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TESTIMONY ON INTERNATIONAL ANTITRUST ENFORCEMENT

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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 Koren Wong-Ervin and I am the Director of the Global Antitrust Institute at Scalia Law School at George Mason University, where I also teach courses on global antitrust law and the intersection between antitrust and intellectual property laws.[1] I am also former Counsel for Intellectual Property and International Antitrust at the U.S. Federal Trade Commission. I am pleased to testify and to discuss my perspectives on the U.S. Chamber of Commerce's recently released report and recommendations on International Competition Policy (Expert Report).[2]

As an initial matter, I would like to thank the U.S. Chamber of Commerce and the members of the International Competition Policy Expert Group for their contribution to the critically important issue of economically-sound competition law enforcement and policy both at home and abroad.

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. Several recent competition investigations, particularly those involving the licensing of intellectual property rights (IPRs), have raised concerns about fundamental due process and the alleged use of industrial policy in competition investigations to lower royalty rates in favor of local implementers. These concerns raise serious problems for innovation, economic growth, and consumers, and are likely compounded by the use of extra-jurisdictional remedies whereby one agency imposes worldwide portfolio licensing remedies, including on

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[1] The Global Antitrust Institute promotes the application of sound economic analysis to competition enforcement around the world through training programs, competition advocacy, and research. For additional information, including a list of our economics trainings and comments on foreign draft laws and guidelines, visit https://gai.gmu.edu. My biography is available at https://gai.gmu.edu/about/leadership-staff/koren-w-wong-ervin/.

[2] 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 [hereinafter Expert Report].

foreign patents, for conduct that may be deemed procompetitive or benign in other jurisdictions, which may facilitate a lowest-common denominator approach.[3]

My testimony has three parts.

First, I discuss the problem framed by the Expert Report, namely that "[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."[4] I then offer recommendations to examine those contentions.

Second, I discuss the need for systematic examination prior to using international trade and investment policies to address the problems outlined in the Expert Report. I also propose alternative measures such as public exposure, including expressions of concern at the highest level of the U.S. government, which appear to have been an effective way to achieve some of the desired change in the past.

Third, I discuss the importance of and possible limits to achieving convergence on economically-sound effects-based competition law analysis. I also recommend an interim measure aimed at creating accountability for foreign jurisdictions and providing stakeholders with information necessary to comply with foreign competition laws. Specifically, I recommend requiring transparency as to what factors foreign jurisdictions consider in conducting competition analysis, and how those factors are weighed and balanced.

I. "INAPPROPRIATE" USE OF COMPETITON LAWS

Overall, 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.[5] These acts include denying U.S. companies fundamental due process, protecting their own markets from competition, and, in the case of IPRs in particular, using competition law to reduce royalty payments to U.S. companies to unduly favor their domestic manufacturers.

High profile examples include China's National Development and Reform Commission's (NDRC's) 2015 penalty decision against Qualcomm Incorporated in which the NDRC imposed a nearly $1 billion fine against the company and, among other things, arbitrarily required it to use a

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[3] Koren W. Wong-Ervin, *Protecting Intellectual Property Rights Abroad: Due Process, Public Interest Factors, and Extra-Jurisdictional Remedies*, COMPETITION POLICY INTERNATIONAL (Apr. 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947749 [Wong-Ervin, *Due Process*]; *see also* 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 [Wong-Ervin et al., *Extra-Jurisdictional Remedies*].

[4] Expert Report *supra* note 2, at 6.

[5] *Id.*

royalty base of 65% of the net selling price of devices when licensing its 3G and 4G technologies.[6]

Another example is a 2014 decision by China's Ministry of Commerce in which the agency conditionally approved Microsoft's acquisition of Nokia's devices and services business, imposing numerous conditions on both Microsoft and Nokia, including commitments not to increase royalty rates on specified patents for a period of eight years.[7] In contrast, enforcers in both the United States and the European Union (EU) cleared the transaction without conditions. In global markets (such as in the Microsoft/Nokia case), one would expect the facts to be similar and that enforcers around the world applying sound economic principles would reach similar conclusions. In the European Commission's closing statement, it stated that: (1) the transaction would not raise any competition concerns, in particular because there are only modest overlaps between the parties' activities; (2) several strong rivals, such as Samsung and Apple, would continue to compete with the merged entity; and (3) any competition concerns that might arise from Nokia's licensing conduct post-transaction fall outside the scope of EU merger regulation because Nokia is the seller, whereas the investigation relates to the merged entity.[8]

A third example is the Korea Fair Trade Commission (KFTC) decision against Qualcomm from earlier this year in which the KFTC essentially sought to act as the world's competition police by imposing global portfolio-wide remedies including on U.S. and other non-Korean patents.[9]

Imposing worldwide remedies can conflict with principles of international comity and result in significant substantive conflicts with the competition agencies of other countries, particularly given the wide variety of approaches taken globally on competition matters generally and specifically with respect to matters involving IPRs—namely with respect to honoring an IPR holder's core right to exclude others from using the invention.[10] Extra-jurisdictional remedies

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[6] *See* Qualcomm Press Release, *Qualcomm and China's National Development and Reform Commission Reach Resolution* (Feb. 9, 2015), http://files.shareholder.com/downloads/QCOM/3864235320x0x808060/382E59E5-B9AA-4D59-ABFF-BDFB9AB8F1E9/Qualcomm_and_China_NDRC_Resolution_final.pdf; *see also* Douglas H. Ginsburg et al., *Excessive Royalty Prohibitions and the Dangers of Punishing Vigorous Competition and Harming Incentives to Innovate,* COMPETITION POLICY INTERNATIONAL ANTITRUST CHRONICLE (Mar. 2016) (discussing NDRC's penalty decision against Qualcomm and the dangers of applying excessive pricing prohibitions to intellectual property rights), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2748252.

[7] *See, e.g.*, Koren W. Wong-Ervin, *Antitrust and IP in China: Quo Vadis?* (Apr. 2015), https://www.ftc.gov/system/files/attachments/key-speeches-presentations/wong-ervin_-_2015_aba_spring_meeting_4-16-15.pdf.

[8] European Commission Press Release, *Mergers: Commission clears acquisition of Nokia's mobile device business by Microsoft* (Dec. 4, 2013), http://europa.eu/rapid/press-release_IP-13-1210_en.htm.

[9] KFTC Administrative Decision Against Qualcomm Inc. ¶ 483 (Jan. 20, 2017); *see also* Unofficial English translation of KFTC Press Release, http://www.essentialpatentblog.com/wp-content/uploads/sites/64/2017/01/2016.12.28-KFTC-Press-Release-unofficial-Englsih-translation.pdf.

[10] "Economic theory and empirical evidence show that IPRs—a central feature of which is the right to exclude—incentivize the creation of inventions, ideas, and original works. They also facilitate the sale

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.[11]

Numerous other examples come to mind involving reported concerns about due process, including: failure to notify the parties of the legal and factual basis upon which an investigation is based; lack of an independent tribunal to review decisions and the ability to stay remedies pending appeal; refusal to allow parties to fully cross-examine witnesses at hearings; failure to provide access to the investigative file, including any exculpatory evidence; failure to protect confidential information and recognize attorney-client and other important legal privileges; and failure to allow participation of international counsel of the parties choosing.[12]

I recommend that the U.S government conduct a study to determine whether there is evidence of discriminatory enforcement, the use of industrial policy, economically-flawed analysis, good faith analysis that misses the mark for other reasons, or sound analysis.[13] I would

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and licensing of intellectual property (IP) by defining the scope of property right protection and lowering transaction costs, and they produce incentives to develop alternative technologies as well as improvements and other derivative uses." Comment of the Global Antitrust Institute, Antonin Scalia Law, George Mason University, on the Anti-Monopoly Commission of the State Council's Anti-Monopoly Guidelines on the Abuse of Intellectual Property Rights at 3 (Apr. 13, 2017) (citing Bruce H. Kobayashi & Joshua D. Wright, *Intellectual Property and Standard Setting* in the ABA HANDBOOK ON THE ANTITRUST ASPECTS OF STANDARD SETTING 1, 2 (2010); William M. Landes & Richard A. Posner, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW (2003)); Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*," 116 YALE L.J. 1742 (2007)), https://sls.gmu.edu/gai/wp-content/uploads/sites/27/2016/07/GAI-Comment_China-State-Council-AML-IP-Guidelines_4-13-17_FINAL.pdf.

[11] Wong-Ervin et al., *Extra-Jurisdictional Remedies*, *supra* note 3.

[12] *See generally* Abbott B. Lipsky, Jr. & Randolph Tritell, *Best Practices for Antitrust Procedure: The Section of Antitrust Law Offers Its Model*, THE ANTITRUST SOURCE (Dec., 2015), http://www.americanbar.org/content/dam/aba/directories/antitrust/dec15_lipsky_tritell_12_11f.authcheckdam.pdf; U.S. Chamber of Commerce, *Adherence to ICN Guidance on Investigative Process: A Practitioner Survey* (May 2, 2017), https://www.uschamber.com/sites/default/files/practitioner_survey_results_-_icn_guidance_investigative_process_-_2017.pdf.

[13] For an economic analysis of recent competition law investigations and theories of harm, see Koren W. Wong-Ervin et al., *Tying and Bundling Involving Standard-Essential Patents*, GEO. MASON L.R. (forthcoming 2017) (on tying and bundling), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2956359, Douglas H. Ginsburg et al., *The Troubling Use of Antitrust to Regulate FRAND Licensing*, COMPETITION POLICY INTERNATIONAL ANTITRUST CHRONICLE Vol. 10 No. 1 (Oct. 15, 2015) (on the creation of competition law sanctions for seeking or enforcing injunctive relief), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2674759, Jorge Padilla & Koren W. Wong-Ervin, *Portfolio Licensing at the End-User Device Level: Analyzing Refusals to License FRAND-Assured Standard-Essential Patents at the Component Level*, 62 ANTITRUST BULLETIN (forthcoming 2017) (on refusals to license and end-user device licensing), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2806688, and Koren W. Wong-Ervin et al., *A Comparative and Economic Analysis of the U.S. FTC's Complaint and the Korea FTC's Decision Against Qualcomm*, COMPETITION POLICY INTERNATIONAL ANTITRUST CHRONICLE (Apr. 2017) (on market

begin with a self-study of our own decisions and then move to jurisdictions that have been the subject of frequent complaints by U.S. companies, such as China, the EU, India, and Korea. For example, an analysis could be conducted to determine whether these jurisdictions apply the same process and analysis to both domestic and foreign companies.

Relatedly, I wholeheartedly support the Expert Report's call "for the Trump Administration to continue to expressly confirm that, as an organizing principle, competition law and policy should focus on eliminating unreasonable artificial impediments to competition, both private and governmental, as a way of promoting economic growth, innovation[,] and consumer welfare."[14] Such an approach is essential if the United States is to remain a leader in promoting economically sound effects-based competition analysis that fosters innovation. Indeed, the failed experiment of the United States in seeking to use its antitrust laws to serve a hodgepodge of social and political goals, many with an explicitly anticompetitive bent such as protecting small traders from more efficient rivals, resulted in the failure of U.S. antitrust laws to promote competition or further consumer welfare.[15] This ended in the 1970s when the U.S. Supreme Court shifted the focus of U.S. antitrust law from a mix of economic, social, and political goals to solely economic goals.[16]

II. THE USE OF INTERNATIONAL TRADE AND INVESTMENT POLICIES AND ALTERNATIVE EFFECTIVE MEASURES

I agree with the Expert Report that the U.S. Government should "systematically examine" the possible use of international trade and investment policies to combat discriminatory or other unsound foreign competition actions. Such an examination is necessary prior to recommending any specific actions.

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.[17] To that end, I favor the Expert Report's recommendation to consider creating a listing

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power, refusals to license, tying and bundling, and de facto exclusive dealing), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947306.

[14] Expert Report, *supra* note 2, at 7.

[15] Comment of the Global Antitrust Institute, George Mason University, on the Questionnaire for the Revision of China's Anti-Monopoly Law at 3-4 (Dec. 10, 2015), http://masonlec.org/site/rte_uploads/files/GAI%20Response_Questionnaire%20on%20AML%20Revisions_12-10-15_FINAL.pdf.

[16] *See, e.g.*, Nat'l Society of Prof'l Engineers v. United States 435 U.S. 679, 690, 695 (1978) ("Under either [the per se rule or a rule of reason,] the inquiry is confined to a consideration of impact on competition conditions. … The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services."); Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription").

[17] 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

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.[18]

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 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,[19] were in large part remedied through a multi-pronged approach, which included a letter from the then-Secretary of the Treasury Department,[20] followed by statements from President Obama to China's President Xi.[21]

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 are easier to identify than other problematic forms of "inappropriate" application of competition law such as discriminatory enforcement or industrial policy.

III. THE NEED FOR EFFECTS-BASED COMPETITION ANALYSIS BASED UPON SOUND ECONOMIC ANALYSIS AND METHODOLOGY

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

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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.

[18] 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.

[19] *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.

[20] *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).

[21] *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").

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.[22] 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."[23]

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.[24] For example, China's Anti-Monopoly Law provides for "promoting the healthy development of the socialist market economy,"[25] and states that "[t]he state constitutes and carriers out competition rules that accord with the socialist market economy, perfects macro-control, and advances a unified, open, competitive and orderly market system."[26] 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 development of the national economy as well as to assure the interests of general consumers."[27] The Introduction to India's Competition Act states

[22] Pac. Bell Tel. Co. v. LinkLine Commc'ns, 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."); Verizon Commc'ns 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)).

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

[24] *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.

[25] 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.

[26] *Id.* Art. 4.

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

that, in interpreting the Act, the Competition Commission should "keep[] in view . . . the economic development of the country."[28]

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 consider 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.[29]

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 lacks 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.

IV. CONCLUSION

In closing, 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.

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[28] Competition Act of India, Introduction, http://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf.

[29] 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 Wong-Ervin, *Due Process*, *supra* note 3, at 6-7.