

**INTERNATIONAL ANTITRUST ENFORCEMENT:  
CHINA AND BEYOND**

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**HEARING**  
BEFORE THE  
SUBCOMMITTEE ON  
REGULATORY REFORM,  
COMMERCIAL AND ANTITRUST LAW  
OF THE  
COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED FOURTEENTH CONGRESS  
SECOND SESSION

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JUNE 7, 2016  
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## **INTERNATIONAL ANTITRUST ENFORCEMENT: CHINA AND BEYOND**

**TUESDAY, JUNE 7, 2016**

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON REGULATORY REFORM,  
COMMERCIAL AND ANTITRUST LAW  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Subcommittee met, pursuant to call, at 4:02 p.m., in room 2141, Rayburn House Office Building, the Honorable Darrell E. Issa (acting Chairman of the Subcommittee) presiding.

Present: Representatives Goodlatte, Issa, Collins, Ratcliffe, Bishop, Johnson, and Conyers.

Staff Present: (Majority) Anthony Grossi, Counsel; Andrea Lindsey, Clerk; (Minority) Slade Bond, Minority Counsel; and James Park, Counsel.

Mr. ISSA. The Subcommittee on Regulatory Reform, Commercial and Antitrust Law will please come to order.

Without objection, the Chair is authorized to declare recesses of the Committee at any time.

We welcome here everyone, and particularly our witnesses supporting International Antitrust Enforcement: China and Beyond, and I now recognize myself for an opening statement.

We convene today's hearing to examine the enforcement of competition laws across the globe but with a focus on how China is enforcing its laws. This focus is a result of troubling reports that China may be using its competition laws or, if you will, its antitrust laws, to advance industrial policy at the expense of America and other foreign companies. We will also examine how the executive branch has responded to China's administration and its competitive laws.

Over the past 30 years, China's economy has experienced remarkable growth, increasing at a rate of nearly 10 percent per year. During that time, China has become an important trade partner to the United States and a significant influence in the American economy. Between 1990 and 2015, total trade with China rose from \$20 billion to \$598 billion and, just last year, China passed Canada as the United States' largest trading partner.

China is the second largest U.S. agricultural export market, the third largest U.S. merchandise export market, and the fourth larg-

est U.S. service export market. In total, China is estimated to be a \$400 billion market to American companies.

While these statistics provide stark numbers, one need only look no further than the labels on phones, toys, cars, clothes, and a wide array of other consumer products to see a familiar marking “made in China” to understand the pervasive impact of China’s economy in the United States. As China’s economy developed, so did its laws and regulations designed to foster future growth. In 2007, China enacted its competition laws called the “Anti-Monopoly Law,” or “AML.”

Since the AML’s enactment, there have been troubling reports of China deploying the law in a manner that violates international norms of due process with the result of prioritizing the advancement of China’s industry policies over promoting competition. These reports include allegations that China prevented foreign lawyers from representing their clients before competition authorities, threatened foreign executives during the course of competition investigations, targeted foreign companies more frequently than Chinese companies with respect to merger remedies, and conduct investigations pursued the extraction of intellectual property at below market rates, and sought remedies that directly benefited the Chinese industry.

Given the size of the Chinese economy and the importance to American industry, these are serious allegations. Following these reports, the executive branch has responded in a variety of ways. Notably, the Commerce Department has engaged with China through the U.S.-China Joint Commission on Commerce and Trade and the Departments of State and Treasury similarly engaged in the U.S.-China Strategic/Economic Dialogue, which is taking place this week in Beijing.

Past meetings with U.S. officials have resulted in non-binding voluntary commitments by China to improve transparency, increase due process, and enhance the fairness of the AML.

We should ensure that U.S. companies are treated fairly, consistently, and objectively by international jurisdiction. Today’s hearing will help inform the Committee regarding international competition law enforcement, particularly China, and whether other countries are influenced by China’s use of the AML.

Additionally, the hearing will update us regarding how the executive agencies are coordinating with each other and engaging with China and other countries on the treatment of U.S. companies and citizens abroad. On a personal note, I was an electronics executive during the era in which many, many American companies found themselves moving abroad, often to Taiwan, the new territories, and then into Mainland China. During that era, this was not the law, and yet there was inherently a desire to build a future China. And to this, on a personal note, I want to build a better China, and commerce is the answer, but it’s only the answer if in fact they embrace the international norms that allow them to win when they’re competitive and choose other vendors when in fact the most competitive vendor comes from somewhere other than China.

I look forward to today’s discussion and our excellent panel, and it’s my honor to recognize the Ranking Member, Mr. Johnson of Georgia, for his opening remarks.

Mr. JOHNSON. I thank the Chairman.

Today's hearing is a welcome discussion of international anti-trust enforcement with a specific focus on China's approach to competition policy under its Anti-Monopoly Law. Over the past several decades, one of the most profound developments in antitrust law has been its expansion into the global economy.

In the 1980's, as few as five countries robustly enforce the anti-trust laws. Today, more than 100 jurisdictions are members of the International Competition Network, an organization of enforcement agencies. This growing interest in antitrust law reflects a broader trend that reflects Nations moving away from centrally planned economies to open markets.

In recent years, there has also been some divergence from the U.S. approach to antitrust enforcement among Nations with established competition authorities. This change is particularly evident in China's aggressive enforcement of its Anti-Monopoly Law, which includes both procompetition goals such as preventing monopolization, and noncompetition directives such as improving economic efficiencies and development in China.

Some have suggested that these twin goals have at times served to protect domestic commerce rather than promote competition. Examining these differences is important because local enforcement decisions can have global effects, as Federal Trade Commission Chairwoman Edith Ramirez has observed. But diversity and enforcement policy is itself—in itself is not necessarily bad.

Progressives have long suggested that we rethink our antitrust policies to move beyond the excesses of the Chicago school of economic theory, as our former colleague Senator Herb Kohl has referred to it, to incorporate noneconomic values that promote the public interest through enforcement policy.

With this in mind, I commend our enforcement agencies for taking a long view in competition policy that embraces diverse anti-trust frameworks and respects local autonomy, while also seeking to establish a fair, independent, and transparent enforcement process internationally. While most work remains to be done to broaden international consensus and ensure that enforcement policy is not just a tool for promoting domestic or industrial policy goals, I'm confident that we can continue to work productively to bridge our differences and complement divergent enforcement regimes.

As we seek consensus, it is imperative that we avoid an exceptional view of our own enforcement practices if we are to build upon ongoing dialogues with other sovereign Nations to establish economic and political comity. Indeed, progressives have long suggested a rethinking of our antitrust policies to move beyond what Senator Herb Kohl again referenced as the excesses of Chicago school of economic theory, and that we seek to incorporate noneconomic values that promote the public interest through enforcement policy.

In closing, I thank the Chair for holding today's hearing, and I hope to continue to look beyond our own antitrust enforcement practices in future hearings. I also thank our witnesses for their testimony. We truly have a wealth of expertise on the panel. I'm looking forward to hearing your views, particularly on the issue of whether or not there should be just one regime and it be our re-

gime for antitrust enforcement. And when I say “ours,” I mean the American formula. And with that, I will yield back the balance of my time.

Mr. ISSA. I thank the gentleman. It’s now my pleasure to introduce the Chairman of the full Committee for his opening statement, the gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman.

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. In particular, China has risen in prominence as an economic marketplace as well as a competition law jurisdiction.

Over the past several years, reports have surfaced that allege China is deploying its competition laws in a manner that strains the boundaries of due process, that focuses on advancing domestic industrial policies, and that seeks to extract valuable American innovations without fair compensation.

I would like to thank Chairman Issa for holding today’s hearing to delve into these potentially serious abuses. Today’s testimony will help the Committee gain a better understanding of the history of China’s competition laws, how they have been enforced, and the potential impact of this enforcement on other international competition jurisdictions. Furthermore, it will provide a record regarding how our executive agencies, including our antitrust enforcement agencies, have been coordinating among each other and engaging with China and other 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 the balance of my time.

Mr. ISSA. I thank the gentleman for his opening statement and his comments.

If Mr. Conyers arrives, we’ll take his opening statement in due course. But it’s now my pleasure to introduce the distinguished panel here today. The witnesses’ written statements will be entered into the record in their entirety, and I would ask each of the witnesses to summarize their testimony within 5 minutes.

Since virtually all of you are pros, I’ll summarize by saying, the red lights work just like they do on city streets. Please look at them for the same indications of go, go faster, and stop. To help you stay within that time period, please observe them.

It's now my honor to introduce our witnesses, but before I do that, in concert with the rules of the Committee, I would ask that all four of you please rise to take the oath. Please raise your right hands.

Do you solemnly swear that the testimony you're about to give will be the truth, the whole truth, and nothing but the truth?

Thank you. Please be seated. And let the record reflect that all witnesses answered in the affirmative.

It's now my pleasure to introduce Commissioner Ohlhausen.

Commissioner Ohlhausen was sworn in to her position as the Commissioner of the Federal Trade Commission on April 4th, 2012, to a term that expires September of 2018. Prior to becoming the Commissioner of the FTC, the Commissioner spent 11 years working for the Federal Trade Commission in various capacities, including Director of the Office of Policy and Planning and Attorney Adviser to the former FTC Commissioner Swindle.

She has spent a number of years in the private sector working on FTC issues and as a partner at the law firm of Wilkinson Barker and Knauer, LLP. The Commissioner earned her bachelor's degree in English with honors from the University of Virginia and her J.D. from George Mason, newly named Antonin Scalia Law School. I see somebody picked that up right away.

Our next witness, Mark Cohen, is a Senior Counsel at the United States Patent and Trademark Office where he leads a 21-person team focused specifically on the expertise of China. It's got to be a full-time job with just 21 of you.

Mr. Cohen has over 30 years of private and public sector in-house and academic experience in the China transition economies, serving in such roles as the director of IP for Microsoft Corporation and a counsel at the law firm of Jones Day, a Cleveland-based company of my youth, but worked in their Beijing office.

In addition to his position at the Patent and Trademark Office, Mr. Cohen lectures at universities in the United States and abroad, including Harvard, Fordham, and the China University of Political Science and Law. Mr. Cohen earned his bachelor's degree in Chinese studies from the State University of New York in Albany, his master's degree in Chinese language and literature from the University of Wisconsin, and his J.D. from Columbia. I'm impressed.

Next, we have Mr. Sean Heather. Sean Heather is the Vice President of the U.S. Chamber of Commerce Center for Global Regulatory Cooperation, which seeks to align trade, regulatory, and competition policy in support of open and competitive markets. During his 16-year career at the Chamber, Mr. Heather has worked in a wide range of issues spanning from international trade and antitrust to tax technology and corporate governance. Mr. Heather is also the co-author of the Chamber's comprehensive report on China's enforcement of its competition laws.

Mr. Heather received his bachelor's degree in business administration and an MBA both from the University of Illinois.

Last and definitely not least, we have Professor Thomas Horton, professor of law at the University of South Dakota School of Law. Professor Horton transitioned to a full-time academic position following a 28-year career as an antitrust lawyer where he served at both the Federal Trade Commission and the Antitrust Division of

the Department of Justice, in addition to partnership at several major international law firms.

Professor Horton earned his bachelor's degree from Harvard, *cum laude*, his J.D. from Case Western Reserve University School of Law, right there on the near east side of Cleveland where he graduated with the Order of the Coif, and a master's degree with honors in Liberal Studies from Georgetown University.

Before I recognize the Commissioner, thank you Mr. Horton for going to Case. Everyone in my family either applied or went there. I went to Kent State. You can tell why.

Your Honor.

**TESTIMONY OF THE HONORABLE MAUREEN OHLHAUSEN,  
COMMISSIONER, FEDERAL TRADE COMMISSION**

Ms. OHLHAUSEN, Chairman Issa, Ranking Member Johnson, and Members of the Subcommittee, thank you for the opportunity to appear before you today.

International antitrust law has been very dynamic over the past two decades. The FTC engages in multilateral fora and bilateral consultations. It also offers technical assistance to build stronger relationships with foreign competition agencies and to encourage convergence on sound economic competition policy and enforcement. The global economy, competition, and consumers benefit when competition laws function coherently and effectively. Enforcement predictability also reduces the cost of doing business and improves outcomes for consumers.

While the FTC's focus has been global, the agency has devoted significant attention and resources to two areas that have received particular attention in recent years: China's antitrust enforcement and the application of antitrust intellectual property rights. I personally spend a lot of time on these issues. I have traveled to China seven times in recent years to engage in dialogue, both formal and informal, on antitrust policy and enforcement, including attending a conference on antitrust in Asia in Hong Kong just last week.

Even before the enactment of China's Anti-Monopoly Law, or the AML, in 2007, the FTC and the DOJ worked with Chinese officials to promote predictability, fairness, and efficiency in antitrust enforcement. We have also stressed the importance of economics to sound antitrust policy.

China's AML resembles the competition laws of the United States in many ways, including, for example, provisions on cartel conduct and anticompetitive mergers. The AML, however, also has important differences, including the prohibition of unfairly high pricing and consideration of noncompetition factors, such as the effect of a merger on economic development.

Our engagement with Chinese authorities on the development and implementation of the AML has produced some positive tangible results. A good example is China's adoption of a simplified merger review procedure last year, which saves time and reduces costs for merging companies. We have also observed that MOFCOM increasingly sets forth its economic analysis in published merger decisions.

Nonetheless, our efforts with the Chinese AML agencies are best seen as a work in progress as there is continued concern regarding

the procedural and substantive application of the AML. Issues raised by Chinese procedures include the degree of transparency, the opportunity to present a defense, and the ability to be represented by counsel. Due process is a critical element to ensure fair, transparent, and nondiscriminatory application of antitrust laws. At the recent meeting in Hong Kong, I was particularly encouraged to see all three Chinese agencies acknowledge these procedural concerns.

On a substantive level, there continues to be a belief that Chinese agencies are pursuing noncompetition objectives to antitrust enforcement to promote domestic industries or Chinese competitors. We take such concerns seriously and have worked through multiple avenues, including our most recent vice minister level bilateral meeting in April to encourage China's agencies to ensure appropriate transparency and fairness.

So far, we have seen some promising responses, including through the Strategic and Economic Dialogues, as well as the U.S.-China Joint Commission on Commerce and Trade. In 2014, through these dialogues, China officially recognized that the objective of competition policy is to promote consumer welfare and economic efficiency rather than promote individual competitors or industries, and that enforcement of competition laws should be fair, objective, transparent, and nondiscriminatory. Through these dialogues, China also provided certain commitments regarding AML enforcement procedures. We will continue to engage with Chinese anti-trust authorities on these issues.

International convergence on unilateral conduct remains a challenging area overall, particularly for conduct involving IP rights. Many of the concerns about IP-related enforcement have focused on China because its competition law prohibits unfairly high pricing as well as places limits on refusals to deal. The Chinese AML agencies' current draft IP guidelines reinforce this concern with provisions that would create liability for refusals to license intellectual property deemed necessary to compete in a given market, as well as provisions that would prohibit unfairly high IP royalties.

The FTC and the DOJ have voiced concerns over the potential danger of reducing incentives to innovation, not only in China but globally, and have thus urged caution in enforcing these provisions. The FTC will continue to advocate for policies and approaches that promote innovation and competition as these guidelines continue to develop.

Thank you for your time, and I look forward to your questions.  
[The prepared statement of Ms. Ohlhausen follows:]



**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**

**“International Antitrust Enforcement: China and Beyond”**

**Washington, D.C.  
June 7, 2016**

Chairman Marino, Ranking Member Johnson, and Members of the Subcommittee, thank you for the opportunity to appear before you today. I am Maureen Ohlhausen, Commissioner of the Federal Trade Commission. I am pleased to testify on behalf of the Commission and discuss the FTC's perspectives on international competition policy and enforcement.<sup>1</sup>

International antitrust has been one of the most dynamic areas of antitrust law over the past two decades. The number of jurisdictions with competition laws has expanded from a few dozen to more than 120 in the past 25 years. Enforcers in these jurisdictions operate in a wide variety of legal, economic, and political contexts. As a result, approaches to the enforcement of competition laws vary, sometimes significantly, around the world. With the expansion of global trade and the operation of many companies across national borders, the FTC and the Antitrust Division of the Department of Justice (DOJ), the two agencies that share jurisdiction for enforcement of the antitrust laws in the United States, increasingly engage with our antitrust colleagues around the world to promote sound antitrust principles and practices.

The U.S. antitrust agencies work to foster cooperation with our counterparts worldwide and to play a leadership role in promoting convergence toward best practices in antitrust enforcement and policy. The global economy, competition, and consumers everywhere benefit when competition laws function coherently and effectively, as does domestic antitrust enforcement. Increased enforcement predictability also reduces the costs of doing business in the global economy and improves outcomes for consumers. The U.S. antitrust agencies facilitate dialogue and convergence toward sound, economics-based competition policy and enforcement, through multiple channels, including building and maintaining strong bilateral relations with foreign competition agencies, and participating in the projects and activities of multilateral

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<sup>1</sup> This written statement represents the views of the Federal Trade Commission. My oral presentation and responses to questions are my own and do not necessarily reflect the views of the Commission or any other Commissioner.

organizations. When appropriate, we also work with other agencies within the U.S. government to advance consistent competition enforcement policies, practices, and procedures in other parts of the world.

This testimony has five parts. First, we describe the adoption of antitrust laws around the world and how the FTC has engaged with the now extensive number of antitrust regimes through multilateral and bilateral mechanisms. Second, we discuss some of the specific successes achieved through our work with our antitrust colleagues to improve practices internationally. Third, we describe our work to advance due process and substantive policies based on sound competition principles and some of the related challenges. Fourth, we discuss China's continuing development of its antitrust laws and approaches, and our advocacy for due process and competition-based substantive policies. Finally, we address intellectual property in the international antitrust context, with a focus on China, on which the Subcommittee has expressed particular interest.

**I. The Expansion of Antitrust Regimes Around the World and the FTC's Mechanisms for Engagement**

Antitrust laws have been on the books in the United States and Canada since the late 1800s, but it was not until the 1990s and 2000s that the adoption of antitrust laws accelerated globally. In many instances, countries modeled their antitrust laws on the U.S. framework, while taking into account their own legal traditions and administrative mechanisms. At the same time, cross-border transactions and business conduct grew, increasingly attracting antitrust scrutiny in more than one country.

The global spread of antitrust law called for mechanisms to enhance consistency and advance best practices to minimize the risk of conflicting obligations or undue restrictions on businesses operating internationally, and protect consumers from anticompetitive conduct. As

discussed below, the “soft law” approach to developing and promoting best practices through multilateral organizations and bilateral engagement has yielded some significant long-term successes.

Two of the principal multilateral organizations in which the FTC participates are the International Competition Network (ICN) and the Organization of Economic Cooperation and Development (OECD). In 2001, competition agencies from 13 jurisdictions established the ICN as a “virtual” network to discuss and exchange views and information on antitrust enforcement and policy issues, and to promote cooperation and convergence of approach towards superior practices. The ICN has grown to include more than 130 enforcement agencies from nearly every jurisdiction with a competition law.<sup>2</sup> The OECD’s Competition Committee is a premier source of competition policy analysis and advice to governments. It brings together OECD-member competition agencies as well as observers from non-member countries to participate in regular discussions, and to develop studies, guidance, and recommendations, on competition issues. The OECD also holds in-depth peer reviews of national competition laws and policies.

The U.S. antitrust agencies have been actively engaged in developing both organizations and leading various initiatives. The FTC and DOJ are founding members of the ICN and have served on its steering committee since its inception. The FTC has led several ICN working groups that identified and promulgated among its membership internationally recognized best practices. The U.S. antitrust agencies also play leadership roles in the OECD’s Competition Committee and its two working parties. For example, the FTC introduced and helps lead the Committee’s ongoing work on competition issues involving disruptive innovation.<sup>3</sup>

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<sup>2</sup> The three Chinese enforcement agencies, described below, are notable exceptions.

<sup>3</sup> United States submissions to the OECD, as well as other FTC contributions to other international bodies, are available on the FTC’s website at <https://www.ftc.gov/policy/reports/us-submissions-oecd-other-international-competition-fora>.

The U.S. antitrust agencies also have pursued convergence through our extensive network of bilateral relations. For example, just a few weeks ago, the U.S. antitrust agencies met with the competition agencies of Canada and Mexico to discuss such topics as cross-border investigations and disruptive innovation.<sup>4</sup> This past April, the FTC and DOJ held a third joint dialogue with the Vice Ministers of all three Chinese antimonopoly enforcement agencies.<sup>5</sup> At those meetings, we addressed, among other topics, the role of competition enforcement and advocacy in promoting innovation.

Last Fall, the FTC and DOJ held bilateral consultations with the Chairman and senior officials of the Korea Fair Trade Commission (KFTC). These consultations provided an opportunity for the agencies to discuss key issues, including antitrust enforcement involving intellectual property and due process. Concurrently, the FTC and DOJ signed an antitrust cooperation memorandum of understanding with the KFTC to promote increased cooperation and communication.<sup>6</sup> Cooperation and interaction between the U.S. and Korean agencies have increased noticeably since this milestone.

Exchanges like these increase our understanding of how foreign enforcers apply their laws, and provide opportunities for us to share the FTC's experience in enforcing U.S. antitrust laws. They provide a platform to engage in frank discussions about areas in which we may not have similar goals or approaches with respect to our competition laws, policies, and enforcement.

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<sup>4</sup> Press Release, Fed. Trade Comm'n, Officials from the United States, Canada and Mexico Participate in 2016 Trilateral Meeting in Toronto to Discuss Antitrust Enforcement (May 20, 2016), <https://www.ftc.gov/news-events/press-releases/2016/05/officials-united-states-canada-mexico-participate-2016-trilateral>.

<sup>5</sup> Press Release, Fed. Trade Comm'n, FTC and Justice Department Officials Meet with Officials of Chinese Antitrust Agencies (Apr. 13, 2016), <https://www.ftc.gov/news-events/press-releases/2016/04/ftc-justice-department-officials-meet-officials-chinese-antitrust>.

<sup>6</sup> Press Release, Fed. Trade Comm'n, Federal Trade Commission and Department of Justice Sign Antitrust Memorandum of Understanding with Korea Fair Trade Commission (Sept. 8, 2015), <https://www.ftc.gov/news-events/press-releases/2015/09/federal-trade-commission-department-justice-sign-antitrust>.

Importantly, they also provide an avenue to express concerns when, in our view, those goals or approaches do not adequately protect consumer welfare or provide due process.

The FTC's technical assistance program is another important aspect of our international engagement. Through this program, the FTC, often in conjunction with DOJ, shares its expertise with a broad array of newer agencies to encourage the development of legal frameworks, practices, and policies based on sound competition principles and international good practice. During the past year, the FTC conducted 30 competition training missions, in, for example, India on abuse of dominance and intellectual property; China on vertical agreements; and Brazil on merger remedies. We also conducted training in South Africa, Colombia, Indonesia, and the Philippines, among other countries.

Pursuant to the authority under the US SAFE WEB Act,<sup>7</sup> the FTC also hosts "International Fellows" from foreign competition agencies who work directly with FTC staff for periods of several months. Fellows gain first-hand experience with the FTC's enforcement practices and approaches, and bring new insights and perspectives back to their agencies. The FTC has hosted 61 competition officials from 26 jurisdictions since the program's inception in 2007.

A third important component of our international engagement is enforcement cooperation. Cooperation on cases under common investigation promotes sound substantive and procedural approaches across jurisdictions and helps to ensure consistent, effective, and efficient remedies and outcomes. Our cooperation during parallel investigations of the same merger or conduct entails engagement on key policy and procedural issues and the exchange of views on legal theories, evidence, analyses, and remedies. In fiscal year 2015, we had significant

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<sup>7</sup> Pub. L. No. 109-455, § 9, 120 Stat. 3372, 3381 (2006) (codified at 15 U.S.C. § 46).

cooperation in 35 investigations with counterpart agencies, including those in Australia, Belgium, Brazil, Canada, China, the European Union, Japan, Korea, Mexico, New Zealand, Pakistan, South Africa, Taiwan, Ukraine, and the United Kingdom. We concluded each of these matters with compatible outcomes, often involving coordinated remedies. This is a remarkable accomplishment that has enhanced the effectiveness and efficiency of competition enforcement for consumers and companies on a global scale. Two recent and particularly noteworthy examples of enforcement cooperation are the Holcim/Lafarge merger of cement manufacturers, and ZF's acquisition of TRW Automotive in the car and truck components industry.<sup>8</sup>

## **II. Examples of FTC Initiatives and Efforts to Promote Antitrust Enforcement Best Practices**

The FTC has a significant history of employing the mechanisms described in the previous section individually and in combination to address important opportunities and challenges in international antitrust policy and enforcement. For example, the FTC led one of the ICN's first projects — developing best practices to address undue costs and burdens in multi-jurisdictional merger review. The project resulted in Recommended Practices for Merger Notification and Review Procedures that call for, among other good practices, an appropriate nexus to the reviewing jurisdiction, objective notification thresholds, and procedures to clear non-problematic transactions expeditiously. Although not all jurisdictions had rules and laws that complied with these Recommended Practices, ICN members were able to agree as a collective body to the recommendations in part because the ICN uses a “soft law” approach that does not obligate members to comply (or come into compliance).

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<sup>8</sup> Holcim Ltd. and Lafarge S.A., FTC No. C-4519 (June 16, 2015), <https://www.ftc.gov/enforcement/cases-proceedings/141-0129/holcim-ltd-lafarge-sa-matter>; ZF Friedrichshafen and TRW Automotive, FTC No. C-4520 (June 18, 2015), <https://www.ftc.gov/enforcement/cases-proceedings/141-0235/zf-friedrichshafen-trw-automotive-matter>.

Since the adoption of these recommendations between 2002 and 2006, the ICN and individual members, including the FTC, have promoted their implementation through training, comments, and other tools, with significant results. The competition agencies of the European Commission, Germany, Italy, Brazil, and Korea have changed their merger regimes to conform to these ICN best practices. And more than three quarters of ICN members with merger regimes, including the Common Market for Eastern and Southern Africa (COMESA) and India, have made changes in the past decade that bring their merger procedures into at least partial conformity with these ICN best practices. In the past decade, the number of countries with mandatory merger control has increased by approximately 30 percent, but the costs and burdens of merger notification and review in many ICN member jurisdictions have decreased, for example, as individual jurisdictions have narrowed the scope of notification obligations and agencies have introduced “short form” notification forms.

We also have achieved substantial progress in developing consensus around sound substantive rules governing the core areas of antitrust – mergers, unilateral conduct, and anti-cartel enforcement. Through the ICN’s Unilateral Conduct Working Group, which the FTC co-chaired, the ICN agreed on Recommended Practices on the Assessment of Dominance that provide a sound analytical framework grounded in economic principles to determine whether a firm has substantial market power or dominance, a threshold step in any unilateral conduct investigation. In addition, the FTC actively engaged in a multi-year ICN project that recently culminated in a Merger Remedies Guide. The Guide identifies the basic principles of sound merger remedies, including how agencies can design and implement appropriate remedies, helping to ensure that they are necessary, clear, enforceable, effective, timely, and sufficient. Last month, the FTC began a term as co-chair of the ICN’s Merger Working Group, which will

provide a multilateral platform to continue work on minimizing differences in merger review process, analysis, and remedies.

On the heels of these efforts, the attention of the U.S. antitrust agencies has turned to addressing due process concerns. Transparency, meaningful engagement with parties, the right to counsel, and the protection of confidential information ensure fairness to parties, result in fully informed enforcement decisions and enhance the credibility of antitrust enforcement. Through bilateral engagement and multilateral efforts, the FTC and DOJ regularly promote the benefits of due process and advocate for sound procedural reforms. The FTC recently led a multi-year ICN project that culminated in the adoption of ICN Guidance on Investigative Process. The guidance sets out international best practice standards for procedural fairness in antitrust investigations and serves as a benchmark to promote convergence in this sensitive area. The FTC is now promoting implementation of the guidance through its technical assistance and International Fellows programs, through programs in other international fora, such as OECD, APEC and ASEAN workshops, through our staff comments on draft laws and regulations, as well as through the ICN itself. Since the adoption of the guidance, process improvements increasingly have become a point of emphasis for competition agency reforms. For example, competition agencies in Japan and Poland recently changed their rules to incorporate many of these best practices.

### **III. Advancing Due Process and Competition-based Enforcement Around the World**

While the FTC has helped to facilitate the implementation of antitrust enforcement best practices, room for improvement and broader implementation remains. When an antitrust enforcement agency in another jurisdiction may not be providing adequate due process, we use our bilateral relationships to raise these concerns at appropriate junctures. In our experience, agencies can be highly receptive when we engage with them as colleagues about these concerns.

The FTC also may work with the Department of State and other U.S. government agencies through the interagency process to determine the most effective strategy to address due process concerns.

In some instances, what may register as a procedural or substantive concern about the work of a foreign antitrust agency may reflect merely a lack of enforcement experience. Over the past two decades, with the benefit of the FTC's technical assistance program, through which we share our extensive enforcement experience, many jurisdictions have changed their procedures and analytical frameworks to more effectively and efficiently follow competition best practices, including with regard to due process practices and procedures. In other instances, however, the approach taken by a foreign competition agency may reflect goals or policies that differ from or are contrary to competition policy, such as labor or industrial policies or economic protectionism. We have long advocated that competition law be applied with the goal of protecting competitive markets and promoting consumer welfare, and to all market participants in a non-discriminatory manner.<sup>9</sup> Using 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.

If we believe that enforcement procedures, policies or actions may be implemented without regard to due process or based on protectionism, the FTC will raise, where appropriate, the issue directly with the relevant agency. In addition, the FTC, along with DOJ, coordinates

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<sup>9</sup> See, e.g., Edith Ramirez, Core Competition Agency Principles: Lessons Learned at the FTC, Antitrust in Asia Conference, Beijing, China (May 22, 2014), [https://www.ftc.gov/system/files/documents/public\\_statements/314151/140522abachinakeynote.pdf](https://www.ftc.gov/system/files/documents/public_statements/314151/140522abachinakeynote.pdf); Maureen Ohlhausen, International Convergence, Competition Policy, and the Public Interest, IBA Mid-Year Antitrust Conference, Cape Town, South Africa (Mar. 8, 2014), [https://www.ftc.gov/system/files/documents/public\\_statements/204991/140308convergenceiba.pdf](https://www.ftc.gov/system/files/documents/public_statements/204991/140308convergenceiba.pdf).

with other U.S. agencies through the interagency process to address these issues, including through appropriate government-to-government dialogues.

#### **IV. China's Competition Policy and Enforcement**

While such issues have been raised from time to time with regard to a number of jurisdictions, in recent years China's enforcement procedures and substantive approaches have received the most attention. Recognizing this, the FTC has made engagement with the three Chinese anti-monopoly agencies one of its highest international priorities. China began to enforce its newly enacted Antimonopoly Law (AML) eight years ago, as part of its efforts to move towards a more market-oriented economy. Well before the passage of the AML in 2007, the FTC and DOJ advocated consensus international good practices, such as those in ICN instruments, to Chinese officials drafting the law. China's AML ultimately evolved to resemble in many ways the competition laws of the United States and other leading antitrust jurisdictions, including provisions that address cartel conduct, monopolization (or abuse of dominance), and anticompetitive mergers. However, the law also contains provisions that do not have analogues under U.S. law, such as a prohibition of unfair high pricing and consideration of non-competition factors like the effect of a merger on economic development. One of the AML's stated overall goals is "promoting the healthy development of the socialist market economy."

After the AML came into force, the FTC, along with DOJ, presented a series of workshops, funded by the U.S. Trade and Development Agency (USTDA), to share the experience of our enforcers in evaluating conduct and mergers with a focus on promoting consumer welfare and economic efficiency. We held multiple workshops for each of China's three AML enforcement agencies – the Ministry of Commerce (MOFCOM), which handles mergers, the National Development and Reform Commission (NDRC), which handles price-

related conduct, and the State Administration for Industry and Commerce (SAIC), which handles non-price related conduct. The FTC, along with DOJ, also led the United States' engagement with China on draft substantive and procedural implementing regulations issued by the three AML enforcement agencies.

One can see a tangible result of our efforts in MOFCOM's recent adoption of a simplified merger review procedure in 2015 that has reduced costs and delays for many merging companies. Under this procedure, companies that believe their transaction to be "simple" – *i.e.*, does not present any meaningful competition issue – may request faster review. This procedure addresses a significant concern of merging companies that MOFCOM's review unduly delayed transactions that did not raise competition issues, resulting in unnecessary costs and burdens. MOFCOM, in seeking to address the concerns with its process, consulted extensively with FTC and DOJ staff on our experience with the Hart-Scott-Rodino Act,<sup>10</sup> under which our agencies clear over 95 percent of merger filings in the first 30 days after filing. Our experience helped MOFCOM design its system, and these systemic changes have resulted in a significant increase in the number of transactions MOFCOM approves within 30 days of accepting the merger filing—from less than 30 percent to over 70 percent.

We have also highlighted the relevance of economics to sound antitrust analysis, and have shared our techniques and approaches, including as regards to the organizational structure and the role of economists at the FTC, with the Chinese anti-monopoly agencies. Notably, we have used opportunities that include bilateral meetings, technical assistance, and case cooperation with MOFCOM to underscore the importance of economic evidence and analysis to

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<sup>10</sup> Pub. L. No. 94-435, 90 Stat. 1383 (1976) (codified at 15 U.S.C. § 18a).

merger assessment. As these discussions have progressed, we have observed that MOFCOM increasingly sets forth its economic analysis in published merger decisions.

Of course, our efforts with respect to China's three AML enforcement agencies—relatively new agencies tasked with enforcing a relatively new competition law for one of the world's largest economies—are best seen as a work in progress. Undoubtedly, there will continue to be concerns regarding both the procedural and substantive application of the AML. Issues raised by Chinese procedures, many of which the Chinese agencies acknowledge, include insufficient transparency, failure to provide a meaningful opportunity for defense, and limitations on the ability to be represented by counsel. Regarding substance, there continues to be a belief that China's agencies are pursuing non-competition objectives through competition enforcement to promote either certain industries or particular Chinese competitors. The U.S. antitrust agencies take such concerns very seriously. We recognize 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.

The FTC has worked through multiple avenues to encourage China's agencies to ensure that their procedures provide appropriate transparency and fairness to parties. In addition to addressing these issues and sharing our approaches in bilateral meetings, including our recent meetings with Chinese enforcement agencies in April, the FTC and DOJ have taken leading roles in broader U.S. government efforts to address these points, including in the Strategic and Economic Dialogue (S&ED). As part of the 2014 S&ED, China recognized "that the objective of competition policy is to promote consumer welfare and economic efficiency rather than promote individual competitors or industries, and that enforcement of their respective

competition laws should be fair, objective, transparent, and non-discriminatory.”<sup>11</sup> The FTC and DOJ also participate in the U.S.-China Joint Commission on Commerce and Trade (JCCT). In connection with the 2014 JCCT, China provided more specific commitments regarding enforcement procedures, including assurances that China would inform parties of the basis of liability before imposing administrative penalties, provide decisions in writing, and permit lawyers, including foreign counsel, to participate in meetings with the AML enforcement agencies.<sup>12</sup> The FTC has continued to pursue additional understandings and outcomes through these channels and other fora regarding important aspects of Chinese antitrust enforcement procedures.

#### **V. Antitrust and Intellectual Property**

A more challenging area for international convergence is unilateral conduct. Section 2 of the Sherman Act, along with Section 5 of the FTC Act, prohibit anticompetitive conduct that creates or maintains a monopoly, and laws in other countries prohibit business conduct that abuses that company’s dominant position. Determining when conduct crosses the line from aggressive business conduct to prohibited monopolization or abuse of dominance is a challenge for enforcers around the world.

This challenge is particularly acute in the area of conduct involving intellectual property (IP). IP rights allow the rights holder to sue to exclude others from using its patented technology, proprietary know-how, or creative work. In some cases, this may give the rights holder a monopoly position in a particular market. The FTC analyzes conduct involving IP rights as it does conduct involving other forms of property, applying the same antitrust rules but

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<sup>11</sup> See U.S.-China Joint Fact Sheet Sixth Meeting of the Strategic and Economic Dialogue (July 11, 2014), <https://www.treasury.gov/press-center/press-releases/Pages/j12561.aspx>.

<sup>12</sup> See U.S.-China Joint Fact Sheet on 25th Joint Commission on Commerce and Trade (Dec. 29, 2014), <https://www.commerce.gov/news/fact-sheets/2014/12/us-china-joint-fact-sheet-25th-joint-commission-commerce-and-trade>.

taking into account the unique characteristics of IP rights.<sup>13</sup> Other enforcers take a similar approach. As a result, to the extent agencies differ in their assessment of unilateral conduct, that often carries over to how they treat conduct involving IP under competition law.

An example where differences in approach are explicit is in the area of “excessive pricing.” While U.S. antitrust law does not prohibit even a monopolist from charging whatever the market will bear, the competition laws in most countries prohibit a firm from charging an “excessive” price. While some jurisdictions have exercised this enforcement authority with great caution, others have taken more aggressive stances in enforcement guidelines or actions. This has led to concerns that other jurisdictions may use their competition laws as a tool to regulate the royalties patent holders charge for their patents. The FTC has expressed its concern with other jurisdictions’ using competition laws to engage in price regulation. We have communicated in a variety of ways to enforcers in relevant jurisdictions, as well as legislators when appropriate, the adverse effects on innovation that such approaches can have.<sup>14</sup>

Many of the concerns about IP-related antitrust enforcement have been focused on China. China’s AML contains provisions prohibiting unfairly high pricing as well as placing limitations on refusals to deal. Its enforcement agencies are in the process of drafting guidelines for enforcement of the AML, including the above provisions, with respect to conduct involving intellectual property. Although the drafting process is ongoing, recent drafts contain provisions that would create liability for refusals to license intellectual property that is deemed “necessary”

<sup>13</sup> See U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 4 (2007); U.S. Dep’t of Justice & Fed. Trade Comm’n, Antitrust Guidelines for the Licensing of Intellectual Property § 2.1 (Apr. 6, 1995).

<sup>14</sup> See, e.g., Edith Ramirez, Chairwoman, Fed. Trade Comm’n, Core Competition Agency Principles: Lessons Learned from the FTC, Keynote Address at the Antitrust in Asia Conference, Beijing, China (May 22, 2014), [https://www.ftc.gov/system/files/documents/public\\_statements/314151/140522abachinakeynote.pdf](https://www.ftc.gov/system/files/documents/public_statements/314151/140522abachinakeynote.pdf); Edith Ramirez, Chairwoman, Fed. Trade Comm’n, Keynote Address, Seventh Annual Global Antitrust Enforcement Symposium (Sept. 25, 2013), [https://www.ftc.gov/sites/default/files/documents/public\\_statements/7th-annual-global-antitrust-enforcement-symposium/130925georgetownantitrustspeech.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/7th-annual-global-antitrust-enforcement-symposium/130925georgetownantitrustspeech.pdf).

to compete in a given market as well as provisions that would prohibit charging unfairly high IP royalties. Application of these provisions 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. The FTC and DOJ continue to convey concerns to China's enforcement agencies about these provisions, as well as other aspects of the draft guidelines that may have the unintended effect of chilling incentives to innovate and compete on the merits. We have urged a cautious approach to enforcement under these provisions, to help ensure that incentives for innovation are not undermined. As the development of these guidelines continues, the FTC will continue to engage and advocate regarding these concerns, and for other enforcement policies and approaches that promote innovation and competition.

#### **VI. Conclusion**

In summary, international antitrust enforcement has come a long way in the past 25 years. We have accomplished much through working with our colleagues in other countries, but our work is not done. There likely will always be issues for targeted engagement and advocacy as we work to ensure that antitrust regimes around the world consistently adopt best practices and eliminate enforcement practices that do not advance consumer welfare or comport with due process.

Thank you. I look forward to your questions.

Mr. ISSA. Thank you. It's now my pleasure to introduce the Ranking Member of the full Committee for his opening statement, Mr. Conyers of Michigan.

Mr. CONYERS. Thank you, Chairman Issa, and I want to put my statement in the record.

Mr. ISSA. Without objection.

Mr. CONYERS. And just note that today's hearing, with these particular witnesses, promises to be not only informative and timely, particularly with respect to China's enforcement of its Anti-Monopoly Law, and I appreciate your comments in that regard. And over the last days even, Treasury Secretary Jacob Lew, who was in China for the latest round of talks in the ongoing U.S.-China Strategic/Economic Dialogue, makes our discussion here so significant and important. I commend the Chairman for it, and I leave you with this one thought. What impact will China's alleged discriminatory enforcement practices have on American jobs?

And I thank the Chairman for his indulgence, and I yield back the balance of my time.

[The prepared statement of Mr. Conyers follows:]

**Statement of the Honorable John Conyers, Jr. for the Hearing on  
“International Antitrust Enforcement: China and Beyond”  
Before the Subcommittee on Regulatory Reform, Commercial and  
Antitrust Law**

**Tuesday, June 7, 2016, at 4:00 p.m.  
2141 Rayburn House Office Building**

Today’s hearing promises to be not only informative, but timely given the various issues presented by international antitrust enforcement, particularly with respect to China’s enforcement of its Anti-Monopoly Law.

Over the last two days, Treasury Secretary Jacob Lew was in China for the latest round of talks in the ongoing U.S.-China Strategic and Economic Dialogue.

It was through this very mechanism that concerns about China’s antitrust enforcement practices had been raised previously.

Given the increasingly interconnected economic relationships among nations – and in particular between the United States and China – it is crucial that we educate ourselves about foreign antitrust regimes and their impact on American businesses and our economy as a whole.

As we hear from our witnesses, I would like them to address several questions.

**To begin with, what impact will China’s alleged discriminatory enforcement practices have on American jobs?**

The potential for hurting American jobs governs how I view this matter as well as many other issues concerning the global economy and trade.

To the extent that Chinese antitrust enforcement actions unfairly advantage Chinese firms over American ones – and to the extent that such unfair competition results in American companies going out of business and American workers losing their jobs – I would be deeply concerned.

For instance, discriminatory enforcement may allow Chinese firms to collude with each other and with the Chinese government to sell products below cost and drive American competitors out of business, costing American jobs.

**In addition, what are the reasons behind China's alleged discriminatory enforcement of its Anti-Monopoly Law?**

Of course, the Anti-Monopoly Law explicitly includes policy goals such as the protection of “industries controlled by the state-owned economy and related to the lifeblood of the national economy and to national security . . .” and “to facilitate technology advancement.”

Other factors shaping enforcement may include the fact that the Anti-Monopoly Law has only been in effect less than 8 years and has yet to fully develop. In addition, the enforcement agencies may lack sufficient staffing, resources, and experience.

I would like know to what degree each of these factors shapes Chinese enforcement behavior.

**Finally, to what extent can and should the United States shape Chinese antitrust enforcement behavior?**

China's antitrust law and its enforcement practices are informed not just by free-market economics principles, which are dominant in our law – perhaps too much so – but also by China's own political, social, and cultural values.

I want to know whether such non-economic factors ultimately mean that there are significant limits to what the United States and other nations can do.

Also, are there some lessons that we can draw from our observations of China's antitrust enforcement efforts in terms of our own antitrust enforcement?

Accordingly, I thank our witnesses for their testimony and look forward to an enlightening discussion.

Mr. ISSA. I thank the gentleman, and hopefully we'll see the answer to that question as we speak.

With that, we go to Mr. Cohen for his opening statement.

**TESTIMONY OF MARK A. COHEN, SENIOR COUNSEL,  
UNITED STATES PATENT AND TRADEMARK OFFICE**

Mr. COHEN. Chairman Issa, Ranking Member Johnson, Members of the Committee, thank you for the opportunity to discuss competition law in China from the perspective of the U.S. Patent and Trademark Office. It's an honor to appear before you today.

USPTO is engaged with China on all IP issues, including those that involve antitrust and licensing. Last year, Under Secretary Lee met with Chinese Vice Premier Wang Yang, and just last week, I accompanied Deputy Under Secretary Slifer to Beijing to advance talks on critical IP issues. Along with the United States Trade Representative, Under Secretary Lee also cochairs the IP Working Group of the Joint Commission on Commerce and Trade, or JCCT, to engage bilaterally on improvements to China's IP regime.

Over the years, the JCCT and related dialogues have included several commitments on IP, including on standards, licensing, legitimate sales of IP-intensive goods, and judicial reform. The USPTO's China team consists of 21 people, including experienced IP attaches in three Chinese cities. We have signed agreements to support cooperative activities in IP with several Chinese agencies. We also frequently meet with industry to exchange views, educate them, and share their concerns.

In our experience, the current environment for IP and antitrust in China has three pronounced characteristics. These are: one, strong antitrust enforcement is counterposed against weak IP protection; two, there's little foreign use of the IP enforcement system while there is considerable foreign concern about being targeted for competition law violations; and, three, industrial policy in China makes it difficult to legitimately license technology to third parties.

Regarding the first item, China's weak enforcement system, Chinese IP damages are too low weakening fundamental protections IP right holders need. IP holders who run afoul of Chinese AML authorities often do not believe that their legitimate rights have been protected. In summary, China is pursuing IP abuse without first having adequately secured IP use.

As an example of this unbalanced environment, the antitrust fine imposed against Qualcomm for 975 million U.S. Dollars is thousands of times more than the average damages in a patent litigation in China. Second, surveys and press reports suggest that many foreign companies feel targeted. While Chinese antitrust authorities have taken pains to show that they are enforcing their laws evenhandedly, this sense of feeling targeted is coupled with little affirmative use of China's IP system as well as concerns over due process and a sense that foreigners' rights are not being adequately protected.

As for the third item, industrial policy, I share the concerns of many here. Much of the problem with commercialization of technology today in China is due to an overinterventionist Chinese economy. Notwithstanding the international consensus that IP is a

“private right,” China’s state planners have created a wealth of interventions in IP creation and licensing from which it is reasonable to assume antitrust policy is not excluded.

These three serious problems highlight the challenges our companies face: Weak IP protection, targeting, and industrial policy. The Administration has pushed back on the more onerous aspects of these policies. USPTO is also taking the lead on highlighting challenges involved in licensing IP to China, including negotiating with our Chinese counterparts, training programs, and research.

In summary, the Administration strongly supports China’s efforts to develop an antitrust regime consistent with the practices of other market economy countries. However, there are many aspects of China’s economy that may not be fully market driven in the context of both IP and IP-related antitrust.

Thank you, and I look forward to your questions.

[The prepared statement of Mr. Cohen follows:]

STATEMENT OF  
MARK A. COHEN  
SENIOR COUNSEL, CHINA  
OFFICE OF POLICY AND INTERNATIONAL AFFAIRS  
UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE  
SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL  
AND ANTITRUST LAW  
COMMITTEE ON THE JUDICIARY  
U.S. House of Representatives  
“International Antitrust Enforcement: China and Beyond”  
JUNE 7, 2016

**Introduction**

Chairman Marino, Ranking Member Johnson, and Members of the Committee:

Thank you for this opportunity to discuss China’s Anti-Monopoly law from the perspective of the U.S. Patent and Trademark Office (USPTO).

My comments are focused on the intellectual property (IP) aspects of China’s antitrust regime, in particular on the role of the USPTO in IP and China’s anti-monopoly law (AML).<sup>1</sup>

**The Role of the USPTO in Anti-Monopoly Matters in China**

The USPTO is engaged with China on all IP issues, including those that involve antitrust and licensing. The USPTO has a statutory mandate to advise the President and all federal agencies, through the Secretary of Commerce, on national and international IP policy issues, including IP protection in other countries. In addition, the USPTO is authorized by statute to provide guidance, to conduct programs and studies, and to interact with IP offices worldwide and with international intergovernmental organizations on matters involving IP.

Under Secretary of Commerce for Intellectual Property Michelle Lee and other USPTO officials routinely engage in discussion with high-ranking Chinese officials related to IP law

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<sup>1</sup> China has a number of laws other than the AML that have competition aspects, including the Anti-unfair Competition Law, Pricing Law, Contract Law, and the Technology Import/Export Regulations, which can regulate how intellectual property is transferred or monetized for stated purposes of regulating competition or preventing unfair behavior.

developments and proposed improvements to Chinese IP laws. For example, last year, Under Secretary Lee met with Chinese Vice Premier Wang Yang. And just last week, Deputy Under Secretary Russell Slifer was in Beijing to advance talks on critical IP issues. Along with the United States Trade Representative (USTR), Under Secretary Lee also co-chairs the IPR Working Group of the Joint Commission on Commerce and Trade (JCCT) to engage bilaterally on improvements to China's IP laws.

This past December, the JCCT included several outcomes on the Anti-Monopoly Law, standards, licensing, IP, legitimate sales of IP-intensive goods and services, abusive IP litigation, and judicial cooperation – all of which directly impact IP in China. USPTO experts coordinate with our trade and antitrust colleagues from other agencies in these bilateral discussions.

The USPTO leads negotiations on behalf of the United States at the World Intellectual Property Organization (WIPO); advises USTR on the negotiation and implementation of the IP provisions of international trade agreements; supports USTR at the World Trade Organization (WTO); advises the Secretary of Commerce and the Administration on a full range of IP policy matters, including in the areas of patents, copyrights, trademarks, and trade secrets; conducts empirical research on IP; and provides educational programs on the protection, use, and enforcement of IP.

The USPTO's "China team," which I lead, consists of 21 lawyers and support personnel located in the Washington area and three cities in China: Beijing, Guangzhou, and Shanghai. We have negotiated agreements and Memoranda of Understanding to support cooperative activities on IP with several Chinese agencies, which also contain bureaus with authority over Anti-Monopoly Law-related issues, including the State Administration for Industry and Commerce (SAIC) (which handles non-price related abuse of dominance), the Ministry of Commerce (which handles merger review), and the State Intellectual Property Office (SIPO) (which is involved in the intersection of IP protection and antitrust). We have also actively engaged in recent years with China's IP courts and tribunals, which are limited jurisdiction courts and tribunals that hear IP and non-IP related antitrust-related disputes. We have also actively supported numerous Congressional and Congressional staff delegation visits to China on IP-related matters.

Through the USPTO's Office of the Chief Economist, and work my team undertakes, we actively support more data-driven approaches to IP in China. Our new China Resource Center collects data on all IP-related matters. The focus of this center is on the protection and enforcement of IP rights, and commercialization and industrial policies affecting these rights. As this effort grows, we hope that the USPTO's China Resource Center will prove to be an invaluable resource to our stakeholders in the U.S. Government, perhaps including our colleagues in the antitrust enforcement agencies, and the business and academic communities.

The IP Attaché Program is an important asset that supports the USPTO's efforts. We currently have 13 attaché positions in 10 cities, including three based in China. IP attachés are IP experts who serve as U.S. diplomats in Embassies and Consulates abroad. IP attachés promote U.S. IP policies to achieve high-quality and balanced IP systems, including effective protection and enforcement, in their host countries and regions. The IP attachés work closely with the USPTO and the Office of Intellectual Property Rights (OIPR) in advancing the commercial interests of U.S. companies in foreign markets where they are experiencing barriers to market access.

### **The Anti-Monopoly Law/IP Relationship in China**

China's experience in IP-related issues has deeply informed its perspective on antitrust issues generally. Certain of China's highest profile cases in recent years have involved IP. There are also jurisdictional, agency, and legislative overlaps between IP and antitrust.

To name a few examples: China's specialized IP tribunals and courts handle antitrust litigation. China's State Administration for Industry and Commerce, which houses a bureau that handles non-price-related abuse-of-dominance cases, in addition to trade secrets and trade dress matters and also has bureaus that administer trademarks, trademark enforcement, trademark agency appeals and company name registrations among other areas. The former Minister of Commerce Director General, who handled mergers, was in charge of IP matters when he was the Director General of Law and Treaties at the Ministry of Commerce. Many of China's antitrust related laws also build upon pre-existing laws, regulations, and rules, some of which have significant IP components. These laws include the Anti-Unfair Competition Law, which contains measures to protect trade secrets and trade dress, and the Contract Law, which also addresses the "monopolization of technology."

The paradox China presents, from a USPTO perspective, is the combination of weak and non-deterrent IP protection with strong antitrust enforcement with potentially high penalties that has recently focused on IP, including on IP held by U.S. companies. As USTR noted in its 2015 report on China's WTO compliance, "inadequacies in China's IPR protection and enforcement regime continue to present serious barriers to U.S. exports and investment." In a recent survey, U.S.-China Business Council respondents listed IP concerns in a number four priority slot in a list of the top 10 challenges for members with respect to business performance in China.<sup>2</sup> IP issues have averaged as a number 4.5 priority over the past ten years. According to AmCham Shanghai's 2016 China Business Report, 49% of respondents believed that lack of IPR protection and enforcement constrains their investment in innovation and R&D in China.<sup>3</sup> Concerns about IP are based on the U.S. perception that these are our competitive advantages in China. When AmCham China respondents in all sectors addressed what they considered their competitive advantage versus Chinese domestic entities, three of their top four perceived advantages were IP-related: Brands (74%), Technology & IP (63%), and Development and Innovation (59%).<sup>4</sup>

### **IP Challenges in China's Antitrust Environment**

Broadly speaking, the current environment for IP and antitrust in China shows three clear trends: strong antitrust enforcement balanced against weak IP rights for deterring infringement; pursuit of foreigners in antitrust, with little foreign affirmative use of the IP system; and, a legal and

<sup>2</sup> <https://www.uschina.org/reports/uscbc-2015-member-company-survey>

<sup>3</sup> <http://www.amcham-shanghai.org/ftpuploadfiles/Website/CBR/2016/China-Business-Report.pdf>

<sup>4</sup> <http://www.amchamchina.org/policy-advocacy/business-climate-survey/>

industrial policy environment where it is very difficult to legitimately license patents to third parties. I will discuss each of these, below:

### 1. Strong Antitrust Enforcement/Weak IP Enforcement

Chinese patent damages are too low. IP holders who run afoul of Chinese AML authorities, and may potentially pay significant fines, do not have comfort that their legitimate IP rights have been or will be protected. For example, one antitrust/IP related administrative penalty for a completed investigation to date is the antitrust fine imposed against Qualcomm for \$975 million USD by China's National Reform and Development Commission (China's former State Planning Commission) (March 2, 2015). By comparison, according to one database, Ciela.cn, the average damages in a Chinese patent case is as low as CNY 118,266<sup>5</sup>, or about \$18,000 USD. A recent report by a newer database service, IPHouse, determined that the average compensation in a patent infringement matter in Beijing for 2015 was 460,418 RMB or about \$74,260.<sup>6</sup> By comparison, the Qualcomm fine was over **50,000** times the average patent damage award as calculated by CIELA, or about 13,000 times the IPHouse report. It is also about 20 times higher than the highest patent damage award, \$45,000,000 USD in a first instance trial against Schneider Electric, which many view as an outlier, in terms of the high damages that were awarded.

Of course, antitrust and IP infringement cases seek to remedy different harms, and penalties in these matters are calculated differently. That said, in the area of IP, there is an international obligation, under the TRIPS Agreement, for courts to award damages sufficient to deter further infringements (Art. 41.1).

### 2. IP-related Antitrust Activities Against Foreigners for Asserting IP Rights and Weak Foreign Utilization of the IP System

Chinese antitrust authorities have taken pains to indicate that they are enforcing their antitrust laws even-handedly.<sup>7</sup> Nonetheless, many U.S. tech companies have been the subject of antitrust enforcement for their IP-related practices including licensing, such as Qualcomm, InterDigital, Microsoft, Dolby and HDMI. IP issues have also appeared in Chinese merger decisions, including Google-Motorola, Microsoft-Nokia, and Coca Cola-Huiyuan. Press reports<sup>8</sup> and survey data suggest that many foreign companies feel targeted. U.S.-China Business Council survey data<sup>9</sup> presents a severe picture for foreigners in antitrust matters: 86 percent of companies

<sup>5</sup> Viewed on May 17, 2016; this finding is consistent with a research study by Brian Love et al. which found average damages of between 80,00 and 150,000 RMB in patent litigation in China. (<http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1920&context=facpubs>)

<sup>6</sup> <http://en.iphouse.cn/#page2>

<sup>7</sup> Xinhua, China's anti-monopoly law fair and strict: official (Sept. 4, 2014) [http://english.gov.cn/policies/policy\\_watch/2014/09/24/content\\_281474989118272.htm](http://english.gov.cn/policies/policy_watch/2014/09/24/content_281474989118272.htm)

<sup>8</sup> See also China Targeting Foreign Companies, American Chamber Says (Sept. 2, 2014), <http://www.bloomberg.com/news/articles/2014-09-02/u-s-companies-say-china-subjectively-enforcing-laws>.

<sup>9</sup> <https://www.uschina.org/reports/competition-policy-and-enforcement-china>

surveyed said they were concerned about China's competition enforcement activities, and nearly 30 percent said they were concerned that they would be targeted by future investigations.

Recently released data from China's Supreme People's Court reporting on IP litigation for 2015 reveals that the total number of civil IP cases in China involving foreigners, as calculated by the Court, was only 1.3% of China's IP docket, or 1,327 cases in 2015. Foreign IP cases dropped 23% in absolute numbers from last year, despite an overall increase of 7.2% of total decided IP cases.

Concerns over targeting may also stem in part from the perceived bias within the Chinese system. In the Huawei vs InterDigital case, QIU Yongqing, the chief judge who ruled against U.S. based InterDigital, stated that Huawei's strategy of using anti-monopoly laws as a countermeasure is worth learning by other Chinese enterprises: and that "Chinese enterprises should bravely employ anti-monopoly lawsuits to break technology barriers and win space for development."<sup>10</sup> James M. Zimmerman, the current Chairman of AmCham China described the environment from a U.S. perspective: "There's the insinuation that foreign company executives will be personally persecuted or prevented from leaving the country... The lack of due process in these investigations is disturbing."<sup>11</sup> Many foreigners also have concerns over retaliation of various kinds if they bring IP lawsuits. For example, several years before the AML was enacted, the State Administration for Industry and Commerce conducted a study which appeared to point to foreign companies, including Cisco, as abusing its dominant position by refusing to license its technology<sup>12</sup>. Cisco had sued one of those companies (Huawei) for illegally copying its IP before the SAIC survey was completed. There have been several other cases which suggest that there may have been retaliation for bringing Section 337 or other patent litigation matters, or even for seeking settlements of disputes in the U.S. or elsewhere.

Nonetheless, we lack equivalent data sets on both the IP system and antitrust system at this time to draw comprehensive comparisons. In recent years, Chinese IP adjudication has however benefited from initiatives involving publication of all civil and administrative cases, statistical reporting of decisions, annual white papers on developments in agencies and the courts, experiments in developing case law and precedent, experiments in publicly filed amicus briefs, regulations requiring transparent coordination amongst enforcement authorities, and even a WTO request to provide copies of IP cases<sup>13</sup> which are providing an increasingly robust basis for assessing China's IP system, including, in many cases, its impact on foreigners. This experience in IP, in appropriate circumstances, may create useful pathways for China's antitrust development.

<sup>10</sup> [http://mfyb.chinacourt.org/paper/html/2013-10/29/content\\_72138.htm?div=-](http://mfyb.chinacourt.org/paper/html/2013-10/29/content_72138.htm?div=-)

<sup>11</sup> "Mr. Confession' and his boss drive China's antitrust crusade" (Sept. 15, 2014) <http://www.reuters.com/article/us-china-antitrust-ndre-insight-idUSKBN0HA27X20140915>

<sup>12</sup> "Multinationals' Anti-Competition Behavior in China and Counter-Measures Therefore," Industry and Commerce Administration, Section (1)D, Issued by the Anti-Monopoly Division, Fair Trade Bureau, State Administration for Industry and Commerce (March 1, 2004). See also [https://www.uschamber.com/sites/default/files/legacy/reports/100728chinareport\\_0.pdf](https://www.uschamber.com/sites/default/files/legacy/reports/100728chinareport_0.pdf)

<sup>13</sup> See <http://www.ip-watch.org/2006/01/25/ustr-clarifies-demand-for-details-on-chinas-ipr-enforcement-cases/>.

### 3. Licensing Practices

In its 2015 annual member survey<sup>14</sup>, the U.S.-China Business Council reported that 59% of respondents expressed concern about transferring technology to China. Concerns about technology transfer included protection of IP (75%), enforcing license agreements (51%) and the government dictating or influencing licensing negotiations (32%). The U.S.-China Business Council noted that the companies impacted by this issue felt it “very acutely.” A more recent, unpublished 2016 survey by the US-China Business Council rated China the most challenging legal and regulatory market, ahead of the United States, Europe, developed markets in Asia and other emerging markets.<sup>15</sup>

These consequences can be especially acute for the United States, which is the world’s largest technology exporter. In 2014, the United States exported \$130.362 billion dollars of technology. The Chinese market was \$6.826 billion, or about 5.2% of that total. Ireland, Switzerland, the United Kingdom, Canada and Japan all exceeded China as an export market. Importantly, most of the technology exports to China from the U.S. (about 58%) are between related parties, e.g., between a parent and subsidiary. In other words, only about 42% of the technology exports to China are between unrelated parties. By comparison, Taiwan which is a slightly smaller technology market, was dominated by unrelated party transactions with the U.S. (about 93%).<sup>16</sup>

The above data raise concerns whether China is overly focused on IP abuse, and not sufficiently directed to improving IP use. I believe that much of the problem with commercialization of technology today is due to an over-interventionist Chinese economy. From a legal perspective, one should not lose sight of the fact that the AML, like many Chinese laws and China’s constitution itself, is intended to promote “the healthy development of the socialist market economy” (Art. 1)<sup>17</sup> which includes China’s state planning apparatus. Notwithstanding the international consensus that IP is a “private right” (TRIPS Agreement, preamble), China’s legacy state planning has created a wealth of incentives and intervention in IP creation and licensing, from which it is reasonable to assume antitrust policy is not excluded. These policies have the potential to make it difficult for foreigners to license their technology in China.

Amongst two of the notable socialist market economy goals of China, are the 15 year Science and Technology Plan (2006) which has a goal of reducing “dependence on imported technology reduced to 30% or below” and the “Action Plan for Implementing the National Intellectual

<sup>14</sup> <https://www.uschina.org/reports/uscbc-2015-member-company-survey>

<sup>15</sup> Unpublished survey conducted in 2016 with the support of USPTO, China Resource Center. Details are available from USCBC or USPTO.

<sup>16</sup> International service trade data from Department of Commerce, Bureau of Economic Analysis and Census Bureau. (<http://www.bea.gov/international/index.htm#services>)

<sup>17</sup> See also, PRC Constitution, Art. 15, Antitrust Competition Law (Art. 1).

Property Strategy (2014—2020)” promulgated by the State Council”<sup>18</sup> which has a goal of increasing technology exports from the \$1.3 billion USD in 2013 to \$8 billion USD by 2020.

Regarding policy support for different sectors, NDRC, the antitrust regulator which brought the Qualcomm case and was the former State Planning Commission, drafted a plan in 2014 of “building an innovative platform to promote the development of strategic emerging industries” which includes the IT sector. SIPO, through its leadership of the National IP Strategy in 2013, similarly called to “prepare a work plan for intellectual property in China’s Strategic and Emerging Industries.”<sup>19/20</sup> The current five year national IP strategy also calls for China to “Strive to Build a Strong IPR Country” and calls for “strengthening patent pilot projects, joint utilization of patents and collective management of patents... to strengthen the competitive advantages of industries.”

Chinese government interventions include a goal of increasing state support for patents through state funded loans secured by patents to about \$30 billion USD by 2020.<sup>21</sup> The Chinese government, through its High and New Technology Enterprise tax incentives, also provides tax benefits for companies that locally own IP or conduct R&D. Chinese government interventions in IP creation include national and local quotas for patent creation per 10,000 people, subsidies for patent applications or maintenance, national and local incentives to participate in standards setting bodies, tax preferences for companies which own their own locally-created IP, industry specific plans to obtain additional patents in technologies of concern to China, and talent programs for developing IP talent or talent in industrial sectors.

The Administration has pushed back on these policies as well as procedural aspects of China’s AML regime, including some of the excessive practices and due process concerns, in our various bilateral dialogues.

#### **USPTO’s Role Engaging on These Issues**

The USPTO engages on both sides of the balance between IP enforcement and increased antitrust enforcement in China. The Agency has a leading role in issues involving patent protection and enforcement and we have long engaged the Chinese government, its courts and the Chinese patent office, on the need for more deterrent and predictable remedies and better civil enforcement of IP rights.<sup>22</sup> We advocate on behalf of the U.S. Government through comments on draft laws, in JCCT discussions, and in the context of our direct relationships with China’s patent office and other agencies. We also conduct numerous training programs for U.S. industry to better understand China’s IP environment.

<sup>18</sup> Guo Ban Fa [2014] No. 64

<sup>19</sup> The SEI’s include: 1. Energy efficient and environmental technologies; 2. Next generation information technology (IT); 3. Biotechnology; 4. High-end equipment manufacturing; 5. New energy; 6. New materials; and 7. New-energy vehicles (NEVs). See also <https://www.uschina.org/sites/default/files/sci-report.pdf>

<sup>20</sup> Notice of Its Opinion on Key Tasks on Deepening Economic Reform in 2014 (dated April 30, 2014, released May 20, 2014) ([http://www.gov.cn/jhngce/content/2014-05/20/content\\_8818.htm](http://www.gov.cn/jhngce/content/2014-05/20/content_8818.htm)).

<sup>21</sup> Guo Ban Fa [2014] No. 64

<sup>22</sup> See letter of SIPO Commissioner Tian Lipu to USPTO Director Kappos of September 27, 2012 at [http://www.uspto.gov/sites/default/files/ip/ip\\_overseas/china\\_team/Commissioner\\_Tians\\_letter\\_to\\_Mr\\_Kappos.pdf](http://www.uspto.gov/sites/default/files/ip/ip_overseas/china_team/Commissioner_Tians_letter_to_Mr_Kappos.pdf).

On antitrust matters, we support the efforts of the Department of Commerce and other agencies (including the U.S. antitrust enforcers, USDOJ, FTC, and as well as USTR) in their engagement when such matters implicate IP issues. There have been several commitments by China in recent years to improve procedural fairness on antitrust matters which USPTO supports.

We have also taken a lead on highlighting challenges involved in licensing IP to China, including testimony before the U.S. China Economic and Security Commission<sup>23</sup>, negotiating with our Chinese counterparts, conducting two separate programs with China's patent office and Ministry of Commerce on licensing regulation, and educating U.S. companies on risks of IP protection and licensing in China's current environment. One such program on China IP issues was held last year in cooperation with the University of California at San Diego.<sup>24</sup> Our next program on the Economic Contribution of Technology Licensing, in conjunction with George Mason University, is scheduled for tomorrow, June 8 at USPTO.<sup>25</sup>

### Conclusion

China's AML was enacted only eight years ago in 2008. But, Chinese regulators benefit from hundreds of years of experience of other governments, and have been engaging in technical dialogues and exchanges with a wide range of agencies, companies and universities. Comparisons with intellectual property suggest that arguments regarding China's developing world status should have a very short life span.

Although intellectual property appeared a very new concept to China in 1983, by 2011 China had become the most litigious society for intellectual property in the world, with the largest trademark office and one of the two largest patent offices. Moreover, this "foreign concept" has taken deep root in China: over 98% of the IPR litigation in China involves Chinese suing Chinese, and many of the key rights (85-98%) granted by China's IP agencies (trademarks, utility model patents, design patents), are granted to Chinese nationals. As with IP, China has now emerged as a major antitrust venue, which has also elicited considerable concern from the business community, and should be engaged accordingly.

The Administration strongly supports China's efforts to develop an antitrust regime consistent with the practices of other market-economy countries. However, we are concerned that there are many aspects of China's economy that may not be fully market driven, in the context of both IP and IP-related antitrust.

Thank You.

<sup>23</sup>[http://www.uscc.gov/sites/default/files/Mark%20Cohen\\_testimony.pdf](http://www.uscc.gov/sites/default/files/Mark%20Cohen_testimony.pdf)

<sup>24</sup>[https://china.ucsd.edu/\\_files/np-2015/Agenda-New-Perspectives.pdf](https://china.ucsd.edu/_files/np-2015/Agenda-New-Perspectives.pdf)

<sup>25</sup><https://events.r20.constantcontact.com/register/eventReg?oeidk=a07ecm8dmfg411c97a3&oseq=&c=&ch=>

Mr. ISSA. Thank you.  
Mr. Heather.

**TESTIMONY OF SEAN HEATHER, VICE PRESIDENT, CENTER  
FOR GLOBAL REGULATORY COOPERATION, U.S. CHAMBER  
OF COMMERCE**

Mr. HEATHER. Thank you, Chairman Issa and Ranking Member Johnson, for today's important hearing and inviting the Chamber to testify.

The Chamber's approach to antitrust is grounded in the belief that antitrust should be transparent, fair, predictable, reasonably stable over time, consistent across jurisdictions, and based on sound economic analysis.

For the past several years, the Chamber has worked with China on its Anti-Monopoly Law, and China has made some positive progress. In part, improvements can be traced to high level engagement between the two governments. The Chamber welcomed the commitment by the two Presidents during President Xi's State visit in 2015 where it was agreed, quote, "Both countries affirm the importance of competition policy approaches that ensure fair and non-discriminatory treatment of entities and that avoid the enforcement of competition law to pursue industrial policy goals." However, China's antitrust enforcement has yet to live up to this ideal.

The AML itself allows China's agencies wide latitude to inject industrial policy into their enforcement activity. Further, stakeholders in China's government, not directly charged with enforcing the AML, have the potential to weigh in and steer the outcome of an antitrust investigation. As a result, in many cases, foreign companies find themselves as a victim of industrial policy goals that promote also discrimination and protectionism. Merger reviews have created opportunities for China's own national champions to expand and increase their market share, have capped prices for products and technology on which domestic companies rely, and protect famous Chinese brands from acquisition by foreign companies.

To date, all merger transactions blocked or conditionally approved have involved foreign companies. Similarly, AML transactions—AML investigations have forced foreign companies that market consumer products to reduce prices, even when such prices appear to be the result of market forces rather than anticompetitive conduct.

The Chamber is particularly concerned with China's ongoing efforts to develop IP abuse guidelines under the AML. Those guidelines endorse a broad, unbalanced essential facilities doctrine, impose stiff Anti-Monopoly sanctions for refusing to license IP or charging, quote, "excessively highly" royalties.

As drafted, the guidelines would force companies that possess critical technologies to license their intellectual property to Chinese competitors or to lower licensing costs to benefit local firms. As China concludes its drafting process later this year, the American business community hopes that China will remove its unbalanced essential facilities doctrine, delete provisions on excessive pricing, and eliminate provisions that prohibit or restrict the refusal to license. We believe such a course correction is ultimately in China's

long-term interest as it seeks to move up the value chain and become a global innovative contributor.

Let me mention a word or two about due process. Concerns regarding the substance of China's AML and its enforcement are compounded by continuing concerns over transparency and due process. Limited evidence is often presented to the target in support of vague or novel theories of harm. The absence of an independent judiciary, as well as potential threats of retaliation, deters companies from seriously considering an appeal. The result, more often than not, is an investigative process that incentivizes the foreign target of investigation to settle on terms favorable to the Chinese government.

Looking beyond China, the Chamber actively follows upwards of a dozen jurisdictions annually. Many of the concerns we discuss here today exist elsewhere in the world to varying degrees. Today, it can be difficult to discern what is an appropriate international antitrust norm. Take a statement from the Korea Fair Trade Commission regarding its 2015 enforcement plan. It stated that one of its primary goals was to strengthen enforcement against global monopolistic enterprises holding original technologies having a significant influence in the Korean industry.

The wording of such a statement demonstrates how perverse uses of antitrust can creep toward becoming an acceptable international norm. Last year, China issued a fine to Qualcomm for just under a billion dollars. That amount may seem like a lot, but it is actually the third highest fine behind the questionable fines issued by Europe against Intel and Microsoft. China also raised eyebrows over the condition it imposed on the Microsoft-Nokia merger, only for Korea to follow and place significantly more questionable conditions on that same merger.

In these examples, China's actions can be seen to further stretch international norms while also claiming to live within them. It also demonstrates that the world of international trust presents problems beyond China.

In closing, the Chamber greatly appreciates the work of the U.S. antitrust agencies and this Administration, yet more work needs to be done. Let me conclude by highlighting some of the recommendations from my written testimony for Congress and this Committee to consider.

First, it is important to endorse a whole-of-government approach wherever antitrust is misused and abused. It is critical that competition policy advocacy, vis—vis, China occur within the framework of the Administration's broader economic and commercial policy toward China as set forth by the President of the United States.

Second, Congress, through rigorous oversight support, should support the Administration to do everything in its power to ensure provisions of China's IP abuse guidelines are at least as consistent with U.S., EU, and Japanese approaches. This must be a top and urgent priority.

Finally, Congress should be more vocal in its support for addressing these concerns through bilateral investment treaty negotiations with China and through competition chapters in our trade agreements.

Thank you, and I look forward to answering your questions.

[The prepared statement of Mr. Heather follows:]



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## Statement of the U.S. Chamber of Commerce

**ON: International Antitrust Enforcement:  
China and Beyond**

**TO: U.S. House of Representatives Judiciary  
Subcommittee on Regulatory Reform, Commercial  
and Antitrust Law**

**BY: Sean Heather, Vice President, Global Regulatory  
Cooperation, Executive Director International &  
Antitrust Policy, U.S. Chamber of Commerce**

**DATE: June 7, 2016**

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1615 H Street NW | Washington, DC | 20062

The Chamber's mission is to advance human progress through an economic,  
political and social system based on individual freedom,  
incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

## **I. Chamber Approach to Competition Policy and Antitrust Enforcement**

The U.S. Chamber has a long-standing and significant role in competition policy and enforcement advocacy at home and around the world. Through the U.S. Chamber's Antitrust Council and International Division, we work globally to promote the following principles:

1. Antitrust law must be grounded in consumer welfare and enforcement should reflect a rigorous approach to sound economic analysis,
2. Antitrust enforcement proceedings must be transparent and afford due process,
3. There needs to be meaningful checks and balance as part of any antitrust proceeding as well as meaningful and independent judicial review,
4. Remedies need to be appropriate and narrowly tailored.

## **II. International Antitrust Initiatives and Advocacy**

Internationally, we believe competition and trade policy should be complementary. The benefits of international trade will be lost if markets do not operate in pro-competitive ways.

Related and equally important, governments must not use competition policy as an industrial policy tool to promote national champions and achieve protectionist goals that circumvent commitments to open trade and investment.

In recent years, antitrust agencies have proliferated rapidly around the world.

There are more than 120 competition enforcement agencies in existence today.

The policy of the United States government has been to actively promote and encourage this development—even as the results of this ongoing effort have been mixed.

For many jurisdictions, the introduction of competition law and enforcement has been a positive development.

In other jurisdictions, governments are introducing and enforcing antitrust regimes, at least in part, to promote industrial policy and undermine the competitiveness of American firms in their home markets and around the world.

### **III. The Chamber's Engagement on China's Anti-Monopoly Law**

The Chamber's work in China on the Anti-Monopoly Law (AML) development and implementation has long been a critical component of our international antitrust work plan.

Over many years, we have worked constructively with China's Anti-Monopoly Law Enforcement Authorities (AMEAs)—the National Development and Reform Commission (NDRC), the Ministry of Commerce (MOFCOM), and the State Administration for Industry and Commerce (SAIC)—as well as China's judiciary and leading academic experts, to share our experiences in the development and enforcement of U.S. antitrust laws.

Since 2006, we have hosted delegations from the National People's Congress, NDRC, MOFCOM, SAIC, and China's judiciary, with which we have exchanged views on the U.S. antitrust regime, the AML drafting process, and the development and application of related AML implementing guidelines and rules.

We are proud to have been the lead private sector sponsor of a public-private partnership with the U.S. government, funded by the U.S. Trade and Development Agency, which provided extensive training for China's AMEAs.

We have appreciated the opportunity afforded by the AMEAs to provide submissions on numerous AML implementing regulations, guidelines, and rules, two of which are appended to this testimony.

In addition, the Chamber in September 2014 issued a comprehensive and well-documented report examining the first five years of enforcement under China's AML. The report entitled *Competing Interests in China's Competition Law Enforcement: China's Anti-Monopoly Law Application and the Role of Industrial Policy* is also attached to this testimony.

As we noted in our report, the Chamber was pleased that the Third Plenum Decision Document, released in 2013, recognized that the market should play a “decisive” role in allocating resources.

Indeed, implementation of the AML provides an enormous opportunity for China to accelerate its economic transition by boosting competition and reducing the prominence of monopolies and oligopolies in its economy; increasing consumer welfare, choice, and consumption; and stimulating market-driven innovation.

In short, the AML has the potential to stimulate a new round of dynamic growth and efficiencies across all aspects of the Chinese economy – an outcome that would also contribute positively to U.S.-China relations.

We particularly welcomed the commitment of the Communist Party leadership to reduce government involvement and unnecessary regulation, increase the role of market forces, and facilitate the greater utilization of intellectual property. These important statements underscore the importance of free and fair competition without regard to the nationality of market actors or other industrial policy considerations.

Indeed, China has made some progress in implementing the AML, consistent with input from the U.S. government and American business.

Specifically,

- China has used the AML to prevent undue concentrations of market power, combat cartels and abuse of market dominance, and pursue other goals that enhance the overall competitive environment in China.
- China has gradually begun to increase the efficiency of its merger review process, appropriately recognizing that mergers are time sensitive.
- China has made some improvements in due process, with the most egregious reports of due process violations having subsided.
- China has also announced that as of July 1, it will begin implementation of a new Fair Competition Review System, which, as a first step, will include self-examination by government agencies at all levels of their policies to determine whether the regulations include anticompetitive elements. While this policy is

unlikely to benefit foreign-invested companies in the near term, it represents a step in the right direction.

In part, some of these improvements can be traced to high-level engagement between the two governments on AML policy and enforcement concerns, including in meetings between Presidents Barack Obama and Xi Jinping in November 2014 in Beijing and September 2015 in Washington.

Specifically, the U.S. Chamber of Commerce welcomed the commitment by the two presidents during President Xi's State Visit in 2015 that:

*Both countries affirm the importance of competition policy approaches that ensure fair and non-discriminatory treatment of entities and **that avoid the enforcement of competition law to pursue industrial policy goals.***

#### **IV. China's Use of the AML as a Tool of Industrial Policy**

However, China's enforcement of the AML continues to fall short of this ideal, and the Chamber remains concerned about China's use of the AML as a tool to advance industrial policies that distort markets, reserve them for national champions, and undermine the value of the intellectual property of our members.

The Chamber believes the U.S. government needs to continue to respond to this challenge with a "whole-of-government" approach.

In practice, this means that the Department of Justice and Federal Trade Commission need to closely coordinate with other agencies within the U.S. government on China competition policy matters, ideally under a new statutory requirement.

It's critical that U.S. government interagency coordination and execution of competition policy advocacy vis-à-vis China occur within the framework of the Administration's broader economic and commercial policy toward China, as set by the President of the United States, that aims to promote open and competitive markets, vigorously protect intellectual property rights, and ensure that American

firms receive the best treatment that China is according to any of its own firms (including its emerging national champions) —both state-owned and state-supported—across key sectors of the Chinese economy.

I'll return to this point in my conclusion.

Any assessment of China's AML and its enforcement should begin with the three AMEAs responsible for enforcing the AML: MOFCOM, NDRC, and SAIC.<sup>1</sup> This tripartite division of enforcement responsibilities tends to lead to dispersion of competition law expertise among several different agencies and a heightened risk of inconsistent interpretation and application of the AML.

Most importantly, exposure of competition law enforcement personnel to the institutional pressures of the larger agency to which they belong, particularly for NDRC introduces a significant bias toward domestic industrial policy and price caps.

Further, to date, the AMEAs<sup>2</sup> have demonstrated limited willingness or capability to conduct sound and persuasive economic analysis, and in the absence of an independent judiciary, the AMEAs have wide latitude to inject industrial policy concerns into their AML enforcement activity.

Equally important, the AML itself includes provisions (i) encouraging the “healthy development of [a] socialist market economy,”<sup>2</sup> (ii) establishing a special role for SOEs (described as the “lifeline of the national economy”),<sup>3</sup> (iii) carving out a privileged role for administrative monopolies,<sup>4</sup> and (iv) providing a prohibition on abuse of dominance that is specific to intellectual property rights (IPR).<sup>5</sup> “Socialist” in this context means “public ownership”—a reference to SOEs.

Although many competition laws contain vague statements regarding the public good that may be subject to misinterpretation, this and other references to

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<sup>1</sup> MIIT has stated that it wishes to have greater powers to administer the AML with respect to both merger review and investigations in relation to the information technology industry. See Rebecca Zhang, “China’s MIIT eyes extended regulatory reach on antitrust, unfair competition issues,” PaRR (May 27, 2014).

<sup>2</sup> Art. 1.

<sup>3</sup> Art. 7.

<sup>4</sup> Art. 8.

<sup>5</sup> Art. 55.

industrial policy in the text of the AML arguably put China outside international competition law norms. For example, even in the European Union—a competition law jurisdiction considered to give greater weight to industrial policy<sup>6</sup>—competition law does not identify the development of the economy as a goal of competition law, does not explicitly carve out a special role for SOEs, and does not treat anti-competitive conduct involving intellectual property (IP) any differently from other forms of anti-competitive conduct.

As a result, in many cases involving foreign companies, China's AMEAs have skewed the implementation of the AML and related statutes to support China's industrial policy goals, including through discrimination and protectionism.

In other words, although the legal machinery of the AML has been used to protect competition and prevent monopolistic conduct, China has also employed it both domestically and extraterritorially to pursue objectives that do not reflect a free, open, and fair market-based economy. Examples include the following:

- *Promoting industrial policy, even at the expense of free and open competition.*

MOFCOM's merger reviews have created opportunities for China's own national champions to expand and increase their market shares, capped prices for products and technology on which domestic companies rely, and protected famous Chinese brands from acquisition by foreign companies. Similarly, through AML investigations, NDRC has forced foreign companies that market consumer products, including but not limited to soaps, detergents, infant formula, and automobiles, to reduce prices, even when such prices appear to be the result of market forces rather than anti-competitive conduct.

The Chamber is monitoring closely recent announcements that China has launched a new enforcement campaign against the pharmaceutical and medical device industries in China, which many believe will focus disproportionately against U.S. and other foreign companies, with the aim of lowering prices and promoting national champions, irrespective of economic analysis that demonstrates harm to consumer welfare and abuse of a dominant market position.

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<sup>6</sup> See, e.g., D. Daniel Sokol, "Merger Control under China's Anti-Monopoly Law," Minnesota Legal Studies Research Paper No. 13-05 (Jan. 27, 2013), at 6–7.

○ *Curtailing Intellectual Property (IP) rights.*

In the merger review context, MOFCOM has permitted certain transactions only on the condition that the foreign companies involved cap IP license fees, including for non-standards essential patents (SEPs), and license their technology on terms that are otherwise exceptionally favorable to licensees—generally Chinese electronics manufacturers. In the investigations context, NDRC has appeared to use AML investigations to pressure U.S. telecommunications and semiconductor firms to lower license fees associated with 2G, 3G, and 4G wireless telephone technologies.

The beneficiaries of these policies are often Chinese national champions in industries that China considers strategic, such as commodities and high technology.<sup>7</sup> China seeks to strengthen such companies through the AML and, in apparent disregard of the AML, encourages them to consolidate market power, although this is contrary to the normal purpose of competition law.<sup>8</sup> By contrast, foreign companies suffer disproportionately from China's patterns of enforcing the AML.

In fact, all transactions blocked or conditionally approved by MOFCOM to date have involved foreign companies, and the curtailment of IP rights appears designed to strengthen the bargaining position of domestic licensees.

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<sup>7</sup> Regarding the specific industries that China considers strategic, *see generally* US-China Business Council (USCBC) "USCBC Summary of the National Development and Reform Commission (NDRC) 2014 Work Plan" (Feb. 5, 2014), available at [http://www.uschina.org/sites/default/files/2014%20NDRC%20Work%20Plan\\_0.pdf](http://www.uschina.org/sites/default/files/2014%20NDRC%20Work%20Plan_0.pdf).

<sup>8</sup> NDRC, the Ministry of Industry and Information Technology (MIIT), and other agencies have an official policy to achieve industrial concentrations for domestically-invested companies in the automobile, steel, cement, shipbuilding, electrolytic aluminum, rare earths, electronic information, pharmaceuticals, and agriculture industries. *See Guiding Opinions on Accelerating the Promotion of Mergers and Reorganizations of Enterprises in Key Industries*, issued by MIIT, NDRC, Ministry of Finance, Ministry of Human Resources and Social Security, Ministry of Land and Resources, MOFCOM, People's Bank of China (PBC), State-Owned Assets Supervision and Administration Commission (SASAC), State Administration of Taxation (SAT), SAIC, China Banking Regulatory Commission (CBRC), and China Securities Regulatory Commission (CSRC) (Jan. 22, 2013). Gong Xin Bu Lian Chan Ye [2013] No. 16 (*hereinafter* 2013 MIIT Joint Opinions). Indeed, all three AMEAs are among the authors of this document. Companies and local governments may oppose this policy, but there is no indication that the AML constitutes an impediment to implementing it. *See* David Stanway, "China Ditches Steel Industry Consolidation Targets in New Plan," Reuters (Mar. 25, 2014) (quoting Xu Leijiang, the chairman of Baoshan Iron and Steel, as stating that the policy created "huge monsters" weighed down by debt and unprofitable investments).

## **V. Concerns Regarding Intellectual Property**

The U.S. Chamber of Commerce and our members are particularly concerned about China's ongoing efforts to develop implementing guidelines under the AML that would promote what Chinese officials have promised will be more strict administration and enforcement against abuse of IPR.

Earlier this year, and in response to a request from China's Anti-Monopoly Law Commission (AMC) to develop a unified set of guidelines to govern IP abuse, the NDRC and the SAIC each released draft AML IP Abuse Guidelines that endorsed a broad, unbalanced essential facilities doctrine, and impose stiff antimonopoly sanctions for refusing to license IP or charging "excessively high" royalties.

U.S. Chamber comments on these measures to the Chinese government are appended to our written testimony.

China's Ministry of Commerce has also developed draft guidelines to govern the treatment of intellectual property in merger review cases, but those guidelines have yet to be released for public comment.

The Chamber understands that the AMC hopes to reconcile the various draft guidelines into a single binding document by the end of 2016.

As drafted, the NDRC and SAIC Guidelines would force companies with "dominant market positions" or that possess critical technologies to license their intellectual property to Chinese competitors or to lower licensing costs to benefit local firms.

The Chamber is deeply concerned that virtually any unilateral refusal to license could be characterized as an abuse of IPR under the proposed guidelines, and thereby be subject to significant AML sanctions.

The approach adopted in the draft NDRC and SAIC guidelines coincides with a significant uptick in the velocity, scope, and scale of new Chinese industrial

policies that aim to promote domestic champions in industries ranging from information and communications technology to medical devices and pharmaceuticals to other areas of advanced manufacturing.

The fear among many foreign companies is that China aims to use the AML, including forthcoming IP abuse guidelines, in concert with industrial policies like Made in China 2025 and Internet Plus that *de facto* promote Buy China and other localization policies, to systematically and unfairly curb the influence and competitiveness of foreign companies in its market and globally.

The Chamber believes that China's use of the AML in concert with other industrial policies that aim to promote domestic champions is not in China's long-term interest.

As China makes efforts to ascend the value-added chain, it would be perverse for it to deem the most important and valuable innovations, by reason of their value, essential facilities and to force the innovative owner to license at potentially artificially lower than market rates.

Assistant Attorney General Bill Baer at the 19<sup>th</sup> Annual International Bar Association Competition Conference put it best:

“We don't use antitrust enforcement to regulate royalties. That notion of price controls interferes with free market competition and blunts incentives to innovate. For this reason, U.S. antitrust law does not bar “excessive pricing” in and of itself. Rather, lawful monopolists are perfectly free to charge monopoly prices if they choose to do so.”

The NDRC and SAIC drafts also seem to be in tension—if not in conflict—with China's own domestic IP laws as well as its international IP obligations.

Over the past year, competition concerns, including related to IP, have also arisen within other proposed draft revisions to Chinese law, including the Anti-Unfair Competition Law.

The draft revisions prohibit “unfair trading” by an undertaking “taking advantage of its comparative advantage position.” The concept of “comparative advantage position” is inherently vague and compared with the “abuse of dominance” clause in Article 17 of the AML, it creates a much lower threshold for the enforcement agencies to intervene and regulate—with essentially the same type of powers and remedies—making it in direct conflict with the AML.

As China continues the drafting process of its AML IP Abuse Guidelines and other measures that could be used to undermine the legitimate exercise of IP rights, the American business community hopes that China will remove its unbalanced essential facilities doctrine; delete provisions on excessive pricing; and eliminate provisions that prohibit or restrict the refusal to license.

IP rests on the basic principle that it comes with an exclusionary right and if the holder chooses to extend a license it generally has the right to do so on terms of its own choice.

The U.S. Chamber of Commerce strongly supports ongoing efforts by the Obama Administration at the highest levels to forestall an adverse outcome on China’s pending IP abuse measures that could be unfairly used against U.S. firms in China as well as harmful to China’s innovation goals.

## **VI. Concerns Regarding Due Process**

Concerns regarding the substance of China’s AML and its enforcement are compounded by continuing concerns over transparency and due process of enforcement.

Notwithstanding some progress in China regarding due process and transparency, there remains a perception that the targets of an enforcement proceeding are in violation of law prior to evidence having been gathered or presented.

Unlike the U.S. system in which the target of an investigation ultimately will have its case heard before an independent judicial body, China’s AML regrettably places the burden of proof squarely on the shoulders of defendant. Historically,

limited evidence is presented to the defendant in support of often vague or novel theories of harm. Targets of investigation can be told the evidence that has been gathered cannot be shared because it is confidential in nature.

Adding to the problem is the fact all three of China's antitrust agencies are responsible for broader missions that run counter to a consumer-welfare approach to antitrust enforcement. These responsibilities include industrial policy planning and representing the interest of Chinese industries, including state-owned enterprises.

The result is that within the Chinese system, stakeholders in China's government that may not be directly visible have the potential to weigh in and steer the outcome of an antitrust investigation.

The absence of an independent judiciary as well as potential threats of retaliation against companies serves as a strong check against companies that might otherwise seriously consider appealing an administrative decision.

The result, more often than not, is an investigative process that incentivizes any foreign target of an investigation to settle on terms favorable to the Chinese government.

## **VII. Recommendations for Congressional Oversight**

The Chamber wishes to reiterate its strong support and deep appreciation for the President's efforts to address AML challenges with President Xi as well as efforts by cabinet officials from the Departments of Justice, Treasury, and Commerce, as well as USTR to address AML.

The Chamber also appreciates the efforts of the Federal Trade Commission, including the significant efforts of Commissioner Ohlhausen, to address AML policy and enforcement challenges with China.

Yet more work needs to be done to address the continuing, and in some cases, growing concern of China's use of its AML as a tool of industrial policy.

In that spirit, the Chamber recommends the Congress and this committee, as part of its oversight function, consider the following recommendations:

- Endorse a “whole of government approach” wherever antitrust is misused and abused. From the perspective of our members, a whole- of- government approach is essential as efforts continue to curb the industrial policy impulses embedded in the AML and China’s regulators, and agreements reached at the U.S.-China Strategic and Economic Dialogue and U.S.- China Joint Commission on Commerce and Trade have established a baseline of best behavior and practice upon which the U.S. government must continue to build. In practical terms, a whole-of- government approach should, at its core, statutorily mandate full interagency coordination and information sharing in efforts to address competition policy around the world.
- Ensure through rigorous oversight that the Administration is doing everything in its power to ensure provisions of China’s IP Abuse Guidelines regarding essential facilities, refusal to license, excessive pricing are consistent with U.S., EU and Japanese approaches. This must be a top and urgent priority.
- Work with the Administration to ensure that the ongoing bilateral investment treaty negotiations with China and other governments include provisions that deter use of antitrust laws as a tool of industrial policy to hinder market access and undermine intellectual property rights.
- Through oversight, foster a hyper-sensitivity in support of transparency and due process.
- Exercise domestic oversight with an eye toward international impact of domestic antitrust decisions. Upon occasion, there have been outcomes from U.S. agencies that may appear to conflict with U.S. international economic policy positions. Domestic enforcement cases must be explained to international audiences so that they are not perverted by

other jurisdictions to achieve outcomes inimical to U.S. government intent and interests. Extraterritorial remedies must be avoided.

- This committee should increase scrutiny of technical assistance programs, but as authorizing committees, it is important to ensure there are sufficient funds available for travel to engage with priority jurisdictions.
- Finally, Congress should be more vocal in its support for expanded competition chapters in free trade agreements. In particular, there is much more that can be done to advance transparency and due process in antitrust enforcement as well as curb misuse of antitrust for industrial policy purposes in our trade agreements.

#### **VIII. High Stakes: U.S. Antitrust Agencies Must Lead By Example Abroad Through Sound Enforcement at Home**

These recommendations, however, are not enough to ensure positive outcomes. U.S. antitrust authorities must lead by example.

It is also worth mentioning that the Chamber has stressed to both U.S. antitrust agencies that what happens at home matters abroad. It is critical that the U.S. be an example for other jurisdictions.

While the U.S. antitrust enforcers should not hesitate to enforce U.S. law out of fear for how it will be interpreted, U.S. enforcers need to be conscious that the world is watching and must be prepared to defend their decisions both at home and abroad.

This has not always been the case. For example, in both the Bosch case and in Google/Motorola Mobility, the commitments required under consent orders prohibited the ability of these companies to seek injunctive relief for patents encumbered by commitments made to standard setting bodies.

The concern with these decisions is that the FTC failed to clearly constrain these commitments to apply solely within the United States, despite the fact that intellectual property rights are recognized on a national basis<sup>9</sup>.

In these cases a poor example was set, even if the parties were willing to agree to it, because the remedy had an ill-advised extraterritorial impact.

**IX. The stakes for the U.S. economy are significant and go well beyond China.**

For much of the last thirty years, tensions in the global antitrust system have existed between the United States and Europe. While some of those tensions have been worked through, there remain real and substantial differences in substance, approach and procedure.

As the United States has looked to help guide nascent antitrust jurisdictions, so has the European Union. One might argue that the European approach to antitrust has prevailed in many countries, even as U.S. influence can also be seen in foreign statutes and agency regulations.

The flexibility provided by the European administrative process combined with its approach to competition law is attractive to foreign jurisdictions. Its open ended nature is also ripe for abuse in foreign jurisdictions where rule of law in general can be a challenge.

Of course no jurisdiction is a complete copy and paste of either the U.S. or EU approach, so native interpretations drive slight deviations. These deviations present problems for continuity to the global antitrust system under the best of conditions.

However, the more deviations from the norm that exist, the less one is still able to identify a global norm. The result is increasingly questionable investigations, enforcement decisions, and remedies. What was once viewed as an outlier can become tolerated and even acceptable.

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<sup>9</sup> In addition to the extraterritorial concern, the Chamber also raised concern in the Bosch case over the lack of transparency on the part of the Federal Trade Commission to understand why the patents named in the consent order were made available on a royalty-free basis.

The concern is not just antitrust newcomers like China or India, but concerns abound in multiple jurisdictions including well established jurisdictions like Europe and Korea. For example, the Korean Fair Trade Commission (KFTC) in a press release about recent changes it was seeking to make to its IP abuse guidelines stated:

“In particular, domestic companies are expected to be protected from the abuse of patents, as the amendment will provide a basis for effectively regulating global companies’ abuse of monopoly with patents.”

In addition to this statement the KFTC’s 2015 Enforcement Plan stated that one of its primary goals was to strengthen enforcement against global monopolistic enterprises holding original technologies having a significant influence in the Korean industry.

Statements such as these demonstrate that perverse use of antitrust is creeping towards becoming an acceptable international norm. China’s actions are further challenging “international norms” by stretching them, while also claiming to live within them.

For example, last year China issued a fine to Qualcomm for just under one billion dollars. This amount seems like a lot, but it is actually the third highest fine behind the questionable fines issued by Europe to Intel and Microsoft.

China also raised eye brows over the conditions it imposed on the Microsoft/Nokia merger, only for Korea to follow and place significantly more questionable conditions on that same merger.

In these examples, China’s actions can be seen to further stretch international norms, while not positioning China as an absolute outlier. But it also demonstrates that the world of international antitrust presents problems beyond China.

## **X. Conclusion**

The Chamber thanks the committee for holding this hearing, would like to acknowledge the hard work of the Administration to confront these difficult challenges and is happy to answer any questions.

Mr. ISSA. Thank you.  
Professor Horton.

**TESTIMONY OF THOMAS J. HORTON, PROFESSOR OF LAW AND  
HEIDEPRIEM TRIAL ADVOCACY FELLOW, UNIVERSITY OF  
SOUTH DAKOTA SCHOOL OF LAW**

Mr. HORTON. Chairman Issa, Ranking Member——

Mr. ISSA. Could you pull it a little closer to you so we could hear you?

Mr. HORTON. Chairman Issa——

Mr. ISSA. And make sure the light is on, the little button down in the middle.

Mr. HORTON. Oh, there we go.

Mr. ISSA. There we go. Thank you.

Mr. HORTON. Thank you.

Chairman Issa, Ranking Member Johnson, distinguished Committee Members, counsel, and staff members, thank you so much for inviting me to testify here today. And thank you Chairman Issa for your kind words about Case Western Reserve University in northeast Ohio.

To understand China's Anti-Monopoly Law and its recent enforcement efforts, it's necessary and crucial not only to carefully examine the words of the Anti-Monopoly Law but to read them in the context and light of Chinese history, culture, and traditions. First and foremost, we must recognize that China may be the only civilization the world has known upon which Western thought exercised little or no influence until modern times. China's historical culture was largely independent of Western influences, and its responses to its people's economic needs are often peculiar to China and sharply differentiated from other countries.

Second, it's important to keep in mind that China's political system does not share our values of Western legal traditions. China is not in any sense a Western-styled democracy, and in reality, the country still is without rule of law.

Furthermore, the leaders of the Chinese Communist Party are not interested in bringing about a change of allegiance by bringing Western political systems to China. Consequently, China's Anti-Monopoly Law enforcement activities ultimately are not directed toward carrying out or reenforcing Western neoclassical economic ideologies but toward helping to protect the socialist rule of law system with Chinese characteristics.

China's determination to chart its own antitrust course without following or adhering to Western ideologies has resulted in four major trends during the first 8 years of AML enforcement.

First, China aspires to protect and buttress its economy by safeguarding what it perceives to be fair market competition in the consumer and public interest of China's citizens.

Second, China's determined to protect at all costs its own perceived long-term security and economic interest.

Third, China's focused on protecting its indigenous business and entrepreneurs, including its diverse multitude of small- and medium-sized businesses.

And fourth, China's demonstrating a strong propensity to focus on potential barriers to entry and use of exclusionary practices.

Ironically, echoing the comments of Representative Johnson, America would be well served by following similar objectives in our anti-trust enforcement policies instead of continuing the current under-enforcement of antitrust laws which have led to alarming levels of concentration and diminished competition in industry after industry.

Rather than simply criticizing China and trying to lure it into following current neoclassical American economic models, we should humbly ask ourselves whether we might learn from the Chinese and their Confucian traditions and values. On one hand, China should be lauded for promulgating an aggressive antitrust policy that takes into account Confucian norms of ethics, morals, and fairness, and seeks to inspire increased corporate social responsibility. We would be well served to pursue similar objectives.

On the other hand, as stated here by the other witnesses, the Chinese and their antitrust enforcers are going to need to pay more attention going forward to their own Confucian traditions and values. Ongoing business and governmental corruption in China must be aggressively addressed. Furthermore, the Chinese need to acknowledge and realistically address the pressures on their AML enforcers to aggressively target foreign companies in order to protect and bolster indigenous Chinese companies and businesses.

And finally, the theft of IP and IT to bolster the Chinese economy must stop. Instead of trying to pretend that they're acting neutrally and objectively in their AML enforcement, the Chinese need to find better ways to focus primarily on competition policies as opposed to industrial protectionism.

As always, the future is uncertain, but the stakes could not be higher. Whether we like it or not, China's and our economies are inextricably linked and positively correlated. Both China and the West must continue our ongoing dialogues and seek to continue building strong economic, cultural, and political bridges. After all, much more than future international antitrust enforcement is at stake. Thank you.

[The prepared statement of Mr. Horton follows:]

STATEMENT OF THOMAS J. HORTON  
Professor of Law and Heidepriem Trial Advocacy Fellow  
The University of South Dakota School of Law

Before the  
SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

of the  
COMMITTEE ON THE JUDICIARY,  
UNITED STATES HOUSE OF REPRESENTATIVES

Concerning  
"INTERNATIONAL ANTITRUST ENFORCEMENT: CHINA AND BEYOND"

June 7, 2016

Chairman Goodlatte, Ranking Member Conyers, Subcommittee Chairman Marino, Ranking Subcommittee Member Johnson, and distinguished Committee Members, thank you for inviting me to this hearing on “International Antitrust Enforcement: China and Beyond.”<sup>1</sup>

## I. INTRODUCTION

In August 2007, the People’s Republic of China (PRC), through its National People’s Congress, enacted its Anti-Monopoly Law (AML), which first took effect in 2008. Areas of concern include “Monopoly Agreements,” “Abuses of Dominant Positions,” “Concentrations of Undertakings,” and “Prohibitions of Abuse of Administrative Powers to Restrict Competition.”

American, European, and Japanese antitrust competition regulators, lawyers, and economists have taken understandable pride in counseling and helping China in drafting, adopting, and interpreting its new AML.<sup>2</sup> Indeed, “[t]he core provisions of the AML were modeled on EU competition law, and to a lesser extent, on the laws of the United States, Germany, Japan, and other countries.”<sup>3</sup>

Although “anti-monopoly efforts are a very new phenomenon in China,”<sup>4</sup> China today finds itself under an intense global microscope. “Though many jurisdictions have adopted competition laws in recent decades, none of those laws has engendered the level of interest sparked by China’s Anti-Monopoly Law (AML).”<sup>5</sup> China’s rapid ascendance as an increasingly

<sup>1</sup> I am a Professor of Law and Heidepriem Trial Advocacy Fellow at the University of South Dakota School of Law. Following a 28-year career as an antitrust lawyer and complex litigator, I transitioned in 2009 to my current full-time position teaching Antitrust & Consumer Protection Law and Trial Advocacy. My career has included stints with the Antitrust Division and the Federal Trade Commission, as well as partnerships in several major international law firms. During the summers of 2012 and 2014, I taught Comparative Antitrust Law to Chinese and American law students at the Chinese Youth University for Political Science (CYUPS) in Beijing, and the Shanghai International Studies University (SISU) in Shanghai. My scholarly publications on China’s Anti-Monopoly Law and its enforcement include: *Antitrust or Industrial Protectionism? Emerging International Issues in China’s Anti-Monopoly Law Enforcement Efforts*, 14 SANTA CLARA J. INT’L L. 109 (2016); *Confucianism and Antitrust: China’s Emerging Evolutionary Approach to Anti-Monopoly Law*, 47 INT’L LAWYER 193 (2013); and *Analyzing Information Exchanges Between Competitors Under [China’s] Anti-Monopoly Law*, in CHINA’S ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS 95 (A. Emch & D. Stallibrass, eds. 2013) (with Jenny Xiaojin Huang).

<sup>2</sup> Noted Chinese competition scholar Professor Xiaoye Wang regards China’s AML “as a great achievement of international cooperation.” Xiaoye Wang, *Highlights of China’s New Anti-Monopoly Law*, 75 ANTITRUST L. J. 133, 134 (2008). Professor Wang observes that “[t]he competition enforcement agencies of other countries, in particular the U.S. Department of Justice, the U.S. Federal Trade Commission, and the European Commission contributed significant assistance.” *Id.*

<sup>3</sup> H. STEPHEN HARRIS, JR., PETER J. WANG, YIZHE ZHANG, MARK A. COHEN & SEBASTIAN J. EVRARD, ANTI-MONOPOLY LAW AND PRACTICE IN CHINA 2-3 (2011). The authors further note that “[m]any of the stated goals for the AML are broadly consistent with those of such other jurisdictions’ laws, including preventing or stopping monopolistic conduct, safeguarding and promoting the order of fair market competition, improving economic efficiency, and protecting the interests of consumers.” *Id.* See also Wang, *supra* note 2, at 134 (“[I]t is no surprise that many good provisions from other well-established antitrust laws have been incorporated in the Chinese AML.”)

<sup>4</sup> CHINA’S ANTI-MONOPOLY LAW, *supra* note 1, at xxxvii.

<sup>5</sup> HARRIS ET. AL., *supra* note 3, at 8. The reasons for the high level of global interest include: “the sheer scale and astounding growth of China’s markets, the vast amounts of foreign capital invested in China, the burgeoning sales of Chinese goods abroad, the substantial growth in the participation of Chinese firms in foreign markets, and a recognition of the significant challenge posed by the establishment of free market competition in China’s socialist market economy.” *Id.*

active and controversial global antitrust enforcer is especially ironic, as until the late 1970s, China viewed the term competition as a “capitalist monster.”<sup>6</sup>

Although China’s legal system and anti-monopoly regulatory efforts are still “a work in progress,”<sup>7</sup> key trends and patterns in China’s enforcement of its AML are emerging. First and foremost, China is aggressively charting its own course.<sup>8</sup> China sees its AML enforcement as an integral part of its mission of “safeguarding market order and achieving social fairness and justice [in] establish[ing] an initial law regime for the socialist market economy.”<sup>9</sup> China’s leaders view “socialism with Chinese characteristics and the Chinese dream [as] the main theme of our age.”<sup>10</sup> So it should hardly come as a surprise to anyone that China will continue to see one of its primary anti-monopoly missions as carrying out AML Article 1’s mandate of “promoting the healthy development of the socialist market economy.”<sup>11</sup>

Of course, the Chinese are astute enough to recognize that it was the United States “that smoothed the way for Beijing’s entry into the World Trade Organization.”<sup>12</sup> They also know that they owe a substantial part of their “economic miracle” to trade with the West.<sup>13</sup> So there is little doubt that the Chinese are likely to continue “selectively adapting elements of Western learning and technology to China’s needs.”<sup>14</sup>

This does not mean, however, that China is likely to follow western Chicago School

<sup>6</sup> Xiaoye Wang, *The New Chinese Anti-Monopoly Law: A Survey of a Work in Progress*, 54 ANTITRUST BULL. 579, 580 (2009).

<sup>7</sup> Pittman B. Potter, *Legal Reform in China: Institutions, Culture, and Selective Adaptation*, 29 L. & SOC. INQUIRY 465, 486 (2004).

<sup>8</sup> See MARTIN JACQUES, *WHEN CHINA RULES THE WORLD: THE END OF THE WESTERN WORLD AND THE BIRTH OF A NEW GLOBAL ORDER* 582 (2d ed. 2012) (“It would be wrong to assume that [China] will behave like the West; that cannot be discounted, but history suggests something different”); Thomas Velk, Olivia Gong & Ariel S.N. Zuckerbrot, *A Trans-Pacific Partnership*, 60(1) ANTITRUST BULL. 4, 5 (2015) (“By means of a unique, clearly evident capacity to mix, balance, and then apply its own special plays and stratagems, China will evolve into a highly efficient but quite different superpower from the United States”); Horton, *Confucianism and Antitrust*, *supra* note 1, at 212 (“China’s long and impressive history and culture, however, ensure that China will do what it has done throughout its long history—chart its own course”); JOHN KING FAIRBANK & MERLE GOLDMAN, *CHINA: A NEW HISTORY* 164 (2006) (arguing that China’s market economy will “be to a large extent in Chinese hands”).

<sup>9</sup> The State Council Info. Office, China, *China’s Efforts and Achievements in Promoting the Rule of Law*, 7 CHINESE J. INT’L. LAW 513, 514-17 (2008).

<sup>10</sup> See, e.g., CCP Document No. 9, April 22, 2013, *Communique on the Current State of the Ideological Sphere: A Notice from the Central Committee of the Communist Party of China’s General Office*, translation available at <http://www.chinafile.com/document-9-chinafile-translation>.

<sup>11</sup> AML, Ch. I, Art. 1.

<sup>12</sup> Andrew Jacobs, *The War of Words in China*, N.Y. TIMES, Aug. 2, 2014; see also JACQUES, *supra* note 8, at 580 (“As a rising power, [China] has been obliged to converge with and adapt to the existing international norms, and in particular to defer to and mollify the present superpower, the United States, since the latter’s cooperation and tacit support have been preconditions for China’s wider acceptance”).

<sup>13</sup> See, e.g., Jacobs, *supra* note 12 (“[S]ince the 1980s, when the pragmatic Deng Xiaoping urged his people to learn from the West in an effort to tackle endemic poverty, Chinese leaders have set aside their economic cudgels. In the decades that followed, Adam Smith-style market economics turned former factory workers into millionaires”).

<sup>14</sup> JONATHAN D. SPENCE, *THE SEARCH FOR MODERN CHINA* 216 (1990). See also Velk, Gong & Zuckerbrot, *supra* note 8, at 10 (China “is now undergoing a process through which it may amalgamate its natural culture with some of the better social and economic ideas of the west”).

economic theories in interpreting or enforcing its Anti-Monopoly Laws.<sup>15</sup> China is unapologetically basing its current AML enforcement activities and decisions on social, political and moral, as well as economic, considerations.<sup>16</sup> “China’s leaders believe that economic and social responsibilities exist together and cannot meaningfully be separated.”<sup>17</sup>

Whether we like it or not, China’s leaders suspect that many in the West are trying “to obscure the essential differences between the West’s value system and the value system [the Chinese] advocate, ultimately using the West’s value systems to supplant the core values of Socialism.”<sup>18</sup> As an example, when China’s President Xi Jinping first came to power in October, 2013, he blasted what he characterized as western efforts to “denigrate the socialist system—all to promote the Euro-American model of capitalism and constitutionalism.”<sup>19</sup> President Xi’s predecessor, Hu Jintao, similarly warned that “international forces are intensifying the strategic plot of Westernizing and dividing China”, and called on his countrymen to “sound the alarm and remain vigilant.”<sup>20</sup>

China’s leaders consequently are seeking to eschew the teachings and ideologies of unrestrained free-market economics that have underpinned the United States’ antitrust enforcement efforts since the late 1970s.<sup>21</sup> Blasting neoliberalism, China’s leaders allege that Western critics “aim to change [China’s] economic infrastructure and weaken the government’s control of the national economy.”<sup>22</sup> CCP Document No. 9, for example, charges: “They brag on

<sup>15</sup> See, e.g., JACQUES, *supra* note 8, at 563 (arguing that China will continue developing “in very much its own way, based on its own history and traditions, which will owe little or nothing to any Western inheritance”).

<sup>16</sup> See, e.g., Horton, *Confucianism and Antitrust*, *supra* note 1, at 213 (“China’s future AML enforcement is likely to be based on social, moral, and political considerations”); JACQUES, *supra* note 8, at 562 (“The reason for China’s transformation . . . has been the way it has succeeded in combining what it has learnt from the West, and also its East Asian neighbours, with its own history and culture, thereby tapping and releasing its own native sources of dynamism”).

<sup>17</sup> Horton, *Confucianism and Antitrust*, *supra* note 1, at 213. See also Geoffrey Kok Heng See, *Harmonious Society and Chinese CSR: Is There Really a Link?* 89 J. BUS. ETHICS 1, 2 (2009) (discussing the CCP’s recognition that it must deal with social and economic issues as an interwoven “national priority”); Harmonious Society, The 17th National Congress of the Communist Party of China (Sept. 30, 2007, 9:14 AM), available at <http://english.peopledaily.com.cn/90002/921691/92211/6274973.html>, at 1-2 (discussing how economic growth in China must be balanced by tackling serious social and economic dislocations).

<sup>18</sup> Doc. No. 9, *supra* note 10. “Document No. 9, as it [is] known, called for eradicating seven subversive strains of thinking. Beginning with ‘Western constitutional democracy.’ The list included press freedom, civic participation, ‘universal values’ of human rights, and what it described as ‘nihilist’ interpretations of the Party’s history. The ‘seven taboos’ were delivered to university professors and social media celebrities, who were warned not to cross the line.” EVAN OSNOS, *AGE OF AMBITION: CHASING FORTUNE, TRUTH, AND FAITH IN THE NEW CHINA* 365-66 (2014).

<sup>19</sup> *Id.* at 365.

<sup>20</sup> *Id.* at 319.

<sup>21</sup> For example, CCP Document No. 9 additionally excoriates Western efforts at “promoting Neoliberalism, [and] attempting to change China’s basic economic system.” Doc. No. 9, *supra* note 10. See also Beina Xu & Eleanor Albert, *The Chinese Communist Party* (Nov. 17, 2014) available at <http://www.cfr.org/china/chinese-communist-party/p29443>; Chris Buckley, *China Takes Aim at Western Ideas*, N.Y. TIMES, Aug. 19, 2013; Noah Feldman, *CCP’s Plan for Pro-Democracy Voices: Repression*, JAPAN TIMES, Aug. 27, 2013; Andrew McKillop, *China’s 7 Perils Are All Western*, MKT. ORACLE, Aug. 20, 2013 (discussing Document No. 9’s criticisms of the doctrines of “free markets” and “neo-liberalism”); Stanley Lubman, *Document No. 9: The Party Attacks Western Democratic Ideals*, WALL ST. J., Aug. 27, 2013.

<sup>22</sup> Doc. No. 9, *supra* note 10, at pt 4. The CCP’s Document No. 9 adds:

about how we should use Western standards to achieve so-called ‘thorough reform.’”<sup>23</sup> The harsh rhetoric currently coming from China indicates that “[a]fter a lull in xenophobia, anti-Western invective [in China] is back.”<sup>24</sup>

China’s determination to chart its own antitrust course without following or adhering to western ideologies has resulted in four major trends during the first eight years of AML enforcement. First, China aspires to protect and buttress its socialist market economy by safeguarding what it perceives to be “fair market competition” and the “consumer and public interests” of China’s citizens.<sup>25</sup> Second, China is determined to protect at all costs its own perceived long-term security and economic interests. Third, China is focused on protecting its indigenous businesses and entrepreneurs, including its diverse multitude of small and medium-sized businesses. And, fourth, China is demonstrating a strong propensity to focus on potential barriers to entry and the use of exclusionary practices by dominant firms.

China’s AML enforcement activities have drawn harsh and scathing criticism from Western governmental and business interests—especially those in the United States.<sup>26</sup> Major themes of such criticisms are that China “is relying on non-competition factors” in its antitrust analyses and enforcement actions, especially in the context of international mergers and acquisitions, and the protection of Intellectual Property (IP) rights; and that China is discriminating against foreign businesses and countries through uneven enforcement of its AML laws.<sup>27</sup> “According to Lester Ross, Vice Chairman of the American Chamber of Commerce in China, this is a strategy by the Chinese government to help its domestic companies catch up in industries in which they are

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Neoliberalism advocates unrestrained economic liberalization, complete privatization, and total marketization, and it opposes any kind of interference by the state. Western countries like the United States, carry out their neoliberal agendas under the guise of ‘globalization,’ visiting catastrophic consequences [including] the international financial crisis from [which] they have yet to recover.

<sup>23</sup> Doc. No. 9, *supra* note 10. The Document continues: “Essentially they oppose the general and specific policies emanating from the road taken at the Third Plenum of the Eleventh Party Congress and they oppose socialism with Chinese characteristics.”

<sup>24</sup> Andrew Jacobs, *The War of Words in China*, N.Y. TIMES, Aug. 2, 2014. *See also* Murong Xuecan, *The New Face of China’s Propaganda*, N.Y. TIMES, Dec. 22, 2013; Orville Schell, *Comrade Xi’s Choice*, WALL ST. J., Oct. 4, 2014, at C1. (“The party’s strenuous denunciation of such ‘hostile forces’ is instructive. It suggests that our own assumptions over the past few decades—that open markets would somehow lead inevitably to open societies and redirect China from what President Bill Clinton once called ‘the wrong side of history’—were pipe dreams.”).

<sup>25</sup> AML, *supra* note 11, at Ch. I, Art. 1.

<sup>26</sup> *See, e.g.*, Velk, Gong & Zuckerbrot, *supra* note 8, at 9 (“In 2014, many American and other foreign companies claimed that they were singled out in antitrust investigations that discriminated against non-Chinese corporations”).

<sup>27</sup> *See, e.g.*, Maureen K. Ohlhausen, Commissioner, Federal Trade Commission, Second Annual GCR Live Conference, *Antitrust Enforcement in China—What’s Next?* (Sept. 16, 2014), at 3–4 (“a growing chorus is claiming that the Chinese are using the AML to promote industrial policy [and] the AML may be used to protect and promote domestic industry”); U.S. Chamber of Commerce, *Competing Interests in China’s Competition Law Enforcement*, Sept. 9, 2014, at ii (“China’s remedies often appear designed to advance industrial policy and boost national champions. AMEs rely insufficiently on sound economic analysis, intellectual property rights have been curtailed in the name of competition law, and AML enforcement suffers from procedural and due process shortcomings. These patterns in AML enforcement give rise to growing concern about the quality and fairness of enforcement, and they raise legitimate questions about China’s commitment to the global antitrust commons.”).

lagging.”<sup>28</sup>

## II. Current Major Emerging Trends in China’s AML Enforcement Efforts

To understand China’s AML and its recent enforcement efforts, it is “necessary and crucial not only to carefully examine the words of the AML, but to read them in the context and light of Chinese history, culture, and traditions.”<sup>29</sup> First and foremost, we must recognize that China may be “the only civilization the world has known upon which Western thought exercised little or no influence until modern times.”<sup>30</sup> “China’s historical culture was largely independent of Western influences and its responses to its peoples’ economic needs are often peculiar to China and sharply differentiated from other countries.”<sup>31</sup>

Second, it is important to keep in mind that China’s political system does not share “the same values of the Western legal traditions.”<sup>32</sup> China is not in any sense “a western-style democracy.”<sup>33</sup> and, “in reality, the country still is without rule of law.”<sup>34</sup> Furthermore, the leaders of the Chinese Communist Party (CCP), including its President Xi Jinping, are not interested in “bring[ing] about a change of allegiance by bringing Western political systems to China.”<sup>35</sup> Indeed, one of the CCP’s conspicuous slogans is “[a] strong Communist Party means happiness to the Chinese people.”<sup>36</sup> CCP Document No. 9 warns Chinese leaders that one of the goals of the West “is to obscure the essential differences between the West’s value system and the value system we advocate, ultimately using the West’s value systems to supplant the core values of Socialism.”<sup>37</sup>

A key concern of the CCP is “to maintain social stability, which ensures the CCP stays in power.”<sup>38</sup> As an authoritarian single-party regime, the CCP believes it must “reinforce [its]

<sup>28</sup> Velk, Gong & Zuckerbrot, *supra* note 8, at 9. See also *China Targeting Foreign Companies*, *American Chamber Says*, BLOOMBERG NEWS, Sept. 2, 2014, available at <http://www.bloomberg.com/news/2014-09092/u-s-companies-say-china-subjectively-enforcing-laws.html>.

<sup>29</sup> Horton & Huang, *supra* note 1, at 95, 98; see also Wentong Zheng, *Transplanting Antitrust in China: Economic Transition, Market Structure, and State Control*, 32 U. PA. J. INT’L. 643, 720 (2010) (“the mold of Western antitrust laws takes place under local conditions that are not entirely compatible with Western antitrust models; despite having a Western-style antitrust law, China has not developed and likely will not develop Western-style antitrust jurisprudence in the near future due to these local conditions”).

<sup>30</sup> NORMAN KOTKER & CHARLES PATRICK FITZGERALD, *THE HORIZON HISTORY OF CHINA* 10 (Norman Kotker, ed., 1969); See also Horton, *Confucianism and Antitrust*, *supra* note 1, at 197.

<sup>31</sup> Horton, *Confucianism and Antitrust*, *supra* note 1, at 197 (citing KOTKER & FITZGERALD, *supra* note 30, at 11).

<sup>32</sup> Ignazio Castellucci, *Rule of Law With Chinese Characteristics*, 13 ANN. SURV. INT’L. L. & COMP. L. 35, 64 (2007). See also Horton & Huang, *supra* note 29, at 98.

<sup>33</sup> See Horton, *Confucianism & Antitrust*, *supra* note 1, at 197.

<sup>34</sup> Velk, Gong & Zuckerbrot, *supra* note 8, at 8. The authors add: “China does not have an independent judiciary that acts as a check on executive power . . . Constitutionally prescribed limits on the sovereign power of the Communist party are mere rhetorical devices.”

<sup>35</sup> Doc. No. 9, *supra* note 10, at 3.

<sup>36</sup> Xuecan, *supra* note 24.

<sup>37</sup> Doc. No. 9, *supra* note 10, at 3.

<sup>38</sup> *Monthly Analysis of U.S.–China Trade Data, Report by the U.S.–China Economic and Security Review Commission*, Nov. 4, 2014, at 5. The USCC Report further characterizes the CCP as “remain[ing] above the law.” *Id.* See also The Right Honourable Brian Mulrooney, *The Growth of a Giant*, 60(1) ANTITRUST BULL. 14, 16 (2015) (arguing that in China there is no “serious consideration of whether China should be open to options beyond a single-party control vehicle or, indeed, whether more clarity needs to be brought to such fundamental issues as whether the party is (according to most current interpretations) above the law or subject to it”).

management of all types and levels of propaganda on the cultural front, perfect and carry out related administrative systems, and allow absolutely no opportunity or outlets for incorrect thinking or viewpoints to spread.<sup>39</sup> In simple terms, China's AML and the authorities that interpret and enforce it ultimately are beholden to the CCP and its "Chinese dream of the great rejuvenation of the Chinese nation" through the continuing development and implementation of "socialism with Chinese characteristics."<sup>40</sup> Therefore, China's AML enforcement activities ultimately are not directed towards carrying out or reinforcing western neoclassical economic ideologies, but towards helping "to perfect a Socialist rule of law system with Chinese characteristics."<sup>41</sup>

***A. China Aspires To Protect Its Socialist Market Economy By Safeguarding What It Perceives to Be "Fair Market Competition" And The "Consumer and Public Interests" Of Its Citizens***

In Article 1 of Chapter 1, China's AML sets out its broad goals of "preventing and prohibiting monopolistic conduct, safeguarding fair market competition, improving the efficiency of economic operation, protecting the consumer and public interests, and promoting the healthy development of the socialist market economy."<sup>42</sup> Article 4 adds that "[t]he State shall formulate and implement competition rules compatible with the socialist market economy, perfect macroeconomic supervision, and develop a united, open, competitive and orderly market system."<sup>43</sup>

From the outset, China's AML is ambiguous, and includes both industrial and competition policies.<sup>44</sup> As noted by distinguished Chinese Anti-Monopoly Law Professor Xiaoye Wang, "[b]ecause consumer interests and the public interest may not be parallel, it may still be difficult for the anti-monopoly authority to make a choice."<sup>45</sup> What is not ambiguous, however, is the CCP's determination that the public interest "is a critical part of the law,"<sup>46</sup> and that China's AML is seen as part of the State's control over an orderly market system designed to promote the healthy development of China's socialist market economy, and "the universal good of the Chinese people."<sup>47</sup>

As China moves forward into its ninth year of AML enforcement, it is becoming clear that China has not accepted western competition policy as a normative organizing principle.<sup>48</sup> Current

<sup>39</sup> Doc. No. 9, *supra* note 10, at p. 7. *See also Monthly Analysis, supra* note 38, at 5 ("The government is well aware of the need to maintain the public's trust in the system").

<sup>40</sup> Doc. No. 9, *supra* note 10, at 2. Indeed, the CPC has gone so far as to pronounce that Chinese television should be dedicated to promoting "socialist core values." OSNOS, *supra* note 18, at 320.

<sup>41</sup> *See President Xi's Plenum Speech Emphasizes the Law*, CHINESE MEDIA DIG., Nov. 10, 2014, at 2.

<sup>42</sup> AML Ch. 1, Art. 1. *See* note 11.

<sup>43</sup> AML Ch. 1, Art. 4. *See also* Susan Beth Farmer, *The Impact of China's Antitrust Law and Other Competition Policies on U.S. Companies*, 23 LOY. CONS. L. REV. 34, 42-43, 45 (2010) (discussing how "AML Articles 1 and 4 diverge from the traditional model of antitrust analysis that is based solely on competition principles").

<sup>44</sup> *See e.g.*, XIAOYE WANG, THE EVOLUTION OF CHINA'S ANTI-MONOPOLY LAW 313, 322-23 (2014).

<sup>45</sup> *Id.* at 323.

<sup>46</sup> *Id.* at 322.

<sup>47</sup> *Id.* at 323.

<sup>48</sup> *Impact of China's Antitrust Law and Other Competition Policies on U.S. Companies: Hearing Before the Subcomm. On Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. 7 (July 13, 2010) (testimony of Shankar A. Singham); *see also* Maurcen K. Ohlhausen, *Illuminating the Story of China's Anti-*

United States Federal Trade Commissioner Maureen K. Ohlhausen believes that in spite of the rhetoric about China wanting to move “away from a planned economy and toward a market system,” there is still a strong “continuing impulse to factor in effects on Chinese industry and employment rather than focusing simply on efficiency and consumer welfare, as well as ongoing support for more direct government intervention in the market.”<sup>49</sup> Such interests are seen as important in “building a harmonious socialist society,” and in promoting “the prosperity of the nation, and the vitality and happiness of the Chinese people.”<sup>50</sup>

All this points to China’s emerging intent to be “guided by social, moral, and ethical considerations” in interpreting and enforcing its AML.<sup>51</sup> A key objective includes “preserving and protecting China’s traditional cultural and historical values,”<sup>52</sup> including Chinese Confucianism.<sup>53</sup> China is determined to regulate competitive behavior it deems to be ethically and socially irresponsible.<sup>54</sup> China is therefore focused on maintaining fair and orderly competition, which “assumes a harmonious business relationship between competitors, as well as suppliers, customers, and partners.”<sup>55</sup> We should not therefore be surprised to see an emphasis on encouraging fair competition, preventing unfair competition practices, and protecting the legal rights and interests of business operators, as well as Chinese consumers.<sup>56</sup> Recent Chinese administrative rulings and guidelines, as well as court decisions, point in this direction.<sup>57</sup>

***B. China Is Determined To Protect And Enhance Its Own Perceived Long-Term Security and Economic Interests***

China’s AML expressly sets forth China’s strong interest in protecting and enhancing China’s national and economic security.<sup>58</sup> Article 31 of the AML requires mergers or acquisitions

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*Monopoly Law*, ANTITRUST SOURCE 1, 4 (Oct. 2013) available at [www.antitrustsource.com](http://www.antitrustsource.com) (observing that during a July 31-August 1, 2013, celebration of the fifth anniversary of China’s AML, Chinese “antitrust officials were more mixed in their endorsement of free-market competition, with several officials emphasizing the need for maintaining regular market order”).

<sup>49</sup> Ohlhausen, *supra* note 27, at 8. See also Farmer, *supra* note 43, at 45 (discussing how the AML allows consideration of effects on “social public interests and economic development”).

<sup>50</sup> WANG, *supra* note 44, at 21 (quoting CCP’s Central Committee’s October 11, 2006, *Decisions Regarding Several Major Issues With Building a Harmonious Society*).

<sup>51</sup> Horton, *Confucianism and Antitrust*, *supra* note 1, at 196.

<sup>52</sup> *Id.* at 199.

<sup>53</sup> *Id.* at 205; see also JACQUES, *supra* note 8, at 565 (“The [Chinese] state remains as pivotal in society and sacrosanct as it was in imperial times. Confucius, its great architect, is in the process of experiencing a revival and his precepts still, in important measure, inform the way China thinks and behaves. Although there are important differences between the Confucian and Communist eras, there are also strong similarities”).

<sup>54</sup> See, e.g., Horton, *Confucianism and Antitrust*, *supra* note 1, at 209; William E. Shafer, Kyoko Fukukawa & Grace Meina Lee, *Values and the Perceived Importance of Ethics and Social Responsibility: The U.S. Versus China*, 70 J. BUS. ETHICS 265, 268 (2007) (discussing how many Chinese fear that “the transition to a market-based economy has been characterized by behavior that is less than ethical and socially irresponsible”); SPENCE, *supra* note 14, at 699 (1990) (discussing China’s longstanding fear of decadent Western influences, including “spiritual pollution”).

<sup>55</sup> Horton, *Confucianism and Antitrust*, *supra* note 1, at 214. See also Lei Wang & Heikki Juslin, *The Impact of Chinese Culture on Corporate Social Responsibility: The Harmony Approach*, 88 J. BUS. ETHICS 433, 443-44 (2009).

<sup>56</sup> See, e.g., Horton, *Confucianism and Antitrust*, *supra* note 1, at 217.

<sup>57</sup> See, e.g., Horton, *Antitrust or Industrial Protectionism?*, *supra* note 1, at 119-123.

<sup>58</sup> See, e.g., Farmer, *supra* note 43, at 36-37 (“In another departure from American antitrust policy, the Chinese antitrust law explicitly incorporates additional, non-competition factors into the analysis. The agency guidelines and

involving foreign companies or investors “which implicate national security” to “go through national security reviews according to relevant laws and regulations.”<sup>59</sup> AML Article 27 additionally requires China’s competition authorities to review “the effect of [a] concentration on national economic development,” as well as “[o]ther factors affecting market competition as determined by the AMEA [Anti-Monopoly Enforcement Authorities].”<sup>60</sup>

AML Articles 27 and 31 mesh with Article 1’s broad goals of “promoting the healthy development of the socialist market economy” and AML Article 4’s admonition that “[T]he State shall formulate and implement competition rules compatible with the socialist market economy, perfect macroeconomic supervision and control, and develop a united, open, competitive and orderly market system.”<sup>61</sup> Together, these articles provide strong incentives to China’s AML authorities to regulate business conduct that “would not only impede competition but also harm Chinese national security [and economic interests].”<sup>62</sup>

These AML provisions further reflect long-standing Chinese concerns and internal debates “regarding the perceived national security issues arising from foreign acquisitions of domestic [Chinese] companies, with particular concern focused on ‘strategic and sensitive’ industries and Chinese national champions.”<sup>63</sup> It is difficult for Westerners to fully appreciate China’s intense security concerns based on the horrific and “long history of destructive imperialism in China, which has led to ‘social disruption and psychological demoralization,’ and, at times, threatened China’s ‘entire way of life.’”<sup>64</sup> But such concerns remain powerful throughout China today. As recently noted by the U.S.–China Economic and Security Review Commission in its November 2014 Report to Congress: “Published Chinese views on China-Japan security relations encompass a mix of suspicion, alarm, and concern—especially on the issues of Japan’s increasing robust

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language of the available decisions employ mainstream analytic concepts, but also may import non-economic factors such as ‘national economic development’ and ‘national security’ in mergers involving foreign investors”).

<sup>59</sup> AML Ch. IV, Art. 31.

<sup>60</sup> AML Ch. IV, Art. 27. *See also* Ohlhausen, *Illuminating*, *supra* note 48, at 6 (discussing how AML Article 27 expressly allows for consideration of broad factors that are inconsistent “with market competition analysis . . . [including] the effect of the proposed deal on the development of the national economy, and any other factors determined by the State Council Anti-Monopoly Enforcement Authority”).

<sup>61</sup> AML Ch. I, Art. 4.

<sup>62</sup> WANG, *supra* note 44, at 320.

<sup>63</sup> HARRIS ET. AL., *supra* note 3, at 134 (quoting NDRC, Special Review Mechanism Needs to be Established for Mergers and Acquisitions Involving Foreign Parties, Dec. 27, 2006). *See also* MARK FURSE, ANTI-TRUST LAW IN CHINA, KOREA AND VIETNAM 107 (2009). In all fairness, it must be noted that in the United States and Canada, serious concerns about China using investments in western companies and technology for military and strategic purposes have led to increasing careful monitoring and review in both countries of Chinese investments and acquisitions. *See, e.g.*, Nicholas Raffin & Eric Wiebe, *A Timeline of the East-West Relationship: Past, Present, and Future Acquisitions* 60(1) ANTI-TRUST BULL. 19 (2015). Indeed, the Committee on Foreign Investment in the United States (CFIUS) “applied mitigation measures to sixteen cases from 2008 to 2010.” *Id.* at 28.

<sup>64</sup> Horton, *Confucianism and Antitrust*, *supra* note 5, at 199-200 (citing FAIRBANK & GOLDMAN, *supra* note 8, at 189). As described by Fairbank and Goldman, “[t]oday’s historians are more likely to stress the social disruption and psychological demoralization caused by foreign imperialism. In these dimensions the long-term foreign invasion[s] of China proved to be a disaster so comprehensive and appalling that we are still incapable of fully describing it.” *Id.* *See also* RANA MITTER, FORGOTTEN ALLY: CHINA’S WORLD WAR II–1937-1945 (2013) (describing in detail the horrors of Japanese atrocities in WWII); MICHAEL BURLEIGH, MORAL COMBAT: GOOD AND EVIL IN WWII 14-21 (2011) (describing Japan’s horrific invasion of China and the barbaric slaughter and torture of Chinese civilians and soldiers); IRIS CHANG, THE RAPE OF NANKING: THE FORGOTTEN HOLOCAUST OF WORLD WAR II (1997) (describing the horrors of Japan’s invasion of China during World War II).

defense and security establishment, the development of the U.S.–Japan alliance, and perceived lack of Japanese atonement over its wartime past.”<sup>65</sup>

Alarming, China has increasingly begun leveraging its economic successes into a major military build-up. For example, the U.S.–China Economic Security Review Commission (USCC) Report adds: “China is engaged in a sustained and substantial military buildup that is shifting the balance of power in the region, and is using its growing military advantages to support its drive for a dominant sphere of influence in East Asia.”<sup>66</sup> The Association of Southeast Asian Nations (ASEAN) has raised particular concerns over China’s naval build-up, which has “served to crystallize the doubts and fears about China’s long-term intentions.”<sup>67</sup>

Some commentators have sought to argue that China’s intense focus on protecting its own economic security partially could be a result of “the national security hurdles encountered by Chinese companies overseas.”<sup>68</sup> Indeed, China appears to have modelled its AML security provisions on United States’ regulations that were used to block foreign purchases in the United States based “on purported national security grounds.”<sup>69</sup> In any event, it seems likely that security concerns on both sides will increasingly impact economic relations between China and the West.<sup>70</sup>

A potential complicating factor in attempting to predict how boldly China will apply security concerns in its interpretation and enforcement of its AML is that the term “national security” conceivably could be defined broadly and “used to promote domestic [Chinese] economic protectionism.”<sup>71</sup> Indeed, MOFCOM’s 2011 implementing regulations broadly cover military or military-related enterprises surrounding a key or sensitive military infrastructure or unit otherwise related to the military, and national security-related enterprises regarding important agricultural and energy products and resources, as well as important infrastructure, transportation,

<sup>65</sup> USCC 2014 Report to Congress, *Competing Interests*, *supra* note 27, at 21.

<sup>66</sup> *Id.* at 22.

<sup>67</sup> JACQUES, *supra* note 8, at 591. Jacques adds: “It would seem that the Chinese government made little or no attempt to inform, let alone consult, its ASEAN partners about the new naval deployments.” *Id.*

<sup>68</sup> HARRIS, ET. AL., *supra* note 3, at 134.

<sup>69</sup> *Id.* Indeed, AML Article 31 “was formulated after CNOOC’s proposed acquisition of Unocal in 2005 in the United States, which failed in the face of heavy opposition on national security and other grounds.” *Id.* at 134, n. 36. See also Michael Petrusie, *Recent Development: Oil and the National Security: CNOOC’s Failed Bid to Purchase UNOCAL*, 84 N. CAR. L. REV. 1373 (2006). Professor Xiaoye Wang perceptively adds that China’s AML security provision “is not unlike the United States’ Exon-Florio merger review of certain foreign investments involving national security.” WANG, *supra* note 44, at 320-21, citing 50 U.S.C.A. §2170. See also Moritz Lorentz, *The New Chinese Competition Act*, 29 EUR. COMPETITION L. REV. 257, 261 (2008); Nathan Bush & Zhou Zhaofeng, *Chinese Antitrust- Act II, Scene I*, 8(1) THE ANTITRUST SOURCE 1, 9 (2008); Raffin & Wiebe, *supra* note 63, at 35-37 (discussing increasing American and Canadian hostility to Chinese investments that could confer strategic military advantages).

<sup>70</sup> See, e.g., CAPITOL FORUM, May 12, 2015, *China’s Anti-Monopoly Law: An Interview with Professor Tom Horton of USD Law* (on file with author).

<sup>71</sup> *Competition Policy in China, Report by the U.S.-China Business Council*, Sept. 2014, at 13. See also Hannah C. L. Ho, *China’s Security Review System for Foreign Investment: Where Do We Stand?*, MONDAQ (April 7, 2014) (discussing the possibility of overbroad interpretations of sensitive or key competitive areas); Christine Kahler, *Foreign M & A in China Face Security Review*, CHINA BUS. REV. (April 1, 2011) (observing that “the security review will analyze the M & A deal’s effects on national security, China’s economy, social stability, and the R & D capabilities of key national security technologies. Transactions found to have ‘significant effects on national security’ will be terminated or approved conditionally”).

technology and major equipment manufacturing.<sup>72</sup> Potential factors to be considered include the influence of potential transactions over China's national defense, the stable running of China's economy, China's basic social life and order, and research and development of key national security technologies.<sup>73</sup> The potential practical breadth of these national security concerns is enormous, and highlights China's obsession with protecting its national security interests against foreign investments. Therefore, it is likely that national security concerns will play a crucial role in China's AML review of the activities of foreign companies and investors in China in the coming years.

Furthermore, as discussed above, China's AML specifically identifies the protecting of "the public interest and the impact on the Chinese national economy" as key goals and objectives.<sup>74</sup> Once again, such considerations in the context of industrial conduct and transactions, including mergers and acquisitions, "is a very broad concept."<sup>75</sup> Combined with the "insufficient independence" for antitrust enforcement authorities in China,<sup>76</sup> such broad economic policy goals for antitrust create potential vulnerabilities for "officials at MOFCOM, NDRC, and SAIC, [who] are part of larger organizations whose functions include the formulation and implementation of macroeconomic and other policies."<sup>77</sup>

There should be little doubt that broad macroeconomic concerns are given priority over competition concerns in China today. For example, in 2014, China's "Party leaders placed their highest priority on maintaining public support through rapid economic growth and job creation."<sup>78</sup> As a result, some commentators argue that "[d]uring the course of 2014, foreign companies investing in China faced increased regulatory burdens and barriers to business dealings that do not similarly encumber China's highly favored 'national champions.'"<sup>79</sup> Throughout 2014, "China used [its] AML to investigate foreign firms in sectors designated by the government as 'strategic and emerging,' including automobiles and information technology."<sup>80</sup> Such developments reveal a continuing intention to heavily factor in perceived effects on Chinese industry and employment.

China's President Xi Jinping announced at China's 2013 Third Plenum that reforms were

<sup>72</sup> MOFCOM Regulation on Implementing the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, of September 1, 2011. *See also* McDermott, Will & Emery, *China Formalises National Security Review System for M & A Transactions by Foreign Firms*, available at <http://www.nationalreview.com/article/china-formalises-national-security-review-system-ma-transactions-foreign-investors>. *See also* JANE M. ZIMMERMAN, CHINA LAW DESKBOOK: A LEGAL GUIDE FOR FOREIGN INVESTED BUSINESSES 930, n. 114 (3d ed. 2010).

<sup>73</sup> *Id.*

<sup>74</sup> Gregory K. Leonard & Yizhe Zhang, *Considering the Unique Aspects of the Merger Review Process in China*, ANTITRUST SOURCE, 1 (2014). *See also* AML, Ch. I, Arts. 1 & 4.

<sup>75</sup> Xiaoye Wang & Adrian Emch, *Five Years of Implementation of China's Anti-Monopoly Law—Achievements and Challenges*, 2013 J. ANTITRUST ENF. 1, 23 (2013).

<sup>76</sup> *Id.* at 21-22.

<sup>77</sup> *Id.* at 22.

<sup>78</sup> U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION 2014 REPORT TO CONGRESS, *supra* note 38, at 33.

<sup>79</sup> *Id.* at 34. Furthermore, "[f]or the first time, in 2014, foreign direct investment (FDI) from China into the United States exceeded FDI from the United States to China." *Id.*

<sup>80</sup> Castelluci, *supra* note 32, at 60. The European Union Chamber of Commerce has emphasized similar concerns. *See* Michael Martina, *EU Lobby Piles in on Foreign Criticism of China's Antitrust Enforcement*, REUTERS, Sept. 9, 2014.

important, but the state would continue to play a key role in the economy.<sup>81</sup> Such pronouncements are more than rhetoric. CCP Document No. 9 confirms that such speeches are designed to “unif[y] the thought of the entire Party, the entire country, and the people enormously.”<sup>82</sup> Combined with the CCP’s promises to “accelerate[e] economic transformation as the main thread, and increas[e] the quality and efficiency of the economy at its core,”<sup>83</sup> it is likely that protecting and enhancing China’s perceived long-term security and economic interests will play a key role in China’s future interpretation and enforcement of its AML.<sup>84</sup> As observed by AML scholar Wendy Ng, “[w]here an important or sensitive Chinese industry is involved, it appears that MOFCOM might be more concerned about the potential negative effects of the transaction on the industry and national economic development more generally.”<sup>85</sup>

***C. China Is Further Focused On Protecting Its Indigenous Businesses and Entrepreneurs, Including Its Diverse Multitude Of Small And Medium-Sized Businesses***

Although China’s economy is plagued today by the continuing existence of State-Owned Enterprises (SOEs),<sup>86</sup> China has a strong backbone of small and medium-size businesses, sometimes referred to as “a fast-growing thicket of bamboo capitalism.”<sup>87</sup> This “astonishing force” of private entrepreneurs is a crucial contributor to economic innovation and growth in China.<sup>88</sup> Not surprisingly, “China continues to show a keen interest in protecting the long-term health and economic opportunities of [these] smaller competitors.”<sup>89</sup> Encouraging small businesses and

<sup>81</sup> *China’s Third Plenum: Xi Jinping Consolidates Power*, TELEGRAPH, Nov. 12, 2013, available at <http://www.telegraph.co.uk/news/worldnews/asia/china/1044176/Chinas-Third-Plenum/>. (“The free market. [the conference statement] said, would be given a ‘decisive role in allocating resources,’ but the Communist party will continue to shape the economic landscape”).

<sup>82</sup> Doc. No. 9, *supra* note 10, at 2.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 46. Brookings Institution scholar Arthur Kroeber adds that “[t]he respective roles of state and market need to be clarified, but the state role will remain very large.” Arthur Kroeber, *After the NPC: Xi Jinping’s Roadmap for China* (Brookings Instit.), March 11, 2014, available at <http://www.brookings.edu/rcsarch/opinions/2014/03/11-after-npc-xi-jinping-roadmap-for-china-kroeber>. Moreover, the IMF observed in a 2014 report on China that its economic reform blueprint “has not been followed up with details on the specific reforms or timetables.” *Id.*

<sup>85</sup> Wendy Ng, *Policy Objectives of Public Enforcement of the Anti-Monopoly Law: The First Five Years*, in CHINA’S ANTI-MONOPOLY LAW, *supra* note 1, at 35, 44. Interestingly, “the involvement of a well-known Chinese brand appears to be an [additional potential] important factor in MOFCOM’s decision-making.” *Id.* at 45. See also Wang & Emch, *supra* note 75, at 22 (“An important weakness of the three antitrust authorities is that they are inserted within larger ministries or commissions under the State Council. In other words, their level in the Chinese hierarchy is not high enough for enforcing the AML in an entirely independent and ‘neutral’ manner”).

<sup>86</sup> A wealth of excellent scholarship discussing economic issues relating to China’s SOEs is available. See, e.g., Thomas Brook, *China’s Anti-Monopoly Law: History, Application, and Enforcement*, 16 APPEAL 31, 38 (2011) (“SOEs have retained significant if not strengthened control of many industries despite attempts by the Chinese government to introduce competition”). A fuller discussion of China’s SOEs and ongoing reform efforts by China is beyond the scope of this paper.

<sup>87</sup> Wesley Harris, *China Energy: A Crossroads Historiography*, 37 T. MARSHALL L. REV. 255, 259 (2012), quoting *China’s Economy: Bamboo Capitalism*, ECONOMIST (Mar. 10, 2011), available at <http://www.economist.com/nodc/18332610>.

<sup>88</sup> *Id.* at 258-59. See also JACQUES, *supra* note 8, at 621 (arguing that “a major reason why the Chinese economy has been so dynamic is the intense competition between the various provinces and their firms”).

<sup>89</sup> Horton, *Confucianism and Antitrust*, *supra* note 1, at 225. See also Horton & Huang, *supra* note 1, at 101 (discussing China’s interest in “protecting the long-term health and stability of smaller competitors, as part of its interest in an orderly market and ‘industry self-discipline’”).

entrepreneurs is viewed as a key part of China's efforts to promote "the healthy development of the socialist market economy."<sup>90</sup>

China sees the protection of small and medium-size competitors and producers in a competitive market as beneficial in several key ways.<sup>91</sup> First, their continuing presence "allows local producers to participate in an evolving and innovative market, thereby increasing the possibility of capturing technological expansions."<sup>92</sup> They also help fuel China's economic growth and promote its long-term economic stability.<sup>93</sup>

China's AML unapologetically sets forth China's interest in protecting its small businesses' competitive opportunities. For example, AML Article 15 (3) sets forth the express objective of "improving operational efficiency and enhancing the competitiveness of small and medium-sized enterprises."<sup>94</sup> AML Articles 1 and 4 bolster and buttress this clear objective by seeking to "safeguard[ ] fair market competition" and by "develop[ing] a united, open, competitive and orderly market system."<sup>95</sup> Similarly, Article 6 forbids dominant undertakings from abusing their market positions "to eliminate or restrict competition."<sup>96</sup> Such provisions have led some scholars to raise the "worrisome possibility" that "the drafters intended the AML as a tool to promote [China's] domestic economy."<sup>97</sup>

In interpreting and carrying out these mandates, China's AML regulators unapologetically have sought to limit activities or transactions that could have an adverse impact on domestic small and medium-size businesses. For example, at a May 2014 Conference in Beijing co-sponsored by the ABA Section of Antitrust Law and the Expert Advisory Committee of the Anti-Monopoly Commission of the State Council of the People's Republic of China (PRC), Shang Ming, the Director General of MOFCOM's Anti-Monopoly Bureau, admitted that "MOFCOM seeks comments from industrial regulators in its merger review practices and will continue to do so."<sup>98</sup> Director Ming further stated that "MOFCOM will continue to balance competition policies and

<sup>90</sup> See, e.g., FAIRBANK & GOLDMAN, *supra* note 8, at 408. Former Chinese Premier Deng Xiaoping, for example, saw government encouragement of small and medium-size businesses as part of a program of economic reforms called "Socialism with Chinese characteristics." *Id.*

<sup>91</sup> See Jared A. Berry, *Anti-Monopoly Law in China: A Socialist Market Economy Wrestles with Its Antitrust Regime*, 2 INT'L L. & MGMT. REV. 129, 144 (2005).

<sup>92</sup> *Id.*

<sup>93</sup> See *id.*

<sup>94</sup> AML Ch. II, Art. 15 (3).

<sup>95</sup> AML Ch. II, Arts. 1 & 4.

<sup>96</sup> AML Ch. I, Art. 6. See also AML Ch. IV, Arts. 27-28. Article 27 states that the effect of economic concentrations on "consumers and other undertakings" must be considered in "the review of concentrations." Other undertakings can be interpreted to include both competitors and customers. Article 28 adds that "where a concentration of undertakings results in or may result in the effect of eliminating or restricting competition, the AMEA shall make a decision to prohibit the concentration." This stern and mandatory language suggests a strong interest in protecting small and medium-sized competitors.

<sup>97</sup> Oliver Q. C. Zhong, *Dawn of a New Constitutional Era or Opportunity Wasted? An Intellectual Reappraisal of China's Anti-Monopoly Law*, 24 COL. J. ASIAN L. 87, 106 (2010); see also *Competition Policy and Enforcement in China*, U.S.-China Bus. Council (Sept. 2014), at 12 ("Many questions remain unanswered about the objectives of China's competition regime. Among them: Will China use the AML to protect domestic industry rather than promote fair competition?").

<sup>98</sup> Client Memorandum from Davis Polk Law Firm 2 (June 5, 2014) (on file with author).

industrial policies in its merger review.”<sup>99</sup>

An early well-known example of MOFCOM’s interest in protecting small and medium-size Chinese businesses is MOFCOM’s 2009 decision to block Coca-Cola’s proposed acquisition of Huiyan, a Chinese juice producer.<sup>100</sup> In its Public Announcement, MOFCOM indicated that it looked at several important factors under AML Art. 27, including “[t]he effect of the concentration on the development of the national economy.”<sup>101</sup> MOFCOM concluded that “[t]he transaction would have an adverse impact on domestic small-and medium-sized enterprises in the fruit juice market and impair their ability to compete and innovate, negatively affecting the sound development of the Chinese juice industry.”<sup>102</sup>

More recent MOFCOM decisions have shown a continuing concern for protecting and enhancing competitive opportunities for Chinese firms. For example, in conditionally approving Merck’s acquisition of AZ Electronic Materials on April 30, 2014, MOFCOM imposed licensing and behavioral remedies due to its concern that competitors could face unfair bundling and cross-subsidization competition that could “result in the marginalization or exit of competitors from the market.”<sup>103</sup> Similarly, on June 17, 2004, MOFCOM prohibited the formation of the proposed P3 Network shipping alliance between Maersk, Mediterranean Shipping, and CMA GGM in part because the network could “suppress competitors’ room for development, increase the parties’ bargaining power vis-a-vis ports, and harm the interest of cargo owners.”<sup>104</sup> More recently, MOFCOM played a potentially decisive role in catalyzing American and Japanese semiconductor and display industry giants Applied Materials and Tokyo Electron to abandon their proposed merger. MOFCOM believed that the proposed merger would have “a severe impact on the interests of Chinese chip manufacturing customers.”<sup>105</sup>

Watching MOFCOM’s increasingly aggressive enforcement efforts unfold, it seems fair to

<sup>99</sup> *Id.* at 3. The Director added that “[i]ndustrial regulators know their respective industries well and their comments often include information on industrial development trends, which helps MOFCOM identify competition problems and solve competition concerns.” *Id.* at 2-3.

<sup>100</sup> Coca-Cola/Huiyan, MOFCOM Publ. Ann. No. 22, March 18, 2009.

<sup>101</sup> *Id.* at 2(5).

<sup>102</sup> Wang and Emch, *supra* note 75, at 9. In section 4(3) of its Public Announcement, MOFCOM explained: The concentration would squeeze out small and medium-sized juice producers in China, and restrain local producers from participating in competition in the juice beverage market and their ability for proprietary innovation, which would have a negative effect over effective competition in the Chinese juice beverage market, and would prove adverse to the sustained sound development of the juice beverage market in China.

MOFCOM Publ. Ann. 22, *supra* note 100, at 4(3).

<sup>103</sup> CHINA COMPETITION BULL. (32nd ed. 2014), at 3 (citing <http://fdj.mofcom.gov.cn/article/AXX/201404/20140400569060.shtml>).

<sup>104</sup> CHINA COMPETITION BULL. (32nd ed. 2014), at 4 (citing <http://fdj.mofcom.gov.cn/article/ztxx/201406/20140600628586.html>). Interestingly, both the United States and European authorities had previously determined “that the alliance would not result in unreasonable increases in transportation costs through a reduction in competition.” *Id.* at 5. Unlike MOFCOM, “both took into account the parties’ argument that the alliance would result in operational efficiencies and benefit consumers.” *Id.*

<sup>105</sup> See CHINA COMPETITION BULL. 4 (36th ed. 2015) (citing <http://www.mofcom.gov.cn/article/ae/ail201504/2015040095517.html>); Interview with Tom Horton, Professor of Law at Univ. of S.D., *supra* note 70, at 3-6 (discussing the various strategic considerations of the proposed deal from the perspectives of the United States, Japan, and China).

predict that China will continue focusing, at least in the near term, on protecting its diverse multitude of small and medium-sized businesses, as well as national champions and core Chinese competitors in strategic businesses.<sup>106</sup>

***D. China Has Shown A Strong Propensity To Focus on Potential Barriers To Entry And The Use of Exclusionary Practices by Dominant Firms***

“[H]aving co-opted Western capitalism and mirrored many of its surface features, China today poses an unprecedented and profound challenge to Western capitalism that scholars and policymakers have only begun to grasp.”<sup>107</sup> As previously discussed, divergent views about antitrust enforcement and different regulatory focuses “may arise from the unique and economic-specific national policies each country’s antitrust laws are designed to promote.”<sup>108</sup> Consequently, “culturally embedded” competition laws, despite similarities in wordings, “may mean different things in different societies.”<sup>109</sup> We should not therefore be surprised that Chinese Anti-Monopoly Law regulators are taking “into account specific social and economic circumstances in China, rather than uncritically importing the legislative models used in the U.S. and the E.U.”<sup>110</sup>

The Chinese do not appear to be buying into the current extreme American judicial tolerance and even encouragement of concentrated industries<sup>111</sup> and predatory conduct, as allegedly “important element[s] in the free market system.”<sup>112</sup> Instead, the Chinese are showing an increased interest in controlling and arresting the growth of monopolies and dominant firms. China’s current interest parallels an ongoing trend in China towards economic decentralization.<sup>113</sup> As previously discussed, many of China’s industries, “are characterized by small-scale firms and

<sup>106</sup> See Lawrence S. Liu, *All About Fair Trade? - Competitors Law in Taiwan and East Asian Economic Development*, 57 ANTITRUST BULL. 259, 298 (2012) (arguing that China “resorts to serious industrial policy to foster national champions in strategic sectors.”); see also Berry, *supra* note 91, at 152 (predicting that China’s AML enforcement “will likely reflect the CCP’s historically protectionist tendencies.”); Deborah Healey, *Anti-Monopoly Law and Mergers in China: An Early Report Card on Procedural and Substantive Issues*, 3 TSINGHUA CHINA L. REV. 17, 26 (2010) (arguing that China’s “policy of promoting mergers and acquisitions to form large companies which will be internationally competitive, thereby creating national champions, is inconsistent with competition law principles”).

<sup>107</sup> Marshall W. Meyer, *Is it Capitalism?*, 7 MGMT. & ORG. REV. 5, 8 (2010).

<sup>108</sup> Farmer, *supra* note 43, at 41.

<sup>109</sup> Liu, *supra* note 106, at 269.

<sup>110</sup> Dr. Yijun Tian, *The Impacts of the Chinese Anti-Monopoly Law on IP Commercialization in China & General Strategies for Technology-Driven Companies and Future Regulators*, 2010 DUKE L. & TECH. REV. 004, ¶ 55 (2010).

<sup>111</sup> See, e.g., Sam Peltzman, *Industrial Concentration Under the Rule of Reason*, 57 J. L. & ECON. S101 (2014) (finding that concentration for American manufacturing has increased since 1982, due largely to the relaxation of antitrust merger standards); Horton, *Confucianism and Antitrust*, *supra* note 1, at 224 (discussing the trend of growing economic consolidation in the United States); WALTER A. ADAMS & JAMES W. BROCK, *THE BIGNESS COMPLEX: INDUSTRY, LABOR, AND GOVERNMENT IN THE AMERICAN ECONOMY* (2d ed. 2004); TED NACE, *GANGS OF AMERICA: THE RISE OF CORPORATE POWER AND THE DISABLING OF DEMOCRACY* 100 (2005) (discussing the rapidly accelerating trend to concentration); KENNETH M. DAVIDSON, *MEGA MERGERS: CORPORATE AMERICA’S BILLION-DOLLAR TAKEOVERS* (2003).

<sup>112</sup> RUDOLPH J. R. PERITZ, *COMPETITION POLICY IN AMERICA: 1888-1992: HISTORY, RHETORIC, LAW* 239 (1996) (quoting RICHARD A. POSNER, *ANTITRUST LAW* 28 (2d ed. 2001)). See also *Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407 (2004); Thomas J. Horton, *Unraveling the Chicago/Harvard Antitrust Double Helix. Applying Evolutionary Theory to Guard Competitors and Revive Antitrust Jury Trials*, 41 U. BALT. L. REV. 615, 616 (2012).

<sup>113</sup> See, e.g., Zheng, *supra* note 29, at 656; Yingyi Qian & Chenggang Xu, *Why China’s Economic Reforms Differ: The M-Form Hierarchy and Entry/Expansion of the Non-State Sector*, 1 ECON. TRANSITION 135, 145-47 (1993).

low market concentration ratios.”<sup>114</sup> Throughout “China’s bustling cities, vast numbers of small businesses exist alongside the towers of industrial and corporate giants.”<sup>115</sup>

Chapter III of China’s AML covers “Abuse of Dominant Market Position.”<sup>116</sup> Recent Chinese AML investigations show an emphasis on enforcing Chapter III. The focus seems to be on lowering potential barriers to entry for Chinese firms and controlling the use of potential exclusionary practices by dominant firms.<sup>117</sup>

In several recent merger investigations, MOFCOM has found that proposed transactions were likely to lead to heightened barriers to entry and the suppression of possible growth and development by competitors. As an example in imposing various conditions on Merck’s acquisition of AZ Electronic Materials, MOFCOM observed “that there were high barriers to entry,” including Merck’s holding more than 3,500 patents in the liquid crystals display market.<sup>118</sup> MOFCOM expressed similar concerns about high barriers to entry in its second decision unconditionally blocking a proposed merger. MOFCOM announced that the transaction would “increase the already high barriers to entry, [and] suppress competitors’ room for development” in blocking the proposed P3 Network Shipping Alliance among Maersk, Mediterranean Shipping, and CMA CGM.<sup>119</sup> Special attention also has been paid in recent months to bundling, and the licensing of intellectual property and technology.

Expansively pressing for the fair, reasonable, and non-discriminatory (FRAND) licensing of intellectual property rights (IPR) is perhaps the single area where the Chinese have been the most aggressive against foreign companies. Although AML Article 55 initially exempts from its ambit the use of IPR, it immediately adds: “however, this Law is applicable to conducts of undertakings that abuse their intellectual property rights to eliminate or restrict competition.”<sup>120</sup> China’s AML enforcement authorities have interpreted and applied Article 55 aggressively and expansively, especially in the context of requiring FRAND licensing of IPR in conditional merger and acquisition approvals.

<sup>114</sup> Zheng, *supra* note 29, at 710. Zheng adds that “[o]fficial statistics indicate that market concentration ratios in China have been unusually low when compared to both developed and developing countries.” *Id.*; see Horton, *Confucianism and Antitrust*, *supra* note 1, at 224-26.

<sup>115</sup> *Id.* at 224.

<sup>116</sup> AML Ch. III.

<sup>117</sup> AML Article 17 defines a “dominant market position” as one that “enables the undertakings to control the price or quantity of products or other trading conditions in the relevant market or to impede or affect the entry of other undertakings into the relevant market.” Articles 18 and 19 set forth a number of factors that can be employed in determining whether undertakings have a dominant market position, including market share, financial and technical status, and the “difficulty for other undertakings to enter the relevant market.” AML Ch. III, Art. 18. A single undertaking with a 50% share of a relevant market is presumed under Article 19 to have a dominant market position.

<sup>118</sup> *MOFCOM Conditionally Approves Merck’s Acquisition of AZ Electronic Materials*, CHINA COMPETITION BULL. 3 (32nd ed. 2014). Additional barriers to entry included photoresist suppliers having to go through a technical certification process that lasts two to three years. *Id.*

<sup>119</sup> *MOFCOM Prohibits the Formation of the P3 Network Shipping Alliance Among Maersk, Mediterranean Shipping, and CMA CGM*, CHINA COMPETITION BULL. 4 (32nd ed. 2014). MOFCOM has consistently voiced concerns about transactions potentially increasing barriers to entry since 2009. See, e.g., MOFCOM Announcement [2009] No. 77 Regarding Conditional Approval of Pfizer’s Acquisition of Wyeth, Sept. 29, 2009, at 4 (3) (iii) (discussing the high barriers to entry in imposing conditions on Pfizer’s acquisition of Wyeth).

<sup>120</sup> AML Ch. VII, Art. 55.

Considered together with MOFCOM's aggressive use of IPR licensing requirements in its conditional approval of mergers,<sup>121</sup> it appears that China increasingly will use its AML to help its indigenous companies gain favorable access to IPR held by foreign companies. This aggressive posture likely reflects China's recognition that "the country's innovators still have a way to go before they can meet the Communist Party's expectations."<sup>122</sup> While "China has strengthened its commitment to R & D to support the government's drive towards innovation, [t]he reality is that China remains heavily reliant on foreign IP."<sup>123</sup> Even though China has surpassed the United States and Japan in filing patents, "many of them [have] little value; they [have] been filed to meet political targets or attract funding."<sup>124</sup> Consequently, "[a]ccess to technology and development of domestic, 'indigenous' technology are key factors in China's development strategy."<sup>125</sup> Such developments lend strong credence to increasing foreign concerns that China will use its AML to promote its domestic research and development needs.

## II. CONCLUSION

"[H]aving co-opted Western capitalism and mirrored many of its surface features, China today poses an unprecedented and profound challenge to Western capitalism that scholars and policymakers have only begun to grasp."<sup>126</sup> We should not be surprised that China's Anti-Monopoly Law regulators are taking "into account specific social and economic circumstances in China, rather than uncritically importing the legislative models used in the U.S. and the E.U."<sup>127</sup> Nor should we be surprised that in charting its own course, China does not wish to be "the tail of someone else's dog."<sup>128</sup>

Unfortunately, notwithstanding China's vigorous protestations and denials, a review of China's AML enforcement activities since 2008 lends strong credence to the allegations that the primary targets of major AML enforcement initiatives have been foreign companies. Chinese officials and their CCP-controlled press have been unapologetic in simultaneously issuing warnings that foreign companies need "to get used to tougher scrutiny,"<sup>129</sup> and "must strictly

<sup>121</sup> See, e.g., *MOFCOM Conditionally Approves Merck's Acquisition of AZ Electronic Materials*, CHINA COMPETITION BULL., 3 (32nd ed. 2014) (discussing MOFCOM's requirements that Merck "offer LCD patent licenses on a non-exclusive, non-transferable, fair, reasonable, and non-discriminatory basis").

<sup>122</sup> Bruce Einhorn, *China's Government Admits Chinese Patents Are Pretty Bad*, BLOOMBERG BUSINESSWEEK, June 23, 2014. See also Christina Larson, *A Peek Into the 'Black Box' of Where China's Hefty R & D Budget Goes*, BLOOMBERG BUSINESSWEEK, Oct. 1, 2014, (discussing the massive graft and corruption in China's research fields).

<sup>123</sup> Dr. Zhan Hao, *SAC Moves Closer to Antitrust Rules for IP*, CHINA LAW VISION, July 10, 2014, available at <http://www.chinalawvision.com/2014/07/articles/competitionantitrust-law-of-the/saic-mov>.

<sup>124</sup> OSNOS, *supra* note 18, at 320. Similarly, while China is producing more scientific papers than anywhere but the United States, they are not even ranked in the top ten in terms of quality. *Id.* Osnos argues that academic fraud is still rampant in China. *Id.*

<sup>125</sup> Adrian Emch & Liyang Hou, *Antitrust Regulation of IPRs – China's First Proposal*, COMPETITION POLICY INTERNATIONAL, ASIA COLUMN 1, 10 (August 1, 2014).

<sup>126</sup> Meyer, *supra* note 107, at 8.

<sup>127</sup> Tian, *supra* note 110, at ¶ 55.

<sup>128</sup> FAIRBANK & GOLDMAN, *supra* note 8, at 322.

<sup>129</sup> See Neil Gough, Chris Buckley & Nick Wingfield, *China's Energetic Enforcement of Antitrust Rules Alarms Foreign Firms*, N.Y. TIMES, Aug. 10, 2014, available at [http://www.nytimes.com/2014/08/11/business/international/china8217s-energetic-enforcement-of-antitrust-rules-alarms-foreign-firms.html?\\_r=0](http://www.nytimes.com/2014/08/11/business/international/china8217s-energetic-enforcement-of-antitrust-rules-alarms-foreign-firms.html?_r=0).

comply with Chinese rules and laws and fulfill their social obligations.”<sup>130</sup>

China’s unwillingness to give more serious consideration to the escalating allegations and criticisms of its AML enforcement activities is cause for grave concern. Given the rising rhetoric and concerns on both sides, it seems that we may be headed for a dangerous clash sparked by two very different antitrust regulatory systems.<sup>131</sup>

China’s current course indicates that China will aggressively pursue AML enforcement with the goal of creating “fair market competition” and protecting the “consumer and public interests” of China’s citizens. China is likely to continue using its AML to protect its long-term security and economic interest, and to protect the competitive opportunities for its small and medium-sized businesses. In so doing, China is likely to continue aggressively seeking to break down perceived barriers to entry and to block exclusionary practices by firms with perceived dominant market positions.

Like it or not, the United States and other Western countries and businesses are going to have to accept that China views itself as different, and that its view of its “socialist market economy” is vastly different from our view of free markets.<sup>132</sup> We need to come to grips with the reality that Chinese antitrust in the next decade is unlikely to mimic our post-Chicago antitrust system, and its grounding in supposedly neutral and scientific neoclassical economic models.

Rather than wasting time criticizing China and trying to lure it into following current American models, we should humbly ask ourselves whether we might learn from the Chinese and their Confucian traditions and values. China should be lauded for seeking to pursue an aggressive antitrust policy that takes into account Confucian norms of ethics, morals, and fairness, and seeks to inspire increased corporate social responsibility.<sup>133</sup> In areas such as resale price maintenance, monopoly leveraging, and unfair predatory conduct by dominant firms, China ironically may be moving towards a potential leadership position in the global antitrust competition law arena, as the founder and historical leader of antitrust, the United States, struggles to overcome forty years of largely misguided neoclassical economics and regain its economic soul.

On the other hand, the Chinese and their AML enforcers are going to need to pay more attention going forward to their own Confucian traditions and values, as well.<sup>134</sup> Ongoing business

<sup>130</sup> China Competition Research Ctr., CHINA COMPETITION BULLETIN, *MOF-COM and the EU Chamber of Commerce Comment on the Recent AML Investigations into Foreign Businesses* 7 (33rd ed. 2014).

<sup>131</sup> See, e.g., Arthur Kroeber & Donald Clark, *Is a Trade War with China Looming? A ChinaFile Conversation*, CHINAFILE (Sept. 12, 2014), available at <http://www.chinafile.com/conversation/trade-war-china-looming>. See also Velk. Gong & Zuckerbrot, *supra* note 8, at 10 (describing the current trading relationship between China and the United States as “combative”).

<sup>132</sup> See, e.g., JACQUES, *supra* note 8, at 563 (stating that “[t]he desire to measure China primarily, sometimes even exclusively, in terms of Western yardsticks, while understandable, is flawed. At best it expresses a relatively innocent narrow-mindedness; at worst it reflects an overweening Western hubris, a belief that the Western experience is universal in all matters of importance. This can easily become an excuse for not bothering to understand or respect the wisdom and specificities of other cultures, histories, and traditions”).

<sup>133</sup> See Horton, *Confucianism and Antitrust*, *supra* note 1, at 228.

<sup>134</sup> In the words of Chinese Academy of Social Sciences Professor Zhou Hanhua: “Chinese society must share the values of a ‘market economy governed by law,’ including freedom, equality, fairness, and trust.” *Chinese Scholars Debate Rule of Law and Economy*, CHINESE MEDIA DIG., Nov. 10, 2014, at 3.

and governmental corruption in China must be aggressively addressed. Furthermore, the Chinese need to acknowledge and realistically address the pressures on their AML enforcers to aggressively target foreign companies in order to protect and bolster indigenous Chinese companies and businesses. Instead of trying to pretend that they are acting neutrally and objectively in their AML enforcement, the Chinese need to find better ways to focus primarily on competition policies, as opposed to industrial protectionism. The ultimate regulatory question must become what is best for economic competition in China, rather than what is best for the CCP's long-term interest in maintaining its tight grip on power.

As always, the future is uncertain. But the stakes could not be higher. Whether we like it or not, China's and our economies are inextricably linked and positively correlated.<sup>135</sup> Both China and the West must continue their ongoing dialogues, and seek to continue building strong economic, cultural, and political bridges.<sup>136</sup> After all, much more than future international antitrust enforcement is at stake.

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<sup>135</sup> See, e.g., Jingling Liu & Zhixiao Zheng, *The Economic Link Between China and North America*, 60(1) ANTITRUST BULL., 40, 44 (2015) (discussing studies and research showing "a moderate and positive [economic] correlation between China and North America").

<sup>136</sup> See, e.g., Daijie Peng, Yi Tzu Tsao & Nicholas Glaudemans, *Agents of Change*, 60(1) ANTITRUST BULL. 46 (2015) ("Improved Sino-Western cooperation requires better communication between China and the West. China should not be dismissive of Western work habits and skills, and the West should not display hostility toward China's advancing economic and political importance").

Mr. ISSA. Thank you.

We now go to the gentleman from Georgia for his round of questioning, Mr. Collins.

Mr. COLLINS. Thank you, Mr. Chairman. I want to take just a moment to sort of broaden out the picture just a little bit, and I think it's what we're looking at and this is sort of an open question to all.

I think we all can understand that China, and with even the last comments Mr. Horton said, is very protectionist, very looking after theirself, but yet at the same time wanting to aggressively market everywhere else in the world. Okay. We can understand that even from a capitalist standpoint in looking at that.

The problem I'm looking at is, especially in this area of IP, I mean, this is a country that have its own, quote, State-owned business moving factories out of Mainland China to other areas in the Middle East to keep their own theft from occurring. So I think we've got an issue here, but I have just a general question, and it was mentioned in a couple of your comments.

In the area of trade, in the area of working with the world, with the negotiations of the TPP and with the past few years of the AML, what do we see in China in regard—have you seen an uptick in the protectionism—I know I have seen in some areas—in maybe a response to the other countries and the TPP? I'd like to get your—just a perspective, maybe an overall perspective on that. And anybody wants to start. Ms. Secretary or whoever wants to start.

Mr. Cohen.

Mr. COHEN. Maybe I'll take a first shot at that. Obviously, you know, USTR is the lead on negotiating—

Mr. COLLINS. Right.

Mr. COHEN [continuing]. The TPP. In our bilateral discussions, China has expressed an interest in the TPP, although I think its primary focus is on its own internal demands and needs. And I think in that area we do see a heightened level of technical interest and engagement on intellectual property, primarily because China wants to become an innovative economy.

Mr. COLLINS. Right.

Mr. COHEN. And that's really shaping its engagement globally.

Mr. COLLINS. And I want to just bring that up, and again, feel free, as a matter of discussion. But you could probably—with it being an innovative economy, I think, are we seeing other problems here when you're looking even outside and even internal estimates of their growth and the issues of their economic growth, which is, at best, stagnating, at best, from the norms of where they were basically governing. What are we seeing when you're saying innovation and—where are we seeing the innovation? It still seems that they're copying a great deal and then protecting it as it comes along. Is that an unfair statement, especially in a restrictive economy at this point?

Mr. COHEN. I think the good news is China is interested in innovating, and the bad news is China is interested in innovating. The good news is that hopefully it will help foreign rights holders of foreign companies if they can compete equally and fairly. And in some areas, China is achieving some measure of success. High-speed rail, for example.

Mr. COLLINS. Right.

Mr. COHEN. Some of the research in the life sciences, and we've seen a lot of activity in patenting. But there is concern that in the process of seeking to become an innovative economy, the field won't be balanced or fair and that foreign entry could be restricted.

Mr. COLLINS. Well, and I think that's what we're seeing.

Mr. Horton and Mr. Heather, I'd like to say this. The interest is not—to me, creativity, and what we talk about in this Committee a lot, is creativity is thinking something new. Creativity is not seeing my pencil and then making another—copying it and painting it red instead of yellow and calling it creative. That's not creative. And I think that's some of the concern.

But the other concern is using—and I'd like to hear from the two here, is taking this idea of protection but also then taking companies that have made innovative strides, have went into China to actually work, becoming—where it becomes more of an economic disincentive, they're saying you're taking over and then we're—basically, all we're doing is rate manipulation at that point.

Mr. Heather and then Mr. Horton, I'd like to hear your comments on that.

Mr. HEATHER. Yes. In response for the Chamber's antitrust policy, I'm not our China expert who's actually in China, but I think if he was here today, he would share with you the way the Chamber looks at it is outside of the antitrust realm, that there are a range of Chinese policies that are all geared toward kind of industrial policy means and ends. And therefore, the antitrust law, in some ways, runs counter to those larger policies that the Chinese government is advancing and, therefore, opens up itself to the opportunity to advance those industrial policy goals.

It's also important to I think note in the China context that the three Chinese agencies, NDRC, MOFCOM, and SAIC all have other missions within their jurisdiction that are much more central to the way the Chinese organize and operate their economies. And the AML function that they fulfill is kind of on the margins of what is their core responsibility, which is more in this industrial policy vein.

As it relates to IP protection and these things, I think there's a number of avenues in which the U.S. Government and the Chamber have been advocating by which to eliminate forced transfer of U.S. companies where they go into China and then as a condition of investing in China, as a condition of operating in China, they are required to somehow joint venture with the state-owned enterprise to pass off their technology in some way, shape, form, or the other. There's a number of ways in which we're working to try to combat that, including through negotiations of a U.S.-China bilateral investment treaty.

Mr. COLLINS. Okay. Mr. Horton.

Mr. HORTON. I grew up in a family where I was indoctrinated as to the importance of the patent laws. My father has 39 patents in the ceramic engineering field, primarily for the use in aircraft engines. And so I believe that the patent laws are amongst the most important laws stated in our Constitution that Jefferson wrote into the Constitution. The bad news for the Chinese and why they're stealing IP is that their innovation is not happening from their

large state-owned enterprises and their institutions are not producing enough good research. They're filing more patents than anyone in the world, but most of them are sham patents that have little value.

The good news for the Chinese and what we might think more about emulating is that they have a growing bamboo thicket of capitalism of small business and entrepreneurs, and really, new innovations, new patents, new ideas come out of small companies. They come out of the garages. They come out of the Bill Gates working in his garage. They don't come out of the big companies. And so the Chinese are seeking to protect their small businesses, something we've gotten away from in the United States with our antitrust policy where we've allowed and even encouraged dominant firms with heavy market concentration, who then can make monopolistic profits that they don't put back into research. So we should emulate the Chinese in protecting our small businesses, entrepreneurs, and doing everything we can to encourage them.

Mr. COLLINS. Mr. Chairman, I yield back.

Mr. ISSA. I thank the gentleman.

We now stay with Georgia and go to the Ranking Member, Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman.

Professor Horton, are there any other lessons that U.S. antitrust policy can take from China's antitrust enforcement efforts?

Mr. HORTON. Yes, I believe that there are. First, I think that in areas like monopoly leveraging, resale price maintenance, where our Supreme Court, just a few years ago in the Leegin case, overruled on a 5 to 4 basis more than 100 years of sound antitrust policy under the name of neoconservative economics, and in predatory behavior by dominant firms.

I think the Chinese are very progressive, and ironically, could end up being leaders in world antitrust enforcement if we in the United States do not become more progressive and put behind us the 40 years of neoclassical economics that have led us astray and that are really a key part of what we're hearing in today's current election cycle about all the unfairness that's endemic in the American economy.

Mr. JOHNSON. What say you to that, Mr. Heather?

Mr. HEATHER. I think that we're talking about apples and oranges. The Chinese system is one that doesn't have a rule of law, which I believe Professor Horton referred to, and so I think any discussion about what policy debate we may have in the United States about the role U.S. antitrust law should play in our market is not akin to what happens in China.

Mr. JOHNSON. Well, I guess their enforcement mechanisms, without an independent judiciary, they're made in a different way.

But Professor Horton, any rebuttal from you as to Mr. Heather's comment?

Mr. HORTON. Well, I think that the Chinese Anti-Monopoly Law where it's very sound and progressive is it talks about fairness, fairness to consumers, fairness to competitors, and a stable economy. And we seem to think that fairness is some kind of mushy idea that has no place in economics. In fact, fairness is funda-

mental to a sound economic system, and the Chinese recognize that. We need to get back to that.

Mr. JOHNSON. Now, our independent judiciary, Mr. Heather, does it have fairness as its benchmark of making decisions or does it—I mean, what do you say to that, to what Professor Horton just said, the ideals that we apply our antitrust policies? I mean, what is our—is our—is there—can we learn something from the Chinese in terms of adopting ideals such as fairness to consumers?

Mr. HEATHER. Well, given the fact that we have had the due process concerns in China's antitrust proceedings, I think it's ironic that we're talking about—or you're depositing the question whether or not we can learn anything about fairness from China. I think that certainly I expect our judiciary to provide fairness when anyone goes before it, but I think the question that underpins this is whether or not the Chicago school of economics is the school by which the U.S. antitrust laws should remain guided or be informed by.

To that point, in referencing that in the context of China, it's one thing to make these kinds of broad statements; it's another thing to have the rigorous economic analysis to support them. And none of the cases that we see coming out of China has an economic proof to go with the statements that they make.

And I think that regardless of where we want to take U.S. antitrust laws, which have changed over the last 100 years in terms of how they're interpreted, and I suspect they will change over the next 100 years, there will still be a requirement in the U.S. system to underpin that with rigorous economic analysis because it's not just about the law, it's about the economics.

Mr. JOHNSON. And our courts apply rigorous economic thought to its decisions on antitrust policy? Yes.

Mr. HEATHER. I believe they are—do so in most cases, yes.

Mr. JOHNSON. I guess it depends on what school they are trained from, perhaps. But let me move on.

China issued some regulations today on electronic payment services, and as global payment networks prepare to establish payment processing services in China, they potentially face impediments under these new rules, which I've not seen. I don't know if any of you all have, but the potential is there.

They will be required to implement Chinese security and encryption standards rather than globally interoperable security standards, which are well established and internationally recognized. How can the U.S. continue to push for competitive access to the Chinese market while protecting the integrity of the international payment system in light of divergent security and encryption standards?

Mr. Cohen, let me ask you that question.

Mr. COHEN. Well, there have been longstanding concerns about market access for payment processing and for encryption and security standards that have been raised for a good 10 or 15 years, and we've been raising them bilaterally as potentially discriminatory treatment of U.S. companies and U.S. rights holders, and in some cases, demanding forced transfer of technology with some successes to date.

I'm not familiar with the latest rules. My office has mostly been concerned about forced transfers of intellectual property or adopting standards that primarily rely on China's indigenous innovation and would thereby discriminate U.S. innovation and U.S. technology.

Mr. JOHNSON. What do you say to that, Professor Horton?

Mr. HORTON. Well, I would be concerned about the Chinese interoperability standard because I do think that the Chinese are very cognizant of their own security interest, and one of the big problems with the IP and IT theft has been the concern that this is going to Chinese military technology.

So I think that we should put tremendous pressure on the Chinese to not allow their own indigenous system that they might take advantage of to be the standard for operating in China. I think the House here could put increasing pressure on China, as could the executive branch, to turn their own Confucian values around and say, you have to be fair toward the rest of the world, not just your own consumers and public.

Mr. JOHNSON. All right.

Mr. Heather.

Mr. HEATHER. I'm unaware of the regulation you mentioned, but our China team would be more prepared to comment and answer questions you have that we can have followup with your staff.

Mr. JOHNSON. Thank you.

Mr. ISSA. Thank you.

Mr. JOHNSON. Ms. Ohlhausen, I will get to you next time.

Mr. ISSA. We'll now go to the gentleman from Michigan, Mr. Bishop.

Mr. BISHOP. Thank you, Mr. Chair, and I thank the panel for your insight today. I wanted to give you a chance to review some of the recent reports highlighting the problem of Chinese companies using stolen images and deceptive advertising to lure American consumers into buying poor quality apparel direct from the Chinese manufacturers.

And that said, Mr. Chair, I'd like to ask unanimous consent to be able to submit this document which depicts blatant pictorial examples of Chinese advertising—

Mr. ISSA. Without objection—

Mr. BISHOP [continuing]. Using stolen images.

Mr. ISSA [continuing]. With unanimous consent, it will be granted.

[The information referred to follows:]

**Chinese Retailers Utilize Venus Photography on their own Website**

Techniques used by Chinese Retailers

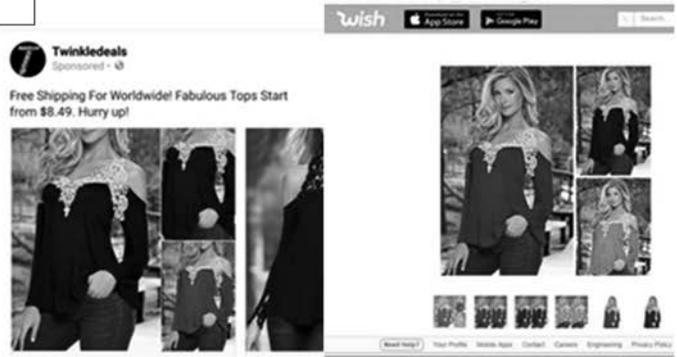
- Copy identical picture
- Cut off model's head
- Photoshop the product (often to change color)
- Mirror the picture

**Example #1**

Original Venus Advertisement



Chinese Copies of Venus Ad



Chinese Retailers Utilize Venus Photography on their own Website

Example #2

Original Venus Advertisement



Chinese Copy of Venus Ad

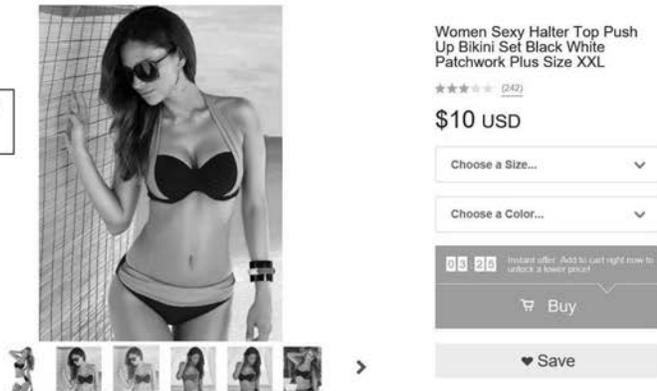


**Chinese Retailers Utilize Venus Photography on their own Website**

Original Venus Advertisement



Chinese Copy of Venus Ad



**Chinese Retailers Utilize Venus Photography on their own Website**

Original Venus Advertisement



Chinese Copy of Venus Ad



All of these websites are using Venus photography and selling poorly manufactured copies of Venus Products.

Chinese websites



Mr. BISHOP. These images are so blatant and lawless, there is no incorporation of any Confucius laws of anything, especially ethics or fairness.

American companies are increasingly discovering that their copyright images are being used in advertisements on sites like Google and Facebook, are preying upon Americans and the American consumers. When the customer receives the item, they look nothing like the picture they saw online in the advertisement. The clothing items are typically made of inferior material. They are constructed cheaply. They arrive in sizes that oftentimes are nowhere near and probably just big enough to fit a child.

Consumers—we all know that customer service as well is nonexistent, and the American buyer has no option whatsoever for returning the product or getting a refund. These false and misleading advertisements using stolen images result in consumers receiving merchandise far below the quality they're expecting and threaten the competitiveness and sustainability of American clothing companies, which we all know are in great jeopardy right now anyway trying to compete.

So I would like to, if I could, refer this question to Commissioner Ohlhausen and Mr. Cohen, and I just would like to know what steps you're taking to eliminate this practice by Chinese companies in order to protect American consumers and to protect the intellectual property of American companies and prevent this kind of activity by Chinese companies in the future.

Ms. OHLHAUSEN. Thank you, Congressman Bishop. The FTC, as you know, in addition to our antitrust authority, is also a consumer protection agency, and so we work internationally with other consumer protection authorities to address these kinds of issues. Now, there can be a challenge for how you reach a company in another country. What is their contact with the U.S.?

So to the extent we can reach companies that are misleading consumers, if they have some presence in the U.S., then we can try to bring an enforcement action. Otherwise, we need to work with our international counterparts.

I would say our relationship with the consumer protection authorities in China is not as developed as they are with the consumer protection authorities in Canada and Europe and some other more developed economies, but we continue to try to work and build these kinds of relationships.

Mr. COHEN. So if I may, Congressman, the problem with counterfeit and shoddy substandard goods emanating from China is well known. Chinese exports are accountable for about 80 percent, if I remember correctly, of U.S. seizures of infringing goods. There's a lot of litigation both within China and outside of China due to China's manufacturing and sales of counterfeit and substandard goods.

Under the JCCT rubric, there is a commitment by the Chinese to work on reducing the incidence of these goods. We've been trying to work with platforms such as Alibaba, JD.com, and others to address this problem. The first recourse is, of course, voluntary steps taken by legitimate platforms to take down the goods, to respond to complaints, and to respond to the complaints not only of consumers but of rights holders who observe the counterfeit goods.

There's a huge magnitude to this problem in terms of the growth of the platforms, the sales coming from overseas, the facility and ease with which the goods can be distributed, including by small parcels, which are hard to detect. And it's really an issue that skips many different agencies within U.S. Government and the Chinese Government, including our own Customs and Border Protection, our FBI, State and local enforcement, the USPTO, U.S Trade Representative, Federal Trade Commission. So it requires a lot of coordinated effort, including working with our rights holders and consumers to address the problem. But it's going to take time and considerable effort.

Mr. BISHOP. Thank you very much for your answer.

Mr. Chairman, I yield back.

Mr. ISSA. I thank the gentleman.

We'll now go to the gentleman from Texas, Mr. Ratcliffe.

Mr. RATCLIFFE. Thank you, Chairman. I appreciate all the witnesses and your testimony today. I think this topic is especially timely, given the U.S.-China Strategic and Economic Dialogue that's taking place this week.

The trends that we've seen with respect to China enforcing its antitrust laws to advance its own industrial policies are troubling, to say the least. In fact, it's difficult to imagine China having a truly objective antitrust law when the very text of that law states that its purpose is to promote a socialist market economy.

But even more telling, I think, are the anecdotes that we see from American and European companies, which in some cases are, frankly, shocking. We've seen reports of intimidation tactics, bullying companies into accepting punishments without full hearings, and even in some cases, companies being told not to challenge their investigations or even bring their lawyers to some of the hearings.

You know, beyond the direct impact of China's behavior on American companies, I'm a little bit concerned that other rising economies out there will see China's behavior and perhaps follow suit. So the bottom line is, I think, that if China wants to be taken serious as a leading economy, then these issues need to be addressed or remediated.

Mr. Heather, I want to start with you. I appreciate you being here to testify today. I know this can be a sensitive issue within the U.S. business community and I know some folks may actually fear retaliation for speaking up and voicing their experiences. So I appreciate you being here to speak on behalf of U.S. companies.

Let me start with what I mentioned before, the U.S.-China Strategic and Economic Dialogue. What meetings and conversations do you hope that our Administration is initiating in that regard?

Mr. HEATHER. Well, I believe that the S&ED has come to a conclusion in China I think as of this morning. I believe the outcomes statements from those meetings were posted late this morning. I do not believe there were any new developments coming out of this S&ED related to competition policy. That being said, I think the S&ED and the JCCT have been enormously helpful in particularly addressing those egregious due process concerns that you mentioned. In fact, I think most of the folks I talked to would say that it's probably been a year since those most egregious practices have been communicated back to the United States. So there is an effec-

tive dialogue there at the highest levels of the United States Government with China and China has shown some responsiveness.

That being said, in my testimony I said there are still due process concerns with a company being able to understand what the theory of harm is against them, being able to see the evidence China has collected so they can mount a defense and respond to that evidence. So there remains many due process challenges in China, but those most egregious offenses that you refer to in your comments are things that, at least for the last year or so, seem to have subsided and you can track that pretty closely with these high level commitments that came out of the S&ED and the JCCT.

Mr. RATCLIFFE. Well, I'm glad to hear your perspectives on that. Let me ask you this question, are there areas of the United States broader economic and commercial policy toward China that you think might be exacerbating some of the concerns that we're talking about today?

Mr. HEATHER. I think the answer to that is absolutely. As I testified, that the AML can be used as a force for good in creating greater competition within the Chinese market, but the legal framework that is the Anti-Monopoly Law also allows for supporting the social development of the market economy, as they refer to it. It carves out space for their state-owned enterprises and does a number of other things that provide unique twists on what antitrust enforcement would be in the United States being consumer welfare focused.

Mr. RATCLIFFE. Thank you.

I move on quickly with my remaining time to you, Commissioner Ohlhausen. In your testimony you talk about China's agencies pursuing noncompetition objectives through competition enforcement to promote certain industries or particular Chinese competitors. You also talk about the fact that the FTC is working with other agencies within our government to advance consistent cooperation enforcement policies.

I want to ask you in my remaining time, what is the interaction with the other agencies? And more particularly, are you receiving any pushback at all or a message that maybe you need to stop or back off a little bit with respect to China for the sake of U.S.-China relations?

Ms. OHLHAUSEN. We work closely with the Department of Justice, and the Department of Commerce on these issues. And what we try to do is give advice to the antitrust agencies in China as fellow antitrust enforcers so that we can engage with them on an expert-to-expert kind of dialogue. I don't think we've gotten any pushback about what we've been doing or what we've been saying from other parts of the U.S. Government.

Now, when I've talked to Chinese officials, we certainly have to be sensitive to the fact that their laws do allow for some noncompetition factors to be included. But one of the things that I've specifically advocated, and it's consistent with the general U.S. position, is if they are taking noncompetition factors into account, they should be clear about that. It shouldn't be just rolled up in a competition analysis so that we don't know what part is competition and what part may be some kind of an industrial policy. So at least as a first step be transparent about the reasons for their decisions.

As a later step, it would be better to remove those kinds of noncompetition factors from an antitrust analysis completely.

Mr. RATCLIFFE. Thank you, Commissioner.

My time has expired. I yield back, Mr. Chairman.

Mr. ISSA. I thank the gentleman.

I'm going to follow up where that left off, though, Commissioner. China is part of the WTO, right? So any subjective, unwritten, we just win, you lose is subject to a challenge, isn't it?

Ms. OHLHAUSEN. I'm not a trade expert, but I think that's correct. Certainly, they have to make commitments.

Mr. ISSA. Right. But you're an expert on unfair trade practices.

Ms. OHLHAUSEN. Unfair trade practices being antitrust and consumer protection.

Mr. ISSA. Right. But as the chief watchdog of consumer protection.

Ms. OHLHAUSEN. Yes.

Mr. ISSA. Domestically, what they're doing of injecting non-defined subjective standards is in fact the kind of manipulation that you investigate in private enterprises all the time to find out how these unpublished wrong selective interpretations go on, right?

Ms. OHLHAUSEN. Right. Well, certainly, in the U.S. our antitrust law has evolved so that we only consider competition factors in the competition analysis.

Mr. ISSA. That wasn't the question.

Ms. OHLHAUSEN. Okay.

Mr. ISSA. But I'll go to Mr. Cohen. The Federal Trade Commission regularly goes after people with false and deceptive practices, implying that you can win when in fact you can't. The WTO does require that there be essentially a transparent policy, and protectionism is inherent—not tariffs, but protectionism is inherently barred within the WTO, and the Administration, our government, can sue, as we are sued, if somebody believes we've crossed that line, correct?

Mr. COHEN. As long as it offends a WTO requirement, that's correct.

Mr. ISSA. So in the case of Mr. Ratcliffe, his examples. The example of this dialogue of antitrust being mixed with, we just want our companies to win, that in fact could lead to WTO action, couldn't it?

Mr. COHEN. Again the lead agency here is USTR, which is not represented. The WTO disciplines on antitrust are rather limited. There are certain provisions in the TRIPS Agreement regarding—

Mr. ISSA. Actually, I wasn't talking antitrust. I was talking about other subjective standards that are causing determinations to be made that are inconsistent with the actual antitrust laws.

Mr. COHEN. Perhaps if there are external influences that are inconsistent with the WTO requirements, such as national treatment or most favored Nations treatment in investment or market access, and those could be cognizable carried issues.

Mr. ISSA. Thank you. Let me follow up with this sort of a general question, but I think it's directed to the Commissioner primarily. Is it fair to say that active engagement—and I'll use a term that's my term, not yours—calling out China for its double standards on

intellectual property and on antitrust, calling them out in a respectful way, but consistently and aggressively, if you will, at least behind closed doors, isn't that an essential part of what we have to do at a minimum to keep China's inherent policies from tipping the scales against us?

And I want to be careful. I'm not necessarily an expert on Confucianism, but it does appear as though China only does that which we push hard to make them live up to. Is that a fair statement somewhat in your estimation?

Ms. OHLHAUSEN. Well, I do think it's been important to have an honest but respectful exchange with the Chinese officials about where there might be deficiencies in their system or where there have been some inconsistencies. So for example, when the U.S. Chamber put out their report in 2014, the Chinese agencies had a press conference where they pushed back and they said, no, we are not administering our law in an unfair way. But what was important is they then continued to engage with us and we saw not just words but deeds followed on by that to have some improvements.

Mr. ISSA. And you keep using the word "respectful," and I think that's critical. This is a large trade partner, but I'm going to ask respectfully each of you to answer yes or no. Is it true that China is abhorrent in their respect for intellectual property both patents and particularly copyright and trademarks?

Commissioner?

Ms. OHLHAUSEN. Are they—I'm sorry, I missed the word. Abhorrent?

Mr. ISSA. Abhorrent was the word I used, but deficient, quite deficient by international standards. Is that fair to say?

Ms. OHLHAUSEN. I think it's fair to say that they're weak.

Mr. ISSA. Okay. Would you go further, Mr. Cohen?

Mr. COHEN. Yes. They are somewhere between weak and abhorrent. Some areas they're improving, but the track record is pretty bad.

Mr. ISSA. And I'll go with the "improving," but I'll stick with the "abhorrent" too.

Mr. Heather, you certainly represent a huge amount of companies that are constantly frustrated. Would you use the word abhorrent, deficient, regardless of improving below international standards of many developed countries?

Mr. HEATHER. I won't worry about the adjective. I will just simply say, yes, China's enforcement of intellectual property rights is substandard.

Mr. ISSA. Thank you.

Mr. Horton, Professor Horton?

Mr. HORTON. I would say seriously deficient. Addressing your comment quickly, the United States enabled China to get into the WTO, the United States has been China's best economic ally in promoting its growth and helping it. And the United States is still the greatest economic engine on the face of the Earth. So if the United States stands up and tells the Chinese, look, you have to treat us with the same kind of fairness and equal rights that you want to instill in your own Anti-Monopoly Laws, that's what it's going to take if you want to continue having shipload after shipload of goods come here into the United States.

Mr. ISSA. So we should speak regularly and affirmatively if we're going to go have them behave?

Mr. HORTON. I would say we should followed Teddy Roosevelt and speak softly and carry a very big stick.

Mr. ISSA. I thank the gentleman.

I now go the gentleman from Georgia for a second round.

Mr. JOHNSON. Thank you, Mr. Chairman.

Ms. Ohlhausen, what has been the relationship between the FTC and, if you know, the Department of Justice in terms of the Chinese antitrust enforcement authorities? Have they reached out? What is the relationship between your agency and DOJ, if you know, and the Chinese enforcement agencies? And if you could describe that relationship, if any.

Ms. OHLHAUSEN. Certainly. We signed a memorandum, the DOJ and the FTC in 2011 signed a memorandum of understanding with the three Chinese antitrust agencies. And what that does is establish a framework for cooperation and dialogue between the U.S., the senior competition officials in the U.S. and in the Chinese agencies.

We also developed a guide for case cooperation on particular cases where we are investigating, the U.S. agencies are investigating and the Chinese agencies are—or a Chinese agency, usually MOFCOM, is investigating, to allow us to talk about it or coordinate in some way. So that's some of the more formal ways that we do this.

And under the memorandum of understanding we have regular high level meetings. We also have a lot of informal engagements and talks. And so, for example, as I mentioned, I've been to China on numerous occasions, often to meet with these officials and to talk with them, to further understanding, to raise important concerns that we might have about their enforcement.

Mr. JOHNSON. So would it be safe to say that improvements are being made in terms of Chinese acknowledgment of American ideals in terms of antitrust enforcement? And also with respect to intellectual property, if you could comment about that.

Ms. OHLHAUSEN. So I think there are improvements being made. I don't think we are close to saying all the problems are taken care of. I do think that there has been progress. It's been slow, it's been very incremental. And one of the things that we often try to talk about or I often try to talk about is why these approaches, the U.S. approaches are not just good for the U.S., but they're good for the Chinese economy.

Certainly, the Chinese officials rightly are caring about the Chinese economy and their growth and their innovation. And so I think it's incumbent on us to explain to them why our approach will lead to the best outcomes for their economy and for their movement from a manufacturing economy to an innovation economy. So protecting IP rights can help their own industries advance, their own industries invest, and have them become stronger players in an innovation model.

So I think that's an important part of the dialogue. And when we point to the problems with them devaluing IP rights, it's not just that it may hurt U.S. companies, but it may hurt their own economy in the long run.

Mr. JOHNSON. So this kind of dialog between an advanced Nation such as America and a developing Nation with respect to China, is this the way to go or should we—you said carry a big stick, Professor Horton. Is there a different way of approaching this than the way that we're doing it now? Would you recommend another approach, Professor Horton?

Mr. HORTON. Well, first we have to recognize that we're dealing with essentially a dictatorship. The Chinese Communist Party is not in any way, shape, or form a democracy as we know it here in the United States. And that kind of government goes back thousands of years in China. So we're coming to any negotiations with China from a very different perspective and standpoint.

Putting ourselves in the Chinese Communist Party leader's shoes, they see all the changes that are transpiring in the world. They fear what was happening in Tiananmen Square, they fear the spread of democracy in China. And so on the one hand they're trying to tamp all of this down while at the same time creating this economic miracle that can help keep them in power by giving more money and goods to the Chinese citizens.

So I think on the one hand we need to step back and say, we're dealing with the Chinese from a very strong position. We have a very sound fundamental democracy. We have a very sound fundamental economy. We have excellent allies throughout the world. We have excellent trade relations. So we should not be intimidated by China's growth or it's 1.5 billion people. We should go into any negotiations with the Chinese and say, look, you know, we helped defeat the Japanese in World War II to liberate your country, we've been good allies with you, we've helped build your economic miracle, but you have serious, serious problems in terms of dealing with the rest of the world and it's in your interest, as Commissioner Ohlhausen said, to step up to the plate and recognize this if you want to go forward as a sound economic partner throughout the world.

Mr. JOHNSON. All right. I thank you, Professor Horton.

And I yield back. Thank you, Mr. Chairman.

Mr. ISSA. Thank you. And I'll be brief the second round.

Mr. Cohen, you were shaking your head during quite a bit of that in a positive way, so I thought I'd follow up a little bit.

There is a government in China that looks out for China. Is it fair to say that two of the challenges businesses face, one of them is a Chinese centric, how do the Chinese view intellectual property? How do the Chinese view competition? Which is sort of a business-to-business one. And then there is the government's desire to, if you will, protect its progress. Used to be it's 10 percent, but whatever number it happens to state that it can achieve that. Is that fair to say that we have two pots there to deal with?

Mr. COHEN. I think that's a fair assessment. In fact, in innovation we see state-driven innovation and private sector innovation. The type that Professor Horton has mentioned is another example of that, one coming from the top down and one from the bottom up.

Mr. ISSA. So when we have, as Commissioner Ohlhausen is dealing with, government-to-government activity, I presume that we're dealing then with two sets of problems. One is that which the government controls directly, which is their policy and procedures,

their execution of laws, and then that which really has more to do with the very strong provinces and more local authority that often it's like pushing a string, in my own words, that you can't necessarily expect the government to control, but they can attempt to make a difference. Is that sort of a fair assessment of the China that we are dealing with that which they control, that which they influence?

Mr. COHEN. There is—I mean, China is not a unified state, it's not a Federal system, but, you know, there is such a saying that the emperor is far and that in the provinces there's a little bit less control. But people still roughly follow national guidelines and the structural weaknesses such as the intervention of the party is pervasive. The courts are no more or less independent than any part of China because the party is still very active there serving its interests.

Mr. ISSA. Well, you know, there's a lot of lawyers here at the table. So isn't it true, as it was more than a decade ago when I was with the late Henry Hyde in China, that they have practically no lawyers educated in the sense that we think of members of the bar?

Mr. COHEN. The legal community has been under a lot of attack in China. They have educated a lot more lawyers, but many of the human rights lawyers have been thrown in jail, many of the outspoken lawyers have suffered repercussions. But at the same time the courts are proceeding well in a technical sense. So you have a very interesting moment in time where the courts are under pressure, yet at the same time, technically, they're improving their expertise in a range of areas.

Mr. ISSA. When I was there with Henry Hyde who made a major address, the number at that time was barely into double digits, sort of 10 percent of judges actually were lawyers. The court system was being administered by people who had not been trained in the law.

Mr. COHEN. I think that's no longer the case.

Mr. ISSA. So it's risen?

Mr. COHEN. It used to be the case that the judges were all former military officials. They since have had to take an exam and they've gotten legal training and in many cases they not only have basic law degrees but graduate—

Mr. ISSA. So that's a good news statement.

Mr. COHEN. Yes.

Mr. ISSA. Last question. I started with you, Mr. Cohen, and I want to follow up one more time. We, the United States, lead the way toward most-favored Nations and then WTO assert—ascension for China in the hopes that they would, after receiving it, then comply better with what they were not complying with ahead of time. And we talked about antitrust laws getting mixed with other noncompetitive or foreign competition, just waiting.

What kind of a grade would you give China on how well we achieve that goal by giving them WTO in hopes that they would live up to a standard you're supposed to have before you become a WTO member?

Mr. COHEN. That standard was to have a rules-based trading system, a transparency, independent courts, at least that, I think, were the aspirations. That is still very much a work in progress.

Mr. ISSA. Okay.

Professor, as a Case Western graduate like my brother, who did get admitted, last question for the whole panel, for you, you see China and you have some serious doubts, and you were very outspoken in that. Is it fair to say, though, that disengagement would in fact, by definition, allow them to keep doing what they're doing? Engagement with some of the caveats that you presented here today is ultimately the answer for how we have our largest trading partner do better.

Mr. HORTON. I think the Chairman's comments today have been quite astute. We have no choice but to engage the country that has approximately 18 to 20 percent of the world's population. China is not going to go away any time, it's going to increasingly influence what's happening throughout Asia and the world. And we should not be afraid of engaging with China.

We have a very strong, fundamentally sound democracy and economy. We have nothing to fear from strongly engaging the Chinese, and over time, perhaps head being them toward the course of democracy. You know, we remember when communist China—or communist Russia broke up. How did that happen, over night? No, I think it was decades of public pressure and subtle pressures and just the people there seeing that there's a better way of life. And the Chinese are traveling all over the country. You can look here in this hearing today, they're here by the dozens. And they see that United States open ideal of democracy and freedom of speech, freedom of religion. These are wonderful guideposts for the future. And let's hope that, over the coming decades, the Chinese will slowly begin to realize that and move closer to a democracy.

Mr. ISSA. Thank you.

In closing, I guess I'll own up to the fact that I made my first trip to Hong Kong as a buyer in 1982 and made several hundred trips before I retired to come to Congress. I have great respect for the Chinese people. I had great respect for the Hong Kong business model and the governance that they managed to turn into a world standard of best practices. I appreciate the fact that the Chinese think of things in 10,000 years. We think of things in our couple hundred years. And apparently, that's one of the reasons they're in less of a hurry than we are to achieve the goals. And I don't say that to be pejorative. I have great respect for where China has come so far.

But this concludes our hearing for today. I want to thank all of our witnesses. You were all incredibly good. I want to particularly thank the Chamber for representing so many companies who, by definition, would prefer to have the Chamber speak on their behalf than to speak individually.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses and additional materials for the record.

And with that, we stand adjourned.

[Whereupon, at 5:25 p.m., the Subcommittee was adjourned.]

A P P E N D I X

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MATERIAL SUBMITTED FOR THE HEARING RECORD

**Response to Questions for the Record from the Honorable Maureen Ohlhausen, Commissioner, Federal Trade Commission**

Commissioner Maureen K. Ohlhausen Response to Questions from  
The Committee on the Judiciary's  
Subcommittee on Regulatory Reform, Commercial and Antitrust Law  
Hearing on "International Antitrust Enforcement: China and Beyond" on June 7, 2016

- 1. To date, the commitments made by China to enhance due process and promote consumer welfare rather than industrial policies are non-binding and voluntary in nature. If China does not follow these commitments, will the FTC seek stronger, binding commitments? How would those commitments be enforced?**

Answer: While the commitments China has made regarding due process and using competition law to promote consumer welfare rather than industrial policy are non-binding, they nonetheless are important statements by China as to how it will undertake competition enforcement. As noted in my testimony, I view those statements and others as a positive development showing that China's antitrust enforcement agencies understand the importance of conducting procedurally fair investigations and pursuing competition rather than industrial policy objectives. The FTC will continue to monitor the adherence by China's agencies to those commitments and engage with them, as necessary, to address any concerns.

I should note that the pending Trans-Pacific Partnership (TPP) contains provisions regarding procedural fairness in competition investigations that would bind the signatories.<sup>1</sup> Reports suggest that China has expressed interest in possibly joining the TPP. Should the TPP take effect and should China ultimately join the Partnership, China would be subject to those binding commitments.

- 2. In your testimony, you note that China is considering adopting policies that may require patent holders to license their intellectual property against their will and may regulate the prices of these licenses. Do you have a view regarding this potential policy? Is the FTC responding to this development and, if so, how? Can you describe any executive branch inter-agency coordination regarding this development?**

Answer: As discussed in my testimony, the FTC is concerned that China may require licensing of intellectual property (IP) through an application of the "excessive pricing" provision under its Anti-Monopoly Law (AML) or a theory that the IP in question is considered "necessary" to entry and competition by market rivals. An overbroad application of competition law to IP-related conduct can deter innovation, both in China and around the world. Accordingly, the FTC, along with the Antitrust Division of the Department of Justice (DOJ), has advocated for caution in adopting such a broad approach to IP-related conduct, such as requiring the licensing of IP to create competition, and for application of the AML to IP-related conduct only when it is likely to harm the competitive process, as opposed to the interest of a competitor. The FTC has done this through engagement at both senior official and staff levels, our technical assistance programs, and comments to China on legislative and regulatory proposals. While issues like "excessive pricing" and mandated licensing of "essential" IP raise questions of competition policy that fall within the responsibilities of the U.S. antitrust enforcement agencies, the FTC, together with the

<sup>1</sup> See Trans Pacific Partnership, Chapter 16.1-16.2.

DOJ, coordinates with Executive Branch agencies to ensure that the approaches we advocate are consistent with United States government (USG) policies on IP. For example, we participate in regular inter-agency meetings coordinated by the National Security Council as well as the Strategic & Economic Dialogue (S&ED) with China and the Joint Commission on Commerce and Trade (JCCT).

- 3. Some have suggested that it would be helpful to require by statute that the FTC and the Antitrust Division of the Department of Justice coordinate with other executive branch agencies when interacting with foreign competition law enforcement agencies. This required coordination would be focused solely on policy, and not related to interacting with foreign jurisdictions on the enforcement of pending cases and investigations. Do you believe that increased coordination would be helpful, and should such coordination be prescribed by statute?**

Answer: As the two federal agencies responsible for antitrust enforcement and policy within the United States government, the FTC and DOJ are uniquely qualified to engage with foreign competition agencies on antitrust issues, and foreign antitrust enforcers generally view the FTC and DOJ as bringing particular antitrust enforcement expertise. As described in my testimony and noted in the previous response, both agencies coordinate with other Executive Branch agencies regarding competition policy matters in appropriate instances.

I believe that current mechanisms for coordination with other agencies within the Executive Branch are functioning well and a new statute is not necessary. Moreover, we would caution that pending cases and investigations often inform or drive policy decisions. Accordingly, it may be difficult for a statute, as outlined in the question, to draw a clear line between circumstances that require coordination because the engagement with a foreign competition agency is policy-related, and circumstances that do not because the engagement relates to a pending investigation or enforcement action.

Additionally, the FTC and DOJ regularly advocate on the international stage that antitrust agencies should enforce competition laws based solely on competition considerations, and that, to the extent antitrust enforcers pursue other goals such as industrial policy, such analysis should be separate and transparent. A statute that mandates coordinated action by the FTC with other Executive Branch agencies with different statutory responsibilities may lead antitrust enforcers in other countries to view the FTC's competition advocacy as intermixed with the pursuit of other U.S. goals and interests. Such an outcome risks undermining the effectiveness of our specific advocacy stressing that agencies focus on competition considerations, as well as our general message urging that other national interests be kept separate from competition enforcement.



**Response to Questions for the Record from Mark A. Cohen, Senior Counsel,  
United States Patent and Trademark Office**

**Responses to Questions for the Record for  
Mark Cohen**

Senior Counsel on China Issues  
U.S. Patent and Trademark Office (USPTO)

Subcommittee on Regulatory Reform, Commercial and Antitrust Law  
Committee on the Judiciary, U.S. House of Representatives

*June 7, 2016 Hearing on "International Antitrust Enforcement: China and Beyond"  
Submitted on July 29, 2016*

**Questions submitted for the Record from Chairman Tom Marino**

**1. Do you believe that China is using its competition laws to obtain intellectual property rights for Chinese companies at below-market rates?**

While Chinese antitrust authorities maintain that they are enforcing their antitrust laws even-handedly, many U.S. tech companies believe that they have been specially targeted for antitrust enforcement for their intellectual property-related practices including licensing. As indicated in the United States Trade Representative's (USTR) 2016 Special 301 Report, "there is ongoing concern among U.S. companies that Chinese competition authorities may target for investigation those foreign firms that hold intellectual property rights that may be essential to the implementation of certain technological standards" and that "[r]eports of intimidating and non-transparent investigative conduct contribute to these concerns." Concerns have also been expressed by leadership at the Antitrust Division of the Department of Justice and the Federal Trade Commission.

**2. Is it possible for China to enforce its AML in such a way that it would violate China's obligations to the World Trade Organization (WTO)? Is there an argument that China may already be in violation of its WTO obligations as a result of its AML enforcement tactics?**

The 2015 USTR Report to Congress on China's WTO Compliance, in part, indicates that the U.S. has raised serious concerns with China regarding its enforcement of the Anti-monopoly Law (AML). The report, however, notes that some progress has been made regarding those concerns. To promote improvements in AML enforcement policy, the U.S. has secured a number of commitments from China at the 2014 and 2015 meetings of the United States-China Strategic and Economic Dialogue (S&ED) and the United States-China Joint Commission on Commerce and Trade (JCCT). In addition to important commitments on procedural fairness and transparency, and access to counsel, China confirmed that the objective of competition policy is to promote consumer welfare and economic efficiency rather than promote individual competitors or industries; that enforcement of competition laws should be fair, objective, transparent, and non-discriminatory; and that China's AML enforcement agencies are to be free from intervention from other agencies in enforcement proceedings. China also committed that, taking into account the pro-competitive effects of intellectual property licensing, it attaches great

importance to maintaining coherence in the rules related to intellectual property rights in the context of the AML. USTR and other agencies, including the USPTO, in collaboration with U.S. stakeholders, will closely monitor and evaluate China's efforts to comply with those commitments.

**3. China is considering adopting policies that may require patent holders to license their intellectual property against their will and may regulate the prices of these licenses. Do you have a view regarding this potential policy? Is the PTO responding to this development and, if so, how? Can you describe any executive branch inter-agency coordination regarding this development?**

Adoption of such policies would be contrary to commitments made by China in various ongoing and completed bilateral discussions. The USPTO will continue to monitor any such policy making and collaborate with USTR and other agencies with intellectual property interests and advocate on behalf of U.S. patent owner and stakeholder interests by providing comments on draft laws and policies, participating in JCCT discussions, and maintaining direct engagement with China's patent office and other agencies.

**4. Some have suggested that it would be helpful to require by statute that the FTC and the Antitrust Division of the Department of Justice coordinate with other executive branch agencies when interacting with foreign competition law enforcement agencies. This required coordination would be focused solely on policy, and not related to interacting with foreign jurisdictions on the enforcement of pending cases and investigations. From the PTO's perspective, do you believe that increased coordination would be helpful, and should such coordination be prescribed by statute?**

With respect to China, both the FTC and the Department of Justice (DOJ) are participants in the Strategic and Economic Dialogue and the Joint Commission on Commerce and Trade and lend their expertise in the development of U.S. policy addressing China's enforcement of its competition laws. The FTC and DOJ currently coordinate their efforts in helping to ensure that foreign antitrust regimes adopt effective enforcement practices and eliminate those practices that do not advance innovation and consumer welfare or fail to comport with due process. While increased coordination between FTC and DOJ may certainly be helpful, I am unaware of any need for a statutory directive in that regard.

**Response to Questions for the Record from Sean Heather, Vice President,  
Center for Global Regulatory Cooperation, U.S. Chamber of Commerce**

CHAMBER OF COMMERCE  
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UNITED STATES OF AMERICA

SEAN HEATHER  
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July 28, 2016

The Honorable Bob Goodlatte  
Chairman  
Committee on the Judiciary  
United States House of Representatives  
Washington, DC 20515

**Re: Responses to Questions for the Hearing Record (June 7, 2016)**

Mr. Chairman:

Thank you for the invitation to testify before the Judiciary Subcommittee of Regulatory Reform, Commercial and Antitrust Law on June 7, 2016, and present the views of the United States Chamber of Commerce (the "Chamber") regarding international antitrust.

To supplement our testimony and the previously submitted Chamber report, *Competing Interests in China's Competition Law Enforcement: China's Anti-Monopoly Law Application and the Role of Industrial Policy*, please find attached my responses to the questions posed to me for the record by members of the Committee.

Sincerely,

A handwritten signature in black ink, appearing to be 'S. Heather', with a horizontal line extending to the right.

1. What impact does China's past and present enforcement of its AML have on U.S. companies and the American economy? Do you believe China's tactics could lead to reduced innovation by companies and diminished revenues that could be used to hire American workers or returned to U.S. shareholders?

The Chamber is concerned with the misuse of China's AML. Misuse comes in many forms, including discriminatory and non-transparent application of the law to foreign companies without due process, enforcement to support non-competition factors (i.e. promotion of industrial policy objectives, including supporting national champions and advancing producer welfare domestically and abroad) as opposed to promoting consumer welfare, and reliance on remedies with extraterritorial impact.

In the first eight years China's AML has been in effect, each of these concerns has borne out in multiple cases to varying degrees. This misuse results in domestic Chinese firms, including those which are state-owned and state-supported, receiving unfair advantages over foreign firms not only in China but around the world. As an example, during the merger review proceedings, the Chinese government has imposed highly questionable behavioral remedies on foreign companies to clear mergers. Chinese antitrust enforcement authorities have regularly intervened in markets to lower what they view as "excessive prices" without economic and competition analysis that would support such intervention in markets. Foreign firms are also deeply concerned that the AML has been and will in the future be wielded as a tool to force technology transfer to support China's indigenous innovation policies and development of national champions.

China's approach in enforcing its AML has and is likely to continue to diminish foreign companies' ability to compete not only in China, but also globally, given the size of the China market and China's penchant for remedies that have extraterritorial impact. The adverse impact not only hits a company's bottom line, but also impacts its ability to innovate.

2. Do you believe that our executive agencies could improve their response to China's abuse of its AML? If so, how?

Yes. It is critically important that the U.S. government significantly strengthen internal coordination and information sharing on AML challenges. The U.S. government must not only speak with one voice on AML concerns, but adopt a policy approach that forcefully addresses industrial policies masquerading as AML enforcement and that is fully consistent with the White House's broader China economic and commercial policies. Ideally, bilateral discussions on antitrust enforcement should not be politicized; rather, they should be driven by sound economic analysis that aims to promote consumer welfare.

However, a clear pattern of both policymaking and enforcement has emerged, in China through which China is injecting non-competition factors into AML cases to achieve industrial policy outcomes. Where China's industrial policy motivations drive AML outcomes, neither U.S. antitrust agency is well situated to push back.

Bilateral engagement between U.S. and Chinese antitrust enforcers on case-specific matters and other law-enforcement related issues is appropriate and needed. However, where AML provisions are explicitly drafted to advance China's international economic policy to promote non-competition objectives and antitrust enforcement inconsistent with U.S. and global norms, the White House as well as key cabinet departments responsible for international economic policy vis-à-vis China—including the United States Trade Representative, Department of Commerce, Department of State, and Department of Treasury—should have a substantially increased role going forward in addressing AML challenges. This is particularly true as China's AML agencies are small offices in much larger ministries responsible for state control of the economy and meeting industrial policy targets. Further, non-antitrust U.S. government departments engage Chinese policymakers in the government at much higher levels than their U.S. antitrust counterparts and have points of engagement that far exceed those of the Assistant Attorney General for Antitrust at the Department of Justice and the Chair of the Federal Trade Commission.

In formulating a coherent international economic policy vis-à-vis China that addresses misuse of China's AML for industrial policy purposes, U.S. antitrust agencies should be required to share information and analysis and coordinate policy approaches with their U.S. government counterparts. U.S. antitrust

agencies have improved their coordination in recent years, but not nearly enough to ensure a coherent and credible international economy policy that addresses growing global market distortions stemming from China's misuse of the AML. We therefore urge the Congress to use its oversight responsibilities to hold key antitrust agencies accountable for a whole-of-government approach in addressing China AML challenges.