U.S. INTERNATIONAL NARCOTICS EXTRADITION CASES: LEGAL TRENDS AND DEVELOPMENTS WITH IMPLICATIONS FOR U.S.–CHINA DRUG ENFORCEMENT ACTIVITIES

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INTRODUCTION

Professor Edward M. Morgan notes that "extradition, as opposed to domestic prosecution, has become the law enforcement vehicle of choice for governments willing to engage with the United States in the anti–drug campaign."[1] This Article will review U.S. international drug trafficking

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1. Edward M. Morgan, *Traffic Circles: The Legal Logic of Drug Extraditions*, 31 U. PA. J. INT'L L. 373, 375 (2009).

extradition cases with the dual objectives of identifying (a) contemporary legal issues, trends and developments; and (b) analyzing how these trends, issues and developments might reasonably apply to future U.S.–China cooperation in international drug enforcement efforts. Special attention will be paid to the recent *Valencia–Trujillo* court decision[2] as an example of why extradition treaties may not be needed for effective drug trafficking enforcement and prosecution in certain instances.

Part I of this Article discusses general international extradition legal rules and principles applied in U.S. courts, based on both treaties and comity. Part II describes how U.S. courts have applied these extradition rules and principles to select international narcotics cases during the past several years. Part III looks at the *Valencia–Trujillo* case and why it may prove useful in bolstering international enforcement. Part IV analyzes how the U.S. approach to extradition in drug cases, particularly extradition not based on treaties, might reasonably be used in future U.S.–China collaborative efforts to combat international drug trafficking through proactive use of the U.S.–China Mutual Legal Assistance Agreement (approved between the two countries in June 2000), even as the two countries consider the much more complicated issue of whether to negotiate a bilateral extradition treaty.

I. GENERAL U.S. INTERNATIONAL EXTRADITION CASE LEGAL RULES AND PRINCIPLES

The United States utilizes two legal approaches to extradition. The primary one involves extradition pursuant to a specific extradition treaty, usually bilateral, which involves either the U.S. or the other treaty party requesting the return of a fugitive to the requesting state. The second approach, which is far less used, is extradition by comity, whereby the court of one country, in the interest of averting real or perceived jurisdictional conflicts with another country's legal system, will defer to that country's judicial order or request for a fugitive's return to face prosecution.[3]

Three legal principles apply to both extradition approaches. First, the alleged crime must constitute an extraditable offense, i.e., the extraditing country must agree that the alleged offense is one suitable for extradition. This is easy enough when a treaty contains a list of such offenses, but is not so readily apparent with comity–based extradition.[4] Second, the offense must constitute a crime in both countries, a requirement often referred to as

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2. United States v. Valencia–Trujillo, 573 F.3d 1171 (11th Cir. 2009), *aff'd*, 2010 U.S. App. LEXIS 11027 (11th Cir. 2010). Valencia–Trujillo subsequently filed an unsuccessful appeal challenging the jury foreman's bias. *Valencia–Trujillo*, 380 Fed. Appx. 936 (11th Cir. 2010), *cert. denied*, 131 S. Ct. 682 (2010).

3. Stephen C. Warneck, Note, *A Preemptive Strike: Using RICO and the AEDPA to Attack the Financial Strength of International Terrorist Organizations*, 78 B.U. L. REV. 177, 205 (1998).

4. *Id.* at 205-06.

"dual criminality" or "double criminality." Although the definitions and elements of the offense in each country need not be identical, some similarities will normally be present under both extradition approaches and both approaches require some form of serious punishment even though this need not be identical.[5] The third principle, "specialty," prohibits the requesting state from prosecuting the fugitive for any crime other than the one for which extradition is sought, although the U.S. generally allows requesting states to add additional criminal charges related to the extraditable offense if permitted under the laws of the requesting state.[6] The U.S. also allows the receiving state to consider pre–extradition illegal conduct in both sentencing phases.[7]

Federal statutes govern U.S. extradition procedures.[8] The statutes establish a two–step procedure that divides responsibility for extradition between a federal judicial officer and the U.S. Secretary of State. The judicial officer, upon complaint, issues an arrest warrant for an individual sought for extradition, provided that there is an extradition treaty between the United States and the requesting foreign country and that the crime charged is covered by the treaty. If a warrant issues, the judicial officer then conducts a hearing to determine whether there is sufficient evidence to sustain the charge under the treaty. If the judicial officer finds sufficient evidence, the judicial officer certifies to the Secretary of State that a warrant for the surrender of the person(s) subject to the extradition request extradition may be issued. The judicial officer must also provide the Secretary of State with a copy of the testimony and evidence from the extradition hearing. The Secretary of State has sole discretion to decide whether extradition should occur. Extradition by non–treaty means generally functions through similar processes.[9]

Even when the above three principles are present, a country may nonetheless refuse to extradite a fugitive based on a legal exception. One such exception involves a political offense, based upon the extraditing state's own national interpretation of what constitutes such an offense when a treaty does not specify otherwise.[10] U.S. courts have developed a two–part test for determining when an offense is sufficiently "political" in nature to fall under this exception based on whether there was some form of violent disturbance or uprising in the requesting country; and if so, whether the alleged offense is incidental to or in furtherance of the uprising.[11] As one legal commentator notes, "[e]ven a purely political offense, however,

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5. *Id*.; Valencia–Trujillo, 573 F.3d at 1178-79.
6. Warneck, *supra* note 3, at 207.
7. U.S. v. Lomeli, 596 F.3d 496 (8th Cir. 2010).
8. 18 U.S.C. §§ 3181-3196 (2006).
9. U.S. v. Lui Kin-Hong, 110 F.3d 103, 109 (9th Cir. 1997) (providing a good illustration of how the process works) [hereinafter *Kin-Hong*].
10. Warneck, *supra* note 3, at 207.
11. Ordinola v. Hackman, 478 F.3d 588, 596-97 (4th Cir. 2007).

when linked to a common crime such as murder, loses its political character, and may thus be the proper ground of an extradition request."[12] Moreover, political offenses normally do not include international crimes such as genocide, piracy, war crimes, and at least arguably, international narcotics trafficking.[13] Another important exception to extradition under U.S. and international law rests on a prohibition (reflected in the U.S. FARR Act,[14] which in turn implemented the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[15]). Judicial review of this exception in U.S. courts is nonetheless all but nonexistent based on a 2008 U.S. Supreme Court decision deferring to the U.S. Executive Branch determination of when these conditions are met, with legal challenges seldom successful under the sole mechanism of habeas corpus.[16]

As noted above, most extraditions occur pursuant to treaty and the cases tend to be fairly straightforward in U.S. courts, with all but a handful of extradition requests made to the U.S. government resulting in the grant of extradition. Extradition pursuant to comity, however, is a more complicated and far less common approach. The United States makes comity–based extradition especially difficult by limiting its application to third country nationals and barring it altogether with regard to U.S. citizens and permanent resident aliens.[17] This restriction does not restrict the U.S. from using non–treaty comity principles to exercise jurisdiction over alleged criminals once they enter the U.S. prosecutorial system, as seen below in the *Valencia–Trujillo* case.

II. SELECT U.S. EXTRADITION CASES INVOLVING NARCOTICS

Both U.S. and non–U.S. courts have experienced increased activity in international narcotics extradition proceedings. The U.S. has been especially assertive in requesting extradition of drug traffickers who seek refuge abroad, including traffickers who are citizens of the countries where extradition is sought, and at times perhaps surprisingly, these countries seem inclined to cooperate by sending these drug traffickers to the U.S. for prosecution.[18] Professor Morgan notes: "The case law reveals that when the

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12. Warneck, *supra* note 3, at 207.

13. *Id.* Prasoprat v. Benov, 421 F.3d 1009 (9th Cir. 2005) (ordering extradition of an alleged international drug trafficker to Thailand), *cert. denied,* 546 U.S. 1171 (2006).

14. Foreign Affairs Reform and Restructuring Act of 1998 § 2242, Pub. L. No. 105-277, 112 Stat. 2681 (clarifying 8 U.S.C. § 1231).

15. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, S. TREATY DOC. No. 100-20, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

16. Munaf v. Geren, 553 U.S. 674 (2008); Mironescu v. Costner, 480 F.3d 664 (4th Cir. 2007), *cert. denied*, 552 U.S. 1135 (2008).

17. 8 U.S.C. § 1101(a)(22) (2006).

18. *See* Joshua H. Warmund, Comment, *Removing Drug Lords and Street Pushers: The Extradition of Nationals in Colombia and the Dominican Republic*, 22 FORDHAM INT'L

United States calls for drug extraditions, the fugitives tend to come; or more accurately, tend to be sent."[19] Below are brief descriptions of how the U.S. courts handle these cases when they arrive.

A. U.S. Appellate Court Extradition Treaty Decisions

U.S. v. Thomas[20] considered the 1972 U.S. extradition treaty with the United Kingdom, as applied to a large scale U.S. marijuana trafficker who, upon learning he would be arrested in the U.S., fled first to Jamaica and then to the England, from where he was extradited. The specific treaty issue was whether the charges against Thomas for operating a "continuing criminal enterprise" conflicted with dual criminality principles because neither the Treaty nor U.K. law expressly included the "continuing criminal enterprise" offense. Because the U.K. criminalizes marijuana trafficking, the Court had no difficulty rejecting Thomas' challenge by concluding that what an offense is called in each country is not especially pertinent as long as the conduct subject to prosecution constituted a serious crime in each country. This case may well be typical of how U.S. courts handle dual criminality challenges in drug cases, as the "continuing criminal enterprise" offense under U.S. law imposes very strong penalties.

U.S. v. Cuevas[21] addressed the issue of when U.S. courts can ignore extraditing country's efforts to limit a sentence as an extradition condition, although the effort here seems legally specious. The Dominican Republic took custody of defendant and extradited him to the U.S. pursuant to both the 1909 bilateral extradition treaty and the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[22] on various narcotics trafficking charges. Following extradition, however, the Dominican Republic unilaterally issued a decree declaring that the applicable sentence for the charged offenses should not exceed thirty years. The Court had little difficulty rejecting this after–the–fact effort by the sending country to condition sentencing and defendant's specialty challenge based on the purported condition, because the U.S. had never agreed to the condition (nor been asked to) when extradition was sought and obtained. Required to interpret the U.N. Convention (to which both the U.S. and the Dominican Republic are parties), as well as the bilateral treaty, the Court found that the Convention did not require a receiving country to limit a sentence to the maximum allowed by the sending country's laws if the

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L.J. 2373 (1999). *See* Rishi Hingoraney, Note, *International Extradition of Mexican Narcotics Traffickers: Prospects and Pitfalls for the New Millennium*, 30 GA. J. INT'L & COMP. L. 331 (2002).

19. Morgan, *supra* note 1, at 420.

20. 322 Fed. App'x 177 (3d Cir. 2009), *cert. denied*, 129 S. Ct. 2813 (2009).

21. 496 F.3d 256 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 680 (2007).

22. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, S. Treaty Doc. No. 101-4, 28 I.L.M. 493.

sending country never required this condition in the extradition proceeding. Interestingly, the trial court sentence of 390 months did not notably exceed the 360–month sentence proposed by the Dominican Republic and because of a non–extradition U.S. law sentencing issue requiring remand of the case to the trial court, it was likely that the defendant would receive a lighter U.S. sentence anyway.

Ramanauskas v. U.S.[23] addresses the issue of when and how double jeopardy and extradition intertwine. The case involves the 2003 U.S.–Lithuania extradition treaty applied to a Lithuanian citizen convicted of counterfeiting offenses in the U.S. pursuant to a plea agreement that acknowledged, but did not include, drug trafficking charges. Ramanauskas was also charged in Lithuania with a drug trafficking offense for which Lithuania sought extradition from the U.S. He argued unsuccessfully that the U.S. plea agreement barred the Lithuanian drug charges extradition based on the treaty provision precluding extradition for charges resolved by plea agreement in the requested country, because another treaty provision expressly permitted extradition for any charges not filed against the person. The U.S. Court found that the decision not to prosecute defendant for drug offenses meant that he could be charged in Lithuania for the alleged drug offenses there.

Prasoprat v. Benov[24] may well be the most controversial U.S. extradition case to date involving narcotics. Prasoprat, a U.S. citizen, was criminally charged in both Thailand and the U.S. with heroin trafficking between the two countries. Thailand sought extradition pursuant to the 1983 bilateral extradition treaty and the defendant opposed this on the ground that he would face the death penalty in Thailand for what is a non–capital offense in the U.S. Although the treaty permitted either party to deny extradition on this basis except for murder crimes, the treaty did not require it. The Court denied defendant the opportunity to contest extradition on this ground based on deference to the U.S. Executive Branch decision to permit extradition, and ordered the case dismissed. Undaunted, however, Prasoprat then filed a second habeas corpus challenge to extradition based on alleged torture if he were returned to Thailand and although the Court recognized there may be a viable legal claim on this basis, the Court nonetheless concluded Prasoprat had provided little credible evidence this would occur and recommended dismissal, with his case apparently still pending on appeal.[25] Although the 2005 appellate decision has been sharply criticized, the rule of judicial non–inquiry into Executive Branch determinations of requesting state conditions still prevails and seems unlikely to change.[26]

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23. 526 F.3d 1111 (8th Cir. 2008).

24. *Prasoprat*, 421 F.3d 1009.

25. Prasoprat v. Benov, 622 F. Supp. 2d 980 (C.D. Cal. 2009).

26. Andrew J. Parmenter, Comment, *Death by Non-Inquiry: The Ninth Circuit Permits the Extradition of a U.S. Citizen Facing the Death Penalty for a Non-Violent Drug*

B. U.S. District Court Treaty Decisions

In the Matter of the Extradition of Jacques Pelletier[27] illustrates how identity of the person being sought for extradition is proved based on a combination of photographs, customs and immigration declarations, interviews with other law enforcement agencies, etc. even when there is no corroborating witness. Brought under the 1908 U.S.–Portugal extradition treaty, the case involved a Canadian citizen sought by Portugal for alleged large–scale drug smuggling. Pelletier owned a large boat seized by the Portuguese navy while carrying a large illegal narcotics shipment, and he was arrested in the U.S. when Portugal sought his extradition. After determining he was the same person as that sought by Portugal, the Court then found extradition proper based upon evidence presented from the Portuguese trial of the captain and crew that Pelletier intended to ship the illegal drugs to Portugal for sale, a crime in both the U.S. and Portugal.

In re Gon[28] involves the application of the 1978 U.S.–Mexico extradition treaty to a Chinese–born Mexican citizen in some interesting U.S. judicial process contexts. Gon was first arrested in the U.S. on methamphetamine distribution charges and while in U.S. custody awaiting trial, Mexico sought his extradition for major drug and related crimes (far more serious in nature than the U.S. charges). Gon tried unsuccessfully to argue that (1) the extradition case should be deferred until after his U.S. case was disposed of; (2) he should be released on bail; (3) he should not be extradited for humanitarian and political offense reasons; and (4) he should be allowed to conduct evidentiary discovery of both Mexico's and the U.S. evidentiary bases for the Mexican charges. The Court rejected deferral based on the long–established principle that extradition proceedings should precede domestic prosecution because of U.S. treaty obligations, although deferral of the extradition removal itself could occur afterward. The Court refused bail because bail is seldom if ever granted in extradition cases and also because Gon posed a serious flight risk. The Court likewise rejected the humanitarian and political offense arguments as legally improvident. The Court then refused discovery of Mexico's evidence as a violation of Mexican sovereignty, but did allow limited discovery of the U.S. for the

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*Offense [*Prasoprat v. Benov*, 421 F.3d 1009 (9th Cir. 2005)]*, WASHBURN L.J. 657, 664-65 (2006); Matthew Murchison, Note, *Extradition's Paradox: Duty, Discretion, and Rights on the World of Non-Inquiry*, 43 STAN. J. INT'L L. 295 (2007); *see* Meredith Angelson, Note, *Beyond the Myth of "Good Faith": Torture Evidence in International Extradition Hearings*, 41 N.Y.U. J. INT'L L. & POL. 603 (2009).

27. In the Matter of the Extradition of Jacques Pelletier, No. 09-22416-MC-SIMONTON, 2010 U.S. Dist. LEXIS 44979 (S.D. Fla. 2010).

28. 613 F. Supp. 2d 92 (D.D.C. 2009); *see also In re* Extradition of Zhenly Ye Gon, No. 08-596, 2009 U.S. Dist. LEXIS 96023 (D. D.C. 2009); *In re* Zhenly Ye Gon, No. 08-596, 2010 U.S. Dist. LEXIS 1563 (D. D.C. Jan. 10, 2010) [hereinafter Zhenly Ye Gon].

purpose of seeing whether any U.S. evidence could negate probable cause for the Mexican arrest warrant.

U.S. v. Blackiston[29] involves a 1982 U.S.–Costa Rica extradition treaty specialty challenge to the sentencing of a U.S. citizen extradited to the U.S. for prosecution of various marijuana trafficking charges. After his return to the U.S., the government added Ecstasy trafficking to the list of crimes Blackiston eventually pleaded guilty to. The issue before the Court was whether Blackiston's sentence could be enhanced for the Ecstasy charges not expressly included in the Costa Rican extradition order because of treaty language stating a person could be "punished" only for the offense(s) subject to the extradition decision absent exceptions inapplicable to the case. Although noting various bases for sentence enhancement in extradition contexts based on crimes either committed in connection with the extraditable offenses of after extradition occurred, the Court expressed concern about the difference between Ecstasy and marijuana and decided to have the U.S. government notify the Costa Rican Government of the proposed sentence enhancement to ascertain whether the latter would object.

U.S. v. Wathne[30] saw the Court wrestle with the complicated issue of appropriate remedies for violation of the dual criminality rule. Wathne was an Icelandic citizen residing in Russia when he was detained by Russian authorities pursuant to a U.S. law enforcement assistance request for questioning about alleged LSD money laundering activities. Wathne claimed the Russians tortured him and fled to India, where he was arrested upon landing at the airport pursuant to an Interpol notice and subjected to a U.S. extradition request under the 1999 U.S.–India extradition treaty. While extradition proceedings in India were pending, Wathne voluntarily agreed to come to the U.S. on the condition that he could raise any defenses allowed under the treaty (he had already succeeded in persuading at least one India court that the treaty did not permit extradition for the alleged offense he was charged with in the U.S.). The parties conceded that extradition from Russia would not have occurred because of both the absence of a treaty and the general unwillingness of Russia to extradite or otherwise send fugitives to the U.S. for prosecution. Wathne successfully persuaded the Court of a dual criminality violation by proving that the money laundering offense he was charged with was not a crime in India when allegedly committed. The Court then considered various remedy options before deciding that it lacked both the power to dismiss the charges (the remedy sought by Wathne) and jurisdiction over the case. The Court noted that if Wathne failed to leave the U.S. he would be considered to waive his right to be free of prosecution, and then pointed out that Wathne probably had nowhere to go because he would likely be extradited from almost any other country he fled to. This is

29. 593 F. Supp. 2d 887 (E.D. Va. 2009).
30. No. CR 05-0594 VRW, 2008 U.S. Dist. LEXIS 79348 (N.D. Cal. 2008).

an interesting case because in essence Wathne won his legal battle but it is far from clear he could ever win the legal war.

U.S. v. Mondragon–Garcia[31] illustrates the difference between extradition and conditional release into the custody of a requesting state. Two Mexican citizens attempting to leave Panama were stopped at the airport and detained for investigation of alleged money laundering. A few weeks later, a U.S. federal court in Florida issued indictments against the two for what were probably similar money laundering offenses. The U.S. Embassy in Panama then requested the conditional release into U.S. custody of the two pursuant to the U.S.–Panama law enforcement cooperative agreement and Panamanian law, deliberately choosing not to request extradition. The Embassy diplomatic note described the two as dangerous members of the Sinaloa, Mexico drug cartel involved in large scale cocaine trafficking, although there was apparently no evidence presented to support this in the note. They were then bought to the U.S. for prosecution. The defendants unsuccessfully tried to convince the Court that their detention and conditional release were predicated on U.S. Government misrepresentations to the Panamanian authorities and a lack of evidence to support their release into U.S. custody. The Court rejected these arguments by ruling that procedural flaws could not negate the charges. This particular court opinion is not especially well–reasoned because even though extradition was apparently never sought, the Court nonetheless analyzed the case pursuant to extradition treaty law and in the end correctly concluded that procedural flaws in an extradition process will not normally negate a court's power to criminally try the extradited persons.

Germany v. U.S.[32] illustrates how U.S. courts decide extradition disputes arising from trials and convictions of fugitives *in absentia*. The case appears to involve two separate extradition treaties, namely the one between the U.S. and Jamaica, where Germany was in preventive custody, and the 1996 U.S.–France treaty. Only the U.S.–France treaty is pertinent here, as it was the basis for the Court's decision finding adequate evidence to support the extradition request. Germany was convicted in absentia in two separate French courts of various cocaine trafficking offenses. Applying well–established case law, the Court determined that the trials in absentia posed no barrier to extradition because the legal test is the same as that for establishing adequacy of probable cause that the crimes occurred. In this case France provided more than ample evidence to meet the standard.

In the Matter of the Extradition of Giovanni Gambino[33] reflects the complexities of interpreting extradition treaty offense language when the English and non–English versions differ from one another. The case involved sophisticated heroin trafficking conspiracies in both the U.S. and

31. No. 8:07-cr-119-T-26MAP, 2007 U.S. Dist. LEXIS 86118 (M.D. Fla. 2007).
32. No. 06 CV 01201 (DLI), 2007 U.S. Dist. LEXIS 65676 (E.D.N.Y. 2007).
33. 421 F. Supp. 2d 283 (D. Mass. 2006).

Italy, with convictions obtained on some of the conspiracy charges in the U.S. and extradition sought by Italy under the 1983 U.S.–Italy treaty for certain conspiratorial acts similar in nature to those resulting in the U.S. convictions. The Court considered the opinions of multiple U.S. and Italian legal experts to determine that the treaty provision precluding extradition for the same or substantially similar offenses conclusively resolved in the requested state did not apply; but then finding that one set of conspiracy charges subject to Italy's extradition requests was not adequately presented or substantiated as required by the treaty, while another could be certified for extradition.

U.S. v. Hunte[34] addresses certain procedural aspects of extradition requests from foreign states arising from the U.S.–Barbados extradition treaty in a marijuana smuggling case. Barbados sought Hunte's extradition based on information obtained from two other persons arrested in Barbados in connection with the same criminal activity. Hunte unsuccessfully argued inadequate probable cause for the extradition because the Court found the testimony by the other arrestees sufficient to support it even though there was a partial recantation by one of them. The Court further found as not credible Hunte's argument she was promised immunity from extradition by U.S. drug officials because she failed to obtain or produce written evidence to support it.

C. Some Key Non–Treaty Decisions

U.S. v. Alvarez–Machain[35] is a significant U.S. Supreme Court case which establishes the legal rule in the U.S. that once a fugitive or criminal suspect comes within the criminal jurisdiction of U.S. courts the person stays within such jurisdiction regardless of how the person arrives there. Here Alvarez–Machain, a Mexican physician suspected and charged with aiding in the torture and murder of U.S. DEA agents in Mexico by a Mexican drug cartel head, was kidnapped in Mexico by U.S. federal agents and brought into the U.S. for criminal prosecution. Mexico formally protested the seizure, claiming it violated the U.S.–Mexico extradition treaty. The Court ruled that the treaty was not the exclusive means of bringing Mexican fugitives into the U.S., and despite a general outcry of opposition from the international community objecting to the abduction as an egregious international law violation,[36] the Court also ruled that he could

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34. No. 04-M-0721(SMG), 2006 U.S. Dist. LEXIS 607 (E.D.N.Y. 2006).

35. Fiocconi v. U.S. Attorney General, 504 U.S. 655 (1992); *see also* Sosa v. Alvarez–Machain, 542 U.S. 692 (2004).

36. *See* Michael J. Glennon, *International Kidnapping: State-sponsored Abduction: A Comment on* United States v. Alvarez–Machain*,* 86 AM. J. INT'L. L. 746 (1992); *see* Halle Fine Terrion, Comment, United States v. Alvarez–Machain*: Supreme Court Sanctions Governmentally Orchestrated Abductions as Means to Obtain Personal Jurisdiction*, 43 CASE W. RES. L. REV. 625 (1993); *see* Royal J. Stark, Comment, *The Ker–Frisbie–Alvarez*

be criminally prosecuted. Interestingly, he was acquitted of the criminal charges and in separate litigation, unsuccessfully sued the U.S. Government in a civil tort action. The decision is very important because it supports proceeding with prosecution without regard to how drug offenders find themselves in U.S. jurisdiction regardless of whether there is an extradition treaty in place.

Fiocconi v. U.S. Attorney General[37] is perhaps the seminal U.S. non–treaty extradition case involving narcotics. The U.S. sought extradition of two French citizens on narcotics trafficking conspiracy charges even though the applicable 1868 U.S.–Italy treaty did not include narcotics offenses. Using comity as the basis for granting the U.S. extradition request, Italy turned over the two to U.S. authorities on the conspiracy charges issued in a Massachusetts federal court. After their return, the two were subjected to additional charges involving trafficking in a New York federal court. Citing specialty, the defendants argued that they should not be subjected to the New York charges because Italy never agreed to grant extradition on these. With some difficulty the Court determined that the spirit of the comity–based extradition was complied with by concluding that the offenses were closely enough connected to obviate any argument that the U.S. was acting in bad faith towards Italy. The Court acknowledged the viability of defendants' arguments but nonetheless sided with the prosecution. It may well have mattered that the U.S. had returned to the Italian courts to seek a broadening of the narcotics charges, and that at the time of the U.S. decision Italy had not objected to the U.S. charges.

U.S. v. Gardiner[38] upheld the use of non–treaty means to obtain U.S. custody over a Bahamian national who entered the Dominican Republic illegally and was subsequently charged in a U.S. court with cocaine trafficking conspiracy. Although the U.S. alerted Interpol of the charges with the apparent intent of seeking extradition, the Interpol alert was in fact used to trigger a Dominican Republic law authorizing the expulsion of any non–citizen subject to an arrest warrant. The Dominican Government turned over Gardiner to U.S. custody and he then tried to argue that the U.S.–Dominican Republic extradition had been violated. The Court rejected this argument by concluding that Gardiner was in effect never extradited to the U.S. but instead was properly handed over to U.S. custody pursuant to Dominican law. Although not an extradition case per se, this decision illustrates how international narcotics crimes can be combated through creative means of obtaining custody over fugitives.

Doctrine: International Law, Due Process, and United States Sponsored Kidnapping of Foreign Nationals Abroad, 9 CONN. J. INT'L L. 113 (1993); *see* Aimee Lee, Comment, United States v. Alvarez–Machain*: The Deleterious Ramifications of Illegal Abductions*, 17 FORDHAM INT'L L.J. 126 (1993).

37. 462 F.2d 475 (2d Cir. 1972), *cert. denied*, 409 U.S. 1059 (1972).

38. 279 Fed. App'x 848 (11th Cir. 2008).

U.S. v. Valencia–Trujillo[39] appears to be a significant new case in the area of non–treaty extradition for narcotics offenses. Convicted on various drug–related crimes, Valencia–Trujillo argued that both specialty and the U.S.–Colombia extradition treaty were violated because matters not in the indictments against him were used to convict him and also because he was charged with offenses not facially within the parameters of the treaty. The Court rejected these arguments by concluding that he was extradited pursuant to non–treaty means because the U.S.–Colombia treaty was not in effect at the time of his extradition, and then concluding that he lacked standing to raise the specialty issue at all as this could only be done in treaty–based extraditions. The potentially far–reaching implications of the Court ruling are elaborated below.

III. *VALENCIA–TRUJILLO* IMPLICATIONS IN FUTURE INTERNATIONAL NARCOTICS ENFORCEMENT

The *Valencia–Trujillo* case has significant implications for international narcotics enforcement and prosecution activities involving the United States because it offers some effective alternatives to the use of extradition treaties as a means of receiving and sending fugitives, suspects, and criminal defendants. The Court ruled that persons extradited by non–treaty means have no legal standing to challenge alleged specialty violations, i.e., to claim that they are being prosecuted for offenses other than those for which they were surrendered. In 2002, Valencia–Trujillo was indicted by a U.S. federal court for alleged drug conspiracy and criminal enterprise activities as a member of the Cali, Colombia drug cartel.[40] Colombia arrested him at U.S. request with a diplomatic note also requesting that Colombia extradite him to the U.S. to face these specific charges. The Colombian Justice and Interior Ministries approved the extradition subject to the condition that he could be tried "only for those charges for which he was requested, and for those acts which took place after December 17, 1997."[41] This 1997 date had legal importance in that Colombia had amended its Constitution to permit extradition of Colombian citizens with or without a treaty for offenses committed after this date.

Before his trial Valencia–Trujillo raised the specialty argument that certain conspiracy counts based on acts allegedly occurring before December 1997 be stricken from the case.[42] The trial court refused and he was convicted on all counts. The appellate court rejected his specialty

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39. 573 F.3d 1171.

40. *Id.* at 1173-74.

41. *Id.* at 1176.

42. Recent Case, *Customary International Law -- Extradition -- Eleventh Circuit Holds That 'Rule of Specialty' Applies Only When Provided by Treaty.* -- United States v. Valencia–Trujillo, *573 F.3d 1171 (11th Cir. 2009)*, 123 HARV. L. REV. 572, 573 (2009) [hereinafter Recent Case].

argument by ruling that he had no right to raise this argument because he was extradited by non–treaty means.[43] In other words, defendants may only challenge specialty violations if they were extradited pursuant to treaty. This tends to undermine the above *Fiocconi* case allowing specialty challenges in comity–based extraditions and some subsequent federal court decisions also allowing specialty challenges in non–treaty cases.[44] The Court also rejected Valencia–Trujillo's argument that specialty protected him under customary international law by noting that specialty probably does not constitute customary international law, and even if it does, no private right of action to enforce it exists because extradition is a diplomatic act between governments.[45]

The *Valencia–Trujillo* case allows U.S. drug enforcement officials and prosecutors to use non–treaty extraditions more aggressively by eliminating surrendered fugitive specialty challenges. The practical effect means that a person within U.S. criminal court jurisdiction has no legal means to challenge prosecutions and convictions based on charges and offenses not part of the non–treaty surrender process. Although the surrendering country can certainly file diplomatic objections, this would not necessarily affect decisions that disregard specialty. For these reasons the case has been sharply criticized by one commentator as "a message . . . that the United States cannot be trusted to live up to the promises that it makes in order to secure extradition."[46] Moreover, the case appears to bar persons subject to comity–based extradition from the U.S. to other countries to raise specialty challenges. In other words, the case provides a great incentive to use means other than treaties as the basis for extradition. Because a number of countries, including the U.S. and China, lack extradition treaties with each other and will necessarily require extensive diplomatic efforts over lengthy periods of time to get them, the *Valencia–Trujillo* decision provides an easier means to facilitate extraditions far less vulnerable to legal attack.

IV. U.S.–CHINA DRUG ENFORCEMENT COLLABORATION THROUGH NON–TREATY EXTRADITION: PROSPECTS AND ISSUES

The U.S. and China have something of an inconsistent history regarding drug enforcement collaboration. It is not altogether clear that any significant collaboration occurred until the late 1980s, when the infamous Goldfish heroin smuggling case reflected both the promise of such

43. Valencia–Trujillo, 573 F.3d at 1181.

44. Recent Case, *supra* note 42, at 575-76.

45. *Id.* at 577-79.

46. Amie Cafarelli, *Extradition Law – Criminal Defendants Extradited Outside of Treaties Lack Standing to Assert Rule of Specialty* – United States v. Valencia–Trujillo, *573 F.3d 1171 (11th Cir. 2009)*, 33 SUFFOLK TRANSNAT'L L. REV. 377, 388 (2010). Whether this criticism is valid is questionable, in that extradition was never used as the U.S. jurisdictional basis for trying the fugitive.

collaboration—at least initially—and a major setback which could have curtailed such collaboration altogether.[47]

A. The Goldfish Heroin Case: A Troubled Beginning

The Goldfish case began in 1988, when Chinese customs brokers at the Shanghai Airport discovered heroin hidden inside a shipment of goldfish destined for San Francisco. Chinese police officials arrested Wang Xong Xiao, a Chinese citizen, for arranging the shipment. During interrogations, Wang allegedly confessed to assisting Hong Kong resident Leung Tak Lun ship the drugs to the United States. Chinese officials arrested Leung, and notified the United States Drug Enforcement Agency of the pending shipment. DEA agents seized the shipment when it arrived in San Francisco and arrested Chico and Andrew Wong. The Chinese government extradited Leung to the U.S., where federal prosecutors indicted Leung and the two Wongs for conspiracy to import and possess heroin with intent to distribute.[48]

In what apparently was the first time China cooperated with another country to prosecute a defendant charged with a criminal offense, China sent Wang and five Chinese investigating officials to the U.S. to assist the U.S. Government at the criminal trial. The Chinese officials testified during the first month of the trial. Wang was then called as a witness, and he testified for several days. Wang then shocked all concerned by filing a petition for political asylum and testifying to the trial court that his Chinese captors had coerced and tortured him to confess falsely. He claimed his Chinese captors ordered him to testify falsely at trial, with the threat that failure to comply with their demands would lead to a death sentence when he returned to China.[49] The trial court immediately declared a mistrial but refused to dismiss the case against defendants, who were convicted in the subsequent retrial.

Meanwhile, Wang's asylum petition became subject to sharp legal conflict as U.S. Government officials sought his removal from the U.S. in apparent retaliation for his changed testimony. The U.S. courts which heard Wang's challenge to the attempted removal found that U.S. prosecutors had engaged in serious misconduct in connection with the decision to bring Wang to the U.S. to testify and further found that Wang should be allowed to remain in the U.S. as his due process rights would be violated if he were involuntarily returned to China to face likely torture and death.[50] Both the trial and appellate courts excoriated U.S. Government officials for not

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47. U.S. v. Leung Tak Lun, 944 F.2d 642 (9th Cir. 1991).

48. *Id.* at 643.

49. *Id.* at 643-44.

50. Wang v. Reno, 81 F.3d 808, 810 (9th Cir. 1996), *aff'g* 837 F.Supp. 1506 (N.D. Cal. 1993).

independently corroborating the legitimacy of Wang's trial testimony against the defendants, and then trying to remove him from the U.S. after placing him in his position in the first place.[51] One commentator has written that "[t]he Wang case demonstrated the importance of a neutral court's capacity to exercise its supervisory powers to protect a witness and to ensure that witness testimony in U.S. proceedings is free of the taint of coercion."[52] Although this case might well have ended further China–U.S. drug enforcement cooperation, this in fact did not occur and instead the two countries developed new legal means to develop it.

B. The *Lui Kin–Hong* Case: Extradition Via Hong Kong

Although not a narcotics case, *U.S. v. Lui Kin–Hong*[53] deserves mention here because it addressed whether extradition from the U.S. to Hong Kong was permissible in the aftermath of the Goldfish decisions as Hong Kong was about to revert to China's jurisdiction on July 1, 1997.

In 1995, when Hong Kong was still subject to British sovereignty, a Hong Kong criminal court charged Lui with large scale bribery involving tobacco imports and pursuant to the applicable U.S.–U.K. extradition treaty which extended to Hong Kong, U.S. officials apprehended Lui at a U.S. airport when he tried to enter the country on a business trip.[54] After extradition proceedings began, a U.S. trial court released Lui on bail contrary to the general rule that bail is not normally allowed in extradition cases but a federal appeals court reversed this decision and ordered Lui held pending the extradition case outcome.[55]

The crux of the case was whether Lui could be lawfully extradited to a Hong Kong criminal court system subject to China's control. Lui argued unsuccessfully that his rights could not be protected in Hong Kong; that there was no extradition treaty between the U.S. and China; and that even if there were an applicable treaty, he was entitled to a political offense exception for the crimes he was charged with. The Court noted that the U.S. and Hong Kong (specifically the Hong Kong Special Administrative Region) had signed an extradition treaty in 1996 which contemplated extradition after the reversion of Hong Kong to China and further noted that both the U.K. and the Hong Kong treaties were in effect. The Court also rejected Lui's effort to show he could not be fairly tried by relying on the non–inquiry rule discussed above, because the Secretary of State has sole

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51. *Id.* at 819-20.

52. David Whedbee, Comment, *The Faint Shadow of the Sixth Amendment: Substantial Imbalance in Evidence-Gathering Capacity Abroad Under the U.S.-P.R.C. Mutual Legal Assistance Agreement in Criminal Matters,* 12 PAC. RIM L. & POL'Y J. 561, 563 (2003).

53. *Kin–Hong*, 110 F.3d 103.

54. *Id.* at 107.

55. *Id.* at 108; *see also* U.S. v. Kin–Hong, 83 F.3d 523 (1st Cir. 1996).

discretion to determine whether Lui could and should be extradited.[56] Finally, the Court found both dual criminality and specialty present in the case while rejecting Lui's evidentiary sufficiency challenges and he was ordered extradited.[57]

Although there is no mention of the Goldfish case in any of the various U.S. court opinions involving Lui, this is in and of itself significant because the U.S. Court of Appeal for the Ninth Circuit decided both. This Court could well have cited Goldfish to block Lui's extradition based on concerns about Lui's rights, but instead opted to rely on explicit treaty language plus the non–inquiry rule to support Lui's extradition. In other words, while knowing Hong Kong would be subject to China's jurisdiction the U.S. Court did not seem concerned about it and assumed the legitimacy of Hong Kong jurisdictions. Three years later a different federal appeals court followed the *Lui Kin–Hong* decision, using the same arguments, in affirming the extradition of another criminal fraud fugitive to Hong Kong in *Cheung v. U.S.*[58] These cases have positive implications for virtually all narcotics cases involving Hong Kong and they help lay a foundation for non–treaty extraditions with China.

C. The 2000 U.S.–China Agreement on Mutual Legal Assistance in Criminal Matters

On June 19, 2000, the U.S. and China signed an important bilateral Agreement on Mutual Legal Assistance in Criminal Matters[59] in Beijing. This Agreement, similar to others entered into by the U.S., China, and many other nations, authorizes law enforcement and prosecutorial officials to collaborate in a number of specific areas related to criminal investigations, prosecutions, and related proceedings. These areas include serving documents; taking witness testimony; providing documentary evidence assistance; expert evaluations; making witnesses available for testimony; locating or identifying persons; executing requests for inquiry, searches,

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56. *Id*. at 110-11.

57. For a good analysis of the case, see Jonathan A. DeMella, Note, *In Re* Extradition of Lui Kin-Hong*: Examining the Effects of Hong Kong's Reversion to the People's Republic of China on United States–United Kingdom Treaty Obligations*, 47 AM. U. L. REV. 187 (1997). For a review of post-reversion Hong Kong extradition generally, see Erik Alexander Rapoport, Comment, *Extradition and the Hong Kong Special Administrative Region: Will Hong Kong Remain a Separate and Independent Jurisdiction After 1997?,* 4 ASIAN L.J. 135 (1997).

58. 213 F.3d 82 (2d Cir. 2000). *See also In re* Extradition of Grace Chan Seong, 346 F. Supp. 2d 1149 (D. N.M. 2004) (allowing the extradition of a U.S. citizen to Hong Kong pursuant to the U.S.-Hong Kong Treaty to face commercial bribery charges. Extradition would not have been allowed to China because of the absence of a treaty and the bar against comity-based extradition of U.S. citizens).

59. Agreement on Mutual Legal Assistance, U.S.-China, June 19, 2000, STATE DEP'T. DOC NO. 01-44.

freezes and evidence seizures; helping with asset forfeitures; and perhaps most importantly, "transferring persons in custody for giving evidence or assisting in investigations; and . . . any other form of assistance which is not contrary to the laws in the territory of the Requested Party."[60] The Agreement resulted from serious U.S. concerns, shared by China, of heroin and methamphetamine activities affecting both countries.[61] To avoid the coercive problems seen in the Goldfish debacle, the Agreement requires consent of anyone whose help is sought in the requesting country's territory to consent to go there, even if the person is in the custody of the requested country; the Agreement also adopts extradition principles by allowing a party to refuse assistance if the request pertains to conduct which is not a crime in both countries unless the parties agree otherwise or which constitutes a political offense, among other exceptions.[62]

These kinds of Mutual Legal Assistance Agreements (MLATs) are used, often effectively, to combat international narcotics and other crimes, although they face criticism for tending to be too much an "Americanized" approach to enforcement with a tendency to sacrifice the rights of individuals subject to the jurisdiction of countries other than the U.S.[63] Commentators seem especially concerned about the issue of rights in China, but at least on the face of the U.S.–China Agreement itself, there are safeguards built into the Agreement to avoid this problem; and organized crimes related to narcotics and other illicit activity involving the two countries are admittedly serious problems for both.[64] Perhaps more significantly, the Agreement gives the two countries a specific framework for potentially effective collaboration in narcotics enforcement and prosecution. Although to date, there are no reported U.S. court decisions utilizing the Agreement, it is quite probably only a matter of time before these cases emerge. This collaboration includes transfer of persons in extradition–like proceedings, subject to the consent requirement.

D. Post–2000 MLAT Agreement Collaborative Activity

The U.S. and China have sought to cooperate with each other in narcotics cases since the 2000 MLAT Agreement, which took effect March 8, 2001. In May 2003, the two countries joined India and Canada in taking down a

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60. *Id.* at art. 1(2)(a)-(j).

61. Whedbee, *supra* note 52, at 561-62.

62. Agreement on Mutual Legal Assistance, *supra* note 59, at arts. 3.1, 9, 11, 12.

63. Whedbee, *supra* note 52, at 569-74.

64. *Id.* at 592-93. Article 11.2 expressly provides: "The Requested Party may request the Requesting Party to make a commitment that a person who has been asked to be present in the territory of the Requesting Party . . . not be prosecuted, detained . . . or subject to any other restriction of personal liberty, for any acts or omissions or convictions which preceded such person's entry into the territory of the Requesting Party . . ." Agreement on Mutual Legal Assistance, *supra* note 59, at art. 11(2).

major heroin trafficking network centered in Fujian. The case involved an elaborate sting operation conducted jointly by U.S. and Chinese officials in China.[65] Annual U.S. State Department International Narcotics Strategy Reports (INSCR) cite other examples of collaboration, and in 2005 the U.S. DEA signed a cooperative memorandum with Chinese authorities to strengthen joint investigative efforts. This in turn may have helped the countries break a major Colombian drug smuggling ring centered in Zhongshan City, southern China, and Hong Kong.[66] Then a few years later, the two countries engaged in Operation Vulture Hunting to break a heroin smuggling ring that involved China, the U.S., and Canada.[67] These collaborative efforts have been somewhat hampered by the absence of a formal Letter of Agreement between the two countries on how drug enforcement efforts should be formally and systematically coordinated so the countries continue their case–by–case approach.

E. The U.S., China and Extradition – Current Issues and Developments

Because of human rights concerns, countries have been reluctant to enter into extradition treaties with China even though, as noted above, extraditions from the U.S. to Hong Kong have proceeded with U.S. judicial and Executive Branch blessings since 1997. In 2005, however, Spain became the first country to enter into an extradition treaty with China with France, Portugal and Australia soon to follow.[68] China now has some twenty bilateral extradition treaties, most with less developed countries, with the impetus for most of them being China's aggressive efforts to seek the return of corrupt government officials who fled the country with ill–gotten gains.[69]

Extradition activities between China and the U.S. have been conducted on a case–by–case basis because of the absence of a treaty. The U.S. has proved willing (in the non–Hong Kong context) to use comity and domestic immigration laws to help China gain custody of its own nationals who do not enjoy freedom from extradition under U.S. law.[70] This approach has its advantages—the main one being flexibility—and disadvantages, including inconsistency in approaches and lack of predictability. To the extent Chinese nationals find themselves extradited to the U.S. through non–treaty means, there appear to be few practical limits on their prosecution as

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65. Bruce Zagaris, *U.S.–P.R.C. Heroin Sting Signals Renewed Drug Cooperation Between the 2 Countries*, 19 INT'L ENFORCEMENT L. REP., August 2003, at 297, 297.

66. *See* 2007 U.S. DEP. OF STATE INT'L NARCOTICS CONTROL STRATEGY REP. 281.

67. 2008 U.S. DEP. OF STATE INT'L NARCOTICS CONTROL STRATEGY REP. 292-93.

68. Matthew Bloom, Note, *A Comparative Analysis of the United States's Response to Extradition Requests from China*, 33 YALE J. INT'L L. 177, 179-80 (2008).

69. *Id*. at 189-90.

70. *Id*. at 200-02.

discussed above. For drug enforcement purposes, extradition of Chinese to the U.S. for prosecution clearly requires no treaty, and this provides a viable mechanism for effective enforcement.

Whether the U.S. and China will have an extradition treaty has been the subject of recent speculation.[71] Now that western European countries and Australia have signed such treaties with China, the U.S. faces an interesting dilemma. It can continue to conduct case–by–case extradition review on a non–treaty basis; or alternatively, follow these other countries with a treaty. It is nonetheless unclear whether a treaty is needed, because as the *Valencia–Trujillo* case suggests, Chinese who find themselves subject to an extradition proceeding seeking either U.S. retention of prosecutorial jurisdiction or U.S. return to China for prosecution have no apparent legal basis for seeking judicial intervention in their plights. Therefore, non–treaty approaches can work. Of course, the U.S. cannot apply such approaches to U.S. citizens and permanent resident aliens regarding transfer to China, but as long as the issue remains one of international narcotics enforcement and prosecution, it seems unlikely that these particular criminal activities will not somehow find themselves, at least partly, within U.S. jurisdiction in some respect.

CONCLUSION

Extradition continues to be the primary U.S. enforcement approach to international narcotics offenses. Although treaties have traditionally been the primary means of obtaining extradition of alleged drug traffickers both to and from the U.S., *Valencia–Trujillo* and various of the other cases discussed above demonstrate that treaties are neither needed, nor necessarily even always desired, for extradition to occur. Comity–based extradition offers the advantage of eliminating judicial challenges to the basis for such extraditions, while necessarily limiting these extraditions from the U.S. to persons other than U.S. citizens or permanent resident aliens. Because the U.S. and China may well require a long time before agreeing to a bilateral extradition treaty, non–treaty extraditions offer an attractive alternative whenever the U.S.–Hong Kong treaty cannot be feasibly used. Despite the Goldfish case fiasco, which could have permanently eliminated U.S.–China cooperation in drug cases, the countries have found ways to increase collaborative enforcement and prosecution efforts to attack their common objective of waging war on international narcotics trafficking involving their respective borders. These authors believe that such collaboration will continue, and most likely expand, as the countries become more familiar and comfortable with how each goes about the business of eradicating the traffickers.

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71. Anna MacCormack, Note, *The United States, China, and Extradition: Ready for the Next Step?*, 12 N.Y.U. J. LEGIS. & PUB. POL'Y 445 (2009).