

Responses to Questions for the Record of

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Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and
Antitrust Law

Hearing on Recent Trends in International Antitrust
Enforcement, with a Focus on the Report and Recommendations
of the International Competition Policy Expert Group,
Commissioned by the Chamber of Commerce

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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?

This important question remains unanswered. The AAI is unaware of any empirical studies that address the frequency, severity, or competitive effects of alleged bad-faith abuses of competition law by foreign competition authorities. In a press release announcing the formation of the ICPEG, Myron Brilliant, executive vice president and head of International Affairs for the U.S. Chamber of Commerce, stated only that antitrust in other jurisdictions “at times appears” to be used as “a tool of industrial policy.”¹ The Report itself states only that “[c]ertain of our major trading partners appear” to have used their antitrust laws in specified abusive ways.² Others have argued modestly that the anecdotal opinions of antitrust experts at least serve to establish that the misuse of foreign competition law is “not . . . theoretical” and “exists.”³

As Ranking Member Cicilline observed during the hearing, there are four categories of cases in which disagreements can potentially arise:

One would be for countries that share our antitrust laws and the framework that we have, and enforce it evenly against U.S. companies, and everyone else, which is of no concern to us. That is sort of the best kind of trading partner. The second group is people who share our standards, and have a framework which is similar to the United States, but apply it unfairly against the U.S. company as compared to their own companies, which is bad-faith, and, I think, obviously of concern. The third is a country that does not share our standards, has a different set of standards than we might use, but applies it evenly to everyone, which is complicated. And then, the fourth area is maybe the worst, they do not share our standards and they apply it worse against the U.S.⁴

This analysis is correct. In crafting a U.S. policy response to the alleged bad-faith misuse of competition law by foreign authorities, the appropriate starting point is to determine the frequency and severity of incidents that fall into the second and fourth categories. With respect to the third category, it is also necessary to assess whether divergent foreign standards are principled or unprincipled and applied in good faith or bad faith. This work has not yet been completed.

2. 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?

¹ Press Release, U.S. Chamber of Commerce, U.S. Chamber Commissions Independent Experts Group (Aug. 26, 2016), <https://www.uschamber.com/press-release/us-chamber-commissions-independent-experts-group>.

² U.S. Chamber of Commerce, International Competition Policy Expert Group: Report and Recommendations 3 (2017), https://www.uschamber.com/sites/default/files/icpeg_recommendations_and_report.pdf [hereinafter “Report”].

³ *Recent Trends in International Antitrust Enforcement: Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 115th Cong. 3-5 (2017) (written testimony of Alden F. Abbott, Deputy Director, Edwin Meese III Center for Legal and Judicial Studies, Heritage Foundation).

⁴ *Id.* (remarks of Rep. Cicilline during Q&A).

The U.S. antitrust bar, the U.S. antitrust agencies, and other advocates have been very effective in raising international awareness of shortcomings in procedural standards in particular. There is widespread, bipartisan agreement in the U.S. antitrust community that multilateral organizations such as the ICN and the OECD Competition Committee have made very valuable contributions to raising global procedural standards. In 2015, for example, the ICN's Agency Effectiveness Working Group, co-chaired by Europe's DG-Comp and the U.S. FTC, released consensus guidance on procedural fairness. Within months of the release, the Korean Fair Trade Commission initiated a major reform initiative aimed at improving due process, transparency, and agency efficiency, which has since been widely praised.

The U.S. antitrust agencies have also been strong advocates for grounding substantive enforcement and competition policy principles in consumer welfare and sound economic analysis. However, substantive competition law standards pose unique challenges. One size simply does not fit all, and the U.S. should respect principled divergences from U.S. standards that are appropriately designed to correct for a perceived market failure and are enforced fairly and even-handedly.

The U.S. antitrust agencies can and should continue their multifaceted approach to promoting international convergence by assuming leadership roles in multilateral organizations, pursuing bilateral cooperation agreements, operating the Technical Assistance Program, participating in formal and informal case cooperation, and through frequent communication and relationship building. To the extent trade-law remedies are considered as a response to suspicious foreign enforcement actions, the U.S. antitrust agencies are best positioned to assess whether foreign competition authorities are acting in good or bad faith and whether divergent enforcement standards are principled or unprincipled.

3. Could you please elaborate on the distinction in your testimony between a White House Working Group and an Inter-Agency Working Group and why the Inter-Agency Working Group should be the preferred solution?

Based on the ICPEG Report's description, a White House Working Group would entail the creation of a cabinet-level entity chaired by an Assistant to the President, who seemingly would have far-reaching authority to set international competition policy. Creating such an entity and bestowing such powers on an individual White House official risks politicizing international competition policy, creating a lobbying target for well-heeled multinational businesses, sending a contradictory and counterproductive message to our trading partners, and inviting retaliation and countermeasures that stifle effective reform.

The AAI believes an alternative mechanism that would improve direct inter-agency coordination on competition matters with international trade implications, without the attendant politicization risks, deserves careful exploration.

The USTR's Trade Policy Review Group (TPRG) and Trade Policy Staff Committee (TPSC) "make up the sub-cabinet level mechanism for developing and coordinating U.S. Government

positions on international trade and trade-related investment issues.”⁵ These groups are administered and chaired by the USTR and are composed of representatives from 19 Executive Branch agencies, including the Department of Justice. The TPSC is supported by 90 subcommittees responsible for specialized areas and several task forces that work on particular issues, and its enabling legislation permits it to invite the participation in its activities of “any agency not represented in the organization when matters of interest to such agency are under consideration,”⁶ which could include the FTC. It may be worthwhile to explore whether the TPRG or TPSC could facilitate direct coordination among agency experts without involvement or control by a powerful political entity in the White House.

The ICPEG Report states, without elaborating, that “[i]n the past, . . . it has often been difficult for federal antitrust and international trade agencies to coordinate effectively” on their own.⁷ This statement requires further clarification and investigation. To the extent any impediments to direct inter-agency coordination are surmountable, this approach may deliver all of the coordination benefits and none of the politicization risks associated with a White House Working Group.

4. You note in your testimony that when a U.S. company is intentionally denied fundamental due process rights with respect to competition investigations, it may warrant applications of trade law and possibly sanctions. How can we ensure proper and consistent coordination between our antitrust agencies and trade agencies in these instances outside a working group?

Coordinated decision-making among agencies with disparate missions is not always appropriate. Sometimes, it is more effective to empower a single expert agency to lead. An important first step is therefore to assess which strategic functions warrant coordination and which are better left to the expert U.S. antitrust agencies.

A coordinated approach likely would be helpful in dealing with foreign competition authorities’ denial of fundamental due process and equal protection rights. Indeed, such denials may be competition issues in name only, insofar as they are problematic regardless of whether the defendant is guilty or innocent of an antitrust violation, and regardless of the substantive antitrust standard applied. The U.S. antitrust agencies, who are apt to be familiar and experienced in dealing with the foreign competition agency, likely can contribute helpful feedback in designing an effective response, but the important challenge is rectifying the abusive conduct, and trade agencies can bring to bear valuable tools to this end.

Where bad-faith denials of fundamental rights are concerned, the AAI believes an investigation should be undertaken to determine whether there are any obstacles to direct inter-agency coordination, and whether they can be surmounted. As part of such an investigation, it may be

⁵ See Office of the U.S. Trade Rep., Mission of the USTR, *Working with Other Agencies* (last visited Aug. 16, 2017), <https://ustr.gov/about-us/about-ustr>.

⁶ See Trade Expansion Act of 1962 § 242, 19 U.S.C. § 1872 (1962).

⁷ Report, *supra* note 2, at 16.

helpful to explore whether the TPRG and TPSC can be effective vehicles for facilitating direct inter-agency coordination in these circumstances.

However, coordinated approaches are often poorly suited to the challenges associated with good faith, principled departures from U.S. antitrust standards. In those situations, the expert U.S. antitrust agencies should be empowered to lead, including with respect to setting policy around what are often complex, technical questions. Empowering them in this way is also necessary to promote effective international cooperation, which experience has proven to be far more effective in promoting international convergence than more aggressive political approaches.

Indeed, if trade agencies and White House political officials were to become deeply involved with the expert U.S. antitrust agencies in assessing the merits of antitrust standards and individual enforcement actions abroad, the results likely will be counterproductive. Actions will speak louder than words, and foreign competition law enforcers can be expected to respond in kind. This would not only threaten the United States' antitrust leadership status in the world, but it would undermine the efforts of allies abroad who share our views and are working to promote appropriate antitrust standards, free from political interference, in their own countries.

When antitrust merits questions are on the table, as opposed to bad-faith denials of fundamental rights, it should be clear both within our government and to our trading partners that the U.S. antitrust agencies have unencumbered policy authority.