



**Prepared Statement of the
Federal Trade Commission**

**Before the
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Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law**

“International Antitrust Enforcement: China and Beyond”

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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.¹

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

¹ 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.² 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.³

² The three Chinese enforcement agencies, described below, are notable exceptions.

³ 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.⁴ This past April, the FTC and DOJ held a third joint dialogue with the Vice Ministers of all three Chinese antimonopoly enforcement agencies.⁵ 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.⁶ 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.

⁴ 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>.

⁵ 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>.

⁶ 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,⁷ 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

⁷ 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.⁸

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).

⁸ 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.⁹ 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

⁹ 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; 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.

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,¹⁰ 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

¹⁰ 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.”¹¹ 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.¹² 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

¹¹ 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>.

¹² 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.¹³ 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.¹⁴

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”

¹³ 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).

¹⁴ 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; 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.

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.