Statement of

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Before the

Committee on the Judiciary

U.S. Senate

Concerning the

International Antitrust Enforcement Assistance Act of 1994

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Mr. Chairman and members of the Committee:

I am pleased to be here today to testify on behalf of the Administration in support of S. 2297, the International Antitrust Enforcement Assistance Act of 1994. Enactment of this legislation is vitally needed if we are to bring our antitrust enforcement tools into line with the realities of the global economy of today and tomorrow.

I want to express the Administration's appreciation, and my personal appreciation, for the bipartisan effort that has led to the introduction of this bill. I want particularly to thank Senators Metzenbaum and Thurmond for their commitment to developing an effective and balanced bill, and

Senators Kennedy, Biden, Leahy, Simon, Simpson, Grassley and Specter for their cosponsorship.

This bill is the product of an extensive and constructive dialogue in which I have met with many members of the Committee and Committee staff, as well as counterparts on the House side, with representatives of the business community and of the bar. A special task force of the American Bar Association's Antitrust Section, formed to study the bill and led by former Assistant Attorney General Jim Rill, has made a tremendous contribution.

A broad consensus has come out of this dialogue. First, there is agreement that more effective enforcement tools are needed to protect American businesses and consumers from anticompetitive conduct in the international arena. Second, there is agreement that these tools must and can be developed in a way that safeguards confidential business information obtained from American firms from misuse or improper disclosure abroad. S. 2297 has been carefully crafted to achieve these objectives.

We live in a global economy, in which the subject matter of antitrust enforcement can be as geographically widespread as the firms and the business activity that affect our nation's markets. Nearly a quarter of the United States' GDP is accounted for by export and import trade, roughly double the figure after World War II.

Today, international considerations in antitrust enforcement are in the mainstream of our enforcement activity. The Antitrust Division currently has some thirty active Sherman Act matters with major international aspects -- nearly double the number that were ongoing just one year ago. And the number that were ongoing a year ago was itself high by historical standards, reflecting the renewed emphasis on international enforcement that Jim Rill, my predecessor under President Bush, had already begun.

Continuing this strengthening of the Division's international enforcement program has been a priority of mine since the day I came into office. One of the first steps I took was the creation, with the approval of Congress, of the position of international deputy assistant attorney general for antitrust, and the appointment of Professor Diane Wood to that position.

But the more active we are, the more apparent it is that the tools we have to deal with this international playing field are out of date. Enforcing the antitrust laws is a fact-intensive job. We need evidence to determine whether the law has been violated. If we conclude that there has been a violation, we need evidence to make a case that will stand up in court.

More and more often, the evidence we need is located abroad. Unfortunately, evidence that is located abroad is far too often evidence that is beyond our reach -- whether it is in the hands of private firms or

individuals, or in the possession of a foreign antitrust enforcement agency. And when we cannot enforce our antitrust laws against foreign anticompetitive conduct because we cannot get the evidence, it is American consumers and American businesses that bear the cost.

The International Antitrust Enforcement Assistance Act would give us the tools we need to get foreign-located antitrust evidence that is beyond our reach today. The bill would enable the Justice Department and the Federal Trade Commission to enlist the help of foreign antitrust enforcers to get crucial antitrust evidence already in the foreign agencies' files, or in the possession of persons in their territory, by allowing us to offer reciprocal assistance in their antitrust investigations.

The Need for Foreign-Located Evidence

I noted a moment ago that the Antitrust Division currently has some thirty active Sherman Act investigations and cases with substantial international aspects. The most difficult challenge in these matters -- and too often the biggest frustration -- is getting information and documents from outside the United States. Many of these investigations involve straight-out cartel conduct aimed at American businesses and consumers. In several of these investigations, there is a serious possibility we will be unable to get the evidence to prosecute because crucial witnesses or documents are abroad and beyond our reach.

In some of these cases, only the U.S. is targeted and only U.S.

antitrust laws are involved. Others of these cartels are aimed at both U.S. and foreign markets, and could be far more effectively investigated and prosecuted by joint action between U.S. and foreign antitrust authorities. In one such investigation recently, we seriously considered launching a coordinated investigation with a foreign antitrust authority; but we recognized that provisions in both our laws would have prevented our sharing the evidence we obtained in our respective territories. We have good reason to believe the foreign antitrust authority involved could have obtained valuable evidence that was beyond our reach.

But let me give you a different example, in this case an example of what can be done with the kind of cooperation S. 2297 would make possible. Just three weeks ago, as a result of a joint investigation between the Antitrust Division and our counterparts in Canada's Bureau of Competition Policy, we broke up a $120 million dollar a year international cartel in the fax paper market. Criminal charges were filed in both the United States and Canada as a result of that successful cooperation. In the U.S., those charges were against a Japanese corporation, two American subsidiaries of Japanese companies, and the former president of one of the U.S. subsidiaries, for their involvement in a price fixing conspiracy that raised thermal fax paper prices by approximately ten percent. The defendants pled guilty, and agreed to pay U.S. criminal fines of more than $6 million dollars, and Canadian criminal fines of nearly l million Canadian dollars.

And just a few weeks earlier, in another investigation with critical Canadian assistance, including simultaneous raids for documents in the

United States by the FBI and in Canada by the Royal Canadian Mounted Police, we successfully completed a major price fixing investigation in the $100 million a year plastic dinnerware industry. Criminal fines in the case so far have exceeded $8 million, and more are expected.

These joint U.S.-Canadian investigations were possible only because we and the Canadians have a mutual legal assistance treaty for cooperation in criminal law enforcement that covers antitrust cases. Unlike Canada, however, most countries with which the United States has agreements of this kind do not treat antitrust matters as part of their criminal law, and thus it is far more difficult, and in some cases impossible, to use these agreements as a vehicle for cooperative efforts.

Let me give you another example. I know you are familiar with the parallel settlements last month of the U.S. and European Commission antitrust cases against Microsoft. It is absolutely clear that our cooperation with the European Commission in that case led to faster, more effective and consistent relief than would have been possible for either us or the European Commission working alone. As Business Week put it in an editorial last week, "In an era of global competition, the Justice Dept. used sound judgment by working closely with European governments. This also frees companies from having to defend the same case twice." The Financial Times called the joint settlements a "milestone in antitrust law" that resulted from "unprecedented cooperation between authorities in Washington and Brussels."

But cooperation in the Microsoft case was possible only because Microsoft agreed that the Justice Department and the European Commission could share information Microsoft had provided to the two agencies. Cooperation with Canada in the plastic dinnerware and fax paper cartel cases was possible only because the U.S.-Canada MLAT came into play. With S. 2297 we will be able to expand this kind of cooperation, to come closer to the day when cartels can no longer prey on the American market from safe havens abroad.

All of the antitrust agreements we have entered into in the past with some of our foreign counterparts fall short, because they are limited by existing law. None of these agreements allows the enforcement agencies to share investigative information whose confidentiality is protected under national law. And none of them allows an antitrust agency to obtain information from private parties on a compulsory basis to assist an antitrust investigation in the other country. Even our 1991 agreement with the European Commission -- the most recent of our existing antitrust agreements -- would not have allowed us to discuss the evidence in our respective cases if Microsoft had not waived its objection to our doing so.

The vital importance of cooperation and access to foreign-located evidence has been recognized in other areas of economic law, where there are cooperative arrangements for access to foreign evidence that far surpass what can be done under present law in antitrust enforcement. Notably, in the securities area -- where the internationalization of the securities marketplace beginning in the 1980's highlighted the need for

international cooperation in policing securities markets -- the SEC has fifteen memoranda of understanding with its foreign counterparts under which it can obtain confidential investigative information and seek assistance in obtaining overseas evidence, in exchange for the SEC's agreement to reciprocate. Similar arrangements exist for tax law enforcement.

This is the kind of authority we need for antitrust -- authority that will expand our ability to protect businesses and consumers from anticompetitive conduct, wherever it takes place, that violates our antitrust laws. We need to be able to ask our foreign counterparts for information in their investigative files. We need to be able to ask our foreign counterparts to obtain information for us from companies and individuals in their territory. And in order to get that kind of cooperation, we need legislation that will allow us to reciprocate.

S. 2297 Will Provide the Needed Tools

First, S. 2297 would help us get evidence that foreign antitrust authorities have gathered in their own antitrust investigations that is relevant to a violation of our antitrust laws. The bill would allow the Justice Department and Federal Trade Commission to reciprocate by responding to requests from foreign antitrust authorities for investigative information that cannot be disclosed to them today because of confidentiality provisions in the Antitrust Civil Process Act, grand jury secrecy rules, and comparable provisions in the Federal Trade Commission

Act.

Second, the bill would enable us get assistance from foreign antitrust authorities in gathering evidence from private firms or individuals that are beyond the reach of U.S. process, by giving us the ability to reciprocate. It would allow the Justice Department to use antitrust civil investigative demands to obtain information on behalf of foreign antitrust authorities, or to seek a court order to compel the production of documents or testimony in the United States in aid of a foreign antitrust investigation.

All of these provisions are accompanied by extensive safeguards to make sure that confidential business information obtained from American firms will not be misused or improperly disclosed by foreign antitrust authorities. These safeguards are a crucial part of the bill. They are there to give confidence that these vital tools designed to protect our businesses and consumers from illegal anticompetitive conduct will not themselves open the door to unfair competition from abroad. Let me summarize these safeguards.

(1) First, antitrust evidence could be provided to a foreign antitrust authority under the bill only pursuant to a publicly disclosed antitrust mutual assistance agreement.

(2) Before entering into any agreement, and before providing assistance under any agreement, the U.S. antitrust agencies would have to be satisfied

that the foreign antitrust authority can and will meet stringent confidentiality requirements for the information that we provided.

The foreign antitrust authority must have laws in place that give protection to any information it receives from the U.S. authorities that is no less than the protection the information would have in the hands of the U.S. agencies.

The Attorney General or Federal Trade Commission, as the case may be, must be satisfied that the foreign authority can and will comply with all applicable confidentiality requirements.

The information must be used only for antitrust enforcement.

The information must be returned to the Attorney General or Federal Trade Commission at the end of the foreign investigation or proceeding.

If there is ever a breach of confidentiality, the person that provided the information would have to be notified, and the mutual assistance agreement would be terminated unless adequate steps were taken to minimize the harm from the breach and to make sure the breach does not recur.

(3) The bill does not authorize the disclosure of premerger information that was received by the Attorney General or the Federal Trade Commission

under 7A of the Clayton Act (Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976).

(4) In addition, the bill does not authorize the disclosure of information submitted to the U.S.Government in connection with title III of the Export Trading Company Act of 1982 or any other statute that is not a federal antitrust law within the meaning of the bill.

(5) The bill makes it clear that national security information cannot be passed along to a foreign agency.

(6) The bill includes provisions to assure that assistance under these agreements will be a two-way street, and that the foreign antitrust agency will provide us with assistance that is comparable in scope to what we agree to provide in return. We have no intention to enter into one of these agreements -- and the bill would not allow us to -- unless we are satisfied that we are getting value in return. The whole point of this bill is to allow us to obtain the evidence we need to prosecute anticompetitive conduct that violates our laws, and we will not enter into agreements that do not further that objective.

(7) Before providing assistance under the Act in response to any foreign request for assistance, the Attorney General or the Federal Trade Commission must conclude that doing so is consistent with the public interest of the United States. This important safeguard gives further assurance that the Act will be implemented in a way that advances, and that it does not put at

risk, important U.S. interests. The bill specifically directs the Attorney General and the Federal Trade Commission to include in their consideration any proprietary interest the foreign government involved may have that could benefit from or be affected by the assistance the U.S. agencies have been asked to provide.

Conclusion

Mr. Chairman, S. 2297 represents a carefully prepared mechanism that will allow us to get the evidence we need to enforce our antitrust laws in today's global economy, while safeguarding sensitive business information against misuse and improper disclosure. With this legislation, I believe that I and my successors, and our colleagues at the Federal Trade Commission, will have the tools we need to extend the level playing field for the benefit of American consumers and American businesses through expanded international antitrust cooperation.

I will be pleased to answer any questions that members of the Committee may have.