Summary of Suggested Core Principles for Information Exchanges in International Cartel Investigations
Submitted by BIAC to WP3

The following sets out suggested core principles for the exchange of information (referred to herein as "Antitrust Evidence") between international antitrust enforcement agencies in the context of international cartel investigations, that could be incorporated in any treaty or inter-governmental agreement governing the exchange of information in respect of international cartel investigations. This draft is submitted by the BIAC Working Group on Information Exchange to Working Party 3. We hope that this revised draft will provide a constructive basis for further discussion within WP3 in this challenging area. We have drawn extensively from the agreement between the U.S.A. and Australia on mutual antitrust assistance negotiated pursuant to the IAEAA (hereafter the U.S.A./Australia IAEAA) and the U.S.A./Canada MLAT (and related legislation). We consider that in many instances these agreements may provide the basis for common ground between the enforcement agencies and the business community on the issues at hand. In the few instances where we consider that these agreements may not afford sufficient protection, we have so indicated and have proposed what we hope are constructive suggestions for purposes of further discussion.

BIAC is committed to supporting effective means to detect, investigate and prosecute those participating in illegal cartels. The core principles suggested try to ensure that this overall objective is achieved in a manner that also reflects appropriate safeguards, reasonable transparency and accountability.

1In this regard, we would adopt the definition of “Antitrust Evidence” in Article 1 of the U.S.A./Australia IAEAA:

“Refers to information, testimony, statements, documents or copies thereof, or other things that are obtained, in anticipation of, or during the course of, an investigation or proceeding under the Parties' respective antitrust laws, or pursuant to the Parties' Mutual Assistance Legislation”.

2We maintain the view that it is important that the principles governing the exchange information from private sources be transparent and therefore recommend that such exchange occur in the context of principles and safeguards that are set out in a treaty or inter-governmental agreement. We appreciate that there may be situations currently where exchanges occur in the absence of such treaties or agreements. It is hoped that the recognition of core principles, as proposed here, will encourage governments currently engaging in informal information exchange to move toward a system of exchange governed by principles set out in a formal agreement or treaty.

3 The members of the BIAC Working Group on International Information Exchange are Listed in Appendix "A"

4We also make reference herein to certain provisions of EC Council Regulation 1/2003 (Competition Law Modernisation Regulation), which was adopted on 16 December 2002. The Regulation will come into force on May 1, 2004.
A. **Provisions Based on Review of the U.S.A./Australia IAEAA and the U.S.A./Canada MLAT**

1. **Requests for Assistance**

   We consider that the provisions governing Requests for Assistance set out in Article III of the U.S.A./Australia IAEAA provide a sound model. In particular, we emphasize the desirability of the following elements:

   - Explanation of how the subject matter of the request concerns a possible violation of the antitrust laws in question and relevance to the investigation or proceeding to which the request relates;
   
   - A description of procedural or evidentiary requirements bearing on the manner in which the Requesting Party desires the request to be executed, which may include any legal privileges that may be invoked under the law of the Requesting Party that the Requesting Party wishes the Executing Authority to respect in executing the request, together with an explanation of the desired method of taking the testimony or providing the evidence to which such privileges may apply;
   
   - Requirements, if any, for confidential treatment of the request or its contents.

   The provisions of Article VI of the U.S.A./Canada MLAT are to similar effect, although not as detailed, reflecting in part the fact that the MLAT (unlike the IAEAA) is not specific to antitrust. As such, we believe that the IAEAA provisions are of greater relevance.

2. **Limitations on Assistance**

   We further consider that Article IV of the U.S.A./Australia IAEAA is a sound model; it gives the Requested Party discretion to deny a request for assistance in specified circumstances. The specified circumstances are:

   - A request is not made in accordance with the provisions of the Agreement;
   
   - Execution of a request would exceed the Executing Authority’s reasonably available resources;
   
   - Execution of a request would not be authorized by the domestic law of the Requested Party;
   
   - Execution of a request would be contrary to the public interest of the Requested Party.
We further endorse subsections B and C of Article IV of the U.S.A./Australia IAEAA that require a party that denies a request to consult with the Requesting Party to determine whether assistance can be provided in whole or in part on agreed terms and conditions and require the party that denies a request to promptly inform the Requesting Party of its decision with an explanation.

The U.S.A./Canada MLAT includes grounds for denial of a request similar to the first and fourth bulleted points set out above and further allows a Requested State to postpone assistance if execution of the request would interfere with an ongoing investigation or prosecution (a limitation that could presumably fall within the “public interest” ground in the U.S.A./Australia IAEAA).

We would recommend a further ground, which would give the Requested Party the discretion to deny a request where the matter in respect of which Antitrust Evidence is sought by the Requesting Party relates to a criminal offence in the Requesting Party’s jurisdiction, but to a civil or administrative matter in the Requested Party’s jurisdiction. A good example of this type of discretion is provided in Articles III (B)(2) and VII of the U.S.A./Australia IAEAA. Under those provisions, antitrust evidence obtained pursuant to a request by the U.S.A. shall not be used for the purposes of criminal proceedings, unless Australia subsequently authorizes such use5.

3. Confidentiality

We are largely in accord with the provisions regarding Confidentiality set out in Article VI the U.S.A./Australia IAEAA. In particular, we would endorse the following as suggested elements of a model provision:

- By entering into the Agreement, each Party confirms that the confidentiality of Antitrust Evidence obtained under the Agreement is ensured by its national laws and procedures and that such laws and procedures (as set out in an Annex to the Agreement) are sufficient to provide protection that is adequate to maintain securely the confidentiality of antitrust evidence provided under the Agreement;

- Each Party shall, to the fullest extent possible consistent with that Party’s laws (as Annexed to the Agreement) maintain the confidentiality of any request and of any

5Under Article 12 of EC Competition Law Modernisation Regulation, information exchanged can only be used to impose sanctions on natural persons where the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of, Article 81 or 82 or, in the absence thereof, where the information was collected in a way that respects the same level of protection of the rights of defence of natural persons as provided under the national rules of the receiving authority. In this latter case, the information exchanged cannot be used to impose custodial sanctions.
information communicated to it in confidence by the other Party pursuant to an Agreement.

• Each Party shall oppose any application by a Third Party for disclosure of any Antitrust Evidence provided under the Agreement. In particular, disclosure to third party plaintiffs, others involved in litigation or possible litigation, and to other branches of the Requesting States’ Government (i.e., the tax authorities) should be opposed (except for the sharing of information for the purposes of enforcing the antitrust laws with other government agencies or departments integral to such enforcement, and who will afford the same level of protection to the information as the Party who received it).

We further endorse the provisions in Article VI (C) and (D) of the U.S.A./Australia IAEAA that provide (in summary):

Unauthorized or illegal disclosure or use of information communicated in confidence to a Party pursuant to this Agreement shall be reported immediately. Both Parties shall promptly consult on steps to minimize any harm resulting from the disclosure and to ensure that unauthorized or illegal disclosure or use of confidential information does not recur. The Executing Authority that provided the information shall give notice of such unauthorized or illegal disclosure or use to the person, if any, that provided such information to the Executing Authority. Such disclosure is a ground for termination of the Agreement.

These provisions are discussed further herein in the context of “Notice”.

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6We have some possible concerns with Article VI (A)(1) of the U.S.A./Australia IAEAA, which provides, in part, “The Requesting Party may ask that assistance be provided in a manner that maintains the confidentiality of a request and/or its contents.” We assume the intent of this provision is to make clear that a Requesting Party can determine in advance whether it is feasible for the request in any particular case to be carried out without the request being revealed to the person or persons whose information is sought (e.g., to protect the integrity of the Requesting Party’s investigation). If so, we take no issue with this provision. If, however, the intent of the provision is that unless confidentiality is requested by the Requesting Party, no confidentiality will apply, we have difficulty reconciling this provision with the apparent intent of Article VI as a whole. In our view, the confidentiality of exchanged antitrust evidence should be assured, and it ought not to be open to either party to waive the confidentiality requirements.

7It is understood that if, after opposition, a court in the Requesting State orders production, that must be complied with, subject to exercising rights of appeal.
4. **Limitations on Use**

We would endorse provisions governing limitations on the use of Antitrust Evidence in the following terms:

- Antitrust Evidence obtained pursuant to an Agreement shall be used or disclosed by the Requesting Party solely for the purpose of administering or enforcing the antitrust laws of the Requesting Party.

- Antitrust Evidence obtained pursuant to an Agreement may be used or disclosed by a Requesting Party to administer or enforce the antitrust laws only (1) in the investigation or proceeding specified in the request in question; and (2) for the purpose stated in the request, unless the Requested Party that provided such Antitrust Evidence has given its prior written consent to a different use or disclosure, but only in respect of the administration or enforcement of the antitrust laws.

Subject to the italicized words indicated, this language is consistent with that in Article VII (A) and (B) of the U.S.A./Australia IAEAA, without the qualification in Article VII (C). The latter provision would allow for the use of Antitrust Evidence by a Requesting Party for the administration or enforcement of laws other than the antitrust laws, with the consent of the Requested Party\(^8\). Protection against disclosure of Antitrust Evidence to third parties, including other government agencies\(^9\) and private plaintiffs and collateral use of Antitrust Evidence beyond antitrust enforcement is a key issue of importance to the business community. This has been an issue for many years especially from those in jurisdictions that do not have class actions for treble damages as are available in the U.S.A. There has also been a concern about the disclosure of information to other government agencies that might use the information for entirely different purposes but without the same protections (i.e., taxing authorities or industry departments who may have relationships with state owned competitors). Accordingly, this is a particularly sensitive area and one that likely will warrant further discussion and consideration.

5. **Taking of Testimony and Production of Documents**

(i) **General**

\(^8\)Article IX (1) and (2) of the U.S.A./Canada MLAT appears to provide even less protection against third party disclosure or collateral use and we take issue with these provisions on the same basis as described above. Article 12 of the EC Competition Law Modernisation Regulation provides that information exchanged can only be used for the purpose of applying Article 81 or 82 of the Treaty and in respect of the subject matter for which it was collected by the transmitting authority. The information may also be used for the application of national competition law where national competition law is applied in the same case and in parallel to Community competition law and does not lead to a different outcome.

\(^9\)Subject to the exception referred to above for disclosure to other agencies engaged in and integral to the enforcement of the antitrust laws and provided that the same protections will apply.
We are largely in accord with the provisions of Article IX of the U.S.A./Australia IAEAA, with regard to the taking of testimony and production of documents. We note in particular Article IX(D) which provides:

The Executing Authority shall, to the extent permitted by the laws of the Requesting Party, comply with any instructions of the Requesting Party with respect to any claims of legal privilege, immunity or incapacity under the laws of the Requesting Party.

We take no issue with this provision if, as we assume, it is intended to provide that the laws of the Requested Party shall prevail over those of the Requesting Party, to the extent that they are more favourable to the interests of the person whose information is being sought in respect of claims of legal privilege, immunity or incapacity. We would take issue with the provision if it is interpreted as entailing that, if the laws in this regard of the Requested Party are less favourable than those of the Requesting Party, those of the Requested Party prevail.

(ii) Protection of Legal Privilege

We acknowledge as helpful the provision in Article II(I) of the U.S.A./Australia IAEAA which provides:

Nothing in this Agreement compels a person to provide antitrust evidence in violation of any legally applicable right or privilege.

As indicated above, Articles III and IX of the U.S.A./Australia IAEAA are also relevant to the protection of legal privilege. Given the significance, however, of this issue to the business community, we further suggest that there should be an additional provision stipulating that a Requesting Party should not receive or use any antitrust evidence that would be subject to legal privilege in its jurisdiction, even though such antitrust evidence may not be subject to legal privilege in the Requested Party’s jurisdiction.

6. Search and Seizure

We take no issue with respect to the provisions of Article X of the U.S.A./Australia IAEAA in respect of search and seizure, but would recommend that such provisions be supplemented with the procedures governing search and seizure set out in Canada’s Mutual Legal Assistance in Criminal Matters Act, (“MLCMA”) the Canadian Statute which implements the U.S.A./Canada MLAT. The relevant provisions of that legislation are sections 10-16. In summary, that legislation provides that where the United States authorities seek to have evidence obtained in Canada pursuant to a search warrant, such warrant may be obtained without notice on application to a Canadian Judge, who may issue such a warrant in accordance with the considerations applicable to such applications in Canada generally. If a warrant is granted and a search and seizure conducted, before any
evidence so gathered is permitted to be transferred to the United States, a further hearing is held at which the “person from whom a record or thing was seized in execution of the warrant and any person who claims to have an interest in the record or thing so seized” has an opportunity to be heard.

7. **Return of Antitrust Evidence**

We would further endorse as a sound provision, Article XI of the U.S.A./Australia IAEAA regarding the return of antitrust evidence upon the conclusion of an investigation or proceeding specified in a request for Antitrust Evidence.

B. **Additional Provisions**

8. **Notice**

[While the discussion that follows represents the views of some BIAC members on the subject of notice, there are still issues based on the views of other BIAC members on the timing, manner and forum through which notice ought to be given in cases where there is a trans-border transfer of proprietary confidential information, and who prefer the position on the subject of notice reflected in the draft framework submitted by BIAC to WP3 in February 2003\(^\text{10}\). At the same time BIAC believes it preferable to try to reach consensus with the antitrust authorities on the other major safeguards applicable to information exchanges.]

We endorse the recommendations in respect of Notice set out in the ICPAC Advisory Committee Report, where it was recommended:

U.S. antitrust authorities should consider providing notice – either before or after the fact – of their intent to disclose information to antitrust authorities in other jurisdictions unless such notice would violate a treaty obligation of the United States, or a court order, or jeopardize the integrity of any U.S., state or foreign investigation.

The core concept embodied in this recommendation is that notice is only to be provided where such notice would not jeopardize the integrity of an antitrust investigation. BIAC further wants to emphasize that nothing set out here, or otherwise, is directed toward

\(^{10}\text{That position is summarized in Para 2.7 of February, 2003 Draft Framework:}

> 2.7 Prior Notification and Right to be Heard: Affected persons should receive notice of any proposed information exchange and be provided an opportunity to be heard before the information is exchanged unless an independent arbiter decides that prejudice to the investigation outweighs the right to be given notice prior to the information exchange. Such rights should be provided and exercised in a manner that avoids significant actual or potential prejudice to any investigation. If prior notice is not given, notice should be given as soon as practicable once the risk of prejudice to the investigation has ceased.
access to or, or interference with the exchange of, the internal work product of the antitrust authorities in the context of international cartel investigations. We do not consider that the international exchange of such internal work product should give rise to a requirement of notice. Rather, the focus of BIAC’s concern is the international exchange of confidential, proprietary business information in the form of documents (or records in whatever form). To illustrate how this approach may work in practice, we have considered four distinct scenarios.

(i) The first scenario is illustrated by the Canadian MLCMA, referred to above. As indicated, under that legislation, the integrity of the United States investigation is preserved by allowing a search warrant to be obtained in Canada without any advance notice to a person or persons whose information is sought. Obviously, once the search warrant is executed, such person or persons will have knowledge of the fact and nature of the investigation and any potential prejudice resulting from such disclosure will have dissipated. It is only at that point, and before any information obtained pursuant to the search is transferred to the United States, that the person or persons whose information has been obtained, or who have an interest in the information, are provided with notice and an opportunity to make representations in court regarding the legality of the search and seizure. This is the procedure currently applicable under the Canadian legislation implementing the U.S.A./Canada MLAT.

(ii) The second scenario is exemplified by information exchanges from Canada to the U.S.A. initially made pursuant to section 29 of the Canadian Competition Act. The Competition Bureau has interpreted that provision as permitting it to communicate information to foreign antitrust authorities (including the United States authorities) where such communication is made, “for the purposes of the administration or enforcement of” the Competition Act. Such information could include Antitrust Evidence obtained from third parties pursuant to the Commissioner’s investigative powers, including antitrust evidence obtained under a search warrant or other compulsory process. We consider that neither the initial communication of information from the Canadian authorities to the U.S. Department of Justice, nor the communication of any information by the foreign authority to Canada in response to Canada’s initial communication, would trigger a notification obligation, so long as the antitrust authorities were of the view that such notice would jeopardize an ongoing investigation. We do consider, however, that notice should be provided in respect of such exchange of Antitrust Evidence as soon as practicable after such time as notice would no longer result in prejudice to the investigation, (such determination to be made solely in the discretion of the antitrust agencies)-- for example, at a point in time similar to that provided for in the Canadian MLCMA, described above. Notice is appropriate in these circumstances so that persons whose information has been the subject of an exchange have the earliest opportunity (consistent with preservation of the integrity of the antitrust investigation) to know of the information exchange.
notice will be provided before any antitrust charges are laid so that an affected person is not required to await trial to raise issues with respect to the Antitrust Evidence adduced, but it is understood that in some cases, the antitrust agencies may be of the view that an investigation continues notwithstanding commencement of proceedings.

(iii) The third scenario is based on the example of discussions between antitrust authorities where there is a sharing of information in a broad sense regarding an investigation, but which does not include the exchange of any actual third party proprietary business information. In our view, the “internal work product” of the antitrust enforcement agencies is beyond the scope of any notice requirements and discussions of this kind ought not to trigger any notice obligation whatsoever (although nothing herein would impact on any obligation that the agencies may have to disclose such information under any applicable domestic mandatory rules for disclosure to accused persons or others in the context of a prosecution or other proceeding).

(iv) The final, and distinct, context in which notice arises is that referred to above under “Confidentiality”. Such a notice obligation arises where there has been a violation or breach of the confidentiality assurances associated with Antitrust Evidence that has been the subject of an international exchange. We appreciate that such situations are likely to be exceedingly rare. Nevertheless, the consequences of a breach of confidence to a business entity can be grave and it is therefore appropriate that where such a disclosure has occurred, both the Party that provided the subject information and the person or persons from whom the information was obtained should be promptly provided with notice of the breach. This will enable the affected person or persons to take such steps or actions as they may deem appropriate or necessary to protect any interests that may be jeopardized by the improper disclosure of their confidential business information.
APPENDIX “A”

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