

ANNEX 1-C

U.S. EXPERIENCE WITH INTERNATIONAL ANTITRUST ENFORCEMENT COOPERATION

U.S. antitrust authorities have worked for over two decades to build formal mechanisms for international cooperation, signing their first formal bilateral antitrust cooperation agreement in 1976. This Annex discusses U.S. experience with international enforcement cooperation, beginning with a discussion of some of the traditional impediments to U.S. efforts at enforcing antitrust laws in international matters. It continues with a discussion of international cooperation through bilateral arrangements and agreements under the International Antitrust Enforcement Assistance Act (IAEAA), and then turns briefly to discuss mutual legal assistance treaties in criminal matters (MLATs) as well legal instruments under which enforcement cooperation is available, and concludes with an overview of multilateral and regional cooperation arrangements in the field. Finally, this section concludes with an assessment of cooperation pursuant to bilateral agreements and other international arrangements.

CHALLENGES TO ANTITRUST ENFORCEMENT IN TRANSNATIONAL MATTERS

Enforcement of national laws in international matters is a process that can be both more complex and less predictable than domestic enforcement. Historically, concerns by nations over issues of sovereignty have led to some combination of legal, practical, and political impediments to such enforcement aims. Some nations introduced a variety of legal obstacles to stymie other nations in their efforts to prosecute international antitrust matters, and of course, affected parties often take their own evasive measures. The most common barriers to both U.S. antitrust authorities and private plaintiffs can impede efforts at accessing information and witnesses across borders.

Sovereignty Concerns

Sovereignty and consequent jurisdictional issues are among those that historically have elicited the most objections from other governments to U.S. antitrust enforcement efforts and, accordingly, led to the implementation of protective measures that bar efforts by U.S. litigants to obtain information for use in their domestic actions.

Extraterritorial antitrust enforcement by U.S. antitrust enforcers has involved investigations into anticompetitive conduct of non-U.S. firms and individuals in violation of U.S. antitrust laws. Such conduct has included instances in which non-U.S. firms and individuals acting outside the United States have caused harm to competition within the United States and, on occasion, to U.S. firms doing business abroad. When engaging in this extraterritorial enforcement, U.S. antitrust authorities need to overcome sovereignty concerns that arise when they seek to obtain information and testimony from non-U.S. citizens located overseas; successfully meet jurisdictional requirements, including establishing personal jurisdiction and subject matter jurisdiction; and render valid service of process. Moreover, the successful prosecution of

U.S. antitrust law under these circumstances requires U.S. antitrust authorities to overcome potential objections that extraterritorial enforcement violates principles of “traditional comity.”

The term comity refers to the general principle that a country should take other countries’ important interests into account in its law enforcement in return for their doing the same. Traditional comity has been defined as “the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws.”¹ The Advisory Committee, in its deliberations, has considered these different dimensions. The application of comity with respect to application of the antitrust laws to conduct outside the United States remains an unsettled area of law after the most recent Supreme Court ruling in the area, *Hartford Fire Insurance Co. v. California*,² and lower federal U.S. courts have recently come to different interpretations of the holdings in this case.

For much of the postwar period, extraterritorial application of U.S. antitrust laws had been a significant source of tension between the United States and its trading partners. In response to U.S. assertions of extraterritorial jurisdiction, some nations introduced laws that could impede U.S. investigatory efforts to compel production or gain access to information or witnesses located abroad. Today, while they are rarely exercised in contrast with even two decades ago, these statutes remain in effect. They encompass blocking statutes, to prevent the U.S. from collecting evidence and testimony on foreign soil, and clawback statutes, to authorize the filing of local suits to recover multiple damages already paid in connection with a foreign judgement. Other mechanisms traditionally employed by foreign governments to resist or object to U.S. assertions of jurisdiction over foreign defendants are used occasionally today. These have taken the form of official protests to legal actions in the United States, including diplomatic notes of protest³ and the filing of amicus curiae briefs in connection with ongoing U.S. litigation;⁴ reservations

¹ *Hilton v. Guyot*, 159 U.S. 113, 164 (1895), Black’s Law Dictionary, 334 (6th ed. 1990).

² 509 U.S. 764, 113 S.Ct. 2891 (1993). For cases that have considered the application of international comity in antitrust cases since *Hartford Fire*, see, e.g., *United States v. Nippon Paper Industries Co., Ltd.* 109 F.3d 1 (1st Cir. 1997); *Metro Industries, Inc. v. Sammi Corporation*, 82 F.3d 839 (9th Cir. 1996). See also *Filetech S.A.R.L. v. France Telecom*, 978 F.Supp. 464 (S.D.N.Y. 1997), *rev’d on other grounds*, 157 F.3d 922 (2d. Cir. 1998). For a further discussion of the case law since *Hartford Fire*, see Spencer Weber Waller, *From the Ashes of Hartford Fire: The Unanswered Questions of Comity*, Paper delivered to the Twenty-Fifth Anniversary Conference on International Antitrust Law & Policy, Fordham Corporate Law Institute, Oct. 22-23, 1998.

³ See, e.g., Note No. 187, of 5 August 1977, from the Government of the United Kingdom to the United States Government (Department of State) concerning the extraterritorial reach of the 1977 amendments to the Export Administration Act. Reprinted in Lowe, *EXTRATERRITORIAL JURISDICTION: AN ANNOTATED COLLECTION OF LEGAL MATERIALS* (Grotius Pub. Ltd., London 1983), 147-149.

⁴ See, e.g., Brief of amicus curiae of the Government of Japan, *United States v. Nippon Paper Industries Co.*, No. 96-2001 (1st Cir., filed Nov. 18, 1996) in which the Government of Japan argued among other things that application of the Sherman Act to conduct by Japanese corporations occurring wholly within Japan is not valid under principles of international law and international comity, and that under well-established canons of construction, U.S. antitrust laws do not apply

against providing investigative or judicial assistance under bilateral or multilateral treaties; and unwillingness to recognize and enforce acts of U.S. courts or extradition requests upon conclusion of antitrust litigation. Blocking statutes, no matter how sporadically invoked, stand as reminders to the hostility that may confront efforts by a U.S. antitrust authority to exercise and to enforce its compulsory power in the affected jurisdiction. Other obstacles include limitations on recognition and enforcement of foreign court orders, particularly those for multiple damages.

Evidence Gathering

One persistent impediment to U.S. evidence gathering efforts in international antitrust matters is the government's limited ability to exercise its compulsory powers in order to obtain information located abroad. As a result, in international matters the government is unable to engage in standard information gathering practices, for example, searching the premises of a firm under investigation and seizing documents in the process. Compounding this situation is the fact that because evidence is located outside U.S. borders, there is a heightened possibility that essential information may be destroyed before U.S. antitrust authorities may have a chance to access it. Indeed, U.S. antitrust officials often emphasize that they are hindered in their efforts to aggressively pursue antitrust law violators because key documents and witnesses located abroad are often out of the reach of U.S. antitrust authorities.⁵

Substantive and Procedural Differences

Substantive and procedural differences between the U.S. and non-U.S. legal systems can also generate frictions between nations. For example, as mentioned above, the United States is constrained in its ability to compel production of information and access to non-U.S. witnesses located overseas.⁶ There are also significant differences between the U.S. and non-U.S. legal systems in the investigative and

to conduct occurring wholly within another country. *See also, e.g.*, In re Uranium Antitrust Litigation, 473 F.Supp. 382 (N.D. Ill. 1979) (No. 76-C-3830), Brief of *Amicus Curiae* The Government of Australia, Brief of *Amicus Curiae* The Government of Canada, Brief of *Amicus Curiae* The Government of The United Kingdom.

⁵ Joel I. Klein, Assistant Attorney General for Antitrust, U.S. Department of Justice, Prepared statement before the Subcommittee on Antitrust, Business Rights, and Competition, Committee on the Judiciary, United States Senate, (May 4, 1999) at 8; and (Oct. 2, 1998) at 5.

⁶ In civil matters, where information-gathering occurs routinely in both the investigation and pre-trial phases, and the government is authorized to exercise its compulsory powers by issuing civil investigative demands (CIDs) to persons located abroad as well as domestically. CIDs are used during the pre-filing stage of civil matters, and can be served internationally pursuant to U.S. law. Section 3 of the Antitrust Civil Process Act, 15 U.S.C. §1312. In criminal matters, grand jury subpoenas, in contrast, may not be served outside the territories of the United States unless directed at U.S. citizens. Nonetheless, valid service is recognized under U.S. law when it is made on a person within the United States, even if it compels production of information located abroad, *e.g.*, service of a grand jury subpoena upon a U.S. subsidiary of a non-U.S. corporation for information in the possession of the foreign parent is recognized as a valid exercise of compulsory power.

discovery features of litigation. In civil matters, parties to litigation in the United States have far broader powers to seek out information both prior to filing and during the pre-trial phase of an action than are available in most other jurisdictions. Such differences can exist even with other common-law jurisdictions, where the scope of party-driven discovery is narrower than in the United States.⁷ And in civil law jurisdictions, for instance, the equivalent of a discovery process is carried out by an impartial fact-finder in the person of a magistrate or a judge rather than the parties, as part of his or her responsibility to rule on matters in dispute. As a pragmatic matter, these differences may well thwart or place limits on U.S.-style efforts to gather information for use in antitrust investigations or litigation.

In a word, such differences between systems exist and can be sources of tension and certainly complexity. Cooperation between enforcement agencies offers the possibility of overcoming some of these obstacles. The following discussion examines the U.S. experience with international cooperation in the field of competition policy. It reviews the history and content of existing bilateral agreements as well as several multilateral recommendations. It then considers the cooperation that has occurred pursuant to these arrangements.

INTERNATIONAL COOPERATION THROUGH BILATERAL ARRANGEMENTS

The United States is currently a party to bilateral antitrust cooperation arrangements with seven jurisdictions, several important multilateral arrangements made under the auspices of the Organization for Economic Cooperation and Development (OECD), and the North American Free Trade Agreement (NAFTA). The United States is also an active participant in the deliberations of the Asia Pacific Economic Cooperation (APEC) forum. Chapter 5 shall consider more specifically the roles of the OECD and of the World Trade Organization, and their activities related to competition policy.

The Bilateral Antitrust Accords

The earliest formal bilateral antitrust cooperation agreement was signed with the Federal Republic of Germany in 1976. Later agreements involved Australia (1982), Canada (1984, superseded by a new agreement in 1995), the European Commission (EC) (1991, supplemented by a new agreement in 1998). In addition, in 1999, new agreements were signed with three countries: Israel, Japan and Brazil.⁸ Under

⁷ This is illustrated in the context of the Hague Convention of the Taking of Evidence Abroad in Civil and Commercial Matters, 23 U.S.T. 2555; T.I.A.S. 7444, a multilateral treaty under which assistance can be obtained for the purpose of taking depositions and gathering pre-trial evidence in connection with civil and commercial matters. Most of the approximately 50 parties to the Convention have specified that they will not provide pre-trial discovery of documents; *see generally*, GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS (3d ed. 1996) at 895-902.

⁸ *See* Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, United States-Federal Republic of Germany, 27 U.S.T. 1956, T.I.A.S. No. 8291, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,501; Agreement Between the Government of the United States of America and the Government of Australia Relating to Cooperation on

U.S. law, all of these bilateral agreements are so-called Executive Agreements. They are formal and binding international agreements, but they have not been ratified by the United States Senate as treaties and thus do not override any inconsistent provisions of U.S. law.

Each of these agreements reflects two themes: enforcement cooperation, on the one hand, and the avoidance or management of disputes, on the other. According to the U.S. Department of Justice, the extent to which one or the other of these themes has predominated in a particular agreement has depended on the specific bilateral concerns and history from which the agreement emerged.⁹ In addition, the most recent bilateral agreement includes a third theme, that of technical cooperation.

For example, the *German* agreement is focused predominantly on law enforcement cooperation, reflecting the strong post-World War II German antitrust enforcement tradition. As the earliest of these agreements, it is the least detailed. By contrast, the 1982 Australian and 1984 Canadian agreements centered more on conflict avoidance, which point of emphasis grew out of differences between the U.S. and these other governments over the *Uranium* antitrust litigation of the late 1970s and early 1980s in U.S. courts. Similarly, in the early 1980s, the United States and Australia were in heated dispute over a U.S. antitrust investigation involving ocean shipping in the U.S. - Australia/New Zealand trade. In negotiating these agreements, typically the United States had been concerned about preserving its ability to apply its antitrust laws to harmful anticompetitive conduct affecting U.S. commerce. The foreign government concern had been typically over ensuring that when its interests were affected, it would have advance notice and an opportunity for consultation and, further, that its interest would be considered in any enforcement action the U.S. might then undertake. While this is no longer a central concern in the negotiation of bilateral agreements today, it does apply in particular to earlier agreements.

Each of the bilateral agreements includes provisions for: acknowledgment of a mutual interest in cooperation; provisions for notification of specific antitrust enforcement activities that affect “important

Antitrust Matters, June 29, 1982, United States-Australia, T.I.A.S. No. 10365, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,502; Memorandum of Understanding Between the Government of the United States of America and the Government of Canada as to Notification, Consultation, and Cooperation with Respect to the Application of National Antitrust Laws, March 9, 1984, United States-Canada, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,503A; Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of their Competition and Deceptive Marketing Practices Laws, August 3, 1995, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,503; Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, September 23, 1991, 30 I.L.M. 1491 (Nov. 1991), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,504; and OJ L 95/45 (27 April 1995), corrected at OJ L 131/38 (15 June 1995); Agreement Between the Government of the United States of America and the Government of the State of Israel Regarding the Application of Their Competition Laws, March 15, 1999, 4 Trade Reg. Rep. ¶13,506; Agreement Between the Government of the United States of America and the Government of the Federative Republic of Brazil Regarding Cooperation Between Their Competition Authorities In the Enforcement of Their Competition Laws, October 26, 1999.

⁹ See World Trade Organization, Communication from the United States, *Approaches to Promoting Cooperation and Communication among Members including in the Field of Technical Cooperation*, WT/WGTCP/W/116 (April 15, 1999).

interests” of the other party and a commitment to give careful consideration to one another’s important interests during the course of undertaking enforcement activities; exchanges of information (other than that which is statutorily protected) through regular meetings between officials; and agreement that there may be situations in which authorities will make determinations about whether to take action or exercise forbearance by applying principles of traditional comity and positive comity provisions.¹⁰

One of the more significant recent developments contained in the modern bilateral antitrust cooperation agreements are the provisions regarding positive comity. The 1991 US-EC, the 1995 US-Canada, and the 1999 U.S.-Israel, U.S.-Japan, and U.S.-Brazil agreements include positive comity provisions. The principle of positive comity rests on the notion that each party agrees to give serious consideration to requests by the other party to take appropriate antitrust enforcement action against anticompetitive conduct within the requested party’s jurisdiction that adversely affects the requesting party’s important interests.¹¹ This differs from the notion of traditional comity, which refers to the general principle that one country should take another countries’ important interests into account in its own law enforcement in return for the first country doing the same. As with all other provisions of these agreements, such cooperation remains voluntary and discretionary.

The potential use of positive comity is an issue that this Advisory Committee has considered in some detail and in particular in the context of perceived harm to U.S. export commerce. It is not a new concept, but it is still in its early days of application. Indeed, only in 1998 did the U.S. conclude its first expanded positive comity agreement -- with the EC -- that clarifies the situations that would presumptively call for referrals and delineates the report-back and consultation mechanisms that would come into play once a referral has been made. As of this time, there has only been one case of a formal positive comity referral, which was initiated by United States and directed toward the EC, although there have been several reported instances of informal requests. Positive comity and its application are examined in detail in Chapter 5.

New Bilateral Antitrust Agreements

Before discussing the cooperation that has been achieved under these agreements, it is important to recognize that antitrust cooperation agreements continue to expand in several ways. In 1999, U.S. antitrust authorities entered into four bilateral antitrust agreements, including the first-ever agreement under the IAEAA, described in further detail below. The IAEAA agreement was signed with Australia, while

¹⁰ These provisions are not included in first-generation agreements with Germany and Australia.

¹¹ For example, in the 1995 Antitrust Enforcement Guidelines for International Operations, it states that “in determining whether to assert jurisdiction to investigate or bring an action, or to seek particular remedies in a given case, each Agency takes into account whether significant interests of any foreign sovereign will be affected.” U.S. DEPARTMENT OF JUSTICE/FEDERAL TRADE COMMISSION, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS 20 (1995) *reprinted in* 4 TRADE REG. REP. (CCH) ¶13,107 (1995).

non-IAEAA bilateral antitrust cooperation arrangements were signed with Israel, Japan, and Brazil. Each marks a new development in the cooperation building efforts of U.S. antitrust authorities, as briefly assessed below.

The first *IAEAA Agreement* was signed between the United States and Australia on April 27, 1999.¹² From a U.S. perspective, it was feasible to enter into such an agreement with Australia because of two features of the Australian system. First, Australia has a strong regime of confidentiality laws that will protect nonpublic information obtained from U.S. companies. Second, its laws authorize entry into agreements under which such information may be exchanged in antitrust matters.

The three other bilateral agreements signed in 1999 are modeled on the earlier agreements signed with Canada (1995) and the EU (1991). Key features in each include notification of enforcement activities, enforcement cooperation and coordination, positive comity, conflict avoidance, consultations, and exchange of antitrust-related information. Like other bilateral agreements, these neither alter any existing laws nor provide for the exchange of confidential information. Each agreement does have distinct features, as well. The *U.S.-Israel Antitrust Agreement* (signed March 15, 1999) is the first bilateral agreement between the United States and a young antitrust regime. The *U.S.-Japan Antitrust Agreement* (signed October 7, 1999) marks an important development in relations between U.S. and Japanese antitrust enforcement authorities, partly because of the long history of trade and economic tension between the United States and Japan.¹³ Finally, the *U.S.-Brazil Antitrust Agreement* (signed October 26, 1999) is the first to include provisions for technical cooperation. It is also the second agreement, after Israel, with a relatively young antitrust authority and the first with a developing economy.

Agreements Under the International Antitrust Enforcement Assistance Act (IAEAA)

To address statutory limitations on the ability of U.S. antitrust authorities' to request assistance in obtaining access to and otherwise exchanging confidential information among other things, in 1994, Congress passed the International Antitrust Enforcement Assistance Act (IAEAA).¹⁴ Specifically, the IAEAA provides that during the course of civil or criminal investigations U.S. antitrust enforcers can exchange confidential information, subject to certain conditions, as described below. In a concession to concerns about protections for business confidential and privileged information raised by business and legal

¹² The finalization process commenced with publication of the agreement in April 1997 the Federal Register for notice and comment, pursuant to the IAEAA's dictates, and subsequent consideration by the Australian Parliament.

¹³ Chapter 3 of this Report reviews that record, in particular those disputes where a feature of the U.S. complaint has centered on the perceived existence of anticompetitive or exclusionary business practices occurring in the Japanese market that inhibit access for U.S. firms.

¹⁴ Pub. L. No. 103-438, 108 Stat. 4597, 15 U.S.C. §§ 6200-6212.

groups during hearings on the IAEAA, the law specifies that its provisions for sharing information do not apply to confidential information obtained in a Hart-Scott-Rodino premerger notification process.¹⁵

A precondition to entering into an agreement under the IAEAA is that the potential partner antitrust authority be empowered to provide *reciprocal assistance* to U.S. antitrust authorities in response to a similarly qualified request. This extends to information already in the authorities' possession as well as to information that one authority requests assistance in obtaining from another jurisdiction. Such information may be obtained through the use of either voluntary or compulsory means. Importantly, assistance under an IAEAA agreement may be provided whether or not the conduct underlying a request would constitute a violation of the antitrust laws of the requested party.

The Act requires that countries provide protection of confidential and privileged information under their own laws commensurate with that under U.S. law. Further, nothing in any IAEAA agreement will compel any person to provide antitrust evidence in violation of any legally applicable right or privilege.

Specific limitations exist on the use that may be made of evidence obtained pursuant to a request under an IAEAA agreement, requiring it be used or disclosed only for the purpose and investigation for which it was requested with two exceptions: if the information is "essential to a significant law enforcement objective" and if the authority providing the information consents; or if the information has been made public through a use -- such as an enforcement proceeding -- consistent with that for which it was requested under the IAEAA agreement. These provisions are similar, in an antitrust-specific environment, to the type of assistance that is available to U.S. government agencies in criminal matters (under MLATs, discussed below) as well as civil matters.¹⁶

In addition, the IAEAA is constructed around a framework of safeguards for confidential and privileged materials, as described below in Box 1-C-1. Some of the more significant IAEAA provisions on confidentiality are summarized in a chart on the following page. The IAEAA is premised on the notion that any partner to an IAEAA agreement be authorized to provide assistance upon a request from the U.S. antitrust authorities and to maintain safeguards in effect to protect confidential and privileged information. At the same time, the IAEAA enables U.S. antitrust authorities to provide enforcement assistance to foreign antitrust enforcement authorities under certain circumstances.¹⁷ The circumstances are no less rigorous

¹⁵ Section 5(1) of the IAEAA, 15 U.S.C. §§ 6204(1).

¹⁶ In civil and administrative matters, several federal agencies may request and receive the type of assistance listed above. Indeed, language in the IAEAA was modeled on that contained in statutory provisions of the U.S. Securities and Exchange Commission, which form the statutory basis for the numerous SEC enforcement cooperation agreements with securities authorities around the world.

¹⁷ The IAEAA was patterned on legal authority conveyed to the U.S. Securities and Exchange Commission through which they have entered into an extensive network of information sharing and cooperation agreements, and adapted to take into consideration certain antitrust-specific concerns. See Testimony of Michael D. Mann, Director, Office of International Affairs, U.S. Securities and Exchange Commission, before the Subcommittee on Antitrust, Business Rights

than under existing U.S. law, including pursuant to requests that might be received in connection with criminal antitrust investigations from MLAT partners.

Mutual Legal Assistance Treaties for Use in Criminal Matters: Other Legal Instruments Under Which Enforcement Cooperation is Available

IAEAA's are one among several legal instruments available to facilitate cooperation and exchange of confidential matters. In criminal antitrust matters, U.S. antitrust authorities also may make use of non antitrust-specific U.S. channels for enforcement cooperation through the network of bilateral mutual legal assistance treaties in criminal matters (MLATs)¹⁸ that the United States has ratified since the mid-1970s. In contrast to the antitrust-specific cooperation agreements, the parties to these MLATs obligate themselves to assist one another in a variety of criminal matters -- in many instances, although not always, including antitrust crimes such as price-fixing -- by obtaining evidence located in one country for the benefit of the other country's law enforcement investigation. The Antitrust Division reports positive experiences using MLATs, although in most instances details of its experiences are not public. Standards for furnishing information pursuant to an MLAT request require a showing of particularized need and involve a case-by-case determination of whether to grant assistance in full or part. Use and disclosure of such information is strictly limited to the specific enforcement matter for which information is requested. All materials not passed into control of a presiding court in the prosecution must be returned at the conclusion of the matter.

and Competition, Committee on the Judiciary, United States Senate (August 4, 1994).

¹⁸ The United States has also entered into 30 MLATs and has signed at least 21 others that are awaiting ratification by the U.S. Senate or equivalent approval from the relevant foreign legislature before entering into force. Antitrust violations are criminal in a number of the countries with which the United States has MLATs and several of the jurisdictions with which signed agreements are awaiting ratification. Other countries have their own MLAT networks.

Box 1-C-1:

**Safeguards in IAEAA Agreements
for Confidential and Privileged Information**

- C U.S. assistance, in full or part, is conditioned upon approval on a case-specific basis by the U.S. Attorney General or the U.S. Federal Trade Commission, requiring a determination that the requesting authority: (i) will satisfy the assurances, terms and conditions described in the IAEAA concerning use, disclosure, or permitting the use or disclosure of evidence received pursuant to the request, (ii) will make available reciprocal assistance; (iii) is capable of complying with the confidentiality requirements applicable under the relevant IAEAA agreement and will do so; and (iv) a determination that granting the request is consistent with the public interest of the United States, taking into consideration the context of the requested assistance. (Sections 3, 8(a))
- C All legally applicable rights or privileges are protected for persons compelled to produce materials, testimony or statements in connection with an investigation initiated in response to a request under an IAEAA agreement, including protections for confidential and business sensitive information in the possession of the U.S. antitrust authorities and reciprocal rights in effect in foreign antitrust authority's jurisdiction. (Sections 3(d), 4(c))
- C U.S. antitrust authorities are prohibited from disclosing any antitrust evidence received under an IAEAA agreement that would violate such agreement, *except* that no IAEAA agreement may prevent the disclosure of such evidence to a defendant in an action or proceeding brought by either U.S. antitrust authority for a violation of any of the Federal laws if such disclosure would otherwise be required by Federal law. (Section 8(b))

IAEAA Agreements must contain: “an assurance that the foreign antitrust authority is subject to laws and procedures that are adequate to maintain securely the confidentiality of antitrust evidence that may be received under section 2, 3, or 4 and *will give protection to antitrust evidence received* under such section that is *not less than the protection provided under the laws of the United States to such antitrust evidence*”; citations and descriptions (including enforcement mechanisms and penalties) of the applicable confidentiality laws in each jurisdiction; “terms and conditions that specifically require using, disclosing, or permitting the use or disclosure of, antitrust evidence received under such agreement or such memorandum only— (I) for the purpose of administering or enforcing the foreign antitrust laws involved, or (ii) with respect to a specified disclosure or use requested by a foreign antitrust authority and essential to a significant law enforcement objective, in accordance with the prior written consent that the Attorney General or the Commission, as the case may be, gives after— [making various additional determinations];” the return of the evidence at the conclusion of an investigation; and automatic notification and termination provisions if confidentiality violations occur. (Section 12) (Emphasis added).

Regional Cooperation Arrangements

In the past few decades, regional organizations have become actively engaged on issues of competition law and policy. The growth in interest has as its corollary, growth in the role that antitrust laws are playing in jurisdictions who are members of these organizations. Competition policy matters are also embodied in at least an elementary manner in multilateral agreements, such as the North American Free Trade Agreement (NAFTA), and they are the subject of discussion and deliberation in a variety of other fora.

Asia-Pacific Economic Cooperation

The United States has been a key participant in the Asia-Pacific Economic Cooperation (APEC) forum since its inception in 1993. APEC is a deliberative forum which has as its goals the advancement of economic cooperation and trade and investment liberalization and facilitation. With the exception of certain mutual recognition agreements that have been developed under the aegis of APEC, it has not served as a forum for the development of binding agreements. Competition policy is a substantive area of interest in APEC. Work in this area has been undertaken in a series of annual workshops on competition policy and deregulation issues held under the aegis of the Committee on Trade and Investment. At their meeting in September 1999, APEC Leaders endorsed a set of non-binding principles developed by this workshop that are intended to act as “benchmarks” for member economies in their efforts to achieve dynamic competitive markets as well as in their efforts at regulatory reform.¹⁹

North American Free Trade Agreement

There is some rudimentary coverage of competition policy matters under the North American Free Trade Agreement (NAFTA). Specifically, NAFTA’s Chapter 15 contains four substantive articles: Article 1501 requires each party to “adopt or maintain measures to proscribe anti-competitive business conduct and take appropriate action with respect thereto” and requires the parties to cooperate on “issues of competition law enforcement policy, including mutual legal assistance, notification, consultation and exchange of information relating to the enforcement of competition laws in the free trade area.” The provision specifically excludes dispute settlement for any matter arising under the article. Article 1502 sets forth rules regarding official monopolies including requirements of transparency and nondiscriminatory treatment to the investors, goods or service providers of another party. Similarly, Article 1503 sets forth rules concerning state enterprises that requires parties to ensure that state enterprises do not act inconsistently with other provisions of the agreement and that they act in a nondiscriminatory fashion toward other parties. Article 1504 established a Working Group on Trade and Competition to make

¹⁹ “APEC Principles to Enhance Competition and Regulatory Reform: Open and Competitive Markets are the Key Drivers of Economic Efficiency and Consumer Welfare” (1999).

recommendations on further work as appropriate within five years of entry into force of the Agreement. While recommendations were due in late 1998, no recommendations have been released as of this writing.

Article 15 of NAFTA does not attempt to harmonize procedural rules nor to articulate general standards. In 1994, the American Bar Association proposed eight framework principles for developing the competition principles of NAFTA and, in an extensive report, a task force of the ABA Antitrust Section provided an elaboration of how those principles might be put into practice.²⁰ The NAFTA 1504 Working Group, however, apparently did not choose to use the regional agreement to deepen competition policy across borders.

Assessment of Cooperation Pursuant to Bilateral Agreements and Other International Arrangements

It appears that cooperation is now occurring on specific enforcement matters and across the spectrum of civil and criminal cases. Multijurisdictional mergers are one area where this now occurs regularly. This is examined in considerable detail in Chapter 2 herein. There have also been several civil nonmerger cases that illustrate a new degree of cooperation between U.S. and foreign authorities. For example, in 1994, the Department of Justice and the European Commission's European Competition Directorate (DG-COMP, formerly known as DG-IV) conducted parallel investigations of anticompetitive practices by *Microsoft* that resulted in a single, jointly negotiated and coordinated remedy, implemented by a virtually identical court decree in the U.S. and an undertaking in Europe. According to the U.S. Department of Justice, this degree of cooperation was possible because Microsoft agreed to waive confidentiality restrictions on information it had provided to the investigating authorities, and the staffs on both sides of the Atlantic consequently were able to coordinate their investigations to a degree that could not have been achieved otherwise.²¹

A case that is often referred to as an informal positive comity referral occurred in 1996, where the Department of Justice conducted an investigation of *AC Nielsen* to determine whether Nielsen offered customers more favorable terms in countries where Nielsen had market power if those customers also used Nielsen in countries where it faced significant competition. The European Commission also investigated the case, since most of the conduct occurred in Europe and had a direct impact on consumers there. There was close contact between the staffs of both agencies, indeed the agencies ultimately publicly lauded the level of cooperation they achieved: not only as an example of conditional deference of jurisdiction to the party most closely connected to the conduct, but also for their high level of cooperation, which was enhanced because they were able to exchange confidential information pursuant to a waiver. In this instance, the U.S. Department of Justice closed its investigation when it became clear that it made sense

²⁰ ABA SECTION OF ANTITRUST LAW, *THE COMPETITION DIMENSION OF NAFTA* (1994).

²¹ See World Trade Organization, Communication from the United States, *Approaches to Promoting Cooperation and Communication among Members including in the Field of Technical Cooperation*, WT/WGTCP/W/116 (April 15, 1999).

to have DG-COMP take the lead. There have been other such cases that are matters of public record.²² And, in April 1997, DOJ announced its first positive comity request to the EC under the 1991 agreement. That case is discussed in greater detail in Chapter 5.

It is too early to gauge cooperation under the IAEEA agreements between the United States and Australia. The U.S.-Australian agreement provides a vehicle for the signatory authorities to request broad assistance in criminal and civil nonmerger antitrust matters, including exercises of compulsory power to obtain testimony and documentary information. Notably, though, because the universe of nonmerger cases involving U.S. and Australian interests is relatively small, this agreements is unlikely to impact the enforcement landscape significantly.

Over the past decade, U.S. antitrust authorities have benefited from enforcement assistance in several criminal cartel matters. The Antitrust Division describes using MLATs -- most notably the one with Canada²³ -- to obtain foreign-located documents and witness testimony in connection with several different U.S. investigations into international cartels. It also reports receiving assistance in some matters through informal mechanisms. These experiences are discussed in Chapter 4.

It also appears that competition officials in a number of countries are interested in expanding the number of such bilateral agreements to which they are a party and deepening the range of areas of coverage, at least with the United States. At ICPAC hearings for example, Canadian, EC and other officials indicated their interest in exploring possibilities for MLATs or IAEEA arrangement or other bilateral arrangements.²⁴

In sum, bilateral antitrust cooperation agreements appear to be an important instrument for fostering cooperation between U.S. and foreign competition authorities. In some instances this is resulting in cooperation on specific enforcement matters, while more generally these instruments are being used to deepen contacts and communications, which over time appear to be useful and necessary building blocks to still greater cooperation. Nevertheless, in many respects, at present the bilateral agreements still remain limited instruments. Because they do not alter existing law or otherwise expand the powers of antitrust

²² For example, the FTC closed an investigation in 1997 in view of an enforcement action by the Italian Competition Authority. This was a case involving a production quota maintained by *Parma ham producers* seen as adversely affected consumers both in Italy and in export markets, including the United States. The FTC decided to stay its hand once it became apparent that the Italian investigation was underway and the remedy likely to address FTC concerns.

²³ The U.S.-Canada MLAT entered into force in 1990.

²⁴ Some jurisdictions other than the United States have their own active bilateral cooperation agenda. The EU is the most dramatic example. The European Commission entered into bilateral cooperation agreements with the United States and Canada (June 1999). Additionally, Australia has been active, signing agreements with the United States and providing for competition law cooperation in its 1994 agreement with New Zealand and in a bilateral competition assistance agreement with Taiwan (1996). New Zealand has also entered into a bilateral Antitrust cooperation agreement with Taiwan (1997).

authorities, they do not expand possibilities for the sharing of confidential or privileged information without the provider's consent, including statutorily protected information, commercially sensitive or privileged information, or nonpublic investigatory information. They may not provide a mechanism for resolving disputes that continue after the end of consultations. Further, the agreements do not implicate substantive law nor seek to reach any formal procedural harmonization between the signatory jurisdictions.²⁵

The specific contribution of bilateral instruments will hinge on the particular characteristics of the jurisdictions that are entering into them. Bilateral cooperation arrangements are likely to offer the United States meaningful assistance on a matter of enforcement priority for the U.S. In other instances, bilateral cooperation arrangements may provide an opportunity for the United States to encourage the development of new competition agencies.

²⁵ See generally A. Douglas Melamed, Principal Deputy Assistant Attorney General for Antitrust, U.S. Department of Justice, *An Important First Step: A U.S./Japan Bilateral Antitrust Cooperation Agreement*, Address before the Japan Fair Trade Institute (November 12, 1998) at 6-10.