

## Questions submitted for the Record from Subcommittee Chairman Marino

1. *Most of the members are probably familiar with a few headline grabbing cases in which foreign antitrust agencies have seemingly acted out of hand. How systemic of a problem is this?*

Answer: Although extensive research has not been done on the matter, there is good reason to believe that this is a not insignificant problem that is likely to grow more serious over time. The [American Bar Association Antitrust Section 2017 Presidential Transition Report](#) (at page 56) noted that “the jurisdiction-by-jurisdiction process that [has] produced . . . [a] worldwide antitrust expansion also [has] created numerous and conflicting variations in nearly every aspect of competition law—including substance, procedure, remedy, institutional framework, and many other key characteristics of antitrust enforcement and compliance.” In my opinion, some of these “variations” do occasionally involve abusive actions – and that incidences of abuse may be expected to rise as foreign competition agencies continue to grow and expand their jurisdiction. Furthermore, the [March 2017 International Competition Policy Group Report and Recommendations](#) (ICPEG Report), which focused specifically on the issue of dealing with foreign abuses, found that:

[C]ompetition laws are not always applied in a sound, transparent, and nondiscriminatory manner and, as a result, they can have significant adverse impact on international trade and investment in domestic and global markets. Certain major trading partners are, in some cases, denying foreign companies fundamental due process and, in other cases, applying their competition laws to protect their home markets from foreign competition, promote national champions, and/or force technology transfers. This is a substantial concern to the United States because of the significant unfair adverse impact it has on U.S. firms seeking to compete at home and in the global marketplace.

ICPEG Report at 6. In addition, as the ICPEG Report explained:

[T]he United States may believe that a foreign enforcement action is not being taken in good faith. For example, enforcement action may reflect an effort to improperly discriminate against a U.S. competitor to further “industrial policy” goals, such as by favoring domestic commercial interests or state-owned enterprises over foreign competitors. . . . In such cases, the U.S. federal antitrust agencies may raise concerns with their counterparts, but their need to cooperate with the foreign enforcement agencies on multiple future transactions limits their leverage and, thus, their ability to preclude current or future abuses. Accordingly, the United States appropriately should look beyond antitrust policy tools and seek other means to deal with the inappropriate application of foreign competition laws that harms U.S. economic interests.

Finally, based upon my long-time experience in international antitrust, I believe that foreign anticompetitive abuses affecting U.S. businesses are likely to be a substantial problem in the foreseeable future.

2. *There seems to be several areas of concern, including due process, protection of IP, extraterritorial remedies, and the protection of state-sponsored or state-owned enterprises. Is there on area in particular you believe should be the focus of U.S. agencies or a potential White House Working Group?*

Answer: While all of these are serious issues of concern, I believe that protection of IP merits particular attention. IP theft has grown like topsy in recent decades, as have attacks by some governments on American companies' efforts to obtain reasonable returns to their property rights. By undermining the value of IP rights, such attacks threaten future American innovation and economic growth, which are supported by robust IP rights protection. As the ICPEG Report explained:

Many companies whose businesses rely significantly on technology and innovation and thus IP rights have been subjected to extensive investigation of their exploitation of those rights and subjected to enforcement and remedies for conduct that reaches far outside the investigating country's own territory and arguably affects the way that those business can exploit their IP rights and operate in other countries. For example, China is contemplating creating liability for refusals to license intellectual property deemed "necessary" to compete in a given market as well as provisions that prohibit charging unfairly high IP royalties. Such measures "would have the potential to reduce incentives for innovation not only in China but also around the world, in light of the sizable market for innovative products in China." In light of these developments, the United States should, by word and deed, support a bipartisan consensus on the appropriate application of competition law to the exercise of IP rights and urge foreign jurisdictions to do the same. Given the seriousness of the economic consequences of foreign disrespect for U.S. IP rights, the Trump Administration may wish to take a strong stance against specific foreign antitrust abuses that target U.S. patents in a manner inconsistent with core competition principles by engaging in international consultations and by considering possible sanctions if all else fails.

ICPEG Report at 31 (footnotes omitted).

3. *How would you evaluate the progress of international organizations to date to promote the adoption of best procedural and substantive competition law standards? What can U.S. antitrust agencies better do to support such standards?*

International organizations have been trying to promote sound due process principles (see the [2012 OECD Report on Procedural Fairness and Transparency](#) and the [ICN Guidance on Investigative Process](#)) and the American Bar Association's Antitrust Section offered its own model in 2015 ([see here](#)). In addition, over the last decade U.S. antitrust enforcers and have addressed the importance of procedural fairness in the context of OECD meetings, bilateral consultations, International Competition Network conferences, and trade negotiations. Although some progress has been made, significant and credible complaints continue to be raised by American companies that in dealing with certain foreign antitrust enforcers. In particular, American firms complain of being denied basic procedural protections, such as adequate notice of the charges against them, the ability to defend themselves, and the ability to appeal to truly independent tribunals, among other allegations. The new leaders of the Federal Trade Commission and the Justice Department's Antitrust Division may wish to publicly emphasize the importance of procedural fairness in the context of international cooperation concerning investigations, and in bilateral and multilateral dialogues. In serious case, they also may wish to indicate that a continued failure by foreign agencies to afford basic due process protections may lead to further steps by the U.S. Government above and beyond mere consultations, complaints, and negotiating positions.

The issue of substantive standards is trickier, because antitrust statutes in civil law countries often are phrased somewhat differently than common law statutes. Nevertheless, the U.S. has made some progress in promoting best practices for merger assessments and cartel investigations, through the International Competition Network and the OECD (OECD guidance has been limited to cartel issues). More progress needs to be made, however, on issues of single firm conduct, vertical restraints, and the intellectual property/antitrust interface. In my view, the U.S. Government should return to single firm conduct, vertical, and IP analysis utilized during the last Bush Administration, and urge that foreign governments show greater respect for unilateral conduct and IP protection. Such a change would seek to enhance the ability of American firms to exploit their legitimate property rights and efficiency-seeking business plans, to the good of the American people. U.S. officials should point out that by adopting such principles as well, foreign governments can advance their own national economic interests.

4. *In your testimony you note that the formation of a working group will reduce the pressure on U.S. antitrust agencies to “do something” with respect to foreign antitrust abuses that is beyond the U.S. agencies’ powers. Where do you currently see limitations in these powers?*

The U.S. antitrust agencies are statutorily authorized to take enforcement action with respect to anticompetitive activity that has a direct, substantial, and reasonably foreseeable effect on U.S. commerce. The focus is on consumer welfare. Foreign antitrust abuses that harm the business interests of American firms within foreign nations often do not meet that test. Moreover, U.S. firms may face a variety of formal and informal foreign regulatory impediments and preferences overseas that deny them entry or skew competition in favor of home-grown firms (including state-owned enterprises and “national champions”). Such impediments are totally beyond the reach of American antitrust law. Finally, American antitrust law can do nothing to remedy foreign nations’ inadequate procedural protections or differences in substantive rules that disadvantage American competitors. In all such cases, the U.S. antitrust agencies can argue with their foreign counterpart authorities in favor of reforms, but the foreign authorities have no duty (and often little or no incentive) to accept such advice. Finally, in raising concerns, the U.S. agencies may feel constrained to “pull their punches” a bit for diplomatic reasons, given the need to cooperate with foreign authorities on individual cases. For all of these reasons, in appropriate instances U.S. government actors other than the federal antitrust agencies may need to get involved to cope with very serious foreign antitrust abuses.