

RECENT TRENDS IN INTERNATIONAL ANTITRUST ENFORCEMENT

HEARING

BEFORE THE
SUBCOMMITTEE ON REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW
OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTEENTH CONGRESS

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<http://docs.house.gov/meetings/JU/JU05/20170629/105986/HHRG-115-JU05-20170629-SD010.pdf>

Hills & Company Letter submitted by the Honorable Tom Marino, Pennsylvania, Chairman, Subcommittee on Regulatory Reform, Commercial and Antitrust Law, Committee on the Judiciary. This material is available at the Committee and can be accessed on the Committee Repository at:

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ACT/The App Association Letter submitted by the Honorable Tom Marino, Pennsylvania, Chairman, Subcommittee on Regulatory Reform, Commercial and Antitrust Law, Committee on the Judiciary. This material is available at the Committee and can be accessed on the Committee Repository at:

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International Competition Policy Expert Group Report submitted by the Honorable Tom Marino, Pennsylvania, Chairman, Subcommittee on Regulatory Reform, Commercial and Antitrust Law, Committee on the Judiciary. This material is available at the Committee and can be accessed on the Committee Repository at:

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RECENT TRENDS IN INTERNATIONAL ANTITRUST ENFORCEMENT

THURSDAY, JUNE 29, 2017

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND
ANTITRUST LAW

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 10:00 a.m., in Room 2141, Rayburn House Office Building, Hon. Tom Marino [Chairman of the Subcommittee] presiding.

Present: Representatives Marino, Goodlatte, Collins, Buck, Ratcliffe, Cicilline, Conyers, Johnson of Georgia, and Schneider.

Staff Present: Ryan Dattilo, Counsel; Andrea Woodard (Lindsey), Clerk; Slade Bond, Minority Counsel; Joe Ehrenkrantz, Minority Professional Staff Member; and Perry Apelbaum, Minority Chief Counsel and Staff Director.

Mr. MARINO. Good morning. The Subcommittee on Regulatory Reform, Commercial and Antitrust Law will come to order. On behalf of Mr. Cicilline and myself, I apologize for the two, three, or four times that this hearing has been postponed and rescheduled, but it is not like we were not doing anything. We had a lot of things going on and still do, but please accept our apologies.

Without objection, the Chair is authorized to declare recesses of the committee at any time. Welcome, everyone, to today's hearing on recent trends in international antitrust enforcement. And I now recognize myself for an opening statement.

Antitrust and competition laws have existed in the United States since the late 1800s. It was not until the last 30 years, however, that the adoption of such laws began to spread globally. Today, nearly every Nation in the world has some form of antitrust or competition law. As a result of this global expansion, there have been efforts to enhance consistency and advance best practices through the establishment of several international organizations. These organizations include the International Competition Network, the Organization for Economic Cooperation and Development Competition Committee, and the United Nations Conference on Trade and Development.

U.S. antitrust agencies have been active participants in these international organizations, with the goal of promoting consumer welfare and economic efficiency as the top priorities of competition

policy. Despite their efforts, consumer welfare and economic efficiency are only one aspect of a multitude of goals in the global anti-trust regulatory environment.

These goals frequently include several other unrelated factors. For example, competition rules in several foreign jurisdictions include inherently subjective concepts, such as protecting fair competition and social public interest, and even promoting the healthy development of the socialist market economy.

These subjective factors often result in legal treatment of business conduct that differs profoundly on a case-by-case basis, as it is driven by political considerations. These differences have begun to have considerable impact on U.S. companies and citizens. In particular, there have been recent concerns relating to due process in foreign jurisdictions, the treatment of intellectual property rights, the imposition of extraterritorial remedies, and nonaction against state-owned enterprises and national champions.

The recent report, issued by the International Competition Policy Expert Group and commissioned by the Chamber of Commerce, found that certain of our major trading partners appear to have used their laws to actually harm competition by U.S. companies, protecting their own markets from foreign competition, promoting national champions, forcing technology transfers, and, in some cases, denying U.S. companies fundamental due process.

We convene today's hearing to examine the enforcement of competition laws across the globe, with a focus on this report and recommendations to address these prevalent issues. It is essential we ensure that U.S. companies are treated fairly, consistently, and objectively by international jurisdictions. Today's hearings will help us inform the committee regarding several recent trends in international competition law enforcement.

Additionally, the hearing will provide us insight in how the administration and the executive agencies can coordinate with each other on the treatment of U.S. companies and citizens abroad. We have an excellent set of witnesses before us today, who will help us to evaluate these issues more fully and consider the next steps in addressing them. I look forward to our witnesses' testimony.

Mr. MARINO. The Chair now recognizes the Ranking Member of the Subcommittee on Regulatory Reform, Commercial and Antitrust Law, Mr. Cicilline, former mayor in the State of Rhode Island, my friend, for his opening statement.

Mr. CICILLINE. Thank you, Mr. Chairman, and welcome to our witnesses, and I too apologize for the inconvenience in scheduling, but really grateful that you are here.

Today's hearing will focus on a recently-issued report by the International Competition Policy Expert Group, concerning the need for fair, transparent, and impartial enforcement of competition laws internationally. The U.S. Chamber of Commerce commissioned this report for the purposes of developing recommendations for a potentially more effective and better-integrated international trade and competition law strategy. According to the report, there is increasing concern among American businesses that some major trading partners are, in some cases, denying foreign companies fundamental due process and, in other cases, applying their competi-

tion laws to protect their home markets from foreign competition, promote national champions, and/or force technology transfers.

Although this report did not engage in fact finding or study of specific cases involving procedural unfairness, it made a series of recommendations to address this overarching concern. These recommendations include the establishment of a White House working group to study and address these concerns through targeted sanctions. While I agree that resolving procedural divergence in international antitrust enforcement is a laudable goal, I am concerned that the use of extraordinary trade remedies to resolve minor disputes may undermine our national interests. This is particularly true given that nations may not apply their own laws in a discriminatory manner against American companies under current law.

For example, the dispute settlement body at the World Trade Organization has provided the U.S. with an avenue to pursue or defend trade disagreements. As of 2015, the United States was a direct party to 232 cases either as a complainant or as a respondent. The U.S. has won or settled without litigation a majority of these active cases. The United States has more than a century of experience in developing and expanding the antitrust laws.

Over the past several decades, the United States antitrust agencies have relied on this experience to engage their international counterparts in ongoing, thoughtful dialogue to build consensus on advancing competition and reduce cross-border inconsistencies. These relationships are built on a foundation of trust and mutual respect. Whether it is a memorandum of understanding, a joint investigation, or just a phone call, international cooperation in criminal and civil enforcement depends on effective communication of shared goals to protect and promote competition. Bilateral cooperation may not work in every case, but it does preserve and strengthen the relationships that will be so crucial to successfully working together in the future, as former Assistant Attorney General Renata Hess observed last year.

In contrast, using trade remedies to resolve the procedural concerns of American businesses in international proceedings could backfire. Abusive sanctions could have serious, unforeseen consequences and should be reserved, in my judgement, for egregious misconduct. I would also note that working toward substantive and procedural consistency should not be confused with seeking identical outcomes among the more than 130 international competition authorities.

Earlier this year, together with Ranking Member Conyers and leaders of the Congressional Progressive Caucus, I sent a letter urging additional congressional appropriations for the purpose of reducing corporate concentration through the vigorous enforcement of the antitrust laws. As I noted then, there is mounting evidence of overall decline of antitrust enforcement in the United States over the past several decades, and the alarming result of this decline is increased costs and less choice for consumers, wage stagnation and depression for workers, diminished private investment, innovation and small business ownership, particularly among minorities, and reduced political freedom due to the outsized political influence of large corporations.

American companies should receive fair treatment abroad, but antitrust scrutiny is not in and of itself unfair or discriminatory. As Professor Fox will testify today, "Since standards of misuse of power differ, and the U.S. has one of the least interventionist monopoly laws in the world, these American firms may understandably feel that they are unfairly targeted by our sister trading partners." Just like Congress may establish enforcement priorities through appropriations or antitrust exemptions, international systems may adjust their own enforcement priorities to align with national policy goals.

I look forward to exploring these issues in today's hearings. I thank our panel of expert witnesses for their testimony and input on this topic. I thank the Chairman for holding today's hearing, and I yield back the balance of my time.

Mr. MARINO. The Chair now recognizes the Chairman of the full Judiciary Committee, Mr. Goodlatte of Virginia, for his opening statement.

Chairman GOODLATTE. Thank you, Mr. Chairman, I appreciate your holding this hearing.

The Judiciary Committee routinely exercises its oversight authority to ensure that our Nation's antitrust laws are applied in a manner that is transparent, fair, predictable, and reasonably stable over time. A natural extension of this oversight is ensuring that our Nation's companies and citizens receive comparable treatment in foreign jurisdictions. As commerce becomes an increasingly global enterprise, the manner in which antitrust and competition laws are applied to companies and citizens located or engaged in business outside of the United States also grows in importance.

Over the past several years, reports have surfaced that certain jurisdictions are deploying their antitrust and competition laws in manners that strain the boundaries of due process, focus on advancing domestic industrial policies, or seek to extract valuable American innovations without fair compensation. I would like to thank Chairman Marino for holding today's hearing to delve into these potentially serious abuses and address potential solutions.

Today's testimony will help the committee gain a better understanding of the seriousness of these issues, and how they might be addressed. Furthermore, it will provide a record regarding how the administration and our executive agencies, including our antitrust enforcement agencies, can coordinate among each other and engage with foreign countries on international competition law enforcement.

This hearing also serves as a reminder that the United States should be a leader in fair and reasonable antitrust enforcement. To that end, enacting important antitrust reforms, such as the SMARTER Act, will help to ensure that the U.S. continues to be an example to international competition law authorities.

I look forward to hearing from today's excellent panel of expert witnesses on these important issues, and I yield back. Thank you, Mr. Chairman.

Mr. MARINO. Thank you. The Chair now recognizes the Ranking Member of the full Judiciary Committee, Mr. Conyers of Michigan, for his opening statement.

Mr. CONYERS. Thank you, Mr. Chairman. Top of the morning to the witnesses. We have got a full slate here, and it is appropriate, because international antitrust enforcement is a subject that we have not really neglected; we just have not got around to yet. And this is a good first step toward the inquiry and reexamination of a very complex subject.

Now, given the increasingly interconnected economic relationships among nations, American firms depend on the fair enforcement of antitrust and competition laws by other countries as a critical factor with respect to their ability to do business abroad. Yet some American firms believe, in my view, that certain countries do not consistently apply their competition laws in a sound and non-discriminatory manner. They allege a lack of due process and transparency, when these firms have become the target of antitrust investigations by competition authorities in those countries. Accordingly, we should keep the following points in mind as we discuss foreign antitrust enforcement practices.

My greatest concern is whether and to what degree these problematic foreign antitrust enforcement practices impact American jobs. To the extent that foreign antitrust enforcement actions unfairly disadvantage American firms, and to the extent this results in American companies going out of business and American workers losing their jobs, I, of course, am deeply concerned, since jobs, justice, and peace is one of my rallying presentations across the years.

The witnesses should provide us guidance on just how real and extensive this problem is. That being said, however, there are and should be limits to what we can insist on from other countries. When it comes to antitrust and competition policy, divergences in outlook and philosophy are not always rooted in a desire to protect national champions, or to discriminate against American firms. Various countries may be at different stages of development, with laws shaped by culture and historical circumstances that, of course, differ from ours. Where complaints about other countries' laws simply reflect such differences, rather than concerns about discrimination, due process, or transparency, we should be careful about overstating our criticism and reaction.

And finally, we must be careful not to provoke retaliation against American businesses with any effort to penalize or pressure any countries to change their enforcement practices. Many helpful recommendations have been made regarding how to address the concerns of American businesses about foreign antitrust enforcement practices. The best ones emphasize dialogue, multicultural standards, and agreements on best practices, and the promotion of cooperation among international antitrust enforcement agencies.

An excessively punitive approach, however, may ultimately prove counterproductive and be harmful to American interests in the long run. So, I thank you for your presence here, and look forward with anticipation to this discussion. Thank you, Mr. Chairman.

Mr. MARINO. Thank you. Without objection, other members' opening statements will be made part of the record.

Mr. MARINO. I will begin today's hearing by swearing in our witnesses before I introduce you. If you would all please stand and raise your right hand.

Do you swear that the testimony that you are about to give before this committee is the truth, the whole truth, and nothing but the truth, so help you God?

Please let the record reflect that all the witnesses have responded in the affirmative. Please be seated. Thank you. And if I mispronounce anyone's name, please do not hesitate to tell me.

Ms. GARZA. Thank you, Chairman.

Mr. MARINO. Ms. Garza, I am going to introduce each of you first, and then ask you to make your statements. Ms. Garza is a partner at Covington & Burling, and the co-chair of the firm's antitrust and competition law practice group. Ms. Garza has been involved in some of the largest antitrust matters, including the merger of Exxon and Mobil, and the U.S. Government's suit against Microsoft, the USFL suit against the NFL, and many other litigation and regulatory matters on behalf of Fortune 500 companies.

Before working at Covington, Ms. Garza served as Acting Assistant Attorney General in charge of the Antitrust Division at the Department of Justice, and also as Deputy Assistant Attorney General for Regulatory Affairs overseeing the matters in the telecommunications, transportation, energy, health care, agricultural, insurance, broadcast radio, real estate, and other industries.

During two prior tours of service, Ms. Garza served as a special assistant, and as Chief of Staff and counselor to the Assistant Attorney General in charge of the Antitrust Division. Ms. Garza was also appointed by President George W. Bush to chair the Antitrust Modernization Commission, a bipartisan, blue-ribbon panel created by Congress to study and report to the President and Congress on the state of antitrust enforcement in the United States. Ms. Garza received her B.S. from Northern Illinois University and her J.D. from the University of Chicago. Welcome this morning.

Professor Wong-Ervin is the Director of the Global Antitrust Institute and an adjunct professor of law at the Antonin Scalia Law School at George Mason University. Prior to joining GAI, Professor Wong-Ervin served as counsel for intellectual property and international antitrust in the Office of International Affairs at the Federal Trade Commission. She also served as an attorney advisor to Federal Trade Commissioner Joshua D. Wright.

Prior to working at the Commission, Professor Wong-Ervin spent almost a decade in private practice, focusing on antitrust litigation and government investigations. She currently serves on the International Antitrust Task Force, the Antitrust Due Process Task Force of the ABA, and was previously co-chair of the ABA's 2016 Antitrust in Asia Conference.

Professor Wong-Ervin is also coeditor of Competition Policy International's North American column, and also serves as co-chair of the Federalist Society Antitrust and Consumer Protection Working Group for the Law and Innovation Project. Professor Wong-Ervin received her bachelor's degree from Santa Clara University and graduated second in her class from the University of California, Hastings College of Law, where she was associate editor of the Hastings Law Review. Welcome.

Mr. Alden Abbott is the Rumpel Senior Legal Fellow and deputy director of the Meese Center for Legal and Judicial Studies at the Heritage Foundation. Prior to joining the Heritage Foundation, he

served as director of patent and antitrust strategy for Blackberry and in a variety of senior government positions, including director of antitrust policy for the Federal Trade Commission, acting general counsel of the Commerce Department, chief counsel for the National Telecommunications and Information Administration, and senior counsel in the Justice Department.

Mr. Abbott is an adjunct professor at the Antonin Scalia Law School at George Mason University and was a Visiting Fellow at All Souls College, Oxford University, and a Wasserstein Fellow at Harvard Law School. He is also a member of the leadership of the American Bar Association Antitrust Section, and a nongovernmental advisor to the International Competition Network. Mr. Abbott received his bachelor's degree from the University of Virginia, his master's degree in economics from Georgetown University, and his J.D. from Harvard Law School. Nice to have you with us.

Ms. Eleanor Fox is the Walter J. Derenberg Professor of Trade Regulation at the New York University School of Law. Before joining NYU Law, Professor Fox was a partner at the New York law firm Simpson Thacher & Bartlett. She has advised numerous younger antitrust jurisdictions, including South Africa, Egypt, Tanzania, Gambia, Indonesia, Russia, Poland, and Hungary, and the Common Market for Eastern and Southern Africa.

Professor Fox was awarded an Inaugural Lifetime Achievement Award in 2011 by the Global Competition Review for substantial lasting and transformational impact on competition policy and or practice. She has served as a member of the International Competition Policy Advisory Committee for the Attorney General of the United States, Department of Justice, and as a Commissioner on President Carter's National Commission for the Review of Antitrust Laws and Procedures.

Professor Fox received her bachelor's degree from Vassar College, her law degree from the New York University School of Law, and an honorary doctorate from the University of Paris and, here it goes, Dauphine. I did not take French. Welcome.

Randy M. Stutz is the associate general counsel of the American Antitrust Institute, or AAI. Mr. Stutz has broad responsibilities across all of AAI's research, education and advocacy programs. He has published numerous white papers, amicus briefs, and journal articles on important competition issues. He has also served as the coeditor of two handbooks, including the International Handbook on Private Enforcement of Competition Law.

Prior to joining AAI, Mr. Stutz practiced antitrust law in the Washington, D.C., Office of Skadden, Arps, Slate, Meagher, & Flom LLP, where he consulted on merger and cartel investigations and multidistrict class actions. Mr. Stutz earned his bachelor's degree in English from Washington University in St. Louis, and his J.D. with honors from the Catholic University Columbus School of Law. Welcome, sir.

Each of our witnesses' statements will be entered into the record in its entirety, but I ask each of you to summarize your statements in 5 minutes or less. And to help you, you see the lights in front of you; that will keep time. The light will switch from green to yellow, indicating that you have 1 minute to conclude your testimony, and when the light turns red, it indicates that your 5 minutes have

expired. And I know you are going to be concentrating on your comments, so when we start to get over the 5-minute mark, I will very diplomatically and politely raise the end of the gavel and give a little tap to give you an indication to please wrap up.

Ms. Garza, please.

STATEMENTS OF DEBORAH GARZA, ESQ., PARTNER AND CO-CHAIR, ANTITRUST AND COMPETITION LAW PRACTICE GROUP, COVINGTON & BURLING LLP; KOREN WONG-ERVIN, ESQ., DIRECTOR, GLOBAL ANTITRUST INSTITUTE (GAI), ADJUNCT PROFESSOR OF LAW, ANTONIN SCALIA LAW SCHOOL, GEORGE MASON UNIVERSITY; ALDEN ABBOTT, ESQ., DEPUTY DIRECTOR, EDWIN MEESE III CENTER FOR LEGAL AND JUDICIAL STUDIES, JOHN, BARBARA, AND VICTORIA RUMPEL SENIOR LEGAL FELLOW, THE HERITAGE FOUNDATION; RANDY STUTZ, ESQ., ASSOCIATE GENERAL COUNSEL, AMERICAN ANTITRUST INSTITUTE; AND ELEANOR FOX, WALTER J. DERENBERG PROFESSOR OF TRADE REGULATION, NEW YORK UNIVERSITY SCHOOL OF LAW

STATEMENT OF DEBORAH GARZA

Ms. GARZA. Thank you, Chairman Marino, Chairman Goodlatte, Ranking Member Cicilline, Ranking Member Conyers, and members of the Subcommittee. Thank you for inviting me to appear here today. I have had the pleasure of appearing before the Subcommittee in the past to testify on recommendations of the Antitrust Modernization Commission and in support of the SMARTER Act, and it is always an honor to be invited to address the Subcommittee and to witness the good, thoughtful work of its members and its staff.

I am here today in my capacity as the antitrust co-chair of the International Competition Policy Expert Group, so named so that we could abbreviate it as ICPEG. ICPEG was a bipartisan volunteer group of 13 competition and international trade policy experts that was convened by the U.S. Chamber of Commerce in August of 2016 for this purpose: to consider how the U.S. can most effectively address the perceived misuse of competition law by some foreign jurisdictions that distorts international trade and harms U.S.-based companies.

ICPEG's members included distinguished academics and thinkers, like Professor Eleanor Fox, who is here today, who have studied and participated in the development of international competition and trade policy for decades, and former enforcers and policymakers from every prior Republican and Democratic administration in the past 36 years. And I would like to pause here to recognize Jim Rill, who was a member of ICPEG, that is here with us today.

The chamber asked this diverse group to leverage our collective experience to develop practical and actionable steps forward that will serve to advance sound trade and competition policy. And that is what we did, with a remarkable degree of consensus. A copy of ICPEG's resulting report and recommendations in our transmittal letter to the President and to the 115th Congress is attached to my statement.

My testimony today is limited to ICPEG's report and recommendations. I am not speaking today on behalf of any specific client interest, and I am not prepared to talk about any particular investigation or enforcement matter. My testimony will be brief, because the ICPEG report and recommendations speak for themselves, and are consistent with my personal views.

Simply put, there is a concern that certain of our major trading partners have, in some cases, denied foreign companies fundamental due process and, in other cases, applied their competition laws to protect their home markets from foreign competition to promote national champions, and/or to force the transfer of technology at royalty rates that favor local technology implementers. Such conduct has a significant unfair adverse impact on the ability of U.S. firms to compete at home and in global markets. Koren Wong-Ervin, who is here testifying today, and Alden Abbott, have provided examples of some of these things in their testimony.

Prior administrations have devoted substantial resources of the very highest political levels to address the problem, with some success. But it has been a difficult nut to crack, and requires persistent efforts and a multifaceted approach that engages both the competition and the trade law levels. Even for those who are wary of the use of trade rules recognize the need for a careful, integrated competition and trade law approach. As Professor Fox put it in her testimony, "It is time that officials from trade and competition sat down at the table and discussed strategies for the good of the country. We need to work toward a coherent trade and competition policy that, among other things, tackles unjustified State restraints and the distorting competition of privileged and cronyistic SOEs," and I say, "Hear, Hear," Eleanor.

I will not go into any great length in describing the recommendations that ICPEG made. But I will say that the first six recommendations focused on the coordination of competition and international trade policy within the U.S. Government. We suggested that it be through a White House working group. Among other things, the working group would determine which international agreements should include competition chapters, including through amendment of existing agreements, what provisions should be included, and how those provisions should be enforced. The working group would also focus on how to most effectively ensure that other countries apply their competition laws in a manner that is consistent with accepted standards of process to ensure transparent, accurate, and impartial enforcement decisions.

I recognize the concerns of some of the members of the Subcommittee about the effects of using trade sanctions and the effects of overreacting to issues. I will note that our report suggested many things that fall far short of imposing sanctions, and an example would be to have these competition chapters in these trade agreements that will create a framework for discussion and a less explosive way to deal with these problems as they arise.

I thank you for your attention and look forward to answering your questions.

Ms. Garza's written statement is available at the Committee or on the Committee Repository at: <http://docs.house.gov/meetings/>

JU/JU05/20170629/105986/HHRG-115-JU05-Wstate-GarzaD-20170629.pdf

Mr. MARINO. Thank you. Professor Wong-Ervin.

STATEMENT OF KOREN WONG-ERVIN

Ms. WONG-ERVIN. Thank you, Chairman Marino, Chairman Goodlatte, Ranking Member Cicilline, Ranking Member Conyers, and members of the Subcommittee. Thank you for the honor of appearing before you today. My testimony will begin with the discussion of the problem as framed by the chamber's expert report, and then I will move on to possible solutions.

To begin, I agree with the report that certain foreign governments appear to be using their competition laws in ways that unfairly harm U.S. companies and inappropriately reduce incentives to innovate. These include, first, denying U.S. companies fundamental due process. Second, in the case of intellectual property rights, using competition laws to reduce royalty payments by U.S. companies to unduly favor domestic manufacturers. And third, imposing unwarranted extra-jurisdictional remedies, namely global, portfolio-wide remedies on foreign conduct involving foreign patents.

Examples of denials of due process include failure to notify the parties of the legal and the factual basis of an investigation, lack of an independent tribunal to review decisions, and the ability to stay remedies pending appeal. Refusal to allow parties to cross-examine witnesses at hearings, and failure to protect confidential information, and recognize attorney-client privilege and other important legal privileges. One case example from earlier this year is the Korea Fair Trade Commission's decision against Qualcomm, in which the agency allegedly refused to allow the company to fully cross-examine witnesses at hearings, and sought to act as the world's competition police by imposing global, worldwide remedies, including on U.S. patents.

Moving on to possible solutions. Based on my experience at the U.S. Federal Trade Commission, it is my belief that public exposure, including expressions of concerns at the highest levels of our government, is one effective means to achieve the desired change. To that end, I favor the report's recommendation to consider creating a listing mechanism for competition enforcement, akin to the USTR's annual Special 301 listing of foreign nations that have inadequate IP protections.

In my experience, the good news is that most foreign jurisdictions seem to want to be considered part of the international mainstream and respond to public statements of concerns. For example, the egregious alleged violations in China against U.S. companies, for example, reportedly locking them in rooms and ordering them to confess their sins under threat of refusing to return their passports, were remedied through a multipronged approach, which included a letter from the then-Secretary of the Treasury Department, followed by statements by President Obama to China's President Xi. These public statements were followed by reportedly better process in China and also China abandoning its previously stated intention to impose extra-jurisdictional remedies.

Lastly, I agree with the report about the dangers of using vague and subjective standards such as fairness in other noncompetition goals, such as employment, or the healthy development of an economy. And I agree that the U.S. should continue to advocate for a consumer welfare standard as set forth by our Supreme Court. Consumer welfare is a broad concept that values what consumers are willing to pay for. It is also an important standard because it connects competition to the methodological commitments of economics in terms of giving theories that can be tested and rejected. Yet, as has been mentioned here today, many foreign jurisdictions currently explicitly provide for the consideration of noncompetition factors. I believe that an effective interim measure is to require transparency from these governments as to what factors they consider and how they are weighed and balanced.

I have often found myself, when I am reading foreign competition decisions, as if there is missing pages. The analysis may start off sounding like mainstream competition analysis, but then the conclusions often lack any evidentiary support and leave me puzzling as to what industrial policy concerns or noncompetition factors may have influenced, or perhaps dictated, the outcome. I believe that requiring transparency and decision-making will go a long way to requiring accountability by foreign jurisdictions and providing some measure of predictability for our companies. Thank you.

Ms. Wong-Ervin's written statement is available at the Committee or on the Committee Repository at: <http://docs.house.gov/meetings/JU/JU05/20170629/105986/HHRG-115-JU05-Wstate-Wong-ErvinK-20170629.pdf>

Mr. MARINO. Thank you. Mr. Abbott.

STATEMENT OF ALDEN ABBOTT

Mr. ABBOTT. Well, thank you. Chairman Marino, Chairman Goodlatte, Ranking Member Cicilline, Ranking Member Conyers, distinguished members of the Subcommittee, I am delighted to be asked to participate here today, and I applaud you for holding this hearing on a very important topic. I am here because I was asked to serve as rapporteur, or principal drafter, of the ICPEG report, which has already been discussed, which represented a consensus opinion of all the ICPEGs members, not anybody's personal opinion. And by the way, again, I want to stress the views expressed today are my own and not necessarily those of the Heritage Foundation.

As already emphasized, this was a bipartisan effort, and because it represented the views of trade experts as well as antitrust experts, it is not too surprising to find some report recommendations touching on the possible role of trade law as a remedy for harmful foreign misapplication of competition law.

Now, as already mentioned, a key aspect of the report is its extensive discussion of consensus U.S. understanding of consumer welfare as the heart of antitrust law. This is reflected in the report's first recommendation, which calls for the Trump administration to expressly confirm that, as an organizing principle, competition law and policy should focus on eliminating artificial impediments to competition, both private and governmental, as a way of promoting economic growth, innovation and consumer welfare.

And let me underscore the fact, the report strongly supports the ongoing excellent work, domestic and international work, of the two Federal antitrust agencies, the Federal Trade Commission and the Justice Department's Antitrust Division. In calling for a White House working group, it does not call for the involvement of non-antitrust agencies or the White House in carrying out American antitrust agency investigations, or in the antitrust agencies making any policy determinations, in the antitrust agencies' regular cooperation with foreign counterparts, or in any of the antitrust agencies' periodic consultations involving competition authorities from around the world.

Simply put, the report contains no language that would support curbing the independence of the Federal antitrust agencies in carrying out their statutory roles, which encompass antitrust-related law enforcement and policy functions. Basically, what the report calls for is better coordination of work on situations where a foreign nation's alleged misuse of its competition law seriously impedes international trade and investment by posing an unreasonable, unjustified, or discriminatory burdens or restrictions on U.S. commerce. And it does this through a working group, the idea not being that the working group is going to seize authority, but that it is going to come up with sort of a measured, thoughtful way of looking at allegations, whether or not there is a working group.

If a major U.S. company is concerned it is being treated unfairly overseas, people in Congress and in the administration from different agencies will be hearing about it. The notion of the working group is to create a structure by which the orderly views of the different departments around the executive branch and the independent agencies can be heard. And again, the notion of the working group is not to get in the way of what the U.S. antitrust agencies are doing in trying to improve things with their counterparts.

The report also calls for additional work by multilateral institutions in which the U.S. is already heavily involved, including the Organization for Economic Cooperation Development, the World Bank, the International Competition Network, and the World Trade Organization. In particular, as already mentioned, the concern about shaming and naming, it calls for more peer-review studies, open analysis of the application of competition law, because I think it is safe to say there is sort of a general consensus view among international economists worldwide that consumer welfare is of central importance, so this is perhaps a way to point out to other agencies their need to keep that in mind.

Already, reference has been made to intellectual property. I will just briefly mention, put in a plug for, the current Acting Chairman of the FTC, who has done a recent article in the Harvard Journal of Law and Technology on the problem of intellectual property and competition; well worth reading.

That closes my statement. I would be pleased to take any questions you might have. Thank you so much.

Mr. Abbott's written statement is available at the Committee or on the Committee Repository at: <http://docs.house.gov/meetings/JU/JU05/20170629/105986/HRG-115-JU05-Wstate-AbbottA-20170629.pdf>

Mr. MARINO. Thank you. Professor Fox.

STATEMENT OF ELEANOR FOX

Ms. FOX. Thank you very much. Chairman Marino, Chairman Goodlatte, Ranking Member Cicilline, Ranking Member Conyers, and distinguished members of the Subcommittee, thank you very much for the invitation to appear before you today. I was honored to be a member of the committee of experts that was organized by the U.S. Chamber of Commerce on which Deborah Garza and Andrew Shoyer were co-chairs, and Alden Abbott was reporter, and I want to thank them for the excellent work that they have done on the problem that we have before us.

So, the problem that we have before us has, let us say, three parts. One is definition: what is the problem? Second is, how big is the problem? What kind of response does it call for? And third is what to do about it. So, I want to say a word about each.

How big is the problem of U.S. trading partners using their competition laws in ways that are illegitimate and that hurt American business? I would like to enlarge the picture. The problem is that nations may use antitrust laws illegitimately outside of the bounds of proper antitrust, hurting other countries and their citizens. I want to include the U.S. in that paradigm. I think we are in a position today where we have to watch that our own country does not use antitrust politically. It has not yet, but one has to be alert, and the problem is on all sides.

What exactly is the problem, and how big? First, there is a question of substantive law; our trading partners', using substantive law, antitrust law, in an inappropriate way. Second, one could ask about industrial policy. Third, one could ask about nation-state restraints, like Chinese SOEs, or any country's national government use of policy that is creating competition. And lastly, a word about discrimination or putting it to U.S. trading partners; is there discrimination against us? As to substantive law, my view is slightly different from the rest of my committee in terms of, should there be one particular focus, such as consumer welfare, for antitrust law? In my view, the problem is a bit larger in that almost every nation agrees that they are trying to make markets work better by their competition law that is just a little more elastic, giving countries and jurisdictions, even our own jurisdiction, a little more elbow room in defining what is hurting competition.

Because I have a broader view of what is legitimately called "harming competition", I also have a view that the problem before us may be a little narrower than many of my colleagues think. I think that we must respect how our trading partners formulate their competition laws, and it is not always how the U.S. formulates it. We must have respect for formulations that are, in general, within the confines of a good competition policy.

Industrial policy: I think we should have respect for other nations' choices except where nations are using their antitrust laws specifically to target us, and to hurt us. State restraints I will pass on now because of time. Discrimination, I think, is very hard to prove, that our trading partners are applying different rules to us than they are to their own companies, and, therefore, the problem as I see it is smaller.

But there is a problem, and the problem, as my colleagues and panel members have said, includes lack of due process. There is

definitely a problem of illegitimate antitrust and antitrust without due process. What to do about it? In my view, the first best attack is to keep talking. Our competition agency heads in the United States have been very clear and very persuasive to other countries. Talking about good standards has worked; at least it has worked sometimes. I think that is definitely the first line of defense.

I do not believe that trade remedies ought to be used as sanctions. I do not think they will work. They may lead to a race to the bottom. So, I do think there should be a working group. It might or might not be called a White House working group. There is a benefit to taking it out of a possibility of thinking of it politically. But there must be better integration between trade and competition.

I want to recognize Jim Rill, who is here. When Jim Rill was head of the Antitrust Division and Carla Hills was the United States' Trade Representative we saw perhaps the high point in the integration of trade and competition used at that time to open the Japanese market, among other things.

Lastly, I want to say: I think the main thing that we have to do in antitrust is keep our eye on the fact competition does not know borders, and should not. We all gain when competition is free and open without borders, and not politicized. We all lose if we become sucked into a circle of tit-for-tat; you do this to us, we will do it to you. I trust our heads of competition, Department of Justice and Federal Trade Commission, who believe strongly in that principle. I trust them very much to carry on the conversation to call out illegitimate antitrust and to press on with what we have always had: a cosmopolitan antitrust. Thank you.

Ms. Fox's written statement is available at the Committee or on the Committee Repository at: <http://docs.house.gov/meetings/JU/JU05/20170629/105986/HHRG-115-JU05-Wstate-FoxE-20170629.pdf>

Mr. MARINO. Thank you. Mr. Stutz.

STATEMENT OF RANDY STUTZ

Mr. STUTZ. Thank you. Chairman Marino, Chairman Goodlatte, Ranking Member Cicilline, Ranking Member Conyers, and members of the committee, I appreciate the opportunity to appear today on behalf of the American Antitrust Institute.

The expert report commissioned by the Chamber of Commerce recognizes that U.S. businesses operating internationally face difficult challenges posed by the enforcement of foreign competition law. The report addresses allegations involving due process violations, foreign enforcement under subjective legal standards, and problematic extraterritorial remedies. But as I explain in more detail in my written testimony, there is a good-faith species and a bad-faith species of each of these allegations. It is important to distinguish between a foreign authority's bad-faith denial of basic rights in pursuit of protectionism and its good-faith disagreements over appropriate legal standards, and how to assess market facts.

With this in mind, there are four key points I wish to leave you with today. First, bad-faith conduct by foreign competition enforcers likely does require better coordination between U.S. trade and competition agencies. The AAI agrees that trade law, including pos-

sibly the threat of trade sanctions, could be a valuable tool in addressing the bad-faith denial of fundamental rights like due process and equal protection in competition proceedings. Trade agencies have a strong claim to authority in these circumstances, because, in many respects, these are competition issues in name only. The behavior is equally problematic regardless of the antitrust standard that is being applied and regardless of whether a U.S. company has actually committed an antitrust violation.

Second, the good-faith conduct of foreign enforcers requires a different policy response, even if some may think a foreign enforcer's standards or remedies are very misguided. The most effective way to deal with good-faith divergences from U.S. standards is to empower the U.S. antitrust agencies to cooperate effectively with their foreign counterparts. I want to stress that this is not just a theory. The U.S. antitrust agencies know this from decades of experience, and they have the benefit of hindsight.

Cooperative relationships with foreign enforcers going back to the 1970s have also helped preempt such divergences in the first place. Through cooperation, U.S. competition experts have been invited to participate directly in foreign policymaking. They have helped draft foreign competition laws, jointly develop best practices, and even train foreign judges and agency staff, and much more. Progress is sometimes slow and incremental, but I think everyone on this panel would agree it has been enormously successful in the long run.

Third, creating a working group to improve coordination between U.S. trade and competition agencies is a good idea, in principle, but it has its limits. Generally speaking, the concept of a working group sounds mostly benign. But if we were to put a working group in the White House and give it government wide power to set international competition policy, we would create a massive lobbying target and risk politicizing competition law enforcement internationally. We would also send the wrong message to the rest of the world.

In our words, we would be telling our trading partners to use an apolitical consumer welfare antitrust standard that protects competition, not competitors. But in our actions, we would be putting a political body in charge of international competition policy. And implicitly, we would be putting the threat of trade sanctions on the table at the behest of U.S. competitors.

Our actions would speak louder than our words. We can expect our counterparts to respond in kind. We would risk losing our antitrust leadership status in the world, and worst of all we would imperil the U.S. antitrust agencies' international cooperation efforts which have been most effective. Alternative approaches to a politicized working group, such as an interagency working group that has an advisory role, are worth exploring.

Fourth and finally, it is important to remember that U.S. businesses operating internationally are sometimes mistreated in their capacity as buyers, not only in their capacity as sellers. Many U.S. manufacturers, for example, are dependent on global supply chains and have to do business with foreign cartels. When they do, foreign governments sometimes harm competition and U.S. competitors by refusing to enforce their antitrust laws.

To be fully effective, international competition policy reform should ensure that U.S. business victims are empowered to seek appropriate relief in U.S. court in these circumstances. Reform of this kind can help deter the proliferation of international cartels that are targeting American businesses and consumers. Finally, these reforms would complement many of the reforms discussed in the ICPEG report.

I thank you for your time, and look forward to your questions.

Mr. Stutz's written statement is available at the Committee or on the Committee Repository at: <http://docs.house.gov/meetings/JU/JU05/20170629/105986/HHRG-115-JU05-Wstate-StutzR-20170629.pdf>.

Mr. MARINO. Thank you very much. Now, it is time for Congress members to ask their 5 minutes of questioning. And we will begin with the Chairman of the full committee, Congressman Goodlatte.

Chairman GOODLATTE. Thank you very much, Mr. Chairman. Mr. Abbott, I will start with you on this question, but I will ask all the panelists to chime in on this as well.

So, we have been hearing a lot in this hearing about the problem of overly aggressive antitrust enforcement in some countries. But is it not true that weak or nonexistent antitrust enforcement can also be an international issue? For example, in May of 2015, 20 members of this committee wrote a letter urging that the U.S. take action to remedy unfair competition from the three major Gulf Air carriers, Qatar, Emirates, and Etihad. In this instance, the three airlines are completely exempted from their countries' competition laws, and as a result, they are able to control aspects of the airline industry in ways making it impossible for others to compete.

So, are there not two sides to this problem? Is there precedent for antitrust enforcement against state-sponsored or state-owned enterprises?

Mr. ABBOTT. Thanks for that question, Mr. Chairman. I think in principle, there should be. I will start with a quick analogy. The U.S. Foreign Sovereign Immunities Act does not apply to the commercial activities, say, of instrumentalities of a foreign sovereign. And it seems to me that if there is a direct, substantial, reasonably foreseeable effect on U.S. commerce from the activities of such instrumentalities, in principle there is a strong argument for applying jurisdiction.

I will not get into it, there are some questions about doctrines such as foreign sovereign compulsion or the Act of State Doctrine, which are limitations, they are not really international law rules. They are really rules of abstention, in which courts, U.S. courts, agree not to interfere in foreign policy decisions committed to the executive branch. But it seems to me that there is no constitutional reason why we could not, if we chose, take jurisdiction when jurisdictional harm and appropriate contacts could be made out.

Chairman GOODLATTE. Mr. Stutz.

Mr. STUTZ. Thank you. This is, I think, a really important question. Non-enforcement is problematic in a variety of different ways. One of the issues that arises is an incentive problem. When, for example, a foreign cartel is injuring a U.S. business, oftentimes the host country of foreign cartel has no incentive to prosecute it. It is actually benefitting from the wealth transfer that is occurring from

a U.S. business to the host country. And so, that is why we have the effects test. It is a doctrine created in the 1940s by Judge Learned Hand.

Chairman GOODLATTE. I have only got 2 minutes left, and I want three more people to chime in, so.

Mr. STUTZ. Just to sum up, it is incredibly important that U.S. victims and the U.S. government have the ability to bring cases internationally.

Chairman GOODLATTE. Thank you. Ms. Garza.

Ms. GARZA. Not to repeat what has already been said, but to say something new: this is an example, I think, of where you can use the trade function of our U.S. government to help solve a problem. For example, in trade agreements it is not uncommon in the competition chapter or another jurisdiction to commit to the enforcement of antitrust laws to allow for a non-distortive free competition, including by SOE. So, I agree with you that in some cases, trade can be distorted by the fact that you do not have sound antitrust enforcement within another jurisdiction. That is something that we should continue to work on, both from the antitrust enforcement and from the trade perspective.

Chairman GOODLATTE. Thank you. Professor Wong-Ervin.

Ms. WONG-ERVIN. Thank you for the question. So, I agree with the report that addresses this, that calls for the Trump administration to support the establishment of an ICN working group on this serious issue of anticompetitive harm caused by state-owned enterprises. The OECD in a 2010 study reported that SOEs are often the recipients of State aids, and, in many countries, the largest share of these subsidies is devoted to preserving lossmaking SOEs.

Chairman GOODLATTE. Thank you. And Professor Fox.

Ms. FOX. Thank you. I agree there is a problem of under-enforcement, and this is a particular problem in cases where there are State measures, or SOEs, state-owned enterprises, to which the antitrust laws are sometimes not applied. Our laws should be applied against state-owned enterprises when they are acting in a commercial interest.

In addition, I agree with Deborah Garza. There is much room for an integrated trade and competition committee to focus on exactly the problem of State restraints, which is usually foreign restraints that hurt us, it could be vice versa. And I would cite in particular, the Vitamin C case in which, so far in the litigation, China has been allowed essentially to immunize an export cartel into the United States, hurting Americans directly.

Chairman GOODLATTE. Thank you. Mr. Chairman, my time has expired, but I do think that it is well worth exploring the underlying issue here, which is allowing state-owned enterprises to do business in the United States. We shy strongly away from, not that we have never done it, but we have very little in the way of State-run enterprises in the United States domestically. But they have to compete with foreign competition, and that has all the benefits of that State subsidy, and sovereignty that goes with it. Thank you, Mr. Chairman.

Mr. MARINO. Mr. Cicilline has graciously deferred to the Ranking Member, but Mr. Collins has to the Rules hearing meeting, and

Mr. Conyers has graciously agreed to allow Mr. Collins to ask his questions for 5 minutes. So, thank you, both of you.

Mr. COLLINS. Thank you all for the courtesy of both sides, and I appreciate it, Mr. Chairman. And again, I think, just focusing on the issue here of developing, you know, what is happening in the international realm, and how they are antitrust, and keeping this very open as far as how do we address this and how do we not. I think, you know, it is really also something we need to understand. Antitrust laws were enacted for the protection of competition, not competitors. And I think that is something as we look at, and this is, you know, Supreme Court actually saying that as well, so. And the concern is foreign countries are not doing that. They are using it basically to harm, in many ways, the markets, or shake the markets, if you would.

And Ms. Garza, in your testimony, there was a recommendation from the White House working group that was meant to produce a form in which sound and coherent trade and competition policies could be forged, not create an antitrust czar to direct antitrust enforcement decisions. Can you elaborate on that, please?

Ms. GARZA. Sure. I was really addressing the concern that was raised by Randy and Eleanor and that I have heard in the past. That is not what we are calling for, an antitrust czar in the White House to direct antitrust policy. That is definitely not what our recommendation is. Our concern is, basically, as has been said here today, to address this question of the misuse, potential misuse, of antitrust law and lack of process that we have experienced in other jurisdictions, and to make sure that the administration, through all of its resources, including on the trade side as well as on the antitrust enforcement side, are marshaled to focus on this issue.

So, the focus of our group was not domestic antitrust enforcement. It was a question of how do we help to further our efforts to ensure that the 130 other nations that have antitrust laws are not misusing them in a way that distorts trade and harms U.S. companies.

Mr. COLLINS. Okay, and keeping with that, I think you brought up a good point. And I think when you are looking at our situation, Mr. Abbott, how can we, as the U.S., better situate ourselves to deal with this emerging issue as it is continued here, you know, to counter preventing proper foreign enforcement actions? Then, we will go to Ms. Fox, we will just sort of catch her on the line here.

Mr. ABBOTT. Sure, that is a good question, Congressman. I think, you know, part of the recommendation was that we act a lot more vigorously to get the international bodies we are already involved in to highlight, to do peer review studies, and to emphasize those issues. And perhaps, you know, a working group could not just in the bilateral antitrust discussions, but in perhaps higher-level government discussions, raise these issues directly. I think it was already mentioned that President Obama raised an issue with the Chinese government about lack of due process, about locking people up in rooms. There needs to be, perhaps, more of that, and perhaps more public attention, and public statements about that, you know, in context of international meetings, bilateral. Not to tell governments what to do, but to raise the concerns at a much higher level.

Mr. COLLINS. Ms. Fox, I am going to elaborate further. The question here is, are we dealing, then, more with an emphasis from the administration, from Congress? Is this a fix that we need to do in more a diplomatic sense, or is this something that there is a legislative fix, or is there a policy fix? Take Mr. Abbott, and take that, that is a great answer, I was just curious. Let us follow that logical step. What do you think? Push the button. There you go.

Ms. FOX. One should first understand what one means by misuse. It is used in at least two different senses. One sense it is used is: our trading partners are not following, for example, U.S. principles of monopolization law. Some people call that misuse, and I do not. If that is the question and some nations are applying their law in a way, for example, that privileges contestability of markets, I think that the answer is talk, between the competition agencies to try to get accepted their point of view. If they do not get it accepted in the international marketplace, maybe it is not right, or maybe it is just not the way most people do it, and we have to live with that if it is within the area of protecting robust markets.

If it is, the kind of atrocities that Alden Abbott just mentioned, that is a serious problem that probably does need a higher level and a higher push. Starting with an integrated committee of trade and competition is a good idea.

Mr. COLLINS. Well, you have definitely found the city for talk and integrated committees. So, we can definitely look at that. Ms. Wong-Ervin, I know I am running out of time. I think the biggest thing what we need to focus on is those examples that are always out there, but I think the focus of this hearing is a proper one, and saying, "What is our response, what is the U.S.'s response, how are we dealing with it internationally, how are we dealing with it, you know, internally". But also say, "Is there ways that we can also, as we already are, with the leaders, especially in many of these areas where they are being challenged?" I guess is the best way to put that.

So, I think, we are the leaders there, let us continue to do so, and I appreciate the opportunity to ask these questions. And I appreciate again the kindness of the Chair and the Ranking Member and others. Thank you. I yield back.

Mr. MARINO. The Chair now recognizes the Ranking Member of the full committee, Congressman Conyers.

Mr. CONYERS. Thank you very much. I think today's hearing is the beginning of an examination and, for some people a reexamination, of antitrust laws, American antitrust laws. I want to ask generally for any of you or all of you that want to respond, how is our country doing in terms of developing a fair antitrust policy in comparison to other countries? In other words, how does this thing rank globally? And any of you may start it off, and continue it.

Ms. WONG-ERVIN. Thank you for the question. I think that the U.S. is a leader in this field. We saw a revolution in our courts in the '60s and '70s, aligning antitrust with economics, with consumer welfare, which is a broad concept, which really values what consumers are willing to pay for. And I think that that linking it to an economic concept, and getting away from vague and subjective standards that can be misused and abused by agencies, really gave a credibility to the U.S., and really helped to, you know, promote

what competition is about, which is about consumers and lower prices and better products.

Mr. CONYERS. Yeah, but how do we stack up with other countries? Are they looking to us for leadership? Or do they think, as the leading capitalist Nation in the world, I mean, we may come off in a poor light. I mean, after all, everybody is not into capitalism. And you know, I am reading between editions of review articles that we are failing in some respects, and that we are doing great in others, and I have never had five people with your backgrounds to give me a little free advice. Which direction are we going in, and what more should we be doing on this subject? And I will look at Professor Fox to start us off, and let everybody who wants to chime in. And if you do not want to answer it, that is okay, too.

Ms. FOX. Thank you, Congressman, for that very interesting question. How is the U.S. doing in its fair competition policy compared with others in the world? In cartels, such as price-fixing agreements, we are up there; gold standard; number one. In monopolization, abuse of dominance, I think, unfortunately, the U.S. has lost leadership by becoming very conservative, and not finding very much that a dominant firm does is illegal. The European Union standard has gotten more prominence in the world. It focuses more on access to markets by those who have been excluded. I think that is, in the world, perceived as more fair.

What we should be doing, though, is a very difficult question, because this is law formation, it goes through our courts, it goes up to the Supreme Court. Our Supreme Court has handed down decisions that fit with the narrow view of what should be illegal as monopolization.

Mr. CONYERS. Well, that is a good start. Where do you come in, Attorney Stutz?

Mr. STUTZ. Thank you for the question. I think it is possible to admire the coherence and principled nature of the U.S. Approach to antitrust law, and at the same time feel concerned about some of the results it has wrought. We have a large concentration problem in this country. Competition is declining in a lot of sectors. It is understandable, perhaps, that other countries would look to the United States and seek to experiment. And there has been a lot of interest in finding ways to more aggressively enforce the antitrust laws in a principled way, and I support that.

Mr. ABBOTT. Very briefly, Congressman, I think with all due respect, I do not believe that competition has diminished. I think that some recent economic research, I know that claims have been made in the last year, too. I just do not think the best recent economic research supports that. And more generally, I think there needs to be a real concern that overemphasis on, and it is true, lots of countries emulate Europe, they have an administrative system, but overemphasis on analyzing actions that do not harm consumers directly or do not deny access, and there has been some of that, could disincentivize innovation, and then harm our leading competitors.

Mr. CONYERS. Anybody else? We have 193 countries, and we have 130 standards. The little countries, they look at a discussion like the one we are having this morning, and say, "We cannot even get in the door." I mean, there is such a disparity between the big

nations and the little nations. And I feel a little bit uncomfortable, because the little nations, I mean, people say, well, who cares, and who asked you to get in here, anyway? This is my last try at trying to put this into some perspective.

Ms. GARZA. May I take a shot?

Mr. CONYERS. Please.

Ms. GARZA. So, two things. One is, just to be clear, I do not think it is the smaller economies that are the problem here. It is actually some of the larger economies that are throwing their weight around.

But the other thing I would say is that competition law has actually been very good for some of these younger and smaller economies. I have had the honor of being able to participate through the years in the International Competition Network and other international fora, and have met and talked to, as have other people here, Eleanor, Koren, Alden, Jim Rill, a lot of those enforcers in countries in Africa, in South America, in Asia. And they recognize that a sound competition law is actually good for them, because it frees up the ability of their economy to grow. It removes artificial barriers to competition. It allows the spread of better distribution of wealth. It allows for innovation.

So, competition law, we really feel, is good for not just the big developed economies, but is good for the smaller economies. Not having distortion of international trade, that benefits them. So, I have actually seen that there is a fair amount of consensus that has developed in all of these international fora about the value of antitrust competition for even those economies. For especially those economies.

Mr. CONYERS. Mr. Chairman, I am troubled by the fact that there is such an extreme difference between the big nations and the little nations. And I resist the notion that the little ones are going to be very grateful to us for being so thorough and fair and concerned. Look, capitalism does not work like that, I mean, in my political perspective. Everybody has got to turn in some profit, or you are going to be hitting the door. And this sounds like a very mild discussion we are having, and for some reason I feel that there is some huge considerations about the differences laying around out here that we have got to get into, and we probably will. What can five members of Congress do with five expert witnesses in a couple hours? So, what can you tell me that will make me feel more satisfied than I am at the present moment?

Ms. FOX. Congressman, thank you again. I think there is a huge problem that you have put your finger on—that little countries have needs that are not recognized, and not recognized by the U.S. model of competition. This does not mean the U.S. model is wrong for the U.S. There are some problems of jurisdiction, there are some problems of simply inability of the small countries to, for example, enforce their law against cartels coming from the developed countries. The developed countries ought to have a rule that they cannot have cartels even they do not hurt Americans. If they hurt only Africans, if they are clear, illegal cartels in the U.S., it should be illegal in the U.S.; that should be stopped where the action is. Right now, it is very hard for small countries to defend themselves,

and there are many actions that are targeted against small developing countries.

Second, if you look at monopolization. As you pointed out, there are many small countries that have very different circumstances on the ground of what are the barriers to competition. They have many more barriers, they have excluded many, many people for a long time; they need laws that are more inclusive; that focus more on exclusionary behavior. There are laws, formulations, that can be against exclusionary behavior, and helping competition, not protecting inefficient competitors.

So, I think the first line is that we, as a country, ought to recognize that, and we ought to recognize that some countries need different standards than the way the U.S. has applied them. Thank you.

Mr. CONYERS. Mr. Chairman, you have been very good to me, and I appreciate it. I want the witnesses to know that there is going to be trouble with some people getting their full amount of sleep tonight as a result of what has gone on here in the House Judiciary Committee this morning, and I thank you very, very much for your presence.

Mr. MARINO. The Chair now recognizes the gentleman from Colorado, Congressman Buck.

Mr. BUCK. Thank you, Mr. Chairman. And I want to thank the witnesses for being here. Professor Wong-Ervin, I listened to your testimony, and you mentioned the Korean sanctions against Qualcomm, and I read your testimony, and you also not only mentioned the Korean sanctions against Qualcomm, but also the Chinese sanctions against Qualcomm. I did not read in there a dispute that Qualcomm had, in fact, engaged in anticompetitive behavior, but rather an analysis of the sanctions against them as being over broad. And I should note, I believe that Taiwan is investigating Qualcomm's anticompetitive behavior. The European Union as well as the United States FTC are all doing that.

You are not suggesting, are you, that the fact that a foreign government has found a United States corporation to have engaged in anticompetitive behavior, that that in and of itself is somehow wrong or unfair?

Ms. WONG-ERVIN. Thank you for the question. No, I am not. So, many of the examples I gave, some were against Qualcomm, some were involved with Microsoft, Nokia, there are several others involving Merck, A.Z., Ericsson. They all have in common the lack of an effects-based approach; the lack of evidence of any actual harm to the competitive process or consumers. So, for example, the Chinese decision against Qualcomm was based on excessive pricing, something that we do not do in the United States. We do not regulate price, particularly with IP, because we do not want to harm incentives to innovate, and because high prices alone do not harm competition. In fact, they can signal to a market that this market is profitable, and you should enter and increase entry.

Mr. BUCK. And I do not mean to cut you off, but I only have a limited amount of time, and I am not sure that I will receive the same treatment from the Chair if I do go over, so I want to make sure that I ask a few more questions. But Apple is also suing

Qualcomm, are they not, for a dispute concerning competitive behavior with their licenses? Is that right?

Ms. WONG-ERVIN. Yes, I believe that.

Mr. BUCK. Okay. Do you know of any investigation of Qualcomm's anticompetitive behavior by the EU, Taiwan, the United States, that has been fully investigated, and where a country has come to the conclusion that Qualcomm has not engaged in anticompetitive behavior?

Ms. WONG-ERVIN. Where an investigation has been dismissed?

Mr. BUCK. After a full investigation?

Ms. WONG-ERVIN. After a full investigation, I do not. And many of the ones you mentioned, like you said, are just in the beginning stages. The one in the U.S. is just, you know, the government just pled its case; they still have to prove its case.

Mr. BUCK. But there is some threshold to even begin an investigation. There has to be some evidence that would lead a government agency to direct resources to do that, would there not?

Ms. WONG-ERVIN. Not in other countries. So, in China and elsewhere, they are obliged to investigate when there are complainants. So, remember, China is largely an implementer of technology, not an innovator, and they have a lot of manufacturers that complain and say, "I want lower royalties." And so, they are obligated; they do not have to have a good-faith basis that they have to investigate.

Mr. BUCK. Mr. Stutz, I want to ask you a quick question. What are the ramifications to the United States in terms of retaliation if the United States acts, either through a trade policy or otherwise, with a foreign country to benefit a particular United States corporation?

Mr. STUTZ. Thank you for the question, Congressman. I think the obvious, immediate risk is retaliation. And just the adoption of a political stance toward competition policy, rather than a law enforcement orientation.

Mr. BUCK. Now, would that retaliation involve just one United States company, or would it involve many United States companies and affect our economy in terms of workers, employment, and our ability to trade with that foreign country?

Mr. STUTZ. Thank you for the question. I think it should be seen as a risk, that there would be a policy response, rather than an individual response to a particular matter. I do think it bears mentioning, with respect to disputes involving multiple authorities investigating, you know, a single entity like Qualcomm, it is important to remember that oftentimes there are not disputes in anti-trust standards between countries. Oftentimes, they agree. In the area of standard essential patent abuse, there is a widespread consensus among enforcers, at least, that this is problematic and that competition law should address it.

So, oftentimes, when there is extraterritorial remedies, lots of countries investigating a single defendant, you can have a lot of efficiencies with a single remedy that can resolve universal concerns. So, it cuts both ways.

Mr. BUCK. Thank you for your answer, and Mr. Chairman, I yield back.

Mr. MARINO. The Chair now recognizes the Ranking Member of the Subcommittee, Congressman Cicilline.

Mr. CICILLINE. Thank you, and thank you again to the witnesses. I would like to begin, Professor Fox, you mentioned that the United States might well be on its way to using antitrust laws to achieve nationalistic ends, and sort of warned us about that. Could you speak a little more to that, of what concerns you are referring to?

Ms. FOX. Yes, I mentioned I have this concern, and I also mentioned I have not seen it happen yet. It is a general concern that simply comes out of, for example, meetings of the highest executive with merger parties, who agreed to invest in America. I have the uneasy feeling that at some point that might be taken into account in letting a merger through lightly. So, I am only saying, be on alert.

Mr. CICILLINE. I know. I understand.

Ms. FOX. I think the head, the acting Chair of our FTC, in my view, clearly would not cave in lightly. The nominee for Justice Department Antitrust would not cave in lightly. But I just say, be on alert, because if that should happen, rule of law unravels and tit-for-tat could happen.

Mr. CICILLINE. Yeah, absolutely. And I think that is what makes the suggestion that we do everything that we can, and I think everyone has suggested, to depoliticize this work as much as we can. And so, Mr. Stutz, you mentioned maybe the idea of an integrated kind of interagency advisory role might be the best way to preserve the integrity of the work, but also reduce the likelihood that it becomes politicized in a way which would undermine the arguments we are trying to make to our trading partners around the world.

Mr. STUTZ. That is right, thank you for the question. And I want to stress, I very much agree and admire the expert report's approach to thinking about the need for coordination and to conduct an examination into how competition and trade policies fit together, and how these agencies can more effectively function by cooperating with one another.

I think there is a devil in the details in how you do the working group. There is a way to approach achieving those coordination benefits without putting the risk of politicizing on the table. And so, you know, I think an important point to remember is that not all decisions in competition and trade policy are necessarily susceptible to group decisionmaking. Sometimes, it is more effective to empower a single expert, or, in this case, an expert agency, to lead. And in my view, when you are dealing with good-faith disagreements over technical questions like antitrust standards and antitrust remedies, the U.S. agencies need to be empowered to set policy.

Mr. CICILLINE. Yeah, and I think the thing that strikes me from the testimony of all the witnesses is that we have really four categories of cases in sort of our disagreements that would 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.

But it seems to me we have to have the ability to understand those differences and shape remedies that reflect that. And what I wonder if, Professor Wong-Ervin, you mentioned, and I think Professor Fox, the notion of trying to create at least some transparency in the way that we have seen success with the TIP Report, obviously, in a different area, trafficking in persons. Where at least there is a kind of standard that has developed, and some information about how the country meets a standard in terms of seriously responding to the issue of human trafficking. This would be a lot more complicated, because you have to acknowledge what is the standard? Is due process available? Are there anticompetitive policies? Are they being applied evenly even if they are bad policies?

But it would seem like if we could agree on the creation of that report, it might be a good way to, at least, educate kind of the international community and American consumers and businesses what the landscape is. And then, you know, encourage people to kind of think about wanting to improve where they stand on that report. And I would be curious to know what the panel thinks about that kind of approach as part of what we might do. Maybe start with Professor Fox.

Ms. FOX. Thank you, Congressman. Yes, transparency would go a very long way. Transparency is a part of due process. If standards are transparent, that is the first step. And a second step is simply transparent but different. Lots of conversation to argue one way or the other that there is a better standard, and taking into account when countries cannot agree.

Ms. WONG-ERVIN. I agree, thank you for the question, that it would be an effective interim measure to require this transparency. But in the long run, I think it is important for trading partners to understand the tradeoffs, right, the tradeoffs of considering non-competition factors, are the difficulties of weighing and balancing various factors across different markets, it can actually undermine consumer welfare, and undermine clear and predictable antitrust. So, I think we should to continue to advocate for a consumer welfare standard, but in the interim require transparency.

Mr. CICILLINE. Thank you very much, and I yield back, Mr. Chairman.

Mr. MARINO. The Chair now recognizes the gentleman from Texas, Congressman Ratcliffe.

Mr. RATCLIFFE. Thank you, Mr. Chairman, I thank the witnesses for being here. Ms. Garza, as you stated in your written testimony, one of the concerns here is the misapplication of foreign antitrust laws by some of our trading partners to protect their home markets from competition, to protect their national champions, and to force the transfer of technology at royalty rates that favor local technology implementers. One of the solutions that the ICPEG report talks about is for the U.S. to consider recommending that the OECD and other multilateral bodies adopt minimum due process

guarantees. And you in your testimony suggested that the administration should continue and strengthen both bilateral and multilateral efforts to establish standards, and ensure that other countries abide by them.

So, in the context of trade law, I think we have seen that this administration is emphasizing the need to shift away from broader multilateral trade agreements towards more narrow, bilateral trade agreements as a way to protect America's interests. I want your perspective on how significant a role bilateral agreements play compared to the multilateral approaches in the context of antitrust law, and what would be the impact of a shift that the administration is proposing.

Ms. GARZA. Well, that may be a little bit above my ability to respond. But I think what we recommended in the ICPEG report was a combined approach. Basically, working within multinational entities on multicountry agreements, but also on a bilateral basis.

If the trend was to go to bilateral agreements, we could achieve our ends through those bilateral agreements through competition chapters. You know, having an understanding with the other country that the agreement is with about standards. And they could be if you had an effort to develop an international consensus on certain minimum standards, that could be a reference point. So, the multinational activities should continue to take place, and they really create the context and reference for the bilateral agreements. I do not know if that answers your question.

Mr. RATCLIFFE. It does. Let me move it from theoretical into practice. So, one of the report recommendations is the evaluation of trade agreements and the further assessment of the inclusion of competition chapters, as you mentioned. And right now, NAFTA is currently being renegotiated, so what is your view on including a competition chapter in NAFTA?

Ms. GARZA. So, the view of ICPEG was that it would be very helpful. I think there may be a competition chapter in NAFTA, too. But what has happened with these competition chapters, as I understand it, is progressively they have gotten better and better. And so, I think, one of the things that we had suggested was that this working group take a look at what should be in, ideally, these competition chapters. And to the extent that the administration is about to renegotiate or reopen any of these agreements, it would be good to have in mind what could be put in these chapters.

And so, the nice thing about having these chapters is that you have a built-in framework for discussion, when you think that there have been violations and potential solutions, how do we resolve disputes. We do not necessarily have that right now, so you can have a problem, but the antitrust enforcement agencies are really ill-suited to do anything to really address it. And you could address it on an ad hoc basis, but that has difficulties, too.

So, the notion is, step back, look at what we would ideally want, put it into these bilateral or multilateral agreements, and increase your ability when things come up to address them early, and to address them effectively to have a meeting of the minds as to how you are going to address them.

So, we think that that could actually be very helpful in resolving the issues going forward.

Mr. RATCLIFFE. Thanks very much. Professor Wong-Ervin, Professor Fox, as I understand her testimony, it is that she does not think that the United States has the one right mold for antitrust rules and standards, or the balance between antitrust laws and intellectual property rights. Do you agree with that assessment?

Ms. WONG-ERVIN. I do not. I think that the U.S. is a leader in innovation, and a lot of that is because of our incentives to innovate. I also think the Supreme Court correctly recognized the errors of the concerns about false positives, or type one errors, and the idea that it is more dangerous to intervene when it is unwarranted, than to not intervene, because the market can more readily correct, than when courts or agencies intervene inappropriately.

Mr. RATCLIFFE. Thanks very much. I will yield back.

Mr. MARINO. Thank you. The Chair recognizes the Congressman from Georgia, Mr. Hank Johnson.

Mr. JOHNSON of Georgia. Thank you, Mr. Chairman, and I thank you all for your testimony today. I think we can agree that there should be more integration between global trade and antitrust policies; laws and agreements between nations. I take it from what you all have said that you all would agree with that statement. And also, that we must respect how foreign trading partners formulate and apply their antitrust laws. We must respect that, but if they fall short, then there should be name and shame applied from the highest levels of our government. In other words, public disclosure of abusive practices and applications by foreign governments of their own laws. I think we can all agree on that.

What I want to ask the panel is, to what extent do the Trump policies and pronouncements of "America First," the rhetoric and the policies that ensue from that, the policies to withdraw from negotiations for the TPP, the threats surrounding NAFTA made by the President; to what extent do the rhetoric and practices of this administration have on foreign governments and their mindset in terms of applying their own antitrust laws? Professor Fox?

Ms. FOX. Thank you. I think the announcement of "my country first" is not fortunate, and it is not limited to the United States. We are in a world today where many countries across the world have a "my country first" policy.

Mr. JOHNSON of Georgia. The U.S. being the leading trade partner, and the preeminent antitrust enforcement regimen, what does it say when we stoop to the level of "America First?"

Ms. FOX. If it means that we will uphold conduct by our companies and apply a different standard to the rest of the world, it is a very negative message. It can mean other things. I am hopeful maybe it would mean other things. But if it does mean nationalism and parochialism, and this applies to the trade agreements you mentioned, it is bad for America. America gains from these trade agreements; America would have gained from the Trans-Pacific Partnership.

I want to add here that the competition chapter and the SOE chapter in the Trans-Pacific Partnership are very well done and very important, and can be models for whenever we are ready again to have multilateral agreements.

Mr. JOHNSON of Georgia. Okay, thank you. I hate to cut you off, Professor Fox, but I wanted to get Professor Wong-Ervin's view on that.

Ms. WONG-ERVIN. Sure, thank you for the question. So as part of my job, what I do is I train foreign enforcers and judges around the world. My institute trained over 300 last year, primarily in China. And I get this question a lot, and my answer is that I am optimistic that antitrust has remained largely nonpolitical, across administrations.

Mr. JOHNSON of Georgia. But it seems that we are headed in the opposite direction under this current administration. Would you agree?

Ms. WONG-ERVIN. I am hopeful that the appointees for the Department of Justice Antitrust and the Acting Chair, particularly I know the Acting Chair of the FTC, that they are—

Mr. JOHNSON of Georgia. I must interrupt you. Let me move to Ms. Garza, and let me get a straight answer from Ms. Garza.

Ms. GARZA. A straight answer, okay. All right, what I will say is, I recognize the concern, but I do not think we have seen any evidence yet of a problem.

Mr. JOHNSON of Georgia. Okay, thank you, thank you, Ms. Garza. Mr. Abbott, I am trying to do this within my five minutes.

Mr. ABBOTT. Congressman, I think I will second Ms. Garza. I know there is some discussion, but I agree.

Mr. JOHNSON of Georgia. Okay, thank you, Mr. Abbott. And last but not least, Mr. Stutz, who appeared to be very intense in his desire to respond.

Mr. STUTZ. Well, thank you, Congressman. Time being what it is, I will just say that the merits of nationalistic policies are more debatable in other contexts, but it is important to remember that antitrust is law enforcement, and it needs to be driven by facts and law. And that is critically important, and it becomes dangerous to apply policy in a law-enforcement context.

Mr. JOHNSON of Georgia. Thank you. I yield back, Mr. Chairman.

Mr. MARINO. Thank you. I recognize myself for questioning. I am not a supporter of NAFTA. I have seen what it has done to my district, significantly, and people on both sides of the party, people not involved in politics, how much they have been out of work. And I think it is about time we have a President that stands up and says, "U.S. First." We have tremendous trade deficits with other countries, that we have not even approached over the last 8 years.

So, each of you can respond if you would like to this question, or the statement that I am going to make. How do you deal with countries, whether they are democracies or whether they are dictatorships, to follow the rules? Do you actually think that China is going to sit down, and we throw this word "transparency" around like it is the panacea; do you actually think China is going to be transparent with us? Do you actually think other countries are going to be transparent? This is about profit. This is about making sure that whoever, such as China, as they did with Qualcomm; this is about profit. I wonder if China is going to reduce its prices based on how they force or are forcing U.S. companies to lower their prices. You do not see that.

So, let us get down to where the rubber meets the road, and give me just one example, other than penalizing countries, whether it is through sanctions, whether it is through trade, on how to play on a level playing field. Ms. Garza.

Ms. GARZA. The issue that you have identified is really part of the impetus for our report, which is to say that there are some things that you can deal with through talk, and through the antitrust enforcement agencies, and there are other things, other instances, where you cannot. So, with respect to China, China has an antitrust enforcement agency that the U.S. and Europe have worked with, but a lot of their decisions are not being driven by the conclusions of their competition law enforcement agency, they are being driven by different conclusions. And so, part of what the group felt was that when you have decisions being taken at that level by another jurisdiction, you have to meet them at that level. You know, it is, like, I cannot take a knife to a gun fight, right? So, with their dealing with it at that level, we have to deal with it at that level.

And during the Obama administration, that happened, in fact. And part of what we are saying is, to the new Congress and to the new administration, let us talk about what we have seen over the last 8 years, let us try to get this right. We realize that there are a lot of issues competing for your attention and resources, we think that this is a good issue. You are focused on trade, you are focused on "America First," this is a component of that, and why we recommended that there be a focused look at that, integrate competition, and also trade, and think about how to deal with the issue that you have raised, in a smart way, and in an effective way.

Mr. MARINO. Professor.

Ms. WONG-ERVIN. Thank you for the excellent question. So, I serve as a scholar in a prominent Chinese university, and there is a member who is of the expert advisory committee. And I was told by him by many other people that China was horrified when President Obama and when others made these public statements of concern, that they want to be considered as part of the mainstream, they are worried about their credibility, and that it did make a big difference. I agree, though, that it is about profit and about lower prices for them, and I think this needs a multipronged solution.

Mr. MARINO. Mr. Abbott.

Mr. ABBOTT. Mr. Chairman, I sort of echo what Ms. Garza said. If you really believe that something has been driven purely politically, and it is doing real harm, certainly the U.S. has some statutory authority. It is not saying when you should use them, but there are things like Section 301 of the Trade Act, which allows for some retaliation. Not saying in any case, but it is out there, and in the appropriate times might be weighed.

Also, there are cases, for instance the merger of two state-owned Chinese enterprises we think will harm competition in the U.S., you could take antitrust action against that. There is also ways of blocking imports under Section 337 of the Tariff Act if they violate U.S. patent rights and impair competition. We have not raised that, but there are a number of tools out there that at least merit consideration.

Mr. MARINO. Professor.

Ms. FOX. Thank you. I think this is exactly the question that an integrated working group would try to deal with. It is very hard to deal with. I want to echo remarks that Professor Wong-Ervin made about Chinese enforcers who really want to abide by international standards, and the people on the ground cannot always get their way. But they have made progress. The more they really want to abide by international standards, including holding SOEs to account, the more we gain somewhat in a level playing field. How to deal with the fact that the highest ministries of China are pushing for unlevel nationalistic policy is a very big, high-level question.

Mr. MARINO. Mr. Stutz.

Mr. STUTZ. Thank you, Mr. Chairman. I want to read a short quote from the Deputy Assistant Attorney General Debbie Platt Majoras after a high-profile divergence in a high-profile merger case between the United States and EU. They reached different conclusions on the same merger. She said, "We recognize that we and the EU will not always agree, and that our way is not always best. We have no power to change EU law other than by persuasion, and vice versa."

That is a really important point. Even when we are talking about sanctions and more aggressive tactics, ultimately we have no power other than to persuade. And so, I think it is extremely important that we think about what is most effective, and how we can persuade. And it is my view that when there are aggressive bad-faith acts by our trading partners, we may want to consider aggressive responses, but the past has shown that when we are dealing with good-faith differences, cooperation is more effective. Thank you.

Mr. MARINO. I think the U.S. on its own would have a tremendous impact on this, but we cannot change the minds of the leaders in China. What that is going to take is a unified effort of most of the countries around the world, to let China know that we will come together and move as one, if China wants to continue to abuse these antitrade issues. In numbers, there is strength.

So, with that, this concludes today's hearing. I want to thank all of you for attending. It has been very enlightening; we could probably spend the next 6 hours here talking about these issues. But I think we have started something here today that we can take that ball and run with it.

So, without objection, all members will have 5 legislative days to submit additional written questions for the witnesses, or additional materials for the record. This hearing is adjourned. Thank you.

[Whereupon, at 11:49 a.m., the Subcommittee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

House Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Hearing (6/29/2017) on “Recent Trends in International Antitrust Enforcement”

Questions submitted for the Record from Subcommittee
Chairman Marino for Deborah Garza, Partner, Covington & Burling LLP

Question 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?

Response:

The key is that these highly impactful, high-profile matters are systemic to the jurisdictions in which they occur. They reflect a systemic disregard by those jurisdictions of accepted norms of due process and/or a tendency to promote national champions or use competition law to reduce patent royalty payments by their manufacturers to U.S. innovators, for example. The issue of state-owned and state-supported enterprises is also systemic. ICPEG’s recommendations are designed to address the failure of post-hoc and ad-hoc U.S. government responses to eliminate the repeated instances of these headline cases. There is a concern that these cases will become increasingly common over time if not addressed effectively now.

Question 2:

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

Response:

Procedural fairness has been discussed in international organizations like the OECD and ICN with the support and urging of the U.S. antitrust agencies. However, neither of those two organizations has yet issued a set of comprehensive best practices. The ICN’s best practices guidance stops at the investigation stage, and the OECD has not issued best practices.

ICPEG identified several ways the U.S. antitrust enforcement agencies could promote the adoption of sound procedural and substantive competition law standards worldwide.

1. The U.S. antitrust agencies could prioritize efforts to solidify consensus on a substantive competition law standard dedicated to the protection of a vigorous competitive process, free from artificial impediments. (ICPEG Rec. 7)

2. The U.S. antitrust agencies, along with USTR and the State Department, could consider the feasibility and value of urging the World Trade Organization to expand member government assessments by the Trade Policy Review Body to cover national competition policy, both procedural and substantive. (ICPEG Rec. 8)

3. The U.S. antitrust agencies could encourage the OECD to establish a mechanism by which one member could request peer review of the practices of another member without the second member's consent. (ICPEG Rec. 9)

4. The U.S. antitrust agencies could encourage the OECD to establish a mechanism to peer review the practices of non-members (like Russia or China). Such peer reviews would focus on specific issues, such as the unreasonably broad imposition of global competition remedies or failure to provide an adequate ability to contest competition law allegations. (ICPEG Rec. 9)

5. The U.S. antitrust agencies could urge the OECD (and/or other multinational bodies) to adopt a code enumerating transparent, impartial and accurate enforcement procedures. (ICPEG Rec. 10)

6. The U.S. antitrust agencies should promote transparent, impartial and accurate enforcement procedures as a topic for consideration by all ICN working groups. (ICPEG Rec. 10)

7. The U.S. antitrust agencies could ask the ICN to make the evaluation of procedural soundness and transparency a special project and key "ICN Second Decade" initiative. (ICPEG Rec. 10)

8. The U.S. antitrust agencies could request that other entities (for example, the World Bank) study the economic benefits of enhanced due process and transparency. (ICPEG Rec. 10)

9. The U.S. antitrust agencies could support the establishment of an ICN working group to focus on anticompetitive harm caused by state-owned entities and state-supported (but not owned) entities. (ICPEG Rec. 11)

10. The U.S. antitrust agencies should consider including due process consultation provisions in antitrust cooperation agreements with other jurisdictions. (ICPEG Rec. 12)

11. To minimize unnecessary jurisdictional conflicts, the U.S. antitrust agencies could promote the application of agreements under which nations would cooperate and take account of legitimate interests of other nations affected by a competition investigation. (ICPEG Rec. 12)

12. The U.S. antitrust agencies could promote the further development of such comity principles by the OECD and ICN. (ICPEG Rec. 12)

Question 3:

The ABA Presidential Transition Report recommends the restoration of the International Deputy Assistant Attorney General to better coordinate with other agencies in this area. Based on your experience with the DOJ, do you agree and do you think more is needed to achieve better cooperation?

Response:

I understand that Roger P. Alford has been named as the Antitrust Division's Deputy AAG for International Affairs. I agree with the ABA Antitrust Section's recommendation that the Antitrust Division should substantially re-commit itself to leading international antitrust policy and enforcement efforts. There is a perception that the Federal Trade Commission has instead led the charge on behalf of the U.S. antitrust agencies. While the FTC's work in this area is highly commendable, however, the FTC is an independent administrative agency. In my opinion, it is extremely important that the full weight of the U.S. Justice Department support these efforts.

**Responses to Questions Submitted
for the Record from Subcommittee Chairman Marino**

Koren W. Wong-Ervin*
**Director, Global Antitrust Institute, and Adjunct Professor of Law,
Antonin Scalia Law School, George Mason University**

**Before the
United States House of Representatives
Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law**

**“Recent Trends in International Antitrust Enforcement”
Hearing Date: June 19, 2017
Responses to Questions: August 17, 2017**

QUESTIONS AND RESPONSES

- 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?**

Law enforcement’s effect on private conduct is often shaped by headline grabbing cases. For example, a headline announcing the government’s execution of an individual for shoplifting would almost assuredly have a deterring effect regardless of whether the punishment is systematic. In the same way, headline cases reporting government threats against companies that seek to defend themselves in competition law investigations, or impose penalty decisions that substantially diminish the value of intellectual property rights, can have a chilling effect on those seeking to defend themselves or deciding whether to invest in costly research and development to create new technology.

Such headline grabbing cases include:

- China’s National Development and Reform Commission’s (NDRC’s) nearly \$1 billion fine against Qualcomm based on “unfairly high” or “excessive” pricing theories.¹ In contrast, U.S. antitrust law does not regulate price, given the risk of

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¹ Nat’l Dev. & Reform Comm’n, Administrative Penalty Decision No. [2015] 1 (Feb. 9, 2015) (“The NDRC finds that the Party [Qualcomm] violated Article 17, Paragraph 1, Item 1 of AML [Anti-Monopoly

detering meritorious competition and incentives to innovate. Moreover, high prices in of themselves do not harm the competitive process. Instead, high prices signal to a marketplace that a particular sector is profitable, which *attracts* new or expanded entry, which leads to lower prices.²

- China's Ministry of Commerce's 2014 decision in Merck-AZ based on the controversial "conglomerate effects" theory,³ under which the agency imposed remedies even though the parties had no overlaps in the relevant markets and AZ's worldwide photoresist share was only 30%. Remedies included prohibiting the companies from offering bundled sales of liquid crystal and global photoresist products and imposing price limitations and other restrictive terms on intellectual property rights. In contrast, enforcers in the United States, Germany, and Taiwan cleared the merger without conditions.⁴
- The Competition Commission of India's (CCI's) 2013 and 2014 prima facie orders against Ericsson based on unfairly high or excessive pricing theories.

Law] that prohibits enterprises with dominant market position from selling commodities at unfairly excessive prices.") (unofficial English translation of decision on file with author), http://www.ndrc.gov.cn/gzdt/201503/t20150302_666209.html (Chinese).

² Absent information about the prices of unconstrained market transactions, it can be particularly difficult to identify a "fair" price. Indeed, it is even more difficult to assess the "fairness" of prices associated with licensing intellectual property rights both because the fixed costs of innovation require prices well above marginal cost in order to secure an adequate return on investments in innovation, and because intellectual property rights themselves are highly differentiated products, which makes reliable price comparisons difficult, if not impossible. The risk of placing overly strict limitations upon prices, or royalties, for intellectual property is that the return to innovative behavior is reduced, which means firms will reduce their investment in further innovations, to the detriment of consumers. Douglas H. Ginsburg et al., *Excessive Royalty' Prohibitions and the Dangers of Punishing Vigorous Competition and Harming Incentives to Innovate*, COMPETITION POL'Y INT'L ANTITRUST CHRON. (Mar. 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2748252.

³ See e.g., William J. Kolasky, Deputy Assistant Attorney General, U.S. Department of Justice, Address Before the George Mason University Symposium: Conglomerate Mergers and Range Effects: It's a Long Way from Chicago to Brussels (Nov. 9, 2001) ("After fifteen years of painful experience with these now long-abandoned theories [of competitive harm from conglomerate mergers], the U.S. antitrust agencies concluded that antitrust should rarely, if ever, interfere with any conglomerate merger. We could not identify any conditions under which a conglomerate merger, unlike a horizontal or vertical merger, would likely give the merged firm the ability and incentive to raise price and restrict output. We recognized, conversely, that conglomerate mergers have the potential as a class to generate significant efficiencies."), <https://www.justice.gov/atr/speech/conglomerate-mergers-and-range-effects-its-long-way-chicago-brussels>; Damien J. Neven, *The Analysis of Conglomerate Effects in EU Merger Control*, in HANDBOOK OF ANTITRUST ECONOMICS 183 (Paolo Buccirossi ed. 2008) (finding that there is little support in economic literature to suggest that conglomerate mergers raise significant anticompetitive issues unless there is no effective competition).

⁴ Koren W. Wong-Ervin, *Antitrust and IP in China: Quo Vadis?* at 4 (2015), https://www.ftc.gov/system/files/attachments/key-speeches-presentations/wong-ervin_-_2015_aba_spring_meeting_4-16-15.pdf.

Among other things, the commission preliminarily concluded that Ericsson violated India's Competition Act by including non-disclosure agreements (NDAs) in licensing agreements for standard-essential patents upon which the company had made a commitment to license on fair, reasonable, and non-discriminatory terms.⁵ Given that the proper purpose of competition law is to protect the competitive process and not individual competitors, it is difficult to see how including NDAs in a license could harm the competitive process.⁶ Indeed, in practice (i.e., outside of litigation), licensees generally demand NDAs as frequently as licensors because license agreements can be quite revealing about the licensee's business practices, risk preferences, and priorities, all information licensees would like to keep from their rivals.

With respect to whether certain foreign governments are using competition law to achieve industrial policy or other non-competition public interest goals, many foreign competition laws explicitly require the considerations of such factors. For example, China's Anti-Monopoly Law states that the law "is enacted for the purpose of . . . promoting the healthy development of the socialist market economy,"⁷ and that "[t]he state constitutes and carries out competition rules that accord with the socialist market economy, perfects macro-control, and advances a unified, open, competitive and orderly market system."⁸ Similarly, Japan's Anti-monopoly Act states that purpose of the Act is "to promote fair and free competition, . . . to heighten the level of employment and actual national income, and thereby to promote the democratic and wholesome development of the national economy as well as to assure the interests of general consumers."⁹ The Introduction to India's Competition Act states that, in interpreting the Act, the Competition Commission should "keep[] in view . . . the economic development of the country."¹⁰

⁵ See CCI Order under Section 26(1) of the Competition Act, 2002, *In re: Micromax Informatics Ltd. v. Telefonaktiebolaget LM Ericsson* ¶ 17 (Nov. 12, 2013), http://cci.gov.in/sites/default/files/502013_0.pdf; CCI Order under Section 26(1) of the Competition Act, 20, *In re Intex Techn. Ltd., v. Telfonaktiebolaget LM Ericsson* ¶ 17 (Jan. 16, 2014), http://cci.gov.in/sites/default/files/762013_0.pdf; see also Koren W. Wong-Ervin, *Standard-Essential Patents: The International Landscape*, ABA INTELL. PROP. COMMITTEE NEWSL. 13-14 (Spring 2014), https://www.ftc.gov/system/files/attachments/key-speeches-presentations/standard-essential_patents_the_intl_landscape.pdf.

⁶ See Koren W. Wong-Ervin et al., *FRAND in India, COMPLICATIONS AND QUANDARIES IN THE ICT SECTOR: COMPETITION ISSUES AND STANDARD ESSENTIAL PATENTS* at 17-18 (Springer Intern'l, forthcoming Fall 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2821344.

⁷ Anti-Monopoly Law of the People's Republic of China, Ch. I, Art. 1, http://english.court.gov.cn/2015-08/17/content_21625234.htm.

⁸ *Id.* Art. 4.

⁹ Antimonopoly Act of Japan, Ch. I, Art. 1, http://www.jftc.go.jp/en/legislation_gls/amended_ama09/.

¹⁰ Competition Act of India, Introduction, http://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf.

With respect to due process, given the difficult if not impossible task of reliably measuring factors such as whether an agency provides meaningful opportunities for engagement, the best available evidence is likely anecdotal and circumstantial.

Based (at least in large part) on receiving numerous first-hand reports from a variety of companies of egregious due process violations, the U.S. antitrust agencies have spent significant resources over the last decade to address these issues. Multilateral organizations such as the International Competition Network (ICN) and the Organisation for Economic Cooperation and Development (OECD) have joined these efforts, which include hosting roundtables,¹¹ working with agencies around the world to develop guidance and best practices documents,¹² and writing articles and giving speeches for domestic and foreign audiences.¹³

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?

As a threshold matter, it is important to understand what I (and many others) consider to be “best practices.” Fundamentally, I am referring to economically-sound effects-based analysis

¹¹ See, e.g., *ICN Roundtable Discussion: Competition Agencies’ Investigative Process* (Mar. 25, 2014), <http://www.internationalcompetitionnetwork.org/uploads/library/doc944.pdf>; see also Paul O’Brien, *Promoting procedural fairness through the ICN*, Fed’l Trade Commission Blog (Apr. 16, 2014), <https://www.ftc.gov/news-events/blogs/competition-matters/2014/04/promoting-procedural-fairness-through-icn>.

¹² INT’L COMPETITION NETWORK, *INVESTIGATIVE TOOLS REPORT* (2013), <http://internationalcompetitionnetwork.org/uploads/library/doc901.pdf>; INT’L COMPETITION NETWORK, *COMPETITION AGENCY TRANSPARENCY PRACTICES* (2013), <http://internationalcompetitionnetwork.org/uploads/library/doc902.pdf>; INT’L COMPETITION NETWORK, *COMPETITION AGENCY CONFIDENTIALITY PRACTICES* (2014), <http://internationalcompetitionnetwork.org/uploads/library/doc1014.pdf>; INT’L COMPETITION NETWORK, *GUIDANCE ON INVESTIGATIVE PROCESS* (2015), <http://www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf>; ORG. FOR ECON. CO-OPERATION & DEV., *PROCEDURAL FAIRNESS AND TRANSPARENCY* (2012), <http://www.oecd.org/daf/competition/mergers/50235955.pdf>; see also ABA Section of Antitrust Law International Task Force, *Best Practices for Antitrust Procedure*, ANTITRUST SOURCE 4-10 (Dec. 2015), https://www.americanbar.org/content/dam/aba/directories/antitrust/dec15_lipsky_tritell_12_11f.authcheckdam.pdf.

¹³ See, e.g., Edith Ramirez, Chairman, Fed. Trade Comm’n, *Keynote Address at the Antitrust in Asia Conference: Core Competition Agency Principles: Lessons Learned at the FTC* (May 22, 2014), https://www.ftc.gov/system/files/documents/public_statements/314151/140522abachinakeynote.pdf; Bill Baer, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, *Remarks as Prepared for Delivery at the 41st Annual Conference on International Antitrust Law and Policy: International Antitrust Enforcement: Progress Made; Work To Be Done* (Sept. 12, 2014), <https://www.justice.gov/atr/file/517736/download>; Koren W. Wong-Ervin, *Procedural Fairness and the Importance of Focusing Solely on Competition Factors in Competition Analysis*, INTERN’L ANTITRUST BULLETIN (ABA Section of Antitrust Law) (Aug. 2014), https://www.ftc.gov/system/files/attachments/key-speeches-presentations/wong-ervin_-_procedural_fairness_-_aug_2014.pdf.

that is limited to prohibiting conduct that harms the competitive process, and does not seek to achieve other objectives such as industrial policy, redistribution, or other political goals. (For an explanation of the dangers of and tradeoffs from considering non-competition goals in competition analysis, see my opening testimony pages 5-9, <https://judiciary.house.gov/wp-content/uploads/2017/06/Wong-Ervin-Testimony.pdf>)

Multilateral organizations play a critical role in promoting international convergence on best practices through soft law instruments such as recommended practices, as well as through the agency-to-agency interaction facilitated by such organizations (for example, interactions ranging from sharing experiences to providing peer pressure to conform with best practices). As one example of the ICN's achievements, over half of its member agencies that have merger enforcement have made changes to their laws and practices inspired by ICN merger recommendations. The U.S. antitrust agencies are critical leaders in these efforts.

Independent bodies are an important complement to the excellent work of multilateral organizations. Independent review is particularly important given that multilateral organizations are often led primarily by competition enforcement agencies that may have incentives to protect and even expand their enforcement powers, as well as to protect against reform efforts that threaten to limit their authority.

3. You note in your testimony that the preliminary way of addressing foreign competition enforcement agencies is public exposure and expressions of concern by the U.S. Government. Is there a sliding scale of responses that can be implemented? What would that look like?

Yes. At one end of the sliding scale are statements by U.S. antitrust agency officials to foreign competition enforcers. Further along the sliding scale are statements made by those at the highest-levels of our government to those at the highest-levels of foreign governments. Based on my experience, it is my belief that strong public statements of concern on issues such as due process, departures from economically-sound effects-based competition analysis, and the misuse of competition law to lower royalty rates for U.S. intellectual property rights in order to unduly benefit foreign implementers, are one effective means to spur needed change.

4. In your testimony you note significant concerns regarding the use of extraterritorial remedies, specifically recent decisions of the Korea Free Trade Commission. Can you elaborate on why that is such cause for concern?

Foreign regulation of conduct involving U.S. property and markets, including dictating the royalty rates and other terms upon which U.S. intellectual property right holders can license their U.S. property rights, likely conflict with U.S. sovereignty and principles of international comity. This is particularly the case when the conduct at issue has no direct effects on foreign consumers (i.e., consumers in the regulating jurisdiction), but rather is regulated in order to protect the regulating jurisdiction's local manufacturers or national champions. For example, the worldwide remedies imposed by the Korea Fair Trade Commission against Qualcomm apply to Korean companies even with regard to their operations outside Korea.

Imposing extra-jurisdictional remedies can also result in significant substantive conflicts with the competition agencies of other countries, particularly given the wide variety of approaches taken globally on competition matters generally and specifically with respect to matters involving intellectual property rights—namely with respect to honoring an IPR holder’s core right to exclude others from using the invention.¹⁴ Contradictory rulings place U.S. firms in the untenable position of being unable to comply with all orders at the same time. In addition, one agency imposing worldwide portfolio licensing remedies, including on foreign patents, for conduct that may be deemed procompetitive or benign in other jurisdictions, is likely to facilitate a lowest-common denominator approach.¹⁵ Lastly, extra-jurisdictional remedies have the potential to produce significant negative effects on competition and welfare, particularly if conduct that is widely considered to be generally procompetitive is the object of one-country’s worldwide prohibition.¹⁶

5. Consistent with the ICPEG Report, you recommend that the U.S. conduct an evaluation of the issues being discussed today; however, you note that we should begin with a self-study. Are there similar concerns foreign agencies have expressed about U.S. enforcement actions?

Foreign competition enforcers and judges frequently rely on U.S. enforcement and other actions to justify their conduct. For example, foreign enforcers and judges have pushed back when I have raised concerns about the use of competition law to achieve discriminatory industrial policy objectives, stating that the United States itself discriminates. One common example relied upon by foreign enforcers and judges is the U.S. Trade Representative’s veto of the International Trade Commission’s decision to grant an exclusion order in favor of a Korean company (Samsung) against a major U.S. company (Apple).¹⁷

Other common examples cited by foreign enforcers and judges to justify their own enforcement include the FTC’s consent orders against Bosch and Motorola Mobility/Google and the U.S. Department of Justice Antitrust Division’s (DOJ’s) Institute of Electrical and

¹⁴ “Economic theory and empirical evidence show that IPRs—a central feature of which is the right to exclude—incite the creation of inventions, ideas, and original works. They also facilitate the sale and licensing of intellectual property (IP) by defining the scope of property right protection and lowering transaction costs, and they produce incentives to develop alternative technologies as well as improvements and other derivative uses.” Comment of the Global Antitrust Institute, Antonin Scalia Law, George Mason University, on the Anti-Monopoly Commission of the State Council’s Anti-Monopoly Guidelines on the Abuse of Intellectual Property Rights at 3 (Apr. 13, 2017) (internal citations omitted).

¹⁵ *Id.*; see also Koren W. Wong-Ervin, *Protecting Intellectual Property Rights Abroad: Due Process, Public Interest Factors, and Extra-Jurisdictional Remedies*, COMPETITION POL’Y INT’L (Apr. 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947749.

¹⁶ Koren W. Wong-Ervin et al., *Extra-Jurisdictional Remedies Involving Patent Licensing*, COMPETITION POL’Y INT’L ANTITRUST CHRON. (Dec. 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2870505.

¹⁷ Letter from Michael B. G. Froman, United States Trade Representative, to Irving A. Williamson, Chairman, United States International Trade Commission, https://ustr.gov/sites/default/files/08032013%20Letter_1.PDF.

Electronics Engineers (IEEE) Business Review Letter (BRL). For example, enforcers in Asia have relied on the two FTC consents to support the use of the controversial “essential facilities” doctrine—a doctrine that the U.S. Supreme Court has made clear it will treat with great skepticism, stating that courts should be very cautious in recognizing exceptions to the general rule that even monopolists may choose with whom they deal.¹⁸ Similarly, within days of the DOJ’s issuance of its IEEE BRL, Chinese enforcers remarked that the DOJ’s letter validates China’s unfairly high pricing decision against Qualcomm, pointing to the section of the letter that essentially endorses the use of component (e.g., chipset) over end-user device licensing in arms-length licensing agreements.¹⁹

6. You have worked extensively with the FTC over the years. How would you evaluate the coordination between the various executive agencies that are responsible for interacting with foreign antitrust/competition agencies? Where do you see the most room for improvement?

In order to solve the problem of inappropriate use of competition laws, one must first clearly understand the problem. To that end, I reiterate my prior recommendation that the U.S. government (led by the U.S. antitrust agencies) sponsor a study (bringing together enforcers, academics, and industry professionals) to determine whether there is evidence of discriminatory enforcement, the use of industrial policy, economically-flawed analysis, good faith analysis that misses the mark for other reasons, or sound analysis. The level of government intervention and interaction will necessarily depend on the nature of the problem. For example, discriminatory enforcement is likely best (and most effectively) addressed at high levels of the U.S.

¹⁸ See *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004) (“We have never recognized [the essential facilities] doctrine . . . and we find no need either to recognize it or to repudiate it here.”); see also Maureen K. Ohlhausen, Remarks at GCR Live Conference: Antitrust Enforcement In China – What Next? (Sept. 16, 2014) (“During one of the . . . conferences I attended in China, I was listening to a presentation on the U.S. and Chinese antitrust laws and the FTC’s decision in Google SEPs came up. The lecturer argued that the U.S. has a strong essential facilities doctrine and then drew a line from this supposed precedent (with no mention of *Trinko*) and similar European decisions to the Chinese Anti-Monopoly Law and other Chinese laws that prohibit unreasonable refusals to deal as to essential facilities. . . Turning to a slide that said ‘inspiration from Google case,’ the presenter reasoned that the FTC’s decision in the Google SEPs matter meant that an ‘unreasonable’ refusal to grant a license for a standard-essential patent to a competitor should constitute monopolization under the essential facilities doctrine.”), https://www.ftc.gov/system/files/documents/public_statements/582501/140915gcrlive.pdf. See also Koren W. Wong-Ervin & Joshua D. Wright, *Intellectual Property and Standard Setting*, 17 FEDERALIST SOC’Y REV. 52, 56-58, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2878955.

¹⁹ See generally Koren W. Wong-Ervin, *Righting the Course: What the DOJ Should Do About the IEEE Business Review Letter*, COMPETITION POL’Y INT’L (Aug. 13, 2017) (“The DOJ should also renounce the sections of the prior administration’s IEEE BRL that endorse certain policies . . . [that] went well beyond the DOJ’s statutory mandate, which is limited to opining on whether the amendments raised antitrust issues, and were wholly unsupported by any evidence of their consequences, much less net benefits.”), <https://www.competitionpolicyinternational.com/righting-the-course-what-the-doj-should-do-about-the-ieee-business-review-letter/>.

government, whereas the U.S. antitrust agencies (along with educational institutes such as my own at Scalia Law School) are particularly well-suited to address economically flawed analysis through economic and other training programs.

7. ChemChina and Sinochem are planning to merge next year, creating the world's largest chemicals group with \$100bn of revenue. Under the current Coverage Rules, Section 802.52, this transaction might be exempt from Hart-Scott-Rodino (HSR) review since both companies are essentially state owned, despite the significant impact such a merger would have on the U.S. market. Do we need to update our Coverage Rules to ensure such transactions are properly reviewed?

- a. SPECIFIC PROVISION: Section 802.52 – a proposed transaction will be exempt from HSR review if (a) The ultimate parent entity of either the acquiring person or the acquired person is controlled by a foreign state, foreign government, or agency thereof; and (b) The acquisition is of assets located within that foreign state or of voting securities or non-corporate interests of an entity organized under the laws of that state.**

Anticompetitive harm caused by state-owned enterprises (SOEs) and state-supported enterprises is a serious issue that needs to be studied and addressed. Indeed, conferring upon SOEs privileges and immunities that are not available to their privately-owned competitors, or are not based on superior performance or efficiency, distorts competition in the market between state-owned and privately-owned rivals. In general, SOEs are not as efficient as privately-owned firms given that, unlike private firms, which are generally driven by profit, SOEs may have a number of other objectives including employment, social goals, or wealth distribution.²⁰ Use of SOEs to achieve non-market goals is generally a costly way to achieve such goals. These incentives can significantly affect their performance in the market and unnecessarily increase the costs of achieving those non-market goals.

With respect to Section 802.52 in particular, I defer to others as this is outside my areas of expertise. I note, however, that while transactions such as ChemChina/Sinochem may be exempt from the HSR Act, they are not exempt from Section 7 of the Clayton Act, i.e., the U.S. antitrust agencies can still investigate and challenge the merger. In addition, the motivation for Section 802.52 appears to be a recognition that U.S. antitrust laws should not interfere with sovereign decisions of other countries, following principles of international comity and the Act of State doctrine. Any efforts to amend this section should include a rigorous study that examines, among other things, issues of reciprocity and appropriate enforcement mechanisms (e.g., the ability to enforce non-compliance through fines or court orders with respect to companies over which the United States may not have jurisdiction).

²⁰ See, e.g., COMPETITION COMM., OECD, POLICY ROUNDTABLES: STATE OWNED ENTERPRISES AND THE PRINCIPLE OF COMPETITION NEUTRALITY 25-29 (2009), <http://www.oecd.org/daf/competition/46734249.pdf>.

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.

Prof. Eleanor M. Fox, Esq.
July 20, 2017

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?

Chairman Marino, Thank you for the question. I believe that in a relatively small number of high profile cases, foreign antitrust agencies apply antitrust law to US companies inappropriately.

I reserve the category for applications that have nothing to do with making markets work better and seem designed simply to appropriate US property, and for purely discriminatory applications of antitrust law.

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?

I give very high marks to international organizations in promoting the adoption of sound and fair procedural and substantive competition standards. The US agencies work very hard to get good results; they are leaders in the process. I do not have advice as to how they can do better. I am often a background part of the process, and when I have ideas I convey them directly.

3. You note in your testimony that you are concerned about the use of trade remedies to cure perceived discriminatory application of antitrust and competition laws against American businesses? Is there a scenario where you can see a situation escalating to the point where trade remedies may be the only option?

No. As I said in my testimony, I think discrimination – in the sense of applying different rules to outsiders than to domestic players – is rare and probably cannot be proved. The bigger problem is lack of due process protections such as we have at home. I doubt that trade sanctions would correct this problem, and I believe that we have made progress by constant conversations and insistence. More progress may be made through the International Competition Network.

4. In your testimony, you identify "hybrid state and private restraints" as especially dangerous to competition and likely to fall into the crack between trade and competition law. Can you give an example of one of these situations?

A good example is the Fuji Film/ Kodak dispute in the 1990s. For years, Kodak was unable to make inroads into the Japanese market because of the combination of Fuji Film's restraints and Japanese state restraints. The trade law could not take on the competition problem, and the competition law could not attack the state-restraint problem. The United States lost its case in the WTO.

Another example is the Chinese vitamin C case, which might be taken up by the U.S. Supreme Court. The Chinese vitamin C manufacturers admittedly fixed prices into the

United States, overcharging the American buyers. The Chinese agency averred, after the fact, that it ordered the Chinese firms to do so. Whether that Chinese government statement should provide a complete shield to the Chinese price-fixers is a matter of US antitrust law, but one might wonder whether a nation should so easily be able to give a free pass to its citizens to violate another nation's law.

5. You agree that the formation of a White House Working Group is a good idea. However, you note in your testimony that there is a significant tension between trade and competition which has led to conflicts between officials working in these areas. Is there a middle ground, where the interest of these two bodies of law can be reconciled?

Yes, I think there is significant space within which the trade and competition officials can work together. This is especially in the area of hybrid restraints, where an unreasonable state restraint combines with an unreasonable private restraint. In some cases the collaboration will help the officials from both specialties see and understand the whole picture; they can fill in for one another missing pieces of a puzzle. In some cases the collaboration may help the officials design useful changes to propose in WTO rules or domestic law. Officials from both disciplines, working together, might construct a better route for America in the many situations in which trade and competition values meet.

Responses to Questions for the Record of

Randy M. Stutz
American Antitrust Institute

Before the
United States House of Representatives
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

Washington, D.C.
June 29, 2017

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.

