Enforcement Against Foreign Nationals?*, (June 4, 2014), available at <http://www.law360.com/articles/544305/a-new-era-in-cartel-enforcement-against-foreign-nationals>.

⁷⁶ *Id.*

⁷⁷ See *supra* note 5.

⁷⁸ See Press Release, DOJ, Antitrust Division, 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.htm.

overcome its deep-seated aversion to imprisoning white collar criminal defendants? Do Japanese and U.S. law satisfy the dual criminality requirement, or does Japan's refusal to imprison white collar defendants mean that the dual criminality requirement is not met?

Individuals deciding whether to voluntarily submit to extradition, contest an extradition request, or simply remain a fugitive will have to make their own assessments of the risks they face. Is a statute of limitations defense available? Can the Division credibly argue that probable cause exists to believe that the defendant violated the Sherman Act? Does the individual have sympathetic circumstances—for example, no criminal history, advanced age, cooperation with investigating authorities, acting at the direction of others—that the MOJ might consider in deciding whether to approve extradition? Would the inability to travel outside Japan affect the individual's ability to do business?

The Antitrust Division has taken great pains to spread the message that it is taking a more aggressive approach to extradition. But it remains to be seen whether the Division will actually devote its resources to the arduous task of securing more extraditions and whether it will seek its first extradition of a Japanese antitrust defendant from Japan. If and when that happens, the success of that extradition request will depend not only upon the individual's unique circumstances, but also upon the MOJ's discretion and the Tokyo High Court's appraisal of the legality of such an extradition. While the pathway for that ultimate determination is clear, the result will be determined by legal and political considerations that currently remain in flux.