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U.S. Efforts to Extradite Persons for Tax Offenses

BRUCE ZAGARIS

I. INTRODUCTION

Today, a person wanted by the U.S. government for tax crimes can arrange his or her affairs so that they can depart the United States. Thereafter, that person can become unavailable by changing his or her name and even identity, going underground, obtaining new passports and citizenship, and even arranging to sell his or her U.S. assets. Prosecution forms an integral part of the government’s enforcement programs in efforts to enforce its tax laws. A voluntary tax system depends on the knowledge that the government can and will prosecute persons who intentionally and willfully commit tax crimes, even if they flee to other countries. Obtaining custody of tax criminals implicates extradition and its alternatives.

This Article discusses extradition for tax crimes. In particular, this Article focuses on the United States as the requesting state, and discusses extradition arrangements concerning tax charges against the offender in the United States. This Article also discusses the law concerning extradition by the United States, especially with countries of the European Union (EU). Part II of this article outlines the applicable U.S. statutory provisions governing extradition. Part III outlines the applicable foreign statutory provisions governing extradition. Thereafter, Part IV considers applicable substantive treaty provisions in U.S. extradition treaties while Part V discusses applicable procedural treaty provisions. Part VI summarizes individual U.S. extradition treaties with respect to tax offenses and related provisions. Part

* Partner, Berliner Corcoran & Rowe, Washington, D.C.; Founder and Editor, INTERNATIONAL ENFORCEMENT LAW REPORTER.
VII reviews the use of alternatives to extradition. Finally, Part VIII highlights the trends in extraditing persons for tax offenses.

Normally, proper advice on an extradition request or indictment requires knowledge of the specific charges, especially since prosecutors regularly charge related offenses in addition to tax charges (e.g., false statements, wire fraud, mail fraud, and money laundering). In addition, many extradition provisions may apply to a specific case, such as the effect of a request for a political offense or of pending proceedings for the same offense in the requested country.

Increasingly, governments are prosecuting persons for tax crimes. Globalization facilitates the increased use of both legal and illegal methods to arrange an individual or entity's tax affairs so as to minimize their tax liabilities.

Traditionally, tax crimes were excluded from the offenses that states made extraditable through either an explicit provision or the omission from the list of extraditable offenses. A requested state omits tax crimes from an extradition treaty because its prosecution concerns the state's revenue matters and gives rise to policy issues and questions about the legitimacy of a state's financial and tax policies. In some ways, this 'revenue rule' is akin to the political offense exception. Additionally, in some cases extraditees can challenge the rule of double criminality under the dual criminality requirement since tax laws are by nature quite diverse.

Historically, many experts criticized the refusal of countries to include crimes of fraud, such as tax fraud, in their extradition treaties. As the differences among world economic systems have


2. In 1983, the Norwegian Government was forced to withdraw an extradition request to the United Kingdom because tax fraud was not a basis for extradition in the Anglo-Norwegian extradition treaty. Poncet & Gully-Hart, supra note 1 (citing G. GILBERT, ASPECTS OF EXTRADITION LAW 55 (1991)).


4. JOHN B. MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION 111 (1891).
declined with globalization, the case for including fiscal offenses has become stronger.\(^5\)

In recent decades, countries have begun to include some\(^6\) or even all fiscal offenses in extradition and criminal cooperation treaties. The present trend is to include tax offenses in extradition treaties. This may be due to the need for better cooperation among states at a time of revenue pressure, which is partly caused by the current recession. In addition, free trade, economic integration, and especially the achievement of the single European market have facilitated international tax enforcement cooperation. In addition, global cooperation has also been encouraged by international organizations, such as the Organization of Economic Cooperation and Development (OECD), the Commonwealth Secretariat, and the Organization of American States.

Article 5 of the European Extradition Convention permits extradition for fiscal crimes when parties agree among themselves, provided that extradition meets the standard requirements, including the dual criminality rule. Such fiscal crimes include tax, duty, customs, and exchange offenses.\(^7\)

The U.N. Model Extradition Treaty does not exclude fiscal offenses from extradition.\(^8\) Chapter 2 of the Second Additional Protocol of March 17, 1978 illustrates the trend to include tax crimes in extradition treaties. Article 5 takes a more mandatory form. It provides that extradition will occur, irrespective of any arrangements between the signatories, whenever the tax crime, under the law of the requesting state, corresponds to an offense of the same nature under the law of the requested state. In this regard, the dual criminality rule has been liberalized so that a requested state cannot refuse extradition because the law of the requested state does not impose the same kind of tax or duty or does not contain a tax, duty, customs, or exchange regulation of the same type as the law of the requesting state. Hence, a

\(^5\) See generally A. N. Sack, (Non-)Enforcement of Foreign Revenue Laws, In International Law and Practice, 81 U. PA. L. REV. 559 (1933) (discussing the reasons for non-enforcement due to the diversity among various economic systems).


\(^7\) Id.

requested state may be obligated to extradite if an act of the same nature as that underlying the request for extradition would be punishable in the requested state. Thus, a person who intentionally evades a tax in the requesting state by giving inaccurate information in a document or making false statements that serve as a basis for a decision concerning the amount of that tax, may be extradited if the same type of deliberate false statements, fraud, or misleading of tax authorities is punishable under the law of the requested state, irrespective of the nature of the tax involved.9

Another example that reflects the trend to include fiscal offenses within international criminal cooperation initiatives is the trend to conclude special agreements and memoranda of understanding on mutual assistance and cooperation on fiscal and financial matters. In particular, the United States has concluded a series of tax information exchange agreements.10 These U.S. documents generally discuss principal applicable U.S. statutory provisions governing extradition.

II. KEY APPLICABLE U.S. STATUTORY PROVISIONS GOVERNING EXTRADITION

Extradition to the United States is substantially affected by the domestic laws, procedures, institutions, and policies of the countries from which the United States requests extradition. Hence, the United States has only limited control over the process. Three factors affect the ability of the United States to influence the extradition process. First, treaties with other countries, especially the applicable extradition treaty, primarily govern extradition to the United States. Second, diplomatic contacts between appropriate officials within the country requesting extradition are important. Here, the State Department plays an important role, even though sometimes the State and Justice Departments do not agree on the applicable law and often have competing values with respect to resolving a particular case.11 Third, the United States influences the process through direct

11. In this regard, the Justice Department prioritizes bringing persons to justice through prosecution while the State Department prioritizes the maintenance of diplomatic relations and protocols.
communications and relations between the U.S. Department of Justice and the foreign officials responsible for handling U.S. extradition requests. A U.S. prosecutor seeking the return of a fugitive for prosecution and a U.S. attorney representing that fugitive can significantly influence the foreign litigation of a U.S. extradition request, if they have a good understanding of the laws and procedures governing extradition to the United States from the requested country. Hence, a solid grasp of not only extradition and international criminal law, but also comparative law, especially comparative criminal law, are important. Normally, at a very early stage, a U.S. attorney must hire an attorney in the foreign state who is experienced in both extradition law and the substantive law in question, such as tax law.

According to 18 U.S.C. § 3192, “the President shall have the power to take all necessary measures for” the security of a person extradited to the United States “against lawless violence, until the final conclusion of his trial for the offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such offenses, and for a reasonable time thereafter.” This provision has been interpreted to mean that when a person is extradited to the United States, “he shall not be arrested or tried for any other offense than that with which he was charged in those proceedings, until he shall have had a reasonable time to return unmolested to the country from which he was brought.”

In addition, 18 U.S.C. § 3192 authorizes the President to appoint agents to accept delivery of a person being extradited to the United States and to transport the person from the surrendering country to the place of trial within the United States. In 1970, President Nixon expressly delegated this responsibility to the Secretary of State. In addition, under § 3192 the President has authority for a person’s care, safekeeping, and security while the person is in the United States in connection with the

13. Id.
16. Exec. Order No. 11,517, 35 Fed. Reg. 4, 937 (Mar. 19, 1970). Subsequently the Secretary has redelegated the authority to the Deputy Secretary and the Legal Adviser although no formal redelegation has been published in the Federal Register.
proceedings with respect to which his extradition was granted, "and for a reasonable time thereafter."

Furthermore, 18 U.S.C. §3193 provides:

A duly appointed agent to receive, in behalf of the United States, the delivery, by a foreign government, of any person accused of crime committed within the United States, and to convey him to the place of his trial, shall have all the powers of a marshal of the United States, in the several districts through which it may be necessary for him to pass with such prisoner, so far as such power is requisite for the prisoner's safekeeping.

III. KEY APPLICABLE FOREIGN STATUTORY PROVISIONS GOVERNING EXTRADITION

Almost all countries from which the United States seeks extradition, especially in the EU, regulate extradition by statute. Like the U.S. statutes relating to extradition from the United States, foreign extradition statutes ordinarily establish the procedures by which extradition from such countries occurs. However, unlike the U.S. extradition statutes, foreign extradition statutes normally have an important number of provisions that establish substantive rules governing extradition. Additionally, some foreign constitutions have provisions affecting extradition from those countries. For instance, the German and Mexican Constitutions prohibit extradition of nationals. In the Netherlands, paragraph 3 of Article 2 of the Constitution and Article 2 of the Extradition Act state that extradition may occur only pursuant to a treaty. Additionally, paragraph 3 of Article 2 confers on individual persons a right to be extradited only pursuant to the provisions of an extradition treaty. Both the procedural and substantive extradition laws of a country from which the United States requests extradition can have a substantial impact on whether a country will grant extradition to the United States in a particular case.

The effect of inconsistencies between statutes and an applicable extradition treaty may be important. In the United States, if a provision of a U.S. extradition treaty is inconsistent with a U.S. statute, the one most recently entered into force takes

The normal rule in foreign common law jurisdictions is that a statutory provision takes precedence over an inconsistent treaty provision. Hence, as demonstrated by the Sheinbein case, even though the 1962 U.S.-Israel extradition treaty calls for each country to extradite its nationals to the other, subsequent Israeli legislation barred the extradition of persons who were Israeli nationals on the date of the commission of the requested offense. Similarly, the 1984 treaty between the United States and Ireland appears to allow extradition for any offense that is punishable under the laws of both countries by imprisonment for more than one year. Nevertheless, the Irish Extradition Act of 1965 prohibits extradition from Ireland for “revenue” offenses. The Irish provision illustrates the continuing legacy of the “revenue rule.”

In civil law jurisdictions, the usual rule is that a treaty provision overrides an inconsistent statutory provision. Many civil law countries have provisions at the beginning of their extradition statutes, which state that those statutes apply only to the extent that the applicable extradition treaty is not inconsistent. However, provisions in the constitutions of such countries either override inconsistent treaty provisions, or effectively disallow the negotiation of treaties that have inconsistent provisions.

IV. APPLICABLE SUBSTANTIVE TREATY PROVISIONS

This Part highlights the types of substantive provisions contained in some or all U.S. extradition treaties and provides a basic discussion of the scope and operation of those provisions in relation to extradition to the United States. The substantive

19. For a discussion of the Sheinbein case, see Israel Supreme Court Denies U.S. Request to Extradite Sheinbein and Israel Prosecution Requests Reconsideration, 15 INT’L ENFORCEMENT L. REP. 143, 143-146 (Apr. 1999). In a three-to-two decision, the Israeli Supreme Court overturned the lower court ruling and held that Samuel Sheinbein, an eighteen-year-old charged with killing, dismembering and burning a teenager in Montgomery Country, Maryland in September 1997, “was a citizen of Israel and could not be extradited to the U.S.”; see also Sheinbein Plea Accepted in Israel, 15 INT’L ENFORCEMENT L. REP. 415, 415-16 (Oct. 1999).

20. ABBELL, supra note 12, at 316 (citing Council of Europe, Expression of Consent by States to Be Bound by Treaty (1987)).

21. Id. Ultimately the executive branch plays a key role in determining whether its country will grant an extradition request. For instance, in the Spanish request to extradite General Augusto Pinochet, Jack Straw, the United Kingdom Home Secretary, in the end denied the extradition request.
provisions of U.S. extradition treaties differ widely, and apparently minor differences in language can result in significant differences in their operation, especially when those provisions are interpreted and implemented by foreign courts and officials under their constitutions, statutes, and general legal principles. Thus, each extradition case must be viewed in terms of the applicable treaty, the domestic law of the country from which extradition is sought, and prior interpretations of similar provisions in that country. In addition, due to the effect that the domestic law of a requested country may have on extradition to the United States, it becomes important to consult counsel from the requested country who are competent to render advice on extradition matters.

A. Obligation to Extradite

The basic obligation to extradite is contained in all U.S. extradition treaties in reciprocal terms. The obligation to extradite is subject to the conditions specified in the treaty. The first article of every U.S. extradition treaty contains the requirement of the signatory countries to extradite persons charged with, or convicted of, extraditable crimes in the requesting country who are “found” in the territory of the country from which extradite is requested.

Modern U.S. extradition treaties condition the obligation to extradite in three ways. First, all extradition treaties concluded after 1960 provide either that the obligation to extradite is “subject to” the conditions established by, or described in, the remainder of the treaty, or that the signatories extradite fugitives to each other “in accordance with,” “pursuant to,” or “under” the conditions or provisions of the treaty. Second, the obligation to extradite only relates to extraditable offenses by, or in accordance with, the treaty. Third, a requested state must only extradite for offenses committed in the territory of the requesting state and for offenses committed outside the territory of the requesting state in circumstances detailed by the treaty.

22. When the United States is the requested state, its jurisprudence does not require the existence of a formal charging instrument in the requesting state, as long as the requesting state complies with the evidentiary and documentary requirements of the treaty. In re Assarsson, 687 F.2d 1157, 1159 (9th Cir. 1982).
B. Definition of Extraditable Offenses

The definition of "extraditable offenses" is important in extradition treaties. The extradition laws of many countries limit extradition to a list of specific offenses and types of offenses, or bar extradition for certain types of offenses. Since the statutory laws of such countries normally take precedence over inconsistent treaty provisions, the scope of offenses and types of offenses for which these countries can grant extradition may be narrower than the definition of extraditable offenses contained in the applicable treaty. Hence, if a question arises whether the extradition laws of such a country allow extradition for a particular offense covered by the applicable treaty, the current extradition laws of that country must be consulted.

The extradition laws of many countries impose a dual criminality requirement on extradition from those countries. Hence, when a foreign country's treaty with the United States is silent or ambiguous with regard to dual criminality, the country may still impose that requirement. The requested state normally looks to see if the underlying conduct for which the requesting state makes its extradition request is equivalent to conduct covered by an offense in the requested state.

Many of the countries with which the United States has concluded treaties that define extraditable offenses as requiring dual criminality, do not have general conspiracy statutes similar to 18 U.S.C. § 371. Hence, those countries agreed to include a treaty provision that creates an exception to the dual criminality rule and makes conspiracy an extraditable offense as long as the offense that was the object of the conspiracy is an extraditable offense. When both the United States and a country from which it requests extradition are parties to one of the multilateral conventions concerning transnational crime, the offenses encompassed by those treaties automatically become extraditable offenses under the extradition treaty in force between them.

25. Wright v. Henkel, 190 U.S. 40, 58 (1903). For instance, before the U.S. Supreme Court's decision in Factor v. Laubenheimer, 290 U.S. 276, 282 (1933), the Court inferred such a dual criminality requirement from "general principle[s] of international law."
27. ABBELL, supra note 12, at 321.
C. Fiscal Offenses as Extraditable Offenses

Some extradition treaties allow extradition to the United States for tax offenses, such as tax fraud, tax evasion, violations of customs laws, and violations of exchange control laws. Despite such allowances, a country from which the United States requests extradition for a fiscal offense may not be able to grant extradition for a tax offense.28 First, a requested country may only allow extradition for offenses listed as extraditable offenses in its extradition statutes. If a country's statutes take precedence over its treaties and the statutes do not list the requested offense as an extraditable offense, the requested country cannot grant extradition. Second, a requested country's extradition statutes may expressly prohibit extradition for fiscal offenses.29 If a country's statutes take precedence over inconsistent or ambiguous treaty provisions, the requested country cannot grant extradition for fiscal offenses. Third, if the applicable treaty has dual criminality and minimum punishment requirements, the requested country may not be able to grant extradition because: (1) the act that is the subject of the request would not violate its criminal laws in converse circumstances; or (2) the corresponding offense under its laws would not be punishable for the requisite minimum period. The same result may occur if the applicable treaty is silent or ambiguous with respect to dual criminality, but the laws of the requested country require dual criminality.30

As mentioned in the discussion of extradition for fiscal offenses in individual U.S. extradition treaties, many treaties provide for extradition for offenses that may include tax crimes. Several treaties also list exchange control offenses as extraditable offenses.31 Some recent U.S. extradition treaties explicitly provide that an offense will be extraditable if it relates to taxes, customs duties, currency control, and import and export of commodities, whether or not the laws of the requested state provide for the

28. See, e.g., Extradition Act, No. 17, pt. 2 (13), reprinted in FORDE, supra note 24, at 114.
29. Id.
31. E.g., Treaty on Extradition, June 22, 1972, U.S.-Den., art. 3(24)(c), 25 U.S.T. 1293, 1298. At present, these provisions do not apply because the United States has no exchange control laws. Hence, the United States would not be able to extradite due to lack of dual criminality.
same kinds of controls on currency or the import or export of the same kinds of commodities.\textsuperscript{32}

Many treaties that provide for a list of extraditable offenses include the following: 
"[f]raud by a bailee, banker, agent, factor, trustee, director, member, or public officer of any company, or fraudulent conversion . . . [o]btaining money, valuable security, or goods, by false pretences; receiving any money, valuable security, or other property, knowing the same to have been stolen or unlawfully obtained."\textsuperscript{33}

In a 1999 case involving an extradition request from Chile for a Chilean national charged, \textit{inter alia}, with fraudulently obtaining refunds of the Chilean Value Added Tax (VAT) and with evading payment of that tax, fraudulently obtaining export subsidies, and filing false documents with the Central Bank of Chile in connection with the tax refund applications, a U.S. District Court found those charges were extraditable and covered by the following provisions in the 1900 extradition treaty. "Fraud or breach of trust by a bailee, banker, agent, factor, trustee or other person acting in a fiduciary capacity, or director or member or officer of any company, when such act is made criminal by the laws of both countries and the amount of money or the value of the property misappropriated is not less than two hundred dollars."\textsuperscript{34}

Notwithstanding the differences between U.S. income tax (and even U.S. sales tax) and the Chilean VAT, the court reasoned that the Chilean tax offense constituted the extraditable crime of fraud under the treaty.\textsuperscript{35}

\begin{footnotesize}
\begin{enumerate}
\item[33.] \textit{See, e.g.,} Extradition Treaty, Dec. 22, 1931, U.S.-Gr. Brit., 47 Stat. 2122 \textit{reprinted in Treaties and Other International Agreements of the United States of America 1749–1949}, at 482–90 (Charles I. Bevans, ed.) (1968) (extending the applicability of the Treaty to Palestine and Trans-Jordan). The treaty was extended to many of the former U.K. colonies and lasted for quite a few years between the United States and a number of former colonies.
\item[34.] \textit{In re} Extradition of Feliciano Palma Matus, 784 F. Supp. 1052, 1055 (S.D.N.Y. 1992).
\item[35.] \textit{Id.} at 1055–56 (finding that the fraud, as defined in the treaty, covered fraud against the government).
\end{enumerate}
\end{footnotesize}
D. Defining Jurisdiction

1. Extraditability of Offenses Committed Outside the United States

With one exception, all U.S. extradition treaties in force obligate the requested country to grant extradition if the requested offense was "committed within the jurisdiction" of the requesting country. This could be interpreted as referring to the competence of the court of the requesting country to try the alleged offender for the requested offense. Historically, the United States has interpreted the term "jurisdiction" in this context to mean "territory." The nature of prosecutions for income tax violations normally enables the United States, as the requesting country, to show that income tax offenses by U.S. tax residents are committed within the United States. However, a noncitizen and nonresident with minimum or no contacts with the United States may be able to argue successfully that any alleged tax crimes were not committed within U.S. jurisdiction.

Common law countries interpret the term "jurisdiction" more narrowly than civil law countries. Hence, civil law countries would appear to be more likely to grant extradition to the United States with respect to offenses committed outside U.S. territory than would foreign common-law countries. However, the extradition laws of many civil law countries impose a reciprocity requirement on extradition from those countries. In addition, some countries' extradition laws require them to prosecute, rather than extradite, with respect to crimes committed wholly or partly outside the United States if the United States would not be able to reciprocate.

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36. ABBELL, supra note 12, at 322–23. For background on territorial jurisdiction and its extensions, see BASSIOUNI, supra note 30, at 295–345.
37. ABBELL, supra note 12, at 323.
38. See Swart, supra note 17, at 100. States may refuse extradition if the requested state would, in an analogous situation, not be able to prosecute the offender or enforce a judgment against him or her. This is often referred to as double criminality in concreto. This means that the requested state could refuse extradition if it would, in similar circumstances, not be able to prosecute or punish a person because it would not have jurisdiction in the matter.
2. Extradition of Nationals of Requested Countries

Common law countries ordinarily extradite their own nationals to the United States.\(^{40}\) In contrast, civil law countries generally refuse to extradite their nationals.\(^{41}\) However, at least two U.S. treaties with civil law countries, Italy and Uruguay, preclude either party from refusing extradition solely on the basis of nationality. The U.S. treaty with the Netherlands precludes either country from denying extradition solely on the basis of nationality if there is a prison transfer treaty in force between the parties. U.S. treaties with Colombia and Bolivia preclude either party from refusing extradition solely on the basis of nationality in certain specified circumstances. Even Colombia has started extraditing its nationals.\(^{42}\) The majority of post-1960 extradition treaties between the United States and civil law countries require a requested country that denies extradition on the basis of the requested person's nationality to submit the case for prosecution in its own courts at the behest of the requesting country. Civil law countries generally have jurisdiction to prosecute their nationals even for crimes committed outside their country. Trial procedures and rules of evidence in civil law countries often enable these countries to try the accused, whereas trial procedures and rules of evidence in common law countries often make prosecution in lieu of extradition impractical.\(^{43}\) However, extremely complex cases are impractical to try. Thus, even if the United States were to indict a foreign person or company for criminal tax and related violations, the foreign country may find it impractical to try the case, despite having jurisdiction based on the nationality of their

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defendant, unless its own revenue and/or other policies were at stake.  

Moreover, all post-1960 U.S. extradition treaties, and a few older ones, expressly prohibit the United States from re-extraditing a person to a third country who was extradited to the United States, except under the same conditions that would allow the United States to prosecute the person for an offense committed prior to his or her extradition for which he or she had not been extradited.

E. Retroactive Effect of Extradition Treaties

Sometimes questions arise as to the retroactive effect of an extradition treaty. For example, does the treaty apply to an offense committed prior to its entry into force? Does the treaty apply to acts that would not have been an offense in the requested country on the date of commission, but which would have become an offense in the country prior to the date the United States requested extradition? Does a current or prior treaty apply to a request made after the entry of the new treaty, but where the offense occurred when the prior treaty was in existence? When questions regarding retroactivity arise, either the treaty will answer those questions or they must be resolved in accordance with domestic laws and precedents of the requested country.

The defense of lapse of time or statute of limitation often exempts an extraditee from extradition for where prosecution or punishment is precluded due to lapse of time. This exemption from extradition is usually referred to as barred by "lapse of time," prescription, or statute of limitation. Most treaties and laws concerning extradition contain similar provisions. Some treaty provisions also prohibit extradition where punishment or

44. See, e.g., Bruce Zagaris, U.S. Court Denies U.S. Government Weiss Resentence Motion Despite Austrian Conditions, 18 INT'L ENFORCEMENT L. REP. 402 (Oct. 2002) [hereinafter Austria Turns Over Weiss]; Bruce Zagaris, Austria Turns Over Weiss to U.S. on Fraud Charges, 18 INT'L ENFORCEMENT L. REP. 348 (Aug. 2002); Bruce Zagaris, Austria Denies Extradition to U.S. Due to Human Rights Considerations, 17 INT'L ENFORCEMENT L. REP. 458 (Nov. 2001). After denying extradition to the United States and starting the prosecution of relator Sholam Weiss, the Austrian Government changed its position and extradited him, apparently due to the complexity of the case, the expense of trying him, and the government's lack of interest in the underlying charges.


46. ABBELL, supra note 12, at 329-30.

47. Id. at 86-88, 326.
enforcement of penalty is barred by the law of the requesting state or at least would be barred by the law of the requested state.48 Importantly, countries vary in the application of the treaty or national law provisions on retroactivity. The requested state may consider the case as if the crime had been committed in the requested state and apply its own statute of limitation to determine whether prosecution would be precluded. If prosecution is barred, the country will deny extradition.49 For example, the European Convention on Extradition provides that “[e]xtradition shall not be granted when the person claimed has, according to the law of either the requesting or the requested Party, become immune by reason of lapse of time from prosecution or punishment.”50 The U.S. government takes the position that unless enforcement specifically precludes retroactive application, such treaties are interpreted to cover offenses committed prior to their entry into force.51

F. Principle of Speciality

According to the statutory requirement of specialty codified at 18 U.S.C. § 3192, the United States or a state of the United States is not allowed to prosecute a person extradited to it for an offense committed prior to surrender and for which the requested country had not agreed to extradition, until the person has been afforded a “reasonable” opportunity to leave the United States. All U.S. extradition treaties now in force have a specialty provision.52 Hence, if a requested country extradites Mr. Y for making a false statement on his tax return, the United States cannot prosecute him for assault and battery. In many cases, however, the United States prosecutes the person in a superceding indictment for crimes arising out of the facts of the indictment. The best way to limit the scope of prosecution is to make the

48. Extradition, 6 Whiteman DIGEST § 16, at 859.
49. BASSIOUNI, supra note 30, at 609.
52. For a fuller discussion of the rule of specialty, see ABBELL, supra note 12, at 328–39; BASSIOUNI, supra note 30, at 429–85.
extradition order very clear and limited. There is ample litigation due to ambiguities about the extradition order. 53

Some courts try to discern whether the requested states would have objected to the court's assertion of jurisdiction to try the defendants for the offense in question. 54 The best method, however, is for the court to require the prosecution to make the inquiry whenever the court determines the extraditee has raised the issue in a meaningful way. 55

G. Evidentiary Considerations

1. Quantum of Evidence Required for Extradition of Person Charged in the United States

A majority of U.S. extradition treaties provide that the surrender of a requested person will occur only upon such evidence of criminality that, according to the laws of the place where the person is found in the requested country, would justify arrest and commitment for trial if the crime or offense had been committed there. Such provisions require a requested country to apply its own arrest and prosecutorial standards in order to determine whether the United States has provided sufficient evidence in connection with its extradition request.

2. Seizure and Surrender of Evidence and Fruits of Offense

Every U.S. extradition treaty in force has a provision authorizing a country from which the United States requests extradition to seize and surrender evidence and fruits of the offense for which extradition is requested. These provisions discuss

53. See, e.g., United States v. Billman, 1996 U.S. App. LEXIS 1657 (4th Cir. 1996) (holding that clarification of the degree permitted prosecution for mail or wire fraud); United States v. Saccoccia, 58 F.3d 754, 764-69 (1st Cir. 1995) (holding that prosecution and conviction following extradition did not violate principles of dual criminality or specialty); United States v. Kahn, 993 F.2d 1368 (9th Cir. 1993) (holding that the doctrine of specialty was not satisfied because Pakistan did not unambiguously agree to extradite Kahn for the specified count); United States v. Merit, 962 F.2d 917 (9th Cir. 1992) (holding that the United States adhered to the doctrine of specialty by limiting prosecution to those offenses found extraditable by the Requesting State); United States v. Ledher-Rivas, 955 F.2d 1510, 1519-21 (11th Cir. 1992) (holding that the United States complied with terms of the extradition treaty).


55. See ABBELL, supra note 12, at 389-90, (citing United States v. Gallo-Chamorro, 48 F.3d 502, n. 7 (11th Cir. 1995) (stating that the United States violated the specialty doctrine by giving Pinkerton instruction to the jury after the Columbian government expressed that it did not have a comparable legal concept)).
the scope and content of the ability to conduct a search and seizure pursuant to an arrest made due to an extradition request and will determine the extent to which a requested state will seek, seize, and surrender property.\textsuperscript{56} In addition, the constitution, statutes, and practices in the requested state may be important in terms of the requested state's actual practice. Since an extraditee may possess money related to an alleged tax crime, the United States, as the requesting state, will want a requested state to protect its interests with respect to search, seize, and surrender of evidence and/or fruits of the offense. It may be practically difficult, however, to determine whether any property in the hands of an extraditee is the fruit of a tax crime.

\textbf{H. Mitigating Factors to Refuse Extradition}

1. Effect of Requested Offense Committed Within Territorial Jurisdiction of the Requested Country

Several post-1960 U.S. extradition treaties expressly grant the requested country discretionary authority to refuse extradition when the requested offense is committed, at least in part, within its territorial jurisdiction.\textsuperscript{57} In the absence of that provision, a requested country always has the authority to prosecute the offense itself, thereby precluding subsequent extradition to the United States. The laws of some countries, especially civil law countries, impose an obligation on them to prosecute any offense committed within their territory.

2. Effects of Age, Health, and Other Humanitarian Considerations

A significant number of post-1960 U.S. extradition treaties have provisions that consider a requested person's age or health, or other humanitarian considerations. The British decision on the \textit{Pinochet} case illustrates the use of such considerations to deny extradition.\textsuperscript{58} The question that normally arises is whether the


\textsuperscript{58} Britain Frees Pinochet, 16 INT'L ENFORCEMENT L. REP. 697 (Apr. 2000); Andrew Parker, et al., Formally Freed, \textit{Pinochet Takes Flight}, FIN. TIMES (London), Mar. 3, 2000, at 1. British Home Office Minister Jack Straw declared on March 2, 2000 that the ninety-four-year-old Pinochet was not fit to face trial after suffering brain damage caused by
requested state should refuse extradition if it believes there are special circumstances relating to a requested person’s age, health, or other personal condition that would make the extradition incompatible with humanitarian considerations.

When a requested state is a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms, counsel for the extraditee may challenge the extradition to the United States on various humanitarian grounds, especially the potentially inhumane conditions of imprisonment or inhuman punishment \(^\text{49}\) that the extraditee would face if extradited to the United States. \(^\text{60}\) The extraditee’s ability to raise defenses on various humanitarian grounds has increased in the aftermath of the U.S. detentions of persons classified as “enemy combatants” since the terrorist incidents of September 11, 2001, and the U.S. denial of detainees’ access to counsel and courts. \(^\text{61}\)

3. Other Treaty Provisions Affecting Extradition to the U.S

At least three U.S. extradition treaties with Western European countries (Denmark, Norway, and the United Kingdom) have a provision that provides that extradition may be refused on any other ground specified by the law of the requested country. \(^\text{62}\) Hence, interested persons must scrutinize an actual or potential extradition request to any of these countries to determine the effect of their extradition laws on request. \(^\text{63}\)

V. APPLICABLE PROCEDURAL TREATY PROVISIONS

Whereas U.S. statutes regulating extradition from the United States have a relatively limited effect on extradition procedures,
the laws of other countries typically have a significant impact on the procedures governing extradition to the United States, partly because they often contain substantive rules concerning extradition from these countries. Due to the importance of foreign procedural laws in regulating extradition to the United States, persons involved with a potential or actual extradition request by the United States should be aware not only of the procedural provisions of the applicable treaty, but also of the procedural provisions of the foreign country's extradition laws. The nuances of a requested country's extradition procedures may not be readily apparent on the face of its extradition statutes and the applicable treaty.

A. Notification of Decision on Request for Extradition

Extradition treaties provide for the nature and extent of a requested country's obligation to notify the United States as a requesting country of its decision on whether to grant extradition. Many of the recent treaties require the requested state to inform the requesting state of the reasons for any partial or complete denial of extradition. On request, the requested state must provide copies of pertinent judicial decisions.64

B. Request for Person Charged in the United States

The extradition laws of most U.S. treaty partners specifically regulate the procedures governing the manner in which extradition requests must be made, the way in which the requested state must proceed, the form and contents of such requests, and the evidence in support of them.

In practice, the United States never starts an extradition case in a foreign country without first making either a formal extradition request or a request for provisional arrest to the requested country. The United States will not submit a formal extradition request without the prior approval of the Department of Justice,65 which then delegates the responsibility to the Office of

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International Affairs (OIA) and the Department of State. The Assistant Legal Adviser for Law Enforcement and Intelligence (L/LEI) coordinates the State Department and OIA's responsibilities. The formal request itself is always made through diplomatic channels, usually by a diplomatic note from the highest-ranking U.S. diplomatic or consular officer in the requested country to the foreign minister of that country.

The U.S. Attorneys' Manual contains the procedures to which federal and state prosecutors in the United States must adhere in requesting the extradition from a foreign country of an individual who has been charged or convicted of an offense in the United States. The OIA plays an important role in advising prosecutors on the formal and practical aspects of successfully preparing an extradition request.

Although some common law countries have detailed and rigid evidentiary requirements on evidence submitted by countries requesting extradition, civil law countries, especially European countries, generally impose less rigid requirements on evidence in support of foreign extradition requests. For instance, most civil law countries do not require the use of first-person affidavits of witnesses. These lax requirements simplify the work of U.S. prosecutors. Sometimes, inexperienced or hurried prosecutors may overlook some elements of the contents of an extradition request. While OIA attorneys often catch omissions and/or defects before they transmit the extradition requests, their enormous volume of work does not always permit detection of problems in proposed extradition submissions.


C. Request for Provisional Arrest and Detention

Extradition treaties allow for provisional arrest and detention of fugitives pending receipt of formal, fully documented extradition requests. This is due to the ease with which an accused can flee and the fact that requesting countries cannot prepare and submit formal, fully documented requests on short notice.

The extradition treaties describe the method and conditions for making a request; the required contents of a request; the action required of a requested country (the United States); the notification of action taken by a requested country; the length, and method of computing the length, of the period of provisional detention. Further, the extradition treaties also describe the effect of release from provisional detention based on the failure of a requesting country to make a formal, fully documented request in a timely manner.

Unlike U.S. extradition statutes, most foreign extradition statutes expressly regulate the substantive and procedural requirements governing provisional arrest. Many provisions in these foreign statutes merely supplement the conditional arrest provisions in the treaties between the foreign country and the United States and are consistent with the statutory terms. In case of inconsistencies between the statutory and treaty provisions, the treaty provision ordinarily will take precedence in civil law countries and the statutory provision in common law countries.

D. Surrender of Requested Person

Most U.S. extradition treaties are silent with respect to the manner of surrendering a person who has been found extraditable. However, the majority of post-1960 treaties, especially many of the most recent ones, provide that the place and time of surrender is to be determined by agreement of the parties. Sometimes, the requesting and requested states disagree on the mode of surrender. For example, a disagreement occurred between Brazil and Mexico when Brazil surrendered Gloria Trevi, the pop star who became pregnant while detained in Brazil and was befriended.

70. Id.
71. ABBELL, supra note 12, at 316, 351.
by some Brazilian legislators. Brazil intended to transport Ms. 
Trevi by commercial flight, accompanied by a member of the 
Brazil's Congressional Human Rights Commission. Mexico 
insisted upon a private plane without such an escort. Mexico 
apparently was concerned about the potential adverse publicity 
the case would garner and the disapproving Brazilian legislators 
who would dominate the press coverage.73

E. Documentation

1. Legalization of Extradition Documents

The substantial majority of pre-1960 U.S. extradition treaties 
do not have provisions that regulate the manner in which 
documents supporting extradition requests should be legalized in 
order to be admissible in extradition proceedings in requested 
countries. In other words, they do not specify how to authenticate 
a judgment, sentence, or arrest warrant that serves as the basis for 
an extradition request.74 Countries from which the United States 
requests extradition under such treaties can be expected to 
interpret these requirements in different ways.75 The great majority 
of post-1960 treaties have provisions that generally regulate the 
procedure for providing documentary evidence in admissible form 
for purposes of extradition proceedings in requested countries.76

Formal requirements can also impose difficulties in 
submitting legal documents to courts. For instance, in an 
extradition case for a tax crime in a European civil law country, 
explanations of U.S. jurisprudence have to be accompanied by a 
duly authenticated copy of the actual decision by the court. In

73. Bruce Zagaris, Brazil Extradites Gloria Trevi to Mexico on Sex Abuse Charges, 19 
74. See, e.g., Convention on Extradition, Aug. 11, 1874, U.S.-Ottoman Empire, art. 5, 
T.S. No. 270. This convention requires a copy of the sentence of a convicted person from 
the court in which he may have been convicted, “authenticated under its seal, and an 
attestation of the official character of the judge by the proper executive authority, and of 
the latter by the minister or consul of the United States or of the Sublime Porte (an official 
of the Ottoman Empire mentioned in Article V of the extradition treaty), respectively.” If 
the person has merely been charged with a crime, it calls for “a duly authenticated copy of 
The warrant for his arrest in the country where the crime may have been committed, or of 
the depositions upon which such warrant may have been issued.” Id.
75. ABBELL, supra note 12, at 347.
76. E.g., Extradition Treaty, May 29, 1970, U.S.-Spain, art. 10, 22 U.S.T. 737, “In the 
case of a request emanating from the United States they are signed by a judge, magistrate 
or officer of the United States and they are sealed by the official seal of the Department of 
State and are certified by the Embassy of Spain in the United States.” Id.
many cases, such documentation was kept in a warehouse, with other decades-old decisions. A party that needed to obtain copies of court decisions had to physically search among the indexes and case files. In some cases, it was impossible to find decisions that were many decades old and these decisions still had to be legalized. In such a case, a court will normally accept an unofficial copy of the decision accompanied by an explanation of how the U.S. case-reporting system handles unofficial decisions. Fulfilling legalization requirements for foreign courts can be time-consuming and expensive, and may also require much advance preparation.

2. Request for, and Provision of, Supplementary Documentation

U.S. extradition requests to non-English-speaking countries and all supporting documents must be translated into the language of the requested country pursuant to either a provision in the applicable treaty or established practice. Each extradition treaty with a non-English-speaking country requires that all documents in support of extradition be translated into the language of the requested state.

The great majority of post-1960 extradition treaties have provisions, based on Article 13 of the European Convention on Extradition, explicitly authorizing a requested state to request additional documentation in circumstances in which the executive authority or a court of the requested country finds the documentation submitted by the United States deficient. These provisions authorize a requested country to request additional documentation and allow it to set a reasonable period for the submission of additional documentation. The need to supplement an extradition request may have consequences adverse to the requesting state because the court may be reluctant to continue to detain an extraditee. Further, pre-1960 treaties may not expressly authorize an extension of the period of provisional arrest and detention. Some U.S. extradition treaties allow a requesting state to renew its request for the same person for the same offense if the

79. ABBELL, supra note 12, at 349-50.
accused is released due to deficiencies in its extradition documents.

Indeed, because of the technical differences between tax crimes in the United States and other countries, especially between tax evasion and tax fraud, Continuing Criminal Enterprises, and Racketeering Influenced Corrupt Organizations Act (RICO), U.S. extradition requests should detail the legal and factual elements for these offenses. If the requests lack sufficient specificity, then the requested state’s court, defense counsel, or the requested state itself may raise the defects. As a result, requesting state (e.g., the United States) may experience a delay, or even worse, a denial in its request.

E. Simplified Extradition or Waiver of Extradition

In many cases where a foreign country arrests a person pursuant to a U.S. extradition or provisional arrest request, the arrested person may want to go to the United States as soon as possible to resolve the matter. The arrestee’s voluntary and prompt return to the United States in those circumstances is likely to increase his chances of release on bail pending trial, and lighter sentencing should he be convicted.

No U.S. extradition treaty that entered into force prior to 1980 facilitates the surrender of a person who does not want to contest his extraditability. The surrender of a person can be expedited, even in the absence of a treaty provision explicitly authorizing it in many countries, especially European countries. Many European countries have amended their extradition laws to simplify the surrender process in such instances. Modern U.S.

80. C.f. Extradition Treaty, June 20, 1978, U.S.-F.R.G., art. 15(2), 32 U.S.T. 1485 (allowing a requested state to request additional evidence and fix a time limit for its submission). A person arrested must be released if the additional evidence or information is not sufficient or is not received within the period specified by the requested state; but such release does not bar a subsequent request in respect of the same offense. But see Extradition Treaty, May 4, 1978, U.S.-Mex., art. 12, 31 U.S.T. 5095 (allowing a requested state to request additional evidence, but silent on the implications of such a request).
85. ABBELL, supra note 12, at 163-64, 351.
86. Id. at 12, at 352.
extradition treaties have detailed provisions on simplified extradition. 87

A person arrested for extradition to the United States who wants to waive extradition should know that, in the absence of a provision to the contrary in the requested country's treaty, the specialty provision of that treaty will not protect him if he waives extradition. Rather, he will not have been extradited, but merely consensually surrendered, to the United States. 88

In a number of cases, the extraditee, prior to waiving extradition and specialty, is not brought before a judge or magistrate and is not informed of his rights. For instance, extraditees who are wanted for capital offenses and wish to return to the United States from Mexico, have been interviewed by U.S. law enforcement officials. Several extraditees have alleged that the U.S. law enforcement officials only told them the positive aspects of returning to the United States, including avoiding a long and difficult stay in very inhospitable Mexican jails. These officials have allegedly neglected to tell them of Mexico's refusal to surrender persons to countries in circumstances in which the death penalty may apply. 89 Hence, the use of waiver or simplified extradition in cases where the decision is not open, informed, and transparent raises important issues about the fairness of the process and may lead to further litigation and undermine the political support for simplified extradition. 90

F. Representation of U.S. Requests Before Foreign Courts

The United States, as a requesting country, would want the advice and assistance of knowledgeable attorneys in a requested country to ensure that its extradition request and supporting documentation meet the requirements of the extradition laws of the requested country and the applicable treaty, as interpreted by

87. Extradition Treaty, June 9, 1998, U.S.-S. Korea, art. 16, 1998 U.S.T. LEXIS 168. The treaty provides: "[i]f the person sought consents to surrender to the Requesting State, the Requested State may surrender the person as expeditiously as possible without further proceedings, to the extent permitted under its law. In such cases, Article 15 of this Treaty shall not apply." Id.

88. Id.

89. These allegations were raised in State of Oregon v. Christian Michael Longo, (Lincoln County, Or. Cir. Ct. 2002) (No. 016441) (involving a charge of aggravated murder) and in the Santa Barbara County Public Defender's complaint at California v. Nicolas Vasquez Romero, (Santa Barbara County, Cal. Super. Ct. 2002) (No. 1074348 and 1074262), a murder case.

90. ABBELL, supra note 12, at 166–67.
the courts of that country. The United States finds it helpful to have its request represented in the courts of the requested country by local attorneys. Finding and retaining private local attorneys with expertise in extradition matter is difficult and expensive. As a result, the substantial majority of U.S. extradition treaties entering into force since the start of the twentieth century require the requested country to provide advice and assistance, and where permitted, representation free of charge.  

An important issue regarding the advice-and-assistance obligation arises in extradition requests between the United States and twenty-three former British colonies, including several small, sovereign Caribbean countries. One problem is that the 1935 U.S.-U.K. extradition treaty does not create an obligation to provide legal assistance with extradition requests.  

Another problem that arises in these countries, especially the small Caribbean countries, is that there is often a shortage of experienced attorneys to prosecute effectively extradition requests, so that the United States must hire outside attorneys to prosecute those requests. These countries are critical to successful international tax cooperation because many of them have strong international financial service sectors and persons accused of tax crimes are often found in the Caribbean.

VI. INDIVIDUAL U.S. EXTRADITION TREATIES WITH RESPECT TO TAX CRIMES

U.S. extradition treaties concluded prior to 1970 do not permit extradition for fiscal offenses (e.g., tax evasion or exchange control) other than those that permit extradition for some customs offenses, or directly or indirectly authorize extradition for smuggling.  

In mid-1970s, however, an important policy shift occurred in the United States and other countries, which made fiscal offenses extraditable.


Since the 1970s, all U.S. extradition treaties (except the new treaties with Switzerland and Ireland),\(^9\) adopt the "straight dual criminality" or "straight dual criminality for federal offense" methods for defining extraditable offenses. They authorize extradition from the United States for fiscal offenses to the extent that the requested offense meets the dual criminality requirement. Additionally, many of the treaties using the list method for state offenses plus the straight dual criminality method for federal offenses cite willful tax evasion as an extraditable offense.\(^9\) Several of the treaties also list exchange control offenses as extraditable offenses.\(^9\) Some recent U.S. extradition treaties explicitly provide that an offense will be extraditable if it relates to taxes, customs duties, currency control, or import and export of commodities, whether or not the laws of the requested state provide for the same kinds of controls on currency or the import or export of the same kinds of commodities.\(^9\) At least one extradition treaty authorizes the requested state to refuse extradition for offenses in connection with taxes, duties, customs, and exchange control if its competent executive authority "determines that extradition for any such offense would be contrary to the public police or other essential interests of" that country.\(^9\)

Clearly, most OECD governments and many other governments will include tax offenses in their extradition arrangements. Most regional organizations that engage in arranging the preparation of extradition treaties that are opened

95. Extradition Treaty, Nov. 14, 1990, U.S.-Switz., art. 3(3), 1990 U.S.T. LEXIS 2211. Sometimes a treaty partner's internal legislation may take priority over the provisions of the extradition treaty and may preclude such state from fulfilling its obligations under an extradition treaty. Section 13 of the Irish Extradition Act of 1965 forbids extradition for tax offenses and takes priority over the apparent inclusion of such offenses by the dual criminality definition of extraditable offenses in the treaty. See FORDE, supra note 23, at 114.


97. E.g., Extradition Treaty, June 22, 1972, U.S.-Den., art. 3(24)(c), 25 U.S.T. 1293. At present, these provisions do not apply because the United States has no exchange control laws. Hence, the United States would not be able to extradite due to lack of dual criminality.


for signature and ratification include tax offenses by optional protocol.

A. Austria

Article 2(1) of the U.S.-Austria extradition treaty\(^\text{100}\) defines an extraditable offense as one punishable under the laws of both parties by deprivation of liberty for a maximum period of more than one year or by a more severe penalty. Article 2(3) provides that, if extradition has been granted pursuant to paragraph 1 or 2, it shall also be granted for any other offense requested, provided that all other requirements for extradition are met.

Article 2(4) provides flexibility to enable extradition in three specific situations. Two of these situations are of particular interest to persons wanted by the United States for tax offenses. An offense is to be considered an extraditable offense whether or not the laws of the parties categorize or describe the offenses in similar terms.

B. The Bahamas

Article 1 of the U.S.-Bahamas extradition treaty\(^\text{101}\) obligates the signatories to extradite to each other, pursuant to the provisions of the treaty, persons whom the authorities in the requesting state have charged with or found guilty of an extraditable offense. Article 2 provides that an offense is an extraditable offense if it is punishable under the laws of both signatories by deprivation of liberty for a period of more than one year, or by a more severe penalty. At present, tax offenses do not appear to exist in the Bahamas. Until now, the Bahamas has opposed international criminal cooperation for tax offenses. However, any person residing in the Bahamas who is a fugitive for tax crimes (especially a U.S. citizen) would have to consider the proximity of the Bahamas to the United States, the disproportionate power of the United States to the Bahamas, and the occasional kidnapping by U.S. law enforcement officials of fugitives in the Bahamas.

C. Barbados

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Barbados and the United States signed an extradition treaty on February 28, 1996, which is now in effect. Article 1 obligates the signatories to extradite to each other, pursuant to the provisions of the treaty, persons sought for prosecution or convicted of an extraditable offense by the authorities in the requesting state. Article 2 provides that an offense will be extraditable if it is punishable under the laws in both signatories by deprivation of liberty for a period of more than one year or by a more severe penalty. Depending on whether Barbados has a similar offense, the potential penalty would have to be deprivation of liberty for a period of more than one year in order to be extraditable.

D. Belgium

The U.S.-Belgian extradition treaty that was signed on April 27, 1987 and took effect September 1, 1997 provides that an offense punishable by both parties by imprisonment or other form of detention for more than one year, or by a more severe penalty will be extraditable. In addition, Article 2 provides that attempts and conspiracies to commit these offenses, and participation in the commission of the offenses are extraditable. Article 2 also provides that an offense will be considered an extraditable offense whether or not the laws of the Contracting Parties place the offense within the same category of offenses or describe the offense by the same terminology. Belgian counsel would need to advise whether the tax offense for which the United States may charge a person is a crime in Belgium and whether it is punishable by imprisonment or another form of detention for more than one year.

E. Bermuda

Bermuda is a dependent territory that has in force the U.S.-U.K. extradition treaty, which was signed June 8, 1972 and entered into force January 21, 1977. A supplementary treaty was signed on June 25, 1985 and entered into force on December 23, 1986. An exchange of letters on October 21, 1976 between the U.K. and U.S. governments confirmed that the treaty applied, inter alia, to

102. Id.
Bermuda. Article 1 obligates each of the signatories to extradite to the other, in the circumstances and subject to the conditions specified in the treaty, any person found in its territory who has been accused or convicted of any offense within Article 3, which was committed within the jurisdiction of the other signatory. Article 2 provides that extradition must be granted for an offense within any of the descriptions listed in the schedule annexed to the treaty. There are twenty-nine offenses listed in the schedule including “false accounting” which may include tax fraud. The only other listed crimes that are close to tax crimes are: “obtaining property, money or valuable securities by false pretenses or other form of deception”; and “fraud or false statements by company directors and other officers.” Article 3(1) also provides that any other offense is extraditable if: “(a) the offense is punishable under the laws of both Parties by imprisonment or other form of detention for more than one year or by the death penalty; (b) the offense is extraditable under the relevant law, being the law of the United Kingdom or other territory to which this Treaty applies by virtue of sub-paragraph (1)(a) of Article 2; and (c) the offense constitutes a felony under the law of the United States of America.”

F. Canada

Article 1 of the 1988 Protocol to the 1974 Canada-U.S. Extradition treaty replaces Article 2 of the treaty. Article 2 had obligated a requested state to extradite for a list of offenses, none of which included fiscal offenses. Article 1 provides that under new Article 2(1) a requested state must extradite for conduct that constitutes an offense punishable by the laws of both states by imprisonment or other form of detention for a term exceeding one year or any greater punishment. In addition, new Article 2(2) requires a requested state to extradite notwithstanding conduct such as interstate transportation, use of the mails, or other facilities affecting interstate or foreign commerce. The requested state is also required to establish jurisdiction and form part of the offense in the United States or “that it relates to taxation or revenue or is one of a purely fiscal character.” Hence, both countries are obligated to extradite persons to the other country.

for a broad number of tax cases (e.g., pure tax cases, such as cases on income, estate, or excise, or general tax-related crimes, such as customs, making false statements or oath in the course of filing a return, or falsely answering inquiries of a revenue agent).

The United States and Canada have a rich relationship when it comes to tax enforcement cooperation. The two countries have simultaneously conduct criminal and civil audits. Revenue authorities have regular meetings to discuss outstanding tax cases. In a number of cases, the United States has prosecuted persons for evading Canadian excise tax, normally on alcohol or cigarettes. However, a split in the circuits exists as to whether the "revenue rule," the common law policy that one country does not enforce a foreign country's revenue judgments, controls U.S. enforcement of Canadian tax crimes. Indeed, Canada's excise taxes on alcohol and tobacco products have been so comparatively high that Canadians have bought U.S. products in order to try to defraud the Canadian Government of tax. The incidence of evasion of these taxes is so high in Canada that a thriving underground economy has developed. One difficulty U.S. prosecutors experienced in Canada is the refusal of Canadian courts to accept double hearsay as admissible evidence in extradition proceedings.

G. Denmark

The U.S.-Denmark extradition treaty was signed June 22, 1972 and entered into force on July 31, 1974. Article 2 provides that the requested State must, pursuant to the provisions of the Treaty, extradite a person charged with or convicted of any offense mentioned in Article 3 only when both of the following conditions exist: (1) the law of the requesting State (e.g., the United States) was in force when the offense was committed and provides a possible penalty of deprivation of liberty for a period of more than


one year; and (2) the law in force in the requested state generally provides a possible penalty of deprivation of liberty for a period of more than one year, which would be applicable if the offense were committed in the territory of the requested state. Article 3 provides that extradition will be granted for the following offenses: (1) offenses relating to willful evasion of taxes and duties; (2) offenses against the laws relating to international transfers of funds; and (3) false statements made before a court or to a government agency or official, including under U.S. law perjury and subordination of perjury.

H. France

The supplementary treaty on extradition between France and the United States, which was signed on February 12, 1970,\textsuperscript{111} states that "(e)xtradition shall be granted, in accordance with the provisions of this Convention, for offenses in connection with taxes, duties, customs and exchange only if the Contracting Parties have so decided in respect of any such offense or category of offenses." Unless France has determined specifically that extradition is not granted for taxes, such offenses would be covered.\textsuperscript{112}

I. Germany

The United States and Germany signed an extradition treaty on June 20, 1978, which entered into force on August 29, 1980.\textsuperscript{113} There is a supplementary treaty signed October 26, 1986 that entered into force March 11, 1993. Article 1(a) of the supplementary treaty provides that extraditable offenses are offenses that are punishable under the laws of both contracting parties. To determine extraditable offenses, it does not matter whether the laws of the contracting parties place the offense within the same category of offenses or denominate an offense by the same terminology, or whether dual criminality follows from Federal, State or Laender\textsuperscript{114} laws. In particular, dual criminality

\textsuperscript{112} Id. The proposed French-U.S. extradition treaty signed on April 23, 1996 broadens the requirements to extradite, but the treaty is not yet in force so it will not be discussed in this article.
\textsuperscript{114} Laender is a state in the German federal system.
may include offenses based on participation in an association whose aims and activities include the commission of extraditable offenses, such as a criminal society under the laws of the Federal Republic of Germany or an association involved in racketeering or criminal enterprise under U.S. law.

Article 1(b) of the supplementary treaty amends Article 6 of the extradition treaty as follows:

Extradition may be refused for offenses in connection with taxes, duties, customs and exchange if the competent authority of the Requested State determines that extradition for any such offense would be contrary to the public policy or other essential interests of the Requested State.

Due to the application of that provision to an extradition request, counsel for an accused would want to obtain the advice of German counsel experienced in extradition.

J. Greece

There is an extradition treaty between the United States and Greece, which was signed on May 6, 1931 and entered into force on November 1, 1932. A protocol interpreting the treaty was signed September 2, 1937 and entered force on the date of signature. Article 1 of the treaty permits extradition only on the basis of offenses listed in Article 2, which does not include tax crimes, or even making of false statements.

K. Ireland

The U.S.-Irish Treaty of 1984 allows extradition for fiscal offenses. In particular, Article 2(1) makes an offense extraditable only if it is punishable under the law of both signatories by imprisonment for a period of more than one year, or by a more severe penalty. Section 13 of the Irish Extradition Act of 1965, however, prohibits extradition for tax offenses and takes precedence over the apparent inclusion of such offenses by the pure dual criminality definition of extraditable offenses in the treaty. Article 1 of the treaty states that each signatory agrees to extradite to the other any persons, including its citizens or

117. U.S.-Ir. Extradition Treaty, supra note 57, art. 2(1).
118. Id.
nationals, who are wanted for prosecution or for the imposition or enforcement of a sentence in the requesting state.

L. Netherlands

The U.S.-Netherlands extradition treaty was signed on June 24, 1980 and entered into force on September 15, 1983. Article 1 requires the signatories to reciprocally extradite the persons charged with those extraditable offenses listed in Article 2. Those crimes include “offenses relating to willful evasion of taxes and duties; . . . perjury; subornation of perjury; [and] making a false statement to a government agency or official.” In addition, extradition offenses, whether or not listed in the appendix, are those that are punishable under the laws of the United States and the Netherlands.

M. Norway

The U.S.-Norwegian extradition treaty was signed on June 9, 1977 and entered into force on March 7, 1980. Under specified circumstances and conditions, Article 1 obligates the signatories to extradite to the other any person who is charged with or convicted of any extraditable offense within Article 2. An extraditable crime must be punishable by a possible penalty of deprivation of liberty for a period of more than one year, or by death penalty in both the requesting and requested countries; and must be listed in the Schedule annexed to the treaty. The schedule includes “[o]ffenses relating to willful evasion of taxes and duties;” “[a]n offense against the laws relating to perjury, subornation of perjury; false testimony”; and “[v]iolation of financial laws when such violation is committed in furtherance of an enumerated offense.”

N. Switzerland

According to Article 1 of the Swiss-U.S. extradition treaty, the signatories agree to extradite to each other, subject to the provisions of the treaty, persons who the competent authorities of the requesting state have charged with or found guilty of an extraditable offense or persons who are wanted for the carrying

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121. Id.
out of a detention order. Article 2(1) provides that an offense will be an extraditable offense only if it is punishable under the laws of both signatory parties by deprivation of liberty for a period exceeding one year. Article 3(3) provides that a requested state may deny extradition for acts that "violate provisions of law relating exclusively to currency policy, trade policy, or economic policy; [or] are intended exclusively to reduce taxes or duties." Hence, the Swiss Government has the discretion to deny extradition based on acts intended exclusively to reduce taxes.

The United States experienced difficulties extraditing persons from Switzerland for tax offenses. One of the most notorious cases was that of Marc Rich, a metals trader charged with criminal tax violations relating to transfer pricing and manipulating oil pricing rules. In 1984, Rich and one of his colleagues, Pincus Green, fled to Switzerland. They received permanent residency in Switzerland despite the felony charges and obtained citizenship from other countries, such as Spain. On January 20, 2001, the last day of his Presidency, President William Clinton pardoned Rich and Green, ending their fugitive status and reigniting the controversy and frustration over the case that had raged for several years in the 1980s. Even after the pardon, controversy ensued over whether Rich had successfully renounced his U.S. citizenship. If he had not, he could be liable for taxes on income he earned during the seventeen years he was a fugitive in Switzerland.

On January 23, 2003, the U.S. and Swiss Governments concluded a mutual agreement that implemented Article 26 and the exchange of information of the Swiss-U.S. Income Tax Convention. Paragraph 10 of the Protocol to the Convention states that "tax fraud" means "fraudulent conduct that causes or is intended to cause an illegal and substantial reduction in the amount of tax paid to a Contracting State." The agreement refers to an understanding that Article 26 and paragraph 10 "will

123. Id.
be interpreted to support the tax administration and enforcement efforts of each contracting state to the greatest extent possible.\textsuperscript{126}

The agreement stated three types of conduct that would be considered "tax fraud or the like" under Article 26 and paragraph 10. The first category is conduct that is established to defraud individuals or companies, even though the aim of the behavior may not be to commit tax fraud. The second category is conduct that concerns the destruction or nonproduction of records, or the failure to prepare or maintain correct and complete records that a person is under a legal duty to prepare and keep for establishing income, deductions, credits, or other information on a tax return. The agreement characterizes that conduct as fraudulent if the person has not properly reported such amounts on the tax return. The third category involves: (1) the failure to file a tax return that a person, who is subject to tax in the requesting country, is under a legal duty to file and (2) an affirmative act that has the effect of deceiving the tax authorities and making it difficult to uncover or pursue the failure to file.\textsuperscript{127}

Under the agreement, examples of this conduct are concealment of assets, covering up sources of income, or handling business affairs to avoid making normal records.\textsuperscript{128} Importantly, the agreement underscored that this list is meant to be illustrative only and does not exclude other conduct that may also be tax fraud under Article 26, paragraph 10 of the Protocol.

In addition, the United States and Switzerland agreed to exchange information in cases where the requesting country has a "reasonable suspicion" of tax fraud. Those suspicions may be based on: (1) documents, whether authenticated or not, including but not limited to business records, books of account, or bank account information; (2) testimonial information from a taxpayer; (3) information obtained from an informant or other third person that has been independently corroborated or otherwise is likely to be credible; or (4) circumstantial evidence. The agreement stated that these examples are simply illustrations, and not limitations.\textsuperscript{129}

In addition to the illustrative descriptions in paragraph 10 of the Protocol, the Mutual Agreement provides fifteen hypothetical

\textsuperscript{126} Id.
\textsuperscript{127} Mutual Agreement of January 23, 2003, supra note 125, at para. 4a–c.
\textsuperscript{129} Mutual Agreement of January 23, 2003, supra note 125, at para. 4.
acts that qualify for tax fraud. They include, inter alia, concealment of embezzlement; concealment of skimmed income through false or incomplete books and records; concealment of bribes from corporate books and records; non-reporting of income by a tax shelter promoter who made misrepresentations; and aiding and abetting a specific taxpayer who has improperly claimed deductions through a tax shelter. This agreement and the detailed hypothetical acts indicate the large number of cases that are now included as potential tax fraud between the United States and Switzerland. The agreement signifies the political commitment to cooperation on tax enforcement cooperation that inevitably will facilitate extradition.

O. United Kingdom

The U.S.-U.K. extradition treaty was signed June 8, 1972 and entered into force January 21, 1977. A supplementary treaty was signed June 25, 1985 and entered into force December 23, 1986. Article 1 provides that each signatory undertake to extradite to the other, in the circumstances and subject to the conditions specified in the treaty, any person found in its territory who has been accused or convicted of any offense within Article 3, committed within the jurisdiction of the other party. Article 3 provides that extradition will be granted for an act or omission if the facts disclose an offense described in the Schedule annex to the treaty or qualifies as an offense punishable under the laws of both Parties by imprisonment or other form of detention for more than one year. The offense is extraditable under the portion of the treaty applicable to the U.K. dependent territories. The offense constitutes a felony under the laws of the United States. The list of offenses referred to in Article 3 include: "false accounting; [and] fraud or false statements by company directors and other officers." False accounting may reach tax fraud.

In sum, to the extent that the United States can persuade its treaty partners to agree to include fiscal offenses as extraditable offenses, future U.S. extradition treaties will include such offenses. As other countries have started to regard fiscal offenses as extraditable, U.S. extradition treaties increasingly include them.

130. Id. at App. (hypotheticals 1–14).
131. Id.
For instance, Article 1 of the Protocol Amendment to the treaty on extradition between Canada and the United States amended Article 2 of the prior treaty by making extraditable tax and other fiscal offenses.\textsuperscript{134}

VII. ALTERNATIVES TO EXTRADITION

In some cases, the United States can obtain custody over an individual who it cannot extradite, by asking the country in which the person is located to deport the individual. If the accused is a U.S. citizen, the United States revokes his passport and informs the country that the person is there illegally. The State Department may revoke the passport of a U.S. citizen pursuant to 22 C.F.R. §§ 51.70 through 51.76, thereby depriving the fugitive/extraditee of a travel document and making it difficult for such person to travel or even remain abroad. The United States can revoke a passport if the person has an outstanding federal arrest warrant for the commission of a felony.\textsuperscript{135} The State Department can also revoke a passport if the person is subject to a criminal court order, condition of probation, or condition of parole prohibiting him from departing the United States under threat of arrest.\textsuperscript{136} Revocation may also occur if the person is the subject of an extradition request or provisional arrest for extradition that has been presented to the requested state.\textsuperscript{137} The State Department can also revoke a passport if the person is subject to imprisonment or supervised release due to a conviction for a federal or state felony drug offense and the person used a passport or otherwise crossed an international border in committing the offense.\textsuperscript{138}

Deportation laws in some countries provide efficient means of deportation. If a person has not entered a foreign country properly, a person often has few rights. If such a person is deported, the United States will then be able to try or punish that person. The returned person also has no right to protection from the rule of specialty, unless the requested state obtains a written

\textsuperscript{134} Protocol Amending the Extradition Treaty with Canada, Dec. 3, 1971, U.S.-Can., art. 1, S. TREATY DOC. NO. 101-17 (as amended by an Exchange of Notes on June 28 and July 9, 1974).
\textsuperscript{135} 22 C.F.R. §§ 51.70(a)(1), 51.72(a) (2002).
\textsuperscript{136} 22 C.F.R. §§ 51.70(a)(2), 51.72(a) (2002).
\textsuperscript{137} 22 C.F.R. §§ 51.70(a)(4), 51.72(a) (2002).
\textsuperscript{138} 22 C.F.R. §§ 51.71(a), 51.72(a) (2002).
promise from the United States that the rule of specialty will apply.  

Sometimes the fugitive/extraditee can avoid deportation if the fugitive enters the requested state on the basis of a valid passport other than a U.S. passport or at least if the fugitive has a valid non-U.S. passport, especially a passport of the requested state. In this regard, many countries offer citizenship to persons whose parents or grandparents were citizens. Other countries offer economic nationality, whereby an individual can acquire nationality by making a substantial investment.

For example, if the accused is a bona fide Irish citizen, it would be legally and diplomatically difficult for Ireland to revoke the citizenship, assuming the citizenship was properly obtained. Revoking citizenship without substantive reasons would denigrate the value of citizenship. Revocation of a residency permit, or more importantly citizenship, is not often viewed as an alternative to extradition. When it occurs, the case should be important, especially since Ireland is a country in which the rule of law is important. It should also be a case where the fugitive/extraditee is a person with no standing in Ireland and his offense makes him easily disposable. There is a very small chance that the United States could make a successful request since the United States has a lot of political leverage with Ireland.

Another alternative to extradition is kidnapping, either by force or by luring. The former is rarely employed and permission from high level officials in the U.S. Department of Justice in Washington, D.C. must be obtained. Luring is occasionally used. It happens when the U.S. government, through use of a subterfuge, attracts an extraditee to enter a country where the United States can arrest him. Because of the sensitivity of

139. ABBELL, supra note 12, at 372–73; U.S. DEPARTMENT OF JUSTICE, CRIMINAL RESOURCE MANUAL § 610.
140. For background on obtaining economic nationality, see for example, MARSHALL J. LANGER, THE TAX EXILE REPORT: CITIZENSHIP, SECOND PASSPORTS AND ESCAPING CONFISCATORY TAXES (2d ed. 1993–94); MARSHALL J. LANGER, CHOOSE GRENADE FOR YOUR SECOND CITIZENSHIP AND PASSPORT (2000). In 2002, many of the economic nationality programs were cancelled or suspended due to abuse of the programs and illegal use of nationality and passports.
142. For instances of legal luring, see for example, United States v. Yunis, 924 F.2d 1086, 1092–93 (D.C. Cir. 1991); United States v. Wilson, 721 F.2d 967, 971–72 (4th Cir. 1983); United States v. Reed, 639 F.2d 896, 901–02 (2d Cir. 1981); United States ex rel. Lujan v. Gengler, 510 F.2d 66, 62 (2d Cir.), cert. denied, 421 U.S. 1001 (1975).
abducting defendants outside the United States (by government agents or the use of private persons, like bounty hunters or private investigators), prosecutors must have advance approval by the OIA before using such tactics. Because some countries may perceive the lure of a person from its territory an infringement on its sovereignty and thus, will not extradite that person, a prosecutor must consult with the OIA before undertaking a lure to the United States or a third country.

On rare occasions, a sovereignty that was offended by a kidnapping or a lure persuaded the United States to return the person to the country and then seek the extradition of the person.

VIII. TRENDS

Recent cases indicate that the United States has successfully extradited several persons for tax offenses. Recently, in response to a Danish extradition request, the United States detained and denied bail in connection with a Danish national and charismatic cult leader charged with tax fraud in Denmark. The evolution of traditional reluctance to extradite for tax offenses (e.g., the "revenue rule") to the current position of increased willingness to extradite for such offenses, at least with respect to some requesting states, is illustrated by the Dutch position. The Netherlands is one of the most sophisticated countries in terms of both international law and international tax cooperation, in part because of its respect for international law, its longstanding hosting of international courts, and its history both as a mercantile country and as an international financial services center. The country's Extradition Act prohibits extradition for tax offenses, unless


144. Id. at § 9-15.630.

145. See United States v. Hills, 765 F. Supp. 381, 383 n.2 (E.D. Mich. 1991) (finding that Canadian authorities released an alleged robber of a Windsor, Canada bank on the U.S. side of Windsor-Detroit tunnel after hot pursuit); Vaccaro v. Collier, 38 F.2d 862, 870 (4th Cir. 1931) (stating that American authorities released an alleged drug dealer to Canada); see also Howard Kurtz, For U.S. Bounty Hunters, National Boundaries Are Little or No Constraint, WASH. POST, May 15, 1987, at A23 (reporting that a Canadian man illegally detained by American bounty hunters in Canada was later released to Texan authorities by Canadian authorities); 4 HACKWORTH, DIGEST OF INTERNATIONAL LAW § 345 (1942). The United States has occasionally sought and obtained the return of a person abducted from the United States by foreign law enforcement officials.

treaties specifically so provide. The Extradition Act does not define a tax offense. One commentator believes it has the same meaning as the provisions of Article 5 of the 1957 European Convention on Extradition, upon which the Act was based. The Dutch Extradition Act covers "offenses in connection with taxes, duties, customs and exchange," that is, offenses punishable by tax law. Case law does include crimes committed for the purpose of evading an obligation to pay taxes as tax offenses. The Dutch Extradition Act is even more restrictive than its counterpart provisions in Article 5 of the European Convention on Extradition since the former does not include offenses "connected with" tax crimes. To determine whether an offense constitutes a tax offense, Dutch courts will consider the nature of the obligation imposed by a criminal provision, as opposed to the name of the Act incorporating the provision.

The Dutch Government has concluded several extradition treaties that provide for extradition for tax offenses, namely with Australia, Canada, Hong Kong, and the United States. Hence, the Dutch Government shows a willingness to extradite for tax offenses, both in bilateral and multilateral treaties. In this regard, while the provisions of Article 5 of the European Convention on Extradition except extradition for tax offenses, the Dutch have joined the Convention's 1978 Second Additional Protocol eliminating the exception. Germany has also become a party to the Protocol, so it has an extradition obligation for tax offenses. Since these countries are neighbors and members of the EU, they engage in substantial inter-state economic activities.

The 1962 Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters excludes extradition for tax offenses unless the signatories expressly provide for it through

147. Extradition Act—Act of 9 March 1967, Staatsblad 139, (containing new regulations relating to extradition and other forms of international assistance in criminal matters), as last amended by the Act of 12 April 2995, Staatsblad 254, in INTERNATIONAL CRIMINAL LAW IN THE NETHERLANDS (Bert Swart & André Klip eds., 1997), at app., art. 11, para. 4.
149. Id.
150. Id.
151. Id.
special arrangements. However, the signatories have not yet made such arrangements.153

Another trend is to include tax crimes in international criminal cooperation agreements. For instance, Article 1 of the Optional Protocol related to the Inter-American Convention on Mutual Assistance in Criminal Matters154 provides that the signatories to the Protocol shall not refuse a request for assistance solely on the ground that the request concerns a tax crime in any case in which the request is from another state party to this Protocol. Article 2 provides that parties to this Protocol, when acting as a requested state under the Convention, shall not decline assistance, which requires the measures, referred to in Article 5 of the Convention, if the act specified in the request corresponds to a tax crime of the same nature under the laws of the requested state.155 The Protocol is already in effect between Ecuador and the United States.

In certain cases, the United States, as the requesting state, may experience difficulty, especially with respect to European countries and countries sensitive to arguments under international human rights. For example, extradition may be difficult when arguments are raised about the potentially inhumane sentences and/or practical inoperability of the prisoner transfer treaties. The latter becomes important with respect to a requested state whose constitution prohibits extradition for nationals and where the extradition treaty allows for extradition based on the expectation that the accused national of the requested state will be able to serve his sentence in the requested state. In some cases where the accused cannot practically take advantage of the prisoner transfer treaty due to a short sentence and the comparatively long time normally required for a transfer to occur, the requested state’s court may be reluctant to extradite, especially if the accused can raise other colorable arguments.

The above-mentioned January 23, 2003 Agreement between the United States and Switzerland regarding the implementation of the exchange of information also indicates the determination of these two countries to extend international tax cooperation.

155. Id. at art. 2.
Switzerland is a key country for the U.S. government's efforts at international enforcement of tax matters because it is a recipient of many worldwide deposits based on its longstanding rules of confidentiality.

IX. CONCLUSION

The evolution of traditional reluctance to extradite for tax offenses (i.e., the "revenue rule") to the current position of increased willingness to extradite for such offenses, at least with respect to some requesting states, is illustrated by several developments. A number of countries, such as the Netherlands, have obligated themselves to extradite for tax offenses through concluding bilateral and multilateral treaties (or protocols).

Crimes involving tax fraud offer the best chance to compel extradition for tax offenses. In some extradition treaties, coverage may include tax offenses and offenses "connected with" tax offenses. Offenses that may be connected with tax offenses include false statements, obstruction of justice, CCE violations, RICO violations, wire fraud, mail fraud, and similar offenses. Since the 1980s, a number of treaties and/or executive agreements that deal with international tax enforcement cooperation, particularly tax information exchange agreements have emerged. Similarly, many treaties of mutual assistance in criminal matters (MLATs) cover tax offenses. In fact, the United States has conditioned some of its tax treaties with countries with important financial service sectors (e.g., Austria and Luxembourg) on concluding MLATs covering tax offenses.

In applying extradition with respect to tax offenses, interested persons must pay careful attention to the substantive law of the requested state with respect to tax offenses, extradition law, constitutional law, criminal law and procedure, and public international law.

There are a few countries whose treaties do not specifically cover tax charges (e.g., Greece, Luxembourg and Portugal) or treat extradition for such offenses as only discretionary (e.g., Germany and Switzerland). It also appears that, notwithstanding the obligation to extradite under the treaty, Irish law may possibly override their extradition treaty with the United States and prevent extradition. The trend is for modern treaties to specifically require extradition for tax crimes and related offenses. In addition, the current international environment is conducive for
governments to extend general and specific international tax cooperation on extradition for tax crimes. As a result, prospects for the U.S. government’s success in extradition for tax crimes are becoming more favorable.