



Hearing on "The Foreign Investment Climate in China:
U.S. Administration Perspectives and the Foreign Investment Climate in China"

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before the U.S.-China Economic and Security Review Commission
Dirksen Senate Office Building
Washington, DC 20510

January 28, 2015

Good morning. Thank you to the Commission for invit

parties. Sixth, and finally, competition agencies should cooperate with their counterparts internationally.

During my many discussions in and about China, people have told me that while the Chinese look to more mature competition agencies for guidance, they are focused on creating an enforcement program with “Chinese characteristics.” Over time, I have come to realize that “Chinese characteristics” may include, as a practical matter, relying on non-competition factors to examine mergers, acquisitions, and conduct with a heavy eye to promoting domestic industry. In fact, China’s Anti-Monopoly Law or “AML,” itself said to have Chinese characteristics, explicitly provides for the consideration of non-competition factors such as protecting “social public interest” and “promoting the healthy de

As I am sure you will hear later today, many observers and industry participants believe that the Chinese government has enforced the AML to promote and protect Chinese industry in certain cases. The U.S. Chamber of Commerce and the U.S.-China Business Council issued critical reports a few months ago on the state of competitive enforcement in China. According to the USCBC report, “[C]oncerns raised by international observers during the drafting process – such as the role of industrial policy considerations in competitive reviews, lack of due process, and insufficient transparency – remain relevant based on China’s initial enforcement efforts.”

II. Antitrust and Intellectual Property

A second topic of concern is China’s approach to issues at the intersection of the antitrust and intellectual property laws, including licensing practices and standard essential patents. I believe in strong intellectual property protection to promote innovation and consumer gains in any country. As the U.S. Supreme Court has said, strong intellectual property protection creates “an incentive to inventors to risk the often enormous cost—years of time, research, and development. The productive effort thereby cost will have a positive effect on society through the introduction of new products and processes of manufacture to the economy....”⁷

China has been exploring how to apply the AML to intellectual property rights. It appears to be moving to a system that favors short term economic gain from reduced intellectual property protections, including the right to exclusion and to fair compensation based on free negotiation of licensing terms and marketplace competition. For instance, MOFCOM has reached merger settlements in recent years in which it has imposed “Fair, Reasonable, and Non-Discriminatory” or FRAND commitments on patents that are not essential to an industry standard. This is different from our practice in the United States.

In addition, at a policy level, the State Administration for Industry & Commerce (SAIC) has been working on IP guidelines similar to those the FTC and DOJ issued in the 1990s seeking public comments. Some aspects of the proposals reflect international norms. For example, SAIC removed a suggestion in an earlier draft that patent pools, which typically are evaluated under the rule of reason here, are presumptively unlawful. Other features of the proposed rules could serve to devalue IP rights, however, which will be felt most acutely by IP-intensive Western businesses. For instance, SAIC does to apply the essential facilities doctrine to intellectual property rights, a doctrine that has faced serious criticism by the Supreme Court in the United States and has yet to be applied to patents anywhere in the world. In addition, many people are concerned about SAIC’s proposals to impose liability on a patentee based on royalty terms it demands on essential patents, including patents not contributed voluntarily by the owner

⁶ The U.S.-China Business Council, *Competition Policy and Enforcement in China*, 5 (Sept. 2014), available at <http://uschina.org/reports/competition-policy-and-enforcement-china>

⁷ *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 480 (1974).

⁸ U.S. Dept’t of Justice and Fed. Trade Commission, *Antitrust Guidelines for the Licensing of Intellectual Property* (1995), available at <http://www.justice.gov/atr/public/guidelines/0558.htm>

⁹ American Bar Association Section of Antitrust Law, Section of Intellectual Property Law, and Section of International Law, *Joint Comments on the SAIC Draft Rules on the Prohibition of Abuses of Intellectual Property Rights for the Purposes of Eliminating or Restricting Competition* 6, July 9, 2014, available at http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_201407saic.authcheckdam.pdf.

to a standard setting body. This would expand liability to patentees subject to FRAND

sizable percentage of transactions. Similarly, as I mentioned above, SAIC's draft IP and AML rules have moved in many respects towards approaches consistent with those used in the U.S., likely a result of comments we, along with our colleagues in other agencies of the U.S. government, have provided to SAIC.

Second, shining a light on discrepancies or biases in Chinese enforcement or competition policies also can be effective. In response to the Chamber report, the Chinese antitrust agency heads responded with a joint press conference. They argued that their processes are fair, transparent, and follow regulations.¹¹ And, of course, this press conference was followed by the commitments made in December at the JCCT that in many ways reflected the characterizations of Chinese enforcement practices made by the antitrust agency heads. These actions suggest to me that China's enforcers want to be accepted internationally as serious and disciplined. Indeed, their enthusiasm for engaging with the FTC and DOJ in China and in the United States, and attentiveness to our experiences in enforcing antitrust laws suggests a serious commitment to gaining international acceptance. In addition, I know that there are enforcers and other influential voices within China that want to see domestic en

are likely to advocate a version of antitrust enforcement that suits their own national economic interest and is grounded in their own cultural and legal norms. I think our goal should be to carefully explain our decisions and avoid making decisions that could be perceived as protectionist to prevent the possibility of misunderstanding or misuse.

I look forward to your questions. Thanks.