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# Trading Secrets — The International Antitrust Enforcement Assistance Act

*Laraine L. Laudati\**

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## I. INTRODUCTION

In November, 1994, the U.S. Congress passed the International Antitrust Enforcement Assistance Act (IAEAA or the Act),<sup>1</sup> providing U.S. antitrust enforcement agencies with the tools to pursue reciprocal arrangements with foreign antitrust enforcement agencies for the purposes of exchanging confidential and other categories of information and retrieving new evidence located abroad in aid of these agencies' respective enforcement activities.

The reciprocal arrangements envisaged by the IAEAA suggest a readiness on the part of the United States to negotiate "second generation" cooperation agreements with foreign agencies, supplementing first generation arrangements such as the United States-European Union Agreement (U.S.-E.U. Agreement) concluded in 1991.<sup>2</sup> These

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<sup>1</sup> International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. § 6201 *et seq.* (Supp. 1996). [hereinafter the IAEAA or the Act].

<sup>2</sup> Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of their Competition Laws, 4 *Trade Reg. Rpt.* (CCH) ¶ 13,504 (September 23, 1991). The French Government successfully

first generation agreements are essentially limited by their failure to provide for confidential information exchange, considered vital to the ultimate success of international antitrust enforcement. Given the liberalization of world trade, achieved through vehicles such as the WTO and resulting in the significant globalization of the economic activity of firms, sharing information located abroad has become central to the ability of antitrust authorities effectively to police anti-competitive action extending across national boundaries.<sup>3</sup>

In the face of these concerns, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) are anxious to create a broad network of agreements under the IAEEA with compatible countries. In particular, they hope to enter an agreement with the European Union (E.U.) and some E.U. Member States, recognizing their dual competence in competition matters.<sup>4</sup> To this end, U.S. officials have visited their counterparts in various Member States, including Germany, Ireland, the Netherlands, Spain, Sweden, and the United Kingdom to promote the Act.<sup>5</sup>

This article will explore the terms of the IAEEA, questioning in particular whether the Act provides a viable mechanism for information exchange, as well as whether it embodies a true commitment to

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argued to the European Court of Justice that the Agreement should have been concluded by the European Council rather than the European Commission. *French Republic v. Commission of the European Communities*, Case C-327/91 (1994). As an internal European matter, therefore, the Agreement was not operative until the European Council formally endorsed it in April, 1995. 1995 O.J. L 95/47; 1995 O.J. L 134/25. As a matter of international law, however, the European Union was still bound by the Agreement, and thus in the interim, both U.S. and E.U. competition authorities largely upheld their obligations under the terms of the Agreement.

<sup>3</sup> See generally *Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules*, Report of the Van Miert Group, July, 1995 (on file with the authors).

<sup>4</sup> See House Subcommittee on Economic and Commercial Law, Questions for Assistant Attorney General for Antitrust Anne K. Bingaman Concerning H.R. 4781, the International Antitrust Enforcement Assistance Act of 1994 (September 12, 1994), answer to question 3 [hereinafter House Questions to Bingaman].

Both the House and Senate Reports accompanying the IAEEA strongly allude to the potential for agreement with the European Union. See H.R. REP. NO. 103-772, 103d Cong., 2d Sess., at 14, 26 (October 3, 1994). [hereinafter "House Report"] (Committee expresses opinion that despite some flux in the "sovereignty arrangements" between the E.U. and the Member States, the E.U. has *sovereign* authority to administer and enforce its antitrust law and to prohibit and regulate disclosure of information that is obtained in the course of an antitrust investigation, as required by IAEEA § 12(9)); S. REP. NO. 103-388, 103d Cong., 2d Sess., at 15 (September 30, 1994). [hereinafter "Senate Report"] (Committee expressly states that the E.U. is an example of a "regional economic integration organization" within the definition of IAEEA § 12(9), and that the E.U. Merger Regulation is an example of a "foreign antitrust law" within the meaning of IAEEA § 12(7)).

<sup>5</sup> Some potential foreign counterparts reportedly appear cool to the idea of entering a bilateral confidential information exchange agreement because they are concerned that the United States has adopted a policy of using antitrust laws to promote its trade policies.

international cooperation. Given specific congressional and administrative interest in reaching agreement with the E.U. and its competition authority, the European Commission, issues relevant to such an agreement will be emphasized.

## II. OVERVIEW OF THE ACT

The IAEAA authorizes the DOJ and the FTC to negotiate bilateral "mutual assistance agreements" with foreign antitrust authorities, under which the agencies would make requests of foreign authorities for evidence located abroad, as well as consider requests from foreign authorities for evidence located in the United States.

The Act requires that mutual assistance agreements include:<sup>6</sup> assurances of reciprocal assistance; assurances of confidentiality not less than that provided by U.S. law; conditions limiting use of evidence received to the sole purpose of administering/enforcing the antitrust laws; pledges to return evidence received; and, terms providing for termination if confidentiality is breached and subsequently not cured.

Requests for information submitted by foreign authorities under a mutual assistance agreement must again be scrutinized on a case-by-case basis to determine whether the assurances included in the agreement continue to be operative. Additionally, the DOJ/FTC must find that honoring the foreign request is consistent with the U.S. public interest.<sup>7</sup>

If a foreign request for assistance is granted, the Act empowers the DOJ/FTC to offer two types of assistance to foreign governments: (1) disclosure of antitrust information from within their files;<sup>8</sup> and (2) use of their investigative authority to obtain new evidence from private parties.<sup>9</sup> For the latter type of assistance, the Act empowers the agencies to utilize two mechanisms in order to satisfy foreign requests. First, they may use their normal investigative powers (*e.g.*, CIDs, subpoenas) on behalf of the foreign partner requesting such assistance.<sup>10</sup> Second, they may apply to a U.S. federal court for an order requiring a party to give testimony or produce documents or other things in response to a foreign request for assistance.<sup>11</sup> The DOJ/FTC would

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<sup>6</sup> IAEAA § 12(2).

<sup>7</sup> IAEAA § 8(a)(3).

<sup>8</sup> IAEAA § 2.

<sup>9</sup> IAEAA § 3(b).

<sup>10</sup> IAEAA § 3.

<sup>11</sup> IAEAA § 4. Section 4(b)(2)(B) provides that the order may specify that the practice and procedure of the foreign partner be used to obtain the information. This section is premised entirely on an already existing statute, 28 U.S.C. § 1782, which allows U.S. federal courts to

offer either category of assistance only if it were offered that category of assistance by the other party to the agreement.

From the perspective of the DOJ/FTC, the benefits of offering assistance in return for reciprocal assistance are twofold: (1) in cases where the United States does not otherwise have jurisdiction, foreign assistance would provide the possibility to get information; and (2) in cases where the United States believes it has jurisdiction, but would have to exercise it extraterritorially, foreign assistance would avoid engendering opposition from foreign governments.

### III. DISCUSSION

Two major issues require scrutiny by a foreign antitrust authority contemplating entry into an agreement pursuant to the IAEAA: whether the United States can offer acceptable levels of confidentiality and whether the IAEAA expresses U.S. readiness to offer truly reciprocal assistance.

#### A. Confidentiality

##### 1. U.S. Guarantee

From the perspective of the U.S. enforcement agencies, the driving force behind the IAEAA is to obtain evidence located abroad for direct use in U.S. court proceedings. This stems from the litigation-based nature of U.S. antitrust enforcement. Thus, the Act contains provisions to ensure that information can be obtained from foreign partners in a form which would make it admissible in evidence in a U.S. court.

This is especially relevant when considering assurances of confidentiality made by the U.S. agencies with regard to a mutual assistance agreement entered pursuant to the Act. The Act prohibits the DOJ/FTC from disclosing in violation of an antitrust mutual assistance agreement any evidence received under the auspices of an agreement.<sup>12</sup> Thus, such evidence is exempt from the disclosure requirements of other U.S. laws such as the Freedom of Information

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provide assistance to foreign courts or foreign tribunals. The purpose of IAEAA § 4(b)(2)(B) is to allow flexibility to get information through procedures that would, to the extent consistent with U.S. law, be compatible with the evidentiary and other requirements of the foreign partner seeking the information. It is not clear what standard a court would use in deciding whether to grant a request for such an order. Presumably, a court could rely on precedent stemming from the use of 28 U.S.C. § 1782, as well as the legislative history of the IAEAA, to make that determination.

<sup>12</sup> IAEAA § 8(b). For comment, see House Report, *supra* note 4, at 21; Senate Report, *supra* note 4, at 13.

Act (FOIA).<sup>13</sup> However, the IAEAA does not relieve the DOJ/FTC of other obligations to reveal information. Moreover, it leaves open some avenues for discretionary release of information to other parties, including state attorneys general.

The following represent limitations on any confidentiality guarantee which can be offered in an agreement under the Act:

- a. Disclosure to a Defendant/Respondent once a complaint has been filed

Broad U.S. rules regarding disclosure and discovery in the course of a trial might jeopardize the confidentiality of any information communicated to the DOJ/FTC by a foreign partner. Although not specifically mentioned in the IAEAA, these derogations are subsumed in the Act's confidentiality guarantee, which states that while the DOJ/FTC may not disclose in violation of a mutual assistance agreement any antitrust evidence received from a foreign partner, the scope of the confidentiality guarantee "may not prevent the disclosure of such antitrust evidence to a defendant in an action or proceeding brought by the Attorney General or the Commission for a violation of any of the Federal laws if such disclosure would otherwise be required by Federal law."<sup>14</sup>

*i. Criminal cases - Brady and the Federal Rules exceptions*

Once a complaint is filed, the prosecution is under an obligation to disclose certain information to the defendant. Although the Supreme Court has expressly held that the prosecution need not provide the defendant in a criminal action with the entire file,<sup>15</sup> the Brady<sup>16</sup> doctrine, on the basis of constitutional due process, prohibits suppression by the prosecution of material,<sup>17</sup> exculpatory evidence sought by a defendant prior to trial. Although no general constitutional obligation requires the prosecutor to disclose *inculpatory* evidence to a defendant prior to trial, Federal Rule of Criminal

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Note that prior to the IAEAA, the FTC would not have been able to grant such confidentiality. A foreign partner would presumably not have benefited from the broad confidentiality provision included in 15 U.S.C. § 57b-2(f), as that section is limited to information received by the FTC either pursuant to compulsory process or voluntarily in lieu of such compulsory process.

<sup>13</sup> 5 U.S.C. § 552 (1996).

<sup>14</sup> IAEAA § 8(b).

<sup>15</sup> *United States v. Bagley*, 473 U.S. 667, 675 (1985).

<sup>16</sup> *Brady v. Maryland*, 373 U.S. 83 (1968).

<sup>17</sup> *E.g.*, evidence that "might have affected the outcome of the trial." *United States v. Agurs*, 427 U.S. 97, 104 (1976).

Procedure 16(a)(1)(C) mandates government disclosure of documents either intended for use by the prosecution at trial, or otherwise material to the defense.<sup>18</sup>

Thus, once a complaint is filed, the aforementioned exceptions could require disclosure to a defendant of a substantial amount of both exculpatory and inculpatory evidence contained within DOJ/FTC files, regardless of whether the agency intends to introduce the material into evidence at trial. Information disclosed could of course include that received from a foreign authority. Moreover, information admitted in evidence will essentially be disclosed to the public as part of the court record. It is possible to seek a protective order from the court limiting disclosure both during discovery and during court proceedings, but whether to grant such an order, as well as the terms of the order, are within the discretion of the court. Where constitutional principles are involved, reliance on the issuance of protective orders is arguably tenuous.

*ii. Civil cases*

The proviso in IAEAA section 8(b) that information be revealed to defendants in the course of court proceedings also applies to civil actions. Although not a matter of constitutional law, respondents in contested civil antitrust actions are also given broad access to DOJ files. As a general matter, Federal Rule of Civil Procedure 26(b) states that parties “may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.”<sup>19</sup> This broad rule may be used by a respondent to demand information from the government file, regardless of whether the information is to be introduced by the government at trial, or even if it ultimately might be inadmissible at trial, provided only that it is “reasonably calculated to lead to the discovery of admissible evidence.”<sup>20</sup> Although the Federal Rules of Civil Procedure are not binding on the FTC in its administrative proceedings, the agency’s dis-

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<sup>18</sup> FED. R. CRIM. P. 16(a)(1)(C). An exception to this discovery rule is provided for “reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case.” FED. R. CRIM. P. 16(a)(2). However, it is not clear whether this exception merely restates the traditional protection offered by the work product doctrine.

<sup>19</sup> Note that the 1993 Amendments to the Federal Rules of Civil Procedure have broadened Rule 26, requiring parties to exchange certain information *prior to discovery, even absent a request from opposing counsel*. This mandatory exchange includes copies or descriptions of any documents relating to “disputed facts alleged with particularity in the pleadings.”

<sup>20</sup> FED. R. CIV. P. 26(b)(1).

covery rules closely parallel those of the Federal Rules and are, as a result, virtually as broad.<sup>21</sup>

Supplementing discovery are routine pre-trial orders, generally mandating that parties provide one another with lists documenting all evidence to be introduced at trial, even if that evidence is legitimately withheld from discovery under one of the discovery limits discussed below.<sup>22</sup> Respondents will thus at least know that the evidence exists, which could suggest the content or the source of the information.

Certain limits on these broad discovery rights nonetheless exist. Most relevant with respect to information provided by foreign partners under the terms of a mutual assistance agreement is the limited access granted to respondents with regard to information submitted to the DOJ/FTC by third parties. Protective orders are routinely granted in civil matters, often providing that: (1) access will be limited to outside counsel, prohibiting respondents themselves from viewing the documents; (2) prior to use at trial, the third party originally submitting the material will be given notice and an opportunity to seek *in camera* status for the materials upon a showing of a clearly defined, serious injury to the party if public disclosure were granted.<sup>23</sup>

b. Disclosure between enforcement agencies and the “significant law enforcement objective” exception

The U.S. agencies sought to ensure that a foreign antitrust enforcement authority receiving information from the United States pursuant to a mutual assistance agreement would not be able to release it to other foreign government agencies. Thus, the Act limits the use of information provided by the U.S. agencies to enforcement of a foreign antitrust law.<sup>24</sup> Qualifying this limitation on the use of information, section 12(2)(E)(ii) of the Act states that any disclosure of information provided to a foreign counterpart be limited to terms and conditions specified in the agreement. These terms and conditions

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<sup>21</sup> See 16 C.F.R. § 4.10(g).

<sup>22</sup> Joseph F. Winterscheid, Confidentiality and Rights of Access to Documents Submitted to the United States Antitrust Agencies, in *Procedure and Enforcement in E.C. and U.S. Competition Law, Proceedings of the Leiden Europa Instituut Seminar on User-Friendly Competition Law*, eds. P.J. Slot & A. McDonnell (London, Sweet & Maxwell, 1993), at 185.

<sup>23</sup> See Winterscheid, *supra* note 22, at 184. Note that aside from protective orders, third parties submitting materials to the FTC are granted the aforementioned protection at 16 C.F.R. § 4.10(g) (exempting from disclosure, absent notice and an opportunity to seek a protective or *in camera* order, material obtained through compulsory process or voluntarily in lieu thereof, material deemed confidential and protected under 15 U.S.C. § 57b-2(f), or material that is confidential commercial or financial information protected by 15 U.S.C. § 46(f)).

<sup>24</sup> See IAEEA §§ 2-4.



could in fact allow for disclosure “essential to a significant law enforcement objective, in accordance with the prior written consent” of the U.S. agencies.<sup>25</sup>

As a matter of reciprocity, a similar limitation would apply with respect to the U.S. agencies’ use of information they receive from a foreign partner. Thus, it appears that an agreement could provide for disclosure to other divisions of the DOJ and FTC, as well as to other government agencies performing duties “essential to a significant law enforcement objective, in accordance with the prior written consent.”<sup>26</sup> However, unlike the exception in IAEAA section 8(b) regarding disclosure to defendants, the section 12(2)(E)(ii) provision is within the discretion of the parties, and may, but need not, be included in negotiation of the mutual assistance agreement.

It is not entirely clear whether the Act’s confidentiality guarantee included in section 8(b), or whether the conscious exclusion of a section 12(2)(E)(ii) “significant law enforcement objective,” condition from a mutual assistance agreement, would override other provisions of U.S. law granting other law enforcement agencies such as state attorneys general access — at the discretion of the DOJ/FTC — to otherwise confidential information included in the DOJ/FTC files.<sup>27</sup>

In any event, access would be limited to official law enforcement purposes,<sup>28</sup> and parties initially submitting the information to the DOJ/FTC file would normally receive notice of and an opportunity to object to this access.<sup>29</sup> Moreover, to the extent that these existing provisions state that other law enforcement agencies may merely *request* information from the federal antitrust authorities,<sup>30</sup> discretionary au-

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<sup>25</sup> IAEAA § 12(2)(E)(ii).

<sup>26</sup> *Id.*

<sup>27</sup> Regarding disclosure to other Federal agencies or State Attorneys General, *see* 15 U.S.C. § 46(f) (permitting disclosure of privileged and confidential trade secrets or commercial or financial information); 15 U.S.C. § 57b-2(c)(2) (permitting disclosure of information considered confidential by the submitter but later determined by the FTC not to be privileged, confidential trade secrets or commercial or financial information); 16 C.F.R. § 4.10(f) (permitting disclosure of non-public material obtained by the FTC, without the consent of the submitter if the material is not confidential, but with notice to the submitter if the material is confidential, *i.e.*, trade secrets and commercial or financial information); 16 C.F.R. § 4.11(c) (permitting disclosure in the context of mainly state requests arising from a law enforcement purpose).

<sup>28</sup> A limited exception to this principle, permits disclosure to states *outside of a law enforcement purpose, i.e.*, for purposes of drafting legislation. 16 C.F.R. § 4.11(d). Disclosure, however, while including material that would not be released to the general public, is more limited than that allowed under Rule 4.11(c).

<sup>29</sup> 15 U.S.C. §§ 57b-2(c)(2), (3).

<sup>30</sup> *Id.*

thority might allow the DOJ/FTC to refuse requests to reveal information provided by a foreign partner.

Administrative discretion, however, can not trump Congressional mandates. The IAEEA does not, for example, amend existing disclosure provisions to specifically exempt from disclosure to other law enforcement agencies information received from foreign partners. Without specific Congressional authorization in the form of such amendments, it is not certain as a matter of administrative law whether the DOJ/FTC could automatically and categorically deny requests from other law enforcement agencies for information provided by a foreign partner.

The only instances of judicial inquiry into this issue involve challenges to the FTC's affirmative decisions to release information to state attorneys general under 15 U.S.C. § 46(f), rather than challenges to FTC denials of information requests. While affirming the substantial discretion accorded the FTC on this issue, courts in these cases have nonetheless felt compelled to lend support to affirmative FTC decisions to release information by citing to Congressional mandates expressed in 15 U.S.C. § 46(f), amended by the Federal Trade Commission Improvements Act of 1980,<sup>31</sup> (the Improvements Act) for the express purpose of "expedit[ing] the flow of information from federal to state law enforcement officials, in part by eliminating the judicial obstacles which had previously impeded the flow."<sup>32</sup> These same courts drew particular attention to the words of those members of Congress who supported passage of the Improvements Act:

*. . . [W]e intended to confirm the Commission's policy of providing documents and information on a nonpublic basis to federal law enforcement agencies and to State attorneys general for State law enforcement purposes. This sharing of information is in the best spirit of Federal-State cooperation. It enhances the States' ability to remedy, in a manner chosen by the State, economic activities that have adversely affected their citizens. It saves taxpayers' money by minimizing duplication of efforts and by reducing the time and effort necessary to conduct State investigations.*<sup>33</sup>

Moreover, even though the Second and Fifth Circuits sided with the FTC in the two cases involving a challenge by state attorneys gen-

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<sup>31</sup> Pub. L. No. 96-252, 94 Stat. 374 (1980).

<sup>32</sup> *Jaymar-Ruby, Inc. v. FTC*, 651 F.2d 506, 512 (7th Cir. 1981).

<sup>33</sup> *Fleming v. FTC*, 670 F.2d 311, 316 n. 14 (1982), quoting statement of Rep. Preyer, 126 *Cong. Rec. H3870* (daily ed. May 20, 1980); *Jaymar-Ruby*, 651 F.2d at 511 (same).

eral to the FTC's denial of an information request, they did so only because the information sought had been filed with the commission pursuant to the premerger notification requirements of Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976,<sup>34</sup> now codified as section 7A of the Clayton Act. The courts held that section 7A "[does] not contemplate the use of premerger information by state officials."<sup>35</sup> In contrast to 15 U.S.C. § 46(f), which "shows that Congress knows how to require that information be made available to state officials on a confidential basis,"<sup>36</sup> the Second Circuit noted that section 7A "plays an important role in a comprehensive regulatory scheme that offers no place for state law enforcement efforts."<sup>37</sup>

Therefore, while the broad discretion accorded the FTC in its affirmative decisions to release information to state attorneys general might translate into latitude to *deny* information requests, review of such denials would likely be colored by the clear expression of Congressional intent in favor of Federal-State cooperation that has been both appealed to by the FTC and embraced by the courts. In other words, although the FTC "need not automatically accede to each and every request for access to [its] files,"<sup>38</sup> the agency must still evaluate each information request on a case-by-case basis. Past judicial review of FTC discretion suggests that automatic and categorical denials of requests for information provided by a foreign partner could be deemed arbitrary and capricious.<sup>39</sup> Despite the substantial discretion accorded the FTC under 15 U.S.C. § 46(f), "permissive statutory language only affects the scope of an agency's discretion; it does not constitute a license to undertake actions that are 'arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.'"<sup>40</sup> Without specific congressional amendment of 15 U.S.C. § 46(f) which, unamended, unequivocally supports and indeed encourages federal-state cooperation, this standard limits the ability of the FTC to automatically and categorically deny requests from state attorneys general for

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<sup>34</sup> Pub. L. No. 94-435, 90 Stat. 1383 (1976).

<sup>35</sup> *Lieberman v. FTC*, 771 F.2d 32, 39 (2d Cir. 1985). See also *Mattox v. FTC*, 752 F.2d 116, 122 (5th Cir. 1985) (Section 7A "does not authorize the FTC to make public any information.")

<sup>36</sup> *Id.* at 38.

<sup>37</sup> *Id.* at 40.

<sup>38</sup> *Fleming*, 670 F.2d at 316 n.15.

<sup>39</sup> *Id.* ("As long as the Commission is not acting in an arbitrary and capricious manner, it may deem disclosure inappropriate or undesirable in certain cases as to whose nature we need not speculate. It is, in fact, Commission policy not to share documents with state officials automatically, but rather to evaluate requests on a case-by-case basis").

<sup>40</sup> *Local 1219, American Fed. of Gov't Employees v. Donovan*, 683 F.2d 511, 516 n. 16 (D.C. Cir. 1982), quoting 5 U.S.C. § 706(2)(A), and citing as support *Fleming*, 670 F.2d at 316 n. 15.

information provided by a foreign party, regardless of the specific terms of a mutual assistance agreement.

Additionally, it appears that 15 U.S.C. § 57b-2(f)<sup>41</sup> already contains an exhaustive list of the situations automatically and categorically "immune" from disclosure by the FTC at the behest of requests from other law enforcement agencies. It is axiomatic that "[w]here Congress provides express exceptions, courts should not imply others."<sup>42</sup> Within the context of Clayton Act section 7A, for example, the Second Circuit took Congress' exhaustive authorization of disclosure in connection with ongoing administrative and judicial proceedings and in communications with Congress "as evidence that the statute's prohibition of disclosure was otherwise meant to be universal."<sup>43</sup> Absent specific congressional amendment, it appears that 15 U.S.C. § 576-2(f) maintains a frozen list of categories granted "immunity" status.

Political considerations also weigh against broad use of DOJ/FTC discretion to summarily deny requests from other law enforcement agencies for information supplied by foreign partners. First, by extending blanket confidentiality protection only to information provided by foreign partners, the DOJ/FTC would essentially place foreign partners in a more advantageous position than domestic parties submitting information either subject to process or voluntarily in lieu thereof. Some members of Congress might have difficulty accepting this paradox as consistent with U.S. public interest. This is particularly true given the clear congressional intent in 15 U.S.C. § 46(f) to promote and encourage information sharing "in the best spirit of Federal-State cooperation."<sup>44</sup> Furthermore, in the case of the FTC, a decision to flex its discretionary muscles and deny information requests submitted by state law enforcement agencies would constitute a substantial change in agency policy. Even before the FTC received express authorization from Congress, with the passage of the

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<sup>41</sup> 15 U.S.C. § 57b-2(f) reads as follows: "EXEMPTION FROM DISCLOSURE. Any material which is received by the [FTC] in any investigation, a purpose of which is to determine whether any person may have violated any provision of the laws administered by the [FTC], and which is provided pursuant to any compulsory process under sections 41 to 46 and 47 to 58 of this title or which is provided voluntarily in place of such compulsory process shall be exempt from disclosure under section 552 of Title 5."

<sup>42</sup> *Lieberman*, 771 F.2d at 38, citing *Andrus v. Glover*, 446 U.S. 608, 616-17 (1980). For other endorsements of the principle *expressio unius est exclusio alterius*, see also *Leatherman v. Tarrant Cty. Narcotics Intelligence and Coordination Unit, et al.*, 507 U.S. 163, 168 (1993); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 188 (1978).

<sup>43</sup> *Mattox*, 752 F.2d at 120.

<sup>44</sup> Statement of Rep. Preyer, 126 *Cong. Rec.* H3870 (daily ed. May 20, 1980).

Improvements Act, to share file information with state attorneys general, the agency's policy was to cooperate with the states, even in the face of "onerous litigation attendant to those disclosure efforts."<sup>45</sup> Moreover, according to its 1995 Report to Congress, the FTC denied only two of 300 state requests for agency records made to it between 1989 and 1993.<sup>46</sup> Considered together, these factors make a sudden policy shift unlikely and politically unattractive.

c. Threshold issue: Freedom of Information Act

The IAEAA section 8(b) exempts evidence obtained from foreign authorities from the disclosure requirements of the FOIA which, otherwise, grant any person a general right of access to federal agency records. The disclosure exemptions written into the FOIA itself arguably already covered at least some DOJ/FTC file information<sup>47</sup> prior to passage of the IAEAA, making the confidentiality guarantee in IAEAA section 8(b) redundant, or at least not as important as it would be if the FOIA contained no such exemption programs.

2. *U.S. Concerns with Foreign Partner's Ability to Guarantee Confidentiality*

The Act contains various precautionary provisions designed to safeguard the confidentiality of information provided by U.S. agencies in response to a foreign request. These provisions were included in response to concerns voiced by the U.S. business community. The main confidentiality requirement, as set forth in section 12(2), states that the foreign authority must be subject to confidentiality laws adequate to "maintain securely" confidentiality, the guarantee of which must in any event not be less than that offered by the United States. This requires an assessment by U.S. authorities of not only the nomi-

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<sup>45</sup> *Fleming*, 670 F.2d at 315.

<sup>46</sup> *Federal Trade Commission Report to Congress pursuant to the Federal Trade Commission Act Amendments of 1994*, February, 1995, at page 23, n.61. In 1994, the FTC in fact "deferred" granting portions of several requests until later in a particular investigation. *Id.*

<sup>47</sup> The relevant FOIA exemptions which arguably made DOJ/FTC files exempt from disclosure pre-IAEAA are as follows:

- 1) Agency personnel rules/practices;
- 2) Records specifically exempted from disclosure by another statute, *i.e.*, section 7A of the Clayton Act, exempting Hart-Scott-Rodino premerger filings from public disclosure requirements;
- 3) Records containing trade secrets or other commercial/financial information received from a person and which is also privileged and confidential;
- 4) Agency correspondence;
- 5) Information that could interfere with proceedings aimed at law enforcement.

See Winterscheid, *supra* note 22, at 178-79.

nal provisions of the foreign authority's confidentiality laws, but also of whether, as a practical matter, those laws will be effectively implemented.

In making this assessment with regard to the E.U., for example, U.S. agencies may also be obliged to inquire into the confidentiality guarantees of the various E.U. Member States. Several parties commenting on the IAEAA prior to its passage expressed concern that evidence provided to the European Commission under a mutual assistance agreement would automatically be disclosed to all Member States.<sup>48</sup> Although this may reflect a concern for keeping track of any information provided to the Commission, as well as a concern that U.S. parties could become subject to antitrust enforcement actions at both the E.U. and Member State level, it may also reflect a perception that the Member States, with interests in national industry, are often effectively competitors of U.S. industry. Although not specifically mentioning any particular potential foreign partner in this regard, the House and the Senate both stressed that disclosing evidence to a foreign government with a proprietary interest in the outcome of a particular foreign antitrust investigation presents a serious confidentiality problem, by providing sensitive commercial information to a party that is essentially a competitor of the U.S. company concerned.<sup>49</sup> In this case, recall that the Act itself calls for the DOJ/FTC to consider the presence of foreign government proprietary interests as potentially violative of U.S. public interest. This supports an argument against granting a particular foreign request for information or assistance.<sup>50</sup>

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<sup>48</sup> See Report of the Section of Antitrust Law and the Section of International Law and Practice of the American Bar Association on the Proposed International Antitrust Enforcement Assistance Act, August 1, 1994, at 20 and n.24; Statement of the United States Council for International Business on the International Antitrust Enforcement Assistance Act of 1994, August 2, 1994, at 2. Under Article 10(1) of the E.U.'s "Regulation 17" (Council Regulation 17/62, 6 February 1962, reprinted in *Official Journal, English Special Edition 1959-1962*, p. 87), the European Commission is to provide Member State authorities with applications, notifications, and copies of "the most important document" contained in the Commission's files. The Commission has the power to determine which are the most important documents, and has been directed by the European Court of Justice to consider the general principle of the protection of business secrets. Case C-36/92P *Samenwerkende Elektriciteits-produktiebedrijven NV (SEP) v. European Commission* [1994] ECR I-1911, sections 35-37.

<sup>49</sup> House Report, *supra* note 4, at 20; Senate Report, *supra* note 4, at 13.

<sup>50</sup> IAEAA § 8(a)(3).

## B. Reciprocity

Two particular issues raise concerns regarding the United States' commitment to reciprocal, bilateral cooperation, as opposed to extraterritoriality.

### 1. *U.S. Antitrust Enforcement Guidelines for International Operations*

The first concern involves the issuance in 1995 of revised Antitrust Enforcement Guidelines for International Operations (the Guidelines),<sup>51</sup> which promote a vigorous approach to the extraterritorial application of the U.S. antitrust laws. Upon invitation, the European Commission submitted comments on the draft Guidelines, criticizing in particular their failure adequately to recognize the principles of comity as expressed in the present E.U.-U.S. Agreement. While the IAEAA advances the principle of reciprocal cooperation, it is appropriate to question whether administration of the Act will be colored by the tone of the Guidelines. In other words, it is legitimate to inquire whether the Guidelines dilute the general tenor of reciprocity and cooperation embodied by the Act, suggesting instead a renewed emphasis on the pursuit of extraterritorial application of U.S. antitrust law.

### 2. *Provisions of the IAEAA*

The second concern involves particular provisions of the Act which, as supplemented by elaborative comments in the Act's congressional history and by DOJ/FTC officials, warrant further inquiry into the Act's commitment to reciprocal assistance. Although the statements of DOJ/FTC officials should be read in light of their need to "sell" the Act to Congress, they are nonetheless useful to gauge the degree of reciprocal assistance the U.S. agencies will be both willing and empowered to offer.

#### a. Conduct permitted under U.S. law

Although the Act authorizes U.S. antitrust authorities to grant foreign requests for information or assistance "without regard to whether the conduct investigated violates any of the [U.S.] antitrust laws,"<sup>52</sup> Assistant Attorney General Bingaman expressed her belief

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<sup>51</sup> U.S. Department of Justice and the Federal Trade Commission, *Antitrust Enforcement Guidelines for International Operations* (1995).

<sup>52</sup> IAEAA § 3(c).

that cases of conduct violative of foreign antitrust laws yet permitted under U.S. law are in fact "rare."<sup>53</sup> Given that, for example, a European Commission investigation warranting a request for information from U.S. authorities may in fact focus on conduct not covered by U.S. antitrust prohibitions, Bingaman's statement warrants inquiry into whether as a matter of policy such information requests would be honored.

b. "Public Interest" provision

The IAEAA requires that before granting a foreign request for information or investigative assistance under a mutual assistance agreement, the U.S. authorities must find that honoring the request is consistent with U.S. public interest.<sup>54</sup> Although such requirements are standard in legislation of this sort, heavy reliance upon the provision by the House, the Senate, and Assistant Attorney General Bingaman raises the question of whether the United States is prepared to provide truly reciprocal assistance, or whether it will frequently deny foreign requests or only grant them subject to burdensome conditions, under the auspices of the "public interest."

The House, the Senate, and Bingaman all mention the "public interest" provision as a rationale to deny a foreign request pursuant to an investigation of conduct not prohibited by U.S. antitrust law.<sup>55</sup> Further, the House and the Senate in the legislative history of the Act herald the provision as a source of "wide latitude" for U.S. antitrust authorities, giving them the power to deny foreign requests or to attach conditions to their being granted based upon a multitude of factors, including:<sup>56</sup> whether the foreign government has any proprietary interest in the outcome of a particular investigation;<sup>57</sup> whether a target party should be notified of the foreign request and given an opportunity to contest the request; whether a target party has been granted immunity from U.S. antitrust prosecution in exchange for testimony on a matter; whether the evidence requested involves particularly sensitive competitive information such as a company's future business or product plans; and, whether the party subject to a request is not in fact

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<sup>53</sup> See House Questions to Bingaman, *supra* note 4, answers to questions 2, 5.

<sup>54</sup> IAEAA § 8(a)(3).

<sup>55</sup> House Report, *supra* note 4, at 15; Senate Report, *supra* note 4, at 11; House Questions to Bingaman, *supra* note 4, answer to question 5.

<sup>56</sup> House Report, *supra* note 4, at 20; Senate Report, *supra* note 4, at 13.

<sup>57</sup> See IAEAA § 8(a)(3). This factor, particularly relevant in the context of the discussion of confidentiality, is the only factor expressly mentioned in the text of the Act.



the target of an investigation, but rather only happens to possess evidence about an investigative target.

c. “Substantially similar” provision

Within the House Questions to Bingaman, there was some question of whether the Act’s definition of “foreign antitrust laws” and its authorization of DOJ/FTC assistance to foreign authorities investigating violations of those laws in fact limit the scope of the assistance which could be provided.

“Foreign antitrust laws” are defined in the Act as those laws “that are substantially similar to any of the [U.S.] antitrust laws and that prohibit conduct similar to conduct prohibited under the [U.S.] antitrust laws.”<sup>58</sup> Essentially revisiting the debate over whether assistance should be granted in cases involving conduct permitted under U.S. law, the House asked Bingaman whether this definition would prove to be a restrictive provision, limiting assistance to foreign authorities to investigations into conduct purportedly violative of only those foreign antitrust laws substantively similar to U.S. antitrust law.<sup>59</sup> Bingaman’s answer, however, emphasized the utility of the Act’s definition of “foreign antitrust laws” to deny assistance for foreign requests aimed at enforcing foreign laws which, while nominally dubbed “antitrust,” are in fact not truly substantive antitrust laws.<sup>60</sup> Further, the Senate confirmed its general opinion that the Act’s definition included “foreign regulations having the force of law, such as the European Union’s merger regulation.”<sup>61</sup> Therefore, the use of this provision as a device threatening U.S. reciprocal cooperation under the IAEAA appears unlikely.

d. Exemptions from DOJ/FTC Ability to Disclose

Several exemptions from the ability to disclose information to foreign antitrust authorities may hinder the ability of U.S. authorities to provide truly reciprocal arrangements.

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<sup>58</sup> IAEAA § 12(7).

<sup>59</sup> House Questions to Bingaman, *supra* note 4, answers to questions 11, 12.

<sup>60</sup> House Questions to Bingaman, *supra* note 4, answers to questions 11, 12.

<sup>61</sup> Senate Report, *supra* note 4, at 15.

*i. Existing provisions of the FTC authorizing legislation*

Although section 6<sup>62</sup> of the IAEAA purports to blanketly override the disclosure restrictions attendant to the FTC authorizing legislation for foreign partners requesting information under the auspices of a mutual assistance agreement, the Act does not actually *amend* existing law establishing specific confidentiality barriers,<sup>63</sup> and does not add "foreign partners" to the lists of those parties exempt from the confidentiality barriers.<sup>64</sup> Again, "[w]here Congress provides express exceptions, courts should not imply others."<sup>65</sup> While the "general override" language of section 6 of the Act is at least preferable to the approach discussed *supra* relative to confidentiality,<sup>66</sup> it is still possible that without specific amendments, large amounts of FTC file information could be excluded from the reach of foreign requests.

*ii. Premerger Information*

Although section 5(1) of the IAEAA prohibits the disclosure of premerger information (such as market share breakdowns and future competitive business strategies) received by the DOJ or FTC under

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<sup>62</sup> Section 6 of the IAEAA reads as follows: "EXCEPTION TO CERTAIN DISCLOSURE RESTRICTIONS. Section 4 of the Antitrust Civil Process Act (15 U.S.C. 1313), and sections 6(f) and 21 of the Federal Trade Commission Act (15 U.S.C. 46, 57b-2), shall not apply to prevent the Attorney General or the Commission from providing to a foreign antitrust authority antitrust evidence in accordance with an antitrust mutual assistance agreement in effect under this Act and in accordance with the other requirements of this Act."

<sup>63</sup> 15 U.S.C. § 57b-2(f)(exempting from disclosure material received by the FTC which is provided pursuant to compulsory process or voluntarily in place of such compulsory process); 16 C.F.R. § 4.10(a)(8)(same); 16 C.F.R. § 4.10(d)(exempting from disclosure *confidential* material received by the FTC which is provided pursuant to compulsory process or voluntarily in place of such compulsory process); 16 C.F.R. § 4.10(g)(exempting from disclosure, absent notice and an opportunity to seek a protective or *in camera* order, material obtained through compulsory process or voluntarily in lieu thereof, material deemed confidential and protected under 15 U.S.C. § 57b-2(f), or material that is confidential commercial or financial information protected by 15 U.S.C. § 46(f)).

<sup>64</sup> Several provisions exempt either other Federal agencies or State Attorneys General from blanket bars to disclosure. See 15 U.S.C. § 46(f)(permits disclosure of privileged, confidential trade secrets or commercial or financial information to other Federal agencies or State Attorneys General); 15 U.S.C. § 57b-2(b)(6) (permits disclosure of information to other Federal agencies or State Attorneys General, given an "official law enforcement purpose"); 16 C.F.R. § 4.11(c) (same); 16 C.F.R. § 4.11(d) (permits more limited disclosure of information to other Federal agencies or State Attorneys General, absent a law enforcement purpose, *i.e.*, drafting legislation).

<sup>65</sup> *Lieberman*, 771 F.2d at 38, *citing* *Andrus v. Glover*, 446 U.S. 608, 616-17 (1980). For other endorsements of the principle *expressio unius est exclusio alterius*, see *supra* note 42.

<sup>66</sup> See text *supra* at notes 24-45.

section 7A of the Clayton Act,<sup>67</sup> it does not prohibit the DOJ/FTC from providing assistance in response to foreign requests pertaining to merger investigations.<sup>68</sup> Inclusion of evidence in a response to a Clayton Act section 7A premerger information request, in other words, does not automatically immunize the evidence from disclosure to foreign antitrust authorities under a mutual assistance agreement. If the same evidence can be obtained anew through the investigative provisions of the IAEAA,<sup>69</sup> it may be provided to a foreign authority.

Both the House and the Senate, however, expressed their expectations that the DOJ/FTC would refrain from abusing these investigative provisions to get around the general prohibition of IAEAA section 5(1). Rather than broad foreign requests for evidence, the House and the Senate anticipate “that any requests on behalf of foreign antitrust authorities in merger investigations likely would be significantly narrower in scope” than those envisaged by the premerger information requests authorized under section 7A of the Clayton Act.<sup>70</sup> The House went so far as to remind the DOJ/FTC that any attempts to circumvent IAEAA section 5(1) will be policed by the U.S. courts.<sup>71</sup>

Although the precise scope of this exception is unclear, it may have the effect of narrowing the reciprocal provision of information by the DOJ/FTC.

### *iii. Grand Jury evidence*

The Act maintains the Federal Rule of Criminal Procedure 6(e) requirement that grand jury information be kept confidential.<sup>72</sup> However, upon a showing to a court of “particularized need” for the grand jury information, a foreign request under a mutual assistance agreement may be granted.<sup>73</sup> It is noteworthy that this showing may be

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<sup>67</sup> 15 U.S.C. § 18a, as amended by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Title II.

<sup>68</sup> See IAEAA § 5(1).

<sup>69</sup> *E.g.*, court orders compelling production of evidence, subpoenas, civil investigative demands.

<sup>70</sup> Senate Report, *supra* note 4, at 20. See also House Report, *supra* note 4, at 16-17.

<sup>71</sup> House Report, *supra* note 4, at 16-17. Note that the availability of judicial review for violations of Clayton Act Section 7A is unaffected by the IAEAA. IAEAA Section 9(c)(2).

<sup>72</sup> IAEAA § 5(2).

<sup>73</sup> IAEAA § 5(2)(A). The House was particularly concerned to have the U.S. courts decide whether disclosure of grand jury evidence to a foreign antitrust authority should be granted when the evidence is in the form of testimony given under a grant of immunity from prosecution by the U.S. antitrust authorities. See House Report, *supra* note 4, at 18.

more burdensome than that required of state attorneys general seeking access to grand jury information.<sup>74</sup>

#### IV. CONCLUSION

Closer cooperation between antitrust authorities is necessary to achieve more effective enforcement as the process of market globalization and liberalization continues. The IAEAA represents a clear invitation to foreign antitrust authorities to negotiate innovative information-exchange agreements with the United States and, as such, is a commendable first step toward realizing improved cooperation. With a clear understanding of one another's goals, as well as of the mechanisms available for exchanging information, the parties to an IAEAA-brokered agreement should begin to see substantial improvement in their abilities to collect confidential information across borders.

At the same time, however, the IAEAA has its limitations. The U.S. agencies' primary interest in the IAEAA was to obtain a tool for entering agreements which would help them obtain evidence from foreign antitrust authorities for use at trial. The trial disclosure obligations flowing from the use of this evidence, as well as the Act's failure to amend several existing provisions of U.S. antitrust law, may limit the ability of the DOJ/FTC to deliver on promises of confidentiality and reciprocity. Moreover, the strong interest of the U.S. agencies in continuing aggressive extraterritorial application of U.S. law, as evidenced by the revised Antitrust Enforcement Guidelines for International Operations, gives rise to questions regarding DOJ/FTC motivations in seeking second generation cooperation with their foreign counterparts. Understanding and accepting these limitations, however, does not dilute the significance of the IAEAA and the important role it has to play in fostering information exchange agreements central to effective world-wide enforcement of antitrust laws.

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<sup>74</sup> In the legislative history accompanying the IAEAA, the House expressed its view that "the presence of a 'particularized need' for the evidence cannot be automatically presumed in the case of a foreign government official as it is in the case of a State official." House Report, *supra* note 4, at 17. The 1985 amendments to Federal Rule of Criminal Procedure 6(e)(3)(C)(iv) obviated the need for state officials enforcing a state criminal law to show "particularized need;" however, such a showing still exists if the evidence is sought for use in a state civil proceeding. Courts have, of course, had varying interpretations of what must be demonstrated to satisfy the "particularized need" standard.