

LEGISLATIVE TESTIMONY

**The Report and Recommendations of the International
Competition Policy Expert Group (ICPEG)**

**Testimony before the Subcommittee on Regulatory Reform,
Commercial and Antitrust Law
Committee on the Judiciary
U.S. House of Representative
June 29, 2017**

Alden F. Abbott

Deputy Director

and the

John, Barbara, and Victoria Rumpel Senior Legal Fellow

Edwin Meese III Center for Legal and Judicial Studies

The Heritage Foundation

Chairman Marino, Ranking Member Cicilline, and distinguished Members of the Subcommittee:

I am pleased to testify today regarding the Report and Recommendations of the International Competition Policy Expert Group, or ICPEG, released by the U.S. Chamber of Commerce in March 2017 (ICPEG Report or Report).¹ I applaud you for convening this hearing.

My name is Alden Abbott. I am the Deputy Director and the John, Barbara, and Victoria Rumpel Senior Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation.² The views I express in this testimony are my own, and should not be construed as representing any official position of the Heritage Foundation. The bulk of my testimony concerns the nature, purpose, and basic approach of the ICPEG Report. I will also briefly comment on evidence indicating that the misapplication of foreign competition laws, which motivated the Chamber of Commerce's decision to convene ICPEG, is indeed a serious public policy concern.

I. The ICPEG Report

I was asked to serve as Rapporteur for ICPEG, that is, as drafter of the Report that represented the consensus opinion of all of ICPEG's members, not my personal opinion. The Report was a bipartisan effort – ICPEG participants had served as senior trade and antitrust officials in both Republican and Democratic administrations, and included both practitioners and prominent academic lawyers and economists. I should add that ICPEG member Professor Eleanor Fox of New York University Law School issued a short separate statement, reproduced in the ICPEG Report. Professor Fox explained that in general she agreed with the Report and its recommendations, but wished to express some differences in perspective.³

The ICPEG Report is the product of deliberations by leading experts in international trade law and competition policy, and, as such, it incorporates insights from those two separate specialized areas. Thus, it is not surprising to find some report recommendations touching on the possible role of trade law as a remedy for harmful foreign misapplications of competition law.

A key aspect of the Report is its extensive discussion of the consensus U.S. understanding of the consumer welfare orientation of competition law, properly conceived and applied. Notably, this orientation informs the report's first recommendation, which "calls for the

¹ U.S. Chamber of Commerce, *International Competition Policy Expert Group: Report and Recommendations* (Mar. 14, 2017), available at https://www.uschamber.com/sites/default/files/icpeg_recommendations_and_report.pdf.

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³ See ICPEG Report at 33.

Trump Administration to expressly confirm that, as an organizing principle, competition law and policy should focus on eliminating unreasonable artificial impediments to competition, both private and governmental, as a way of promoting economic growth, innovation, and consumer welfare.”⁴ Consistent with the philosophy that informs this recommendation, the Trump Administration has announced a focus on excessive federal regulatory impediments that merit being eliminated, in the context of agency-specific regulatory review task forces established by Executive Order in February of this year.⁵

The ICPEG Report fully supports the ongoing domestic and international work of the two federal antitrust agencies, the Federal Trade Commission and the Justice Department’s Antitrust Division. The Report does not call for involvement of non-antitrust agencies or the White House in the carrying out of American antitrust agency investigations, or in the antitrust agencies’ making of policy determinations, or in the antitrust agencies’ regular cooperation with foreign counterparts, or in the antitrust agencies’ periodic bilateral and multilateral meetings 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 the carrying out of their statutory roles, which encompass antitrust-related law enforcement and policy functions.

What the Report does do is call for better coordination of federal government responses to “situations where a foreign nation’s misuse of its competition law impedes international trade and investment by imposing an unreasonable, unjustified or discriminatory burden or restriction on U.S. commerce, including where the foreign government’s actions may not violate an international trade or investment agreement.”⁶ It does this by supporting the creation of a dedicated interagency White House Working Group.

In other words, the Report recommends a new method for better coping with certain foreign governments’ abuses of foreign laws that harm the U.S. – and, in particular, foreign abuses that distort competition law in an anticompetitive and economically harmful manner. Curbing such foreign abuses is outside the purview of the federal antitrust agencies.

Creating a cooperative government mechanism to deal with these problems – one through which the federal antitrust agencies and other interested government actors can be heard, and decisions reached through careful and orderly joint deliberation – is a form of good government. Properly implemented, it may lead to more effective methods to curb economically harmful practices, and put foreign governments on notice that serious abuses will be reviewed and dealt with in a systematic fashion. In my view, such a mechanism also reduces the pressure on the American antitrust agencies to “do something” with respect to foreign antitrust abuses that is beyond the American agencies’ powers.

To be clear, the federal antitrust agencies will be able to continue to cooperate and exchange views with foreign authorities as before. They will likewise be able, as before, to

⁴ ICPEG Report at 7.

⁵ See Executive Order No. 13777, “Enforcing the Regulatory Reform Agenda” (Feb. 24, 2017), *available at* <https://www.whitehouse.gov/the-press-office/2017/02/24/presidential-executive-order-enforcing-regulatory-reform-agenda>.

⁶ ICPEG Report at 8.

suggest that foreign counterpart agencies adopt sound due process standards and avoid the misapplication of competition law to promote non-competition-based goals. Under the new mechanism, however, the federal antitrust agencies will not bear the perceived burden of forging solutions to particular foreign economic distortions that falsely fly under the color of competition law.

I would emphasize that the Report also calls for further efforts by multilateral institutions, including the Organization for Economic Cooperation and Development (OECD), the World Bank, the International Competition Network (ICN), and the World Trade Organization (WTO), to promote the adoption of best procedural and substantive competition law standards, and, in the case of the WTO and the OECD, to carry out specific peer reviews of foreign countries' national competition policies. In short, the Report recognizes the importance of continuing to work to develop a global consensus on sound competition law and policy principles, both procedural and substantive.

One specific competition issue, the application of antitrust law to intellectual property (IP), is mentioned in a section of the Report that explains how unreasonably broad remedial orders in other jurisdictions may undermine U.S. IP rights. The Report simply and briefly states that, "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."⁷ I would note that good recent scholarship, which is ably discussed in a recent *Harvard Journal of Law and Technology* article by Acting FTC Chairman Maureen Ohlhausen,⁸ underscores the importance of strong IP protection to national economic growth and innovation.

Finally, the Report does not recommend or anticipate particular outcomes. In recognizing that certain foreign abuses of competition laws may be reachable by U.S. international trade law, it calls for the Administration to do a detailed study of potential legal remedies that might be applicable to such abuses, including by implication all international legal ramifications that might stem from such applications. Whether or how particular U.S. laws might or might not be applied, and under what circumstances, are questions that are not addressed. Those are matters that fall within the policy purview of the Trump Administration, to address as it sees fit.

II. The Misapplication of Foreign Competition Laws is a Serious Problem

The ICPEG Report is not a mere exercise in speculation about a theoretical problem that is of little or no significance in the real world. A substantial body of evidence supports the proposition that the misapplication of competition laws by foreign governments threatens to impose substantial economic harm on American companies.

The American Bar Association Section of Antitrust Law highlighted the issue of inappropriate application of antitrust law in its January 2017 Presidential Transition Report

⁷ ICPEG Report at 31.

⁸ Maureen K. Ohlhausen, *Patent Rights in a Climate of Intellectual Property Rights Skepticism*, 30 HARVARD JOURNAL OF LAW & TECHNOLOGY 103 (2016).

(ABA Report).⁹ The ABA Report was authored by leading American antitrust experts who possess extensive knowledge of global antitrust enforcement trends. The Report noted that the global proliferation of antitrust laws has generated “numerous and still-expanding opportunities for friction, complexity, and inefficiency capable of adversely affecting the economy, the business community, and consumers inside and outside the U.S.” [In particular], “[c]osts can arise from inapt substantive standards (including intermixture and confusion within many competition laws of both economic and other policy goals), [and] lack of transparency,” among other factors.¹⁰ This led the ABA Report to recommend that the federal antitrust agencies should where appropriate “actively seek to intercede in foreign enforcement proceedings involving U.S. firms.”¹¹ Relatedly, the ABA Report urged that the U.S. antitrust agencies explore new channels of communication with their foreign counterparts, particularly “where basic procedural standards are materially deficient, or where foreign agency actions (or proposed actions) are contrary to sound substantive law, to consensus notions of territoriality, or to other practices that enjoy broad consensus support among antitrust enforcement authorities in numerous jurisdictions.”¹² In short, the problems noted in the ABA Report, which reflect the direct experience of the American antitrust community, are of a piece with the concerns highlighted in the ICPEG Report.

The misapplication of antitrust law is also recognized as an important issue by competition experts from around the world. Last month, I participated as a non-governmental advisor (NGA) in the ICN’s May 10-12 Annual Conference held in Porto, Portugal,¹³ and attended a May 9 “Pre-International Competition Network Forum” jointly sponsored by the International Bar Association, the International Chamber of Commerce, and the World Bank Group.¹⁴ At these meetings, and at informal “side sessions” of international scholars and practitioners, the misuse of national competition laws repeatedly was mentioned. One side meeting focused in particular on competition agency actions or failures to act that allow anticompetitive national government support for “national champions” and other anticompetitive forms of “industrial policy” to go untouched. In certain cases, the activities of competition agencies reflect the dilemma that some competition laws allow for specific “public policy” carve-outs that limit the effectiveness of those statutes in promoting consumer welfare. Other conversations centered on the need to combat insufficient due process in some competition agency proceedings.

Finally, efforts to combat the misapplication of competition law (including derogations from due process in its application) find growing consensus support in multinational rules and statements of principle. In particular, at the regional level, Article 106 of the Treaty on the

⁹ American Bar Association Section of Antitrust Law, *Presidential Transition Report: The State of Antitrust Enforcement* (Jan. 2017), available at http://www.americanbar.org/content/dam/aba/publications/antitrust_law/state_of_antitrust_enforcement.authcheckdam.pdf.

¹⁰ ABA Report at 56-57.

¹¹ ABA Report at 59.

¹² ABA Report at 59-60.

¹³ See <https://icn2017.concorrenca.pt/agenda>.

¹⁴ See <http://www.int-bar.org/Conferences/conf803/binary/Porto%20Pre-ICN%202017%20programme.pdf>.

Functioning of the European Union (TFEU) in large part bars EU members from shielding their state-owned or state-privileged enterprises from TFEU antitrust scrutiny.¹⁵ Similarly, Articles 107-109 of the TFEU, the “state aid” provisions, generally prohibit market-distorting subsidies by EU member states to particular competitors, subject to certain exceptions.¹⁶ On a global level, the ICN has adopted Recommended Practices that call for the neutral application of antitrust enforcement to state-created monopolies.¹⁷ With respect to due process, the ICN has found that “[t]here is a broad consensus among ICN members regarding the importance of transparency, engagement and protection of confidential information during competition investigations”, and has therefore issued guidance regarding “key investigative principles and practices important to effective and fair investigative process”.¹⁸

In sum, although reasonable observers may differ regarding how (or even whether) to deal with the misuse of national competition laws, it is widely recognized, here and abroad, that such misuse exists, and has significant policy consequences. Notably, a body of regional and multinational norms supports limiting the scope of antitrust laws to the promotion of market-based competition that is designed to enhance consumer welfare. In my opinion, the United States Government should not hesitate to invoke the principles embodied in those norms if it chooses to confront foreign competition law abuses.

III. Conclusion

Thank you once again for inviting me to testify at this hearing. I look forward to your questions.

¹⁵ See generally José Luis Buendía Sierra, *Exclusive or special rights under article 106 TFEU: An overview of EU and national case law*, 23 March 2017, e-Competitions Bulletin Exclusive rights (Art. 106 TFEU), Art. N° 44436, available at <http://www.concurrences.com/en/bulletin/special-issues/exclusive-rights-art-106-tfeu-en/exclusive-or-special-rights-under-article-106-tfeu-an-overview-of-eu-and-44436-en>.

¹⁶ See generally European Commission, *State Aid Control* (2016), available at http://ec.europa.eu/competition/state_aid/overview/index_en.html.

¹⁷ ICN, *State-Created Monopolies Analysis Pursuant to Unilateral Conduct Laws* (2007), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc318.pdf>.

¹⁸ ICN, *ICN Guidance on Investigative Process* (2015), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf>.