

prepared statement of

Eleanor M. Fox
Walter J. Derenberg Professor of Trade Regulation
New York University School of Law

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

Hearing on Trends in International Antitrust Enforcement
with particular regard to the Report of Experts on International Competition
Convened by the US Chamber of Commerce

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

Thank you for the opportunity to appear before you today.

My name is Eleanor Fox. I am a professor of law at New York University School of Law. I hold the chair of Walter J. Derenberg Professor of Trade Regulation. I have been a member of the faculty of NYU School of Law since 1976. Immediately before then I was a partner in the law firm Simpson Thacher & Bartlett. I graduated from New York University School of Law in 1961 and hold an honorary doctorate degree from the University of Paris–Dauphine (2009). My books include a casebook, US ANTITRUST IN GLOBAL CONTEXT (West), a co-authored European Union law casebook (West), and THE DESIGN OF COMPETITION LAW INSTITUTIONS, with Michael Trebilcock (Oxford). My bio may be found on my NYU faculty page at <https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=19924>.

I am pleased to discuss my perspectives on the US Chamber of Commerce’s Experts’ Report and Recommendations on International Competition Policy (Experts’ Report, or Report).¹ The Group of Experts was convened to address the Chambers’ concern “with disparate approaches to antitrust enforcement around the world and increasingly misguided uses of antitrust as a means to achieve industrial policy outcomes”² to the harm of US business. I was

¹ US Chamber of Commerce, International Competition Policy Expert Group: Report and Recommendations (March 2017), https://www.uschamber.com/sites/default/files/icpeg_recommendations_and_report.pdf.

² https://www.uschamber.com/sites/default/files/icpeg_recommendations_and_report.pdf.

honored to be included in the Group of Experts. We submitted our Report in March 2017. I submitted a separate statement, which may be found on the last page of the Report.

We come here today to address a problem. The problem is that certain of our trading partners have been using antitrust laws in strategic ways to achieve nationalistic ends that have nothing to do with antitrust. We may have a second problem. The United States may be en route to doing substantially the same thing – using merger control for nationalistic ends. This could occur if Congress amends CFIUS³ to allow the President to veto mergers for economic ends unrelated to national security.

My main message today is: Keep politics out of antitrust. For illegitimate use of antitrust that harms Americans, continue robust dialog and seek international consensus through the international competition community, not trade sanctions.

Antitrust laws are not political tools. Markets and the antitrust laws that support them are part of a global commons of competition that help people get the goods and services they need and want and spur innovation and growth. They raise standards of living, lift people out of poverty, provide economic opportunity, and empower people to help themselves. In the United States antitrust has always been color blind and nation-blind. This is also true of competition law in most other countries. The cosmopolitan non-political nature of antitrust has improved the plight of people world-wide; not least American consumers and business people. In this age in which forces feed a downward spiral of tit-for-tat nationalistic moves, we have to work at keeping antitrust out of politics and politics out of antitrust in all corners of the world.

I. INTRODUCTION AND BACKGROUND

I will first summarize the Expert Group's perception of the problem and recommendations to solve it. I will then describe my somewhat different appreciation of the problem and my proposals for solution, some of which are reflected in the Report.

The Expert Group endorses the view that certain of our trading partners are systematically applying their antitrust laws in wrong and inappropriate ways that injure American business and appropriate American firms' intellectual property, and do so by proceedings that lack due process. Further, the Group believes that this problem is large and urgent; that it cannot be solved at the antitrust level of national authority to national authority, and that we should raise it to a higher level. The vehicle suggested is a new, cabinet-level White House Working Group to be chaired by an Assistant to the President that includes representatives from the Department of Justice, the Federal Trade Commission, the Council of Economic Advisers, and the Departments of State, Commerce and Treasury. The White House Working Group would be tasked to consider all options including unilateral actions such as through Section 301 of the Trade Act of 1974, which could entail imposing trade remedies to ban imports from offending countries.

³ Committee on Foreign Investment in the United States. *See*, for reports of expansion of CFIUS' authority, Samir N. Kapadia, Wall Street should bet on Trump killing Chinese deals, Business Insider, April 12, 2017, available at <http://www.businessinsider.com/wall-street-should-bet-on-trump-killing-chinese-deals-2017-4>.

Before I present my own perspective, I shall say a word about antitrust law and its reach. The antitrust laws, also called competition laws in much of the world, are intended to protect the market from restraints. They are intended to help keep markets robust so that the forces of competition – not business power – determine what we as consumers can buy and at what price. It is well recognized that market economies need competition laws to prevent abuses of power that frustrate the forces of competition. The most obvious offenses are price-fixing cartels, monopolistic acts that keep outsiders from reaching the market on their merits, and business consolidations (mergers and acquisitions) that create economic power. While we want to prevent harmful restraints, we also want to give businesses the space they need to be creative and efficient. Protection of incentives to behave efficiently and innovatively is part of the analysis in determining what is anticompetitive.

More than 130 nations and jurisdictions now have antitrust or competition laws. All competition systems are trying to free the market from anticompetitive restraints. But there are five factors that may produce divergent results. 1) Market facts may differ. For example, unlike the United States, some nations' markets are typically characterized by weak capital markets, high barriers to entry, and dominant state-owned firms with entrenched privilege. Market facts such as these could counsel more interventionist antitrust. 2) Nations (and experts) disagree on the best balance between antitrust intervention and reliance on the market to safeguard competition. 3) Regarding intellectual property: Nations that are implementers more than producers may strike a balance more towards protecting consumers (licensees) than protecting the exclusivity rights of IP owners. 4) Many nations, unlike the United States, have public interest or industrial policy mandates written into their competition laws. These mandates can lead agencies to clear mergers with conditions based on what is notionally good for the country rather than what is good only for competition.

Since the business world is fairly globalized, what one does in the US, or in China or Japan or Europe, has effects all over the world. It has become accepted practice for nations' competition authorities to take action against off-shore firms that harm their markets. This is the only way to protect the global commons of competition, since we have no international competition law. Thus, the US may condemn a price-fixing cartel in Japan, Taiwan or Korea that hurts Americans, and it may prohibit or condition a merger of two non-US companies where the merger would increase the merging firms' market power and threaten a price-rise in the United States. Likewise, the European Union can prohibit a merger of US firms that harms competition in the EU.

The United States is home to many very successful and dynamic multinational enterprises. Some of them have market power in the world. If they misuse that power under standards of misuse in any affected nation, they can find themselves in the cross-hairs of competition agencies around the world. Since standards of misuse of power differ, and the US has one of the least interventionist monopoly laws in the world, these American firms may understandably feel that they are unfairly targeted by our sister trading partners. I will argue in this testimony that we must learn to distinguish legitimate applications of antitrust in a diverse world, and illegitimate applications that have no relation to market power and its misuse but are bald, strategic nationalism.

II. THE SCOPE OF THE PROBLEM

Legal standards. There has been much convergence of antitrust principles around the world, thanks to various fora for cooperation and convergence and particularly to the International Competition Network, a network of competition authorities. Still, there are notable differences in antitrust principles, especially in the case of abuse of dominance/monopolization, including the treatment of intellectual property.⁴ US companies doing business internationally face more aggressive antitrust law abroad than at home. US companies most prominently involved in foreign antitrust cases include Qualcomm, Microsoft, Google, Apple and Facebook. It would be wrong to conclude that, because foreign law is different in some respects from US law, it is wrong.⁵

Discrimination in applying legal standards. If our trading partners are applying their competition laws discriminatorily against US business, that is quite a different story. Under WTO rules, nations agree not to apply their law differently and detrimentally against foreigners. The Report suggests that US firms have been subject to discrimination. I am not so sure that this is the case; or, if it is the case, that it can be proved. I am convinced that the European Union does not discriminate against foreigners in application of its competition laws. It applies to US firms the same standards that it applies to European firms. Does China discriminate? China often deals permissively with its powerful state-owned enterprises, but it apparently treats other Chinese firms and US firms equally. Moreover, Chinese competition authorities have made progress in bringing the SOEs into the bounds of the law. This is a work in progress.

To some extent the big, dynamic US firms are unique in structure and strategies. The countries' domestic firms are not comparable. If that is so, the discrimination case is very hard to make.

Several foreign competition authorities have brought a disproportionate number of high profile proceedings against US firms.⁶ It happens that once a high profile case is brought, there is a band-wagon effect. If the EU brings proceedings, Korea, China, Taiwan, Russia and others may follow. This may seem unfair. But sometimes even the US follows with suit against the same firms, or even is the first mover, as in certain Microsoft, Google, Qualcomm and Intel

⁴ See E. Fox, "Monopolization and Abuse of Dominance: Why Europe Is Different," 59 Antitrust Bull. 129 (2014).

⁵ Even within US law there are schools of thought. Differences tend to turn on different notions about how well markets work and how much antitrust intervention is necessary to protect them. See FTC Charges Qualcomm With Monopolizing Key Semiconductor Device Used in Cell Phones, complaint and Commissioner Maureen K. Ohlhausen's statement dissenting to the filing of the complaint, January 17, 2017, <https://www.ftc.gov/news-events/press-releases/2017/01/ftc-charges-qualcomm-monopolizing-key-semiconductor-device-used>.

⁶ Note that the US Department of Justice seems to impose large fines for price-fixing disproportionately on foreign firms, especially Asian firms. See chart, Sherman Act Violations Yielding a Corporate Fine of \$10 Million or More, <https://www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more>. See also Ron Knox, The longer arm of the law, Global Competition Review Vol. 15, issue 9, p 26: "since 2005, significant US cartel fines ... have been imposed on more companies headquartered in Asia than in every other country of the world combined." This could be a function of the fact that some of the largest cartels in the world have been centered in Asian countries.

matters. Moreover, just because foreign proceedings are opened against US firms does not mean that the regulating authority is *arbitrarily* challenging US firms. The defendant may in fact be obstructing competition.

Use of non-competition factors: public interest and industrial policy. Many countries' competition laws require the competition authorities to consider public interest factors in vetting mergers. For example, South Africa must consider a proposed merger's effect on jobs and employment. When Walmart bought Massmart in South Africa, a South African order required it to rehire workers laid off, not to lay off additional workers for two years, and to invest 200 million Rand (approximately US\$15 million) in a fund for enhancing the capacity of the small suppliers that risked being shut out of the global supply chain.⁷ In my view, in our community of nations, we must recognize and respect the law and values of South Africa (and our other trading partners). South Africa helps its workers and is willing to pay the principal costs (e.g., higher supermarket prices). Walmart might prefer not to worry about South African workers, but this is South Africa's choice to make.

China's competition law goes further than South Africa's. The Chinese Anti-Monopoly Law (AML) was enacted to promote, among other things, "the healthy development of the socialist market economy." Article 1, AML. The merger control provision mandates the consideration of "the effect of the concentration on national economic development." Article 27. In a limited set of high profile cases, such as *Microsoft/ Nokia* and *Glencore/Xstrata*, China has cleared mergers with conditions, and in an early case it prohibited an acquisition by Coca-Cola, where the anticompetitive effects were not apparent and industrial policy was almost surely the driver.⁸

Industrial policy designed to put costs on outsiders is against cosmopolitan soft world norms and the spirit of the WTO. China has sometimes violated this norm. But even so, we should not overlook the fact that China has adopted and cultivates markets, albeit in a "socialist market" economy; and that its enforcers have quickly learned international standards and apply them in perhaps (I roughly estimate) 97% of its applications.

Due process. Lack of due process is a greater problem than inappropriate substantive applications of law. Standards of due process require a right to be heard and to be heard by persons with open minds, a right to know the charges against one, a right to know the information on which the charges are based, a right to cross-examine witnesses or at least to have a capable judge do so, a right to submit all relevant evidence, a right to have one's lawyers present at informational meetings and hearings, a right to a reasonably timely disposition, a right to a reasoned decision, transparency including as to the grounds of the decision, and a right to appeal. In the United States we are accustomed to being accorded due process (although even

⁷ <http://www.comtrib.co.za/assets/Uploads/110CACJun11111CACJul11-study.pdf>.

⁸ See, for a compilation and description by the US-China Business Council of the merger reviews by MOFCOM from the beginning of merger enforcement in 2008 through the end of 2014, <https://www.uschina.org/sites/default/files/USCBC%20-%20Merger%20Reviews%20Rejected%20or%20Modified%20by%20MOFCOM,%202008-present%20--%20ao%202015.01.12.pdf>.

here shortfalls have been identified). In several Asian countries and elsewhere, huge shortfalls are reported.

III. HOW WE HAVE BEEN HANDLING THE PROBLEMS?

The problems are being addressed on four fronts.

First, cross-fertilization. The International Competition Network hosts a dynamic process of cross-fertilization and convergence. Convergence is facilitated also by the Organization for Economic Cooperation and Development and the United Nations Conference on Trade and Development. Numerous international competition law programs and workshops, as well as bi-lateral and multi-lateral meetings, expose good legal standards and analysis. These various fora have produced a high degree of convergence of competition law principles, as well as understanding of divergences.

A second project that promotes convergence and development of good competition law relates to free trade agreements. Competition law chapters are contained in various free trade agreements. A state-of-the-art chapter is included in the stymied Trans-Pacific Partnership agreement. The competition chapter, along with an excellent adjacent chapter that would control state-owned enterprises, is an important resource and may be imported into future regional agreements.

A third front relates to over-reaching applications of antitrust including takings of intellectual property, and lack of due process. The US antitrust agencies have been in the forefront, calling out lack of due process and arguing for better law. They talk persistently and frequently to officials of offending agencies. They hope and intend to convince the sister agencies of better applications of law and process. They have had some success.

A fourth front involves the highest political level and is appropriately reserved for the most serious problems. In 2014 President Obama complained to Premier Xi Jinping of China's treatment of an unnamed company (thought to be Qualcomm) about the excessive reach of the Chinese Anti-Monopoly Law to diminish American intellectual property rights.⁹

Perhaps as a result of the combined persistence of the US agencies and the intervention of the US President, the Chinese anti-monopoly system has become more transparent, cases and the reasoning in their deposition are more likely to be reported, rights of representation have been better respected, and the system has speeded up. As time goes on there appear to be fewer cases of excessive antitrust. Progress has been made. I understand from China experts that China – not accustomed to Western notions of due process – now gives more due process in the area of antitrust than in all other areas of its law. This progress may be a result of the persistent and persuasive complaints of Americans and others.

IV. THE WAY FORWARD

What is the way forward? There are at least three options:

⁹ See <http://www.reuters.com/article/us-qualcomm-china-antitrust-idUSKBN0JU0AK20141216>.

1. Keep talking, agency to agency, trying to clarify law and process and nudge its convergence. Use the tools of the ICN, OECD, UNCTAD and the WTO. Develop global norms. The Experts' Report makes a variety of suggestions in this regard.

2. In addition, and only occasionally, raise a specific urgent issue, such as the Qualcomm complaints of severe lack of due process and aggressive use of antitrust to lower IP royalty rates, politically at the highest levels.

3. In addition, form a Working Group to coordinate and integrate national thinking on trade, investment and competition. The Experts' Report proposes that the Working Group be located in the White House, and that it consider strategies to punish nations that misapply antitrust to the harm of Americans. The strategies could include imposing trade sanctions for discriminatory antitrust.

Another idea is a Working Group with a different mission. This Working Group would not use trade sanctions as an antitrust remedy but would have two community-regarding functions. It would develop the synergies at the free-trade-and-competition interface, bringing harmful state restraints under control. And it would bring antitrust to the table to make the best case against an expansive CFIUS that would effectively authorize US industrial policy in merger control. This would be a forum for the antitrust officials to make the case against America-first antitrust (antitrust that would deviate from rule of law to privilege US firms), and the case for cosmopolitan antitrust as the front-and-center principle from which derogations would have to be justified.

What I recommend. I commend all three options but with the following glosses.

1. I strongly recommend "keep talking" as the first line of action. Persuading and converging. The US chiefs of antitrust have, to a person, been strongly grounded, persuasive, technically proficient professionals. They do an excellent job, and I am always proud of them. I would leave the issue of aberrant antitrust in their capable hands. Except in extreme cases, I would not thrust the issues into a political arena.

2. I recommend against presenting US antitrust (and especially the most laissez-faire version of it) as the one right set of rules and standards, and labelling divergences from that model as wrong and inappropriate. We owe deference to trading partners' choices, as long as they are transparent, their systems grant due process, and their actions are not disguises to raise Americans' costs. I would commend young antitrust jurisdictions such as China for their progress in understanding and implementing international standards and for blazing a path to control excessive anticompetitive state acts and measures.

Even if we owed no respect to the different perspectives of our trading partners, I believe that insistence that US principles are the only correct ones, and that incorporation of nations' public interest objectives is intolerable, is not only presumptuous but a diversion from a more important mission. There are two big offenses, and they do not include either antitrust deviations from "US-correct" substantive principles or a nation's applications of its public interests. The

big offenses are: lack of due process, and strategic uses of industrial policy to impose costs on outsiders. These are the offenses against which we should direct all of our energy.

3. We should be alert to detect discriminatory applications of antitrust against American firms. We should document them and call out offenders, but not exaggerate them.

4. Exceptionally in critical and serious cases in which discrimination is strongly suspected or where due process has been ignored, we should consider raising the matter to the highest political level.

5. A Working Group is a good idea. The disciplines of trade and of competition have gone their separate ways for all these years. There is tension between them and potentially huge synergies have not been developed. The antitrust officials often see trade policy as one big bargaining arena wherein competition rights are traded away for protection. The trade officials often see antitrust as idealistic rules that ignore aggressive unfair strategies of our trading partners. It is time that officials from trade and from competition sat down at the same table and discussed strategies for the good of the country. These strategies should reflect the second iteration of the Working Group defined in Option 3 above.

But, caution. There are dangers, and especially if the Working Group is located in the White House, which it need not be. There is a danger of narrow nationalistic politics obscuring the vision for a cosmopolitan world in which competition is essentially free and open and we work together with our trading partners to make a better world. There is a danger that we will play into the hands of forces that would re-Balkanize the world; that we exaggerate the deviations from good antitrust law; that we ignore legitimate differences in nations' laws; that we disrespect trading partners that deserve respect; that we lay down the gauntlet with trade remedies and provoke a trade war in return.

V. THE SLEEPER: STATE RESTRAINTS

The Experts' Group was tasked to examine the interplay between trade and antitrust policies. The Report recommends that "the United States should expressly confirm that, as an organizing principle, competition law should focus on unreasonable artificial private *and governmental* impediments to a vigorous competitive process" [emphasis mine] [selected words from Recommendation 1. The Report reflects that government restraints can be just as serious as or more serious than private restraints and proposes an ICN working group "to focus on the continuing serious problem of anticompetitive harm caused by state-owned [and supported] enterprises. Recommendation 11.

Unreasonable artificial state impediments are the real linchpin between trade and competition. Trade law traditionally covers state (meaning nation state) restraints. Antitrust law traditionally covers private restraints. But unreasonable state restraints – often responses to private lobbying – can devastate markets. Recent attention has been drawn to the critical mass of antitrust statutes that empower antitrust authorities to challenge unreasonably anticompetitive

state and local restraints.¹⁰ At the annual meeting of the International Competition Network in Porto, Portugal on May 10-12, 2017, I had the pleasure to moderate a panel on state restraints in which competition agency officials from Sweden, the Netherlands, India, Russia and the European Union described the reach of their competition laws to challenge excessive state restraints, to discipline competition-restraining SOEs, and to create a more nearly level playing field free of cronyism and privilege.

Hybrid state and private restraints are especially dangerous to competition. Ironically, they are likely to fall into the crack between trade law and competition law. One lone case would close the gap. A WTO panel report found a violation by Mexico of a WTO GATS¹¹ provision and a Telecoms Reference Paper. Mexico breached its obligations when its telecom regulator adopted a regulation that organized a domestic cartel to raise the costs of American telecom providers of cross-border service into Mexico.¹² But the *Telmex* case is unique. In a different and earlier matter, Kodak was allegedly shut out of the Japanese film market by a web of public and private restraints,¹³ and it was protected neither by trade law nor competition law. And just last year, US law favored Chinese export price fixers of vitamin C over their American victims on the strength of Chinese agency MOFCOM's representation to the court that it ordered the Chinese manufacturers to price fix into the United States – even though MOFCOM officials had told a different story to the WTO, and the jury in the case found that MOFCOM had made no such order.¹⁴

The Experts' Report might serve as a wake up call, raising consciousness of the yet unplowed territory of state restraints and hybrid state-and-private restraints that harm competition and hurt American (and other) consumers and businesses. This is the real point at which the trade and competition disciplines meet.

CONCLUSION

Normally, in the competition field, we have our eyes on how competition can be harmed by private and sometimes public restraints. The Experts' Report, in its coverage of state restraints, shows how competition and business can be harmed also by excessive and unreasonable antitrust *enforcement*. If the enforcement is also discriminatory, it is doubly unreasonable and against world competition norms. And if the enforcement is carried out without due process, it is triply repugnant, as well as against world norms.

How great is the problem, and what should be done? I have argued that the scope of illegitimate antitrust enforcement has been exaggerated, and that antitrust law that does not

¹⁰ See E. Fox and D. Healey, "When the State Harms Competition—The Role for Competition Law," 79 *Antitrust L.J.* 769 (2014).

¹¹ The General Agreement on Trade in Services.

¹² See E. Fox, "The WTO's First Antitrust Case—Mexican Telecom: A Sleeping Victory for Trade and Competition," 9 *J. Int'l Econ. L.* 271 (2006).

¹³ See Panel Report, Japan – Measures Affecting Consumer Photographic Film and Paper (United States v Japan), WT/DS44/R, adopted 22 April 1998.

¹⁴ In re Vitamin C Antitrust Litigation (2nd Cir. 2016), <http://www.corporatedefensedisputes.com/files/2016/09/In-Re-Vitamin-C-Antitrust-Litigation.pdf>, petition for certiorari filed. The appellate court applied comity principles and refused to go behind China's assertion to the court that it compelled the price fix.

conform with US law is not for that reason inappropriate. Nor is a country's application of its public interest norms inappropriate. We have had many and continuing dialogs with our trading partners about shortfalls in their competition law and process, and our trading partners have often responded, gradually and incrementally, with better law and process. The conversations should continue. We can expect them to continue, and to have some measure of success. Only in the rare case should we raise the problem of deviant antitrust to the level of highest political intervention.

A Working Group should be formed. It should work towards a coherent trade-and-competition policy, embracing a vision of world community safeguarding the global competition commons from nationalistic tactics and protecting us from a race to the bottom. As part of this mandate the Working Group should tackle unjustified state restraints and the distorting competition of privileged and cronyistic SOEs. The Working Group should be cautioned against politicization of antitrust. Narrow national interests should not win out against a cosmopolitan vision of free and open competition. We need to sustain a cosmopolitan vision for a better America and a better world.

June 26, 2017