

# INTERNATIONAL COMPETITION POLICY EXPERT GROUP

*Report and Recommendations*

MARCH 2017





Dear Reader:

The U.S. Chamber of Commerce is pleased to share this report. The Chamber and its members have long been committed to aligning trade, regulatory and competition policy in support of open and competitive markets. In recent years, however, the Chamber has grown concerned with disparate approaches to antitrust enforcement around the world and increasingly misguided uses of antitrust as a means to achieve industrial policy outcomes.

In response, the International Competition Policy Expert Group was formed at the invitation of the Chamber. A diverse group of highly regarded experts in competition and trade policy — representing a range of opinions and views — was invited to serve. The group's deliberations occurred without Chamber involvement, and the conclusions found in the report are their own.

The Chamber would like to extend its deep gratitude to those who served as experts and to the rapporteur for the hard work that went into this report. The report represents a tremendous effort from distinguished experts with decades of experience in trade and competition law and economics, who freely volunteered their time and labor.

The report is without question a significant policy contribution on the nexus of competition and trade policy. We invite U.S. policymakers to closely examine and consider the recommendations in this report.

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To President Donald J. Trump and the 115th Congress of the United States:

Today, nearly every nation in the world has some form of antitrust or competition law regulating business activities occurring within or substantially affecting its territory. The United States has long championed the promotion of global competition as the best way to ensure that businesses have a strong incentive to operate efficiently and innovate, and this approach has helped to fuel a strong and vibrant U.S. economy. But competition laws are not always applied in a transparent, accurate and impartial manner, and they can have significant adverse impacts far outside a country's own borders. 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.

Up to now, the United States has had some, but limited, success in addressing this problem. For that reason, in August of 2016, the U.S. Chamber of Commerce convened an independent, bi-partisan group of experts in trade and competition law and economics to take a fresh look and develop recommendations for a potentially more effective and better-integrated international trade and competition law strategy.

As explained by the U.S. Chamber in announcing the formation of this group,

The United States has been, and should continue to be, a global leader in the development and implementation of sound competition law and policy. . . . When competition law is applied in a discriminatory manner or relies upon non-competition factors to engineer outcomes in support of national champions or industrial policy objectives, the impact of such instances arguably goes beyond the role of U.S. antitrust agencies. The Chamber believes it is critical for the United States to develop a coordinated trade and competition law approach to international economic policy.<sup>1</sup>

The International Competition Policy Expert Group ("ICPEG") was encouraged to develop "practical and actionable steps forward that will serve to advance sound trade and competition policy."<sup>2</sup>

The Report accompanying this letter is the result of ICPEG's work. Although the U.S. Chamber suggested the project and recruited participants, it made no effort to steer the content of ICPEG's recommendations.<sup>3</sup>

The Report is addressed specifically to the interaction of competition law and international trade law and proposes greater coordination and cooperation between them in the

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<sup>1</sup> U.S. Chamber of Commerce, *International Competition Policy Review*, available at <https://www.uschamber.com/international-competition-policy-review>.

<sup>2</sup> U.S. Chamber of Commerce, Aug. 26, 2016, *Inside U.S. Trade: Chamber Sets Up Independent Group to Review International Competition Policy* [Press Release], available at <https://www.uschamber.com/the-news/inside-us-trade-chamber-sets-independent-group-review-international-competition-policy>.

<sup>3</sup> ICPEG members participated in their individual capacities and the views expressed in the report and recommendations should not be ascribed to any of their firms, clients or academic or other institutions with which they may be associated.

formulation and implementation of U.S. international trade policy. It focuses on the use of international trade and other appropriate tools to address problems in the application of foreign competition policies through 12 concrete recommendations.

**Recommendations 1 through 6** urge the Trump Administration to prioritize the coordination of international competition policy through a new, cabinet-level White House working group (the “Working Group”) to be chaired by an Assistant to the President. Among other things, the Working Group would:

- set a government-wide, high-level strategy for articulating and promoting policies to address the misuse of competition law by other nations that impede international trade and competition and harm U.S. companies;
- undertake a 90-day review of existing and potential new trade policy tools available to address the challenge, culminating in a recommended “action list” for the President and Congress; and
- address not only broader substantive concerns regarding the abuse of competition policy for protectionist and discriminatory purposes, but also the denial of fundamental process rights and the extraterritorial imposition of remedies that are not necessary to protect a country’s legitimate competition law objectives.

**Recommendations 7 through 12** focus on steps that should be taken with international organizations and bilateral initiatives. For example, the United States should consider:

- the feasibility and value of expanding the World Trade Organization’s regular assessment of each member government by the Trade Policy Review Body to include national competition policies and encourage the Organisation for Economic Co-operation and Development (OECD) to undertake specific peer reviews of national procedural or substantive policies, including of non-OECD countries;
- encouraging the OECD and/or other multilateral bodies to adopt a code enumerating transparent, accurate, and impartial procedures; and
- promoting the application of agreements under which nations would cooperate with and take into account legitimate interests of other nations affected by a competition investigation.

The competition and trade law issues addressed in the Report are complex and the consequences of taking any particular action vis-a-vis another country must be carefully considered in light of a number of factors beyond the scope of this Report. ICPEG does not take a view on the actions of any particular country nor propose specific steps with respect to any actual dispute or matter. In addition, reasonable minds can differ on ICPEG’s assessment and recommendations. But we hope that this Report will prompt appropriate prioritization of the issues it addresses and serve as the basis for the further development of a successful policy and

action plan and improved coordination and cooperation between U.S. competition and trade agencies.

Deborah A. Garza  
*Competition Law Co-Chair*

Andrew W. Shoyer  
*International Trade Law Co-Chair*

## **ACKNOWLEDGEMENTS**

ICPEG members wish to acknowledge and thank Alden Abbott, who served as Rapporteur for the group, for his insights and invaluable assistance in helping to move the work of ICPEG forward.

We also thank Afroditi Mathioudaki of Sidley Austin LLP and Lauren Willard and Gabriel Fulmer of Covington & Burling for their assistance.

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## I. INTRODUCTION

Almost all nations today have some form of competition law regulating the commercial activities of firms operating in their markets.<sup>4</sup> In the United States, we have long believed that promoting competition globally is the best way to ensure that businesses have a strong incentive to operate efficiently and innovate, keeping prices down and offering the highest quality products and services to consumers. This approach has helped to fuel a strong and vibrant U.S. economy and enjoys strong global support and endorsement from economists and economic institutions around the world.

But competition laws are not always applied in a sound, transparent, and non-discriminatory 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.

Up to now, the United States has had some, but limited, success in addressing this problem. But much more needs to be done. Mindful of this, the U.S. Chamber of Commerce (“U.S. Chamber”) convened a bipartisan group of experts in trade and competition law and economics — referred to in this Report as the International Competition Policy Experts Group

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<sup>4</sup> Antitrust laws, which focus on unreasonable restraints of trade and anticompetitive mergers, are generally referred to as competition laws by countries other than the United States. This paper employs the term competition law and antitrust law interchangeably.

(or ICPEG)— to propose recommendations to the new Administration and Congress for a better integrated and more effective international competition and trade policy. This consensus Report is the fruit of ICPEG’s deliberations.<sup>5</sup> ICPEG agrees that it is vital for the new Administration and Congress to focus jointly on competition and trade considerations in formulating future U.S. international economic policy.

Section II of this Report sets out 12 recommendations. Recommendations 1 through 6 focus on the coordination of competition and international trade policy within the U.S. government. Recommendations 7 through 12 focus on how the United States can most effectively promote its international competition and trade policy through its participation in international organizations focused on competition and trade and its existing and future bilateral, plurilateral and multilateral trade agreements. All of these recommendations require closer coordination and cooperation between the U.S. antitrust enforcement agencies (the Justice Department and Federal Trade Commission), on the one hand, and international policy agencies, on the other hand (especially the Office of the United States Trade Representative and the Departments of State, Treasury and Commerce ).

**Recommendation 1** calls for the Trump Administration to continue 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. As a corollary to this principle, competition law should not be used to either favor or penalize specific competitors or industries,

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<sup>5</sup> Although the U.S. Chamber suggested this project and recruited the participants, it played no role in influencing the content of these recommendations, which solely represent the views of the expert group. ICPEG members participated in their individual capacities and the views and conclusions contained herein should not be attributed to their firms, clients or the academic or other institutions with which they are affiliated. Finally, although this report and its recommendations reflect a general consensus among participants, as with any committee drafting project, individual participants might have emphasized or de-emphasized different aspects of it.

to interfere with the competitive process, or as leverage to induce companies to further objectives other than those of the competition laws themselves.

**Recommendation 2** encourages the Trump Administration to use existing trade laws, including (but not limited to) Section 301 of the Trade Act of 1974, as amended, in 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.

Heretofore, the U.S. government has not systematically examined the interplay between antitrust and trade policies. To rectify this situation, **Recommendation 3** urges the Trump Administration to create a new White House Working Group on International Competition Policy (the "Working Group") to do just that. This cabinet-level Working Group, to be chaired by an Assistant to the President, would prioritize government-wide coordination of international competition and trade policy and set a coordinated strategy for articulating and promoting policies to address the misuse of competition law by other nations that impede competition and harm U.S. companies.<sup>6</sup> Among other things, the Working Group would review foreign regulations and policies that have the effect of imposing substantial anticompetitive harm on U.S. firms and identify legal tools that the United States can use to deal with the inappropriate use of competition laws by other nations. It would also determine which international agreements should include competition chapters (including through the amendment of existing agreements), what provisions should be included in competition chapters, and how those provisions should be enforced.

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<sup>6</sup> It is not intended that the Working Group would involve itself in domestic U.S. antitrust enforcement decisions.

**Recommendation 4** proposes that, as an initial project, the Working Group would oversee a 90-day review of what policy tools are already available to deal with overlapping international trade, investment, and competition problems, and also what new tools should be considered. This review would result in a recommended “action list” to be submitted to the President, addressing steps that should be taken or considered.

**Recommendation 5** urges that the Working Group focus on how to effectively ensure that a country applies its competition laws in a manner that is consistent with accepted standards of process, to ensure that competition enforcement proceedings are transparent, accurate, and impartial. The Trump Administration should continue — and strengthen — multinational and bilateral efforts in this era to establish standards and ensure that countries abide by them, including through the enforcement of existing commitments in trade agreements. In addition, the Working Group should focus on what competition law and international trade law options are available for dealing with these issues, such as through a listing mechanism like the Special 301 listing of jurisdictions that have failed to provide adequate protection of intellectual property rights or through the imposition of targeted sanction under Section 301.

Competition law remedies should be only as broad as reasonably necessary to achieve a country’s legitimate competition goals. **Recommendation 6** advises that the Working Group consider how the United States can most effectively respond to instances in which a foreign competition authority seeks to limit the business activities of U.S. companies through the imposition of unreasonably broad extraterritorial remedies that are not reasonably necessary to protect that country’s legitimate competition law objections.

**Recommendation 7** parallels Recommendation 1 in calling for the United States to continue to work to solidify international consensus on the appropriate use of competition law and the importance of transparent, accurate, and impartial enforcement processes.

**Recommendations 8 and 9** suggest that the United States should request the World Trade Organization (WTO) and Organization for Economic Cooperation and Development (OECD) to carry out specific peer reviews of national policies (procedural and substantive), including of non-OECD countries.

**Recommendation 10** urges the U.S. to consider recommending that the OECD and/or other multilateral bodies adopt a code enumerating minimum due process or procedural fairness guarantees and requesting other international agencies to study the economic benefit of enhanced process and transparency protections. The United States should also promote transparent, accurate, and impartial procedures as a topic for the International Competition Network (ICN), which is a network of almost all the world's competition authorities. These topics could be a key "ICN Second Decade" initiative.

**Recommendation 11** calls on the Trump Administration to support the establishment of an ICN working group on the continuing serious issue of anticompetitive harm caused by state-owned enterprises (SOEs) and state-supported (but not owned) enterprises.

Finally, to minimize unnecessary jurisdictional conflict, **Recommendation 12** proposes that the United States promote agreements between and among international competition authorities under which they would cooperate with and take into account the legitimate interests of other nations affected by a competition law investigation or action.

Section III of the Report explains and elaborates on the foregoing recommendations.

First, it focuses on the appropriate goals and application of competition law, in the United States and globally. It describes the long-held U.S. consensus view that competition law should focus exclusively on securing a free competitive process, unfettered by either private or governmental restraints that unreasonably distort competition to the detriment of consumer welfare.<sup>7</sup> It recommends that the Trump Administration expressly endorse this understanding and reject the introduction of other goals into competition law assessments.

Second, Section III explains that, while they share a general goal of promoting competition through expanding the international trade of goods and services, international trade laws include specific provisions designed to respond to acts, policies or practices of foreign governments that violate an international trade agreement or impose an unjustified, unreasonable, or discriminatory burden or restriction on U.S. commerce. Section III focuses on how U.S. trade laws and international trade and investment negotiations can be used to deal with business restraints and anticompetitive foreign government actions that are not adequately dealt with by competition law. Where other governments have used their competition laws in an anticompetitive way, to discriminate against foreign-based competitors to favor national commercial interests, the United States should consider how to use trade policy tools, like trade law sanctions, to counteract foreign actions that harm, rather than strengthen, the competitive process and the international trade and investment system.

Third, Section III examines the lack of accuracy, impartiality and transparency in the conduct of some foreign competition law investigations and prosecutions. It explores possible

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<sup>7</sup> Although the precise meaning of consumer welfare has been debated, there is general agreement that it does not include non-competition related objectives or favoring one set of competitors over another. See 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 110 (3d ed. 2006) (“[P]opulist goals should be given little or no independent weight in formulating antitrust rules and presumptions. As far as antitrust is concerned, they are substantially served by a procompetitive policy framed in economic terms.”).

means for dealing with these deficiencies, including by enforcing and crafting new provisions in international agreements.

Fourth, and finally, Section III notes two specific and serious problems that merit special attention: (i) foreign competition authorities' challenges to U.S. intellectual property rights and (ii) threats to impose global remedies that unreasonably restrict the business activities of U.S. companies outside the foreign jurisdiction's market.

Finally, while U.S. antitrust laws are generally applied in an impartial and nondiscriminatory manner, this report is not intended to suggest that application of these laws is perfect. U.S. antitrust enforcement agencies should make every effort to set an example in the efficient, impartial and transparent application of competition laws on the basis of sound factual and economic analysis. We are aware, moreover, that how the United States applies our antitrust and trade laws will be reflected back on us by the actions of other countries, and we should strive to conform our own actions to the principles enunciated in this report.

## II. RECOMMENDATIONS

### A. *U.S. Government Coordination And Action*

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1. The United States should expressly confirm that, as an organizing principle, competition law and policy should focus on unreasonable artificial private and governmental impediments to a vigorous competitive process that promotes economic efficiency and consumer welfare, and should continue to promote this principle internationally.
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2. The internationalization of competition law enforcement has led to concerns that competition policies are being used to protect home markets and promote national champions to the detriment of international trade in goods and services. Existing trade laws, including (without limitation) Section 301 of the Trade Act of 1974, as amended, can and should be used to address a foreign nation's misuse of competition law that impedes international trade and investment by imposing unreasonable, unjustifiable or discriminatory burdens or restrictions on U.S. commerce whether or not they violate an international trade or investment agreement.
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3. The U.S. government heretofore has not systemically examined the interplay between antitrust and international trade and investment policies. Increasing concerns over the misuse of competition law enforcement to advance domestic industrial policy and the absence of adequate procedural protections demonstrate that greater focus and better coordination in this area is needed. ICPEG accordingly recommends that the United States prioritize the coordination of international competition and trade policy through a White House Working Group on International Competition Policy (the "Working Group") including representatives from the U.S. Justice Department, Federal Trade Commission, Council of Economic Advisers, Trade Representative (USTR), State Department, Commerce Department, and Treasury Department.
    - 3a. The Working Group should be a cabinet-level entity chaired by an Assistant to the President. The Working Group would decide how frequently to meet at a senior level, and what decision-making processes should be delegated to the sub-cabinet level (for example, regular "deputy-level" meetings), but there should be a clear commitment to the process from the highest level.<sup>8</sup>
    - 3b. The Working Group should set an overall, high-level strategy for articulating and promoting substantive and procedural policies in dealing with both individual nations and multilateral organizations (such as the OECD, the United Nations

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<sup>8</sup> To ensure that the input from competition and trade agencies is considered together, this Working Group should be distinct from the new National Trade Council.



Conference on Trade and Development (UNCTAD), ICN, World Trade Organization (WTO) and Group of 20 (G20)).

- 3c. A central focus of the Working Group should be how to effectively respond to the inappropriate use of foreign competition laws in the pursuit of industrial policies and other noncompetition goals, such as the promotion and protection of national champions and forced technology transfers. The Working Group should seek to identify available legal tools that the U.S. (in particular, USTR) can bring to bear to deal with issues, what new legal tools might be needed, and how to effectively use those tools.
  - 3d. The Working Group should also review foreign regulations and policies that have the effect of imposing substantial anticompetitive harm on U.S.-based businesses seeking to compete in foreign countries and global markets. Such foreign measures, which do not strictly involve the intentional misapplication of competition law (for example, unjustified regulatory barriers to entry), may prove particularly insidious and long-lived if not challenged.
  - 3e. The Working Group should specifically determine which international agreements should include competition chapters (including through the amendment of existing agreements), what should be included in competition chapters, and how those provisions should be enforced, including through the dispute settlement mechanisms otherwise applicable to that agreement.
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- 4. The Working Group should oversee an initial 90-day review of U.S. policy tools to deal with the interaction of international trade, investment, and competition issues. This review should identify (i) where norms have already been established; (ii) where norms need to be articulated; (iii) existing agreements the United States could consider entering into or new agreements it could consider promoting; (iv) existing legal tools the United States can use to take unilateral actions (such as through Section 301 of the Trade Act of 1974, as amended) to prevent the use of competition policies in a manner that violates an international trade agreement or imposes an unjustified, unreasonable or discriminatory burden or restriction on U.S. commerce; (v) existing international provisions that the United States can consider invoking to deal with foreign anticompetitive state actions (such as Article XVII of the GATT 1994); and (vi) new legal tools that would better address the international competition, investment and trade challenges that the U.S. will likely confront in the future. A report and recommended "action list," which takes into account the costs as well as the benefits of utilizing different legal tools, should be submitted to the President at the end of the 90-day review.
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- 5. In addition to the broader substantive concerns regarding the misuse of competition policy for protectionist and discriminatory purposes, the Working Group should also

address the need for transparent, accurate, and impartial competition enforcement processes globally, and consider options for dealing with specific procedural issues, such as targeted sanctions or a listing mechanism akin to USTR's annual Special 301 listing of foreign nations that have inadequate IP protection. Senior U.S. representatives should be encouraged to emphasize adherence to and enforcement of due process clauses in the competition provisions of trade agreements to which the United States is a party.

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6. Antitrust remedies should be only as broad as necessary to achieve legitimate competition enforcement goals. Accordingly, the Working Group should address the extraterritorial imposition of remedies by a foreign competition authority that specifically disadvantage U.S. companies and are not reasonably necessary to protect that country's legitimate competition law objectives. The Working Group would decide on how to effectively use existing U.S. laws, including Section 301, to deal with individual or systemic substantive problems as they arise. The Working Group should also explore whether new U.S. laws are needed to more effectively address these problems.
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#### ***B. International Organization And Bilateral Initiatives***

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7. The United States should continue to work on a bilateral and multilateral basis to solidify consensus on a substantive competition law standard based on the protection of a vigorous competitive process, free from artificial impediments.
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8. The United States should consider the feasibility and value of expanding the WTO's regular assessment of each Member government by the Trade Policy Review Body to cover national competition policies, both procedural and substantive. The WTO could coordinate with the OECD as useful and appropriate in undertaking its analyses.
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9. The OECD should be encouraged to consider undertaking competition peer reviews of another country's competition authority at the request of an OECD member, without first obtaining the consensus agreement of that competition authority. The OECD should also be encouraged to consider undertaking competition peer reviews of non-OECD countries, such as China or Russia. These peer reviews would involve OECD staff and would be targeted to specific issues (for example, the unreasonably broad imposition of global competition remedies or failure to provide an adequate ability to contest competition law allegations).
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10. The United States should consider promoting the adoption of a code by the OECD and/or other multilateral bodies enumerating transparent, accurate, and impartial procedures. Concurrently, the United States should consider the utility of requesting that other forums (for example, the World Bank) study the economic benefits of enhanced due process and transparency protections. The United States should also promote transparent, accurate, and impartial competition law enforcement processes as a topic for consideration by all ICN Working Groups, and ask that the evaluation of procedural soundness and transparency be made an ICN special project and key “ICN Second Decade” initiative.

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11. The United States — through interagency cooperation — should support the establishment of an ICN working group to focus on the continuing serious problem of anticompetitive harm caused by state-owned enterprises (SOEs) and state-supported (but not owned) enterprises.

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12. To minimize unnecessary jurisdictional conflicts, the United States should consider promoting the application of agreements under which nations would cooperate with and take into account the legitimate interests of other nations affected by a competition investigation. The United States should also consider promoting the further development of such principles by the OECD and the ICN.

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The Working Group proposal in Recommendation 3 would not in any way displace or undermine the roles and responsibilities of the various federal agencies in the implementation or enforcement of U.S. antitrust or U.S. trade policy, law or agreements. Rather, it should serve as a forum for developing a more coordinated Administration response to other governments’ abuses of their commitments and laws that impose substantial anticompetitive harm on American businesses. The Working Group is not designed to serve as a continuing systematic supervisor of the work of the antitrust agencies in regard to their efforts to secure effective global standards of sound due process and substantive principles, nor of the work of international trade agencies in the negotiation or enforcement of trade laws and agreements. In the past, however, it has often been difficult for federal antitrust and international trade agencies to coordinate effectively, and the negative consequences for U.S. interests have increased as foreign governments have

stepped up the use of competition law as an instrument of international trade and industrial policy. The Working Group is designed to help develop consensus Administration policies to deal with problems of this nature, such as the possible engagement of agencies in addition to antitrust agencies and possible invocation of U.S. trade law or other sanctions, and the more effective engagement of antitrust agencies with their counterparts in defense of U.S. interests, when and if appropriate. In particular, the engagement of agencies in addition to the antitrust agencies could take place where the conduct of the foreign competition agency appears to be substantially influenced by considerations other than competition principles, and where important U.S. interests are affected.

### III. ANALYSIS

#### A. *The Goals and Application of Competition Law*

##### 1. *The U. S. Approach To Antitrust: Protecting A Vigorous Competitive Process To Promote Consumer Welfare*

For roughly forty years, the U.S. Supreme Court has recognized that the appropriate goal of U.S. antitrust law is the promotion of consumer welfare. The Supreme Court stated in 1979 that “Congress designed the Sherman [Antitrust] Act as a ‘consumer welfare prescription,’”<sup>9</sup> a position it has consistently maintained. As leading antitrust scholars have explained,

The promotion of economic welfare as the lodestar of antitrust laws—to the exclusion of social, political, and protectionist goals—transformed the state of . . . [antitrust] law . . . . Indeed, there is now widespread agreement that this evolution toward welfare and away from noneconomic considerations has benefited consumers and the economy more broadly. Welfare-based standards have led to greater predictability in judicial and [enforcement] agency decision making.”<sup>10</sup>

As a general matter, a focus on the welfare of consumers tends to further economic efficiency and to maximize overall economic welfare.

As the means to promoting this welfare goal, there is widespread agreement that U.S. antitrust law should target impediments to the workings of a vigorous competitive process. As

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<sup>9</sup> Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979).

<sup>10</sup> Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405, 2406-07 (2013) (footnote citations omitted). See also William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 35 (“Both [the Chicago School and Harvard School] generally embrace an economic efficiency orientation that emphasizes reliance on economic theory in the formulation of antitrust rules. . . [T]he two schools discourage consideration of non-efficiency objectives such as the dispersion of political power and the preservation of opportunities for smaller enterprises to compete.”); Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CALIF. L. REV. 797, 798 (1987) (“The economic goal of [antitrust] policy is to promote consumer welfare through the efficient use and allocation of resources, the development of new and improved products, and the introduction of new production, distribution, and organizational techniques for putting economic resources to beneficial use. . . [T]here is no reasonable basis for presuming that courts must give priority or even weight to populist goals where the pursuit of such goals might injure consumer welfare by interfering with competitive pricing, efficiency, or innovation.”)

the Federal Trade Commission explains, antitrust law is designed “to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up.”<sup>11</sup> And, where intellectual property (“IP”) is concerned, enforcers should recognize that effective protection of IP rights provides an incentive for investment in innovation that leads to the creation of new products and services, unlocking dynamic competition that promotes long-term consumer welfare.

In short, U.S. antitrust enforcement is geared toward the protection of the free competitive process as a whole — not the protection of particular competitors — because courts, enforcement agencies and academics believe that it leads to the greatest welfare in the short and especially the long term. Modern U.S. antitrust enforcement accordingly focuses on the likely effects of particular conduct on the competitive process, taking into account objective economic data and economic analysis, with a full consideration of business efficiencies that may motivate particular business practices. The U.S. federal judiciary also has endorsed and applied this “economic approach” to antitrust law.

The ICPEG strongly recommends that the new Administration remain firmly committed to the promotion of a free competitive process and as the “lodestar” of U.S. antitrust law, and that it continue to rely on sound, economics-based, case-specific analysis. Using U.S. antitrust law to achieve other objectives would interject harmful uncertainty into antitrust enforcement, detract from economic welfare, potentially be in tension with the rule of law, and, importantly, undermine longstanding U.S. efforts to advocate the consumer welfare approach overseas. The ICPEG agrees that diminished support by foreign enforcers for a consumer welfare orientation could harm U.S. companies, which would find themselves more readily subject to discriminatory

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<sup>11</sup> U.S. Federal Trade Commission, *The Antitrust Laws* (2016), <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws>.

treatment overseas, based on subjectively applied notions of “industrial policy.” The U.S. government’s ability to advocate with foreign governments would be undermined if U.S. policy recognized goals other than consumer welfare enhancement as appropriate for antitrust enforcement.

**2. *Alternative Approaches To Antitrust Law Result in Inconsistent Outcomes, Economic Uncertainty, Cronyism, And Greater Burdens On Business***

The United States has been a global leader in promoting consumer welfare as the appropriate goal of competition policy. This has borne some fruit.<sup>12</sup> For example, a former European Union Competition Commissioner has stated that “[d]efending consumers’ interests is at the heart of the Commission’s competition policy,” reflecting “the importance of competition policy to consumers, and the importance of consumer welfare when implementing competition policy [in Europe].”<sup>13</sup> While it is not essential that every jurisdiction adopt the U.S. competition law model, it is nevertheless important that other jurisdictions are broadly consistent with the objective of promoting the competitive process.

The U.S. antitrust agencies have promoted consumer welfare in the deliberations of the ICN, which is a “virtual” network of competition agencies and expert advisers that seeks to promote “soft convergence” among different nations’ competition laws and enforcement practices. Significantly, a 2011 ICN study found that “[i]t appears the promotion of consumer

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<sup>12</sup> See, e.g., World Bank, *Competition Policy* (Sept. 13, 2016), <http://www.worldbank.org/en/topic/competitiveness/brief/competition-policy>. OECD, *Global Forum: The Interface between Competition and Consumer Policies* (June 5, 2008) at 8, <http://www.oecd.org/regreform/sectors/40898016.pdf>, (“The evolution in competition policy in the past few decades has been well-documented. Once, competition policy was based on diverse rationales, such as protection of small competitors against large ones, or as part of a broader industrial policy. Now it is widely understood to have a single purpose: the enhancement of consumer welfare.”).

<sup>13</sup> John Madill and Adrien Mexis, “Consumers at the heart of EU competition policy,” *Competition Policy Newsletter* 27, No. 1 (2009) (quoting a 2008 statement by then-European Competition Commissioner Nellie Kroes), [http://ec.europa.eu/competition/publications/cpn/2009\\_1\\_7.pdf](http://ec.europa.eu/competition/publications/cpn/2009_1_7.pdf).

welfare is a common theme for most [competition] [a]uthorities throughout the world, regardless of whether or not it plays a formal role in their legal framework.”<sup>14</sup> In addition, the Justice Department and Federal Trade Commission (“FTC”) have stressed the importance of consumer welfare to competition analysis in providing technical assistance to countries that have recently adopted competition laws.<sup>15</sup>

Nevertheless, consumer welfare is only one of a multitude of competition law goals in many jurisdictions outside the United States, and a dedication to consumer welfare often appears to be lacking in enforcement actions. Where competition rules include inherently subjective concepts such as substantive “fairness” (as is the case in many jurisdictions), for example, the legal treatment of business conduct may differ profoundly on a case-by-case basis, often driven by ad hoc political considerations. Thus, for example, jurisdictions that condemn “unfair” prices might impose liability both for prices that are deemed “too high” (perhaps merely reflecting consumer preferences for a particular product) and those that are deemed “too low” (perhaps merely reflecting the superior economic efficiency of the firm under scrutiny vis-à-vis its competitors). Because “unfairness” and other subjective considerations (“excessive size” or “concentration,” for example) may be invoked arbitrarily, business planning and investment are undermined. Commercial success may turn on political cronyism, rather than on the ability of a firm to efficiently provide the goods and services consumers desire at a competitive price (the result the consumer welfare approach to antitrust law is designed to foster).

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<sup>14</sup> “Competition Enforcement and Consumer Welfare: Setting the Agenda,” at 8 (2011) (report presented at the 10<sup>th</sup> Annual ICN Annual Conference, May 17-20, The Hague), <http://www.internationalcompetitionnetwork.org/uploads/library/doc857.pdf>.

<sup>15</sup> See Federal Trade Commission, International Technical Assistance Program (2016) (including links to discussion of technical assistance programs by both the FTC and the Justice Department’s Antitrust Division), <https://www.ftc.gov/policy/international/international-technical-assistance-program>.



Disparate antitrust goals in other jurisdictions create situations in which the substantive differences between the United States and other jurisdictions can cause conflicts. Often remedies have global impact, and they may thus fundamentally threaten business models. Remedies that require the disclosure of proprietary information, for example, cannot be confined to the jurisdiction ordering disclosure: the loss of confidentiality in any single jurisdiction means the loss of confidentiality worldwide. Similarly, a jurisdiction that prohibits all vertical restrictions on resale<sup>16</sup> may necessarily create unauthorized product flows worldwide, since otherwise unauthorized sellers are set free to provide the product wherever they can find a purchaser. Such issues arise from mixed-purpose antitrust systems in many parts of the world. China, the European Union, Brazil, India, Korea, Japan, and Taiwan have all come under criticism for creating problems of this character.

Even when “unfairness,” “industrial policy,” and other highly subjective considerations are not directly or openly relied upon as ultimate decision-making criteria, significant problems remain. While a number of jurisdictions have begun to speak seriously about the merits of an economics-based consumer welfare approach, these principles are not embraced in many other jurisdictions. In addition, even where there is some positive recognition of the approach, it is not applied consistently in case law and agency decision-making. Too few jurisdictions have prominent roles for economists trained to understand problems of industrial organization. Even jurisdictions regarded as mature, like the European Union, have created important roles for economists only recently, and the impact of economic analysis on the resolution of specific matters remains unclear. And legitimate IP rights are often not respected for their role in

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<sup>16</sup> Under the economics-based consumer welfare approach, the U.S. evaluates such restrictions on a case-by-case basis, striking down only those restraints that distort the competitive process and fail to provide countervailing consumer benefits.

incentivizing investment in innovation that can have an enormously positive long term impact on competition. Without the discipline of close review by expert economists and other officials empowered and motivated to apply analytically rigorous scrutiny to proposed enforcement initiatives, competition authorities often become comfortable with an unjustifiably more interventionist view of enforcement.

Enforcement activities may reflect local case law that allows an agency to exercise its powers of investigation and its decision-making authority in an expansive and highly discretionary way. Where this occurs, competition authorities can tend to discount the costs and disruption that their enforcement activities impose on legitimate business conduct, give too little weight the costs of wrongfully condemning conduct that is procompetitive, and exaggerate the likelihood and consequences of wrongfully exonerating conduct that might have anticompetitive impact. Such an expansive enforcement approach can create significant disincentives for procompetitive or competitively neutral conduct, impose excessive burdens and costs on compliance-minded business enterprises, and ultimately deprive consumers of the benefits of robust and lawful competition and innovation.

Problematically, in some matters, competition authorities (including those in the United States) appear to have pursued investigations well beyond the point where objective review would indicate either that the suspected conduct did not occur as initially anticipated, or that such conduct poses no substantial threat to competition. In some cases, they have made overly burdensome requests for information. Where enforcement authorities assign investigating staff with little sophistication in economic and competition analysis or understanding of the characteristics of the industry context in which the investigation is taking place, companies can

be forced to spend inordinate time and resources to educate the investigators on relevant aspects of their industries.

Because many jurisdictions have adopted competition law and its enforcement relatively recently, they have little or no direct experience with the complex and gradual learning process that has led to the development of clear judicial doctrine requiring robust economic analysis based on sound empirical support and rejecting over-reliance on presumptions of illegality. Without this experience, sound competition analysis and decision-making has yet to become institutionalized in many jurisdictions outside the United States. This can result in authorities initiating investigations and cases that fail to target business conduct likely to have substantial anticompetitive effects. Forms of procompetitive or competitively neutral conduct may be subject to lengthy and burdensome investigation and ultimately condemned wrongly.

Further, some jurisdictions base their enforcement activity on approaches developed in previous cases. Bad enforcement decisions result where prior cases were based on questionable or discredited economic and/or legal theories and approaches. As some jurisdictions align their enforcement approaches with sound economic analysis, other systems that fail to do so can create friction within the enforcement process and uncertainty among global businesses.

Issues of divergence are compounded in complex, novel and dynamic industries — precisely those industries that generate and apply the most innovative technologies and business models, where incentives to invest in IP play a particularly important role and it is most essential to avoid “chilling” creative forces. Many jurisdictions do not appreciate the unique demands of economic analysis and competition law enforcement in such industries.

In short, the United States confronts a situation in which many jurisdictions fall far short of employing an economics-based, consumer welfare-oriented approach to competition law

enforcement focused on preserving a vigorous competitive process. At the very least, the United States should continue to advocate for the adoption of a consumer welfare criterion in jurisdictions around the world, and not condone alternative viewpoints that embolden bad, economically harmful policymaking. Nevertheless, ex-U.S. competition enforcement policy is likely to continue to present serious issues.

In some instances, antitrust-related disagreements between the United States and other jurisdictions may merely reflect honest differences in interpretation of competition law principles. Such cases can be handled primarily by the two U.S. federal antitrust agencies, the Justice Department and the FTC, through interagency consultations and efforts to bring about a greater convergence of analytical tools. Such consultations could bear particular fruit when the United States has itself evaluated the same transaction or conduct and coordinated with the foreign agency in investigating the matter.

In other cases, however, the 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. (Inadequate procedural protections as opposed to intentional substantive misapplications raise somewhat different issues, and are discussed in Part III.C.) 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. In that regard, the employment of U.S. international trade law tools, discussed in Section III.B., merits careful consideration.

A third category of cases involves foreign countries' direct sponsorship of anticompetitive regulations or guidance that hampers the ability of U.S. companies to compete effectively in their markets. Although such cases may not involve the misuse of competition law strictly speaking, they nevertheless may impose the same sort of harms on U.S. business as the second category of cases. Matters that fall within this third category are beyond the purview of the U.S. antitrust agencies and must be dealt with through the involvement of other arms of the U.S. government. As in the second category, U.S. trade remedies may be appropriate to combat such distortions.

***B. International Trade Laws: Their Goals and their Possible Application to Abuses of Competition Law and Regulatory Policy by Foreign Governments***

In the United States, international trade laws have evolved separately from antitrust laws, administered by different agencies overseen by different Congressional committees. While international trade agreements and laws share a general goal of promoting the competitive process, international trade laws include specific provisions designed to respond to unjustified, unreasonable and discriminatory international trade and investment policies and practices that burden or restrict U.S. commerce.

This Report accordingly considers how U.S. trade laws and international trade and investment negotiations can be used to deal with business restraints and anticompetitive foreign government actions that are not adequately dealt with by competition law. In the post-World War II era, the negotiation of multilateral, plurilateral and bilateral trade agreements have reduced or eliminated a wide-range of the historical national barriers to international trade and

investment, like tariffs and quotas, and have also made significant advances in addressing non-tariff barriers, like technical barriers to trade. Regrettably, at the same time, many foreign nations have imposed new anticompetitive government restrictions that distort trade and investment and reduce competition, but often are not explicitly covered by GATT or WTO commitments, or fully covered by U.S. trade agreements, and cannot be reached by U.S. antitrust law.<sup>17</sup> Among those restrictions are misapplications of national competition laws to further national industrial policy or other non-consumer welfare interests, described above, which unfairly discriminate against U.S. businesses while reducing consumer welfare, economic efficiency, and the ability of U.S. businesses to compete in national and global markets.<sup>18</sup>

In response to these developments, over the last several decades the United States has adopted a variety of international trade law tools for the purpose of addressing such foreign government-imposed market distortions. The effective use of these U.S. trade law remedies against foreign government-induced market distortions, including the misapplication of national competition laws, can be welfare-enhancing, much like sound antitrust enforcement policy.

The U.S. trade law that is most directly applicable to foreign anticompetitive market distortions, including the misapplication of competition law, is Section 301 of the Trade Act of 1974, as amended.<sup>19</sup> Section 301 provides that the USTR, subject to the specific direction, if

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<sup>17</sup> See generally Alden F. Abbott and Shanker Singham, *Competition Policy and International Trade Distortions*, 4 EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW 23 (2013), [file:///C:/Users/abbotta/Downloads/9783642339165-c1%20\(21\).pdf](file:///C:/Users/abbotta/Downloads/9783642339165-c1%20(21).pdf).

<sup>18</sup> See Prepared Statement of the Federal Trade Commission Before the United States House of Representatives Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial and Antitrust Law, on “International Antitrust Enforcement: China and Beyond” (June 7, 2016), [https://www.ftc.gov/system/files/documents/public\\_statements/953113/160607internationalantitrust.pdf](https://www.ftc.gov/system/files/documents/public_statements/953113/160607internationalantitrust.pdf) (noting that “[u]sing competition law for protectionist ends to promote a domestic competitor or industry would rob consumers of the intended benefits of competition law enforcement and undermine the legitimacy of the competition law system globally.”).

<sup>19</sup> 19 U.S.C. § 2411.

any, of the President, may take action, including restricting imports, to enforce rights of the United States under any trade agreement, to address acts inconsistent with the international legal rights of the United States, or to respond to unjustifiable, unreasonable, or discriminatory practices of foreign governments that burden or restrict U.S. commerce. Interested parties may initiate such actions through petitions to the USTR, or the USTR may itself initiate proceedings. Of special interest, Section 301 includes the “toleration by a foreign government of systematic anticompetitive activities by enterprises or among enterprises in the foreign country that have the effect of restricting . . . access of United States goods or services to a foreign market” as one of the “unreasonable” practices that might justify such a proceeding.

Despite its expansive language, Section 301 has not been brought to bear in recent years to deal with foreign anticompetitive distortions, including abuses of competition law. To a large extent, previous Administrations may have been hindered by the lack of policy coordination and cooperation among government officials who have been responsible for administering antitrust and international trade laws. The Working Group is intended to overcome this lack of policy integration, coordination and cooperation. In addition to deciding how to use existing trade tools, like Section 301, the Working Group should consider whether new tools are needed.

### ***C. Due Process and Transparency***

Sound and transparent process improves the quality of the decisions enforcement authorities make by better ensuring that decision-makers consider all relevant information and analysis and thus the substance and predictability of the law.<sup>20</sup> A lack of transparency and due process can result in ill-informed decision-making. It exaggerates substantive differences across

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<sup>20</sup> See ICN, *ICN Guidance on Investigative Process* (2015), <http://www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf> (“Transparency about legal standards and agency policies is a basic attribute of sound and effective competition enforcement.”). (*ICN Guidance.*)

jurisdictions and fuels bad economic analysis because of the information asymmetry between the competition law authority and the party or parties under investigation. Poor process leads to poor outcomes because flaws in process do not offer sufficient opportunities for parties to correct the factual record and misguided analysis early enough in the investigatory process. The result is that an alleged violation becomes “baked in” to the enforcement proceeding in an early investigative stage.

Procedural safeguards serve to protect the rights of parties involved in enforcement before competition law authorities and lead to better, more informed enforcement outcomes. A lack of safeguards has enabled competition law authorities to abuse the rights of parties in investigations and enforcement proceedings — for example, by lack of access to evidence, unreasonably short time periods to respond to requests for information and inability to discuss concerns with enforcement agency officials or appeal to impartial reviewers. At times, companies may not even be informed of the theories of harm for cases against them or the evidence that the agency may have to support a theory of harm. They may be unable to access exculpatory information held by third parties or be informed of information an agency is relying on in its case. Such a situation is ripe for abuse and together with other abuses create potential rule of law issues and reduces the legitimacy of antitrust authorities. As the *ICN Guidance on Investigative Process* explains, “Engagement with the parties under investigation is a basic attribute of sound and effective competition enforcement, promoting more informed and robust enforcement.”<sup>21</sup>

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<sup>21</sup> See *ICN Guidance at 5*. The *ICN Guidance* advises that competition agencies should provide opportunities for meaningful engagement during an investigation, including the opportunity for parties under investigation to present evidence and arguments/defenses and “should have clear policies regarding the disclosure of confidential information obtained during investigations.” *Id.*



Due process concerns also implicate third party complainants. Interest group capture is more likely when there is a lack of transparency and procedural due process. In settings where there is a lack of transparency, interest groups can rent seek more effectively because the rent seeking is not subject to public scrutiny.<sup>22</sup>

Administrative processes under which the same entity is both judge and prosecutor are potentially ripe for abuse. A lack of effective checks and balances can result in abuses in process that in turn lead to problematic substantive applications of the law merely for a “win”.

Procedural fairness has been discussed across international organizations such as the OECD<sup>23</sup> and the ICN,<sup>24</sup> with the support and urging of the United States. Nevertheless, extensive, let alone enforceable, best practices have not been reached in either forum. Instead, a number of competition authorities around the world have appeared to ignore the need for transparent, accurate, and impartial process. For example, leading U.S. companies have complained that in certain jurisdictions they are subject to investigations and enforcement actions in which they are not given adequate notice or time for responses to questions; are not informed of the particular acts or practices which are a subject of concern; are not allowed to obtain from enforcers information about the theory of anticompetitive harm; are not informed about the nature of third party complaints or objections; are not allowed to provide information regarding the justification for their actions; are not able to question the basis for particular fines or other penalties; and are unable effectively to appeal final agency determinations to independent

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<sup>22</sup> Fred S. McChesney & William F. Shughart II (eds.), *The Causes And Consequences of Antitrust: The Public-Choice Perspective* (1995).

<sup>23</sup> OECD, *Procedural Fairness and Transparency* (2012), <http://www.internationalcompetitionnetwork.org/uploads/library/doc892.pdf>.

<sup>24</sup> ICN, *Competition Agency Transparency Practices* (2013), <http://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1560&context=facultypub>.

judges.<sup>25</sup> Problems of this sort raise serious questions in both common law and civil law (accusatory and administrative) systems. They create unwarranted uncertainty, imposing random harm on businesses, major administrative costs, and disincentives to invest and engage in international commerce—to the detriment of consumer welfare and the overall economy.

The United States should prioritize the inclusion of basic due process requirements in the competition law chapters of bilateral and plurilateral trade and investment agreements. Such agreements should also include enforcement provisions authorizing appropriate action for serious violations of due process commitments. In addition, the U.S. antitrust agencies should consider possible inclusion of due process consultation provisions in antitrust cooperation agreements to which they are party.

In this regard, ICPEG recommends reference to a report of the American Bar Association’s Section of Antitrust Law’s International Task Force on best practices for antitrust procedure, which provides a detailed discussion of how to ensure the accurate, efficient and impartial administration of competition laws at all stages of investigation and enforcement. The procedures recommended in this procedural best practices document are designed to be applicable to any competition law system, regardless of the type of legal regime in which the system is embedded — judicial or administrative, civil law or common law.<sup>26</sup>

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<sup>25</sup> For example, the FTC noted issues that have been raised by Chinese competition enforcement procedures, which include “insufficient transparency, failure to provide a meaningful opportunity for defense, and limitations on the ability to be represented by counsel.” Prepared Statement of the Federal Trade Commission Before the United States House of Representatives Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial and Antitrust Law, on “International Antitrust Enforcement: China and Beyond” (June 7, 2016), [https://www.ftc.gov/system/files/documents/public\\_statements/953113/160607internationalantitrust.pdf](https://www.ftc.gov/system/files/documents/public_statements/953113/160607internationalantitrust.pdf). The FTC “recognize[d] that the pursuit of competition enforcement without procedural safeguards or based on opaque, non-competition standards undermines the legitimacy of antitrust enforcement around the world.” *Id.* at 12.

<sup>26</sup> “Best Practices for Antitrust Procedure: Report of the ABA Section of Antitrust Law International Task Force, dated May 22, 2016 (“Best Practices Report”), <http://www.regeringen.se/4b013e/contentassets/fc05f4222757489ba0b7110ae2f98144/american-bar-association-aba-section-of-antitrust-2.pdf>. The Best Practices Report has not been approved by the ABA House of Delegates or

***D. Unreasonably Broad Remedies in other Markets that Undermine U.S. IP Rights***

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.<sup>27</sup> 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."<sup>28</sup>

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.

Closely related to concern about divergent treatment of the exploitation of IP rights is the potential global effect of competition enforcement decisions that undermine such rights. Such

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Board of Governors and is not a statement of policy by the American Bar Association itself. However, it has been approved for submission to foreign competition authorities pursuant to ABA Blanket Authority.

<sup>27</sup> See Prepared Statement of the Federal Trade Commission Before the United States House of Representatives Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial and Antitrust Law, on "International Antitrust Enforcement: China and Beyond" (June 7, 2016), [https://www.ftc.gov/system/files/documents/public\\_statements/953113/160607internationalantitrust.pdf](https://www.ftc.gov/system/files/documents/public_statements/953113/160607internationalantitrust.pdf).

<sup>28</sup> *Id.*

extra-jurisdictional remedies risk creating substantive conflicts among antitrust regimes.<sup>29</sup> U.S. antitrust enforcers should take note of this potential, factor it into its treatment of the legitimate efforts of the owners of IP to obtain full returns to their investments in innovation, and encourage other competition law enforcers to do the same.

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<sup>29</sup> *See, e.g.*, Christine A. Varney, Ass't Att'y Gen., Antitrust Div. U.S. Dep't of Justice, *Coordinated Remedies: Convergence, Cooperation, and the Role of Transparency*, Remarks as Prepared for the Institute of Competition Law New Frontiers of Antitrust Conference (Feb. 15, 2010) (encouraging antitrust agencies to “endeavor to make our remedial decisions with our eyes open to their consequences beyond our shores, taking steps to minimize their extraterritorial effects; let us keep our eyes open to what our sister agencies have already done in particular cases, so that we do not unnecessarily diverge from their decisions”).

### **Separate Statement of Eleanor M. Fox:**

In general, I agree with the Report and its recommendations. I take this opportunity to express some differences in perspective.

First, I believe, as do my colleagues on the committee, that we face threats to the integrity of our competition system and that it is critically important to maintain transparency, due process, non-discrimination and sound rules of law. But I fear such threats at home as well as from abroad and I would want to emphasize that all rules we suggest for our trading partners should apply equally to us if the tables are turned.

Second, I do not believe that the United States has the one right mold for antitrust rules and standards or for the antitrust/intellectual property interface, although much wisdom can be found in U.S. law. In my view we should respect different views and different circumstances and thus recognize the legitimacy of other approaches as long as they are applied with transparency, proportionality, due process, and non-discrimination.

Third, I am concerned about using trade remedies to cure perceived discriminatory foreign applications of antitrust against American business. I fear that trade remedies may lead to tit-for-tat retaliation. Except in extreme cases, I would rather proceed by intense, focused conversations, both bi-laterally and in international fora, in an attempt to understand the roots of divergences and the space for convergence, and to shine light on improprieties. I would also want to recognize the responsiveness of our trading partners to many such conversations already had, and to commend the progress of younger antitrust jurisdictions in largely applying international standards and in making their systems more open to comment and dialog.

Some of these ideas appear in the Report. It is a question of emphasis. Moreover, the Report covers other important ground, such as treatment of state restraints, and I am happy to be associated with it.