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Business increasingly competes in a global marketplace. Though borders of nations once largely contained commerce, now all types of transactions occur across those borders. Aided by an increased consumer demand for foreign goods,[1] by the deflation of grand-scale ideological division and isolationism that divided the world during the Cold War, and by the proliferation of sophisticated communication technologies, countries have brought their cultures and businesses into close contact. Marked expansion of transnational trade in goods and services has followed the increasing familiarity and, in turn, interdependence of countries. Now, however, businesses venture beyond their nations' boundaries to fulfill a variety of demands, not just to find new markets. They seek, for example, more efficient production facilities, different technologies, ideas for products, partners for joint ventures, and expertise in specialized fields.[2] Businesses are thus becoming more international and less easily identifiable by nationality.[3]

This new international economic activity affects antitrust enforcement. Whereas enforcement of competition laws[4] once occurred within a single country where both the conduct and most of its effects could be found, the acts and

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1. *See* David J. Gerber, *Symposium on Antitrust Law and the Internationalization of Markets, Foreword: Antitrust and the Challenge of Internationalization*, 64 CHI.-KENT L. REV. 689, 691-92 (1988).

2. *See id.* at 689.

3. *See* ROBERT S. REICH, THE WORK OF NATIONS: PREPARING OURSELVES FOR 21ST-CENTURY CAPITALISM 113 (1991).

4. The terms "competition" and "antitrust" are used interchangeably throughout this paper, though in some contexts they may imply different subject matters.

consequences of today's commerce may be spread across many different nations. Consequently, domestic antitrust offices will want to prosecute conduct that occurs abroad because it affects domestic markets. According to Anne Bingaman, Chief of the Antitrust Division at the U.S. Department of Justice, international antitrust issues are "at the forefront" of the Department's agenda.[5] A new international focus by antitrust offices will also mean that certain international conduct that affects many markets will be the focus of antitrust investigations by more than one country.

These new types of enforcement situations create dilemmas for governments, their competition agencies, and the private sector. The Antitrust Division and its counterparts in other countries, though they may want to pursue foreign companies, know that obtaining evidence with which to prosecute is procedurally challenging and diplomatically risky. They can certainly gather information about domestic companies, but that is, at best, only part of the evidence they need. Without enough evidence, they cannot prove their cases.[6] Companies, for their part, are often frustrated by multiple and conflicting requirements that several countries' investigations impose on them.

An obvious path to addressing these difficulties is to increase cooperation among the competition offices of different nations. Establishing a direct channel through which critical information about companies can flow would help the competition agencies' investigative efforts as well as facilitate the coordination of their enforcement activities. Several countries, as well as the European Union (EU), have antitrust cooperation agreements.[7] Some of these agreements, which establish nonbinding mechanisms allowing different countries' antitrust offices to share information, have enjoyed moderate success in encouraging countries to communicate.[8]

None of the civil antitrust arrangements, however, allow the sharing of the information often most helpful to international antitrust enforcement and cooperation: information classified as confidential. The information that countries protect through confidentiality laws—internal documents, information received from companies, investigatory findings—is the most valuable for enforcement actions, and the hardest to obtain. As one antitrust official lamented, a "wall of silence" around each antitrust agency prevents them from communicating in a meaningful

5. Anne Bingaman, Address at Stanford Law School Sponsored by the Law and Business Society (Feb. 8, 1994).

6. *See infra* text accompanying note 13.

7. For example, *see infra* notes 136-42 and accompanying text. For the purposes of this paper, and in light of the recent change in nomenclature, the EC Commission will retain its name, and the European Community (EC) will be referred to as the EU, or European Union.

8. For one example, see the discussion of the U.S.-EU agreement *infra* note 136 and accompanying text.

way.[9] In addition, none of the civil antitrust arrangements allow one authority to collect information on another's behalf using their compulsory powers.

To address this growing problem, the United States and the rest of the international community must act soon. They should draft bilateral and eventually a multilateral agreement that would allow them to cooperate with one another. Most importantly, the final agreements, whether modifications of existing arrangements or new efforts, must provide for reciprocal access to nonpublic files. The agreements should also encourage antitrust offices to use their compulsory powers of evidence gathering on one another's behalf. Without these new agreements, existing competition offices will not remain effective enforcers of antitrust law.

A new U.S. law, the International Antitrust Enforcement Act of 1994,[10] represents an important first step in the direction of better cooperation. The Act allows the Antitrust Division to enter into international cooperation agreements with its sister agencies.[11] Other countries should follow suit in passing such legislation so the process of drafting and negotiating new cooperation agreements can begin quickly.

This article analyzes the problem of cooperation in the international antitrust field and suggests a specific approach for addressing it. Part I identifies the need for better confidential information-sharing arrangements and other substantial cooperation among the competition offices of different countries. Part II highlights some of the obstacles to antitrust information sharing in general, and to confidential information sharing in particular. Part III is a review of the current arrangements that countries use to gather antitrust evidence, both in general and in the competition area. Part IV outlines progressive arrangements in other enforcement areas (for example, securities) that may serve as models for an antitrust arrangement. Finally, Part V draws on the preceding analysis to propose several principles that could provide guidance for new agreements that promote better cooperation in the field of antitrust enforcement.

I. The Importance of Cooperation in International Antitrust Enforcement

As competition is internationalized, domestic antitrust offices will find it increasingly difficult to regulate anticompetitive behavior without cooperation from

9. *Panelists Probe Prospect of Harmonization of Antitrust, Review EC Merger Developments*, 62 ANTITRUST & TRADE REG. REP. 664, 668 (1992) [hereinafter *Panelists Probe*] (quoting former Dep. Ass't Att'y Gen. Charles A. James).

10. The International Antitrust Enforcement Assistance Act of 1994, Pub. L. No. 103-438.

11. *Id.*; *see* Jeremy Kahn, *U.S. Acts to Boost Antitrust Efforts*, FIN. TIMES, June 14, 1994, at 5; *Clinton Signs Bill to Help Enforcers Obtain Foreign-Located Antitrust Evidence*, BNA, MANAGEMENT BRIEFING, Nov. 3, 1994 [hereinafter *Clinton Signs Bill*]; Bingaman, *supra* note 5.

their counterparts abroad.[12] "[T]he heart of any American antitrust case is the discovery of business documents," and current laws make these documents very difficult to obtain.[13] Bingaman states: "[T]he most significant obstacle to our international enforcement efforts has been our limited ability to get information and documents from outside the U.S. in order to build a case that will stand up in court."[14] To demonstrate the parameters of the problem, she offers a hypothetical example involving an international price-fixing cartel in a highly concentrated, large industry whose members are located in the United States and another country, and whose conduct is directed at both markets.[15] Both countries have laws that prohibit such collusion, and both competition offices are interested in investigating and prosecuting the conduct.[16] The heart of the governments' cases will be evidence that shows the existence of price-fixing. This information could include a memorandum of a phone call made to a competitor, a calendar entry of a meeting of competitors with no obviously legitimate purpose, or a copy of a competitor's price list.[17]

The authorities logically start by collecting information about the company located within their own country using the compulsory powers allocated to them under domestic law. They will likely have to classify the information they collect as confidential.[18] Once both offices have the information they need from the domestic manufacturer, they are faced with trying to procure information from the company that is located abroad. Domestic discovery methods will prove fruitless. Further, competition authorities will not be able to cooperate with foreign sister enforcement agencies to resolve their discovery quandry, because they lack agreements that overcome the confidentiality problem.

Bingaman explains the frustrating situation: The Antitrust Division has no authority to subpoena documents for the foreign enforcement officials, share documents with them, or even disclose what documents it has.[19] The two competition offices each have only part of the information they need to prosecute the

12. *See* Gerber, *supra* note 1, at 700.

13. *In re* Uranium Antitrust Litig., 480 F. Supp. 1138, 1155 (N.D. Ill 1979).

14. *Clinton Signs Bill, supra* note 11.

15. Bingaman, *supra* note 5. This hypothetical is the most simple case because it involves only two countries. The same scenario would apply if the cartel were spread across many countries and engaged in price fixing in several countries. Ironically, confidentiality laws prevented some officials in antitrust authorities from giving more specific examples of instances when they would have wanted an information-sharing agreement.

16. AMERICAN BAR ASSOCIATION, REPORT OF SPECIAL COMMITTEE ON INTERNATIONAL ANTITRUST 31 (1991) [hereinafter ABA] ("[T]he harmful effects of cartel conduct are increasingly likely to impact international business").

17. Telephone Interview with Charles S. Stark, Chief of International Commerce Section of Antitrust Division at U.S. Department of Justice (Mar. 4, 1994).

18. *See* text Part II.C.

19. *See* Bingaman, *supra* note 5; *see also infra* notes 62-74 and accompanying text; ABA, *supra* note 16, at 8. The Canada/U.S. Mutual Legal Assistance Treaty (MLAT) might be available in this situation. *See infra* notes 155-58 and accompanying text.

cartel. Each has information the other needs, and domestic confidentiality laws bar both from sharing their most compelling information. To be sure, the public information each has and could share under an exisiting arrangement could be significant. But the information key to the prosecution, that is the documents that demonstrate the existence of price-fixing, would be unreleasable.[20] These difficulties understandably discourage authorities from prosecuting international antitrust cases.[21]

The problems described above are not hypothetical or harmless. The case Bingaman describes mirrors a U.S. enforcement effort that has recently resulted in grand jury indictments. For two years, the Department of Justice has been investigating an alleged conspiracy to fix prices of industrial diamonds in world markets. The parties involved, General Electric Company and a unit of the De-Beers group, now control 80 percent of the market.[22] The investigation has been hampered by difficulties in getting information from Europe that might show that mid-level managers in Belgium and Germany discussed prices in 1991 and 1992.[23] This conspiracy potentially allows substantial illicit gains by the two companies involved. Yet the antitrust agreement between the United States and Germany is inadequate to help the countries tackle it.[24]

Ideally, increased information sharing in individual cases could pave the way for substantive cooperation in the international community, which, in turn, could aid antitrust enforcement. As countries communicate about cases, procedures, and laws, they will learn more about each other's enforcement regimes, and will develop relationships that could lead to better coordination. Currently, an international merger or joint venture can be subject to enforcement by many countries applying disparate policies.[25] An extreme example is the Gillette-Wilkinson leveraged buy-out and acquisition, which fourteen different countries' antitrust authorities investigated to some degree.[26] The coordination of these types

20. For a discussion of domestic confidentiality laws, see *infra* notes 66-74 and accompanying text.

21. *See* Owen P. Martikan, *The Boundaries of the Hague Evidence Convention: Lower Court Interest Balancing After the Aerospatiale Decision*, 68 TEX. L. REV. 1003, 1029 (1990).

22. Keith Bradsher, *U.S. Indicts G.E. and De Beers in Diamond Pricing*, N.Y. TIMES, Feb. 18, 1994, at D1.

23. William M. Carley & Amal Kumar Naj, *Price-Fixing Charges Put GE and De Beers Under Tough Scrutiny*, WALL ST. J., Feb. 22, 1994, at A1. One way the Justice Department managed to get information was to arrest a key official while he was traveling in the United States. Zachary Schiller & Patrick Oster, *For GE, a Time Bomb in Ohio?*, BUS. WK., Feb. 14, 1994, at 30.

24. An example of the need for these arrangements is the Wood Pulp case, Case 85/202, *In re* Wood Pulp Cartel, 1985 O.J. (L 85) 1, [1985] 3 C.M.L.R. 474. In that case, the EC Commission prosecuted a cartel whose members were located in Canada, Finland, and the United States. DG-IV, the EU antitrust directorate, would undoubtedly have benefited by an arrangement that allowed it to solicit confidential information from competition agencies in those countries, or allowed those countries to use their compulsory powers to gather information on behalf of the Commission.

25. *See* ABA, *supra* note 16, at 1.

26. *See* MERGER CASES IN THE REAL WORLD: A STUDY OF MERGER CONTROL PROCEDURES 66-83 (1994); *OECD Lacks Enthusiasm for Draft International Antitrust Code*, BNA INT'L BUS. & FIN. DAILY, Dec. 15, 1993.

of investigations might eventually lead to international convergence of substantive antitrust regulations. Attempts to implement an international antitrust code are premature, but may be successful in the future, especially in an atmosphere of cooperation.[27] Such a code could eventually lead to a unified system in which antitrust offices could more easily control international anticompetitive conduct.

Not surprisingly, many studies have recognized the need for international antitrust cooperation agreements. In 1984, an Organization for Economic Cooperation and Development (OECD) publication noted that "[i]t is . . . vitally important that adequate procedures exist to enable competition authorities to obtain sufficient information to evaluate the effects or legality of commercial activities."[28] The publication further recommended that:

> [OECD] Member countries should supply each other with such relevant information on restrictive business practices as their significant national interests permit them to disclose. Where confidentiality considerations constrain such cooperation, Member countries should consider such measures as may be necessary and appropriate to enable them to supply information or reply to requests from foreign competition authorities, provided that adequate assurances to preserve the confidentiality of the information are received from those authorities.[29]

In 1991, the American Bar Association's Special Committee on International Antitrust observed that current information exchanges among antitrust enforcement agencies "are at present restricted to non-confidential information [which] greatly limits the potential utility of these exchanges, since much of the truly pertinent information will have been received in confidence from the parties themselves or third parties."[30] The Committee proposed that countries amend their national confidentiality laws to allow agencies to share information submitted to them for purposes of an investigation.[31] In a 1993 report to the OECD, Professors Richard A. Whish and Diane Wood[32] recommended both greater general cooperation in the process of merger review, and consideration of a system in which parties could choose to waive their confidentiality rights to permit cooperation between agencies.[33] They also noted the advantages of competition authorities

27. *See OECD Lacks Enthusiasm for Draft International Antitrust Code*, *supra* note 26; *International Antitrust Code Will Be Studied by GATT Members*, 65 ANTITRUST & TRADE REG. REP. 259, 259 (1993); Eleanor M. Fox, Antitrust, Trade and the Twenty First Century—Rounding the Circle, The Handler Lecture, Address Before the Association of the Bar of the City of New York (May 26, 1993).

28. ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, COMPETITION LAW ENFORCEMENT: INTERNATIONAL COOPERATION IN THE COLLECTION OF INFORMATION 73 (1984) [hereinafter COMPETITION LAW ENFORCEMENT].

29. *Id.* at 75.

30. ABA, *supra* note 16, at 190.

31. *See id.*

32. Diane Wood is now the Deputy Assistant Attorney General for International Antitrust at the U.S. Department of Justice.

33. *See* MERGER CASES IN THE REAL WORLD, *supra* note 26, at 103-05. Parties might agree to waive their confidentiality rights if they believed that a consolidated merger review process would mean cost savings.

collecting information for one another.[34] Many other professionals in the antitrust field have also called for increased cooperation and consultation.[35]

II. Obstacles to a Strong Information-Sharing Agreement

Although countries generally agree on the need for better cooperation, their laws, habits, and fears pose barriers to implementation. Countries have achieved considerable progress regarding cooperation agreements, but to make further strides they must continue to address certain obstacles. These potential barriers—differing antitrust policies, concerns over national economic interests, and national confidentiality laws—must be anticipated to move towards a better cooperation regime.

A. Differing Approaches to Antitrust

Competition laws evolved independently in different countries to suit different needs. Stated and unstated objectives for competition policy, therefore, vary significantly among nations.[36] These differing objectives can pose barriers to antitrust cooperation, especially in the sharing of sensitive material. When an antitrust office that is solicited for information does not agree with the goal of the other country's investigation, that office may be unenthusiastic about cooperating. "It is axiomatic that in anti-trust matters the policy of one state may be to defend what it is the policy of another state to attack."[37]

The controversy surrounding the U.S. extraterritorial application of its antitrust laws illustrates the difficulties that can arise from conflicting approaches to antitrust.[38] U.S. law sometimes permits the prosecution of antitrust misconduct that

34. *Id.* at 98.

35. *See, e.g.*, ABA, *supra* note 16, at 191; Gerber, *supra* note 1, at 703-04 ("Increasing internationalization of competition combined with jurisdictional limits on the capacities of individual states to achieve their regulatory goals by themselves means that the U.S. will become increasingly dependent on foreign cooperation to accomplish its economic regulatory objectives.").

36. *See generally* Joseph P. Griffin, *EC/U.S. Antitrust Cooperation Agreement: Impact on Transnational Business*, L. & Pol'y Int'l Bus., June 22, 1993, at 51; Fox, *supra* note 27, at 14-29 (discussing EU competition law and comparing it to that of the United States); W.S. Comanor et al., Competition Policy in Europe and North America: Economic Issues and Institutions (1990) (nationals from major industrialized countries describing their different antitrust policies); Erika Nijenhuis, Comment, *Antitrust Suits Involving Foreign Commerce: Suggestions for Procedural Reform*, 135 U. Pa. L. Rev. 1003, 1005 & nn.13-14 (1987) (noting that developing nations approach antitrust from a different perspective); Thomas W. Dunfee & Aryeh S. Friedman, *The Extra-Territorial Application of United States Antitrust Laws: A Proposal for an Interim Solution*, 45 Ohio St. L.J. 883, 891 & nn.49-50 (1984) (explaining that Western and Islamic countries have different perspectives).

37. Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., 1978 App. Cas. 547, 617 (H.L. 1977).

38. The issue of extraterritorial application of U.S. antitrust laws is complex and controversial. *See, e.g.*, Gary B. Born & David Westin, International Civil Litigation in United States Courts 590-617 (2d ed. 1992); Erik Nerep, Extraterritorial Control of Competition Under International Law (1983); Cecil J. Olmstead, Extra-Territorial Application of Laws and Responses Thereto (1984); Warren Pengilley, *Extraterritorial Effects of United States Commercial*

harms U.S. consumers, even when the acts in question have taken place abroad.[39] Other countries, including the United Kingdom, have perceived such wide jurisdiction to be an infringement of their sovereignty. After the *Rio Tinto Zinc* litigation, for example, which involved the U.S. Department of Justice supporting extraterritorial discovery requests regarding a uranium cartel,[40] Britain adopted the 1980 Protection of Trading Interests Act, which allows nationals to resist complying with certain discovery orders of foreign authorities.[41] This Act also permits British courts to refuse to enforce foreign judgments that "infringe[] the jurisdiction of the United Kingdom."[42]

Another example of the different national views of antitrust involves the varying opinions regarding the Japanese treatment of their *keiretsu* (a term that refers to close business alliances). The U.S. government and commentators have accused Japan of being excessively tolerant to arrangements that deprive outside companies of economic opportunity; the Japanese government disagrees with that assessment, and permits such associations.[43] Because of their differing views, Japanese and American antitrust agencies will likely be unwilling to help each other prosecute some types of conduct.

Countries have cooperated despite these differences. As illustrated in Part III, antitrust offices have exchanged nonconfidential information even when they have ideological disagreements. One way future bilateral agreements could minimize this problem is by making cooperation explicitly not contingent upon the assisting country's evaluation of the merits of the requesting county's investigation.[44]

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and Antitrust Legislation: A View from "Down Under," 16 VAND. J. TRANSNAT'L L. 833 (1983); P.C.F. Pettit & C.J.O. Styles, *The International Response to the Extraterritorial Application of United States Antitrust Laws*, 37 BUS. LAW. 697 (1982); Peter N. Swan, *International Antitrust: The Reach and Efficacy of United States Law*, 63 OR. L. REV. 177 (1984); John H. Shenefield, *Thoughts on Extraterritorial Application of the United States Antitrust Laws*, 52 FORDHAM L. REV. 350 (1983); Andreas F. Lowenfeld, *Antitrust, Interest Analysis, and the New Conflict of Laws*, 95 HARV. L. REV. 1976 (1982) (book review); Eleanor M. Fox, *Extraterritoriality, Antitrust, and the New Restatement: Is "Reasonableness" the Answer?*, 19 N.Y.U. J. INT'L L. & POL. 565, 577 (1987); J.S. Stanford, *The Application of the Sherman Act to Conduct Outside the United States: A View from Abroad*, 11 CORNELL INT'L L.J. 195 (1978).

39. *See* BORN & WESTIN, *supra* note 38, at 590; *Justice and FTC Issue Draft Guidelines on International Antitrust Enforcement*, 67 ANTITRUST & TRADE REG. REP. 488 (1994).

40. Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., 1978 App. Cas. 547 (H.L. 1977).

41. Protection of Trading Interests Act (PTIA) 1980, ch. 11, § 2 (Eng.); *see* BORN & WESTIN, *supra* note 38, at 603 & n.89; RICHARD P. WHISH, COMPETITION LAW 386 (3d ed. 1993).

42. *See* PTIA, *supra* note 41, § 4.

43. *See Seminar Examines Operation and Impact of Keiretsu System*, 61 ANTITRUST & TRADE REG. REP. 616, 617 (1991); Robert L. Cuts, *Capitalism in Japan: Cartels and Keiretsu*, HARV. BUS. REV., July-Aug. 1992, at 48. Japan and the United States have undertaken a series of negotiations known as the Structural Impediments Initiative which has addressed the issue of Japanese antitrust enforcement. *See* ABA, *supra* note 16, at 107; FOX, *supra* note 27, at 13.

44. For a sample provision, see text part V.E.

B. Concern over National Economic Interests

Another obstacle to smooth cooperation between antitrust offices is the specter of damage to national industry. Antitrust enforcement often implicates significant economic interests. When those interests work to the benefit of one country but to the detriment of another, the latter country may not be willing to cooperate in prosecuting an alleged wrongdoer.[45] The reluctance to share information may come from a fear of aiding competitors in other countries or of harming one's own industry. For example, without significant assurances of confidentiality, an antitrust office may be hesitant to reveal competitively sensitive information (such as the kind obtained in a merger investigation about a company's future plans) to a competition office in the country where the chief rival of that company is headquartered.

Likewise, when foreign prosecution directly threatens the financial health of an important domestic company industry, a competition office may not want to aid in that prosecution. Some countries' blocking statutes, which prohibit the release of sensitive information to other countries, make this form of noncooperation explicit.[46] This phenomenon may be even more prevalent in an internationalized marketplace where countries seek to bolster the competitiveness of their domestic firms in the face of international competition.[47] One well-known incident, the Laker affair, may have involved such concerns.[48] The case involved Laker Airways, which filed a $1.7 billion antitrust action in U.S. district court, alleging a price-fixing conspiracy. The British airlines named as defendants, including British Airways, obtained an injunction from a lower British court, which prevented Laker from pursuing the suit in U.S. court, based on the claim that the U.S. court was infringing the sovereignty of the United Kingdom by asserting jurisdiction.[49] The House of Lords, however, overturned the lower court's decision, paving the way for the suit, and acknowledging U.S. jurisdiction. The British government under Prime Minister Margaret Thatcher was dismayed at this outcome: "The Government reacted with understandable consternation [at the House of Lord's ruling]. For Whitehall's lawyers were only too aware

45. *See, e.g., Panelists Probe, supra* note 9, at 668 (comments of former Dep. Ass't Att'y Gen. Charles A. James regarding self-interest of nations).

46. *See infra* notes 106-07 and accompanying text; *see, e.g.*, French Act of July 16, 1980, on Communication to Foreign Persons of Documents and Information Relating to Economic, Commercial or Technical Matters, No. 80-538, J.O., 17 Juillet 1980, at 1799 (limiting transmission of information related to "essential economic interests" of France).

47. The very conduct that concerns foreign governments—the cartelization of domestic firms, for example—may be exactly what a domestic authority would be reluctant to prosecute when that arrangement could make domestic firms more viable in an internationally competitive marketplace. *See* Gerber, *supra* note 1, at 693.

48. For a thorough account of the facts, see Daryl A. Libow, *The Laker Antitrust Litigation: The Jurisdictional "Rule of Reason" Applied to Transnational Injunctive Relief*, 71 Cornell L. Rev. 645, 655-6 (1986); ABA, *supra* note 16, at 151-52.

49. *See* ABA, *supra* note 16, at 151.

that trial by jury in the civil action posed an inevitable risk for [British Airways] and its privatisation plan."[50] One explanation for the British government's reaction is that it feared the impact of treble-damage liability on the financial security of British Airways. The government then owned the airline but had scheduled it for privatization as the "flagship" of the Thatcher privatization scheme.[51] In the end, the British government not only refused to support an enforcement effort but lobbied against the prosecution of British defendants. In the face of heavy diplomatic pressure from the British government,[52] the Reagan administration eventually called off the U.S. grand jury investigation.[53]

Governments may also want to protect their export cartels from prosecution by foreign antitrust authorities. Many countries do not prosecute cartels that only export goods to other countries, or pure export cartels.[54] For example, France excludes pure export cartels from prohibition under French competition law.[55] Japan allows export cartels if the government is first notified under the Export and Import Transactions Law.[56] If the cartel in question does not harm competition in the country where it is located, but does contribute significantly to GNP, the home country may be unwilling to aid a foreign country that wants to prosecute the cartel. For example, an agreement that would have allowed the EC Commission in the wood pulp case[57] to receive information that other competition offices had

50. DUNCAN CAMPBELL-SMITH, STRUGGLE FOR TAKE-OFF: THE BRITISH AIRWAYS STORY 172 (1986).

51. *See id.* at 3; *see also* Annika Doos, *Cheap Flight Champion Ends Legal Fight, Paves Way for BA Sale*, REUTERS N. EUR. SERVICE, Aug. 22, 1985.

52. *See* CAMPBELL-SMITH, *supra* note 50, at 173, 195.

53. *See* Carole A. Shifrin, *Laker Airways Antitrust Suit Nears Settlement for $48 Million*, AVIATION WK. & SPACE TECH., July 22, 1985, at 27; ABA, *supra* note 16, at 152.

54. *See* ABA, *supra* note 16, at 40.

55. French law prohibiting alliances and other concerted action is found in article 7 of the primary competition law. *See* Article 7 of Ordonnance no. 86-1243 du 1er décembre 1986 relative à la liberté des prix et de la concurrence (Modifié par loi no. 87-499 du 6 juillet 1987) [hereinafter Ordonnance no. 86-1243] *in* MINISTRE DE L'ECONOMIE DES FINANCES ET DU BUDGET, CONCURRENCE, CONSOMMATION, FRAUDES 59 (1991) (Ordinance No. 86-1243 of December 1, 1986, Relating to Freedom of Prices and Competition (Fr.), *reprinted in* J. WILLIAM ROWLEY & DONALD I. BAKER, INTERNATIONAL MERGERS: THE ANTITRUST PROCESS 333 (1991)). But article 62 of the Price Ordinance No. 45-1483, issued on June 30, 1945, specifies that "exports abroad direct or through an agent" are not disallowed, and are thus exempted from article 7. B3 WORLD LAW OF COMPETITION § 2.06[2], at FRA 2-36 (Julian O. von Kalinowski ed., 1987); *see* ABA, *supra* note 16, at 43 n.13. Other countries have similar provisions allowing export cartels. *See id.* at 40-73.

56. *See* Yushutsunyu torihiki ho [Export and Import Transactions Law], Law No. 299 of 1952, as amended 1965, *translated in* JAPAN FOREIGN TRADE NEWS 348-73 (spec. ed. 1974). The United States, under the Webb-Pomerane Act, also excepts associations engaged solely in export trade from prosecution under the Sherman Act. *See* ABA, *supra* note 16, at 49-61; 15 U.S.C. §§ 62, 63 (1988). Germany's laws retain slightly more control over the cartels. *See* Gesetz gegen Wettbewerbsbeschrankungen [Act Against Restraints of Competition], *amended by* Viertes Gesetz zur Anderung des Gesetzes gegen Wettbewerbsbeschrankungen [Fourth Act to Amend the Act Against Restraints of Competition], 1980 BGB1.I, 458 (F.R.G.). For a discussion of German law, see ABA, *supra* note 16, at 70-73.

57. *See In re* Wood Pulp Cartel, *supra* note 11.

collected, or perhaps better, asking them to use their compulsory powers to collect certain information, would have been very helpful to DG-IV, the EU antitrust directorate. But those countries may have had incentives to protect their domestic industry.

It is unclear how often these types of significant differences would arise in the course of ongoing cooperation among antitrust agencies. Perhaps countries will eventually agree to help one another except in unusual cases, in return for reliable reciprocal assistance. Any future agreements, however, will have to allow for this progression and will have to give countries a way to refuse to cooperate in extreme situations.[58]

C. National Confidentiality Laws

Clearly current information-sharing agreements have occasionally been able to avoid the above outlined philosophical and economic obstacles because countries have exchanged public information in an effort to cooperate.[59] These obstacles will continue to diminish in importance as authorities discover that the important contest pits them against increasingly powerful multinational companies, not against each other. The most concrete obstacle to the sharing of antitrust information is that of national confidentiality laws. These laws still prevent the exchange of much vital information and remain a barrier that future efforts toward antitrust cooperation must address.

Most industrialized countries protect information gathered during the course of an antitrust investigation or volunteered by companies under a notification process.[60] Countries take these precautions for a variety of important reasons: to keep from tarnishing a company's reputation simply because it is being investigated; to avoid affecting securities markets on the eve of restructurings; to preserve incentives of companies to volunteer information; to prevent harassment of witnesses; and most importantly, to protect companies' sensitive financial and strategic information.[61] For antitrust offices to be effective in calling for the amendment of confidentiality laws, as the U.S. Department of Justice has done, they will have to address the important reasons for which the laws were first passed.

An examination of the U.S. and EU confidentiality laws regarding antitrust information reveals the types of systems in place that fufill the goal of confidentiality while preventing information sharing. In the United States the two bodies responsible for antitrust enforcement, the Federal Trade Commission (FTC) and

58. *See* text at part V.C. for the solution the bilateral model suggests.

59. *See infra* note 157 and accompanying text.

60. *See* Competition Law Enforcement, *supra* note 28, at 54-59.

61. *See id.* at 55. Confidentiality concerns were one reason the new EU merger law took seventeen years to enact. *See Members Worry EC Revealing Too Much Data*, Int'l Herald Trib., Nov. 19, 1991.

the Department of Justice, are constrained by different sets of confidentiality rules. Under the Clayton Act,[62] the FTC Act,[63] and the FTC Rules of Practice,[64] FTC employees cannot release essentially any information they receive during the course of a law enforcement investigation, unless the submitter consents. The only exception to this general rule is that, subject to certain safeguards, the FTC may share information with other state and federal law-enforcement agencies.[65]

The rules for the Antitrust Division of the Department of Justice are more complex. When a party voluntarily supplies information, the Division, in contrast to the FTC, is not subject to a general statutory confidentiality requirement.[66] The Division may agree, however, upon the request of the supplying firm, to restrict disclosure of the information.[67] Information that the Division obtains through use of its compulsory powers is protected by one of several provisions. Materials that companies submit under the Hart-Scott-Rodino premerger notification system are protected from both FTC and Antitrust Division disclosure.[68] Section 7A(h) of the Clayton Act exempts the material from Freedom of Information Act (FOIA)[69] inquiries, as well as from public disclosure of any kind, except in the case of an administrative or judicial proceeding in which the FTC or the Division is a party.[70] Materials the Division obtains in response to a Civil Investigation Demand (CID) are protected by section 4(c) of the Antitrust Civil Process Act,[71] which limits the disclosure of CID information to judicial proceedings, grand juries, and some federal agencies.[72] The materials that Division attorneys collect in the course of a criminal grand jury investigation are protected by a very broad obligation of secrecy. The Federal Rules of Criminal Procedure mandate secrecy with respect to all "matters occurring before the grand jury."[73] One exception that can allow the release of information in a criminal case to a

62. *See* Clayton Act § 7A(h), 18 U.S.C. § 12 (1988).

63. *See* Federal Trade Commission Improvements Act of 1980, §§ 21(b), 21(c), 21(f), 15 U.S.C. § 57(b)(1) (1988), *amended by* Pub. L. No. 103-312, 108 Stat. 1691, 1983-94 (1994).

64. FTC Rule 4.10(d); *see* Edward A. Tomlinson, *Use of the Freedom of Information Act for Discovery Purposes*, 43 MD. L. REV. 119, 163-64 (1984).

65. See Federal Trade Commission Improvements Act of 1980, *supra* note 63, § 21(b)(6); FTC Rule 4.11(c).

66. There are, however, general government-wide criminal law constraints regarding the revelation of sensitive information obtained during the course of duty. *See* 5 U.S.C. § 522a(a)-(i) (1988); 18 U.S.C. § 1905 (Supp. IV 1992).

67. *See* JUSTICE DEPARTMENT GUIDE TO THE FREEDOM OF INFORMATION ACT 57 (1992).

68. *See* Clayton Act § 7A(h), 15 U.S.C. § 18 (1988).

69. 5 U.S.C. § 552 (1988).

70. *See* 15 U.S.C. § 18 (1988).

71. *Id.* §§ 1311-1314.

72. *Id.* § 1313(c)(3).

73. FED. R. CRIM. P. 6(e)(2). For a detailed analysis of what types of information are releasable under what circumstances, see U.S. DEP'T OF JUSTICE, 1 ANTITRUST DIVISION GRAND JURY PRACTICE MANUAL II/1/62 (1991).

foreign government permits disclosure "when so directed by a court."[74] As discussed later in connection with securities regulation,[75] many of these laws can be amended to allow antitrust officials to release information to foreign antitrust authorities under special circumstances.

EU law also contains substantial obligations regarding secrecy of company information. Regulation 17/62, article 20(2) specifies that " 'the Commission . . . shall not disclose information acquired as a result of this Regulation and of the kind covered by the obligation of professional secrecy.' "[76] Article 19(3) ensures that when the Commission publishes its decisions, the texts are sensitive to the revelation of potential business secrets.[77] The new merger regulation, EU Council Regulation 4064/89, also contains confidentiality protections. Article 17 prevents "the Commission and the competent authorities of the Member States, their officials and other servants" from disclosing any information obtained through applying the Regulation.[78] The scope of these provisions is determined by ongoing case law.[79] The European Court of Justice (ECJ) held, for example, that "business secrets" must never be divulged.[80] In addition, the Regulation provides that the information may only be used in connection with the case at hand.[81] Many other countries, such as Canada,[82] France,[83] Germany,[84] and the United Kingdom,[85] also have significant confidentiality protection in their respective laws.[86]

74. FED. R. CRIM. P. § 6(e)(3)(C)(i); *see* discussion of Canada-U.S. MLAT, *infra* notes 155-58 and accompanying text.

75. *See* text Part IV.C.

76. Council Regulation 17/62, art. 20, 1959-1962 O.J. Spec. Ed. 87 [hereinafter Council Regulation 17/62], *reprinted in* COMMISSION OF THE EUROPEAN COMMUNITIES, COMPETITION LAW IN THE EUROPEAN COMMUNITIES 52 (1990).

77. *Id.* art. 19(3).

78. Council Regulation 4064/89 of 21 December 1990 on the Control of Concentrations Between Undertakings, art. 17, 1990 O.J. (L 257) 14, 23 [hereinafter Council Regulation 4064/89].

79. Professors Whish and Wood also point out that EU confidentiality provisions are affected by standards of the Member States. *See* MERGER CASES IN THE REAL WORLD, *supra* note 26, at 88, 106.

80. Case 53/85, AKZO Chemise BV v. Commission, 1986 E.C.R. 1965, [1987] 1 C.M.L.R. 231, 232.

81. Regulation 4064/89, *supra* note 78.

82. *See* Competition Act, R.S.C., ch. C-34, §§ 10-12, 29 (1990) (Can.).

83. Section 23 of title III of the 1986 competition ordinance in the French code, for example, allows the President of the Competition Council to refuse to produce evidence that may contain business secrets. Ordonnance no. 86-1243, *supra* note 55. Disclosure by parties to the suit or by antitrust authorities "is punishable by a fine and imprisonment under Article 378 of the Criminal Code." *See* COMPETITION LAW ENFORCEMENT, *supra* note 28, at 56.

84. *See* COMPETITION LAW ENFORCEMENT, *supra* note 28, at 56.

85. U.K. law, declares that "no information with respect to any particular business which has been obtained under or by virtue of the provisions . . . of this Act" shall be disclosed as long as the business exists, without consent. Fair Trading Act 1973, ch. 41, § 133 (Eng.).

86. Banking secrecy laws are another type of confidentiality law that may occasionally pose a problem for antitrust enforcement. *See* COMPETITION LAW ENFORCEMENT, *supra* note 28, at 52. Agreements in other enforcement areas, namely money laundering, have overcome these legal strictures, as could antitrust arrangements. *See infra* notes 173-78 and accompanying text; Richard M.

Industry will be especially vocal in its insistence that these comprehensive confidentiality protections for the information it surrenders to the government are not diluted.[87] Understandably, business is worried that sensitive and often very valuable information, like trade secrets or strategic plans, will fall into their competitors' hands. Thus, even during the negotiations of the U.S.-EU bilateral antitrust agreement, which does not permit the exchange of confidential information, business attorneys expressed concerns about confidentiality.[88] Other enforcement regimes, like securities regulation, however, have managed to satisfy these strong concerns.[89] One way an antitrust agreement could be similarly responsive is through a forceful clause that credibly ensures the confidentiality of any information transferred under the agreement. As long as governments are serious and cautious about the confidentiality of their transfer procedures, this clause would probably be a satisfactory solution.[90]

Systems based on voluntary notification, like the EU's, may have to be particularly responsive to business concerns. If businesses become fearful that information they file with the Commission will be passed on to the partner country in a bilateral agreement, they may be reluctant to notify the Commission voluntarily of their plans. In the case of the EU, it is not clear how much the system would actually be affected by a comprehensive agreement,[91] but it is a risk to consider. The United Kingdom similarly relies on a voluntary notification procedure and would be concerned that the possibility of donated information being passed around the world could jeopardize the system. A strict confidentiality provision in an information-exchange agreement could remedy this problem as well.

In addition to preventing the release of vital nonpublic information, confidentiality laws may also be preventing the release of public information. Because competition authorities themselves are sometimes unsure about what information their domestic law protects, they will usually err on the side of safety and withhold releasable information.[92] Professors Whish and Wood recommend in their study that countries take it upon themselves to clarify, both for workers in their own

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Phillips & Gilbert C. Miller, *The Internationalization of Securities Fraud Enforcement in the 1990s*, 25 REV. SEC. & COMMODITIES REG. 119 (1992). The issue is not elaborated here, however, because it does not arise with great frequency in the antitrust area.

87. *See* MERGER CASES IN THE REAL WORLD, *supra* note 26, at 106.

88. *U.S.-EC Notices Increase Since Accord; Confidentiality Concerns Are Downplayed*, BNA INT'L BUS. DAILY, Feb. 28, 1992.

89. *See infra* notes 185-90 and accompanying text.

90. For one proposed confidentiality clause, see text at part V.B. *infra*.

91. Transactions that fall under block exemptions already avoid the voluntary reporting requirement. *See* WHISH, *supra* note 41, at 236-41. For those companies to whom the procedure applies, they could give up significant advantages if they do not voluntarily report. *See id.* at 289. For a discussion of the advantages and disadvantages of notification, see Adrian Brown, *Notification of Agreements to the EC Commission: Whether to Submit to a Flawed System*, 17 EUR. L. REV. 323 (1992). Note, as well, that the Commission's authority to enter into information-sharing agreements is being called into question at the ECJ. *See* note 145 *infra*.

92. *See* MERGER CASES IN THE REAL WORLD, *supra* note 26, at 105.

agency and for those in foreign agencies, what information their confidentiality laws allow and do not allow to be released.[93] That exercise would certainly help promote the sharing of public information that should be occurring even under current arrangements.

On the flip side of confidentiality laws are the domestic laws that allow the government to release information it holds. These laws also trigger confidentiality concerns and would have to be changed to accommodate an effective cooperation agreement. For example, countries may be concerned about the EU structure, because confidential information that the EC Commission collects during the course of an investigation may be passed on to EU Member States. Regulation 17/62 implements articles 85 and 86 of the Treaty of Rome and specifies in article 10: "The Commission shall . . . transmit to the competent authorities of the Member States a copy of the applications and notifications together with copies of the most important documents lodged with the Commission for the purpose of establishing the existence of infringements of articles 85 or 86. . . ."[94] It is not clear whether article 10 would apply to information received from another country under a cooperation agreement, but other countries may have concerns about entering an agreement with the EU under which all the confidential information they share may be sent to other countries.[95] To address such concerns, a new EU law could simply exempt antitrust information received from a foreign authority from this distribution requirement.

In the United States, the FOIA is designed to allow the public access to government records.[96] This act could pose a threat to confidential information exchange between the Antitrust Division and other authorities. If foreign agencies believe that their information is subject to release under the FOIA, they will not want

93. *See id.*

94. EU Council Regulation 17/62, *supra* note 76, art. 10. The new merger regulation in article 19 also calls for the Commission to transmit information it gets to the Member States. *See* WHISH, *supra* note 41, at 728. For a thorough analysis of the new merger regulation, see DAMIEN NEVEN ET AL., MERGER IN DAYLIGHT: THE ECONOMICS AND POLITICS OF EUROPEAN MERGER CONTROL (1993).

95. Whether information received from another country's antitrust office would constitute "the most important documents lodged with the Commission" is not certain. Council Regulation 17/62, *supra* note 76, art. 10. The documents may not be "the most important" nor may they be "lodged" which could refer to what companies themselves produce. Or, indeed, the ECJ hearing such a case may decide that the Regulation did not envisage international information sharing, and that a new rule must be established.

Assuming the information from another country's antitrust office does get forwarded to the EU Member States, they are not permitted, as with any evidence forwarded from the Commission, to use it themselves in their investigations. *See Direccion General de Defensa de la Competencia v Asociaccion Espanola de Banca Privada and Others*, Case C-67/91, *reprinted in Limited to Use of Information Given to States by Commission*, TIMES, Nov. 26, 1992. This rule is already a source of tension between the EU and Member States. It could become another obstacle to agreements with the EU if the Member States believe that the other country party to the cooperation agreement with the EU might benefit disproportionately from the agreement because that country will be able to use all the information that the EU transfers, whereas the Member States would be constrained.

96. 5 U.S.C. § 552 (1988).

to transmit it. Fortunately, this quandary has been resolved in the securities area with an exception to the FOIA, and could be likewise addressed in the antitrust area.[97]

Countries have overcome the obstacles to cooperation discussed above—differing approaches to antitrust and domestic economic protection—in exchanging public information. The remaining confidentiality issue is a serious one, but arrangements in other areas, and in criminal antitrust enforcement, illustrate that it is not insurmountable.[98] An exacting confidentiality provision and some modifications to information-release statutes would provide a basic solution. Until they reach new arrangements, however, antitrust agencies must comply with existing bilateral and multilateral agreements and other current information-gathering methods that are inadequate for effective antitrust enforcement.

III. Existing Arrangements for International Information-Gathering in Antitrust Investigations

If an antitrust authority decides to prosecute foreign anticompetitive conduct that is harming its marketplace, it will need to seek evidence from abroad. This part demonstrates that, unfortunately, no currently available method for evidence gathering is adequate for the lawyer or administrator in a government competition office faced with the need to obtain information from sources located outside the country. The investigator currently has two options: use general international discovery methods to try to obtain information directly from the company or individual in question; or use existing arrangements in the antitrust area to obtain information from that country's competition office.

A. International Discovery Generally

An antitrust administrator who decides to obtain the information directly has three paths to choose from: apply the domestic country's rules of discovery; use a letter rogatory; or follow procedures outlined in the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.[99] None of the alternatives presents an easy and rewarding path.

The first method, applying domestic rules of discovery for taking evidence abroad, is often lauded in countries such as the United States as "broader, swifter,

97. 15 U.S.C. § 78x(d) (1988 & Supp. V 1994) provides that information received by the Securities Exchange Commission (SEC) from a foreign authority pursuant to a Memorandum of Understanding (MOU) will be exempt from release under exemption 3 of FOIA, if public disclosure would violate that country's laws. *See also* Justice Department Guide to the Freedom of Information Act, *supra* note 67, at 44-52 (analyzing Exemption 3).

98. *See infra* notes 157, 162-95 and accompanying text.

99. The Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T 2555, 847 U.N.T.S. 231 [hereinafter Convention].

and less expensive'' than other types of discovery.[100] For countries in which competition authorities are permitted to use their compulsory powers abroad,[101] this approach can appear to be the simplest. However, the use of this method, especially by the United States, has been very disruptive: ''[N]o aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the request for documents in investigation and litigation in the United States.''[102] In civil law countries, such as France, discovery is mostly a judicial function, and such jurisdictions will often not allow extraterritorial discovery. Rather, they will view requests, particularly pretrial requests for documents, as abusive ''fishing expeditions'' that could reveal commercial secrets.[103] Thus, an antitrust lawyer may want to reconsider applying domestic laws to collect information abroad even if such laws allow it. The risk of disturbing relations with the foreign country is very real because such efforts could amount to a perceived infringement of sovereignty.[104] A country's reaction may depend on whether the information is being solicited voluntarily or by use of compulsory powers, but some countries, like Switzerland, allow neither approach without supervision.[105] Also, because of so-called blocking statutes, this direct method may be ineffective—the sensitive financial information needed is likely to be protected by laws that prohibit nationals from revealing it.[106]

100. David S. Pennock, *U.S. Procedures for Obtaining Discovery Abroad for Use in Proceedings in the United States*, *in* OBTAINING DISCOVERY ABROAD 1, 2 (ABA ed. 1990) [hereinafter ODA].

101. Germany, Sweden, and the United States, for example, allow this type of action. *See* COMPETITION LAW ENFORCEMENT, *supra* note 28, at 26-27. The United Kingdom, France, and the Netherlands do not usually investigate entities abroad. *See id.* at 25-26; *see also* Joseph M. Steiner, *Canada*, *in* ODA, *supra* note 100, at 105; Gilles de Poix, *France*, *in* ODA, *supra* note 100, at 49; Yoshio Ohara, *Japan*, *in* ODA, *supra* note 100, at 129; Axel Epe, *West Germany*, *in* ODA, *supra* note 100, at 65; Andre A. Wicki, *Switzerland*, *in* ODA, *supra* note 100, at 81; Edward L. Kling, *United Kingdom*, *in* ODA, *supra* note 100, at 23 (lawyers and professors from Canada, France, Japan, Germany, Switzerland, and the United Kingdom discussing the discovery laws of their countries).

102. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442 reporter's note 1 (1987).

103. *See* Daniel J. Plaine & Dale Warren Dover, *Compulsory Discovery Methods: The Hague Evidence Convention, Letters Rogatory, Foreign Limits on Testimony and Document Production*, *in* INTERNATIONAL LITIGATION 197-98 (1989); de Poix, *France*, *in* ODA, *supra* note 100, at 51; *see also* Andreas F. Lowenfeld, *Some Reflections on Transnational Discovery*, 8 J. COMP. BUS. & MKT. L. 419, 419-20 (1986).

104. *See* BORN & WESTIN, *supra* note 38, at 367-73; *see supra* notes 38-42 and accompanying text.

105. *See* Robert F. Brodegaard, *Effective Discovery Abroad for U.S. Courts*, *in* INTERNATIONAL LITIGATION 155, 169 (1989); *see also* BORN & WESTIN, *supra* note 38, at 165-77 (explaining methods for U.S. litigators when foreign witness is willing to testify).

106. *See* BORN & WESTIN, *supra* note 38, at 371-73; *see also* Plaine & Dover, *supra* note 103, at 202-05 (discussing the effectiveness of blocking statutes); COMPETITION LAW ENFORCEMENT, *supra* note 28, at 44-50 (discussing history of blocking statutes and particular examples); ABA, *supra* note 16, at 150-51; *see also supra* notes 40-42 and accompanying text (discussing the enactment of the U.K. statute). Sometimes U.S. courts will sanction foreign parties who do not comply with discovery orders, even though national laws prohibit them from complying. The U.S. Supreme Court confronted the difficult issue of how courts should respond to noncompliance by a party due to a blocking statute in Société Internationale pour Participations Industrielles et Commerciales v. Rogers,

Many countries have enacted such laws, including Australia, Canada, France, Switzerland, and the United Kingdom.[107]

Another disadvantage of using domestic law is that it may not prove compulsory because a domestic court will not always be able to assert jurisdiction over the foreign conduct or persons in question.[108] In that case, an antitrust office is left to gather information directly from voluntary foreign sources, which is likely to be ineffective yet still offensive to the foreign government.

In practice, one of the few ways some antitrust offices do get evidence directly from companies located abroad is to find related domestic companies, either subsidiaries or parents, and to apply domestic discovery procedures to gather information through them.[109] In Canada, the European Union, Japan, Sweden, and the United States, for example, competition authorities may use their compulsory powers under domestic law to solicit information from companies located within their respective territories about related companies outside.[110]

Letters rogatory are another available discovery method. In use for decades, they involve the transmission from one country's judiciary to another, through diplomatic channels, of a request for assistance in gathering evidence for a pending case.[111] Parties apply to their own judiciary, which in turn decides whether or not to execute a letter. If it does, the letter is transmitted to the other country's judiciary, which is bound only by comity to execute the request, and does so according to only its domestic law.[112] Though they have the advantage of not offending a foreign country's sovereignty,[113] letters rogatory have been criticized for being slow, expensive, and unpredictable.[114]

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357 U.S. 197 (1958). The Court adopted a two-part inquiry in which it first asked whether or not to order discovery, and then whether to apply sanctions. The Court weighed several factors in its analysis, including the importance of the evidence and the nationality of the party. For a thorough discussion of *Société Internationale* and its progeny, see BORN & WESTIN, *supra* note 38, at 374-405. What is not clear is whether the threat of sanctions leads to the discovery of foreign evidence, or if the foreign parties just accept sanctions.

107. *See* Pennock, *supra* note 100, at 18-22; BORN & WESTIN, *supra* note 38, at 372-73.

108. For jurisdiction issues in U.S. courts, see BORN & WESTIN, *supra* note 38, at 354, 357-60. Courts in other countries have different requirements for their extraterritorial jurisdiction, but many, including those in Canada, Japan, Germany, and the United States, rely on an "effects" test, which allows them to assert jurisdiction over the conduct if effects are felt in their territory. *See* ABA, *supra* note 16, at 148; *see also* COMPETITION LAW ENFORCEMENT, *supra* note 28, at 39-44 (discussing different countries' jurisdictional requirements). The EC Commission has also recognized this doctrine, but the ECJ has not. *See* WHISH, *supra* note 41, at 374.

109. *See* COMPETITION LAW ENFORCEMENT, *supra* note 28, at 30-32; BORN & WESTIN, *supra* note 38, at 355-56.

110. *See* COMPETITION LAW ENFORCEMENT, *supra* note 28, at 30-31. Of particular interest are Canadian search and seizure provisions that allow authorities to "search" computer data bases that may be linked electronically to information sources abroad.

111. *See* Plaine & Dover, *supra* note 103, at 193-94; *see also* BORN & WESTIN, *supra* note 38, at 406-10 (general discussion of letters rogatory).

112. *See* Brodegaard, *supra* note 105, at 162; BORN & WESTIN, *supra* note 38, at 407.

113. *See* BORN & WESTIN, *supra* note 38, at 406.

114. *Id.* at 408.

A government competition investigator's final option is to use the Hague Evidence Convention.[115] Opened for signature on March 18, 1970, the Convention represents an effort by member countries to standardize and simplify the procedures by which evidence is sought from abroad.[116] Many civil law countries consider this Convention to be the only way foreign parties can take evidence from their citizens.[117] The Convention provides for three methods of collecting evidence abroad—by letter of request, by consular or diplomatic official, or by appointed commissioner. The first method can be compulsory, while authorities can only use the latter two with willing witnesses.[118] A judicial authority in one contracting state sends letters of request to the designated "central authority" of another contracting state, requesting that a competent authority there "obtain evidence, or . . . perform some other judicial act."[119] The Convention details all the specific information that the request must contain and instructs the executing authority to apply its own laws "expeditiously" to carry out the request.[120] The Convention also specifies that witnesses may refuse to comply where a privilege is recognized in their own country or in the country where the request originated applies.[121] The letter of request differs from the letter rogatory in that a treaty obligation compels countries to cooperate in the case of the former, whereas only comity binds the foreign court in the latter.[122] The Convention methods of consular, diplomatic, and commissioner-assisted testimony are not available in every contracting state, and, in some states, authorities must first seek permission to use them. These methods are only applicable to proceedings that have already commenced, unlike letters of request, which may be used during pretrial. Essentially, the Convention provides that a consular official from the contracting state seeking the evidence, or a commissioner whom a judicial authority from that state appoints, may assist in gathering information.[123]

The Convention is not very useful for discovery in government competition proceedings, and neither the U.S., Canadian, nor EU competition offices have ever used it to obtain information from abroad. First, many countries have joined in an exception to the Convention that prohibits its use for pretrial document discovery.[124] The Convention, therefore, is not helpful for investigative work.

115. Convention, *supra* note 99; see BORN & WESTIN, *supra* note 38, at 411-47.

116. *See* Brodegaard, *supra* note 105, at 157. Current parties to the Convention include: Argentina, Barbados, Cyprus, Denmark, Finland, France, Germany, Israel, Italy, Luxembourg, Mexico, Monaco, the Netherlands, Norway, Portugal, Singapore, Spain, Sweden, the United Kingdom, and the United States. Pennock, *supra* note 100, at 8.

117. *See* de Poix, *France, in* ODA, *supra* note 100, at 51-52.

118. *See* Pennock, *supra* note 100, at 9.

119. Convention, *supra* note 99, art. 1.

120. *Id.* arts. 4, 9.

121. *Id.* art. 11.

122. *See* Plaine & Dover, *supra* note 103, at 196.

123. *See* Pennock, *supra* note 100, at 10; Convention, *supra* note 99, arts. 15-22.

124. Convention, *supra* note 99, art. 23; *see* BORN & WESTIN, *supra* note 38, at 415.

Second, the Convention only applies to civil or commercial matters. The Convention will not apply in the case of a criminal antitrust proceeding that some countries, notably Canada and the United States, may have. Moreover, some countries may not consider even a noncriminal antitrust case filed by the government to be a civil or commercial matter, but an administrative one.[125] Countries such as the United Kingdom have also entered into exceptions that allow them to abrogate cooperation for certain reasons, such as state security.[126] Finally, some agencies have found that even when they have been successful in obtaining information under the Convention, "the time and expense expended . . . has been substantial," especially when compared to procedures under effective bilaterals.[127]

Because none of these discovery methods effectively allows antitrust offices to gather evidence in other countries, many agencies simply do not obtain information from abroad unless they can do so with the company or person's cooperation, or by finding a subsidiary or parent in their own country. Illegal conduct, as a result, can fall through the cracks—not prosecuted because authorities lack sufficient evidence.

B. Current Arrangements in the Competition Area

Because standard international discovery methods are likely to prove ineffective or time-consuming, a lawyer or administrator in a competition office may try to obtain the necessary information by cooperating with antitrust offices in other countries who also might have an interest in the case. These offices may already have gathered the desired information using domestic discovery procedures, or they may be prepared to do so.

Unfortunately, current antitrust arrangements are inadequate to foster effective cooperation between offices. Although they may overcome the obstacles discussed above, such as differing approaches to antitrust, the existing arrangements do not modify (or encourage the modification of) strict domestic confidentiality laws. In addition, they do not provide for cooperation, such as in the gathering of evidence, on behalf of a foreign authority.

1. *Multilateral Efforts*

Under the auspices of international organizations such as the United Nations and the OECD, countries have participated in several initiatives designed to

125. This issue has apparently not been fully resolved. At least one authority claims that the Convention is not applicable to agency investigations in any case. *See* ABA, *supra* note 16, at 202. But another authority seems to imply that it may vary by country. For example, France would probably not allow the Convention to apply in instances when the government itself is bringing a case in the antitrust field. *See* de Poix, *France, in* ODA, *supra* note 100, at 53. However, the United Kingdom may allow it. Kling, *United Kingdom, in* ODA, *supra* note 100, at 25.

126. Micheal D. Mann & Joseph G. Mari, *Current Issues in International Securities Law Enforcement, in* INTERNATIONAL LITIGATION 51, 131 (1989).

127. *See id.* (experience in the securities context).

facilitate the sharing of antitrust information. For example, in 1980 the United Nations adopted a set of principles regarding restrictive business practices. The information-sharing recommendations suggest that countries share information consistent with their domestic laws and that they establish mechanisms to facilitate such exchanges.[128]

The OECD has also issued several nonbinding recommendations regarding antitrust enforcement. In 1979, the OECD adopted a recommendation with information exchange, notification, and coordination provisions that have been extensively used.[129] In 1986, the OECD revised the recommendation,[130] and currently, it suggests that countries notify each other when they undertake enforcement activities and that "they . . . supply each other with such relevant information on restrictive business practices as their legitimate interests permit them to disclose" and insofar as their domestic laws permit.[131] An appendix to the revised recommendation states that countries providing information may specify with what degree of confidentiality they want their information to be protected, and for how long.[132] The 1986 recommendation has encouraged countries to make regular notifications to each other about their enforcement activities. From October 1, 1991, to March 3, 1993, countries sent one another over three hundred notifications and requests under the recommendation.

Although the European Union operates under no separate multilateral agreement, it presents a unique example because some confidential information is exchanged between the European Commission and its Member States. Under EU Regulation 17/62, the Commission must forward some confidential information to the Member States,[133] and they in turn are obligated to provide information upon the request of EU investigators.[134] Cooperation between the EU and its Member States is more developed than elsewhere. Even so, cooperation among the Member States themselves for local enforcement is not generally available.

Though these multilateral arrangements represent steps in the right direction, none of them, aside from the unique example of the EU, tackles the issues of confidential information exchange and significant cooperation in evidence gathering. Neither, unfortunately, do the bilateral arrangements in the antitrust area, except in the criminal context, which comprises only a fraction of international antitrust cases.

128. *See* COMPETITION LAW ENFORCEMENT, *supra* note 28, at 69-70.

129. OECD Doc. C(79)154 (Final) (Oct. 5 1979); *see* COMPETITION LAW ENFORCEMENT, *supra* note 28, at 69.

130. OECD Doc. C(86)44 (Final) (May 21, 1986).

131. *See id.*

132. *See id.*

133. Council Regulation 17/62, *supra* note 76, art. 10.

134. *Id.* art. 11(1). For an article that describes the general procedural relationship between the EU and one of its Member States, see Rainer Bechtold, *Antitrust Law in the European Community and Germany—An Uncoordinated Co-Existence?*, INT'L ANTITRUST L. & POL'Y (1992).

2. *Bilateral Arrangements*

Several countries have adopted bilateral arrangements that address specifically the issue of mutual assistance in antitrust, including notification of activities, enforcement cooperation, and information exchange.[135] Agreements concluded to date include EU-United States (1991),[136] Canada-United States (1984),[137] Germany-France (1984),[138] Australia-New Zealand (1990),[139] Australia-United States (1981),[140] Germany-United States (1976),[141] and a provision in the North American Free Trade Agreement.[142] The EU and Canada and the EU and Japan are considering entering into agreements.[143] The French Minister of the Economy has also mentioned that France and the United States were contemplating a similar step.[144]

In order to understand the extent of efforts so far in the competition area, the Agreement Regarding the Application of Their Competition Laws between the United States and the European Union, signed on September 23, 1991, will be examined as a representative and recent example.[145] The preamble states that the agreement was adopted, in part, out of the recognition that "the world's economies are becoming increasingly interrelated" and that the enforcement of competition laws would be enhanced by cooperation.[146] The first article of the Agreement sets out its purpose, "to promote cooperation and coordination and lessen the possibility of impact of differences between the Parties in the application of their competition laws."[147] The preamble then defines what laws, authorities, and conduct fall under

135. In addition, some Friendship, Commerce and Navigation treaties have sections that propose consultations between the parties to eliminate the effects of restrictive business practices, but they have not been often, if ever, invoked. *See* COMPETITION LAW ENFORCEMENT, *supra* note 28, at 65.

136. Agreement Regarding the Application of Their Competition Laws, Sept. 23, 1991, EC-U.S., 30 I.L.M. 1487 [hereinafter EC-U.S. Agreement].

137. 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, Mar. 9, 1984, Can.-U.S., 23 I.L.M. 275.

138. Agreement Concerning Cooperation on Restrictive Business Practices, May 28, 1984, F.R.G.-Fr., 26 I.L.M. 531.

139. Closer Economic Relations-Trade Agreement, Mar. 28, 1983, Austl.-N.Z., 22 I.L.M. 945.

140. Agreement Relating to Cooperation on Antitrust Matters, June 29, 1982, U.S.-Austl., 34 U.S.T. 388.

141. Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, U.S.-F.R.G., 27 U.S.T. 1956.

142. *See* MERGER CASES IN THE REAL WORLD, *supra* note 26, at 192.

143. *See* WHISH, *supra* note 41, at 729.

144. *See France, U.S. Approach Agreement on Antitrust Cooperation, Assistance*, BNA INT'L BUS. & FIN. DAILY, Dec. 10, 1993.

145. EC-U.S. Agreement, *supra* note 136, at 1491. For a discussion of this agreement as related to further convergence, see James F. Rill & Virginia R. Metallo, *The Next Step: Convergence of Procedure & Enforcement*, INT'L ANTITRUST L. & POL'Y 15 (1992). France is now accusing the EU of not having had the authority to enter into this agreement with the United States. *EU: Court of Justice Says Commission Not Competent to Sign Competition Agreement with USA*, AGENCE EUROPE, Mar. 5, 1994.

146. EC-U.S. Agreement, *supra* note 136, at 1491.

147. *Id.* at 1492.

the jurisdiction of the Agreement. Article II, entitled "Notification," describes the process by which the competition offices will keep each other informed as to their respective activities. The parties agree to notify each other about enforcement activities that "may affect important interests of the other Party."[148] Those interests are subsequently defined, and include anticompetitive behavior carried out in the other party's territory, mergers or acquisitions that involve a company incorporated under the laws of the other party, action that the other party somehow encouraged, or possible remedies that would involve conduct within the other party's territory. Unlike any bilateral agreement in the competition field that has come before it, the EU-U.S. Agreement sets out a timetable by which some information, such as merger notifications, is to be relayed.[149]

Article III states that the competition authorities of each party will meet at least twice a year, both to exchange information about their enforcement activities and important economic sectors, and to discuss potential policy changes and any other relevant topics. The article also commits the parties to provide each other spontaneously with information that may be relevant to potential or existing enforcement actions. Upon the receipt of a specific request from a party, the Agreement states that the other party should provide relevant information that it has to the requesting party, provided that releasing the information would be within the limits of articles VIII and IX; that is, the release would not violate any existing domestic laws, including those of confidentiality.[150] Article VIII, "Confidentiality of Information," provides in part:

> Each Party agrees to maintain, to the fullest extent possible, the confidentiality of any information provided to it in confidence by the other Party under this Agreement and to oppose, to the fullest extent possible, any application for disclosure of such information by a third party that is not authorized by the Party that supplied the information.[151]

Despite the progress it represents, the EU-U.S. bilateral agreement still does not permit the exchange of the most crucial information—that which is confidential. It does not call for a modification of domestic confidentiality laws so that competition agencies could share this information with one another. Also, the two competition authorities cannot use their compulsory powers of evidence gathering on one another's behalf; although article IV provides for cooperation and coordination of enforcement activities, it again is limited by domestic law, which does not provide for this kind of assistance. The Agreement does not suggest that those laws be changed.

The EU-U.S. bilateral agreement attempts to solve the obstacles of differing antitrust policies and conflicting economic interests through increased communi-

148. *Id.* at 1493.

149. Joseph Griffin, *E.C.-U.S. Agreement on Antitrust Already Has Had Impact on Business,* NAT'L L.J., Apr. 13, 1992, at 31.

150. EC-U.S. Agreement, *supra* note 136, at 1496.

151. *Id.* at 1501.

cation, but it does not address the issue of confidentiality, presumably for the reasons, among others, of EU structure discussed above.[152] The bilateral agreement, nevertheless, has had an effect on the way the United States and the EU communicate regarding their competition activities. Like many authorities, the U.S. and EU offices communicated casually before the bilateral agreement, but now "[e]nforcement officials on both sides of the Atlantic have made it clear that since the Agreement, the flow of information between them has increased significantly."[153] Commentators have also predicted that this Agreement will lead toward "more of a convergence in enforcement policies" because the offices will share information about, for example, how they define the relevant market in a merger case.[154]

The United States is party to another bilateral instrument that provides for more active cooperation. The Treaty Between the Government of Canada and the Government of the United States on Mutual Legal Assistance in Criminal Matters (MLAT), entered into force in early 1990, covers assistance in criminal cases generally, but has been used frequently and successfully by both countries to obtain information for criminal antitrust proceedings. The MLAT provides for a large variety of assistance and even permits parties to use their compulsory powers to gather evidence for one another.[155] Both the United States and Canada have done so on the other's behalf. In addition, no part of the MLAT prohibits or limits the trading of confidential information, and article XIII(2) provides that "[t]he Requested State may provide copies of any document, record or information in the possession of a government department or agency, but not publicly available, to the same extent and under the same conditions as would be available to its own law enforcement and judicial authorities."[156] This clause clearly contemplates the sharing of confidential information, and Canada and the United States have exchanged such information under the MLAT. Article IX permits the requested state to specify that the information it reveals is treated confidentially by the requesting state. The treaty only applies in cases of criminal antitrust prosecutions, which make up the minority of cases in Canada and the United States and do not exist in countries with solely civil competition laws. However, according to the authorities involved, the MLAT has proved to be a powerful tool and has significantly aided antitrust enforcement efforts.[157]

152. *See supra* notes 95-97 and accompanying text.

153. *See* Griffin, *supra* note 149, at 33; *see also* Griffin, *supra* note 36, at 55.

154. Barbara Franklin, *Antitrust Accord; FTC, EC Agree to Share Enforcement Information*, N.Y. L.J., Jan. 2, 1992, at 5 (quoting Barry Hawk).

155. Treaty on Mutual Legal Assistance in Criminal Matters, March 18, 1985, Can.-U.S., 24 I.L.M. 1092, arts. II, VI, VII, XII.

156. *Id.* art. XIII(2).

157. Telephone Interview with Charles S. Stark, Chief of Foreign Commerce Section of Antitrust Division of the U.S. Department of Justice (Nov. 3, 1993); *see also Metzenbaum, Brooks to Introduce Bill to Give New Negotiating Authority to DOJ*, BNA INT'L BUS. & FIN. DAILY, June 15, 1994 [hereinafter *Metzenbaum*] (MLAT helped the United States break up a plastic dinnerware cartel).

The MLAT did not require implementing legislation in the United States and simply supersedes domestic laws, such as those regarding confidentiality, that would ordinarily prevent the assistance. Canada did pass legislation that brought its domestic law into conformity with MLAT's that it has signed.[158] In the case of a Memorandum of Understanding (MOU) or agreement, implementing laws that allow the parties to do what they have agreed to are a crucial part of any effective regime. A new law the U.S. Department of Justice sponsored, modeled after 1988 SEC legislation, specifies changes in domestic law that will allow the United States to release and accept confidential information for use in investigations and prosecutions pursuant to an international agreement.[159] For example, the law provides that section 4 of the Antitrust Civil Process Act will no longer prevent the U.S. Attorney General from providing evidence to a foreign authority for an antitrust investigation.[160]

IV. Precedents for a More Comprehensive Instrument

The bilateral agreements concluded to date in the antitrust arena could form foundations for comprehensive instruments in the future. As of now, however, most are not useful for the sharing or collection of confidential information. Other areas in international finance have taken more substantial steps toward full cooperation by calling for legislation that changes domestic laws. Specifically, some agreements in the areas of tax, money laundering, and securities have made significant progress in information sharing.[161] These agreements could be useful as models for future efforts toward more extensive cooperation in international antitrust.

An important difference between these areas and antitrust is that in these areas of enforcement, the conduct at issue, such as tax evasion or insider trading, consists of attempts by individuals to evade laws that benefit the general population. In competition cases, the conduct at issue may involve even more serious injury to the public, but may seem less egregious because the cases are complicated and do not readily offer single guilty individuals. Antitrust authorities seeking forward-looking agreements may, therefore, have a difficult time convincing their legislatures that such agreements are as necessary in the area of competition as in the areas below.

158. *See* Mutual Legal Assistance in Criminal Matters Act, ch. 37, 1988 S.C. 1007 (Can.).

159. *Clinton Signs Bill, supra* note 11.

160. The International Antitrust Enforcement Assistance Act of 1994, Pub. L. No. 103-438, § 6 (1993); *supra* note 73-74 and accompanying text. In 1992 Australia unilaterally enacted a similar law, the Mutual Assistance in Business Regulation Act, which provides a mechanism for the government to assist overseas regulators with collecting information for criminal prosecutions, including those in antitrust. Mutual Assistance in Business Regulation Act, No. 25, AUSTL. C. ACTS (1992).

161. For a detailed treatment of arrangements in all these areas, see Mutual Assistance Agreements, OECD, DAFFE/CLP/WP3(93)3 [hereinafter Mutual Assistance].

A. Tax

The problems of international tax evasion and double taxation have long concerned many governments. They have negotiated numerous bilateral as well as multilateral treaties in the area of taxation in response.[162] In 1992, member countries to the OECD revised a model bilateral treaty, the OECD Model Tax Convention on Income and Capital, drafted originally in 1963, and agreed that their own bilateral agreements would conform to the model.[163] Article 26 provides that:

> The competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the provisions of this Convention. . . . Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved [in a relevant taxation case].[164]

This section of the Convention contemplates the sharing of confidential information, but it is limited by domestic laws of the Contracting States regarding trade secrets and public policy. The commentary on article 26 cautions that "[s]ecrets mentioned in this sub-paragraph should not be taken in too wide a sense."[165]

Despite the limitation by domestic law, member countries have exchanged information. Recently, the OECD issued guidelines regarding article 26 designed to make information transfer between tax authorities under tax bilateral agreements more efficient.[166] The survey taken of OECD member countries as part of the project revealed several positive trends regarding confidential information sharing. Most countries believe that their tax secrecy provisions do not block information exchange (unlike in the antitrust area)[167] and that they can sometimes overcome banking secrecy problems in the tax area.[168] One half of the member countries reported no restrictions on releasing confidential information, and others have very narrow definitions of what information is secret and nonreleasable.[169] No case was offered in which information was withheld for confidentiality reasons. The guideline authors concluded that "the recognition of trade and business secrets [do not] constitute a serious obstacle for the exchange of information" in the tax area.[170] In addition to the matrix of tax bilaterals agreements, several

162. *See id.* at 35 (chart showing all the tax bilaterals as of January 1992).
163. *See id.* at 2, 33.
164. Model Tax Convention on Income and on Capital, art. 26(1), Report of the Committee on Fiscal Affairs, OECD (Dec. 14, 1960).
165. *Id.*
166. OECD, Working Party No. 8 of Committee on Fiscal Affairs on Tax Avoidance and Evasion, Exchange of Information, Revised Guidelines for the Competent Authorities, DAFFE/CFA(93)6/REV1, Sept. 2, 1993.
167. *See id.* at 25.
168. *See id.* at 26-27.
169. *See id.* at 63.
170. *See id.* at 28.

multilateral arrangements exist in the tax field.[171] Notably, the Nordic Convention allows for the possibility of tax officials participating in examinations abroad.[172]

B. Money Laundering

The largest hurdle in nations' efforts to combat money laundering has traditionally been national banking secrecy laws.[173] Some instruments in the money laundering context, however, have overcome this problem. For example, article 5(3) of the U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,[174] entered into force in 1990, states that "each Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized. A Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy." The Convention also allows nations to use their compulsory powers on behalf of other nations in furtherance of money-laundering investigations or prosecutions.[175]

The 1990 Council of Europe Convention goes further. First, it applies to money laundering in all cases, not just when linked to drug trafficking. Second, chapter III, section 2 contemplates the cooperation of parties in a broad variety of ways including "any measure providing and securing evidence."[176] This provision allows for extensive cooperation in confiscation. Article 7 directs countries to adopt legislation allowing authorities to confiscate on each others' behalf. If countries take that suggestion to heart, impressive cooperation could result. The Convention includes a provision on confidentiality, article 33, which requires that the requesting party keep the information confidential or inform the requested party if it cannot. This Convention, however, does not suggest that countries should change their national confidentiality laws.

Most information sharing in the money-laundering context takes place under Mutual Legal Assistance Treaties (MLATs). Over one hundred of these agreements direct cooperation with respect to criminal matters among many countries.[177] Like the Canada-U.S. MLAT discussed in part V.B.2. above, these agreements provide for an impressive range of assistance, including evidence-

171. *See, e.g.*, Council Directive 77/799 on Mutual Assistance in the Field of Direct Taxation, 1977 O.J. (L 336) 15-20. Nordic Convention on Mutual Assistance in Tax Matters (enforced since May 1991); Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters (signed in 1988, and not yet entered into force).

172. *See* Mutual Assistance, *supra* note 161, at 7.

173. These laws can also pose a barrier to antitrust enforcement, but such conflicts do not arise frequently. *See supra* note 86 and accompanying text.

174. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, S. Treaty Doc. No. 101-4 (1990).

175. *Id.* arts. V, VII.

176. 1990 Council of Europe Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime, Nov. 8, 1990.

177. For example, Canada has concluded agreements with Hong Kong, the Bahamas, Mexico, and the Netherlands.

gathering, access to files, and interviewing of witnesses.[178] Few, if any, of these treaties prohibit the exchange of confidential information, and some encourage it. Depending on domestic laws, the countries may share such information and have done so frequently.

C. SECURITIES

The information-sharing provisions in the area of securities are the most advanced of any area of international financial cooperation. As in the field of antitrust, "[o]ne of the greatest difficulties of investigating illegal cross-border conduct is gathering evidence. . . . [E]fforts to obtain evidence from abroad can involve the expenditure of substantial time and resources."[179] In reaction to these difficulties, countries have built numerous bilateral agreements that comprise an effective system in which parties may fully cooperate with one another, even regarding confidential information. The U.S. Securities and Exchange Commission (SEC) has concluded nonbinding agreements with its counterparts in seventeen other countries and in the EU, and many of the parties use these agreements extensively.[180] The agreements are varied, but the Memorandum of Understanding Concerning Consultation and Cooperation in the Administration and Enforcement of Securities Laws (MOU), between the SEC and the Comision Nacional del Mercado de Valores of Spain (concluded on July 8, 1992) provides a recent example.

Clause 3, section 2 of the MOU outlines a large scope of possible assistance between the two countries, including providing access to files, taking testimony and statements from witnesses, obtaining documents, and conducting inspections for each other.[181] Further provisions of the MOU contain instructions on the content of requests and how they are to be processed. Under the confidentiality section, the parties agreed to use their best efforts to keep the requests and all information obtained by them confidential.[182] The cornerstone of the MOU involves the crucial question of implementing legislation. Without domestic laws that permit broad assistance, the authorities are helpless to comply with requests for confidential information or evidence gathering. Although the MOU points out

178. *See, e.g.*, United Kingdom Model Agreement Concerning Mutual Assistance in Relation to Drug Trafficking, May 1990.

179. James R. Doty, *The Role of the Securities and Exchange Commission in an Internationalized Marketplace*, 60 FORDHAM L. REV. 577, 583 (1992).

180. The countries are: Argentina, Brazil, Canada, Costa Rica, France, Hungary, Indonesia, Italy, Japan, Luxembourg, Mexico, the Netherlands, Norway, Spain, Sweden, Switzerland, and the United Kingdom; *see* SEC Agreements with Regulatory Authorities of Other Countries, at 1 (PLI Corp. Law & Practice Course Handbook Series No. 84-7022, 1993); *Memorandum of Understanding Signed by SEC, Australian Securities Commission*, BNA INT'L BUS. & FIN. DAILY, Oct. 21, 1993.

181. Memorandum of Understanding Concerning Consultation and Cooperation in the Administration and Enforcement of Security Laws cl. 3, § 1(2).

182. *Id.* cl. 3, § 6 (1,2).

that its provisions do not "supersede domestic law,"[183] it nevertheless instructs the parties to "use all reasonable efforts to recommend to the appropriate authority that legislation be enacted, or to obtain the assistance of other government agencies or entities that have such authority" in order to provide assistance.[184]

A number of countries have enacted the critical legislation needed to allow their securities authorities to share confidential information and to use their compulsory powers to help other countries gather evidence. In 1990, for example, U.S. lawmakers enacted legislation allowing the SEC to share information:

> The Commission may, in its discretion and upon a showing that such information is needed, provide . . . information in its possession to such persons, both domestic and foreign, as the Commission by rule deems appropriate if the person receiving such records or information provides such assurances of confidentiality as the Commission deems appropriate.[185]

Also, the SEC is now permitted to use its compulsory powers on behalf of another government, taking into account issues of reciprocity and of the U.S. public interest.[186] Any information it receives from a foreign government is protected from domestic disclosure.[187]

Section 47 of Australia's National Companies and Securities Commission Act indicates that the Commission may disclose documents or information in its possession "if, in the opinion of the Commission, it is in the public interest."[188] Austria, Canada, Denmark, France, Germany, Italy, Japan, Norway, Sweden, Turkey, and the United Kingdom all have some form of legislation that allows them to cooperate to a greater or lesser extent with foreign securities authorities.[189] Some countries adopted such legislation after signing MOUs in the securities field. In addition to overcoming securities confidentiality laws as the Spain-U.S. bilateral MOU does, the Switzerland-U.S. Treaty on Mutual Assistance has prompted Switzerland to establish a mechanism by which banks can disclose information, in some situations, without violating Swiss bank secrecy laws.[190]

The International Organization of Securities Commissions (IOSCO) prepared a set of principles in 1991 to guide countries in drafting additional securities instruments.[191] One of the draft MOU principles is a confidentiality provision that guarantees that foreign information will be treated at least as carefully as

183. *Id.* cl. 3, § 2(1).

184. *Id.* cl. 3, § 1(3).

185. 15 U.S.C. § 78x(c) (Supp. IV 1992). At the end of 1993 the Commission adopted rule 24c-1 under the Securities Exchange Act of 1934, which lists the various types of people who may be able to receive nonpublic information. *See* Access to Nonpublic Information in the Commission's Possession, 58 Fed. Reg. 52,416 (1993) (to be codified at 17 C.F.R. §§ 200, 203, 240).

186. 15 U.S.C. § 78u(a)(2) (1988).

187. *Id.* § 78x(d) (Supp. IV 1992).

188. Mutual Assistance Agreements, *supra* note 161, at 18.

189. *See id.* at 18-19.

190. *See id.* at 30.

191. Working Party No. 4 of the Technical Committee, International Organization of Securities Commissions, Principles for Memoranda of Understanding, Sept. 1991.

domestic information under the requesting party's laws. Another principle suggests a public-policy exception to compliance, and another describes a broad set of possible types of cooperation.[192]

There have been efforts at multilateral agreements in the securities area as well. For example, the Council of Europe Convention on Insider Trading came into force in October 1991.[193] It provides for the communication between the securities authorities of signatory states of otherwise confidential information.[194] An EU Directive allows for a similar type of cooperation.[195]

The network of agreements in the securities field is an example for antitrust arrangements to follow. Countries share confidential information and use their compulsory powers to gather evidence on one another's behalf. Antitrust agencies could point legislators to the securities example and remind them that the harm to consumers that can come from unchecked competition abuses can be as great as, if not greater than, the damage from violations of securities laws.

V. Strengthening Enforcement in International Antitrust: A Blueprint for Mutual Assistance

In light of the pressing need for better information-sharing and cooperation arrangements, the nascent efforts in the antitrust field, and the strong precedents for cooperation in other fields, the following blueprint for a progressive mutual assistance agreement would provide competition authorities with the tools they need to prosecute international anticompetitive behavior. Inspired in part by existing bilateral agreements and the IOSCO guidelines, the ten principles offered can provide the basis for agreements for cooperation in the antitrust field.[196] For example, now that a new law gives the FTC and the Department of Justice the power to cooperate under antitrust mutual assistance agreements, those future agreements could be based on the model below.[197]

The most imposing hurdle to implementation of a final agreement is reform of domestic laws so the parties—countries or their antitrust agencies—can realize the full cooperation envisioned by the agreement. Therefore, the following principles identify the places in which domestic law may prevent the stated objectives. Any final agreement should have clauses that encourage or require the parties to seek such necessary legal modifications.

192. *Id.* at 8-9.

193. *See* Mutual Assistance Agreements, *supra* note 161, at 16.

194. *See id.*

195. *Id.*

196. The Canada-U.S. MLAT, *supra* note 155, the EC-U.S. Agreement, *supra* note 136, and the Spain-U.S. SEC MOU, *supra* note 181, were the primary models used.

197. The International Antitrust Enforcement Assistance Act of 1994 contains guidelines that the U.S. would need to follow in drafting agreements. Pub. L. No. 101-438, § 12.

A. Purpose and Definitions

Antitrust cooperation agreements should clearly describe the purpose and define the terms contained in the document. The purpose will likely be to "promote cooperation and coordination"[198] among antitrust authorities, and to better arrest international anticompetitive behavior. Many international agreements begin with a similar section to establish a common understanding of terminology and direction between the parties.

B. Confidentiality

The confidentiality provision of an antitrust cooperation agreement is one of the most crucial because much of the information countries will seek to exchange is nonpublic. It must be strong enough to assure authorities that the businesses under investigation will not be penalized by leaks of sensitive information. This concern has been one of the major barriers to better agreements.

An agreement should provide that the requested party specify exactly how it expects any confidential information that it transfers to be treated. The agreement should require the requesting party to inform the requested party prior to transmission if it is unable to comply with the outlined requirements. Parties should also agree to punish, criminally or otherwise, staff in competition agencies who do not comply with confidentiality requirements. Finally, agreements should provide that, to the extent that their domestic laws do not allow the parties to provide adequate confidentiality assurances for foreign material, parties should seek a change in their domestic laws.

While other confidentiality provisions are possible, this version allows the countries, in good faith, to set their own confidentiality standards. Some agreements have a provision which states that the requesting party will treat the information it receives the way it would treat similar domestic information. This type of a provision, though it offers more predictable standards, may not be an adequate assurance in situations where the requested party's confidentiality provisions are stricter than those of the requesting party.

C. Public Policy Exception

The parties will only accept an agreement that exempts them from compliance in extreme situations. Parties should not be able to avail themselves of this exception whenever compliance is inconvenient, so the exception should be narrowly tailored. The agreement should permit the requested party to decline to assist only when doing so would jeopardize its sovereignty, national security or other vital public policy interests, or when the request is not in accordance with the provisions of the agreement. Agreements should also require that when a requested party

198. EC-U.S. Agreement, *supra* note 136, at 1492.

refuses to cooperate, that party should promptly notify the requesting party of its reasons.

D. Scope of Cooperation

The agreement should allow for a broad scope of possible assistance so the parties can aid each other to the full extent they are willing. As in other provisions, it is critical that the agreement encourage the parties to seek changes in their national laws to allow all types of cooperation. At a minimum, assistance available under the agreement should, first, provide access to information in the public and non-public files of the requested party. If either party is prohibited from sharing confidential information, it should seek a change in the domestic law that restricts sharing. This change is, of course, a crucial step in ensuring that the agreement is effective. Second, the agreement should cover taking testimony from persons and obtaining documents. If a party does not have the authority to use its compulsory powers on behalf of another government, it should seek that authority from its legislature. This power could prove to be important, because a foreign antitrust authority may not have investigated the company in question, and therefore will not have the desired information on hand. Finally, parties should be allowed to coordinate enforcement activities when they agree that such coordination would be beneficial.

E. Subject Matter

An agreement must specify which kinds of cases fall within its jurisdiction. Although the purpose and definition section will limit jurisdiction to competition investigations, the agreement should also require the requested party to assist the requesting party regardless of whether the conduct under investigation would be illegal under the requested party's laws (unless the requested party would be prevented from assisting under those circumstances by its laws). This provision would allow the parties to avoid long, substantive legal discussions about the cases and their respective competition laws. If under its domestic laws, a party is only allowed to render assistance for a case involving conduct that would be illegal under its own laws, the agreement should suggest that it seek a change in that law.

F. Permitted Uses

To further assure parties that shared sensitive information will not be used for unauthorized purposes, an agreement should provide that the requesting party may only use the information it receives for the purpose or purposes specified in its request, for example, as evidence in a prosecution. Should the requesting party want to use the information in another way, or share it with another agency, the agreement should require that it first obtain permission from the requested

party. Alternatively, the parties could agree that the information may be shared with certain related domestic agencies and be used for purposes in the general framework of that stated in the request.[199]

G. Notification

If the authorities keep each other abreast of matters on which their offices are working, they will find it easier to cooperate and coordinate. An agreement should contain a provision that parties notify one another of actions they plan to take, or information that they have received, that might be relevant to the other party. In addition, the agreement should allow parties to notify each other when they learn of illegal conduct that is harming the other party's interests. In the case of such conduct, the parties should consult regarding appropriate enforcement measures. This provision could supplement the OECD notification system already in place.[200]

H. Consultation

To ensure that cooperation under the agreement occurs as smoothly as possible, the agreement should encourage the parties to consult regarding any matter related to the agreement at the request of either party. The parties should meet annually at the minimum. In general, the agreement should ask that the parties keep each other's interests in mind whenever possible.[201]

I. Procedure for Assistance

The agreement should set out a fairly detailed procedure for cooperation so that authorities know what their obligations are and what their expectations should be. The agreement should define specific procedures both for how assistance should be requested and for how the requests should be implemented. The existence of the request and of any response to it should be kept confidential. Requests for assistance should include: requirements for confidentiality; a basic description of the case as well as the purpose for which the information is sought; legal provisions pertaining to the matter; a general description of the type of assistance to be rendered; a suggested time period for a reply; and any other information that might help the requested party locate the evidence needed or the persons to be interviewed.

The requests should be promptly processed according to the domestic procedures of the requested party unless the parties agree otherwise. To the extent permitted by the law of the requested party, a representative of the requesting

199. *See, e.g.*, Memorandum of Understanding Signed by SEC, Australian Securities Commission.

200. *See supra* notes 129-32 and accompanying text.

201. This concept is like the "positive comity" concept in article V of the EC-U.S. bilateral agreement. *See* EC-U.S. Agreement, *supra* note 136, at 1497-98.

party may participate directly in the execution of a request. The parties may also want to consider establishing time periods for the acknowledgment and processing of requests.

J. Cost-Sharing

Because the costs of gathering and conveying information might be substantial, the parties should decide on a rule regarding costs. If one party, for example, incurred significant expenses in deposing several witnesses on behalf of another, it should not have to disrupt the information transfer procedure to ask for reimbursement. Agreements should provide that if the requested party anticipates incurring substantial costs in executing a request for assistance, that it may consult with the requesting party regarding a cost-sharing arrangement before continuing to respond to the request.

VI. Implementation

An important final consideration for establishing a regime of comprehensive cooperation is the effective implementation of the principles. The most efficient and progressive solution would be an arrangement in which a group of countries enter a multilateral agreement under which they all freely share information according to the above principles. Unlike a system of bilateral agreements, this agreement would not force countries to repeat similar work in drafting and negotiation for different partners. In addition, this method negates the risk of leaving certain pairs of countries unlinked. Further, a multilateral agreement would foster cooperation on a large scale and would make it difficult for anticompetitive conduct to go unchecked. A multilateral agreement could also lead to greater communication between many nations, resulting in more substantive convergence and perhaps even an international antitrust authority. Unfortunately, there is not enough support among countries at the present time for a progressive multilateral agreement.

Perhaps the best alternative solution, then, is to establish a network of bilateral agreements, as in the securities area, supplemented by efforts toward a multilateral agreement. An organization such as the OECD could recommend that its members incorporate the above principles into new or existing antitrust bilateral agreements. In addition, its member countries could pass a resolution agreeing to move toward a multilateral solution as their bilateral agreements become stronger and more numerous. The major advantage of this structure is that each bilateral agreement can be tailored to the individual authorities and procedures of each country. In addition, those pairs of countries prepared to enter into a more comprehensive agreement can avoid the risk of a multilateral agreement that represents only the lowest common denominator of agreed cooperation. Conscious progress toward a multilateral agreement, however, would keep coun-

tries thinking in terms of universal cooperation, which eventually could be the most efficient and effective solution.

Certain countries will not immediately want to enter any new bilateral agreements because they calculate that the risks of harming domestic industry attendant in a cooperative effort will outweigh the benefits of greater enforcement power. Their calculus will likely change, however, as commerce becomes increasingly international and escapes their regulations.

The majority of bilateral information-sharing agreements to date have been either Memoranda of Understanding or Agreements and not binding treaties. Governments are likely to want to follow the same route in the antitrust area given the sensitive nature of some of the information at stake. However, as in the case of an MLAT, a binding treaty that has an adequate exception clause can represent a stronger commitment while still retaining flexibility. Antitrust authorities should strive for these types of binding commitments. Whether the parties to the bilateral agreements should be the competition authorities or the governments themselves depends on the significance of the choice within the domestic law of the countries involved. The EC-U.S. antitrust agreement and the Canada-U.S. MLAT and antitrust MOU are between the governments themselves. But in the securities area, most of the MOUs are between agencies.

Effective implementation of any bilateral instrument, and eventually a multilateral one, has to consider domestic legal and political conditions. The greatest challenge will be to change domestic laws to allow countries to operate fully under a comprehensive cooperation agreement. Countries must amend or supersede confidentiality laws that prevent the release of information to other countries and laws that could let foreign information be released. In addition, authorities should seek laws that allow evidence gathering on behalf of other competition authorities. The timing and content of efforts like the new law allowing the United States to enter international cooperation agreements, will depend on political will. In the end, effectively addressing lawmakers' and lobbyists' fears is the key to establishing a productive system.[202]

VII. Conclusion

Antitrust authorities are currently greatly hampered by their inability to cooperate effectively. The current tools available to competition authorities are insufficient to handle new international illegal conduct. Except for minor exceptions, current arrangements between countries do not provide for the type of assistance agencies need: the sharing of confidential information and the gathering of evidence on one another's behalf.

Other areas of enforcement, such as securities regulation, have overcome policy

202. *See Metzenbaum, supra* note 157 (example of lawmaker fears about harming American interests).

differences and similar obstacles to meaningful cooperation and have developed broad cooperative regimes. The antitrust community must likewise address the growing need for international cooperation. The new U.S. law allowing international antitrust cooperation provides an opportunity the Antitrust Division must seize. The United States and other countries must adopt new bilateral agreements and modify old ones if they are truly going to be able to continue their effective regulation in a future of growing international commerce. They must also work steadily toward a multilateral system that would offer no escape to violating companies. The alternative is unchecked anticompetitive behavior that could seriously harm the welfare of the world's consumers.