

CPI's North America Column Presents:

International Competition Policy Expert Group: Report and Recommendations

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May 2017



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In March 2017, the U.S. Chamber of Commerce released a report and recommendations on *International Competition Policy* (Expert Report), written by a bipartisan group of highly regarded experts in competition and trade policy.¹ On May 19, 2017, the United States House of Representatives Committee on the Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law will hold a hearing to discuss the report and its recommendations.²

As the Expert Report notes, “[a]lmost all nations today have some form of competition law regulating the commercial activities of firms operating in their markets.”³ Indeed, in the last 25 years, there has been a remarkable proliferation of foreign competition laws and agencies, expanding from 23 jurisdictions with competition laws in 1990 to approximately 130 jurisdictions to date. The problem as framed by the Expert Report is that these laws “are not always applied in a sound, transparent, and non-discriminatory manner and, as a result, they can have significant adverse impact on international trade and investment in domestic and global markets.”⁴ Instead, “[c]ertain major trading partners are, in some cases, denying foreign companies fundamental due process and, in other cases, applying their competition laws to protect their home markets from foreign competition, promote national champions, and/or force technology transfers.”⁵

To address these concerns, the Expert Report offers twelve recommendations. As explained in the opening letter to the report from the co-chairs of the drafting group, recommendations one through six “urge the Trump Administration to prioritize the coordination of international competition policy through a new, cabinet-level White House working group (the Working Group) to be chaired by an Assistant to the President.”⁶ Among other things, the Working Group would set a government-wide strategy for articulating and promoting policies to address the misuse of competition law by other nations, and review existing and potential new trade policy tools available to address such misuse. Recommendations seven through twelve “focus on steps that should be taken within international organizations and bilateral initiatives,” such as possibly expanding the World Trade Organization’s assessment of member governments to include a review of competition policies and encouraging multilateral organizations such as the Organisation for Economic Co-operation and Development “to adopt a code enumerating transparent, accurate, and impartial procedures.”⁷

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

² Hearing press release, <https://judiciary.house.gov/press-release/regulatory-reform-subcommittee-hold-hearing-international-antitrust-enforcement/>. My written testimony for the hearing is available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2965568.

³ Expert Report, *supra* note 1, at 6.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 2.

⁷ *Id.*

As I explain in my written testimony for the May 19 congressional hearing, I agree with the Expert Report that certain foreign governments appear to be using their competition laws (as well as their unfair trade practices acts) in ways that unfairly harm U.S. companies and inappropriately reduce incentives to innovate.⁸ These acts include denying U.S. companies fundamental due process, protecting their own markets from competition, and, in the case of intellectual property rights (IPRs) in particular, using competition law to reduce royalty payments to U.S. companies to unduly favor their domestic manufacturers.

Based on my experience, it is my belief that public exposure, including expressions of concern at the highest level of the U.S. government, is one effective way to achieve the desired change.⁹ To that end, I favor the Expert Report's recommendation to consider creating a listing mechanism for competition enforcement akin to the U.S. Trade Representative's annual Special 301 listing of foreign nations that have inadequate intellectual property protections.¹⁰

The good news is that many, if not most, foreign competition agencies want to be considered part of the international mainstream, and respond to public statements of concern. For example, the allegedly egregious violations of due process by China's National Development and Reform Commission (NDRC) against U.S. companies, including reportedly locking executives in rooms and ordering them to "confess their sins" under threat of refusing to return their passports,¹¹ were in large part remedied through a multi-pronged approach, which included a letter from the then-Secretary of the Treasury Department,¹² followed by statements from President Obama to China's President Xi.¹³

⁸ Prepared Statement of Koren W. Wong-Ervin, Antonin Scalia Law School, George Mason University, Before the United States House of Representatives Committee on the Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law, "International Antitrust Enforcement" (May 19, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2965568.

⁹ Strategic public shaming has been employed for example by China's NDRC. "Based on analysis of media coverage and interview findings, [a recent] study finds that the way the NDRC disclosed its investigation is highly strategic depending on the firm's co-operative attitude toward the investigation. Event studies further show that the NDRC's proactive disclosure resulted in significantly negative abnormal returns of the stock prices of firms subject to the disclosure." Angela Huyue Zhang, *Strategic Public Shaming: Evidence from Chinese Antitrust* (Mar. 30, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2943268.

¹⁰ I note that such a mechanism already exists to a limited extent. See, e.g., USTR, *2017 National Trade Estimate Report on Foreign Trade Barriers* at 94-95, 353-54, 283-84 (<https://ustr.gov/sites/default/files/files/reports/2017/NTE/2017%20NTE.pdf>); USTR, *2016 Report to Congress On China's WTO Compliance* at 22-23 (Jan. 2017), <https://ustr.gov/sites/default/files/2016-China-Report-to-Congress.pdf>.

¹¹ See generally Michael Martina & Matthew Miller, "*Mr. Confession*" and his boss drive China's antitrust crusade, REUTERS (Sept. 15, 2014) ("[L]awyers and executives describe meetings with the NDRC as interrogations,' where raised voices, flaring tempers and verbal reprimands are commonplace."), <http://www.reuters.com/article/us-china-antitrust-ndrc-insight-idUSKBN0HA27X20140915>.

¹² See, e.g., Laurie Burkitt & Bob Davis, *U.S. Treasury Warns China Over Antimonopoly Efforts*, WALL ST. J. (Sept. 14, 2014), <https://www.wsj.com/articles/u-s-treasury-warns-china-over-antimonopoly-efforts-1410687635> (reporting that the letter recommended that China avoid using its competition law to devalue foreign IPRs).

¹³ See, e.g., Michael Martina & Matthew Miller, *As Qualcomm Decision Looms, U.S. Presses China on Antitrust Policy*, REUTERS (Dec. 15, 2014), <http://www.reuters.com/article/us-qualcomm-china-antitrust-idUSKBN0JU0AK20141216> (quoting then-White House National Security Council spokesperson Patrick Ventrell: "The United States government is concerned that China is using numerous mechanisms, including anti-monopoly law, to lower the value of foreign-owned patents and benefit Chinese firms employing foreign technology. ... President Obama raised these concerns about the enforcement of China's anti-monopoly law directly with President Xi when they met in Beijing last month").

Following these statements, China's NDRC reportedly provided better process. It also abandoned its previously-stated intention to impose extra-jurisdictional remedies, namely global, portfolio-wide remedies, including on foreign conduct involving foreign patents. Extra-jurisdictional remedies have the potential to produce significant negative effects on competition and welfare, particularly if conduct that is widely considered to be generally procompetitive is the object of one-country's worldwide prohibition.¹⁴ Extra-jurisdictional remedies are also easier to identify than other problematic forms of "inappropriate" application of competition law such as discriminatory enforcement or industrial policy.

Lastly, I wholeheartedly agree with the Expert Report on the need for economically-sound effects-based competition analysis, particularly analysis that takes into consideration the social cost created by errors in assessing competition law liability. There are two types of errors possible: Type I (or false positives) in which procompetitive conduct is mistakenly condemned, and Type II (or false negatives) in which we fail to condemn conduct that is actually anticompetitive. The U.S. Supreme Court has recognized the limitations courts face in distinguishing between pro- and anticompetitive conduct in antitrust cases and emphasized the high rate of Type I error in monopolization cases in particular.¹⁵ The U.S. Supreme Court has also expressed concerns, originally explained in Judge Frank Easterbrook's seminal analysis, that the cost to consumers arising from Type I errors might be greater than those attributable to Type II errors because "the economic system corrects monopoly more readily than it corrects judicial errors."¹⁶

I recognize, however, that the United States may not be able to achieve convergence on these principles in the short term given that many foreign competition laws explicitly provide for the consideration of non-competition factors such as "fairness" or the economic development of the country.¹⁷ For example, China's Anti-Monopoly Law provides for "promoting the healthy development of the socialist market economy,"¹⁸ and states that "[t]he state constitutes and carries out competition rules that accord with the socialist market economy, perfects macro-control, and advances a unified, open, competitive and orderly market system."¹⁹ Similarly, Japan's Antimonopoly Act states that purpose of the Act is "to promote fair and free competition, . . . to heighten the level of employment and actual national income, and thereby to promote the democratic and wholesome

¹⁴ Koren W. Wong-Ervin et al., *Extra-Jurisdictional Remedies Involving Patent Licensing*, COMPETITION POLICY INTERNATIONAL ANTITRUST CHRONICLE (Dec. 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2870505.

¹⁵ Verizon Commc'n Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) ("Mistaken inferences and the resulting false condemnations are especially costly, because they chill the very conduct the antitrust laws are designed to protect." (internal quotations omitted)). See also Pac. Bell Tel. Co. v. LinkLine Commc'n Inc., 555 U.S. 438, 451 (2009) ("To avoid chilling aggressive price competition, we have carefully limited the circumstances under which plaintiffs can state a Sherman Act claim by alleging that prices are too low."); Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 283 (2007) ("[W]here the threat of antitrust lawsuits, through error and disincentive, could seriously alter underwriter conduct in undesirable ways, to allow an antitrust lawsuit would threaten serious harm to the efficient functioning of the securities markets.").

¹⁶ Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 15 (1984).

¹⁷ See Koren W. Wong-Ervin, *Procedural Fairness and the Importance of Focusing Solely on Competition Factors in Competition Analysis*, ABA INTERNATIONAL ANTITRUST BULLETIN at 8-9 (Aug. 2014), <https://www.ftc.gov/system/files/attachments/key-speeches-presentations/wong-ervin - procedural fairness - aug 2014.pdf>.

¹⁸ Anti-Monopoly Law of the People's Republic of China, Ch. I, Art. 1, http://english.court.gov.cn/2015-08/17/content_21625234.htm.

¹⁹ *Id.* Art. 4.

development of the national economy as well as to assure the interests of general consumers."²⁰ The Introduction to India's Competition Act states that, in interpreting the Act, the Competition Commission should "keep[] in view . . . the economic development of the country."²¹

Nevertheless, I strongly agree with the Expert Report about the dangers of using vague and subjective standards such as "fairness" or other non-competition goals in competition analysis, and I believe the United States should continue to advocate for an economic welfare standard. I also think an effective interim measure is to require transparency as to what factors are considered in competition analysis and how those factors are weighed and balanced. In training foreign competition judges and enforcers, I have also strongly urged them to analyze the competitive effects of a particular course of conduct before considering any non-competition goals so they will at least understand any welfare gains or losses associated with their decision. Indeed, it is important for such jurisdictions to carefully consider the tradeoffs of attempting to serve multiple goals. For example, difficulties with weighing and balancing competition and non-competition factors and efficiencies against equity concerns, the latter of which may undermine consumer welfare considerations.²²

I have often found myself reading certain foreign competition agency decisions and feel as if there were missing pages. The analysis starts off sounding like mainstream competition analysis, for example, beginning with an analysis of market power or dominant position and then articulating a theory of harm, but that analysis is often ignored in the rest of the decision. Conclusions often lack evidentiary support and leave me puzzling as to what non-competition factors or industrial policy concerns actually motivated (or dictated) the outcome. Requiring transparency in decision making would go a long way towards creating accountability for foreign competition agencies and courts and providing some measure of predictability for stakeholders with global operations who are attempting to comply with foreign competition laws.

In conclusion, I agree with the Expert Report that certain foreign governments appear to be using their competition laws (as well as their unfair trade practices acts) in ways that unfairly harm U.S. companies and inappropriately reduce incentives to innovate. I also agree that the U.S. government should develop a systematic strategy for combating such actions and forcefully advocate for economically-sound effects-based competition law analysis. As a starting point, I would focus on fundamental due process issues such as requiring transparency in decision making and continue to use public exposure, including concerns expressed by those at the highest levels of the U.S. government.

²⁰ Antimonopoly Act of Japan, Ch. I, Art. 1, http://www.jftc.go.jp/en/legislation_gls/amended_ama09/.

²¹ Competition Act of India, Introduction, http://www.cci.gov.in/sites/default/files/ccil_pdf/competitionact2012.pdf.

²² For a discussion of the difficulties of balancing numerous factors across different markets, balancing efficiency concerns against equity concerns, and balancing static and dynamic concerns, see Karen W. Wong-Ervin, *Protecting Intellectual Property Rights Abroad: Due Process, Public Interest Factors, and Extra-Jurisdictional Remedies*, COMPETITION POLICY INTERNATIONAL at 6-7 (Apr. 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947749.