But the question I want to focus on is whether China, which has a history vastly different from ours, is following a similar trajectory of development as some of the more established competition regimes around the world. Many of the people advocating for increased international cooperation (including me) tend to work from the assumption that most competition authorities are either at a similar place analytically and philosophically or are heading along

I. China and the Need for Cooperation and Convergence

A. Introduction

So why do we care about the direction the Chinese authorities, MOFCOM [Chinese Ministry of Commerce], NDRC

B. Cooperation

Business deals today more and more frequently cross national boundaries, a trend that amplifies the need for more consistent and predictable enforcement by the world's more than 100 competition authorities. Cooperation does not necessarily mean consistent results in every matter; that is simply not realistic. But it can create more consistent outcomes on specific cases, enhance efficiency, and provide predictability to businesses, which in turn facilitates investment and innovation. I agree with my colleagues at the Antitrust Division, who have noted seven guiding principles to foster cooperation: (1) agency transparency and accountability, (2) mindfulness of other jurisdictions' interests, (3) broader and deeper engagement by agencies across jurisdictions, (4) dialogue on all aspects of international competition and enforcement, (5) respect for different legal, cultural, and political paradigms, (6) trust in different agencies'

regulate and comply with the laws on an *ex ante* basis, leading to more competitive markets and expanded investment. This is precisely why it is so important for us to identify the trajectory of the Chinese authorities today and determine how best to engage them in cooperation and manage convergence with them over time.

II. The Characteristics of Modern Competition Regimes

Ideally, we would like China and other emerging markets' competition regimes to converge on a modern enforcement paradigm. So what are some of the characteristics we should be looking for? I see at least five key elements necessary for such a competition authority.

First, competition-based factors should guide antitrust policy and enforcement decisions. This means industrial policy, national security, employment, and other non-competition issues ideally should not play a role in decisions by competition agencies about mergers, acquisitions, or other conduct. Those concerns should be addressed by another part of government. And, to the extent non-competition issues do play a role, it should be transparent to the parties.

Second, competition enforcement decisions should focus on achieving welfare goals informed by industrial organization economics. In the United States, most agencies' effects analysis focuses on consumer welfare, others argue for a total welfare standard. Either way, the remedies sought should be reasonably related to achieving an I/O-based welfare goal. This at a minimum requires policymakers and agency staff to be properly trained lawyers and economists.

Third, the competition regime must abide by commonly-accepted timing requirements, merger reporting thresholds, and other best practices in merger notification and review. Ideally, but not necessarily, these standards would follow norms based on work like the ICN Merger Working Group's Recommended Practices for Merger Notification and Review Procedures.

Fourth, the agency must be transparent in its analysis of mergers, acquisitions, and conduct cases, as well as in the dissemination of data for cleared and abandoned transactions and

other enforcement decisions. Again, the agency's transparency efforts could follow best practices like the ICN's Recommended Practices for Merger Analysis. Giving businesses and consumers a clear window into agency approaches through analytical guidelines, statements explaining decisions, and speeches enhances agency credibility and offers market participants a way to comply more easily with the laws. Transparency offers predictability and fairness to those subject to an agency's oversight, preserving due process for the parties, reducing the cost of merger reviews, and promoting increased compliance with the law. In addition, the practice of publicly explaining decisions can prompt agency self-evaluation, better understanding and implementation of decisions down the management chain, and, ultimately, enhanced decision-making quality.

Fifth, and finally, the model modern competition agency should aspire to international cooperation in both multilateral and bilateral settings, ideally following the guiding principles on cooperation that I noted earlier. The FTC works with numerous agencies around the world through both multilateral and bilateral engagements. We serve on the ICN's Steering Group and as Co-Chair of its Agency Effectiveness Working Group, and are active across the wide range of its initiatives to help develop best practices and international norms. At the OECD, we are participating in a dialogue on "agency infrastructure" as a foundation for effective enforcement. The FTC also maintains bilateral relationships to promote agency information sharing and case cooperation with agencies across many jurisdictions, both informally and under the auspices of a growing number of formal agreements.[2]

[2] Feda5Tm-.e guidluGomm'ne guid,ral engagements. We serve on the ICN's Steering Group and

III. Where China Stands After Five Years of the AML

So, how do the Chinese enforcement agencies measure up along these five dimensions? Better than you might expect, all things considered – but there is still room for improvement.

A. The Role of Non-Competition Factors in Chinese Antitrust Enforcement

Article 27 of the Anti-Monopoly Law, which covers merger control, sets out the factors for MOFCOM to consider when deciding whether or not to approve a merger. Three factors are consistent with what we see here in the United States – market concentration, share and power; effects on entry and technological innovation; and effects on consumers. But the last two factors expressly allow for broader considerations: the effect of the proposed deal on the development of the national economy, and any other factors determined by the State Council Anti-Monopoly Enforcement Authority. Article I of the AML also sets out the goal of the law to "safeguard the … social public interest and pr

that they are approaching the competition laws from a different legal and cultural perspective; and (4) be transparent in how we in the US agencies handle matters and analyze the competition issues influencing our own actions, to set an example and to minimize misunderstanding with the Chinese agencies.

Ultimately, I think the key here is patient cooperation and diligent work on both sides, as the most fruitful way forward is to engage the Chinese agencies, offer them ao eseo5c .00pport, and ao ocate for greater convergence toward a competition-based analysis.

B. The Slow, but Heartening, Adoption of I/O Economic Analysis

Another hallmark of a modern competition regime is a reliance on I/O economics. Here, China appears to be moving in what I would characterize as the right direction. Some foreign practitioners initially criticized MOFCOM's economic analysis as relatively weak, citing for example the lack of a relevant market finding in the agency's early decisions in *Coca-Cola/Huiyan* and *InBev/Anheuser-Busch.*[4]

However, more recent MOFCOM decisions include relevant market definitions, as well as analytical forays beyoc .0tructural presumptions to the more sophisticated terrain of unilateral and coordinated effects. For instance, MOFCOM's approval of the United Technology/ Goodrich acquisition in June 2012, required a.0tructural remedy but preceded similar decisions by the US and EU. In addition, China's courts appear to have increased the sophistication of their analyses. For example, in the recent *Qihoo v. Tencent* case, the Guangdong High People's Court in a careful March decision rejected bundling and exclusionary practices claims because the plaintiff had failed to identify a relevant market in which the defendant was dominant. And, in March 2012, the Shanghai No. 1 Intermediate court rejected a resale preseomaintenance case against Johnson & Johnson for lack of an adverse effect on competition. These types of

[4] *See id.*

decisions are encouraging, particularly in their sophisticated application of the economic concepts that are fundamental to modern antitrust enforcement.

C. A Potential Turning Point in Merger Review Procedures

MOFCOM also is making strides to improve its merger review and notification procedures. Although many practitioners find the notification requirements ambiguous, the reviews slow, and the process difficult to predict, particularly MOFCOM's handling of Chinese state-owned entities, including in acquisitions with foreign parties, the Chinese are moving quickly to strengthen the merger notification regime.[5] For example, last summer MOFCOM revised its merger notification form to include more details about notification requirements that had been unclear, like calling for submission of internal studies and reports about the proposed transaction. More recently, MOFCOM sought comments (the comment period ended two weeks

process and substantive analysis.[8]

competition officials at all five agencies, as well as communication and cooperation between individual agencies at the senior or working level. It also identifies specific avenues for cooperation, including: (1) exchanges of information and advice about competition law enforcement and policy developments; (2) training programs, workshops, and other means to enhance agency effectiveness; (3) exchanges of comments on proposed laws, regulations, and guidelines; and (4) cooperation on specific cases or investigations, when it is in the investigating agencies' common interest. Pursuant to the MOU, we held our first joint dialogue with China this past September and will hold our next dialogue later this year.

The FTC, DOJ, and MOFCOM also have issued a framework for cooperation in merger cases, the *Guidance for Case Cooperation.*[11] This framework allows us to exchange information and engage in other cooperative efforts when investigating the same transaction. Under these auspices, MOFCOM cooperated with the FTC in the hard disk drive mergers.[12]

On a multilateral basis, China participates in the OECD Competition Committee as an observer and is a member of UNCTAD. The Chinese agencies also consistently ask for and implement comments from third parties on proposed changes in Chinese laws and regulations. We spent substantial resources working with Chinese officials to aid in their development of the Anti-Monopoly Law a few years ago. We participated in workshops with their agencies, discussed substantive competition analysis and effective investigative techniques, and submitted numerous written comments on drafts of their laws and regulations. I believe that such efforts were worthwhile, and I hope that we continue to cooperate with the Chinese agencies. In

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http://www.ftc.gov/opa/2011/07/chinamou.shtm. The text of the MOU is available at http://www.ftc.gov/os/2011/07/110726mou-english.pdf.

[11] Guidance for Case Cooperation between the Ministry of Commerce and the Department of Justice and Federal Trade Commission on Concentration of Undertakings (Merger) Cases (Nov. 29, 2011), *available at* http://www.ftc.gov/os/2011/11/111129mofcom.pdf.

[12] *See* Fed. Trade Comm'n, Statement of the Federal Trade Commission Concerning Western Digital Corporation/Viviti Technologies Ltd. and Seagate Technology LLC/Hard Disk Drive Assets of Samsung Electronics Co. Ltd, at 2 (Mar. 5, 2012), *available at* http://www.ftc.gov/os/caselist/1110122/120305westerndigitalstmt.pdf.

addition, we have found the ICN a productive forum and think it would benefit from Chinese participation going forward.

IV. Lessons for U.S. Enforcers

A. Introduction

I have traveled to China and met with many of their officials both there and in the U.S. My takeaway on a personal level is that they are genuinely interested in modernizing their competition authorities and being woven into the fabric of international enforcement. They want to be perceived as sophisticated enforcers in keeping with the size and sophistication of their economy. I think on four of the five factors I discussed today, the Chinese agencies are still relatively young but moving ambitiously along the trajectory of other, now well-established international enforcement bureaus. They have a stronger interest in behavioral remedies, which means we may see more of a hybrid model, even putting aside the use of non-competition factors. I think the most valuable lesson here is that we can and should continue to engage the Chinese authorities through outreach, cooperation efforts, and technical assistance. Our efforts appear to be paying off. As I mentioned today, the FTC has been reaching out across a range of initiatives – from formal high-level cooperation, to technical assistance abroad, and hosting MOFCOM officials here.

Also, in the near term, leading competition agencies in some respects should be even more cautious, transparent, and analytically meticulous in their own work because emerging market authorities are watching and could misunderstand our actions or potentially use sloppy decisions on our part as "competition fig leaves" to address other domestic issues or concerns. Before we move to questions and answers, let me close with a story about how this issue recently became very real to me.

In particular, I raised concerns about the FTC enforcing Section 5 without providing sufficient information about the relationship between that statutory provision and the antitrust laws, including the Sherman and Clayton Acts. Without such information, it is unclear what the term "unfair methods of competition" means or how the Commission will use its enforcement discretion under Section 5. I also was concerned our decisions would create conflict with other federal institutions since a *de facto* effect of our orders is to prohibit standard-essential patent holders from pursuing injunctive relief in federal courts and the ITC.[21] Moreover, when we rely on Section 5 of the FTC Act, which only the FTC can enforce, rather than the antitrust laws, which both the DOJ and FTC can enforce, we potentially create two different standards for patent holders, depending on which agency happens to review any alleged misconduct.

I am also concerned that the settlements created potentially confusing precedent for foreign enforcers. The FTC placed serious restrictions on the ability of holders of standard-essential patents to seek injunctions, which is a critical intellectual property right.[22] In my view, the FTC did this in each case with very little, if any, evidence that the patent holder agreed to waive this right when it participated in the standard-setting process. Further, in *Bosch*, the FTC required Bosch to grant royalty-free licenses on its patents as a

high value on intellectual property rights and that we have not explained adequately why these