

INTERNATIONAL JUDICIAL ASSISTANCE IN  
ANTITRUST ENFORCEMENT:  
THE SHORTCOMINGS OF CURRENT  
PRACTICES AND LEGISLATION, AND THE  
ROLES OF INTERNATIONAL  
ORGANIZATIONS

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INTRODUCTION

The rise of multinational corporations and globalized industries has led to an increasing number of international antitrust investigations by the Federal Trade Commission (FTC) and the Department of Justice (DOJ). Both agencies may increasingly turn to international judicial assistance from other nations during the course of their investigations and trials.<sup>1</sup>

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1. International judicial assistance refers to “the multinational goal of having nations”

Multilateral treaties and domestic legislation have attempted to facilitate cooperation among nations in pursuit of more streamlined international judicial assistance for the United States and foreign nations.

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention)<sup>2</sup> was enacted to facilitate international relations for judicial assistance purposes. Under this treaty, a “judicial authority,”<sup>3</sup> but not an administrative agency, may request judicial assistance from other countries in the form of depositions or document production.<sup>4</sup> To circumvent the “judicial authority” language of the Hague Evidence Convention, administrative agencies may request a federal court to issue orders on the agencies’ behalf under the All Writs Act.<sup>5</sup> Administrative agencies may also rely on other treaties containing international judicial assistance provisions,<sup>6</sup> including those in the field of criminal law.<sup>7</sup> In the context of civil antitrust investigations, however, the scope of international judicial assistance provisions is rather limited in that

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assist each other “in support of their respective . . . tribunals.” Karl Schwappach, *The Inter-American Convention on Taking Evidence Abroad: A Functional Comparison with the Hague Convention*, 4 N.Y. INT’L L. REV. 69, 69 (1991) (citing Harry Leroy Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 515 (1953)).

2. The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters art. 1, Mar. 18, 1970, 23 U.S.T. 2555, 2557 [hereinafter Hague Evidence Convention] (“In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State . . . to obtain evidence, or to perform some other judicial act.”).

3. The Hague Evidence Convention contains no definition for *judicial authority*. Parties must analyze each request on an individual basis, focusing on the function, and not the title or categorization, of the requesting authority. See, e.g., DAVID MCCLEAN, INTERNATIONAL JUDICIAL ASSISTANCE 90 (1992) (citing *In re Letters Rogatory Issued by the Director of Inspection of Government of India*, 385 F.2d 1017 (2d Cir. 1967) (deciding that a tax assessment agency in India was not a tribunal entitled to the execution of a letter requesting international judicial assistance in New York)).

4. See Hague Evidence Convention, *supra* note 2, arts. 1–14; see also C. Peck Hayne, Jr., Anschuetz, *International Discovery American-Style, and the Hague Evidence Convention*, 19 N.Y.U. J. INT’L L. & POL. 87, 89 (1986) (“Under the Convention, a judicial authority in one country asks a judicial authority in another to obtain specified evidence, such as through the use of depositions or the production of documents.” (citing Hague Evidence Convention, *supra* note 2, arts. 1–14)).

5. The All Writs Act authorizes U.S. federal courts to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” 28 U.S.C. § 1651 (2006).

6. As of April 2007, the United States had mutual legal assistance treaties with fifty-three countries. Compliance Week, United States Mutual Legal Assistance Treaties (MLATs), <http://www.complianceweek.com/s/documents/MLAT.doc> (last visited Aug. 18, 2009).

7. For example, the Securities and Exchange Commission (SEC) has utilized “criminal” treaties because U.S. federal securities laws are both civil and criminal in nature. Securities Exchange Act, 15 U.S.C. § 78aa (2006) (“Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred.”).

they typically cover criminal and not civil violations of antitrust law.<sup>8</sup>

In 1994, Congress responded to this gap in statutory assistance coverage by adopting the International Antitrust Enforcement Assistance Act (IAEAA or Act),<sup>9</sup> which sought to improve access to evidence located abroad for civil antitrust investigations.<sup>10</sup> The Act vests the United States Attorney General's office with the authority to assist foreign nations in procuring evidence relating to an antitrust matter.<sup>11</sup> Further, the IAEAA encourages cooperation with foreign nations through bilateral agreements called antitrust mutual assistance agreements (AMAAs), which allow both the FTC and the DOJ to disclose to foreign antitrust authorities otherwise confidential information to help enforce their antitrust laws.<sup>12</sup> The IAEAA has proven to be largely ineffective, however, as only one AMAA has been formed under the IAEAA, and that agreement is utilized infrequently.<sup>13</sup>

This Recent Development examines the deficiencies of the existing legislation and practices relating to international judicial assistance. Section I provides a background of international judicial assistance procedure as it relates to antitrust law, with a focus on the Hague Evidence Convention and the IAEAA. Section II highlights the shortcomings of current legislation and customs for seeking and providing international judicial assistance. Section III considers the growing roles of international organizations in fostering a greater level of informal communication among antitrust agencies worldwide. These informal channels of communication are necessary to promote cooperation and convergence in an era of ever-increasing levels of international antitrust enforcement.

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8. See William P. Connolly, Note, *Lessons to Be Learned: The Conflict in International Antitrust Law Contrasted with Progress in International Financial Law*, 6 FORDHAM J. CORP. & FIN. L. 207, 209 (2001).

9. 15 U.S.C. §§ 6201–6212 (2006).

10. Press Release, FTC, First International Antitrust Assistance Agreement Under New Law Announced by FTC and DOJ (Apr. 17, 1997), <http://www.ftc.gov/opa/1997/04/iaeaa.shtm>.

11. 15 U.S.C. § 6202(a).

12. *Id.* § 6201.

13. See William J. Tuttle, Note, *The Return of Timberlane? The Fifth Circuit Signals a Return to Restrictive Notions of Extraterritorial Antitrust*, 36 VAND. J. TRANSNAT'L L. 319, 352 (2003) (stating that the 1999 agreement with Australia—the International Antitrust Enforcement Assistance Act's (IAEAA's) only concluded agreement—provides less assistance than what was originally planned in the IAEAA legislation).

## I. BACKGROUND

### A. *A Brief Background of the Hague Evidence Convention*

The Hague Evidence Convention, one of the most successful of the Hague conventions,<sup>14</sup> states that courts of one country have a right, through a “letter of request”<sup>15</sup> from a central authority,<sup>16</sup> to obtain evidence or perform some other judicial act through the courts of another country. Courts can exercise this right in judicial proceedings involving civil and commercial matters.<sup>17</sup> When the Hague Evidence Convention was ratified on March 18, 1970, the United States became a party to the treaty in hopes that it would increase levels of international judicial assistance.<sup>18</sup> Some countries, including France and various other civil law countries, had alternative motives, hoping instead that the Hague Evidence Convention would contain the extraterritorial reach of foreign courts during the pretrial discovery phase.<sup>19</sup> Prior to the Hague Evidence Convention, the United States had hoped to increase international judicial assistance by enacting unilateral provisions that would facilitate foreign authorities’ ability to obtain evidence from within the United States; however, this did not result in the reciprocity that the United States initially envisioned.<sup>20</sup> The Hague Evidence Convention has since been signed by forty-four nations.<sup>21</sup>

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14. See MCCLEAN, *supra* note 3, at 86 (attributing the success of the convention to “the continuing review of its operation”).

15. A *letter of request* is defined as a “document issued by one court to a foreign court, requesting that the foreign court (1) take evidence from a specific person within the foreign jurisdiction or serve process on an individual or corporation within the foreign jurisdiction, and (2) return the testimony or proof of service for use in a pending case.” BLACK’S LAW DICTIONARY 988 (9th ed. 2009).

16. Each contracting state must establish a “Central Authority” and may designate “other authorities.” Governments may establish more than one central authority. Typically, nations use the same central authority as the one used in other Hague Conventions dealing with civil procedural matters, such as the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. MCCLEAN, *supra* note 3, at 91.

17. Hague Evidence Convention, *supra* note 2, arts. 1–2.

18. See Schwappach, *supra* note 1, at 69 (indicating that the United States was not only a party to the Hague Evidence Convention but also assisted in its drafting).

19. See Cynthia D. Wallace, ‘Extraterritorial’ Discovery: Ongoing Challenges for Antitrust Litigation in an Environment of Global Investment, 5 J. INT’L ECON. L. 353, 365–66 (2002) (explaining that pretrial discovery is often restricted by statutes in foreign countries, such as France and Germany, which have no pretrial discovery phase and that the word *pretrial* connotes a “detachment” from the actual case to many civil law practitioners).

20. Letter from William Rogers, Sec’y of State, U.S. Dep’t of State, to President Richard M. Nixon (Nov. 9, 1971), reprinted in 12 I.L.M. 324 (1973).

21. For an up-to-date list of signatories to the Hague Evidence Convention, see Hague Conference on Private International Law, Status Table for Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, [http://www.hcch.net/index\\_en.php?act=conventions.statusprint&cid=82](http://www.hcch.net/index_en.php?act=conventions.statusprint&cid=82) (last visited Jan. 24, 2010).

### B. A Brief Background of the IAEEA

Much of today's antitrust cooperation policy is grounded in comity, a principle requiring consideration of other nations' sovereignty and laws.<sup>22</sup> This cooperation has resulted in numerous mutual legal assistance treaties (MLATs), which are compulsory agreements between the United States and other countries wherein each party agrees to provide legal assistance to the other.<sup>23</sup> Since most MLATs focus on criminal matters, antitrust violations, which are predominately recognized as civil matters, do not typically fall under the ambit of MLATs.<sup>24</sup>

In the interest of greater cooperation, Congress enacted the IAEEA in 1994 to grant the United States' antitrust authorities more liberal abilities to share investigatory information with other countries' authorities.<sup>25</sup> The IAEEA allows the DOJ and the FTC to share antitrust evidence that they would not have been able to share prior to its enactment.<sup>26</sup>

The IAEEA also permits federal courts to order testimony or evidence from an entity within the court's jurisdiction to assist a foreign antitrust authority in the enforcement of its antitrust laws, so long as the United States has entered into an AMAA with that foreign country.<sup>27</sup> An AMAA

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22. Connolly, *supra* note 8, at 209 (characterizing the concept of comity as the balancing of other nations' laws "against the rights of one's own nation").

23. *Id.* A mutual legal assistance treaty (MLAT) is a bilateral treaty that obligates signatory countries to provide assistance to each other by allowing each country a means to access evidence in the foreign country. MLATs have the status of federal law, and they create binding and reciprocal international obligations between the signatory countries. The United States has MLATs with over fifty countries ranging from white-collar crime enforcement to organized crime. SECTION OF ANTITRUST LAW, AM. BAR ASS'N, INTERNATIONAL ANTITRUST COOPERATION HANDBOOK 8–9 (2004) [hereinafter HANDBOOK].

24. Connolly, *supra* note 8, at 209. Some MLATs are only applicable when the underlying offense is a criminal offense in both signatory countries—called a "dual criminality" requirement. Other MLATs, however, only require that the underlying offense be criminal in the country requesting assistance. Therefore, depending on the individual MLAT and the laws of the foreign country, MLATs entered into by the United States may or may not be applicable to antitrust offenses. Criminal liability generally exists in cases involving horizontal agreements between competitors to price fix, bid rig, or allocate markets or customers. Offenders can be imprisoned for these offenses in the United States, Canada, France, Ireland, Germany (for bid rigging), Japan, South Korea, Norway, the Slovak Republic, and the United Kingdom. HANDBOOK, *supra* note 23, at 9 & n.27.

25. MARK R. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER: A GUIDE TO THE OPERATION OF UNITED STATES, EUROPEAN UNION AND OTHER KEY COMPETITION LAWS IN THE GLOBAL ECONOMY 82 (3d ed. 2006). The IAEEA was met with strong support by both political parties as well as the Clinton Administration. It was drafted with input from the business community and took only ten weeks to pass through Congress after introduction. Connolly, *supra* note 8, at 218.

26. The IAEEA defines *antitrust evidence* as anything "obtained in anticipation of, or during the course of, an investigation or proceeding under any of the Federal antitrust laws." 15 U.S.C. § 6211(1) (2006). However, it prohibits the sharing of information "in violation of any legally applicable right or privilege." *Id.* § 6202(d).

27. JOELSON, *supra* note 25, at 82.

is a written agreement between a foreign antitrust authority and the United States which ensures that the United States will provide assistance to the foreign authority comparable to the amount the foreign authority provides to the United States.<sup>28</sup> Without an AMAA, the United States is generally prohibited from sharing with other nations confidential information obtained during an antitrust investigation.<sup>29</sup> Further, the United States may order that the manner in which the testimony or evidence is obtained be in accord with the foreign country's normal practices and procedures.<sup>30</sup> The usefulness of AMAAs as bilateral, interagency agreements stems from the fact that they establish a protocol for international judicial assistance while embodying a desire for improved cooperation between agencies.<sup>31</sup>

An AMAA must provide for equal and reciprocal assistance from the foreign country before any confidential information is shared.<sup>32</sup> The foreign country must assure the United States that it has laws and procedures in place that will ensure the continued confidentiality of the shared information and that it will respect the confidentiality of the shared information to an equal or greater degree than the United States.<sup>33</sup> The United States' antitrust enforcement agencies are allowed to share some information that is deemed agency confidential.<sup>34</sup> Although Congress intended for the IAEEA to encourage international cooperation in civil and criminal antitrust matters, Australia is the only country ever to enter into an AMAA under the IAEEA.<sup>35</sup>

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28. See Tuttle, *supra* note 13, at 352 (indicating that an exception to the written agreement requirement is available if the Attorney General or the FTC believes that the foreign agency is capable of fulfilling the confidentiality requirements and that it will provide comparable assistance to the United States).

29. ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 218 (2007) [hereinafter AMC REPORT], [http://govinfo.library.unt.edu/amc/report\\_recommendation/amc\\_final\\_report.pdf](http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf). Even under the IAEEA, agencies cannot share confidential *business* information, which is protected by statute. They may, however, share confidential *agency* information, which agencies treat as nonpublic, but are not prohibited from disclosing. Examples of confidential agency information include, among others, market definitions, assessments of competitive effects, and the fact that an agency has opened an investigation. John J. Parisi, Int'l Antitrust Div., FTC, Presentation at the Sixth Annual London Conference on EC Competition Law: Enforcement Cooperation Among Antitrust Authorities (May 19, 1999), <http://www.ftc.gov/speeches/other/ibc9905991update.shtm> (last visited Dec. 2, 2009).

30. JOELSON, *supra* note 25, at 82.

31. HANDBOOK, *supra* note 23, at 47.

32. 15 U.S.C. § 6211(2) (2006).

33. JOELSON, *supra* note 25, at 83.

34. HANDBOOK, *supra* note 23, at 48 (stating that, in addition to certain agency confidential information, publicly filed information and information under the Freedom of Information Act may also be shared).

35. See Agreement Between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance, U.S.-Austl., Apr. 27, 1999, <http://www.justice.gov/atr/public/international/docs/usaus7.htm> [hereinafter U.S.-Austl. Agreement]; cf. JOELSON, *supra* note 25, at 83 (noting that the AMAA between the

## II. SHORTCOMINGS OF CURRENT PRACTICES AND LEGISLATION

A potential cause of disharmony in the field of international judicial assistance is the notion that extraterritorial discovery infringes upon foreign sovereign interests.<sup>36</sup> International law recognizes the well-founded principle that a nation is forbidden from seizing documents or taking depositions on foreign soil absent the foreign nation's authorization.<sup>37</sup>

The rise of domestic litigation has resulted in an increasing need to conduct discovery abroad.<sup>38</sup> Fundamental differences among nations concerning the different methods of discovery have led to conflicts in extraterritorial discovery that remain far from resolved.<sup>39</sup> In particular, the different identities of the evidence gatherer among different countries can be a potential cause of friction for international judicial assistance purposes. In common law countries such as the United States, discovery is conducted by the parties.<sup>40</sup> In civil law countries, however, discovery is conducted by a court official.<sup>41</sup> Although the Hague Evidence Convention and the IAEAA sought to standardize procedure and facilitate international judicial assistance, each has shortcomings that have prevented the realization of their purposes.

### A. Problems with the Hague Evidence Convention

The Hague Evidence Convention sought to remedy problems in

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United States and Australia contains a provision requiring the United States to declare whether the information it seeks is in furtherance of a possible criminal proceeding, in which case Australia reserves the right to decline). The Australian antitrust enforcement agency would not have benefited from an MLAT, as Australian competition enforcement is currently in civil, and not criminal, jurisdiction. Antitrust & Trade Law Section, Int'l Bar Ass'n, Submission to the U.S. Antitrust Modernization Committee 20 (Jan. 27, 2006), [http://govinfo.library.unt.edu/amc/public\\_studies\\_fr28902/international\\_pdf/060127\\_IBA\\_International.pdf](http://govinfo.library.unt.edu/amc/public_studies_fr28902/international_pdf/060127_IBA_International.pdf).

36. See Wallace, *supra* note 19, at 356 (explaining that noninterference is a sovereign right protected under international law).

37. See *id.* at 357 (noting that United States courts have typically requested that documents be produced in the United States for inspection, thereby avoiding the problem of conducting judicial affairs in a foreign country that might go against the laws in that foreign state). Additionally, by bringing foreign witnesses to the United States, parties may be more confident that the evidence is admissible and was gathered in a method that is familiar to United States courts. INTERNATIONAL LITIGATION: DEFENDING AND SUING FOREIGN PARTIES IN U.S. FEDERAL COURTS 277 (David J. Levy ed., 2003) [hereinafter INTERNATIONAL LITIGATION].

38. INTERNATIONAL LITIGATION, *supra* note 37, at 275.

39. See Wallace, *supra* note 19, at 391 (explaining that the vast amount of foreign protest and statutes against United States discovery orders attests to the fact that there is still a large amount of disagreement concerning international judicial assistance at the investigational level).

40. INTERNATIONAL LITIGATION, *supra* note 37, at 276.

41. *Id.*

international judicial assistance by formalizing international discovery techniques and providing a standardized procedure for executing requests.<sup>42</sup> The Hague Evidence Convention was enacted with two goals in mind: (1) to simplify the process of obtaining evidence abroad, which was of particular concern to the United States,<sup>43</sup> and (2) to restrict the “‘extraterritorial’ reach and scope of foreign parties . . . in ‘pre-trial’ discovery proceedings.”<sup>44</sup>

The Hague Evidence Convention, however, was met with opposition from countries like France, Germany, Luxembourg, Norway, and Portugal, all of whom objected to providing evidence for pretrial discovery purposes.<sup>45</sup> The United Kingdom brought about the addition of Article 23<sup>46</sup> in hopes that it would prevent third-party discovery, which was not allowed under its own restrictive discovery rules but is allowed in the United States.<sup>47</sup> This insertion, however, evolved into allowing signatories<sup>48</sup> to refuse unspecific pretrial discovery requests.<sup>49</sup>

Other imperfections exist in the Hague Evidence Convention. For example, in *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*,<sup>50</sup> the Supreme Court held that litigants in U.S. courts are not required to invoke the Hague Evidence Convention when seeking evidence from foreign entities.<sup>51</sup> This had an adverse effect on other signatory countries that interpreted this holding to mean that when the United States signs an international agreement, it does

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42. HANDBOOK, *supra* note 23, at 17.

43. Wallace, *supra* note 19, at 364 (stating that one of the Hague Evidence Convention’s original objectives was to “facilitate the obtaining of evidence abroad that would otherwise be unobtainable or fraught with foreign government opposition or obstruction”).

44. *Id.* at 364–65.

45. The Hague Evidence Convention may not be used as a precomplaint investigative tool and can only be used by United States antitrust enforcement agencies to the extent that cases brought by the agencies constitute civil, and not penal, litigation. Foreign signatories may consider a case brought by a government agency seeking fines not to be a “civil or commercial matter” and therefore outside of the purview of the Convention. HANDBOOK, *supra* note 23, at 17.

46. Article 23 states that “a contracting state may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.” Hague Evidence Convention, *supra* note 2, art. 23.

47. Wallace, *supra* note 19, at 366.

48. See *supra* note 21 for the list of signatories to the Hague Evidence Convention.

49. See Lawrence Collins, *The Hague Evidence Convention and Discovery: A Serious Misunderstanding?*, 35 INT’L & COMP. L.Q. 765, 772 (1986) (noting that in the United Kingdom, obligations to make discovery do not arise before the close of pleadings, and the requirement for specificity prohibits American-style “fishing expeditions”).

50. 482 U.S. 522 (1987).

51. See *id.* at 538 (reviewing the text and history of the Hague Evidence Convention to reach the conclusion that procedures are optional).



not have to honor the agreement.<sup>52</sup> In contrast, French law requires that parties strictly comply with the procedures set forth in the Hague Evidence Convention.<sup>53</sup>

Further, U.S. courts readily rule that discovery methods under the Hague Evidence Convention are ineffective and instead choose to conduct discovery under the Federal Rules of Civil Procedure.<sup>54</sup> However, utilizing the Federal Rules of Civil Procedure for international discovery purposes may violate the sovereignty of foreign states and result in more nations adopting “blocking statutes” to provide greater protection to their citizens.<sup>55</sup> France is one of several countries that has enacted blocking statutes that forbid their nationals from cooperating with unilateral discovery attempts.<sup>56</sup> The French blocking statute<sup>57</sup> was broadly drafted with the intention of prohibiting all discovery not expressly permitted by the Convention and forbidding pretrial discovery in France based only on United States discovery practices.<sup>58</sup> Further, the legislative history of the blocking statute reflects hostility toward the ability of parties under United States law to conduct pretrial discovery without the supervision of a judicial authority, a concept antithetical to French discovery procedure.<sup>59</sup>

In addition, the Hague Evidence Convention is problematic because it

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52. See Keith Y. Cohan, Note, *The Need for a Refined Balancing Approach when American Discovery Orders Demand the Violation of Foreign Law*, 87 TEX. L. REV. 1009, 1028–29 (2009) (asserting that this holding may have lowered the value of international agreements with the United States altogether). The principles in the *Aérospatiale* holding were closely related to those specified in the Restatement of Foreign Relations Law of the United States, which admits exclusive use of the Hague Evidence Convention only where the discovery cannot be carried out on United States soil or where evidence is sought from nonparties to a litigation who reside in another contracting state. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 473 (1987).

53. Karim Boulmelh & Eric Borysewicz, *Discovery in France Under the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, ALFA INT’L, [http://www.alfainternational.com/files/tbl\\_s12Publications%5CFileUpload92%5C201%5CDiscovery%20in%20France.pdf](http://www.alfainternational.com/files/tbl_s12Publications%5CFileUpload92%5C201%5CDiscovery%20in%20France.pdf) (last visited January 24, 2010).

54. See HANDBOOK, *supra* note 23, at 18 (providing, as an example of international discovery under the Federal Rules of Civil Procedure, a United States court order requiring evidence to be produced no matter where it is located). For two examples of cases where a United States court circumvented the Hague evidence doctrine and instead relied on the Federal Rules of Civil Procedure for international discovery, see *In re Air Crash Disaster near Roselawn, Ind.* on October 31, 1994, 948 F. Supp. 747, 752 (N.D. Ill. 1996) and *In re Perrier Bottled Water Litig.*, 138 F.R.D. 348, 356 (D. Conn. 1991).

55. INTERNATIONAL LITIGATION, *supra* note 37, at 283. In addition to blocking statutes, some nations, such as Australia, have “claw-back” provisions, which allow for actions to reduce treble damages awarded by United States courts. Connolly, *supra* note 8, at 215.

56. HANDBOOK, *supra* note 23, at 18–19.

57. Law 80-538 of July 16, 1980, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 17, 1980, p. 1799.

58. Bate C. Toms III, *The French Response to the Extraterritorial Application of United States Antitrust Laws*, 15 INT’L LAW. 585, 596 (1981).

59. *Id.*

allows only a “judicial authority” to make requests under their provisions.<sup>60</sup> Courts and tribunals are considered “judicial authorities” under the Hague Evidence Convention, but executive authorities, legislative bodies, and administrative agencies are not.<sup>61</sup> When seeking to compel discovery abroad, administrative agencies can satisfy the “judicial authority” requirement in the Hague Evidence Convention by obtaining a court order.<sup>62</sup>

### B. Problems with the IAEAA

In an attempt to fill this gap in authority to compel discovery abroad, the United States and various foreign antitrust authorities entered into antitrust cooperation agreements (ACAs), which are bilateral, interagency agreements and are strictly used as antitrust enforcement tools.<sup>63</sup> ACAs typically commit antitrust authorities to providing information already in their possession upon request, as well as providing information voluntarily, but they do not override laws prohibiting the sharing of some confidential information.<sup>64</sup> The IAEAA, however, enabled the FTC and the DOJ to enter into AMAAs, which are similar to ACAs but authorize a greater level of cooperation.<sup>65</sup> AMAAs, unlike ACAs, enable the sharing of some confidential information that would otherwise be subject to legal prohibitions.<sup>66</sup>

Although the IAEAA was initially heralded as groundbreaking legislation,<sup>67</sup> the fact that only one AMAA has been implemented suggests

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60. See *supra* note 2 and accompanying text.

61. Hague Evidence Convention, *supra* note 2, arts. 1, 6.

62. Peter Q. Noack, Comment, *West German Bank Secrecy: A Barrier to SEC Insider Trading Investigations*, 20 U.C. DAVIS L. REV. 609, 641 (1987) (noting that administrative agencies must obtain court orders because their own investigative subpoenas do not authorize foreign discovery).

63. The United States antitrust enforcement agencies have entered into formal bilateral agreements with antitrust authorities in Brazil, Canada, Germany, Israel, Japan, Mexico, Australia, and the EC. HANDBOOK, *supra* note 23, at 38–39.

64. To circumvent confidentiality laws, parties are often asked to waive the protections governing materials received in connection with a merger review. As a result of such waivers, the United States and the EC have been able to coordinate their merger reviews of numerous international transactions including AOL–Time Warner, MCI–WorldCom, Boeing–Hughes, AstraZeneca–Novartis, GE–Honeywell, and Metso–Sveldala. *Id.* at 40–41. Antitrust cooperation agreements (ACAs) are generally best suited for investigative cooperation whereas MLATs are typically best suited for accessing foreign-based evidence. However, because many international agreements are loose commitments and not binding engagements, the “requested state”—i.e., the jurisdiction providing the assistance—may not be strictly obligated to provide the assistance. HANDBOOK, *supra* note 23, at 12.

65. *Id.* at 47.

66. *Id.* at 48.

67. Attorney General Janet Reno, Senator Howard Metzenbaum, Representative Jack Brooks & Assistant Attorney General Anne Bingaman, News Conference for the Introduction of the International Antitrust Enforcement Assistance Act of 1994 (June 13,

that the legislation may lack efficacy.<sup>68</sup> When the legislation first passed, several jurisdictions, including Japan, the European Union, and Britain,<sup>69</sup> voiced their criticisms of the Act.<sup>70</sup>

The European Union's concern with the IAEAA was based on Article 20 of Regulation 17 of the European Community Treaty. Under Article 20 of the European Community Treaty, members can only use information acquired during antitrust investigations for the purposes for which it was acquired.<sup>71</sup> Because foreign authorities are not mentioned in Regulation 17, providing the United States with confidential information through an AMAA would be prohibited, and the EC was reluctant to revise Regulation 17 to allow for such sharing of confidential information.<sup>72</sup>

Another problem with the IAEAA is that it does not require a jurisdictional analysis prior to issuing a request for information.<sup>73</sup> In the absence of an AMAA under the IAEAA, administrative agencies must obtain a court order from a federal court,<sup>74</sup> which sometimes proves successful for the agencies but can result in delays.<sup>75</sup>

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1994) (transcript available from the Federal News Service).

68. It took three years after the enactment of the IAEAA for the Australian AMAA, the first and only AMAA, to be implemented. See JOELSON, *supra* note 25, at 83.

69. Robert Rice, *Rebuff for U.S. over Antitrust Stance—Draft Guidelines on Jurisdiction Outside the Country Are Unpopular with Other Governments*, FIN. TIMES (London), Mar. 7, 1995, at 13. Another grounds for international distrust of the IAEAA is that requests under the IAEAA are made on a case-by-case basis and can be denied by the DOJ or FTC. This allowed for the interpretation of the Act as having an attitude of “we will get what we can and move on.” Connolly, *supra* note 8, at 228.

70. Connolly, *supra* note 8, at 228–29.

71. *U.S. Antitrust Bill and the EC*, BUS. L. EUR., Sept. 14, 1994, at 2.

72. *Id.* In 1998, after witnessing the lack of success of the IAEAA, Charles Stark, Chief of the Foreign Commerce Division of the Antitrust Department of the DOJ, indicated that many nations still needed legislation allowing them to enter into agreements such as AMAAs. Connolly, *supra* note 8, at 225.

73. Won Ki Kim, *The Extraterritorial Application of U.S. Antitrust Law and its Adoption in Korea*, 7 SING. J. INT'L & COMP. L. 386, 397–98 (explaining that under the IAEAA, invasive discovery orders could be issued without first conducting a jurisdictional analysis and without “balancing relevant considerations of effects, comity, economic impact, and international interests”).

74. A federal court has the authority to issue such orders under the All Writs Act. 28 U.S.C. § 1651 (2006). Japan has advised the United States that it requires a court order and special deposition visas, and that it will not accept orders issued by administrative law judges. Additionally, Japan does not permit telephone depositions. *Obtaining Evidence in Japan*, in 740 LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES 27, 30 (Practising Law Inst. 2006).

75. For two examples of cases in which the United States utilized this method to obtain evidence, see *CFTC v. Nahas*, 738 F.2d 487 (D.C. Cir. 1984) and *FTC v. Compagnie de Saint Gobain-Pont-a-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980). Congress decided that the FTC and the Internal Revenue Service (IRS) should be authorized to issue investigative demands in foreign states in a manner congruent with the service-of-process provisions of Rule 4 of the Federal Rules of Civil Procedure. See 15 U.S.C. § 57b-1 (2006) for the statute regarding the FTC and 26 U.S.C. § 982 (2006) for the statute pertaining to the IRS. *U.S. Department of State Circular: Preparation of Letters Rogatory*, in 739 LITIGATION AND

Foreign authorities may feel that AMAAs require them to allow the United States to use AMAA-obtained confidential information outside of antitrust enforcement. This reluctance to enter into AMAAs might stem from two provisions currently contained in the IAEAA.<sup>76</sup> First, the IAEAA contains a provision that requires parties to enter into AMAAs on a reciprocal basis, with the foreign authority having comparable rights and obligations as the United States.<sup>77</sup> Second, the AMAA allows foreign authorities to request permission from United States officials to use confidential information for non-antitrust-enforcement purposes.<sup>78</sup>

The reciprocity requirement allows for the interpretation that the foreign authority must provide a similar means for the United States to request permission to use confidential information for non-antitrust-enforcement purposes.<sup>79</sup> The Antitrust Modernization Commission<sup>80</sup> believes that these two provisions explain the paucity of foreign agencies' entrance into AMAAs with the United States because foreign agencies may not want to offer a mechanism for the United States to request permission to use the information for non-antitrust-enforcement purposes.<sup>81</sup>

The Antitrust Modernization Commission has recommended that the IAEAA be amended to "clarify that it does not require that Antitrust Mutual Assistance Agreements include a provision allowing non-antitrust use of information obtained pursuant to an AMAA."<sup>82</sup> If foreign agencies are dissuaded from entering into AMAAs out of fear that their information will be used for non-antitrust purposes, an amendment to the IAEAA could clarify this issue. The amendment would state that AMAAs are not

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ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES 1037, 1040 (Practising Law Inst. 2006).

76. AMC REPORT, *supra* note 29, at 218 (arguing that the combination of two particular provisions in the IAEAA appears to have impeded foreign jurisdictions from entering into AMAAs with the United States because they are not willing to allow the possibility of non-antitrust uses of information).

77. 15 U.S.C. § 6211(2)(A) (2006) ("An assurance that the foreign antitrust authority will provide to the Attorney General and the Commission assistance that is comparable in scope to the assistance the Attorney General and the Commission provide under such agreement or such memorandum.").

78. *Id.* § 6211(2)(E)(ii) (noting that information may be released "with respect to a specified disclosure or use requested by a foreign antitrust authority and essential to a significant law enforcement objective, in accordance with the prior written consent that the Attorney General or the Commission").

79. *Id.*

80. The Antitrust Modernization Commission is a twelve-member bipartisan commission created by Congress in 2002 to determine whether United States antitrust law needs modernization and to make recommendations. The Commission obtained the views of interested parties and issued its report and recommendations to Congress and the President in April 2007. Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, § 11053, 116 Stat. 1856, 1856 (2002).

81. AMC REPORT, *supra* note 29, at 218.

82. *Id.*

required to contain a provision allowing non-antitrust use of information, which could result in more countries entering into these agreements with United States agencies.<sup>83</sup> If the IAEEA is amended so as to clarify “that downstream disclosure of antitrust evidence for non-antitrust purposes is not a mandatory requirement,” a foreign antitrust agency could still “grant” the “right” to the United States if it so chooses.<sup>84</sup>

### III. THE VITAL ROLES OF INTERNATIONAL ORGANIZATIONS

One possible explanation for the lack of AMAAs under the IAEEA is that administrative agencies might prefer to utilize alternative means for securing international judicial assistance.<sup>85</sup> For example, the United States has cooperated significantly with the European Union, its Member States, Canada, and other countries in merger investigations.<sup>86</sup> International organizations, such as the Organization for Economic Co-operation and Development (OECD)<sup>87</sup> and the International Competition Network (ICN),<sup>88</sup> provide a framework for this type of cooperation among the

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83. *Id.* at 219.

84. Section of Int'l Law, Am. Bar Ass'n, Comments in Response to Antitrust Modernization Commission Request for Public Comment Regarding International Topics (Aug. 29, 2005), <http://meetings.abanet.org/webupload/commupload/IC990000/newsletterpubs/abaAMCftaifinal.pdf>. Australia opted to grant the FTC and the DOJ this right in its AMAA with the United States. U.S.-Austl. Agreement, *supra* note 35, art. VIII(B).

85. See Section of Antitrust Law, Am. Bar Ass'n, Comments in Response to the Antitrust Modernization Commission's Request for Public Comment Regarding International Cooperation: Are There Technical or Procedural Changes that the United States Could Implement to Facilitate Further Coordination with Foreign Antitrust Authorities? 3 (Feb. 8, 2006) [hereinafter Antitrust Section Comments to the AMC], [http://govinfo.library.unt.edu/amc/public\\_studies\\_fr28902/international\\_pdf/060208\\_ABA\\_Intl\\_Cooperation\\_Intl.pdf](http://govinfo.library.unt.edu/amc/public_studies_fr28902/international_pdf/060208_ABA_Intl_Cooperation_Intl.pdf) (listing MLATs, applicable legislation, Interpol, and extradition as alternative means for securing international judicial assistance).

86. See *id.* (stating that when both jurisdictions examine the same transaction, it is rare for the respective outcomes to be inconsistent, as they were in the Boeing-McDonnell Douglas merger). For more information about the Boeing-McDonnell Douglas merger, see generally William E. Kovacic, *Transatlantic Turbulence: The Boeing-McDonnell Douglas Merger and International Competition Policy*, 68 ANTITRUST L.J. 805 (2001). “The Europeans prefer MLATs” to AMAAs “because [MLATs] usually define whether or not the information that is shared will be used for criminal prosecutions or civil antitrust cases,” which is a feature that most European nations’ laws do not provide. Connolly, *supra* note 8, at 233.

87. Originally, twenty countries signed the Convention on the Organisation for Economic Co-operation and Development on December 14, 1960, and ten more countries have since become members. Organisation for Economic Co-operation and Development (OECD), Member Countries, <http://www.oecd.org/membercountries> (last visited Oct. 17, 2009). The OECD recommends that its members cooperate on antitrust law matters, and it provides a forum for agencies to cooperate in the areas of notification, exchange of information, coordination of action, consultation, and conciliation. JOELSON, *supra* note 25, at 78.

88. Almost all of the world’s competition agencies are ICN members. Antitrust

agencies.<sup>89</sup>

Arguably, the ICN has the greatest potential to facilitate efficient, informal dialogue among the member agencies for three reasons. First, the ICN is an organization of antitrust agencies and not of governments, unlike the OECD, World Trade Organization, and the United Nations Conference on Trade and Development.<sup>90</sup> Because agencies, and not governments, comprise the ICN, its member agencies are best poised to assist each other informally on issues of antitrust policy.<sup>91</sup> Increases in informal communication and assistance may lead to increased cooperation among the agencies when conducting cross-jurisdictional investigations or when enforcing antitrust laws.

Second, there is no formal structure to the ICN—it operates through working groups made up of government officials, academia, consumer groups, legal societies, and trade associations.<sup>92</sup> These working groups command a level of expertise that may exceed that of the infrastructures of nongovernmental organizations with centralized structures. The compartmentalized structure inherent in working groups may allow the ICN to operate more efficiently than an entity with an operating structure with multiple levels of authority.

Finally, unlike the OECD, which consists mainly of high-income economies,<sup>93</sup> the ICN reaches almost all antitrust agencies. Thus, informal,

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Section Comments to the AMC, *supra* note 85, at 4. For an up-to-date list of member agencies, see ICN Membership Contact List, <http://www.internationalcompetitionnetwork.org/members/member-directory.aspx> (last visited January 24, 2010).

89. Antitrust Section Comments to the AMC, *supra* note 85, at 2–4. Certain foreign domestic laws are not as permissive as those of the United States, and this lack of domestic authorization obstructs cooperation. The OECD has recognized that this lack of domestic authority interferes with cooperation in anti-cartel enforcement. In light of this effect on international judicial assistance, the organization has adopted a recommendation that its member states adopt more permissive domestic laws that would provide greater assistance, in hopes to combat cartels more effectively. HANDBOOK, *supra* note 23, at 22.

90. The International Competition Network (ICN) works closely with the WTO, OECD, and United Nations Conference on Trade and Development (UNCTAD), and the ICN Steering Group may invite representatives from these international bodies to contribute to ICN activities on the same terms as nongovernmental advisors. International Competition Network, Operational Framework, <http://www.internationalcompetitionnetwork.org/index.php/en/about-icn/operational-framework> (last visited July 9, 2009).

91. The ICN is the only international body that is devoted exclusively to competition law enforcement. International Competition Network, About the ICN, <http://www.internationalcompetitionnetwork.org/index.php/en/about-icn> (last visited Aug. 18, 2009).

92. William E. Kovacic, *Extraterritoriality, Institutions, and Convergence in International Competition Policy*, 97 AM. SOC'Y INT'L L. PROC. 309, 311 (2003), available at [www.ftc.gov/speeches/other/031210kovacic.pdf](http://www.ftc.gov/speeches/other/031210kovacic.pdf).

93. The World Bank categorizes twenty-seven of the thirty OECD member countries as high-income economies. World Bank, Country Groups, <http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:204>

streamlined communication that includes newer antitrust agencies would further the organization's goals of cooperation and convergence.<sup>94</sup> One potential obstacle is that younger agencies with fewer resources may not be willing or able to designate resources to building an institutional framework that would support active participation in international organizations.<sup>95</sup> This obstacle can be overcome by convincing these agencies that investments in institution building are a critical part of enforcement activities.<sup>96</sup> As agencies and governments converge on consistent antitrust enforcement policies, the IAEEA may become more effective as governments go beyond mere cooperation in the sharing of information and shift toward greater cooperation in the evaluation and analysis of cases.<sup>97</sup>

### CONCLUSION

The rise of globalized industries has led to a greater need for international judicial assistance in antitrust enforcement. Although treaties exist to facilitate international cooperation for judicial assistance purposes, the United States' agencies still face obstacles when obtaining evidence from abroad. These hardships stem from the differences in the adjudicative cultures of the United States and foreign nations. Specifically, the United States' use of administrative agencies for antitrust enforcement and its unique use of pretrial discovery stand in stark contrast to the procedures and customs of many foreign nations.

The IAEEA sought to balance international cooperation and the protection of confidential data by providing a method for antitrust

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(last visited January 24, 2010).

94. An example of the substantial results that have come from agencies sharing experiences and best practices is the set of ICN Recommended Practices for Merger Notification and Review Procedures. Because these recommendations have become an international standard that has led to changes in various laws, they have reduced costs for parties to international mergers while making their merger review process more efficient and effective. Randolph W. Tritell, Assistant Dir. for Int'l Antitrust, FTC, Statement at the Antitrust Modernization Commission Hearing on International Antitrust Issues 4-5 (Feb. 15, 2006), available at [http://govinfo.library.unt.edu/amc/commission\\_hearings/pdf/Statement\\_Tritell.pdf](http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Statement_Tritell.pdf).

95. See Kovacic, *supra* note 92, at 311 (noting that academics and practitioners tend to grade competition authorities based on the cases they prosecute, so agencies may be more apt to allocate resources toward antitrust enforcement and not toward institution building).

96. See *id.* (indicating that successfully developing widely accepted international antitrust policy standards would require that agencies reallocate some resources away from the prosecution of cases).

97. See Tuttle, *supra* note 13, at 352-53 n.284 (explaining that the informal accord reached between the European Union and the United States allows for simultaneous review by both authorities of merger proposals, but does not provide for cooperation in the evaluation of the cases because the respective authorities have differing competition policy).

enforcement authorities to share confidential information with other authorities while adhering to strict guidelines. As evidenced by the fact that only one AMAA has been created by its authority, the IAEEA's effectiveness has been minimal. A possible solution proposed by the Antitrust Modernization Commission is to amend the IAEEA to clarify that it does not require that an AMAA include a provision allowing non-antitrust use of information obtained pursuant to the AMAA.

The United States' antitrust agencies rely heavily on alternatives to multilateral treaties and the IAEEA. Specifically, agencies embrace instruments such as MLATs, informal assistance, and letters of request based on reciprocity instead of pursuant to the Hague Evidence Convention. Especially in the absence of an effective IAEEA, international organizations such as the ICN play an important role in establishing efficient channels of informal communication. This interagency communication stimulates cooperation and convergence, thereby strengthening international judicial assistance for the United States' antitrust authorities and those abroad.