103D CONGRESS 2D SESSION

H. R. 4781

To facilitate obtaining foreign-located antitrust evidence by authorizing the Attorney General of the United States and the Federal Trade Commission to provide, in accordance with antitrust mutual assistance agreements, antitrust evidence to foreign antitrust authorities on a reciprocal basis; and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JULY 19, 1994

Mr. Brooks (for himself and Mr. Fish) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

- To facilitate obtaining foreign-located antitrust evidence by authorizing the Attorney General of the United States and the Federal Trade Commission to provide, in accordance with antitrust mutual assistance agreements, antitrust evidence to foreign antitrust authorities on a reciprocal basis; and for other purposes.
 - 1 Be it enacted by the Senate and House of Representa-
 - 2 tives of the United States of America in Congress assembled,
 - 3 **SECTION 1. SHORT TITLE.**
 - 4 This Act may be cited as the "International Antitrust
 - 5 Enforcement Assistance Act of 1994".

1	SEC. 2. DISCLOSURE TO A FOREIGN ANTITRUST AUTHOR-
2	ITY OF ANTITRUST EVIDENCE.
3	Subject to section 8 and except as provided in section
4	5, the Attorney General of the United States and the Fed-
5	eral Trade Commission may provide, in accordance with
6	an antitrust mutual assistance agreement in effect with
7	a foreign antitrust authority, antitrust evidence to the for-
8	eign antitrust authority to assist the foreign antitrust au-
9	thority—
10	(1) to determine whether a person has violated
11	or is about to violate any of the foreign antitrust
12	laws administered or enforced by the foreign anti-
13	trust authority, or
14	(2) to enforce any of such foreign antitrust
15	laws.
16	SEC. 3. INVESTIGATIONS TO ASSIST A FOREIGN ANTITRUST
17	AUTHORITY IN OBTAINING ANTITRUST EVI-
18	DENCE.
19	(a) GENERAL AUTHORITY.—In accordance with an
20	antitrust mutual assistance agreement in effect with a for-
21	eign antitrust authority, subject to section 8, and except
22	as provided in section 5, the Attorney General may, using
23	the authority of the Attorney General to investigate pos-
24	sible violations of the Federal antitrust laws, conduct in-
25	vestigations to obtain antitrust evidence relating to a vio-
26	lation of the foreign antitrust laws administered or en-

1	forced by the foreign antitrust authority, and may provide
2	such antitrust evidence to the foreign antitrust authority,
3	to assist the foreign antitrust authority—
4	(1) to determine whether a person has violated
5	or is about to violate any of such foreign antitrust
6	laws, or
7	(2) to enforce any of such foreign antitrust
8	laws.
9	Such investigations may be conducted, and such antitrust
10	evidence may be provided, without regard to whether the
11	conduct investigated violates any of the Federal antitrust
12	laws.
13	(b) Conforming Amendments.—The Antitrust
14	Civil Process Act (15 U.S.C. 1311 et seq.) is amended—
15	(1) in section 2—
16	(A) in subsection (d)—
17	(i) by striking "or any" and inserting
18	", any, and
19	(ii) by inserting before the period ",
20	or any of the foreign antitrust laws", and
21	(B) by adding at the end the following:
22	"(k) The term 'foreign antitrust laws' has the mean-
23	ing given such term in section 12 of the International
24	Antitrust Enforcement Assistance Act of 1994.", and
25	(2) in the first sentence of section 3(a)—

1	(A) by inserting "or to an investigation au-
2	thorized by section 3(a) of the International
3	Antitrust Enforcement Assistance Act of 1994"
4	after "investigation", and
5	(B) by inserting "by the United States"
6	after ''proceeding''.
7	SEC. 4. JURISDICTION OF THE DISTRICT COURTS OF THE
8	UNITED STATES.
9	(a) AUTHORITY OF THE DISTRICT COURTS.—On the
10	application of the Attorney General made in accordance
11	with an antitrust mutual assistance agreement in effect
12	with a foreign antitrust authority, the United States dis-
13	trict court for the district in which a person resides, is
14	found, or transacts business may order such person to give
15	testimony or a statement, or to produce a document or
16	other thing, to the Attorney General to assist the foreign
17	antitrust authority that is a party to such agreement—
18	(1) to determine whether a person has violated
19	or is about to violate any of the foreign antitrust
20	laws administered or enforced by the foreign anti-
21	trust authority, or
22	(2) to enforce any of such foreign antitrust
23	laws.
24	(b) Contents of Order.—(1) An order issued
25	under subsection (a) may direct that testimony or a state-

- 1 ment be given, or a document or other thing be produced,
- 2 to a person who shall be recommended by the Attorney
- 3 General and appointed by the court. A person so appointed
- 4 shall have power to administer any necessary oath and to
- 5 take such testimony or such statement.
- 6 (2) An order issued under subsection (a) may pre-
- 7 scribe the practice and procedure for taking testimony and
- 8 statements. Such practice and procedure may be in whole
- 9 or in part the practice and procedure of the foreign state,
- 10 or the regional economic integration organization, rep-
- 11 resented by the foreign antitrust authority with respect
- 12 to which the Attorney General requests such order. To the
- 13 extent such order does not prescribe otherwise, any testi-
- 14 mony and statements required to be taken shall be taken,
- 15 and any documents and other things required to be pro-
- 16 duced shall be produced, in accordance with the Federal
- 17 Rules of Civil Procedure.
- 18 (c) RIGHTS AND PRIVILEGES PRESERVED.—A person
- 19 may not be compelled under an order issued under sub-
- 20 section (a) to give testimony or a statement, or to produce
- 21 a document or other thing, in violation of any legally appli-
- 22 cable right or privilege.
- 23 (d) VOLUNTARY CONDUCT.—This section does not
- 24 preclude a person in the United States from voluntarily
- 25 giving testimony or a statement, or producing a document

- 1 or other thing, in any manner acceptable to such person
- 2 for use in an investigation by a foreign antitrust authority.
- 3 SEC. 5. LIMITATIONS ON AUTHORITY.
- 4 Sections 2, 3, and 4 shall not apply with respect to 5 the following antitrust evidence:
- 6 (1) Antitrust evidence that is received by the 7 Attorney General or the Commission under section 7A of the Clayton Act (15 U.S.C. 18a), as added by 8 9 title II of the Hart-Scott-Rodino Antitrust Improve-10 ments Act of 1976. Nothing in this paragraph shall 11 affect the ability of the Attorney General or the 12 Commission to disclose to a foreign antitrust author-13 ity antitrust evidence that is obtained otherwise than under such section 7A. 14
 - (2) Antitrust evidence that is matter occurring before a grand jury and with respect to which disclosure is prevented by Federal law, except that for purposes of this section and Rule 6(e)(3)(c)(i) of the Federal Rules of Criminal Procedure, a judicial proceeding includes a judicial or administrative proceeding of a foreign state or a regional economic integration organization under any of the foreign antitrust laws of such foreign state or such organization.
 - (3) Antitrust evidence that is specifically authorized under criteria established by Executive

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1	Order 12356, or any successor to such order, to be
2	kept secret in the interest of national defense or for-
3	eign policy, and—
4	(A) that is classified pursuant to such
5	order or such successor, or
6	(B) with respect to which a determination
7	of classification is pending under such order or
8	such successor.
9	(4) Antitrust evidence that is classified under
10	section 142 of the Atomic Energy Act of 1954 (42
11	U.S.C. 2162).
12	SEC. 6. DISCLOSURE OF ANTITRUST EVIDENCE OBTAINED
13	UNDER THE ANTITRUST CIVIL PROCESS ACT.
14	Section 4 of the Antitrust Civil Process Act (15
15	U.S.C. 1313) shall not apply to prevent the Attorney Gen-
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10	eral from providing to a foreign antitrust authority anti-
	eral from providing to a foreign antitrust authority anti- trust evidence in accordance with an antitrust mutual as-
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17 18	trust evidence in accordance with an antitrust mutual as-
171819	trust evidence in accordance with an antitrust mutual assistance agreement in effect under this Act and in accord-
171819	trust evidence in accordance with an antitrust mutual assistance agreement in effect under this Act and in accordance with the other requirements of this Act.
17 18 19 20	trust evidence in accordance with an antitrust mutual assistance agreement in effect under this Act and in accordance with the other requirements of this Act. SEC. 7. PUBLICATION REQUIREMENTS APPLICABLE TO
17 18 19 20 21	trust evidence in accordance with an antitrust mutual assistance agreement in effect under this Act and in accordance with the other requirements of this Act. SEC. 7. PUBLICATION REQUIREMENTS APPLICABLE TO ANTITRUST MUTUAL ASSISTANCE AGREE-
17 18 19 20 21 22 23	trust evidence in accordance with an antitrust mutual assistance agreement in effect under this Act and in accordance with the other requirements of this Act. SEC. 7. PUBLICATION REQUIREMENTS APPLICABLE TO ANTITRUST MUTUAL ASSISTANCE AGREEMENTS.

- 1 ment and after consultation with the Commission, the At-
- 2 torney General shall publish in the Federal Register—
- 3 (1) the proposed text of such agreement and
- 4 any modification to such proposed text, and
- 5 (2) a request for public comment with respect
- 6 to such text or such modification, as the case may
- 7 be.
- 8 (b) Publication of Proposed Amendments to
- 9 ANTITRUST MUTUAL ASSISTANCE AGREEMENTS IN EF-
- 10 FECT.—Not less than 45 days before entering into an
- 11 agreement that makes an amendment to an antitrust mu-
- 12 tual assistance agreement in effect under this Act and
- 13 after consultation with the Commission, the Attorney Gen-
- 14 eral shall publish in the Federal Register—
- 15 (1) the proposed text of such amendment, and
- 16 (2) a request for public comment with respect
- to such amendment.
- 18 (c) Publication of Antitrust Mutual Assist-
- 19 ANCE AGREEMENTS ENTERED INTO AND OF AMEND-
- 20 MENTS TO SUCH AGREEMENTS.—Not later than 30 days
- 21 after entering into an antitrust mutual assistance agree-
- 22 ment, or an agreement that makes an amendment to an
- 23 antitrust mutual assistance agreement in effect under this
- 24 Act, the Attorney General shall publish in the Federal
- 25 Register—

1	(1) the text of the antitrust mutual assistance
2	agreement or of such amendment, as the case may
3	be, and
4	(2) in the case of an agreement that makes
5	such amendment, a notice containing—
6	(A) a statement of the fact that such
7	agreement was entered into,
8	(B) citations to the provisions of the Fed-
9	eral Register that contain the text of the
10	amendment and of the antitrust mutual assist-
11	ance agreement that is so amended, and
12	(C) a description of the manner in which
13	a copy of the antitrust mutual assistance agree-
14	ment, as so amended, may be obtained from the
15	Attorney General.
16	(d) Condition for Validity.—An antitrust mutual
17	assistance agreement, or an agreement that makes an
18	amendment to an antitrust mutual assistance agreement,
19	entered into in violation of subsection (a) or (b) shall not
20	be considered to be entered into under the authority of
21	this Act.
22	SEC. 8. IMPLEMENTATION OF ANTITRUST MUTUAL ASSIST
23	ANCE AGREEMENTS.
24	(a) Determinations.—The Attorney General may
25	conduct an investigation under section 3, and the Attorney

General or the Commission may provide antitrust evidence to a foreign antitrust authority, under an antitrust mutual 3 assistance agreement in effect under this Act only if the 4 Attorney General or the Commission, as the case may be, determines in the particular instance in which such investigation or evidence is requested that— 6 (1) the foreign antitrust authority— 7 (A) will satisfy the assurances, terms, and 8 9 conditions required by subparagraphs (A), (B), and (D) of section 12(2), and 10 11 (B) is capable of complying with and will comply with the confidentiality requirements 12 applicable under such agreement to the re-13 14 quested antitrust evidence, 15 (2) providing the requested antitrust evidence will not violate section 5, and 16 17 (3) conducting such investigation, or providing 18 the requested antitrust evidence, as the case may be, 19 is consistent with the public interest of the United 20 States, taking into consideration, among other factors, whether the foreign state, or the regional eco-21 22 nomic integration organization, represented by the

foreign antitrust authority holds any proprietary in-

terest that could benefit or otherwise be affected by

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- such investigation or by the provision of such anti-
- 2 trust evidence.
- 3 (b) Limitation on Disclosure of Certain Anti-
- 4 TRUST EVIDENCE.—Neither the Attorney General nor the
- 5 Commission may disclose in violation of an antitrust mu-
- 6 tual assistance agreement any antitrust evidence received
- 7 under such agreement, except that such agreement may
- 8 not prevent the disclosure of such antitrust evidence to
- 9 a defendant in an action or proceeding brought by the At-
- 10 torney General or the Commission for a violation of any
- 11 of the Federal antitrust laws if such disclosure would oth-
- 12 erwise be required by Federal law.
- 13 (c) Required Disclosure of Notice Re-
- 14 CEIVED.—If the Attorney General or the Commission re-
- 15 ceives a notice described in section 12(2)(G), the Attorney
- 16 General or the Commission, as the case may be, shall
- 17 transmit such notice to the person that provided the evi-
- 18 dence with respect to which such notice is received.
- 19 SEC. 9. LIMITATIONS ON JUDICIAL REVIEW.
- 20 (a) Publication.—Determinations made under sec-
- 21 tion 8(a) shall not be subject to judicial review.
- 22 (b) CITATIONS TO AND DESCRIPTIONS OF ANTI-
- 23 TRUST LAWS.—Whether an antitrust mutual assistance
- 24 agreement satisfies the requirements specified in section
- 25 12(2)(C) shall not be subject to judicial review.

1	SEC. 10. SUPPLEMENTATION AND PRESERVATION OF AU-
2	THORITY.
3	(a) Supplemental Authority.—The authority
4	provided by this Act is in addition to, and not in lieu of,
5	any other authority vested in the Attorney General, the
6	Commission, or any other officer of the United States.
7	(b) Authority Preserved.—This Act does not
8	modify or affect the allocation of responsibility between
9	the Attorney General and the Commission for the enforce-
10	ment of the Federal antitrust laws.
11	SEC. 11. REPORT TO THE CONGRESS.
12	In the 30-day period beginning 3 years after the date
13	of the enactment of this Act and after consultation with
14	the Commission, the Attorney General shall submit, to the
15	Speaker of the House of Representatives and the Presi-
16	dent pro tempore of the Senate, a report—
17	(1) describing how the operation of this Act has
18	affected the enforcement of the Federal antitrust
19	laws,
20	(2) the extent to which foreign antitrust au-
21	thorities have complied with the confidentiality re-
22	quirements applicable under antitrust mutual assist-
23	ance agreements in effect under this Act,
24	(3) the number and identities of the foreign
25	antitrust authorities that have entered into such
26	agreements,

- 1 (4) the identity of each foreign state, and each 2 regional economic integration organization, that has 3 in effect a law similar to this Act,
 - (5) the approximate number of requests made by the Attorney General and the Commission under such agreements to foreign antitrust authorities for antitrust investigations and for antitrust evidence,
 - (6) the approximate number of requests made by foreign antitrust authorities under such agreements to the Attorney General and the Commission for investigations under section 3 and for antitrust evidence, and
 - (7) a description of any significant problems or concerns of which the Attorney General is aware with respect to the operation of this Act.

16 SEC. 12. DEFINITIONS.

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- For purposes of this Act:
 - (1) The term "antitrust evidence" means information, testimony, statements, documents, or other things obtained in anticipation of, or during the course of, an investigation or proceeding under any of the Federal antitrust laws or any of the foreign antitrust laws.
 - (2) The term "antitrust mutual assistance agreement" means a written agreement, or written

- memorandum of understanding, that is entered between the Attorney General and a foreign antitrust authority for the purpose of conducting investigations under section 3, or for providing antitrust evidence, on a reciprocal basis and that includes the following:
 - (A) An assurance that the foreign antitrust authority will provide to the Attorney General or the Commission assistance that is comparable in scope to the assistance the Attorney General or the Commission, as the case may be, provides under such agreement or such memorandum.
 - (B) An assurance that the foreign antitrust authority is subject to laws and procedures that are adequate to maintain the confidentiality of antitrust evidence that may be received under section 2, 3, or 4 and will give protection to antitrust evidence received under such section that is not less than the protection provided under the laws of the United States to such antitrust evidence.
 - (C) Citations to, and brief descriptions of, the laws (including treaties, statutes, executive orders, and regulations) of the United States,

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and the laws (including treaties, statutes, executive orders, and regulations) of the foreign state, or the regional economic integration organization, represented by the foreign antitrust authority, that protect the confidentiality of antitrust evidence that may be provided under such agreement or such memorandum. Such citations and such descriptions shall include the enforcement mechanisms and penalties applicable under such laws.

- (D) Terms and conditions that specifically prohibit using antitrust evidence received under such agreement or such memorandum, for any purpose other than the administration or enforcement of the foreign antitrust laws involved.
- (E) An assurance that antitrust evidence received under section 2, 3, or 4 from the Attorney General or the Commission, and all copies of such evidence, in the possession or control of the foreign antitrust authority will be returned to the Attorney General or the Commission, respectively, at the conclusion of the foreign investigation or proceeding with respect to which such evidence was so received.

1	(F) Terms and conditions that specifically
2	provide that such agreement or such memoran-
3	dum will be terminated if—
4	(i) the confidentiality required under
5	such agreement or such memorandum is
6	violated with respect to antitrust evidence,
7	and
8	(ii) adequate action is not taken both
9	to minimize any harm resulting from the
10	violation and to ensure that such confiden-
11	tiality is not violated again.
12	(G) Terms and conditions that specifically
13	provide that if the confidentiality required
14	under such agreement or such memorandum is
15	violated by the foreign antitrust authority with
16	respect to antitrust evidence, notice of the viola-
17	tion will be given—
18	(i) by the foreign antitrust authority
19	promptly to the Attorney General or the
20	Commission with respect to antitrust evi-
21	dence provided by the Attorney General or
22	the Commission, respectively, and
23	(ii) by the Attorney General or the
24	Commission to the person (if any) that

- provided such evidence to the Attorney 1 General or the Commission. 2
 - (3) The term "Attorney General" means the Attorney General of the United States.
 - (4) The term "Commission" means the Federal Trade Commission.
 - (5) The term "Federal antitrust laws" has the meaning given the term "antitrust laws" in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)) but also includes section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that such section 5 applies to unfair methods of competition.
 - (6) The term "foreign antitrust authority" means a governmental entity of a foreign state or of a regional economic integration organization that is vested by such state or such organization with authority to enforce the foreign antitrust laws of such state or such organization.
 - (7) The term "foreign antitrust laws" means the laws of a foreign state, or of a regional economic integration organization, that are substantially similar to any of the Federal antitrust laws and that prohibit conduct similar to conduct prohibited under the Federal antitrust laws.

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l	(8) The term "person" has the meaning given
2	such term in subsection (a) of the first section of the
3	Clayton Act (15 U.S.C. 12(a)).

(9) The term "regional economic integration organization" means an organization that is constituted by, and composed of, foreign states and in which such foreign states have vested authority to make decisions binding on such foreign states.

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