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**Title:** From Paper Promises to Concrete Commitments: Dismantling The Obstacles to Transatlantic Cooperation in Cartel Enforcement

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**Abstract:**

2011 marks the 20<sup>th</sup> Anniversary of the US/EU Cooperation Agreement and the antitrust community has been celebrating this milestone by basking in the successes of the international cooperative endeavor. Unfortunately the US/EU Cooperation Agreement does not go far enough towards true cooperation to make international antitrust enforcement a reality because the US Department of Justice and the European Commission cannot share the fruits of their investigative efforts. This is particularly surprising in the field of cartel enforcement, where there is much existing consensus on the treatment of such conduct and increasing harmonization in the procedural aspects. This paper confronts the common justifications for limiting the ability of competition authorities to share confidential information and proposes alternative mechanisms to maximize the efficacy of international enforcement.

**Keywords:** Cartel, Criminal Antitrust, Enforcement Agencies, International, Procedures

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FROM PAPER PROMISES TO CONCRETE COMMITMENTS: DISMANTLING THE OBSTACLES TO  
TRANSATLANTIC COOPERATION IN CARTEL ENFORCEMENT

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1. Introduction.....	2
<i>a. Challenges of International Cartel Enforcement.....</i>	2
<i>b. Achievements in International Cooperation .....</i>	3
<i>c. Opportunities for Extending Cooperation .....</i>	5
2. The Agencies' Limited Powers to Share Confidential Information Under Existing Cooperation Mechanisms.....	6
<i>a. Bilateral Cooperation Agreements .....</i>	6
<i>b. Mutual Legal Assistance Treaties.....</i>	9
<i>c. The International Antitrust Enforcement Assistance Act .....</i>	10
3. Common justifications for limiting agency powers to share confidential information..	13
<i>a. Cooperation undermines the incentives of the leniency regime .....</i>	13
<i>b. Shared information would be discoverable in private actions .....</i>	15
<i>c. Information may be misused .....</i>	18
<i>d. Sharing information without permission violates due process rights .....</i>	19
<i>e. Information could be used for purposes contrary to national interests.....</i>	19
<i>f. Expanded powers of cooperation would be redundant .....</i>	20
4. Improving the Legal Framework for Cooperation.....	21
<i>a. What Information do the Agencies Share in Practice? .....</i>	21
<i>b. Expanding cooperation .....</i>	22

## Introduction

### *a. Challenges of International Cartel Enforcement*

Globalization presents fundamental challenges for the international enforcement of competition laws. Each antitrust agency is vested with the jurisdiction to enforce national competition laws to protect its own consumers. This institutional model is not well-suited to respond to the realities of transnational business conduct, including international collusive conspiracies. International cooperation between antitrust agencies is essential for improving what would otherwise be extremely patchy enforcement.

The institutional deficiencies of the prevailing system manifest themselves in two forms: gaps and overlaps. The gaps arise because not all countries have competition laws, not all competition authorities have the power to investigate the full breadth of anticompetitive conduct, and not all competition authorities have sufficient resources to carry out their mandate. The geographical scope of cartel conduct is not restricted to those jurisdictions that have and enforce competition laws. In fact the absence of enforcement in a particular country is likely to encourage inclusion of that market within the bounds of a collusive agreement, as the additional risk associated with doing so may be negligible.<sup>1</sup> This problem may be more acute in exactly those countries in which the harm from cartel conduct is most damaging. Many developing countries lack the resources or expertise to pursue international cartel cases.<sup>2</sup> They rely on international cooperation and technical assistance to help to protect their consumers. They also benefit from strong domestic enforcement abroad.

Even those countries that vigorously enforce their competition laws may struggle to reach all infringing behavior. Conduct affecting one country may originate in another country, creating overlaps in jurisdiction. For the affected country to pursue conspirators located outside its borders under its own national laws it must establish extraterritorial jurisdiction under the “effects doctrine.”<sup>3</sup> In addition the affected country faces a series of logistical and practical barriers to prosecution, including difficulties of service of process, personal jurisdiction, discovery, admissibility of evidence, availability of witnesses, and enforcement of judgments.<sup>4</sup> Foreign conspirators may introduce special international defenses, such as “foreign sovereign compulsion,” as the Chinese defendants to the *Vitamins* cartel case attempted to do in the US courts.<sup>5</sup> Cooperation with

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<sup>1</sup> Eleanor M. Fox, *Can We Solve the Antitrust Problems of Globalization by Extraterritoriality and Cooperation? Sufficiency and Legitimacy*, 48 ANTITRUST BULL. 355, 360 (2003).

<sup>2</sup> *Id.* at 359.

<sup>3</sup> *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993) (holding that the exercise of jurisdiction by the United States court was proper when the foreign defendant intended to and in fact did produce a substantial effect in the United States and there was no conflict with foreign law raising concerns of international comity).

<sup>4</sup> Spencer Weber Waller, *The Internationalization of Antitrust*, 77 B. U. L. REV. 343, 376 (1997).

<sup>5</sup> *See* In re Vitamin C Antitrust Litigation, 584 F.Supp.2d 546 (E.D.N.Y. 2008). The attempted reliance on the foreign sovereign compulsion defense was ultimately unsuccessful, despite the *amicus* brief filed in support of the motion for summary judgment by the Ministry of Commerce of the People’s Republic of China, because the District Court found that Chinese law did not compel the defendants to contravene US law. In re Vitamin C Antitrust Litigation, 06-MD-1738 (BMC)(JO) (E.D.N.Y. Sept. 2011).

enforcement officials in the host country of the conspiracy is one way to circumvent these difficulties and is proving essential to effective prosecution by the affected country.<sup>6</sup>

An even more delicate balance must be struck if the host country is investigating the same conduct concurrently. In that case the agencies may need to actively coordinate their enforcement activities. It might be expected that if company headquarters are raided in the US then failure to conduct simultaneous raids in the European Union (the “EU”) may lead to loss of evidence.<sup>7</sup> Coordination may therefore be necessary to maintain the element of surprise with respect to dawn raids.<sup>8</sup>

### *b. Achievements in International Cooperation*

The current state of international cooperation certainly represents an impressive accomplishment. It has evolved out of a recognition that the gaps and overlaps in antitrust enforcement lead to unacceptable enforcement results. Nevertheless, some commentators appear to think that international cooperation has plateaued at the limit of its potential.<sup>9</sup>

The antitrust community, in so far as it addresses itself towards this issue, can be broadly divided into two camps. Some see cooperation as an alternative to truly international antitrust laws. The US has been associated with the view that cooperation holds more promise than full harmonization.<sup>10</sup> Cooperation overcomes some of the hurdles of regulating transnational conduct without sacrificing the national sovereignty to decide particular cases according to the effect on national welfare.

Others view cooperation as a step along the way towards multilateral agreements and a truly international antitrust regime, with harmonized legal standards.<sup>11</sup> They see cooperation in the

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<sup>6</sup> Andrew T. Guzman, *Antitrust and International Regulatory Federalism*, 76 N.Y.U. L. REV. 1143, 1143 (2001).

<sup>7</sup> Scott D. Hammond, Director of Criminal Enforcement, Antitrust Division, U.S. Department of Justice, *Beating Cartels at Their Own Game – Sharing Information in the Fight Against Cartels*, presented at the Inaugural Symposium on Competition Policy by the Competition Policy Research Center, Fair Trade Commission of Japan (November 20, 2003) at 2.

<sup>8</sup> Scott D. Hammond, Director of Criminal Enforcement, Antitrust Division, U.S. Department of Justice, *Dispelling the Myths Surrounding Information Sharing*, presented before the ICN Cartels Workshop, Sydney, Australia (November 20-21, 2004) at 1.

<sup>9</sup> Paul B. Stephan, *Global Governance, Antitrust, and the Limits of International Cooperation*, 38 CORNELL INT’L L.J. 173, 209 (2005) (“The extant agreements suggest that we already have reached the limits of state-to-state bargains.”).

<sup>10</sup> Waller, *supra* note 4, at 348 (“Cooperation between national antitrust enforcers seems a natural alternative to attempting to create a new international antitrust order.”) and 360 onwards. *See also* Diane P. Wood, *The Impossible Dream: Real International Antitrust*, 1992 U. CHI. LEGAL F. 277; Diane P. Wood, *The Internationalization of Antitrust Law: Options for the Future*, 44 DEPAUL L. REV. 1289 (1995).

<sup>11</sup> *See, e.g.*, the various works by Professor Eleanor Fox on this subject, including Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT’L L. 1 (1996); Eleanor M. Fox, *The End of Antitrust Isolationism: The Vision of One World*, 1992 U. CHI. LEGAL F. 221; and Eleanor M. Fox, *Harmonization of Law and Procedures in a Globalized World: Why, What, and How?*, 60 ANTITRUST L.J. 593 (1991). *See also* Mario Monti, *International Cooperation in Antitrust: US/EU and Beyond*, 69 ANTITRUST L.J. 361 (2001). For the contrary view, *see* Waller, *supra* note 4, at 378; Guzman, *supra* note 6, at 1146; and Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 ANTITRUST L.J. 711 (2000-2001).

enforcement of national competition laws as an imperfect substitute for international antitrust.<sup>12</sup> Cooperation builds mutual trust and understanding, and recognition of mutual goals,<sup>13</sup> but cooperation alone is not enough. This position resonates in particular with Europeans,<sup>14</sup> perhaps because they have already been through the process of ceding national sovereignty to supranational bodies.

Both camps appear to believe that cooperation currently proceeds in an extensive and satisfactory manner. But the current levels of agency cooperation, between the EU and the US at least, fall short of what they could and should be. Almost 15 years ago, Spencer Weber Waller commented that international cooperation was “*little more than an illusory promise of assistance when it is in the assisting nation’s interests to do so.*”<sup>15</sup> Despite significant improvements in the cooperative relationship between these two agencies, some observers believe the international situation to be little changed today.<sup>16</sup>

Crucially, in terms of effective enforcement in both the EU and the US, the agencies can only share “confidential information” in extremely restricted circumstances.<sup>17</sup> Those circumstances are limited along several dimensions according to the type of investigation (criminal versus civil), the identity of the recipient agency, and whether the originating source of the information is willing to grant a waiver. Complacency as to the achievements of the cooperation agenda, either as an end in itself or as a building-block towards international antitrust, is therefore unjustified.<sup>18</sup> The level of mutual cooperation between the US and the EU that has been enshrined in law to date represents a significant but still modest outcome that must be improved upon.

This paper confines its discussion to the sharing of confidential information between the EU and the US in the context of international cartel investigations when both the Department of Justice and the European Commission (the “Commission”) believe there to have been an infringement of the respective laws they are charged to uphold. The focus is on this limiting case because, in theory, it should be the least problematic. There is broad agreement between the two agencies, and the two bodies of law, on the treatment of hardcore cartels. In contrast with the parallel review of mergers, where it is possible for there to be flatly incompatible decisions, inconsistent approaches pose less of

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<sup>12</sup> Fox, *supra* note 1, at 370; Andrew Guzman, *The Case for International Antitrust*, 22 BERKELEY J. INT’L L. 355, 370 (2004).

<sup>13</sup> A. Douglas Melamed, *International Cooperation in Competition Law and Policy: What Can be Achieved at the Bilateral, Regional, and Multilateral Levels*, 2 J. INT’L ECON. L. 423, 428 and 432 (1999); Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT’L L. 478, 501 (2000).

<sup>14</sup> Waller, *supra* note 4, at 347; 3, fn 223-225

<sup>15</sup> Waller, *supra* note 4, at 377.

<sup>16</sup> See, e.g., International Competition Network, Cartels Working Group, Subgroup 1, *Co-operation Between Competition Agencies in Cartel Investigations*, Report to the ICN Annual Conference, Moscow, May 2007.

<sup>17</sup> Judge Wood is one of the few commentators explicitly acknowledging the extent to which limitations on the ability of agencies to share confidential information represents a particularly severe constraint on cooperation. Honorable Diane P. Wood, *Is Cooperation Possible?*, 34 NEW ENG. L. REV. 103, 111 (1999-2000).

<sup>18</sup> Fox is overly optimistic: “The case of cartels is an especially successful one. World cartels are being uncovered with frequency and skill. Agency coordination is at a high level. Problems of information exchange remain to be worked out, but are subjects of active attention.” Fox, *supra* note 1, at 373.

a problem in cartel cases.<sup>19</sup> One jurisdiction may find only a minor infringement and another may impose a heavy sanction (including individual criminal liability, for example), but unless the sanction is extremely severe the firm's operations in the other jurisdiction may not be affected.

This paper will demonstrate that existing levels of cooperation are limited even in this apparently straightforward case in which one would otherwise expect mutually aligned interests and strong incentives to cooperate. If there cannot be agreement between antitrust agencies in the limiting case of parallel cartel enforcement then the prospects for worldwide substantive convergence across the different spheres of antitrust law are slight. Such convergence in antitrust laws would be futile without cooperation in enforcement,<sup>20</sup> and cooperation will not be made easier by substantive convergence if the obstacles discussed in this paper remain. More importantly, if there cannot be a cooperative agreement between the EU and the US – two agencies with a relatively good track record of cooperation, albeit within the limited parameters outlined in this paper, and with purportedly high levels of mutual trust and respect – then international antitrust, involving agencies and jurisdictions with more disparate interests, may never get off the ground. At the same time, cooperation of such a restricted nature, as is currently in operation, does not serve as an adequate alternative to international antitrust law. Cooperation between national agencies will therefore act neither as a substitute to international antitrust nor as a stepping-stone towards it, unless the scope of cooperation can be expanded.

### *c. Opportunities for Extending Cooperation*

The current state of international cooperation is neither inevitable nor immutable. The US has proactively enacted legislation, in the form of the International Antitrust Enforcement Assistance Act (the “IAEAA”),<sup>21</sup> which would allow for some expansion in cooperation with any jurisdiction that passes corresponding legislation. Despite some expressions of interest, the EU has yet to enter into an extended agreement with the US.<sup>22</sup>

The case for cooperation, in terms of the benefits that it generates, has been made elsewhere.<sup>23</sup> But Scott Hammond, at the time Director of Criminal Enforcement for the Antitrust Division at the Department of Justice, lamented that: “[w]hile competition authorities have improved their ability to coordinate investigative strategies, our ability to share the fruits of our parallel investigations for the most part has not progressed and remains *unreasonably restricted*. These limitations are damaging the ability of competition authorities to crack international cartels and to

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<sup>19</sup> This may be one reason for the lack of urgency in progressing international cooperation in cartel enforcement. By and large, there has been less cooperation on cartel cases than merger cases. Larry Fullerton & Camelia C. Mazard, *International Antitrust Co-operation Agreements*, 24 WORLD COMP. 405, 417 (2001).

<sup>20</sup> Wood, *supra* note 17, at 110.

<sup>21</sup> Public Law 103-438, published at 108 Stat. 4597, and codified at 15 U.S.C. §§ 6201-6212.

<sup>22</sup> In 2000, Mario Monti said that he was “personally convinced of the merits of going down the road to concluding such an agreement ... [and] will consider putting the case to the Commission and to our Member States at some stage in the future.” Mario Monti, *Co-operation between competition authorities – a vision for the future*, Remarks before the Japan Foundation Conference, Washington, D.C., 23 June 2000, at 11.

<sup>23</sup> See, e.g., Guzman, *supra* note 12, at 355. Some have queried the measurable benefits, noting the lack of empirical data. See, e.g., Don Wallace, Jr., *Reasons For Skepticism*, 434 NEW ENG. L. REV. 113, 116 (1999-2000).

hold cartel members responsible for their offenses” (emphasis added).<sup>24</sup> The inability to share investigative materials is fundamental impediment to true cooperation.

This paper proposes more reasonable restrictions. If the antitrust community can isolate and overcome the explicit and implicit objections to expanding the situations in which confidential information can be shared then this could form the focal point for discussions about expanding cooperation in other areas. In the course of rebutting the common justifications for limiting agency powers to share confidential information this paper will consider what type of “confidential information” is at issue in each case, highlighting the existing lack of clarity in this matter and attempting to formulate alternative approaches that are consistent with expanded cooperation. What is needed is an improved legal framework within which cooperation can operate, to overcome the challenges of international antitrust enforcement while minimizing the perceived costs.

## 2. The Agencies’ Limited Powers to Share Confidential Information Under Existing Cooperation Mechanisms

### *a. Bilateral Cooperation Agreements*

Although bilateral cooperation between the US and the EU on specific antitrust cases predates any formal agreement between the two jurisdictions,<sup>25</sup> this arrangement was formalized in 1991 when the US and the EU entered into the Agreement Between the Government of the United States of America and the Commission of the European Community Regarding the Application of Their Competition Laws (the “US/EU Agreement”).<sup>26</sup> The mechanisms incorporated in the US/EU Agreement were based on those suggested in the 1995 OECD Recommendation and Guiding Principles.<sup>27</sup> The US/EU Agreement embodied a renewed enthusiasm for building a transatlantic relationship between the two agencies. It was heralded as a turning point in international enforcement, although it was not the first of its kind. The US has an agreement with

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<sup>24</sup> Hammond, *supra* note 8, at 1.

<sup>25</sup> See Charles S. Stark, Chief, Foreign Commerce Section, Antitrust Division, U.S. Department of Justice, *Improving Bilateral Cooperation*, Remarks at the Conference on Competition Policy in the Global Trading System (June 23, 2000).

<sup>26</sup> Agreement Between the Government of the United States of America and the Commission of the European Community Regarding the Application of Their Competition Laws, Sept. 23, 1991, U.S.-EC, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13, 504. Initially there was some controversy over the agreement’s legitimacy as the European Commission’s capacity to enter into it was challenged by France. See Case 327/91, French Republic v. Commission, 1994 E.C.R. 3641. Ultimately the US/EU Agreement was concluded by the Council of Ministers of the European Commission in 1995, but with effect to 1991.

<sup>27</sup> The 1995 Recommendation of the OECD Council Concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade, OECD Doc. C(95)130/FINAL (1995) (hereafter “OECD Recommendation”), available at <http://www.oecd.fr/daf/clp/rec8com.htm>. The OECD Recommendation was originally adopted in 1967 and has since been modified several times. The OECD Recommendation incorporates the principles of timely notification when “important interests” of another Member country may be affected by an investigation, the sharing of information, consultation, coordination of parallel investigations, provision of assistance in obtaining evidence located in a Member territory, and considering conducting investigations on the behalf of an affected Member country against conduct occurring within one territory with affects the other Member country.

Germany dating back to 1976.<sup>28</sup> Other bilateral agreements followed, including pacts with Australia,<sup>29</sup> Canada,<sup>30</sup> Israel,<sup>31</sup> Japan,<sup>32</sup> Brazil<sup>33</sup> and Mexico.<sup>34</sup>

Article III of the US/EU Agreement recognizes a common interest in sharing information that will (a) facilitate effective application of their respective competition laws, or (b) promote better understanding by the two jurisdictions of economic conditions and theories relevant to their competition authorities' enforcement activities and intentions or participation in regulatory proceedings. The US and EU also agreed to "provide the other Party with any significant information that comes to the attention of its competition authorities about anticompetitive activities that its competition authorities believe is relevant to, or may warrant, enforcement activity by the other Party's competition authorities."<sup>35</sup>

The US/EU Agreement was the first bilateral agreement to enshrine a mechanism by which counterpart competition authorities can request that the other party pursue an infringement carried out within the host country's borders under the host country's competition laws. This 'positive comity' principle was further clarified in the 1998 Positive Comity Agreement,<sup>36</sup> and promoted as best practice in the 1995 OECD recommendation.<sup>37</sup> The operation of positive comity can lead to conflicts of national interest, if one party asks the other to take action against, for example, a national champion, and if no consumer harm accrues in the host jurisdiction. Despite the ambition of the Positive Comity Agreement, there have been few requests made under it and cooperation is

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<sup>28</sup> Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices, 23 June 1967, *reprinted in* 4 Trade Reg. Rep (CCH) ¶ 13,501; *available at* <http://www.usdoj.gov/atr/public/international/docs/germany.us.txt>.

<sup>29</sup> Agreement between the Government of the United States of America and the Government of Australia Relating to Cooperation on Antitrust Matters, 29 June 1982, *reprinted in* 4 Trade Reg. Rep (CCH) ¶ 13,502, *available at* <http://www.usdoj.gov/atr/public/international/docs/austral.us.txt>.

<sup>30</sup> Agreement Between The Government of the United States of America and The Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws, 3 Aug. 1995, *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶ 13,503, *available at* <http://www.usdoj.gov/atr/public/international/docs/uscan721.txt>, *replacing* Memorandum of Understanding Between the Government of Canada and the Government of the United States of America as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws, 9 Mar. 1984, *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶ 13,503A.

<sup>31</sup> Agreement Between the Government of the United States of America and the Government of the State of Israel regarding the application of their competition laws, 15 Mar. 1999, *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶ 13,506.

<sup>32</sup> Agreement Between the Government of the United States of America and the Government of Japan concerning cooperation on anticompetitive activities, 7 Oct. 1999, *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶ 13,507.

<sup>33</sup> Agreement Between the Government of the United States of America and the Government of the Federative Republic of Brazil regarding cooperation between their competition authorities in the enforcement of their competition laws, 26 Oct. 1999, *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶ 13,508.

<sup>34</sup> Agreement Between the Government of the United States of America and the Government of the United Mexican States regarding the application of their competition laws, 11 July 2000, *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶ 13,509.

<sup>35</sup> Article III(3) of the US/EU Agreement.

<sup>36</sup> Agreement between the European Communities and the Government of the United States of America regarding the application of positive comity principles in the enforcement of their competition laws, 4 June 1998, *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶ 13,504A; OJ L 173/26 (18 June 1998).

<sup>37</sup> Paragraph I.A.5 of the OECD Recommendation.

provided on a purely voluntary basis. By contrast, the case of concurrent investigations by different agencies should theoretically be less problematic. Therefore, if progress can be made on this front then positive comity may prove more realistic in the future.

The terms of the US/EU Agreement appear to show an impressive commitment to cooperation in international enforcement, but the agreement constitutes ‘soft law’ only.<sup>38</sup> It is characterized as an ‘executive agreement,’ and although it is a formal and binding international agreement it does not amend domestic law, for example with regards to confidentiality.<sup>39</sup>

Firms frequently submit information relating to a broad range of commercial activity, either voluntarily or by compulsory process, pursuant to investigations by competition authorities into existing or potential violations. The concerns such submissions raise for the parties involved are discussed in more detail in Section 3, but for now it is important to appreciate the broad protections that this information is afforded under each jurisdiction’s domestic law. The US/EU Agreement does not override domestic provisions relating to the treatment by either the Department of Justice or the European Commission of confidential information that comes into their possession<sup>40</sup> and it does not suspend the operation of domestic blocking legislation.<sup>41</sup> Although the Department of Justice can, in theory, obtain access to foreign-located documents through the grand jury subpoena process, the Department’s Criminal Resource Manual instructs prosecutors to make reasonable attempts to obtain evidence through diplomatic channels and through cooperation with foreign agencies first.<sup>42</sup>

In addition to domestic law protecting confidential information, the US/EU Agreement itself includes specific carve-outs. Article VIII provides that: “[n]otwithstanding any other provision of this Agreement, neither Party is required to provide information to the other Party if disclosure of that information to the requesting Party (a) is prohibited by the law of the Party possessing the

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<sup>38</sup> See, e.g., Stark, *supra* note 25; Terry Calvani, *Conflict, Cooperation, and Convergence in International Competition*, 72 ANTITRUST L.J. 1127, 1131 (2004-2005); Fullerton & Mazard, *supra* note 19, at 414. Paul B. Stephan states, in relation to bilateral cooperation agreements generally, that “[a] review of their terms, however, reveals that they do not even create soft law. Rather, the bilateral agreements express only a desire to consult and cooperate, and do not limit the discretion of any regulatory authorities.” Stephan, *supra* note 9, at 205.

<sup>39</sup> Article IX of the US/EU Agreement.

<sup>40</sup> See, e.g., Federal Rule of Criminal Procedure 6(e) (prohibiting disclosure of certain information obtained in conjunction with a grand jury investigation, including information that would reveal the strategy or direction of the investigation, the nature of the evidence produced before the grand jury, the views of the grand jury members, or what has actually occurred before the grand jury) and Article 287 of the EC Treaty (broad professional secrecy obligation prohibiting all Commission officials from disclosing information) and Article 28 of Regulation 1/2003 (Commission officials involved in the enforcement of Community competition law may not disclose any information of the kind protected by professional secrecy obligations obtained through the use of investigation powers delegated to them by regulation (i.e. responses to Article 11 requests for information, Article 14 dawn raids, etc.)).

<sup>41</sup> Blocking statutes prevent or limit the ability of foreign litigants to obtain information, witnesses, or documents located in the relevant jurisdiction. See Robert Pitofsky, FTC Chairman, *Competition Policy in a Global Economy – Today and Tomorrow*, Address Before the European Institute 8<sup>th</sup> Annual Transatlantic Seminar on Trade and Investment (Nov. 4, 1998).

<sup>42</sup> USAM 9-11.140 states that “[t]here are special considerations involved when evidence sought by United States investigators and prosecutors is located in a foreign country. Before initiating any process to obtain testimony or evidence from abroad, prior consultation with the Criminal Division is required pursuant to USAM 9-13.500. Inquiries should be directed to the Office of International Affairs.”

information, or (b) would be incompatible with important interests of the Party possessing the information.”

What information can agencies share in the limiting case of concurrent cartel investigations? The net effect of the provisions of the US/EU Agreement is that the agencies can only share confidential information if the source of the information grants a waiver. In practice parties do routinely grant waivers if they have sought leniency in both jurisdictions, but the default position is for them not to do so and there is no legal basis for the agencies to insist upon it. The default position matters, as this forms the baseline from which deviations must be justified.

### *b. Mutual Legal Assistance Treaties*

In addition to bilateral cooperation agreements, the US has also entered into Mutual Legal Assistance Treaties (MLATs) with over 50 countries.<sup>43</sup> These treaties allow for the sharing of even confidential information in the context of criminal investigations.<sup>44</sup> The MLATs are not specific to antitrust investigations but can be invoked in such cases, although some require that both jurisdictions treat the conduct under investigation as a crime (known as the “dual criminality” requirement). This would allow the US to share confidential information relating to cartel conduct with, for example, Canada or the UK.

The US/Canada MLAT<sup>45</sup> provides for mutual assistance in various forms, including “(a) examining objects and sites; (b) exchanging information and objects; (c) locating or identifying persons; (d) serving documents; (e) taking the evidence of persons; (f) providing documents and records; (g) transferring persons in custody; (h) executing requests for searches and seizures.”<sup>46</sup> The US/Canada MLAT, therefore, responds to many of the procedural issues posed by the problem of overlapping jurisdiction.

Although the US/Canada MLAT does not explicitly override domestic confidentiality provisions, Article 13 provides that:

The Requested State may provide copies of any document, record or information in the possession of a government department or agency, but not publically available, to the same extent and under the same conditions as would be available to its own law enforcement and judicial authorities.<sup>47</sup>

Disclosure of confidential information would therefore appear to be possible through this route, and the agreement was relied upon successfully to coordinate investigations into the plastic dinnerware<sup>48</sup> and thermal fax paper cartels.<sup>49</sup>

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<sup>43</sup> See ABA SECTION OF ANTITRUST LAW, INTERNATIONAL ANTITRUST COOPERATION HANDBOOK 56 (2004) for a list of jurisdictions with which the US has entered into MLATs.

<sup>44</sup> RESTATEMENT OF THE LAW (THIRD) THE FOREIGN RELATIONS OF THE UNITED STATES § 115 (1987).

<sup>45</sup> Treaty on Mutual Legal Assistance in Criminal Matters, Mar. 18, 1985, U.S.-Can., 24 I.L.M. 1092 (1985) (the “US/Canada MLAT”).

<sup>46</sup> Art. II(2) US/Canada MLAT.

<sup>47</sup> Article XIII US/Canada MLAT.

<sup>48</sup> See *Plastic Dinnerware Price Fixing Probe Nets Indictment, Guilty Plea Agreements*, 66 Antitrust & Trade Reg. Rep. (BNA) 661 (June 16, 1994).

*c. The International Antitrust Enforcement Assistance Act*

The US cannot, however, share confidential information with the EU pursuant to an MLAT because the EU imposes only administrative penalties (as opposed to criminal sanctions) for competition law violations. The US/EU MLAT<sup>50</sup> is therefore inapplicable in antitrust cases. Perhaps in recognition of the legal limitations of MLATs, the US Congress passed the IAEAA in 1994 with broad bi-partisan support.<sup>51</sup> The IAEAA authorizes the Department of Justice to enter into bilateral “antitrust mutual assistance agreements” to share confidential information in civil investigations, or in criminal investigations when the counterpart agency, pursuant to domestic law, does not treat the conduct as a crime.<sup>52</sup> In fact, the conduct in question need not even violate the Federal antitrust laws.<sup>53</sup>

If the Department of Justice has entered into an “antitrust mutual assistance agreement” with the relevant jurisdiction then it is permitted to share with the counterpart agency “antitrust evidence,” which is defined as “anything obtained in anticipation of, or during the course of, an investigation or proceeding under any of the Federal antitrust laws,”<sup>54</sup> except if disclosure would be “in violation of any legally applicable right or privilege.”<sup>55</sup> In the same circumstances, the IAEAA would also permit the Department of Justice to use its investigative powers to gather evidence for use by a foreign antitrust agency and to withhold from public disclosure antitrust evidence obtained from a foreign antitrust agency.<sup>56</sup>

These provisions would allow the Department of Justice to enter into an expanded cooperation agreement to share confidential information with the Commission. But the IAEAA requires that the cooperating jurisdiction pass equivalent legislation that guarantees sufficient protection to the confidential information that is shared.<sup>57</sup> The recipient agency must have in place adequate safeguards to ensure that the confidential information is not misused. Only then can the US enter into an expanded cooperation agreement with that jurisdiction.

Even then the benefits of the antitrust mutual assistance agreements, over and above the bilateral cooperation agreements, are limited, in terms of the exchange of confidential information.<sup>58</sup> Section 6201 of the IAEAA permits that:

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<sup>49</sup> See *U.S. and Canadian Prosecutors Attack Cartel Behavior by Fax Paper Distributors*, 67 *Antitrust & Trade Reg. Rep.* (BNA) 108 (July 21, 1994).

<sup>50</sup> Agreement on Mutual Legal Assistance, June 25, 2003, U.S.-EU, 2003 O.J. (L 191) 34.

<sup>51</sup> See *Division Official Stresses Importance of International Enforcement and Comity*, *Antitrust & Trade Reg. Rep.* (BNA) No. 1699, at 187 (Feb, 9, 1995).

<sup>52</sup> 15 U.S.C. § 6204(2)(B).

<sup>53</sup> 15 U.S.C. § 6202(c).

<sup>54</sup> 15 U.S.C. § 6211(1).

<sup>55</sup> 15 U.S.C. § 6202(d).

<sup>56</sup> 15 U.S.C. § 6201.

<sup>57</sup> 15 U.S.C. § 6211(2)(B).

<sup>58</sup> Waller, *supra* note 4, at 378 (describing the IAEAA as authorizing “a great deal of negotiating effort and possible statutory change in return for a fancier version of the same illusory promise” as embodied by the bilateral cooperation agreements).

In accordance with an antitrust mutual assistance agreement ... except as provided in section 6204 ... the Attorney General of the United States and the Federal Trade Commission may provide to a foreign antitrust authority with respect to which such agreement is in effect ... antitrust evidence to assist the foreign antitrust authority –

- (1) in determining whether a person has violated or is about to violate any of the foreign antitrust laws administered or enforced by the foreign antitrust authority, or
- (2) in enforcing any of such foreign antitrust law.

This would appear to be a broad power to share information, except that Section 6204 (Limitations on authority) restricts the type of “antitrust evidence” to which Section 6201 applies, excluding “[a]ntitrust evidence that is matter occurring before a grand jury and with respect to which disclosure is prevented by Federal law.”

Section 6203 appears to offer another path for foreign authorities by permitting the Attorney General to apply for an order from the district court compelling testimony or production of evidence to assist a foreign antitrust authority. However, such an order cannot compel testimony or production of evidence as would be “in violation of any legally applicable right or privilege.”<sup>59</sup>

The situation is not much different, therefore, with or without an antitrust mutual assistance treaty under the IAEAA. If no antitrust mutual assistance treaty is in operation then, in cartel cases, foreign agencies have to rely on the Federal Rules of Criminal Procedure to obtain evidence in the US. The default position is that material forming part of a grand jury proceeding is confidential,<sup>60</sup> but Rule 6(e)(3) outlines the permissible exceptions, including disclosure pursuant to a court order preliminarily to or in connection with a judicial proceeding.<sup>61</sup> This might permit disclosure to a foreign agency, although the agency would have to demonstrate a “particularized need” for the information.<sup>62</sup> This necessitates a showing that: (1) the material is needed to avoid a possible injustice in another proceeding, (2) the need for disclosure outweighs the need to continue to maintain secrecy, and (3) the request covers only the minimal information required.<sup>63</sup> This exception has scarcely been relied upon in any proceedings, let alone in relation to requests from antitrust agencies, and it is unclear whether it would even apply in that circumstance.<sup>64</sup>

Section 6204 (Limitations on authority) envisages that, pursuant to the relevant antitrust mutual assistance treaty, foreign agency officials enforcing foreign antitrust law would be treated under the Federal Rules of Criminal Procedure as state officials enforcing state law in relation to requests to obtain grand jury materials in a Federal antitrust investigation.<sup>65</sup> Foreign agency officials operating under an antitrust mutual assistance treaty can therefore take advantage of the exception in Rule 6(e)(3)(C)(iv), which permits disclosure to state officials for the enforcement of state law,

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<sup>59</sup> 15 U.S.C. § 6203(c).

<sup>60</sup> FED. R. CRIM. P. 6(e).

<sup>61</sup> FED. R. CRIM. P. 6(e)(3)(C)(i).

<sup>62</sup> See ABA SECTION OF ANTITRUST LAW, *supra* note 43, at 27.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 28.

<sup>65</sup> 15 U.S.C. § 6204(2)(A).

even at the investigative stage.<sup>66</sup> However, the foreign agency (unlike state officials) must still demonstrate a “particularized need” for the information, showing evidence of the three requirements.

Perhaps reflecting the limited additional benefits of antitrust mutual assistance treaties, thus far only Australia has taken advantage of the IAEEA.<sup>67</sup> Australia entered into the US/Australia Mutual Assistance Agreement in 1999,<sup>68</sup> and has relied on the agreement to obtain information at least once.<sup>69</sup> The US/Australia Mutual Assistance Agreement embodies the intention of the Department of Justice and the ACCC to “assist one another and to cooperate on a reciprocal basis in providing or obtaining antitrust evidence that may assist in determining whether a person has violated, or is about to violate, their respective antitrust laws, or in facilitating the administration or enforcement of such antitrust laws.”<sup>70</sup> But the operation of the US/Australia Mutual Assistance Agreement is limited by the operation of domestic law: “[n]othing in this Agreement shall require the Parties or their respective Antitrust Authorities to take any action inconsistent with their respective Mutual Assistance Legislation”<sup>71</sup> (i.e. the IAEEA and the Australian equivalents<sup>72</sup>) and “[t]he Requested Party may deny assistance in whole or in part if ... execution of a request would not be authorized by the domestic law of the Requested Party.”<sup>73</sup>

2011 marks the 20<sup>th</sup> anniversary of the US/EU Agreement, which has given rise to a slew of articles and papers recounting the successes of this cooperative endeavor.<sup>74</sup> The IAEEA may be considered to be a limited overture to other jurisdictions, offering the possibility of more extensive cooperation. However, even cooperation under IAEEA antitrust mutual assistance agreements is severely circumscribed by domestic confidentiality laws. The remainder of this paper addresses itself

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<sup>66</sup> Rule 6(e)(3)(C)(i) requires that the request for materials be made preliminary to, or in connection with, a judicial proceeding. This may not extend to the initial investigatory phase. Handbook p50.

<sup>67</sup> Charles S. Stark cites another possible explanation – that counterpart countries need time to pass legislation equivalent to the IAEEA. Stark, *supra* note 25, at 540. This optimism is less realistic almost 14 years later, with no additional mutual legal assistance agreements having been signed.

<sup>68</sup> Agreement Between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance, April 27, 1999, *available at* <http://www.usdoj.gov/atr/public/international/docs/usaus7.htm>.

<sup>69</sup> In relation to the *Vitamins* cartel, the Australian Competition and Consumer Commission (ACCC) announced that it would be investigating the case and Chairman Fels noted the “recently signed antitrust cooperation treaty with the U.S.” and disclosed that the ACCC already has contacted U.S. authorities about obtaining information “to further its considerations.” 76 Antitrust & Trade Reg. Rep. (BNA) 586 (May 27, 1999).

<sup>70</sup> Article 2(A) US/Australia Mutual Assistance Agreement.

<sup>71</sup> Article 2(D) US/Australia Mutual Assistance Agreement.

<sup>72</sup> The Mutual Assistance in Business Regulation Act 1992 and the Mutual Assistance in Criminal Matters Act 1987.

<sup>73</sup> Article 4(A)(3) US/Australia Mutual Assistance Agreement.

<sup>74</sup> Rachel Brandenburger, *Twenty Years of Transatlantic Antitrust Cooperation: The Past and the Future*; William E. Kovacic, *Nine Next Steps for Transatlantic Antitrust Policy Cooperation*; Miek van der Wee & Holger Dieckmann, *EU/U.S. Cooperation in the Area of Competition Policy*; James F. Rill, *The U.S./EC Antitrust Cooperation Agreement: Genesis, Innovation, and Early Implementation*; Frank Montag & Daniel Colgan, *The Complexity of Cartel Enforcement in Times of Globalization of Competition Law*; and Sean Heather & Guido Lobrano, “*I’d like to propose a toast*” *Marking the 20<sup>th</sup> Anniversary of U.S.-EU Antitrust Cooperation*, all in the Competition Policy International Antitrust Chronicle, October 2011(1).

to analyzing the justifications for operating international cooperation within such a restrictive framework, in order to establish whether alternative measures can be put in place.

### 3. Common justifications for limiting agency powers to share confidential information

Given the broad level of agreement between the US and the EU on the treatment of hardcore cartels, the limited nature of the cooperation provided for by the US/EU Agreement is somewhat surprising.<sup>75</sup> It can be explained in part by the broad constituency of objectors troubled by existing cooperative efforts and resistant to any expansion.<sup>76</sup>

The justifications for placing limits on the power of the agencies to share confidential information fall into two categories: perceived costs and perceived redundancy. Firstly, there are perceived costs that are associated with expanding cooperation. These costs primarily accrue to the business community that would be interacting with both agencies, but there is also a risk that the agencies' own enforcement agendas could be jeopardized. Worse, full cooperation could lead to harm to the national and supranational interests that each agency is mandated to protect. Second, there is a perception that the existing provisions for mutual disclosure go far enough. The agencies are able to bring successful cases without additional cooperation and they have other ways to get hold of evidence located outside their borders. In this sense, expanded cooperation is seen as redundant.

Before going on to consider the various justifications individually, an additional complicating factor is that there is some confusion over the precise meaning of "confidential information" in this context. Different justifications for limiting agency powers appear to refer to different types of "confidential information" that should not be shared. In evaluating the legitimacy of a particular justification it is necessary to identify whose interests are being protected and whether such protection is warranted. Where protection is reasonable it may be possible to put in place alternative measures that respond to the concern without limiting agency powers to share information *per se*.

#### *a. Cooperation undermines the incentives of the leniency regime*

The primary rationale supporting the limitation of agency powers to share confidential information is that to do otherwise would undermine effective enforcement against cartel conduct. The Department of Justice and the Commission offer leniency to cooperating cartel members if they self-report infringing conduct. Both agencies rely heavily on leniency applications to detect the existence of collusive conspiracies and to gather evidence to build successful cases.<sup>77</sup> These activities

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<sup>75</sup> Wood, *supra* note 17, at 109.

<sup>76</sup> John J. Parisi, U.S. Federal Trade Commission, *Enforcement Cooperation Among Antitrust Authorities*, presented before the IBC UK Conferences Sixth Annual London Conference on EC Competition Law (original published May 19, 1999) (updated August 2010) at 10. Others also oppose not only international antitrust but also broader cooperation. See Stephan, *supra* note 9, at 175 ("The growing call by regulators and scholars to widen and deepened international cooperation in competition policy should be resisted.").

<sup>77</sup> See, e.g., Gary R. Spratling, *Detection and Deterrence: Rewarding Informants for Reporting Violations*, 69 GEO. WASH. L. REV. 798, 799 (2000-2001) and Sari Suurnäkki, *Disclosure of Information in Civil Proceedings: Recent Developments and Implications for Leniency Policy*, address before the ABA Spring Meeting 2011.

feed into the other objectives of cartel enforcement: deterrence, punishment and putting an end to the infringement.

There is a fear that the sharing of confidential information between the Department of Justice and the Commission would discourage self-reporting.<sup>78</sup> The logic proceeds as follows: cartel members make the decision to defect from the conspiracy and report to the authorities based on a global assessment of risk. The offer of a reduction in penalties induces cooperation by tipping the balance towards reporting. This creates a ‘race to the prosecutor’ in which firms compete to be the first to report, adding an additional layer of mistrust to the cartel dynamic, destabilizing the collusive agreement, and deterring cartel formation. But firms will only self-report if they can obtain immunity (or at least leniency) from significant liability in all jurisdictions in which they face prosecution. If agencies can share information submitted by a leniency applicant with agencies in other jurisdictions, including ones in which the firm is not eligible for lenient treatment or jurisdictions that do not offer leniency, then the firm will not self-report in any jurisdiction. Therefore information submitted by a leniency applicant should not be shared with counterpart agencies. As a result, the Department of Justice protects not only the evidence submitted in support of the leniency application but also the identity of the leniency applicant.<sup>79</sup>

Although there is little explicit discussion of the issue, “confidential information” in this context appears to mean “inculpatory evidence.” It is not just that the leniency applicant fears that one agency will share commercially sensitive information with another agency, which might be used to harm the firm’s competitive position, but that the information will be used either to implicate the company in question in a parallel or adjacent conspiracy or to form the basis of a more severe penalty. This would operate to discourage self-reporting in jurisdictions that allowed sharing of “confidential information” of this sort.

This position raises several questions that, for the most part, remain unanswered. What if the same firm seeks immunity in both jurisdictions? One condition of immunity is full and continuing cooperation, so the firm should, in theory, have nothing to hide from either agency. In such a case, the agencies should not have to obtain a cross-waiver in order to share submissions. They should instead be able to compare notes to determine whether the applicant is in fact disclosing all relevant information in its possession.

What about the treatment of subsequent leniency applicants? Although the granting of immunity to one applicant does not bar applications by subsequent firms in either jurisdiction, both agencies stipulate that the evidence submitted in support of subsequent applications must materially further the investigation that has already begun. The EU Leniency Notice provides for partial leniency for the second and third firm to report,<sup>80</sup> and the US system allows for negotiated pleas.<sup>81</sup> It is to the late applicant’s benefit that the agencies cannot share confidential information already

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<sup>78</sup> Hammond, *supra* note 8, at 10; Hammond, *supra* note 7, at 10.

<sup>79</sup> Gary R. Spratling, *Making Companies and Offer They Shouldn’t Refuse*, Address Before the Bar Association of the District of Columbia’s 35<sup>th</sup> Annual Symposium on Associations and Antitrust (Feb. 16, 1999).

<sup>80</sup> 2002/C/45/03 at ¶ 23.

<sup>81</sup> See Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, U.S. Department of Justice, *The U.S. Model of Negotiated Plea Agreements: A Good Deal With Benefits for All*, address to the OECD Competition Committee Working Party No. 3 (October 17, 2006).

submitted by other applicants since this increases the chance that the evidence supporting its application is novel and useful. Once the first firm has self-reported and is cooperating, the argument for protecting subsequent firms by limiting the power of the agencies to share confidential information is significantly weaker. In fact, if the agencies were permitted to share information from previous leniency applications then subsequent firms would have a stronger incentive to cooperate to the fullest extent, in the hope of obtaining some reduction in penalty.

Consideration of the type of “confidential information” that might lead to the perceived loss in cooperation reveals an alternative to an outright restriction on agency powers to share confidential information. To the extent that there is a legitimate fear that leniency applicants will not self-report if doing so might increase their exposure elsewhere, agencies can commit to sharing only information submitted by the leniency applicant that pertains to the involvement of other co-conspirators. This solution deals with both problems identified above: it protects the primary leniency applicant, thus preserving the incentive to self-report, while at the same time incentivizing full cooperation from subsequent applicants. If the leniency applicants would not trust the agencies to correctly distinguish between self-incriminating information and information relating to the other participants then the leniency applicant could itself prepare the bundle to be shared with the counterpart agency, redacting as necessary information relating to its own involvement. This level of cooperation on the part of the leniency applicant should not be voluntary – the agencies should not have to rely on obtaining a cross-waiver since the limitation on the type of confidential information that can be shared removes the justification for the outright protection of the confidential information as a whole. Furthermore, there is reason to believe that the fear of undermining the leniency program has been overstated. If parties do regularly grant waivers then the fear that firms will not seek leniency if the agencies share information must not be accurate, since they do self-report anyway and do permit the sharing of otherwise confidential information.

*b. Shared information would be discoverable in private actions*

One sub-issue relating to the effectiveness of the leniency regime is the looming fear that information submitted to an enforcement agency in one jurisdiction might become discoverable in private actions in a second jurisdiction if the information is shared with an agency in that second jurisdiction.<sup>82</sup>

The primary argument against disclosure is that it would act to discourage the submission of inculpatory evidence to an agency that has the power to share that information with another agency, particularly if the jurisdiction of the second agency has active private enforcement. This would act to undermine the leniency program of the disclosing jurisdiction.<sup>83</sup> To be concrete, there is a fear in non-US jurisdictions that firms will not cooperate with those agencies’ investigations if they are concerned that information submitted could be used against them in the context of private class

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<sup>82</sup> Parisi, *supra* note 76, at 20.

<sup>83</sup> Suurnäkki, *supra* note 77, at 2.

actions in the US, in which treble damages are awarded to successful plaintiffs.<sup>84</sup> With a growing number of private actions in the EU, similar fears may soon be voiced by US and other defendants.<sup>85</sup>

The EU is particularly concerned with the effect that such disclosures would have on the efficacy of its leniency policy. The Leniency Notice itself states:

Potential leniency applicants might be dissuaded from cooperating with the Commission under this Notice if this could impair their position in civil proceedings, as compared to companies who do not cooperate. Such undesirable effect would significantly harm the public interest in ensuring effective public enforcement of [Article 102 TFEU] in cartel cases and thus its subsequent or parallel effective private enforcement.<sup>86</sup>

The EU has taken measures to ensure that information in its possession is not discoverable in the US, including allowing oral submission of leniency applications. Parties go to great lengths to ensure that documents stay outside the bounds of US discovery, for example by transcribing by hand or dictating hundreds of pages of transcripts obtained through the Commission's access to file procedure, since photocopying the documents might render them discoverable.<sup>87</sup>

The European Commission has strongly advocated against discoverability of documents submitted to the Commission under its leniency program particularly because, unlike the Department of Justice, the Commission does not have the benefit of the threat of a jury trial or the power to call witnesses by subpoena. Therefore the corporate statements submitted under the leniency procedure form the bedrock of the Commission's case in cartel investigations.<sup>88</sup> In the past, when the protected status of leniency documents has been challenged by US plaintiffs in US courts, the EU has intervened, submitting *amicus curiae* briefs supporting the protection of the documents.<sup>89</sup> This tactic has had varying success.<sup>90</sup> The Commission has also submitted letters to litigants for their use in foreign proceedings stating the Commission's policy of non-disclosure and

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<sup>84</sup> *Id.* at 8.

<sup>85</sup> In *Pfleiderer v. Bundeskartellamt* (Decision of 14 June 2011, case C-360/09) the European Court of Justice determined that cartel victims are not precluded from gaining access to the files of Member State competition authorities. National courts must balance the legitimate concern over the effectiveness of leniency programs against the need to ensure private litigants have the effective opportunity to recover damages.

<sup>86</sup> 2002/C/45/03 at ¶ 6.

<sup>87</sup> Suurnäkki, *supra* note 77, at 7.

<sup>88</sup> *Id.* at 11.

<sup>89</sup> See United States District Court for the District of Columbia, *In Re Vitamins Antitrust Litigation*, Misc. No. 99-197, Docket No. 3079 (May 20, 2002); United State District Court for the Northern District of California, *In Re Methionine Antitrust Litigation*, Case No. C-99-3491, CRB MDL no. 1311 (June 17, 2002); and United States District Court for Eastern District of New York, *In Re Payment Card Interchange Memorandum Fee and Merchant Discount*, 05-Md-1720.

<sup>90</sup> In the private *Vitamins* litigation, the District Court ordered the disclosure of corporate statements submitted to the European Commission in the context of a leniency application, despite the *amicus* brief submitted by the Commission. It is noteworthy that the party that had submitted the statements did not itself context the order for production.

expressing concerns that any discovery would jeopardize the effectiveness of the Commission's leniency program.<sup>91</sup>

There has been some sympathy for this position from the US courts. In 2007, in the *Rubber Chemicals* litigation, a US District Court explicitly denied the plaintiffs' request for discovery of communications between a leniency applicant and the Commission on the grounds of "international comity." The Court recognized the "impact of discovery of such communications on the Commission's interests in the effective enforcement of its competition laws and its cooperation with the US to enforce those laws internationally." But this is not a policy position – it represents one judge's interpretation and this analysis necessarily proceeds on a case-by-case basis only.<sup>92</sup>

The above concerns relate to access by private litigants in the US to documents physically located in Europe. The unease is amplified by the suggestion that documents be handed over to agencies in the US. It is perceived that this presents an even greater risk of discoverability. The scope of discovery in the context of antitrust investigations and private litigation is a live issue.<sup>93</sup> The Supreme Court recently denied a petition to review the decision of the 9<sup>th</sup> Circuit allowing the Department of Justice to subpoena foreign documents brought into the US in the context of a private antitrust suit in federal district court in San Francisco.<sup>94</sup> The question is whether this paves the way for the reverse case, that is US private litigants claiming access to foreign documents in the possession of the Department of Justice.

But, as Judge Wood has explained, the Department of Justice does not routinely hand over documents to plaintiffs for use in class actions.<sup>95</sup> Privileges, subject to some limitations, exist to protect from disclosure government policy deliberations and law enforcement investigation files.<sup>96</sup> Those privileges have been successfully relied upon by the agencies in the past.<sup>97</sup> To obtain information submitted to the Department of Justice a private plaintiff would most likely have to seek an order of the court, and the originating source of the information would have the opportunity to present objections to disclosure at the hearing.<sup>98</sup> Further, Section 6207(b) of the IAEAA specifically authorizes the Department of Justice to withhold from public disclosure any evidence obtained from foreign authorities. Supporting provisions can be found in the fifth exemption to the

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<sup>91</sup> See United States District Court for the Northern District of California, *In Re Rubber Chemicals Antitrust Litigation*, Case No. C04-1648 MJJ (BZ) (N.D. Cal. 2007) and United States District Court for the Western Districts of Pennsylvania, *In Re Flat Glass Antitrust Litigation (II)*, Civil Action No 08-mc-180 MDL No. 1942.

<sup>92</sup> Under the test laid out in *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 536-544 (1987), in the comity analysis of a discovery request, the Court must consider a number of factors: (1) how important is the requested information to the litigation; (2) how specific is the request; (3) did the information originate in the United States; (4) are there alternative means of securing the information; (5) how much would refusing the request undermine important United States interests, and how much would complying with the request undermine important foreign sovereign interests.

<sup>93</sup> See Calvani, *supra* note 38, for an in-depth discussion.

<sup>94</sup> *White & Case LLP v. United States*, 79 U.S.L.W. 3728 (June 27, 2011). See *In re: Grand Jury Subpoenas Served on White & Case, et. al.*, No. 10-15758 (9th Cir. Dec. 7, 2010), Opinion of the 9<sup>th</sup> Circuit available at <http://www.ca9.uscourts.gov/datastore/opinions/2010/12/07/10-15758.pdf>.

<sup>95</sup> Wood, *supra* note 17, at 110.

<sup>96</sup> See *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1341-43 (D.C. Cir. 1984).

<sup>97</sup> Parisi, *supra* note 76, at 21.

<sup>98</sup> Wood, *supra* note 17, at 110.

Freedom of Information Act (which permits agencies to withhold inter-agency deliberative communications from disclosure)<sup>99</sup> and Article 339 TFEU.<sup>100</sup> The US/Australia Mutual Assistance Agreement specifically states that “[e]ach Party shall oppose, to the fullest extent possible consistent with that Party’s laws, any application by a third party for disclosure of ... confidential information,”<sup>101</sup> and Article VIII(2) of the US/EU Agreement mirrors this wording. For additional certainty, any expanded agreement with the EU could require a waiver to be obtained from the source of the information in the specific circumstance of a request for disclosure by a third party.

The possibility of reduced cooperation by conspirators resulting from a heightened risk of private litigation is not therefore an argument against the sharing of confidential information *per se*. Rather it is a persuasive case for further elaboration and clarity on the rules of discoverability and what is and is not discoverable in US antitrust class actions.

*c. Information may be misused*

One justification put forward by the business community for preventing the sharing of confidential information between agencies appears to be based on the belief that regulatory authorities cannot be trusted with business secrets.<sup>102</sup> Firms are, apparently, reluctant to provide even their own governments with information, let alone having that information fall into the hands of a foreign agency.<sup>103</sup> “Confidential information” in this case seems to refer to “commercially sensitive” information, and one fear that is voiced is that the agencies will share commercial information with competitors (including state-owned entities) or the public.<sup>104</sup> These concerns are based on rumor, with no substance.<sup>105</sup> Hammond’s call for the business community to come forth with examples of such misuse of information has not been answered,<sup>106</sup> and in fact there have been no reported instances of leakage.<sup>107</sup>

Companies regularly provide both agencies with detailed commercial information in the context of merger filings, apparently trusting the agencies not to disclose the information.<sup>108</sup> This is the case even though, typically, the type of information required for a merger filing is much more

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<sup>99</sup> 5 U.S.C. § 552(b).

<sup>100</sup> Article 339 reads “[t]he members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.”

<sup>101</sup> Article 6(A) US/Australia Mutual Assistance Agreement.

<sup>102</sup> Hammond, *supra* note 7, at 9.

<sup>103</sup> Waller, *supra* note 4, at 388.

<sup>104</sup> See Joseph P. Griffin, *What Business People Want from a World Antitrust Code*, 34 NEW ENG. L. REV. 39, 42-43 (1999-2000); Parisi, *supra* note 76, at 20; *Government and Business Community Differ on Extent to Cloak Confidential Information*, 71 Antitrust & Trade Reg. Rep. (BNA) 17 (1996); Frank R. Schonveld, *Cartel Sanctions and International Competition Policy: Cross-Border Cooperation and Appropriate Forums for Cooperation*, 26 WORLD COMP. 433, 458 (2003).

<sup>105</sup> It also appears to be based on a general suspicion in relation to the prevalence of economic espionage. Griffin, *supra* note 104, at 42.

<sup>106</sup> Hammond, *supra* note 8, at 6.

<sup>107</sup> Parisi, *supra* note 76, at 20.

<sup>108</sup> Hammond, *supra* note 7, at 9.

“commercially sensitive” than that submitted for a leniency application.<sup>109</sup> Unlike for mergers, firms in a cartel investigation do not usually have to submit documents relating to technical innovations or commercial strategy (except to the extent that it is part of the collusive agreement and thus has been divulged to competitors already), and any pricing data tends to be historical.

As with the discussion relating to leniency, a careful analysis of the underlying justification reveals a satisfactory solution short of restricting the sharing of confidential information for the purposes of cartel investigations. Commercially sensitive information can be redacted before being shared by the agency, by the concerned party itself, as is common practice in relation to the Commission’s access to file procedure.

Another type of feared misuse is that evidence obtained for a cartel investigation will be used for other enforcement purposes.<sup>110</sup> Again, limiting agency powers to share confidential information does not meet this concern directly. Instead safeguards should be put in place to prohibit the use of information in other enforcement actions.

*d. Sharing information without permission violates due process rights*

To protect rights of due process, criminal investigations are conducted according to certain standards, for example those relating to the manner in which evidence is gathered. There is a risk that these rights may be violated if evidence obtained in the context of a civil investigation can be used as the basis of criminal prosecutions, since the same protections may not be in place in both cases.

As with the justifications offered above, this argument is not a persuasive case against information sharing. If information is obtained in the EU through dawn raids conducted with guarantees of due process equivalent to those granted in the US then it should be possible to share that information with the Department of Justice.

On the other hand, the EU might be resistant to information gathered through its administrative process being used in individual criminal prosecutions. But the evidence that would be relevant to a case in the US is evidence of a crime committed against US consumers. The desire to protect European firms or individuals that engage in conduct that is not considered a crime in Europe is understandable, but when doing business in the US those firms and individuals must be prepared to act within the laws of the US. The different treatment of the conduct in the two jurisdictions should not prevent agency cooperation. The test should be whether reasonable due process requirements have been complied with in the individual case.

*e. Information could be used for purposes contrary to national interests*

The desire to preserve national sovereignty goes a long way towards explaining the lack of progress in establishing an international antitrust regime.<sup>111</sup> It also explains why the already limited

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<sup>109</sup> *Id.* at 8.

<sup>110</sup> Parisi, *supra* note 76, at 21.

<sup>111</sup> Stephan, *supra* note 9, at 205.

information-sharing provisions of the various bilateral cooperation agreements are not compulsory. Either agency may refuse to share information on a case-by-case basis.<sup>112</sup>

Under the US/EU Agreement, the sharing of even non-confidential information is voluntary. The agencies work to protect the consumer interest which, in the absence of a truly international antitrust law, is interpreted to mean the interest of consumers within the country's borders. If sharing information was compulsory then counterpart agencies could use the information to prosecute defendants located within the host agency's jurisdiction even if no harm accrues to the host country's consumers, and even if the defendants' actions are beneficial to the host country. In other words, if agencies could demand that other agencies share foreign evidence then this power could be used to assert extraterritorial jurisdiction.<sup>113</sup> If countries forfeit their right to refuse to cooperate then they effectively cede the ability to control how evidence they obtain is used. This justification for limiting cooperation, or at least for not expanding it, may be the most revealing in terms of explaining why so few countries have taken advantage of the IAEEA.

However, this concern could be addressed by a more narrow limitation on the power to share confidential information. Any expanded agreement could contain a carve-out for "national interest" exceptions, as in the US/Canada MLAT<sup>114</sup> or the US/Australia Mutual Assistance Agreement.<sup>115</sup> There is a risk that this exception would be interpreted broadly and might be used to discriminate in favor of domestic companies, but this concern is not applicable to all cartel investigations therefore it should not prevent the sharing of confidential information when the interests of the US and the EU are aligned. In any case, it would be an improvement on the prevailing system.

*f. Expanded powers of cooperation would be redundant*

Cooperation with counterpart agencies in other jurisdictions is not the only way to get hold of evidence located in other countries. Agencies can also use "letters rogatory" to obtain evidence<sup>116</sup> and this mechanism has the advantage of not being contingent on reciprocity agreements.<sup>117</sup> Letters rogatory are requests for assistance from the courts of one country addressed to the courts of another country.<sup>118</sup> However, compliance with letters rogatory and letters of request is at the court's discretion. At a time of what the UK perceived to be a US attempt to expand its jurisdiction, the UK courts denied several requests for evidence.<sup>119</sup> These methods of obtaining evidence are not as reliable as they need to be for effective enforcement and often involve long delays because they

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<sup>112</sup> Frederic Jenny, *International Cooperation on Competition: Myth, Reality and Perspective*, 28 ANTITRUST BULL. 973, 979 (2003).

<sup>113</sup> Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501, 1543 (1998).

<sup>114</sup> Art. V(1) US/Canada MLAT.

<sup>115</sup> Article 4(A)(4) US/Australia Mutual Assistance Agreement.

<sup>116</sup> Scott S. Megregian, *Panelists Emphasise Cooperation in Cartel Enforcement*, 31 INT'L BUS. LAW. 79, 79 (2003).

<sup>117</sup> Waller, *supra* note 4, at 378.

<sup>118</sup> ABA SECTION OF ANTITRUST LAW, *supra* note 43, at 15.

<sup>119</sup> Waller, *supra* note 4, at 384.

must pass through diplomatic channels.<sup>120</sup> In fact the Department of State warns that “*letters rogatory are a time consuming, cumbersome process and should not be utilized unless there are no other options available.*”<sup>121</sup> Furthermore, use of letters rogatory does not build strong institutional relationships.<sup>122</sup>

It may be argued that, even absent heightened levels of cooperation, the agencies are able to build and win many international cartel cases.<sup>123</sup> They are stretched to the limits of their resources and could not take the additional enforcement actions that full cooperation might facilitate. However, the agencies also waste resources by duplicating investigative work, and the companies being investigated lose time and money through parallel investigations.<sup>124</sup> A more rational and efficient system would allow the agencies to share information to avoid the unnecessary utilization of scarce resources.

#### 4. Improving the Legal Framework for Cooperation

##### *a. What Information do the Agencies Share in Practice?*

In fact, despite the justifications for limiting the ability of the agencies to share confidential information, the US and the EU do purport to have a solid cooperative relationship. Enforcement officials state publically that they routinely pick up the phone to call their counterparts across the Atlantic, using informal channels to share the information they are permitted to share.<sup>125</sup>

John J. Parisi, at the time Counsel for European Union Affairs in the Office of International Affairs of the Federal Trade Commission, described the types of information that the agencies do share. The US agencies distinguish between confidential “business information,” for example as submitted by a leniency applicant, and confidential “agency information,” that forms part of the agency’s investigation.<sup>126</sup> Confidential “business information,” which includes information submitted by subjects of an investigation and third parties, either voluntarily or by compulsory process (subpoena or Civil Investigative Demands), can only be shared if the source of the information grants a waiver or if such action is covered by a MLAT or other mutual assistance agreement. The European Commission makes similar distinctions between the different types of confidential information, as summarized in its Report to the Council and the European Parliament on the application of the US/EU Agreement for calendar year 1997.<sup>127</sup>

By contrast, the agencies regularly share confidential “agency information,” which includes information in the public domain, the fact that an investigation has been opened, the fact that

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<sup>120</sup> U.S. Department of State Circular: Preparation of Letters Rogatory.

<sup>121</sup> *Id.*

<sup>122</sup> Anne K. Bingaman, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, *International Cooperation and the Future of U.S. Antitrust Enforcement*, Address Before the American Law Institute (May 16, 1996).

<sup>123</sup> Tarullo, *supra* note 13, at 480.

<sup>124</sup> Parisi, *supra* note 76, at 22.

<sup>125</sup> Jenny suggests reasons that the agencies may wish to portray the cooperative relationship as more productive than it actually is, including the desire to avoid a more formal, and possibly restrictive, protocol on cooperation. Jenny, *supra* note 112, at 1001.

<sup>126</sup> Parisi, *supra* note 76, at 16.

<sup>127</sup> Commission Report, dated May 11, 1998, at 5, available at <http://europa.eu.int/comm/dg04/interna/en/rapport0598.pdf>.

information has been requested from a foreign individual or company, substantive case analysis, potential remedies to be sought, and other tips.<sup>128</sup> This information is “confidential” in the sense that it is typically treated as information not for public disclosure.<sup>129</sup> This information can be extremely useful to counterpart agencies and also allows one agency to share its expertise with another.<sup>130</sup>

Parisi lists in detail the kinds of information that is shared by the agencies in a merger investigation and how that information is exchanged.<sup>131</sup> It can be expected that a similar process applies to cartel investigations. Initially, written notification, sometimes preceded by a telephone call, will be given of the opening of an investigation that affects the other jurisdiction.<sup>132</sup> Then telephone conference calls will be arranged, during which the staff may discuss the expected process of the investigation, including the timetable, and any publically available information.

Professional staff at the agencies advise case attorneys as to what information can and cannot be shared.<sup>133</sup> There is little public guidance, however, of where they draw the line in practice. Furthermore, despite concerns of some companies that the agencies cannot be trusted with confidential information, leniency applicants will often grant cross-waivers, particularly when they have obtained immunity in both the EU and the US.

#### *b. Expanding cooperation*

Some have observed that the US commitment to cooperation – entering into MLATs, passing the IAEEA and securing the US/Australia Agreement – is reflective of a general resistance to going further down the road towards harmonization. This paper has attempted to unpack the various justifications for limiting agency powers to share confidential information and has shown that these concerns can be addressed more directly with less restrictive measures. Further negotiations should lead the EU to take full advantage of the opportunities envisaged by the IAEEA. It should be possible to agree to sharing confidential information without undermining enforcement and while still retaining the important element of sovereignty.

Judge Wood stresses that it is not necessary for the US and EU to enter into a comprehensive agreement right away. Cooperation is not beneficial in every international case and not at every stage of the investigation.<sup>134</sup> To assess the legitimacy of the concerns highlighted in this paper, and to test to proposed solutions, it would be better to proceed more cautiously, on a case-by-case basis.<sup>135</sup> Instead of focusing on the exceptional cases, in which the costs outweigh the benefits, and therefore blocking the sharing of confidential information in all cases, the agencies

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<sup>128</sup> *Id.* at 17.

<sup>129</sup> *Id.*

<sup>130</sup> Melamed, *supra* note 13, at 425.

<sup>131</sup> Parisi, *supra* note 76, at 9-18.

<sup>132</sup> *Id.* at 10.

<sup>133</sup> *Id.* at 18.

<sup>134</sup> Wood, *supra* note 17, at 108.

<sup>135</sup> This is what Melamed refers to as “a sort of ‘common law’ approach to antitrust cooperation.” Melamed, *supra* note 13, at 432.

should open up the path for cooperation so that it may prove its worth when and where the objections are weakest.

The agencies can use cooperative efforts in securities regulation as a model. The U.S. Securities and Exchange Commission (SEC) is able to cooperate with its counterpart agencies on a case-by-case basis, using formal and informal channels, allowing for a flexible approach and the organic evolution of cooperative mechanisms. The SEC is actively encouraging other jurisdictions to make the requisite modifications to their domestic legislation that would allow for deepened cooperation. The SEC requires that any requesting agency establish and maintain such safeguards as are necessary to protect the confidentiality of files to which access is granted, and provide assurances of confidentiality to the SEC, including assurances that the authority will: (1) make no public use of these files or information without prior approval of SEC staff; (2) notify the SEC of any legally enforceable demand for the files or information prior to complying with the demand, and assert such legal exemptions or privileges on the SEC's behalf as it may request; and (3) not grant any other demand or request for the files or information without prior notice to and lack of objection by SEC staff.<sup>136</sup>

In terms of protection afforded foreign evidence shared with the SEC, pursuant to Section 24(d) of the Securities Exchange Act of 1934, the SEC cannot be compelled under the Freedom of Information Act to disclose records obtained from a foreign securities authority if the foreign authority had “in good faith determined and represented to the Commission that public disclosure of such records would violate the laws applicable to that foreign authority.”

The SEC has entered into twenty bilateral agreements over the last twenty years that remain in force today.<sup>137</sup> The SEC has also recently entered into bilateral “supervisory” agreements with the UK's Financial Services Authority and the German consolidated financial services regulator known as “BaFin” that go well beyond sharing information purely in enforcement investigations.<sup>138</sup> To give an indication of the success of these types of agreements, in fiscal year 2008, the SEC made 594 requests to foreign authorities for enforcement assistance and responded to 414 requests from foreign authorities.<sup>139</sup>

These developments have taken place against a backdrop of intense global interest in bolstering cross-border financial regulation. Under the auspices of the International Organization of Securities Commissions (“IOSCO”), the Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (the “MMoU”) was developed in 2002. This is a non-binding multilateral agreement that describes the terms under which any signatory can request cooperation or information from any other signatory as long as it meets the requirements of the agreement. As of January 2010, 96% of eligible securities regulators met the

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<sup>136</sup> Section 24(c) of the Securities Exchange Act of 1934 and 17 C.F.R. § 240.24c-1 (Rule 24c-1).

<sup>137</sup> Kathleen L. Casey, Commissioner of the U.S. Securities and Exchange Commission, *Testimony Concerning International Cooperation to Modernize Financial Regulation*, Before the United States Senate Banking Subcommittee on Security and International Trade and Finance (September 30, 2009).

<sup>138</sup> *Id.*

<sup>139</sup> See SEC website on international enforcement assistance, available at [http://www.sec.gov/about/offices/oia/oia\\_crossborder.shtml#mechanisms](http://www.sec.gov/about/offices/oia/oia_crossborder.shtml#mechanisms).

requirements to become signatories or have committed to seek the necessary legislative changes that would allow them to do so.<sup>140</sup> The goal is to create a network of agreements that enables national regulators to pursue wrongdoing throughout the globe. In terms of deterrence, the record of cooperation in securities enforcement increases the chance that violators will be caught and punished. The same argument would apply to cartel enforcement.

The possibility of enhanced cooperation has generated some resistance, but there are compelling reasons for pursuing this course.<sup>141</sup> The business community, not often found to support aggressive antitrust enforcement, would at least welcome the decreased transaction costs of dealing with two agencies coordinating their investigations.<sup>142</sup> The international discourse on cooperation needs to shift from a focus on the positives and negatives of cooperation to a discussion of how to exploit the positives while at the same time minimizing the negatives. This will require crafting more sensible restrictions on the sharing of confidential information that protect legitimate business concerns and the agencies' effective leniency programs without sheltering infringing, and sometimes criminal, conduct from prosecution and punishment.

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<sup>140</sup> Kathleen L. Casey, Commissioner of the U.S. Securities and Exchange Commission, *Testimony Concerning Continuing Oversight on International Cooperation to Modernize Financial Regulation*, Before the United States Senate Banking Subcommittee on Security and International Trade and Finance (July 20, 2010).

<sup>141</sup> Evenett *et al.* remark that “aggressive prosecution of cartels can deter collusion but only where sufficient international cooperation exists to gather evidence and prosecute offenders so that cartel participants actually have something to fear.” Simon J. Evenett, Margaret C. Levenstein & Valerie Y. Suslow, *International Cartel Enforcement: Lessons from the 1990s*, 1221 (2001).

<sup>142</sup> Waller, *supra* note 4, at 385.