Prepared Statement of

Randy M. Stutz
American Antitrust Institute

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

Hearing on Recent Trends in International Antitrust Enforcement, with a Focus on the Report and Recommendations of the International Competition Policy Expert Group, Commissioned by the Chamber of Commerce

Washington, D.C.
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Chairman Marino, Ranking Member Cicilline, and Members of the Subcommittee, thank you for the opportunity to testify today. My name is Randy Stutz. I am the Associate General Counsel of the American Antitrust Institute ("AAI"). The AAI is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy.[1]

The AAI has long recognized that the formation of competition policy too often occurs in "silos." It has been at the forefront of exploring the lessons that alternative disciplines can bring to competition law and policy, and vice versa, with illuminating results.[2] The AAI therefore agrees with what it believes is the fundamental contribution of the Report and Recommendations of the International Competition Policy Expert Group ("ICPEG") commissioned by the U.S. Chamber of Commerce ("Report"): The U.S. government should promote "improved

[1] The AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. Individual views of Members of AAI's Board of Directors or Advisory Board may differ from AAI's positions. For more information about AAI, see http://www.antitrustinstitute.org.

[2] *See, e.g.*, Report on Antitrust and Entrepreneurship, AM. ANTITRUST INST. (2016), http://www.antitrustinstitute.org/entrepreneurship-report; A Multidisciplinary Examination of Efficiency, AM ANTITRUST INST. (2014), *available at* http://www.antitrustinstitute.org/content/audio-symposium-multidisciplinary-examination-efficiency; Antitrust as an Interdisciplinary Field: Insights from Business Strategy and Research, AM. ANTITRUST INST. (2012), http://www .antitrustinstitute.org/events/antitrust-interdisciplinary-field-insights-business-strategy-and-research.

coordination and cooperation between U.S. competition and trade agencies" and "systematically examine the interplay between antitrust and international trade and investment policies."[3]

In seeking solutions to this coordination problem, however, the unique values and contributions of competition and trade law and policy should not be sacrificed. Competition and trade agencies play different roles, and certain decisions in the international competition policy arena are poorly suited to group decision-making, where distinct agency missions can become muddled and distorted, particularly when subject to significant political pressure.

My testimony today has four parts. In Part I, I analyze the three core problems identified in the Report, which involve allegations of due process violations, discriminatory competition law enforcement, and illegitimate extraterritorial remedies. I conclude that these problems are distinct in ways that alter the calculus for a proper U.S. policy response. While authority for addressing foreign competition enforcers' bad faith denial of due process and equal protection may be appropriately housed in a working group, authority for addressing foreign competition law standards and remedies should rest with the expert U.S. competition agencies.

In Part II, I argue that vesting authority for setting international competition policy in a White House Working Group comprised of multiple agency heads with disparate missions would be a mistake. While an inter-agency investigative or advisory working group may be very valuable, the structural change in government contemplated in Recommendations 3-6 of the Report is unwarranted and likely would be counterproductive. It would politicize competition law enforcement, send a contradictory message to our trading partners, and undermine cooperation with foreign enforcers.

In Part III, I explain why the past has shown that empowering the U.S. antitrust agencies to work closely with their foreign counterparts has been the most effective approach toward achieving both substantive and procedural convergence.

In Part IV, I encourage this Subcommittee to consider international competition policy reforms that protect U.S. businesses in their capacity as buyers, not solely in their capacity as sellers. Reform of this sort is badly needed and fits hand-in-glove with the reforms discussed in the Report. U.S. domestic legal standards, for example, should not defer to foreign competition authorities' discriminatory interpretations of their laws when U.S. businesses sue foreign cartels. Likewise, it is as important to promote appropriate extraterritorial remedies that benefit U.S. businesses and the U.S. economy as it is to prevent inappropriate extraterritorial remedies.

Generally speaking, the AAI agrees with many aspects of the Report and believes it raises an important, non-partisan issue. However, to better improve coordination among government trade and competition experts and policies, alternatives to vesting authority for international competition policy in a White House Working Group should be explored, and the ambit of potential reform measures should be expanded to incorporate U.S. businesses' interests in their capacity as consumers.

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[3] U.S. CHAMBER OF COMMERCE, INTERNATIONAL COMPETITION POLICY EXPERT GROUP: REPORT AND RECOMMENDATIONS 3, 13 (2017), https://www.uschamber.com/sites/default/files/icpeg_recommendations_and_report.pdf [hereinafter "REPORT"].

I. Bad Faith Acts May Warrant Trade Sanctions, But Good Faith Acts Warrant a Diplomatic Response

The ICPEG Report identifies three core concerns involving "abuses of competition law" by other nations. The Report's first concern is that U.S. companies have been denied basic due process rights in foreign competition enforcement investigations and proceedings.[4] It's second concern is that foreign enforcers have engaged in discriminatory enforcement, either to unfairly hinder U.S. companies or to unfairly advantage "national champions."[5] It's third concern is that foreign enforcers have overreached by imposing illegitimate extraterritorial remedies.[6]

Because of their distinct missions, competition agencies are better positioned to address certain manifestations of these problems than trade agencies, and vice versa. Trade agencies, which can impose sanctions, are better positioned to address bad faith departures from accepted international norms. Competition agencies, which are expert in international cooperation in this domain, are better positioned to address good faith, principled departures from U.S. substantive and procedural standards.

A. There is an Important Role for Trade Agencies, and Possibly Sanctions, When Foreign Competition Enforcers Engage in Bad Faith Denials of Fundamental Rights

The ICPEG was not commissioned to perform, and the Report does not contain, any fact-finding.[7] The AAI is not aware of any empirical studies that address the extent of the abuses alleged in the Report and whether they reflect systemic problems within certain foreign jurisdictions. At a minimum, however, we know that several U.S. multinationals have relayed anecdotal complaints about the denial of fundamental due process, which, if accurate and representative, are very disturbing.[8]

The Report also discusses anecdotal complaints of discriminatory applications of competition laws and illegitimate remedies, which, with further investigation, could prove equally troubling. If foreign enforcers are enforcing their laws or imposing "remedies" in a manner that serves no purpose other than helping domestic firms "win" in the marketplace, there is simply no valid justification for this conduct. Denial of equal protection, like the denial of

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[4] *Id*. at 1, 2; *see also id*. at 27-31.

[5] *Id*. at 1, 2; *see also id*. at 19-25.

[6] *Id*. at 2; *see also id*. at 31.

[7] *Id*. at 3. The Report also explicitly "does not take a view on the actions of any particular country" and acknowledges that "reasonable minds can differ on ICPEG's assessment and recommendations." *Id*.; *see also* SEPARATE STATEMENT OF ELEANOR M. FOX, REPORT at 33.

[8] *See* AM. ANTITRUST INST., AAI CONFERENCE EXAMINES KEY DEVELOPMENTS IN INTERNATIONAL ANTITRUST AND COMPETITION LAW ENFORCEMENT, (2017), http://www.antitrustinstitute.org/sites/default/files/International%20Roundtable.2.17_0.pdf [hereinafter "AAI INT'L ROUNDTABLE SUMMARY"] (discussing anecdotal evidence of seemingly indefensible due process abuses).

fundamental due process, implicates fundamental legal norms that are universally shared in the developed world.

Trade agencies have a strong claim to authority to act in these circumstances. When a U.S. company is intentionally denied fundamental rights in bad faith, the fact that it occurs in a competition law context is almost irrelevant. Whether a U.S. firm is clearly guilty of an antitrust violation under the most painstaking, economically rigorous antitrust standard, or wrongfully accused under an ad hoc, non-economic standard, the AAI believes violations of due process and equal protection norms should be fought on identical terms. The AAI therefore agrees with the ICPEG that it is worth exploring whether there are ongoing, bad-faith abuses of competition law that may warrant applications of trade law and possibly sanctions.[9]

B. Good-Faith, Principled Departures from U.S. Substantive and Procedural Standards Deserve Respect

Cross-fertilizing trade and competition policy is not the cure for every international disease, however. The AAI believes the threat of trade sanctions is potentially appropriate for the bad-faith "misuse" of competition law. In these instances, the problem is not that countries don't know what they are doing, but that they do. As the Report acknowledges, however, it does not make sense to leverage the threat of sanctions on a trading partner for ignorance of proper standards or good faith disagreements with antitrust policy.[10] A proper approach to improving coordination among competition and trade agencies must fully account for this distinction.

1. Allegedly Protectionist Policies May Actually Be Good Faith Regulatory Efforts Not Unlike Our Own

It would be simpler to address allegedly discriminatory applications of foreign competition law if all of them were borne of bad faith. But they are not. Although we may condemn the misuse of subjective competition law standards to effectuate industrial policy, for example, sometimes sovereign nations make valid political decisions to subordinate competition in service of other societal values. Indeed, the United States does so itself, as reflected in our lengthy list of statutory and common law exemptions and immunities from the federal antitrust laws, including immunity for export cartels under the Webb-Pomerene Act. We also have regulated industries, like telecommunications, where competition standards are designed to

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[9] It is worth noting that a nation's commitment to due process and equal protection is not static. Korea, for example, was once widely accused of affording inadequate due process, but it has since been widely praised for implementing effective changes, to the point that some believe it now affords better protections than the European Union. *See id.*; *see also* U.S. CHAMBER OF COMMERCE, ADHERENCE TO ICN GUIDANCE ON INVESTIGATIVE PROCESS: A PRACTITIONER SURVEY 119 (2017), https://www.uschamber.com/sites/default/files/023172_adherencetoicnguidancereportfn.pdf (showing that approximately 90% of surveyed practitioners believe due process and transparency in Korea has improved, approximately 10% believe it has stayed the same, and none believe it has gotten worse).

[10] *See* REPORT, *supra* note 3, at 24 ("In some instances, antitrust-related disagreements between the United States and other jurisdictions may merely reflect honest differences in interpretation of competition law principles. Such cases can be handled primarily by the two U.S. federal antitrust agencies . . . . In other cases, however, the United States may believe that foreign enforcement action is not being taken in good faith. . . . In such cases, . . . the employment of U.S. international trade tools . . . merits careful consideration."),

coexist with public interest standards, which incorporate arguably subjective concepts like diversity.

When a U.S. defendant under investigation by a foreign authority claims that the authority is discriminatory or protectionist, there is at least a preliminary question whether the authority uses its competition law enforcement as a good-faith regulatory response designed to cure a perceived market failure rather than a pretext for picking winners and losers. We cannot credibly tell different countries with different economies that they should all balance competition and regulation in exactly the same way we do.[11] It follows that we should pause before putting the threat of trade sanctions on the table to try to reverse the kind of good-faith political decision we would insist on being able to make for ourselves.[12]

2. Extraterritorial Remedies Are Highly Fact Specific and May Be Not Only Appropriate, But Superior

The imposition of extraterritorial remedies is arguably even more nuanced. At the extreme end of the spectrum, it is easy to see why a foreign authority's limitations on intellectual property licensing practices that apply beyond a nation's sovereign borders, but that do not protect consumers within the nation's borders, should be inherently suspect. Moreover, compulsory licensing that does not redress competitive harm may be tantamount to "expropriation" of a firm's IP rights for the benefit of domestic rivals.

At the same time, however, competition authorities in every country have not only the right, but the responsibility, to protect consumers from anticompetitive conduct that harms domestic commerce,[13] which is fully consistent with principles of international comity.[14] It is perfectly appropriate, for example, for a foreign competition authority to address abusive domestic patent enforcement strategies by owners of standard essential patents (SEPs), which are a problem in the United States and around the globe. To be sure, some believe there is little to no

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[11] *See, e.g.*, Eleanor M. Fox, *Competition Policy: The Comparative Advantages of Developing Countries*, 79 LAW & CONTEMP. PROBS. 69, 72-73 (2016) (noting, for example, that the "stark contrast in the economic realities" of developing countries, where state-owned entities are prevalent, capital markets work poorly, barriers to entry are high, and corruption and inequality are pervasive, raises questions as to "the portability of Western law").

[12] *See* SEPARATE STATEMENT OF ELEANOR M. FOX, REPORT at 33 ("In my view we should respect different views and different circumstances and thus recognize the legitimacy of other approaches as long as they are applied with transparency, proportionality, due process, and non-discrimination.")

[13] *See* U.S. DEP'T OF JUST & FED. TRADE COMM'N., ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION 47 (2017), https://www.ftc.gov/system/files/documents/public_statements/1049863/international_guidelines_2017.pdf [hereinafter "INTERNATIONAL GUIDELINES"].

[14] *See id.* at 29, 47.

role for antitrust law to play in cases of abusive patent enforcement.[15] Others disagree.[16] But it is obvious that both policies are principled and can be adopted in good faith.

When foreign conduct (including abusive foreign patent assertion) harms domestic commerce, the time honored and widely accepted "effects test"[17] serves as a useful starting point to assess the validity of enforcement decisions that have extraterritorial implications. When the effects test is satisfied in these circumstances, the important question, which informs the appropriate U.S. policy response, is whether the remedy is principled. If so, a remedy's extraterritorial aspects could, perhaps with the benefit of international cooperation, create enforcement efficiencies and have positive side effects for competition and innovation,[18] even if it is imposed under standards that differ from ours.[19]

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[15] *See, e.g.*, Douglas H. Ginsburg, Taylor M. Owings, & Joshua D. Wright, *Enjoining Injunctions: The Case Against Antitrust Liability for Standard Essential Patent Holders Who Seek Injunctions*, ANTITRUST SOURCE (Oct. 2014), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct14_ginsburg_10_21f.authcheckdam.pdf.

[16] *See, e.g.*, Harry First, *Exploitative Abuses of Intellectual Property Rights, in* THE CAMBRIDGE HANDBOOK OF ANTITRUST, INTELLECTUAL PROPERTY, AND HIGH TECH (Roger D. Blair & D. Daniel Sokol eds., 2017); Fiona Scott Morton & Carl Shapiro, *Patent Assertions: Are We Any Closer to Aligning Reward to Contribution?*, *in* NAT'L BUREAU OF ECON. RESEARCH, INNOVATION POLICY AND THE ECONOMY, VOLUME 16, at 124 (Josh Lerner & Scott Stern eds., 2016), http://faculty.haas.berkeley.edu/shapiro/patentassertions.pdf. AAI's view is that the application of the antitrust laws to FRAND abuse is particularly appropriate given that standard setting takes place among competitors and confers market power on patent holders. *See* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 501 (1988) (quoting Am. Soc'y of Mech. Eng'nrs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 570-73 (1982)). As the FTC has explained, "[S]tandard setting often supplants the competitive process with the collective decision-making of competitors, requiring that we be vigilant in protecting the integrity of the standard-setting process," and "a breach of a FRAND commitment in the context of standard setting poses serious risks to the standard-setting process, competition, and consumers." In re Motorola Mobility LLC, FTC File No. 121-0210, 2013 WL 124100, at *38 (FTC Jan. 3, 2013). *See also* Timothy J. Muris, BIPARTISAN PATENT REFORM AND COMPETITION POLICY 10-12 (American Enterprise Inst., 2017), http://www.aei.org/wp-content/uploads/2017/05/Bipartisan-Patent-Reform-and-Competition-Policy.pdf (supporting the use of antitrust law to address FRAND abuse).

[17] *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993); U.S. v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945) ("[I]t is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders.").

[18] *See, e.g.*, RANDOLPH W. TRITELL & JOHN P. PARISI, THE EC-US COOPERATION AGREEMENT: TWO DECADES OF COOPERATION, CHALLENGES, AND CONVERGENCE 10-11 (2011) (citing Commission Regulation 4064/89 of July 6, 1998, Halliburton/Dresser, 1998 O.J. (C 239) 16, ¶¶ 6–7; Commission Regulation 139/2004 of Mar. 29, 2010, Cisco/Tandberg, Case No. COMP/M.5669), https://www.ftc.gov/system/files/attachments/key-speeches-presentations/2011canenbleyfestschrift.pdf ("In some instances, it has been possible for either the EC or one of the U.S. agencies to take a decision that fully satisfies the competitive concerns of the other authority and that authority takes no further enforcement action."); *see also* INTERNATIONAL GUIDELINES, *supra* note 13, at 29 ("The Agencies consider whether the objectives sought to be obtained by U.S. enforcement could be achieved by foreign enforcement.").

[19] Indeed, there is evidence to suggest that U.S. enforcement standards are too weak and too preoccupied with risks of false positives to the exclusion of the risks of false negatives. JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (2015); *see* Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1, 37 (2015).

Of course, even when an extraterritorial remedy would be imposed on a principled basis, it nonetheless may be inadvisable on comity grounds. There is much to be said for the United States' parsimonious approach of "seek[ing] a remedy that includes conduct or assets outside of the United States only to the extent including them is needed to effectively redress harm or threatened harm to [domestic] commerce and consumers and is consistent with the Agency's international comity analysis."[20] Yet, there are clear limits on what comity requires when legitimate domestic competition interests are at stake. Comity is "the recognition which one nation *allows* within its territory to the legislative, executive or judicial *acts* of another nation."[21] That is why, in performing comity analysis, the U.S. agencies consider "the degree of conflict" with a foreign jurisdiction's "law or articulated policy" and "enforcement activities," and make a separate determination whether "the importance of antitrust enforcement outweighs any relevant foreign policy concerns."[22]

Comity is thus an abstention principle, not a 'global consumer welfare' prescription. If the degree of conflict or the importance of antitrust enforcement counsels against abstention, but a nation is nonetheless willing to subordinate its legitimate domestic competition interests to help promote global economic welfare, some may consider that a noble sacrifice. But it is certainly not required under comity principles. Presumably the United States would think twice before choosing not to redress harm to domestic competition; other nations may do so too.[23]

3. Not All Departures from Due Process Standards Are Created Equal

Even where the bedrock principle of due process is concerned, the problems raised in the Report do not always admit of ready solutions. In the United States, every company is entitled to due process, but it is not always clear what process is due. If it were, the United States would not have a monopoly on the correct answer.[24] The United States affords more procedural protections than many other nations because it operates primarily as a "rule of law" system, with Article III judges trying antitrust cases in court.[25] But even here, U.S. defendants challenge the adequacy of U.S. process all the time. And while "administrative" systems abroad may rely more heavily on competition agencies to decide antitrust disputes than judges and courts, the systems may not necessarily discriminate against U.S. businesses. If European defendants are making the same

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[20] INTERNATIONAL GUIDELINES, *supra* note 13, at 47. International cooperation becomes a valuable bulwark against the theoretical risk of unintended consequences in these circumstances. *Id*. (cooperation allows agencies to "avoid conflicts contemplated by their foreign counterparts"); *see infra* Section III.

[21] INTERNATIONAL GUIDELINES, *supra* note 13, at 27 (emphasis added) (quoting Hilton v. Guyot, 159 U.S. 113, 164 (1895)).

[22] *Id*. at 28.

[23] *See* SEPARATE STATEMENT OF ELEANOR M. FOX, REPORT at 33 ("I would want to emphasize that all rules we suggest for our trading partners should apply equally to us if the tables are turned").

[24] *See* Renata B. Hesse, Principal Dep. Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Remarks at the Chatham House Conference on Globalization of Competition Policy: Can there Be a "One-World Approach" to Competition Law? (June 23, 2016), https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-renata-b-hesse-delivers-remarks-chatham-house ("One size does not fit all, certainly not in process . . . . We do not expect any country to copy all our laws and institutions, and we don't suggest it.")

[25] *See* AAI INT'L ROUNDTABLE SUMMARY, *supra* note 8.

complaints about European due process as U.S. defendants, for example, the threat of retaliatory trade measures does not seem justifiable.

A U.S. policy response to good-faith, principled departures from U.S. substantive and procedural standards must account for these subtleties.

II. Authority to Set International Competition Policy Should Not Be Transferred to a White House Working Group

To implement the laudable goal of improving coordination between competition and trade agencies, the Report recommends creating a White House Working Group on International Competition Policy comprised of representatives from the U.S. Justice Department, Federal Trade Commission, Council of Economic Advisors, the Office of the U.S. Trade Representative, the State Department, the Commerce Department, and the Treasury Department. The new Working Group would be a "cabinet level entity chaired by an Assistant to the President."[26] Authority for setting "overall, high-level strategy" in the international competition policy arena would be divested from the federal antitrust agencies and transferred to the Working Group.[27] The federal antitrust agencies would still be permitted to communicate with foreign authorities through "interagency consultations," but only the collective body of representatives would be permitted to set policy, government-wide.[28]

The AAI believes that solving the coordination problem in this way would be a mistake. First, there is a mismatch in the Report's call for structural changes in the government to transfer authority for setting international competition policy to a working group, on the one hand, and the Report's concession that "[t]he U.S. government heretofore has not systemically examined the interplay between antitrust and international trade and investment policies," on the other.[29] Such a restructuring might make sense if a systemic examination had already been completed, and if it had shown definitively that *all* high-level international competition strategy should be set collectively via group decision-making, with nothing reserved exclusively or even primarily for the expert U.S. competition agencies. The AAI does not believe this is justifiable, for several reasons.

A systemic examination should first determine, among other things, whether the bad faith abuses alleged in the Report are as severe and pervasive as feared, and if so, which strategic functions toward addressing them are appropriately within the province of a working group.

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[26] REPORT, *supra* note 3, at 13.

[27] *See id*. (working group would set "overall, high level strategy . . . in dealing with both individual nations and multilateral organizations); *id*. (working group would "decide . . . what decision-making processes should be delegated to the sub-cabinet level").

[28] *Id*. at 24. The Report suggests the U.S. antitrust agencies *could* resolve differences with foreign agencies under the proposed regime, *id.*, but all of the authority to do so apparently would be vested with the Working Group. *See supra* note 27.

[29] *Id.*at 13; *see also id.* at 2 ("We hope that this Report will . . . serve as the basis for the further development of a successful policy"); *id*. ("[T]he consequences of taking any particular action . . . must be carefully considered in light of a number of factors beyond the scope of this Report").

Persistent, bad-faith denials of basic due process and equal protection, which arguably are just as problematic outside the competition law context as within, may be appropriate for resolution by a working group. Decisions about whether a foreign authority's substantive and remedial antitrust standards depart from U.S. standards in principled versus unprincipled ways, however, should be reserved for the expert U.S. antitrust agencies, so they are empowered to effectively cooperate with foreign enforcers.

Creating a White House Working Group with a czar also threatens to turn international competition policy into a political football. It would create a target at which well-heeled multinational businesses and advocacy groups could funnel their lobbying expenditures, creating a highly charged political atmosphere. This is could very well degrade rather than improve the quality of current policy, even if it facilitates better coordination.

Third, the proposal would send the following problematic message to the rest of the world: "We think all antitrust policy should be apolitical and adhere to a consumer welfare standard that protects competition, not competitors. To make sure you agree, we are putting a political body in charge of international competition policy and implicitly will consider the use of trade sanctions at the behest of U.S. competitors in all such matters." This would be a contradictory and self-defeating message to send to our trading partners if we expect them to use their competition laws in principled ways rather than as political tools.[30]

The appearance of a double standard could prove "a lightning rod for retaliation, perhaps in the form of tit for tat. And it teaches the wrong lesson to competition enforcers abroad who are fighting for competitive markets and see U.S. process and standards as an example."[31] "Even mixed messages and the inability to speak with a single and consistent voice could prove confounding and hence disruptive. The most likely results would be retrenchment abroad, a loss of credibility, and a diminished role for U.S. antitrust leadership in the world."[32]

At a minimum, the AAI recommends exploring whether the coordination problem can be solved using an inter-agency working group rather than a White House Working Group. The Report states, without elaborating, that "[i]n the past, . . . it has often been difficult for federal

[30] The U.S. system arguably is already open to the criticism that it enforces its antitrust laws more aggressively against foreigners. *See* Donald I. Baker, Remarks Before the American Antitrust Institute: Antitrust Enforcement: From Sunlight to Shadows? 15 (June 15, 2015), https://antitrustinstitute.org/sites/default/files/ANTITRUST ENFORCEMENT- FROM SUNLIGHT TO SHADOWS.pdf (noting that vast majority of largest Sherman Act fines and increasingly long jail sentences have been imposed against foreigners).

[31] Eleanor M. Fox & Harry First, *America-First Antitrust*, CPI ANTITRUST CHRON. (Feb. 2017), https://www.competitionpolicyinternational.com/wp-content/uploads/2017/02/CPI-Fox-First.pdf; *see* Andrew I. Gavil, *On the Value of Antitrust Diplomacy*, ANTITRUST SOURCE (Feb. 2017), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/feb17_gavil_2_16f.authcheckdam.pdf. ("[I]n the political sphere, one's actions often matter more than one's words—and what goes around comes around. Other jurisdictions . . . carefully observe U.S. enforcement decisions, study U.S. enforcement guidelines, and listen attentively to the pronouncements of U.S. antitrust policymakers.").

[32] Gavil, *supra* note 31.

antitrust and international trade agencies to coordinate effectively" on their own.[33] To the extent any impediments are surmountable, however, an inter-agency working group may deliver all of the coordination benefits and none of the politicization risks associated with a White House Working Group. Precursors may already exist in the form of the USTR's Trade Policy Steering Group (TPSG) and Trade Policy Staff Committee (TPSC); perhaps these could be studied and improved upon.[34]

III. The Past Has Shown that the U.S. Antitrust Agencies' Cooperative Approach is Far More Effective in Achieving Substantive and Procedural Convergence Than More Aggressive Political Approaches

The poster child for the counter-productivity of politicizing international competition policy is likely the GE-Honeywell merger of 2001. After the Antitrust Division and European Commission reached divergent conclusions on the legality of the merger, European Competition Commissioner Mario Monti expressed "profound respect" for the Antitrust Division, but was quoted as saying he "deplore[d] attempts to . . . trigger political intervention" by the Bush White House, which GE CEO Jack Welch reportedly had sought.[35] In reflecting on the embarrassing episode, the Deputy Assistant Attorney General for the Antitrust Division concluded that "[t]he U.S./EU divergence on the GE-Honeywell decision underscores the need to continue working cooperatively and constructively."[36] She explained, "We recognize that the EU is entitled to make and interpret its own laws. We also recognize that we and the EU will not always agree and that our way is not always best. We have no power to change EU law, other than by persuasion, and vice versa. For this reason, we believe it is important that we discuss this issue in depth, both in private and in public."[37]

With the benefit of hindsight, the U.S. antitrust agencies have learned over decades that "international policy work and case cooperation are closely connected."[38] Their guidelines make clear that "cooperating with foreign authorities on both policy and investigative matters . . . contributes to convergence on substantive enforcement standards that seek to advance consumer

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[33] REPORT, *supra* note 3, at 16. This statement requires further clarification. Impediments to the agencies working together effectively should be a central component of the systemic examination.

[34] *See* Office of the U.S. Trade Rep., Mission of the USTR, *Working with Other Agencies* (last visited June 24, 2017), https://ustr.gov/about-us/about-ustr. The USTR "consults with other government agencies on trade policy matters" through the TPSG and TPSC. "These groups, administered and chaired by USTR and composed of 19 Federal agencies and offices, make up the sub-cabinet level mechanism for developing and coordinating U.S. Government positions on international trade and trade-related investment issues." *Id*.

[35] Michael Elliott, *The Anatomy of the GE-Honeywell Disaster*, Time (July 8, 2001), http://content.time.com/time/business/article/0,8599,166732,00.html.

[36] Deborah Platt Majoras, Dep. Asst. Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Remarks Before the Antitrust Law Section of the Georgia State Bar Association: GE-Honeywell: The U.S. Decision (Nov. 29, 2001), https://www.justice.gov/atr/speech/ge-honeywell-us-decision.

[37] *Id*.

[38] INTERNATIONAL GUIDELINES, *supra* note 13, at 37; *see* Randolph D. Tritell, *Meeting the Challenges of the Evolving International Antitrust Landscape*, 22 GEO. MASON L. REV. 1269, 1275 (2015) (noting that cooperative approach in the aftermath of GE-Honeywell helped to eliminate merger conflicts between U.S. and EC merger enforcement over the next 15 years).

welfare, based on sound economics, procedural fairness, transparency, and non-discriminatory treatment of parties."[39] Progress using this approach is sometimes slow, and incremental, but it has been remarkably successful in the long run.[40] If a White House Working Group is created on the proposed terms, the agencies may no longer have the power to independently make enforceable policy commitments to foreign authorities, which undermines trust and imperils the positive working relationships developed by career staff over decades.[41]

IV. International Competition Policy Reform Should Promote Fair Competition for U.S. Businesses in Their Capacity as Buyers, Not Solely as Sellers

The AAI agrees with the ICPEG that it is important to examine the threat of competitive harm to U.S. businesses in their capacity as rival sellers in foreign markets (or as defendants before foreign tribunals, as such). But U.S. businesses also confront inequity and mistreatment at the hands of our trading partners in their capacity as buyers, and consumers, every day. This is particularly true when U.S. manufacturers buy component parts and other intermediate goods from foreign cartels. When U.S. businesses purchase cartelized inputs abroad, foreign governments sometimes harm competition by U.S. companies, protect their own markets from foreign competition, and promote national champions by refusing to adequately enforce their competition laws. As Judge Diane Wood has explained, they may even be acting economically rational in doing so,[42] which is why the aforementioned effects test is so important. If a nation's competition enforcers don't prosecute anticompetitive conduct occurring abroad that has direct, substantial and foreseeable effects at home, nobody else will.

A. U.S. Courts Should Not Defer to Discriminatory Interpretations of Foreign Competition Law that Injure U.S. Buyers

Yet here in the United States, several recent court decisions have prevented U.S. businesses from recovering for their injuries, turning a blind eye to massive wealth transfers from American companies (and by extension American consumers) to foreign cartels. In one important case, after U.S. business victims sued a Chinese Vitamin C cartel for price fixing, the

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[39] *Id.*; *see* Tritell, *supra* note 38, at 1275 ("[T]here is perhaps nothing that drives convergence as concretely as having staffs from two or more agencies focus together on the analysis of a particular set of facts and body of evidence.").

[40] *See* Tritell, *supra* note 38 (discussing "central importance of interagency cooperation" and detailing cooperation successes dating back to 1970s involving cross-border investigations, negotiation of bilateral and multilateral agreements, involvement in the drafting of foreign competition laws, jointly developing best practices, convincing foreign enforcers not to wrongly prosecute, the Technical Assistance program, the International Fellows program, training judges and agency staff, and more).

[41] *See* Gavil, *supra* note 31 ("[T]he progress made through the painstaking work of the world's antitrust diplomats could be easily upended if a new administration seeks abruptly to change course. Such changes could easily unsteady the steady hand that has guided U.S. policy toward international competition development.").

[42] *See* Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 860 (7th Cir. 2012) (Wood, J.) (en banc) ("The host country for [foreign cartels, especially those over natural resources that are scarce in the United States and that are traded in a unified international market] will often have no incentive to prosecute . . . " because it "would logically be pleased to reap economic rents from other countries; their losses from higher prices . . . are more than made up by the gains from the cartel price their exporters collect.").

Second Circuit dismissed the complaint when a Chinese competition agency filed an amicus brief representing that the defendants were required to fix prices under Chinese law.

In sweeping fashion, the Second Circuit held that "a U.S. court [may] not embark on a challenge to a foreign government's official representation to the court regarding its laws or regulations, even if that representation is inconsistent with how those laws might be interpreted under the principles of our legal system."[43] The Court believed that failing to defer completely to the Chinese agency's representation, even after the district court determined that documentary evidence from the agency's own website "directly contradicted" the representation,[44] "disregards and unravels the tradition of according respect to a foreign government's explication of its own laws."[45]

The Second Circuit's view of the level of deference owed to foreign agencies' interpretations of their laws in U.S. courts is not just incongruous, but irreconcilable with the ICPEG's statement that certain "[foreign] enforcement action may reflect an effort to improperly discriminate against a U.S. competitor . . . by favoring domestic commercial interests or state-owned enterprises."[46] If foreign governments are wrongfully injuring U.S. businesses by discriminating against them in how they interpret their laws in their own countries, it is equally (if not more) problematic that U.S. courts may be abetting that effort here at home by deferring to those interpretations in the name of comity. If international competition policy reform is to be effective, it is essential that U.S. legal standards for the level of deference owed to foreign interpretations of law account for the very same discriminatory behavior the Report would rectify abroad.

B. It Is as Important to Promote "Good" Extraterritorial Remedies for U.S. Business Victims as It Is to Prevent "Bad" Ones

Reform to address U.S. companies' international interests as consumers is also badly needed in the area of extraterritorial remedies. The Report notes that, in theory, an ill-conceived competition remedy that is wrongfully applied extraterritorially could injure U.S. businesses. However, the reverse is also true. A well-conceived competition remedy that is appropriately applied extraterritorially can (and often does) afford important benefits and critical protections to U.S businesses, consumers, and the economy. Such remedies economize enforcement efforts and promote badly needed deterrence against foreign cartels.

Moreover, all of the theoretical risks associated with extraterritorial remedies can be eliminated, and all of the enormous benefits can be realized, through cooperation. As the

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[43] In re Vitamin C Antitrust Litigation, 837 F.3d 175, 189 (2d Cir. 2016).

[44] In re Vitamin C Antitrust Litigation, 584 F.Supp.2d 546, 557 (E.D.N.Y. 2008).

[45] *Id*. at 190.

[46] REPORT, *supra* note 3, at 24; *see also* U.S. CHAMBER OF COMMERCE, COMPETING INTERESTS IN CHINA'S COMPETITION LAW ENFORCEMENT: CHINA'S ANTI-MONOPOLY LAW APPLICATION AND THE ROLE OF INDUSTRIAL POLICY 31 (2014), https://www.uschamber.com/sites/default/files/aml_final_090814_final_locked.pdf (China's enforcement actions in individual cases "often appear designed to tilt the competitive landscape in favor of domestic companies at the expense of foreign ones, in violation of the spirit, if not also the letter, of China's WTO commitments").

antitrust agencies' international guidelines explain, cooperation "may facilitate the development of a proposed remedies package that comprehensively addresses the concerns of multiple authorities."[47] And "[i]n some circumstances, cooperation may result in one authority closing an investigation without remedies after taking another authority's remedies into account."[48] Whether the United States is on the giving or receiving end of these enforcement efficiencies, this saves time and resources for both agencies and defendants.

Appropriate extraterritorial remedies also deter massive harm to the U.S. economy when host countries fail to prosecute foreign cartels. Effective deterrence requires penalties that exceed ill-gotten profits, adjusted for the likelihood of getting caught.[49] An exhaustive survey of cartel detection literature shows that, conservatively, detection rates are at most 25–30%, meaning participants in international cartels have about a 75% chance of getting away with their crimes.[50] Accordingly, the ratio of a foreign cartel's total economic penalties for getting caught relative to the amount of supracompetitive profits it can extract from American businesses and consumers (the "penalty-to-harm ratio") must exceed 400% to adequately deter international cartels that would otherwise target American victims.[51]

Enforcement efforts to date have not come close to achieving this level of deterrence. Combining fines and payments resulting from both government and private cases, on average the penalty-to-harm ratio for international cartels affecting the United States does not even reach 100%.[52] In other words, typically it is net profitable for international cartels to illicitly appropriate American wealth, even if they are caught. And the situation has been getting worse, not better.[53] Predictably, international cartels are proliferating.[54]

Effective international competition policy reform must promote the use of appropriate extraterritorial remedies that prevent and deter foreign cartels from preying on Americans. A good start would be to amend the Foreign Trade Antitrust Improvements Act (FTAIA) to ensure

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[47] INTERNATIONAL GUIDELINES, *supra* note 13, at 48 (citing United States Submission to OECD Competition Committee Regarding Remedies in Cross-Border Merger Cases, DAF/COMP/WP3/WD(2013); *see also* Tritell & Parisi, *supra* note 18.

[48] INTERNATIONAL GUIDELINES, *supra* note 13, at 48; *see also id*. at 28–29 ("it has become increasingly common that no conflict exists between U.S. antitrust enforcement interests and the laws or policies of a foreign sovereign").

[49] *See* John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 CARDOZO L. REV. 427, 429 (2012).

[50] *Id*. at 462–65.

[51] *See* John M. Connor, Private Recoveries in International Cartel Cases Worldwide: What do the Data Show? 16 (Am. Antitrust Inst., Working Paper No. 12- 03, 2012).

[52] *Id*. at 15.

[53] From 2000-2010, as compared to 1990-1999, the penalty-to-harm ratio for international cartels significantly *declined*. *Id*.

[54] *See, e.g., Sherman Act Violations Yielding a Corporate Fine of $10 Million or More*, U.S. DEP'T OF JUST., ANTITRUST DIV. (last visited June 13, 2017) (130 of 138 cases yielding DOJ corporate fines of $10 million or more involved international cartels, the bulk of which produced intermediate goods incorporated into other goods).

that injured direct and indirect purchasers, as well as the Antitrust Division, are empowered to bring appropriate cases.[55]

V. Conclusion

The ICPEG Report makes a valuable contribution by drawing attention to the need for better coordination among competition and trade policies. When foreign competition authorities deny fundamental rights to U.S. companies in bad faith, there is an appropriate role for U.S. trade agencies, and possibly sanctions. However, the U.S. competition agencies are better suited to address good faith, principled departures from U.S. standards, and must be empowered to set policy to facilitate effective international cooperation.

An appropriate U.S. policy response to solving the coordination problem among competition and trade agencies must account for the distinction between bad-faith denial of rights and good-faith departures from U.S. standards. Transferring all decision-making authority in international competition policy to a White House Working Group would fail to do so. Instead, it would politicize international competition policy, send a contradictory and counterproductive message to our trading partners, and may well invite retaliation. Competition and trade agencies therefore should retain separate authority to set policy within their core competencies. Alternative solutions to the coordination problem, including an inter-agency working group rather than a White House Working Group, should be explored.

To better address the three problems identified in the Report, attention should be focused foremost on facilitating international cooperation between the U.S. antitrust agencies and their foreign counterparts, which historically has been far more effective than aggressively politicizing competition policy. The ambit of reform proposals also should be expanded to incorporate U.S. businesses' rights and protections as consumers in the international market, which fit hand-in-glove with the problems identified in the Report.

[55] *See* Randy M. Stutz, *Comity, Domestic Injury, and the Metaphysics of the FTAIA*, CPI: ANTITRUST CHRON. (Sept. 17, 2014), https://www.competitionpolicyinternational.com/assets/Uploads/StutzSEP-141.pdf.