

Statement of
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“Free Trade Agreement Implementation: Lessons from the Past”

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Chairman Hatch, Ranking Member Wyden and Members of the Committee, I am pleased to be here today to examine the implementation of U.S. free trade agreements and consider what lessons can be learned and applied in the future.

My name is Sean Murphy, and I am Vice President and Counsel of International Government Affairs at Qualcomm, based at the company’s headquarters in San Diego, California. I manage a range of international public policy issues for Qualcomm, including intellectual property, international trade, and innovation policy.

I applaud the Committee for convening this hearing on the important topic of trade agreement implementation. I quite literally have been thinking about ways to enhance trade agreement monitoring, implementation and enforcement, and options for leverage, since the 1990s when I served in the Office of the U.S. Trade Representative (USTR). So, it is a privilege for me and Qualcomm to be able to contribute to this important dialogue.

Qualcomm has been and remains a strong supporter of international trade agreements. As I have testified previously before the Trade Subcommittee of this Committee, Qualcomm has been particularly supportive of the U.S.-Korea Free Trade Agreement (KORUS), which created an updated template for future trade agreement negotiations by the United States. We also strongly supported the conclusion of the Trans-Pacific Partnership (TPP) negotiations, which successfully builds upon KORUS to not only open new markets in the Asia-Pacific region for our sector but also to create new standards to advance market opportunities in the 21st Century economy. As one of the company co-chairs of the U.S. Coalition for TPP, we look forward to its approval by Congress at the earliest opportunity.

Qualcomm also strongly supported expansion of the World Trade Organization International Technology Agreement (WTO ITA), which will eliminate tariffs on 201 technology products that weren't even conceived of when the ITA was first concluded in the late 1990s. And finally, we also support the ongoing negotiations of the Trans-Atlantic Trade and Investment Partnership (T-TIP). We believe that these agreements, if faithfully implemented and enforced, all have the potential to enable global innovation and connectivity, enhanced productivity, research and development, and economic growth and job creation.

As the United States and its trading partners work diligently to secure ratification and then entry-into-force of the TPP, and to conclude T-TIP, we very much appreciate this opportunity to share lessons learned regarding the implementation and enforcement of prior trade agreements. We recognize that in order to secure continued political support for TPP and future trade agreements,

it is important that the U.S. government demonstrate its commitment to ensuring that America's trading partners are implementing and living up to their existing trade obligations.

OVERVIEW OF QUALCOMM

Founded in 1985, Qualcomm is a world leader in 3G, 4G and next-generation mobile technologies. If you have a smart phone, tablet or other advanced mobile device, you are using some form of Qualcomm-developed technologies. Our research and development efforts, as well as strategic partnerships with other innovative companies, allow us to develop breakthrough technologies mobile companies need to power their businesses. We channel our innovations into the global marketplace in two ways.

First, we broadly license our global portfolio of more than 100,000 issued or pending patents to nearly 300 licensee customers across the mobile industry. Many of our patented technologies have been incorporated into industry-wide technical standards. Qualcomm makes available for licensing both its standardized and non-standardized patented technologies. To help fuel cutting edge innovation, promote interoperability, competition and expanded consumer choice, and enhance widespread dissemination of new technologies, Qualcomm is active in over 150 technology standards bodies around the world. Our innovation- and patent-intensive business model has and continues to provide all companies – big or small – opportunities to enter and compete in the dynamic mobile ecosystem. International standardization is essential for the global mobile industry to achieve scale, which helps drive down prices, expands access, and

improves performance. For example, 4G mobile networks offer data speeds that are 12,000 times faster than networks using 2G standards.

Second, we sell advanced semiconductor chipsets and software implementing some of our innovations, which are incorporated into mobile devices manufactured by our customers and then sold globally. The diversity of supply and competition between these device manufacturers translates into greater innovation, enhanced consumer choice and lower prices.

Qualcomm led the development and commercialization of a pioneering digital communications technology called Code Division Multiple Access (CDMA), and we play a similar role for next-generation mobile technologies known as 4G Long-Term Evolution (LTE). We take pride in our contributions in helping to make mobile communications the biggest, most pervasive information platform in history – with nearly 8 billion mobile connections in a world of 7.3 billion people.

Today, we are the fourth largest semiconductor supplier by revenue and the world’s largest “fab-less” semiconductor company – meaning that we invest heavily in research and development, and design our chips in-house, but do not own or operate our own semiconductor fabrication facilities.

Since our founding just over thirty years ago, Qualcomm has evolved into a global business that derives more than 90 percent of our revenues outside the United States. Last year, our worldwide revenues exceeded \$25 billion, with roughly 60 percent resulting from the sale of chipsets and more than 30 percent from patent licensing.

We license our global portfolio to smartphone and other device manufacturers around the world – including in China, Europe, India, Japan, Korea and Taiwan – and consistently invest more than 20 percent of our total annual revenues in research and development. Since 1985, Qualcomm has invested more than \$38 billion in R&D, with the majority spent here in the United States.

Qualcomm has made important contributions to the U.S. mobile communications sector – which accounted for an estimated \$548 billion or about 3.2 percent of U.S. GDP and sustains more than one million American jobs. While Qualcomm is a global company, approximately 60 percent of our 30,000 employees (65 percent of whom are engineers) are based in the United States. Thus, while Qualcomm drives billions of dollars into a virtuous cycle of innovation and intellectual property creation worldwide, we are also creating and sustaining a significant number of high-skill, high-wage jobs for U.S. workers.

This is why Qualcomm urges government officials around the world to think about international trade in terms of intangible exports in addition to physical products. IP-intensive industries account for over \$8 trillion in value added, or over a third of U.S. gross domestic product.

America's most IP-intensive industries generated direct employment of 27.1 million jobs in 2010 and an additional 12.9 million jobs through indirect activities associated with these industries, for a total of 40 million IP-supported jobs. These 40 million jobs represent 27.7 percent of all jobs in the U.S. economy.

The growth in sales of mobile products has been enormous – in fact, much greater than previous generations of products. Moreover, the products offered to the consumer have evolved with new technologies at an astounding pace. Consider the cell phone of ten years ago, compared with today’s most advanced smartphones. Continued innovation within the United States and throughout the world depends on strong and enforceable intellectual property rights, and viable technical standards enabled by a voluntary private sector-driven technology standard-setting environment, and access to open, competitive markets.

QUALCOMM’S STRONG SUPPORT FOR HIGH-STANDARD TRADE AGREEMENTS

Given the importance of international markets to Qualcomm’s growth, it is no surprise that the company strongly supports the negotiation and implementation of ambitious, high-standard U.S. free trade agreements. Over the past 15 years that I have been at the company, Qualcomm has actively supported each FTA concluded by the United States, as well as Trade Promotion Authority (TPA) legislation, and multilateral trade negotiations, including expansion of the International Technology Agreement (ITA) and the Trade in Services Agreement (TISA) and Environmental Goods Agreement (EGA). Qualcomm’s ability to continue innovating and drive a more competitive wireless industry rests heavily on open markets for information and communications technology goods and services, reliable protection and enforcement of intellectual property rights, regulatory transparency and due process protections.

The foundation of the international trading system is established by the agreements of the World Trade Organization (WTO). Alongside the WTO however, are a web of preferential trade

agreements, many of which exclude the United States. According to the WTO, there are more than 400 bilateral and regional trade agreements in force around the globe, and another hundred are being negotiated. Of those, the United States is a party to just 14 agreements in effect with 20 countries.

These U.S. trade agreements, however, are generally among, if not the most comprehensive and high-standard trade agreements negotiated between trading partners. Each FTA concluded by the United States generally builds upon the agreements that precede it, raising the bar and evolving to promote meaningful access to new markets and protect U.S. investments in these markets. For example, the U.S.-Israel FTA did not originally include rules on intellectual property protection. The NAFTA included IPR provisions, but did not cover basic telecommunications services. The Singapore FTA was the first to include disciplines on government-linked corporations, what we would today refer to as state-owned enterprises, which are the subject of an entire chapter of the TPP.

Early U.S. FTAs, such as NAFTA, the Middle East agreements and the Central American FTA (CAFTA), as well as the conclusion of the WTO's ITA in 1996, played a key role in promoting the global competitiveness and expansion of the U.S. information and communication technologies industry. The fact that it took almost two decades to update the ITA demonstrates the importance of the evolution of U.S. FTAs, which continued to build upon existing WTO and other regional and bilateral agreements, over that same time period.

These agreements also provide important opportunities for the United States to influence and set the rules of the road. This is critical now more than ever to combat a growing array of non-tariff market barriers and “behind the border” impediments to trade, including domestic policies that promote national champions, forced technology transfers and similar protectionist goals.

Of the most recently concluded U.S. FTAs, KORUS and TPP are of the greatest commercial significance to Qualcomm. For example, Korea is the thirteenth largest economy, and the United States’ sixth largest trading partner. It is also one of the most advanced mobile communications markets in the world. As a share of the Korean economy, mobile accounts for an estimated 11 percent of GDP, and a significant contributor to Korean jobs and 5 percent of exports. The mobile sector’s share of Korean GDP is expected to grow from \$143 billion in 2015 to \$187 billion by 2020. Qualcomm is proud of its contributions and partnerships in Korea that have helped to propel the impressive growth and success of Korea’s mobile industry domestically and in export markets. Given this month marks the fourth anniversary of KORUS’s entry into force, it is timely to consider Korea’s implementation track record.

The economies that make up TPP account for roughly 40 percent of global GDP and approximately 825,000,000 consumers. The Asia-Pacific region is a critical and growing market for ICT products and services. It is estimated that by 2020, more than 56 percent of all smart phone sales will be in the broader Asia-Pacific region. TPP includes an ambitious range of disciplines that will advance new market access opportunities for the ICT industry, while also promoting this industry’s research and development capabilities and competitiveness. These include, among others, a requirement that all TPP parties must join the WTO’s ITA, innovative

new regulatory cooperation provisions concerning ICT products, strong IP protections, and due process protections in competition proceedings.

LESSONS LEARNED FROM EXISTING FREE TRADE AGREEMENTS

The value of an FTA commitment depends entirely on the extent to which it is implemented and enforced. This includes not only the commitments embodied in the agreements, but also any side accords, exchanges of letters or related understandings. I think it is fair to say that most of the time, countries abide by their FTA commitments. But in those instances where a country is not living up to its obligations, it is critical that the United States have an effective enforcement strategy in place.

It is inevitable that implementation issues and differences of opinion about interpretations will arise. Based on Qualcomm's observations about the operation of various FTAs, I offer the following recommendations for the Committee's consideration.

1. **CREATE A MECHANISM TO SOLICIT MORE EXTENSIVE INPUT FROM U.S. STAKEHOLDERS TO ENSURE EFFECTIVE IMPLEMENTATION OF ALL FTA OBLIGATIONS BEFORE ENTRY-INTO-FORCE**

Before a trade agreement with the United States can enter-into-force, the President must determine that the trading partner has taken the necessary steps for implementation of all obligations that are to take effect on day one of the Agreement.

I cannot emphasize enough how critical this certification process is to ensuring that a trading partner has the necessary laws and regulations in place to implement its obligations *before* an Agreement enters into force. It is during this certification process when our ability to secure any necessary protections in our trading partners' laws, consistent with the Agreement, is at its greatest. Certification may be the best opportunity the United States has to ensure that trading partners have taken all necessary domestic steps to implement and abide by their commitments.

In light of the enormous undertaking this exercise presents, the U.S. government should seek ways to improve effective analysis and verification that FTA partners have transposed FTA obligations into domestic law before presidential certification is made. Because the U.S. private sector may have relevant insights as to whether domestic measures have been sufficiently updated or changed consistent with FTA obligations, I recommend that the U.S. government engage in closer consultation with the private sector before and during this analysis.

We should consider a mechanism that enables the private sector to provide input, which may be technically complex and “in the weeds,” to be provided and considered as part of a pre-certification “scorecard” or “check list.” I recognize such a pre-certification procedure of this nature adds another step to the certification process. However, the importance of getting this “right” makes going this extra mile worthwhile. And since TPA requires consultation between the Administration and Congress before instruments of ratification are exchanged and FTAs enter into force, this Committee has a critical role in ensuring a careful and considered analysis of whether our partners have taken sufficient steps to implement their FTA obligations.

To illustrate the importance of this sort of analysis, I would like to discuss Qualcomm's recent experiences in Korea. As you may be aware, many U.S. companies, including Qualcomm presently, have had the experience of being involved in competition-related investigations conducted by the Korea Fair Trade Commission ("KFTC"), the agency responsible for applying Korea's competition law.

One of the benefits of KORUS, which I highlighted in my prior testimony in July of 2014, is that it "[e]xpanded existing procedures to ensure fairness, transparency and due process in Korean competition law investigations and enforcement actions." Indeed, the due process provisions for competition law investigations in KORUS Chapter 16 were important factors that contributed to Congressional and U.S. industry support for KORUS. The U.S. Advisory Committee for Trade Policy and Negotiations in 2007 endorsed KORUS in part due to the "state of the art due process provisions" in Chapter 16, noting in particular that KORUS "clarifies that a [respondent in competition proceedings] should be able to cross-examine witnesses and review all documents on which the charges against it" may be based.

In particular, under KORUS, Korea must provide respondents in administrative competition hearings with the opportunity to "review and rebut the evidence and any other collected information on which the determination may be based" and "to cross-examine any witnesses or other persons." Korea, however, has not yet implemented a procedure to provide the subject of an investigation access to all such materials, and to the best of our knowledge, does not have plans to do so. The KFTC appears to take the position that Chapter 16 does not require any

revisions to KFTC procedures, and therefore many of the protections promised by KORUS, and the benefits that U.S. companies reasonably expected from the commitment, have not materialized. But that cannot be the right result. The Chapter 16 procedures were put into KORUS to effect change in the KFTC process, not to maintain a *status quo* that was of significant concern to U.S. companies.

A pre-certification check list exercise that enables the private sector to provide input to the Administration and Congress might have identified this inadequacy and ensured that Korean authorities took the requisite steps necessary to ensure that its antitrust regime was fully compliant with KORUS obligations *prior* to presidential certification and entry into force. Since KORUS took effect, the KFTC has stepped up its enforcement activity involving foreign firms, including some 40 antitrust or consumer protection cases against U.S. companies. A pre-certification process would also avoid any after-the-fact debate over whether an important provisions require any change in in-country policies or procedures. The question of whether Chapter 16 requires any change in KFTC process, for example, should not have been left open to debate after the fact.

It is critical that the U.S. Administration carefully analyze adherence to the TPP competition chapter's similar due process provisions during the certification process and require any changes needed to faithfully implement those provisions. Moreover, once TPP is approved and has entered into force, we urge the U.S. government to scrutinize the antitrust procedures and practices of any parties that would like to join the Agreement and ensure compliance with the

minimum transparency and procedural fairness standards set forth in the TPP competition chapter before allowing any new Party to join the agreement.

2. PROVIDE SUFFICIENT RESOURCES TO ENFORCE U.S. FTAS

As the number of U.S. FTA partners grows, so too will the challenges of vigorously monitoring and enforcing existing FTA commitments. If agreements such as KORUS and TPP, which include state-of-the-art provisions in intellectual property, e-commerce, and other important areas, are truly to establish new global standards, then the U.S. government must rigorously enforce these commitments. A failure to do so sends a negative message about the seriousness of these commitments not only to current FTA partners but also to those Parties that may seek to join TPP in the future.

Toward that end, Qualcomm applauds the enactment of the long-awaited Trade Facilitation and Trade Enforcement Act (H.R. 644). We are particularly pleased to see inclusion of a \$15 million trade enforcement trust fund, championed by Senator Cantwell, which prioritizes the enforcement of intellectual property standards, along with several other disciplines.

The United States' leadership and competitiveness in innovation continues to be challenged in a number of foreign markets. Such challenges include efforts to restrict market access, weaken patent rights, displace imported technologies and foreign intellectual property in favor of indigenous innovation and restrict technology licensors' ability to freely contract with their customers. In many cases, such actions are inconsistent with FTA obligations designed to

protect patent rights, combat forced technology transfer or technology localization, and prohibit discriminatory treatment.

The Trade Enforcement Fund is a useful contribution to ensuring the resources needed to identify and address failures to enforce existing FTA commitments. We hope the necessary funds are appropriated immediately and stand ready to work with Congressional appropriators to that end.

3. MAKE BETTER USE OF EXISTING TRADE TOOLS

Dispute settlement is a critical element of U.S. FTAs by ensuring the binding and enforceable nature of the obligations. But litigation of disputes is not the only mechanism available to ensure compliance – especially when one considers the time horizon and duration of formal dispute settlement procedures.

Short of dispute settlement, U.S. trade officials have a number of other options at their disposal to address FTA-inconsistent practices. These include a range of tools - from consultations to FTA working groups to statutorily mandated “naming and shaming” reports - to mention a few.

Looking again at KORUS, as an example, the agreement contains institutional provisions that create 19 separate permanent committees or working groups to ensure ongoing and continuous dialogue about implementation and compliance, and which provide a forum to have hard conversations when problems arise. However, these committees do not cover all chapters in the Agreement, nor do they appear to meet frequently. For example, last year’s Trade Policy

Agenda report noted that only three of the 19 committees met in 2014. It is worth exploring whether these groups are fulfilling their existing mission and if not, how best to improve the effectiveness of this forum for addressing implementation concerns without needing to resort to dispute settlement.

USTR also produces annual reports that shed light on trade barriers in key markets, including in those of our U.S. FTA partners, such as the National Trade Estimate Report on Foreign Trade Barriers, and the Special 301 and Section 1377 reports, which cover intellectual property and telecommunication challenges respectively. In many cases, these reports provide useful leverage to encourage trading partners to live up to their obligations. However, in a smaller number of instances, the same markets are highlighted in these reports year-after-year without any meaningful changes to the policies that landed them on those lists. Qualcomm therefore supports the provisions in H.R. 644 that require USTR to develop actions plans with appropriate benchmarks to gauge progress for those countries listed on the Priority Watch List in Special 301. These new provisions also authorize enforcement action if it is determined that the country has not substantially met the benchmarks set forth in the action plan. We are optimistic that requirements like these can provide useful leverage to address new concerns as well as intractable problems.

4. EXPAND THE FTA ENFORCEMENT TOOL BOX

The United States must do whatever it takes to ensure effective enforcement of U.S. trade agreements. While the United States should continue to deploy all existing tools available to

ensure compliance with its FTAs, in some cases, these tools may just not be enough. We therefore appreciate the interest of this Committee to have a renewed conversation about enforcement. This should be part of an ongoing dialogue about how to create new tools and make new forms of leverage available to U.S. trade officials so that they can more meaningfully engage their counterparts from FTA countries in results-oriented consultations prior to or in parallel to formal dispute settlement. The U.S. government and should consider innovative ways to give Administration trade policy and trade enforcement officials additional carrots and/or sticks to motivate or ensure implementation and compliance. This is critical to ensuring political legitimacy for trade on an enduring basis.

For example, KORUS introduced a new, expedited dispute settlement process for auto-related measures that violate the FTA, whereby if Korea does not uphold its commitments in this area, U.S. concessions in the FTA can suspend benefits under the agreement, or in other words “snap back” to pre-KORUS terms. It may be worthwhile to consider whether this policy tool could be utilized more broadly, particularly in instances where traditional trade tools might not be sufficient. Such a tool could be necessary to help motivate faster compliance than the conventional approach under most other FTAs which do not envision or authorize the withdrawal or suspension of benefits until after a party has prevailed following lengthy dispute settlement proceedings and possibly also an appeal. The harm to some companies and industries associated with a prolonged period of non-compliance with FTA obligations pending dispute settlement or appellate proceedings could be significant or even irreparable.

CONCLUSION

For U.S. companies, innovators, employers and workers, the global trading system presents both significant challenges and opportunities. For Qualcomm, we believe there is no choice but to engage and compete in the dynamic global marketplace. Likewise, we believe that the role of the U.S. government should also be to engage, and lead by example in pushing for further market-opening, high-standard trade disciplines, and creative solutions to the known and emerging trade barriers confronting American interests in the 21st Century economy.

Trade agreements are and will remain important vehicles to achieve these objectives. No trade agreement is perfect, but full and faithful implementation and enforcement of these agreements are crucial to ensuring that the expected benefits accrue to companies, workers and consumers of the United States and also of our trading partners. And I hope that some of the recommendations I offered here today about how to get the most from our carefully negotiated agreements will help to spark further thinking and discussion.

Thank you again for the opportunity to appear before this Committee and share Qualcomm's views on this critical topic. I look forward to answering your questions.

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