

**AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW
REPORT ON THE PROPOSED AGREEMENT BETWEEN
THE GOVERNMENT OF THE UNITED STATES OF AMERICA
AND THE GOVERNMENT OF AUSTRALIA
ON MUTUAL ANTITRUST ENFORCEMENT ASSISTANCE**

These views are presented on behalf of the Section of Antitrust Law of the American Bar Association ("Section"). They have not been approved by the Board of Governors or the House of Delegates of the American Bar Association and, accordingly, should not be construed as representing the policy of the Association. These views are submitted in response to the Department of Justice and Federal Trade Commission request for comments on the proposed Agreement Between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance (hereinafter "Proposed Agreement").

The Proposed Agreement is the first "antitrust mutual assistance agreement" to be proposed under the International Antitrust Enforcement Assistance Act, 15 U.S.C. §§ 6201-6212 (hereinafter "IAEAA"), enacted in 1994. The Section has consistently supported cooperative relationships among antitrust and competition law enforcement agencies of different jurisdictions, subject to appropriate guidelines and safeguards. Report of the Section of Antitrust Law and the Section of International Law and Practice of the American Bar Association on the Proposed International Antitrust Enforcement Assistance Act, U.S. Senate, Hearing before the Subcommittee on Antitrust, Monopolies and Business Rights of the Committee on the Judiciary, 103d Cong. 2d Sess., on S. 2297, Serial No. J-103-69, p. 47, Aug. 4, 1994. A representative of the Section testified in support of the bill that became the IAEAA. The Section appreciates this opportunity to submit comments on the first draft Agreement, and hereby reiterates its support for the IAEAA as a promising framework for such cooperative relationships.

If the Proposed Agreement comes into effect, its future construction and application will likely be regarded as influential precedent for future agreements under the IAEAA. Since the demand for collaboration among antitrust and competition law enforcement agencies in different jurisdictions is increasing rapidly, there could be many such agreements in the future. Thus, it is appropriate to examine this Proposed Agreement with particular care and to air thoroughly any potential issues that it raises.

The Section observes that the Proposed Agreement effectively applies the terms of the IAEAA in giving specific form to the various mechanisms for bilateral cooperation envisioned in the IAEAA. The Section wishes to point out a single clause in which the Proposed Agreement appears to deviate from the precise and carefully structured framework established by Congress. Based on the analysis and discussion presented below, the Section recommends that the Department of Justice and FTC clarify that this single clause is not in fact intended by the parties to differ or add to the specific purposes for which cooperation is authorized by the IAEAA.

The clause involved is a part of Paragraph A. of Article II, Object and Scope of Assistance, which provides in its entirety (emphasis supplied):

The Parties intend 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.

The italicized clause might be viewed as extending the scope of cooperation under the Proposed Agreement to a purpose other than those specified by the IAEAA. Specifically, Section 2 of the IAEAA provides:

In accordance with an antitrust mutual assistance agreement in effect under this Act...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 under the Act, 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 laws.

Section 3(b) of the IAEAA is the cognate provision authorizing the Attorney General and the FTC to gather evidence in order to assist a foreign antitrust authority for the same two purposes:

In accordance with an antitrust mutual assistance agreement in effect under this Act...the Attorney General and the [Federal Trade] Commission may, using their respective authority to investigate possible violations of the Federal antitrust laws, conduct investigations to obtain antitrust evidence relating to possible violation of the foreign antitrust laws administered or enforced by the foreign antitrust authority with respect to which such agreement is in effect under this Act, and may provide such antitrust evidence to the foreign antitrust authority, to assist the foreign antitrust authority—

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

Thus, the purposes for which assistance is authorized are specifically identified as "determining" whether any person "has violated or is about to violate" foreign antitrust laws, and "enforcing" such laws. (For convenience these will be referred to herein as "determining" and "enforcing" compliance, respectively.) There is no provision in the

Act for the Department of Justice and the FTC to assist foreign antitrust authorities for the purpose of "*facilitating the administration...of such antitrust laws[,]*" as provided in Article II ¶A. of the Proposed Agreement, as quoted above. Thus, the provisions of the Proposed Agreement appear to go beyond what is authorized by the IAEAA.

Our attention has been directed to a passage in the House of Representatives Report on the bill that became the IAEAA, H.R. 4781, H.R. Rep. 103-772, 103d Cong. 2d Sess.:

Section 2 of the bill permits the Attorney General or the [Federal Trade] Commission to disclose antitrust evidence to a foreign antitrust authority to assist in determining whether a person has violated or is about to violate any of the foreign antitrust laws it administers or enforces, or in *administering or enforcing* any of those antitrust laws. Such disclosure is permitted only in accordance with an "antitrust mutual assistance agreement" in effect with the foreign antitrust authority... .

Id. at 15. The italicized phrase seems consistent with an argument that assistance to a foreign antitrust authority is authorized by the IAEAA for the purpose of "administering" foreign antitrust laws. However, the "administering" language does not appear in either of the critical passages in the final legislation, Sections 2 and 3(b). Since "administering" an antitrust law could include activities other than determining and enforcing compliance, it seems inescapable that the language quoted from H.R. Rep. 103-772 is broader in characterizing the purposes for which assistance is authorized than is the legislation itself.

The Section also notes that the Proposed Agreement contains a "savings clause," Article II ¶D., which provides:

Nothing in this Agreement shall require the Parties or their respective Antitrust Authorities to take any action inconsistent with their respective Mutual Assistance Legislation.

Under Article I of the Proposed Agreement, "Mutual Assistance Legislation" includes the IAEAA. Accordingly, the Proposed Agreement already prevents either party from being *required* to provide assistance in the "administration" of the law, if such assistance is "inconsistent with" the IAEAA. However, this language admits the possible argument that the parties have the *discretion* to provide assistance "inconsistent with" the IAEAA, possibly including assistance in the "administration" of the law in forms that go beyond determining and enforcing compliance.

Future activities conducted pursuant to the IAEAA and specific antitrust investigations and enforcement proceedings conducted on the basis of IAEAA activities may be jeopardized by uncertainties regarding compliance of the Proposed Agreement with the IAEAA. Defendants or respondents in such proceedings might challenge actions taken against them on the basis that assistance provided for antitrust law "administration" may have tainted the proceedings, rendering such proceedings improper under governing legal standards applied in the jurisdiction where the proceeding is taking place. This would be

an unfortunate culmination of the significant and long-standing efforts to enhance antitrust and competition law enforcement cooperation through carefully designed mechanisms like the IAEAA.

It seems unlikely that clarity on this issue will be achieved by parsing the language of the statute, the House Report and the terms of the Agreement. In any event, other agencies, courts and parties that may become involved in future antitrust investigations and enforcement proceedings touched by the IAEAA and any antitrust mutual assistance agreements entered into under the IAEAA may adopt different views.

The Section believes that this potential ambiguity would be better resolved through clarification by the Justice Department and FTC, as the U.S. Government agencies primarily responsible for negotiation, execution and implementation of the Proposed Agreement. The statute is clear on its face that the "determining" and "enforcing" compliance purposes are authorized purposes for which evidence can be gathered and provided pursuant to an antitrust mutual assistance agreement meeting the requirements of the IAEAA. In light of all the circumstances, the Section believes that both the U.S. and Australian antitrust enforcement agencies—and other antitrust enforcement authorities that may ultimately be called upon to engage in international antitrust enforcement collaboration pursuant to IAEAA agreements—would be better served by clarifying that the Agreement permits assistance only for the purposes of determining and enforcing compliance as provided in Sections 2 and 3(b) of the IAEAA. Such a clarification would also assist the antitrust bar and, ultimately, the numerous business enterprises that must comply with antitrust and competition rules in the dozens of jurisdictions that may ultimately become involved in international antitrust law enforcement collaboration.

The Section appreciates the opportunity to submit these views.