

COMPETING INTERESTS IN CHINA'S COMPETITION LAW ENFORCEMENT:

China's Anti-Monopoly Law Application
and the Role of Industrial Policy



U.S. CHAMBER OF COMMERCE
International Affairs



COMPETING INTERESTS IN CHINA'S COMPETITION LAW ENFORCEMENT

A Message from the U.S. Chamber of Commerce

The U.S. Chamber of Commerce is pleased to share this report that reflects on China's enforcement of its Anti-Monopoly Law (AML) over more than five years of implementation. Since the law took effect in 2008, China has quickly become one of the most important competition law jurisdictions in the world. The U.S. Chamber welcomed China's enactment of a competition law as part of its continued transition towards a rules-based, market-oriented economy. Indeed, we have long agreed with those who regard the AML as China's potential "economic constitution," marking a possible new chapter in the "reform and opening up" that has propelled the Chinese economy forward since the 1980's.

It is for that reason that the U.S. Chamber is committed to working constructively with China's Anti-Monopoly Law Enforcement Authorities (AMEAs)—the National Development and Reform Commission (NDRC), the Ministry of Commerce (MOFCOM), and the State Administration for Industry and Commerce (SAIC)—as well as China's judiciary and leading academic experts, to share our experiences in the development and enforcement of U.S. antitrust laws. Since 2006, we have been honored to host delegations from the National People's Congress, NDRC, MOFCOM, SAIC, and China's judiciary, with which we have exchanged views on the U.S. antitrust regime, the AML drafting process, and the development and application of related AML implementing guidelines and rules. We are proud to have been the lead private sector sponsor of a public-private partnership with the U.S. government, funded by the U.S. Trade and Development Agency, which provided extensive training for China's AMEAs. We appreciate the opportunity afforded by the AMEAs to provide submissions on numerous AML implementing regulations, guidelines, and rules. This report, which draws extensively on publicly available information including primary Chinese sources, signifies our continuing commitment to support China's AML implementation process in a manner that is consistent with international norms and best practices, and fosters information sharing and comparative analysis based on Chinese, U.S. and global antitrust experiences.

The U.S. Chamber has a long-standing and significant role in competition policy and enforcement advocacy at home and around the world. Through the U.S. Chamber's Antitrust Council and International Division, we work globally to promote the following principles:

- i. Competition policy and trade policy should be complementary. The benefits of international trade will be lost if markets do not operate in pro-competitive ways.
- ii. Governments should not use competition policy as an industrial policy tool to achieve protectionist goals that circumvent commitments to trade and open markets.
- iii. Antitrust enforcement should be transparent, predictable, reasonably stable over time, and consistent across jurisdictions.



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- iv. All antitrust investigations and enforcement decisions should be based on sound economic analysis.
- v. Antitrust remedies should enhance consumer welfare and make sense in an interconnected world where markets are often global.
- vi. Due process is critical in any antitrust investigation.
- vii. Competition policy and antitrust enforcement should apply competition law neutrally with respect to private, state-owned, and state-supported firms.
- viii. Cooperation and consistency among international regulators – including agencies responsible for antitrust enforcement, trade and investment – facilitate open and competitive market operations.

It is these principles that inform our work on antitrust issues in the United States, China, and other jurisdictions. In that regard, the U.S. Chamber was pleased that the Third Plenum Decision Document recognized that the market should play a “decisive” role in allocating resources. We particularly welcomed the commitment of the Communist Party leadership to reduce government involvement and unnecessary regulation, increase the role of market forces, and facilitate the greater utilization of intellectual property. These important statements underscore the importance of free and fair competition without regard to the nationality of market actors or other industrial policy considerations.

Indeed, implementation of the AML provides an enormous opportunity for China to accelerate its economic transition by boosting competition and reducing the prominence of monopolies and oligopolies in its economy; increasing consumer welfare, choice, and consumption; and stimulating market-driven innovation. In short, the AML has the potential to stimulate a new round of dynamic growth and efficiencies across all aspects of the Chinese economy – an outcome that would also contribute positively to U.S.-China relations.

However, China’s enforcement of the AML is not yet living up to this ideal. Rather, as the following report discusses in great detail, AML remedies often appear designed to advance industrial policy and boost national champions, AMEAs rely insufficiently on sound economic analysis, intellectual property rights have been curtailed in the name of competition law, and AML enforcement suffers from procedural and due process shortcomings. These patterns in AML enforcement give rise to growing concern about the quality and fairness of enforcement, and they raise legitimate questions about China’s commitment to the global antitrust commons, which is at least as valuable to China as any other country.



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The U.S. Chamber recognizes that AML enforcement remains in its early years, and the future of AML enforcement is undecided. However, if competition law and enforcement in China are to catalyze economic reform and progress, the application of the AML must correspond more closely with international norms and best practices. We look forward to continuing to work with governments, including the AMEAs themselves, as well as private sector actors to realize this critical objective.

A handwritten signature in cursive script that reads "Jeremie Waterman".

Jeremie Waterman
Executive Director, China
Senior Policy Advisor, Asia
U.S. Chamber of Commerce

A handwritten signature in cursive script that reads "S. Heather".

Sean Heather
Vice President
Center for Global Regulatory Cooperation
U.S. Chamber of Commerce



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Executive Summary

China's Anti-Monopoly Law (AML), which was enacted on August 30, 2007 and became effective on August 1, 2008, was hailed by observers as China's "economic constitution."¹ For the first time in China's history, the AML established in a single statute the legal machinery necessary to prevent monopolistic conduct, including mechanisms to (i) review proposed corporate mergers and acquisitions, to prevent undue concentrations of market power that could lead to monopolistic conduct in the future (administered by the Ministry of Commerce, or MOFCOM); (ii) investigate and penalize monopolistic conduct that does occur (administered by the National Development and Reform Commission, or NDRC, and the State Administration for Industry and Commerce, or SAIC); and (iii) empower private parties harmed by monopolistic conduct to sue companies (adjudicated by courts up to and including the Supreme People's Court (SPC)). Thus, to its proponents, the AML seemed to mark a major milestone in the decades-long transition to a market economy, because it presupposed that fair, open, and market-based competition was worth protecting.

Indeed, China has used the AML to prevent undue concentrations of market power, combat cartels and abuse of market dominance, and pursue other goals that enhance the overall competitive environment in China. However, in many cases involving foreign companies, China's anti-monopoly enforcement agencies (AMEAs) have skewed the implementation of the AML and related statutes to support China's industrial policy goals, including through discrimination and protectionism. In other words, although the legal machinery of the AML has been used to protect competition and prevent monopolistic conduct, China has also employed it both domestically and extraterritorially to pursue objectives that have no place in a free, open, and fair market-based economy. Examples include the following:

- *Promoting industrial policy, even at the expense of free and open competition.* MOFCOM's merger reviews have created opportunities for China's own national champions to expand and increase their market shares, capped prices for products and technology on which domestic companies rely, and protected famous Chinese brands from acquisition by foreign companies. Similarly, through AML investigations, NDRC has forced foreign companies that market consumer products, including but not limited to soaps, detergents, infant formula, and automobiles, to reduce prices, even when such prices appear to be the result of market forces rather than anti-competitive conduct.

¹ See, e.g., "Beijing Olympics, 'New Economic Constitution' focus the Eyes of the World on China," WilmerHale (Aug. 11, 2008); Xiaoyu Guo, "The 'Economic Constitution': A Sword Pointed at Monopoly Behavior," Legal Daily (Aug. 26, 2007), available at <http://news.qq.com/a/20070826/000929.htm>; and Dr. Yijun Tian, "Monopoly Law on IP Commercialization in China & General Strategies for Technology-Driven Companies and Future Regulators," Duke Law & Tech. Rev. [2010] No. 004.



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- *Curtailing Intellectual Property (IP) rights.* In the merger review context, MOFCOM has permitted certain transactions only on the condition that the foreign companies involved cap IP license fees, including for non-standards essential patents (SEPs), and license their technology on terms that are otherwise exceptionally favorable to licensees—generally Chinese electronics manufacturers. In the investigations context, NDRC has appeared to use AML investigations to pressure U.S. telecommunications firms to lower license fees associated with 2G, 3G, and 4G wireless telephone technologies.

The beneficiaries of these policies are often Chinese national champions in industries that China considers strategic, such as commodities and high technology.² China seeks to strengthen such companies through the AML and, in apparent disregard of the AML, encourages them to consolidate market power, although this is contrary to the normal purpose of competition law.³ By contrast, foreign companies suffer disproportionately from China's patterns of enforcing the AML. In fact, all transactions blocked or conditionally approved by MOFCOM to date have involved foreign companies, and the curtailment of IP rights appears designed to strengthen the bargaining position of domestic licensees.

Deficiencies in transparency and due process facilitate discrimination through the AML. For example, while the AML requires both foreign and domestic companies to report transactions meeting certain monetary thresholds to MOFCOM for pre-closing approval, in practice many domestic companies have closed transactions without complying with this requirement or have been actively encouraged to merge to make domestic companies

² Regarding the specific industries that China considers strategic, *see generally* US-China Business Council (USCBC) "USCBC Summary of the National Development and Reform Commission (NDRC) 2014 Work Plan" (Feb. 5, 2014), *available at* http://www.uschina.org/sites/default/files/2014%20NDRC%20Work%20Plan_0.pdf.

³ NDRC, the Ministry of Industry and Information Technology (MIIT), and other agencies have an official policy to achieve industrial concentrations for domestically-invested companies in the automobile, steel, cement, shipbuilding, electrolytic aluminum, rare earths, electronic information, pharmaceuticals, and agriculture industries. *See* Guiding Opinions on Accelerating the Promotion of Mergers and Reorganizations of Enterprises in Key Industries, issued by MIIT, NDRC, Ministry of Finance, Ministry of Human Resources and Social Security, Ministry of Land and Resources, MOFCOM, People's Bank of China (PBC), State-Owned Assets Supervision and Administration Commission (SASAC), State Administration of Taxation (SAT), SAIC, China Banking Regulatory Commission (CBRC), and China Securities Regulatory Commission (CSRC) (Jan. 22, 2013), Gong Xin Bu Lian Chan Ye [2013] No. 16 (*hereinafter* 2013 MIIT Joint Opinions). Indeed, all three AMEAs are among the authors of this document. Companies and local governments may oppose this policy, but there is no indication that the AML constitutes an impediment to implementing it. *See* David Stanway, "China Ditches Steel Industry Consolidation Targets in New Plan," Reuters (Mar. 25, 2014) (quoting Xu Leijiang, the chairman of Baoshan Iron and Steel, as stating that the policy created "huge monsters" weighed down by debt and unprofitable investments).



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more competitive.⁴ The AML gives MOFCOM exclusive jurisdiction over merger review, but in practice other agencies such as NDRC, the Ministry of Industry and Information Technology (MIIT), the Ministry of Agriculture (MOA), and the Ministry of Transportation (MOT)⁵—whose responsibilities sometimes include the promotion of national champions—frequently participate in the merger review process *sub rosa*, and prevent MOFCOM from approving transactions unless their own institutional and stakeholder concerns are assuaged. Although the AML imposes a 180-day time limit on the merger review process, in practice MOFCOM can take much longer by declaring

⁴ MOFCOM recognizes this problem and has implemented regulations to combat it. See Provisional Rule on Failure to Notify Concentrations of Business Operators (2012); “MOFCOM will disclose administrative penalty decisions for illegal implementation of business concentrations,” Central People’s Government of the People’s Republic of China (PRC) (Mar. 20, 2014). By the end of October 2013, MOFCOM had investigated nine transactions that should have been reported, and completed two of the nine investigations, but did not publicly identify the parties involved. See MOFCOM, “Press Release for Business Review 2013 (III): Making Efforts to Well Develop Anti-Monopoly Review of Concentration of Operators to Maintain the Fair Competition Order,” Press Release (Dec. 5, 2013). In addition, for the first time, MOFCOM is reportedly considering punishing domestic parties that failed to report a particular concentration. See Lisha Zhou & Rebecca Wen, “Tsinghua/RDA under MOFCOM scrutiny for possible AML violation - sources say,” PaRR (Aug. 7, 2014). These steps improve transparency and also mitigate the discriminatory application of the merger review process, which in the past has allowed many domestic-to-domestic transactions to be completed without being notified to MOFCOM. See Section III.A. Although these steps are welcome, they are modest in comparison to the hundreds and possibly thousands of domestic transactions that were never notified, even though they met the applicable filing thresholds. See Lester Ross & Kenneth Zhou, “MOFCOM to Publicize Administrative Penalties for Illegal Implementation of Concentrations,” WilmerHale (Apr. 21, 2014), <http://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=17179872193> (indicating that only 60 of 793 reported transactions from August 2008 through April 2014 were domestic-domestic); Yan Sobel, “Domestic-to-Domestic Transactions—A Gap in China’s Merger Control Regime?” Antitrust Source (Feb. 2014), at 5 (citing data showing that there have been 15,177 domestic-to-domestic transactions from August 1, 2013, to December 31, 2013, of which hundreds if not more met MOFCOM’s notification thresholds). Indeed, MOFCOM has suggested that some cases involving a failure to notify will go unpunished and/or will not be reported to the public. See “MOFCOM Held an ‘Anti-Monopoly Work’ Press Conference,” Central People’s Government of the PRC (Apr. 8, 2014), available at http://www.gov.cn/xinwen/2014-04/08/content_2654784.htm (“Firstly, for those fail-to-notify cases accepted before May 1, the administrative penalty will be imposed according to the law if MOFCOM finds such administrative penalties are necessary after review. There is no immunity granted for previous behavior. It is just that publishing the administrative penalty decision is not mandatory for such cases. Secondly, for those fail-to-notify cases accepted after May 1, MOFCOM will make its administrative penalty decisions according to the law if such administrative penalties are found necessary, and the decision will be published on MOFCOM’s website.”).

⁵ See, e.g., Joy C. Shaw, “China’s MOFCOM seeks input from local competitors, industry groups on P3 Network,” PaRR (Mar. 18, 2014) (reporting that China consulted with NDRC and MOT, as well as the domestic shipping industry, prior to rejecting a proposed shipping alliance). MOT, like its counterparts in other jurisdictions, has a mandate to regulate mergers and acquisitions among international shipping companies under Art. 24 of the Regulations on International Ocean Shipping (Dec. 11, 2001), and this mandate could be interpreted as extending to proposed operational alliances like P3. More generally, outside the context of mergers and acquisitions, MOT’s recent decisions have not appeared to promote competition or consumer welfare. In particular, the more efficient Valemax class of dry bulk carriers remains barred from Chinese ports at MOT’s behest, in order to protect the Chinese shipping industry. See Frik Els, “China Extends Ban on Vale’s Giant Ore Carriers,” MINING.com (Feb. 17, 2014).



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notifications “incomplete” or by forcing the parties to withdraw and refile as the time limit approaches.

The due process abuses can be even more egregious in the context of investigations. NDRC pressures companies to confess to AML violations or face much more severe sanctions, and in at least one instance NDRC casually threatened to initiate investigations against more than a dozen foreign companies at what they had been led to believe would be a celebration of the AML's five-year anniversary.⁶ Furthermore, both NDRC and MOFCOM have often barred foreign counsel from participating alongside in-house and local counsel in meetings related to AML enforcement. NDRC has moreover never published the rationale for any of its investigations, penalties, or other determinations in the context of AML enforcement. The lack of transparency surrounding NDRC decisions contrasts with the much higher levels of transparency in the United States and European Union. When controversial decisions are reached in those jurisdictions, there is a healthy debate on the economic theories and evidence underlying agency decisions, in the judicial setting and/or in the public arena.

Some of these due process deficiencies are caused by inexperience with the AML, insufficient staffing, and broader systemic problems with China's administrative and judicial systems.⁷ In addition—and to its credit—MOFCOM has made improvements in transparency and taken steps to mitigate discriminatory application of the AML.⁸ NDRC also recently agreed to suspend its investigation of InterDigital based on commitments proposed by the company, and did not impose a fine on InterDigital or require any specific reduction in the royalties that it seeks from licensees.⁹ Yet these steps, though important, fall short of the major course correction needed. MOFCOM has not stopped issuing merger review decisions that promote industrial policy objectives at the expense of competition. Moreover, NDRC has never publicly acknowledged the substantive or procedural defects in its past and ongoing investigations, and for 2014 it has announced plans to crack down on “illegal pricing behavior” in particular “key industries” such as aviation, cosmetics, automobiles, telecommunications, pharmaceuticals, and household appliances;¹⁰ and to “further exploit the role of IP” in “accelerating economic transformation” and “upgrading the industrial structure.”^{11,12} Indeed, NDRC in its

⁶ See Michael Martina, “Exclusive: Tough-Talking China Pricing Regulator Sought Confessions from Foreign Firms,” Reuters (Aug. 21, 2013). Similar public reports related to SAIC have not surfaced.

⁷ See Zhao Yanan, “Anti-trust team lacks real muscle for enforcement,” China Daily (Aug. 18, 2014).

⁸ See *supra* note 4.

⁹ See *infra* Section IV.A.2.a). The suspension of NDRC's investigation was part of a settlement in which InterDigital made specific commitments. See *id.*

¹⁰ See “NDRC: Six Industries Including Aviation, Household Chemicals, Automobiles, Telecommunications, Pharmaceuticals and Home Appliances Center the AML's Field of Vision,” Beijing Business Today (Nov. 25, 2013). For a summary, see USCBC, “USCBC Summary of the National Development and Reform Commission (NDRC) 2014 Work Plan” (Feb. 5, 2014); see also *supra* note 2.

¹¹ See “NDRC: Further Exploit the Supporting Role of IP,” State Intellectual Property Office (Feb. 27, 2014), available at http://www.sipo.gov.cn/mtjj/2014/201402/t20140226_907655.html.



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investigation of automobile industry pricing has reportedly pressured foreign companies not to challenge or appeal administrative determinations and penalties, and denied them access to counsel,¹³ despite a prior commitment to allow foreign counsel to attend meetings in the context of AML investigations.¹⁴ Moreover, NDRC announced in May 2014 that it will assess fines in patent-related cases on the basis of global revenue rather than domestic revenue, as in the past – a new policy that appears targeted at foreign IPR holders.¹⁵ And in an apparent signal that these enforcement trends will continue, the State Council issued a directive in June 2014 announcing that MOFCOM, NDRC, SAIC, and the State Intellectual Property Office (SIPO) will oversee an effort to intensify “severe punishment” of “monopolistic and anti-competitive behavior”¹⁶ – an announcement that was followed by an SAIC investigation of Microsoft, as well as the above-mentioned NDRC investigation of automobile companies.¹⁷

Also troubling is the eighth draft of pending AML-related Rules on the Prohibition of Abuses of Intellectual Property Rights for the Purposes of Eliminating or Restricting Competition (Draft Rules) issued by SAIC, which, if enacted in their current form, would among other things (i) compel foreign companies outside of a standards-setting context to license their IP; or (ii) allow a standard-setting organization (SSO)—which in China is generally affiliated with the Chinese government—to set a standard that implicates the

¹² In addition, MOFCOM announced that it launched a review of potential anti-competitive behavior across 80 major industries including automobiles, pharmaceuticals, and alcoholic beverages. Samuel Shen & Kazunori Takada, “China launches antitrust review across 80 industries, includes cars, pharmaceuticals,” Reuters (June 9, 2014).

¹³ European Union Chamber of Commerce in China, “European Chamber releases statement on China AML-related investigations,” Press Release (Aug. 13, 2014) (“The European Chamber has received numerous alarming anecdotal accounts from a number of sectors that administrative intimidation tactics are being used to impel companies to accept punishments and remedies without full hearings. Practices such as informing companies not to challenge the investigations, bring lawyers to hearings or involve their respective governments or chambers of commerce are contrary to best practices.”).

¹⁴ See “China: NDRC Refutes Bias against Foreign Firms, External Lawyers,” Competition Policy International (Sept. 17, 2013), available at <https://www.competitionpolicyinternational.com/china-ndrc-refutes-bias-against-foreign-firms-external-lawyers>.

¹⁵ See Joy C. Shaw, “China’s NDRC to use global revenue as basis for fines in patent probes – ABA Antitrust in Asia,” PaRR (May 25, 2014). Xu Kunlin, Director-General of NDRC’s Price Supervision and Anti-Monopoly Bureau, stated at the American Bar Association’s May 2014 Antitrust Asia conference in Beijing that ““when it comes to issues such as patents, the effect [for an antitrust violation] is felt in the global market, which in turn affects the China market. Under these circumstances, we may use global revenue as the basis for calculating fines.” *Id.* (bracketed text in original). Article 46 of the AML authorizes AMEAs to impose a fine between 1% and 10% of total turnover in the preceding year on any company found to have concluded a monopoly agreement. However, the AML does not specify the geographic basis for such turnover calculations.

¹⁶ See Several Opinions of the State Council to Promote Fair Market Competition and Protect Normal Market Order, issued by the State Council (June 4, 2014), Guo Fa [2014] No. 20, available at http://www.gov.cn/zhengce/content/2014-07/08/content_8926.htm#.

¹⁷ See Joy C. Shaw & Lisha Zhou, “China SAIC’s Microsoft investigation triggered by complaint from Kingsoft, sources say,” PaRR (Aug. 6, 2014); “China’s SAIC launches another antitrust raid of Microsoft premises,” PaRR (Aug. 6, 2014); Colum Murphy, “Car Makers Face Hits in China,” Wall St. Journal (Aug. 5, 2014).



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company's patents, regardless of whether the company has joined the SSO or otherwise participated in the standards setting process.¹⁸ This curtailment of IP rights would go far beyond international norms, as even the Draft Rules' defenders acknowledge.¹⁹ Indeed, the American Bar Association, the Quality Brands Protection Committee of China Association of Enterprises with Foreign Investment (which represents more than 200 global multinational companies in China), and even one large Chinese company have criticized the Draft Rules.²⁰

To the extent that China's enforcement of the AML is discriminatory, it arguably violates commitments that China undertook when it acceded to the World Trade Organization (WTO): "the Government of China encouraged fair competition and was against unfair competition of all kinds."²¹ The AML was expressly intended to enforce that commitment.²² Indeed, if China applies the AML in a manner inconsistent with its WTO obligations, this would arguably constitute a violation of WTO law despite being imposed under the guise of competition law.²³ For example, NDRC's use of AML investigations to pressure foreign companies to lower the prices of consumer goods could potentially violate Article XI:1 of the GATT 1994, which generally prohibits restrictions on the importation of goods. A WTO panel recently found that an unwritten measure imposed by Argentina requiring foreign companies to limit the volume and/or price of imports violates Article XI:1, and the same reasoning could apply to China as well.²⁴

Moreover, China's enforcement of the AML is inconsistent with its affirmation in the 2014 Strategic & Economic Dialogue S&ED) that:

¹⁸ SAIC, Prohibition of Abuses of Intellectual Property Rights for the Purposes of Eliminating or Restricting Competition (2013), Seventh Draft, Arts. 7, 13(b).

¹⁹ See, e.g., Salil Mehra & Yanbei Meng, "Essential Facilities with Chinese Characteristics: A Different Perspective on the Compulsory Licensing of Intellectual Property," *forthcoming* 3 J. of Antitrust Enforcement (2015) (describing the Draft Rules as "at great odds with the approach that Courts in ... the United States[] have taken in the past decade.").

²⁰ Joy C. Shaw & Lisha Zhou, "Chinese firm joins chorus of Western objections to SAIC's IP antitrust rules," PaRR (July 18, 2014).

²¹ Working Party on the Accession of China, "Report of the Working Party on the Accession of China," WT/ACC/CHN/49 (Oct. 1, 2001), para. 65; see also *id.*, para. 203 ("Permission to invest . . . would be granted without regard to the existence of competing Chinese domestic suppliers. Consistent with its obligations under the WTO Agreement and the Draft Protocol, the freedom of contract of enterprises would be respected by China.").

²² See *id.*, para. 65.

²³ China could attempt to raise an affirmative defense under Article XX(d) of the GATT 1994, for example, which permits the adoption or enforcement of measures necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the GATT. However, it is doubtful that China could meet the requirements of the chapeau to Article XX, which restricts the application of that provision to measures not imposed "in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."

²⁴ See Panel Report, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438,444,445/WT/R (not yet adopted), para. 6.185. Article XI:1 of the GATT applies with respect to restrictions on the importation of foreign goods. However, it does not apply to restrictions on the sale of goods produced domestically by foreign-invested companies.



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[T]he objective of competition policy is to promote consumer welfare and economic efficiency rather than promote individual competitors or industries, and that enforcement of their respective competition laws should be fair, objective, transparent, and non-discriminatory. China commits that its three Anti-Monopoly Enforcement Agencies (AMEAs) are to provide to any party under investigation information about the AMEA's competition concerns with the conduct or transaction, as well as effective opportunity for the party to present evidence in its defense.²⁵

While this statement is laudable, S&ED commitments are not legally binding under domestic law, and ongoing enforcement activity, as in NDRC's recent investigations of foreign automobile companies, raises legitimate questions regarding China's intent to honor such commitments.²⁶

These issues are discussed in greater detail below. Section I provides an overview of China's system for enforcing the AML. Section II then reviews the AML's text and legislative history, as well as official statements regarding its implementation, which confirm that the AML was designed in part as a vehicle for industrial policy. Sections III through V explain how industrial policy has overshadowed legitimate competition policy in practice, in the context of merger reviews, investigations, and judicial enforcement of the AML, and potentially also in SAIC's Draft Rules (if promulgated as currently drafted).²⁷ Finally, Section VI explains that China itself has a long-term interest in preventing industrial policy from co-opting competition law, and it offers specific recommendations for refocusing the AML on the legitimate policy objectives of safeguarding free, fair, and open competition.

I. Background: AML Enforcement Institutions²⁸

The AML established an administrative and judicial framework that is conceptually similar to that of other countries' competition law systems. However, unlike other countries, China divided responsibility for competition law among three different administrative agencies, as well as the judiciary. China also established a higher-level

²⁵ U.S. Department of the Treasury, "UPDATED: U.S.-China Joint Fact Sheet Sixth Meeting of the Strategic and Economic Dialogue," Press Release (July 11, 2014), available at <http://www.treasury.gov/press-center/press-releases/Pages/j12561.aspx>.

²⁶ See *infra* Section IV.A.1.c).

²⁷ SAIC released the final Draft Rules for public comment until July 10, 2014. See SAIC, "Announcement calling for public comment for SAIC Rules on the Prohibition of Abuses of Intellectual Property Rights for the Purposes of Eliminating or Restricting Competition (Draft for Public Comment)," Press Release (June 11, 2014), available at http://www.saic.gov.cn/gzhd/zqyj/201406/t20140610_145803.html.

²⁸ The AML is enforceable within mainland China and is not enforceable in Hong Kong, Macau, or Taiwan.



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body, the Anti-Monopoly Commission (AMC), to oversee and coordinate the administration of the AML, but its power is unclear and its involvement seems intermittent. These unusual institutional features of the AML reflect its dual role as a competition law and a vehicle for industrial policy.

A. Tripartite Division of Competition Law Enforcement Responsibilities

The three AMEAs responsible for enforcing the AML are MOFCOM, NDRC, and SAIC.²⁹ This tripartite division of enforcement responsibilities tends to lead to (i) dispersion of competition law expertise among several different agencies; (ii) exposure of competition law enforcement personnel to the institutional pressures of the larger agency to which they belong, which—particularly for NDRC—include a bias toward domestic industrial policy and price caps; and (iii) heightened risk of inconsistent interpretation and application of the AML.

MOFCOM is China's most outward-facing economic agency, with responsibility for most aspects of China's international trade and economic policy, including foreign trade and investment policy, WTO affairs, and trade remedies. Under the AML, MOFCOM's Anti-Monopoly Bureau (AMB) is responsible for reviewing proposed "concentrations"—*i.e.*, mergers, acquisitions, and the formation of joint ventures (whether full-function or not).³⁰ The AML states that any concentration satisfying certain monetary thresholds³¹

²⁹ MIIT has stated that it wishes to have greater powers to administer the AML with respect to both merger review and investigations in relation to the information technology industry. See Rebecca Zhang, "China's MIIT eyes extended regulatory reach on antitrust, unfair competition issues," PaRR (May 27, 2014).

³⁰ See AML, Arts. 3, 20. Full-function joint ventures can perform all the functions of an independent economic entity, whereas non-full function joint ventures are formed for a more limited purpose, such as to conduct R&D, produce a product, or provide a service. With respect to the definition of "concentrations," Article 20 of the AML states: "A concentration between business operators refers to: (1) a merger of business operators; (2) a business operator's acquisition of a controlling right in another business operator through the acquisition of equity or assets; [or] (3) a business operator's acquisition of a controlling right in another business operator or its ability to exercise decisive influence over another business operator by contract or other means." On June 6, 2014, MOFCOM amended and re-issued the Guidance on Notification of Concentrations Between Business Operators. Articles 3 and 4 of the new Guidance define "control" to include both sole control and joint control, and state that the determination of "control" should be based on multiple legal and factual considerations. The new Guidance also clarifies that the establishment of a joint venture is notifiable if and only if at least two business operators jointly control the joint venture.

³¹ See Provisions of the State Council on the Thresholds for Declaring Concentration of Business Operators, Art. 3 ("Concentration satisfying the following conditions must be notified in advance to MOFCOM: (1) The total amount of global turnover realized by all the participating business operators of the concentration during the previous accounting year exceeds RMB 10 billion with at least two business operators each achieving a turnover of more than RMB 400 million within China during the previous accounting year; [or] (2) The total amount of turnover within China realized by all participating business operators of the concentration during the previous accounting year exceeds RMB 2 billion with at least two business operators each achieving a turnover of more than RMB 400 million within China during the previous accounting year."). With respect to the calculation of turnover within China, Article 5 of the Guidance on Notification of Concentrations Between Business Operators (2014) clarifies that this includes products and services exported from foreign countries or regions to China, and excludes products and services exported from China to foreign countries or regions. In addition, note that higher thresholds apply



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must be reviewed by MOFCOM in order to close. However, as discussed below, this provision of the AML is not always strictly enforced with respect to purely domestic corporate transactions.³² In addition, MOFCOM may also exercise jurisdiction over proposed corporate transactions that do not satisfy the monetary thresholds, acting *sua sponte*.^{33,34}

NDRC is the largest AMEA, and has conducted most non-merger-related investigations under the AML to date. NDRC's predecessor agency, the State Planning Commission, previously set production targets and prices in China's centrally planned economy. Today's NDRC continues to play a broad, albeit less command-and-control, role as a macroeconomic administrator and regulator, responsible for formulating and implementing government policies in specific sectors of the economy. In the context of the AML, NDRC's Price Supervision and Anti-Monopoly Bureau is responsible for conducting investigations and imposing sanctions to enforce the provisions of the AML prohibiting (i) monopoly agreements or cartels—*i.e.*, agreements regarding pricing, purchasing, sales, or other conduct that has anti-competitive effects;³⁵ (ii) abuse of a dominant market position;³⁶ and (iii) administrative monopolies—*i.e.*, monopolistic conduct by public administrative bodies, such as public utilities, and potentially including

to concentrations in the financial industry. *See* Provisions of the State Council on the Thresholds for Declaring Concentration of Business Operators, Art. 4 (“For the purpose of calculating the turnover, the actual situations in the special industries and fields in respect of banking, insurance, securities, futures shall be taken into account.”); MOFCOM, PBC, CBRC, CSRC, and China Insurance Regulatory Commission (CIRC), Measures for the Calculation of Business Turnover for the Reporting of Concentrations of Financial Operators (Jul. 15, 2009).

³² *See* Section III.A.

³³ *See* Provisions of the State Council on the Thresholds for Declaring Concentration of Business Operators, Art. 4 (“Where the concentration of business operators does not reach the application threshold specified in these Provisions, but the facts and evidence collected pursuant to the prescribed procedures show that the said concentration has or might have the effect of excluding or restricting competition, the department in charge of commerce of the State Council shall conduct an investigation in accordance with the law.”).

³⁴ MOFCOM recently sought to expand its role to conduct local investigations in order to break regional monopolies, but MOFCOM has apparently not conducted any such investigations to date. *See* “Minister of MOFCOM Gao Hucheng held the Eighth Executive Meeting,” Central People's Government of the PRC (Aug. 29, 2013). MOFCOM approved “work plans for removing regional blockade and breaking industry monopoly,” “major tasks on removing regional blockade and breaking industry monopoly” and “work manuals for MOFCOM leaders to conduct local investigations” at the meeting. *Id.* MOFCOM lacks apparent statutory authority to conduct such investigations or other activity in this regard.

³⁵ *See* AML, Arts. 13, 14. The U.S. Chamber recognizes the harmful effects of cartels and has no substantive objection to NDRC's investigation of such domestic or international cartels as the South Korean and Taiwan LCD investigation (concluded 2013) and the Japanese automobile parts and ball bearings investigation (concluded 2014).

³⁶ The AML does not clearly define what constitutes either a dominant market position or its abuse. Rather, the AML states that whether a company has a dominant market position should be determined based on the following open list of factors: (i) market share and competitiveness; (ii) market power in either upstream or downstream markets; (iii) financial strength and technical conditions; (iv) “the extent to which other business managers depend on it in transactions”; (v) barriers to market entry; and (vi) the catchall “other factors related to the determination.” *See* AML, Art. 18.



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state-owned enterprises (SOEs) and other state-affiliated entities.³⁷ NDRC's enforcement activity under the AML began only in February 2011, two and one-half years after the AML itself became effective, when regulations authorizing NDRC to investigate and penalize companies pursuant to the AML were issued.³⁸ However, even before February 2011, NDRC had broad investigative authority under older legislation, especially the Price Law.³⁹ Such legacy is reflected in NDRC's structure—*i.e.*, the Price Supervision and Anti-Monopoly Bureau is responsible for both price regulation and anti-monopoly enforcement. NDRC also is consulted by MOFCOM on merger reviews, in which it often plays an active role.

SAIC, sometimes referred to as China's "economic police," has a more diffuse and decentralized structure than NDRC or MOFCOM, with enforcement activity taking place at the provincial and local levels through local Administrations for Industry and Commerce. In the context of the AML, SAIC has a role similar to that of NDRC, but SAIC has hundreds of thousands of personnel, mostly at the subnational level, to investigate and penalize violations of consumer protection and unfair competition laws and regulations, including under the AML.⁴⁰ In addition, like NDRC, SAIC's Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau's AML enforcement activity began in February 2011, with the promulgation of new regulations giving it the authority to conduct investigations.⁴¹ As of the writing of this report, SAIC is nearing the completion of a highly problematic set of new rules regarding abuse of dominance in the context of intellectual property rights (IPR) (as discussed further in Section IV.C).⁴² It remains to be seen whether SAIC will become a more assertive AMEA if and when such rules are promulgated.

³⁷ See AML, Art. 32.

³⁸ Regulations on Procedures for Enforcement of Administrative Law on Anti-Price Monopoly and Provisions on Anti-Price Monopoly were both promulgated by NDRC on December 29, 2010, and became effective on February 1, 2011.

³⁹ Unlike NDRC, SAIC generally does not participate in price-based investigations. See Price Law (promulgated by the Standing Committee of the National People's Congress on December 29, 1997, effective May 1, 1998).

⁴⁰ See "Notice of the State Council's General Office on Issuing the Provisions on the Main Functions, Internal Units, and Staffing of SAIC," Guobanfa No. 88 (Jul. 11, 2008), Secs. 2(6) and 3(3). The Anti-Unfair Competition Law (AUCL, promulgated by the Standing Committee of the National People's Congress on September 2, 1993, effective the same day) and the Law on the Protection of Consumers' Rights (promulgated by the Standing Committee of the National People's Congress on October 31, 1993, and revised on October 25, 2013), together with the competition provisions therein, are enforced primarily by SAIC and its local counterparts.

⁴¹ SAIC Regulations on Prohibiting Monopolistic Agreements, SAIC Regulations on Prohibiting Abuse of Dominant Market Positions, and SAIC Regulations on Prohibiting Abuse of Administrative Powers to Eliminate or Restrict Competition were promulgated on December 31, 2010, by SAIC and became effective on February 1, 2011. As its name suggests, SAIC's Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau is responsible for enforcing not only the AML but also the AUCL, *supra* note 40, a consumer protection statute dating back to 1993, for which the drafting of revisions has resumed. See *infra* note 68.

⁴² See *supra* note 27.



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This tripartite division of enforcement responsibilities is highly unusual internationally. The vast majority of major jurisdictions have only one competition enforcement authority. For example, the European Commission, together with the national competition authorities of member states, directly enforces European Union (EU) competition rules, and the Directorate-General for Competition within the Commission is primarily responsible for all direct enforcement powers. The Australian Competition and Consumer Commission (ACCC), Indonesian Business Competition Supervisory Commission, Japan Fair Trade Commission, Korea Fair Trade Commission, Competition Commission of South Africa, and the Federal Antimonopoly Service of Russia are the only competition law enforcement authorities in those countries. The United States, with authority divided between the Department of Justice (DOJ) and the Federal Trade Commission (FTC), is the exception for purely historical reasons.⁴³

Dividing responsibilities among several enforcement agencies is particularly counterproductive given the significant resource constraints faced by China's AMEAs in terms of staffing and expertise. MOFCOM's AMB has only about 20 staff members devoted to handling cases,⁴⁴ and NDRC's three divisions for AML investigations together comprise only 46 people.⁴⁵ By comparison, the European Commission has approximately 100 staff members responsible for reviewing proposed mergers, and the U.S. DOJ's Antitrust Division and FTC's Bureau of Competition together have approximately 900 employees.⁴⁶ Moreover, AML enforcement personnel within the three AMEAs are not necessarily assigned to competition law for their entire careers, but may instead shift between bureaus handling different responsibilities in their respective AMEAs.

⁴³ During the drafting process for the AML, U.S. officials and practitioners explained that the divided structure in the United States was an artifact of history that should not be emulated. *See* "Joint Submission of the American Bar Association's Sections of Antitrust Law, Intellectual Property Law and International Law on the Proposed Anti-Monopoly Law of the People's Republic of China" (May 2005), at 4 & note 28, *available at*

http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_prc2005wapp.authcheckdam.pdf. However, the rivalries between different Chinese government departments made it impossible to heed this advice.

⁴⁴ Tom Fairless et al., "Beijing Applies Brakes on Major Global Deals," *Wall St. Journal* (Apr. 1, 2014) (quoting Shang Ming, head of MOFCOM's AMB, as stating that staffing for merger reviews is inadequate). Information regarding SAIC's staffing is not publicly available but is believed to be very small at the central government level.

⁴⁵ *See* Lisha Zhou & Rebecca Zhang, "Shortage of manpower is NDRC's biggest challenge in China – ABA Antitrust in Asia," *PaRR* (May 23, 2014). This article quotes Xu Kunlin, Director-General of the Price Supervision and Anti-Monopoly Bureau of NDRC, as stating that the shortage of enforcement manpower is the biggest challenge facing NDRC in its application of the AML. *Id.* Mr. Xu has asked for an increase of up to 460 staffers (*i.e.*, 10 times the current staffing level) to meet enforcement demands. *Id.* Information regarding SAIC's staffing is not publicly available but is also believed to be very small at the central government level.

⁴⁶ *See* DOJ, Antitrust Division Telephone Directory, <http://www.justice.gov/atr/contact/phoneworks.html> (providing contact information for Antitrust Division employees and FTC employees within the Bureau of Competition); FTC, Inside the Bureau of Competition, *available at* <http://www.ftc.gov/about-ftc/bureaus-offices/bureau-competition/inside-bureau-competition>.



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Indeed, the AMEAs' handling of cases has fallen short of professional standards in a number of instances. For example, as discussed in Section III.B, many MOFCOM decisions have been inadequately explained, and NDRC has threatened to initiate investigations of foreign companies on the basis of casual discussions at a conference, as a way to encourage them to admit to wrongdoing preemptively. To its credit, MOFCOM appears to recognize the problem and has hired outside economic experts in at least six merger review cases so far.⁴⁷ In addition, MOFCOM and the other AMEAs sometimes consult with Chinese academics regarding individual cases, including through the Expert Advisory Board, which is comprised of 21 experts including jurists, economists, and industrial specialists, and is led by former State Council Legislative Affairs Office head Zhang Qiong.⁴⁸ Such efforts may help the AMEAs enforce the AML more professionally in the future.

It is important to recognize that the shortcomings in China's AML enforcement system have not consistently occurred in any other countries that have imposed new competition laws in the past two decades.⁴⁹ China's lagging development is due to some extent to the tripartite division of enforcement responsibilities, which makes the learning curve for each AMEA much steeper. It also reflects the different institutional priorities of each AMEA that—particularly for NDRC—have to date focused more on industrial policy than on safeguarding competition.

B. The AMC

The AMC is one of several supra-ministerial “coordinating and consulting bodies” (CCBs) that coordinate government activity across multiple agencies.⁵⁰ Like other CCBs,

⁴⁷ MOFCOM's published decisions indicate that MOFCOM sought external expertise in Coca-Cola/Huiyuan, Seagate/Samsung, Western Digital/Hitachi, and MediaTek/Cayman MStar. MOFCOM has also hired outside experts for UPS/TNT Express. *See* Fei Deng, “A Five Year Review of Merger Enforcement in China,” *Antitrust Source* (Oct. 2013) and hired Edgeworth Economics for Thermo Fisher/Life, *see* Lisha Zhou & Joy C. Shaw, “SAIC welcomes external economic analysis services in antitrust investigations – ABA Spring Meeting,” *PaRR* (Mar. 28, 2014).

⁴⁸ Zhang Xinzhu, a member of the Expert Advisory Board hired by the AMC, was recently fired from his post because he allegedly “received a large amount of compensation” from Qualcomm for a “non-monopoly” defense in the context of NDRC's AML investigation of Qualcomm. Zhang Qiong was said to have told Zhang Xinzhu not to speak for foreign companies and not to stand opposed to the government, as well as to write a confession about the matter. *See* “Sacked Chinese state antitrust adviser allegedly received money from Qualcomm – reports (translated),” *PaRR* (Aug. 13, 2014); *see also infra* Section IV.A.2.b). Qualcomm has denied having any direct financial links with Professor Zhang. Qualcomm representative Christine Trimble told Reuters: “Qualcomm paid Global Economics its standard rates for the firm's services and did not have any financial dealings with Zhang directly.” *See* Ben Blanchard and Matthew Miller, “Qualcomm denies direct financial links with Chinese antitrust expert,” *Reuters* (August 14, 2014).

⁴⁹ *See* International Competition Network, “ICN Report on OECD/ICN Questionnaire on International Enforcement Cooperation” (2013), *available at* <http://internationalcompetitionnetwork.org/uploads/library/doc908.pdf> (noting that growth in new competition laws and agencies around the world in the past two decades has been “explosive”).

⁵⁰ Commissions like the AMC are weaker, however, than “leading small groups” that are intended to drive policy in particular directions.



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the AMC is composed of high-ranking members from government agencies and is chaired by a senior official such as the Premier, a Vice Premier, or a State Councilor—in this case, Vice Premier Wang Yang.⁵¹ In addition to the 3 AMEAs, 13 other agencies are also represented on the AMC, including industry regulators such as MIIT, which is responsible for adopting plans, policies, and standards for China's industrial development; also represented are departments with sector-specific regulatory authority, such as the Ministry of Transport, the People's Bank of China (PBC), and other financial regulators.⁵²

There is almost no publicly available information about the workings of the AMC, and it has issued very few regulations.⁵³ Indeed, one Chinese commentator suggested that the AMC has mostly been passive with respect to AML enforcement.⁵⁴ However, the AMC may play a role in ensuring that AMEA enforcement activities are consistent with the objectives of the AML.

II. The AML's Prioritization of Industrial Policy over Competition Law

The AML's text and legislative history both confirm that it was designed not only to ensure a smooth transition from a centrally planned economy to a market-based economy, but also to promote industrial policy. Moreover, Chinese officials' statements since enactment of the AML confirm that industrial policy and discriminatory intent continue to guide its application and enforcement.⁵⁵

⁵¹ Former Vice Premier Wang Qishan chaired the AMC when it was first established in 2008, and continued as the Director until March 2013, when Vice Premier Wang Yang replaced him as Director. *See* Liu Wei & Xie Peng, "Five Years of Anti-Monopoly in China," *Southern Weekend* (Sept. 27, 2013).

⁵² The member agencies of the AMC are MOFCOM, NDRC, SAIC, MIIT, Ministry of Supervision, Ministry of Finance, Ministry of Transport, SASAC, SIPO, Legislative Affairs Office of the State Council, PBC, National Bureau of Statistics, CBRC, CSRC, CIRC, and State Electricity Regulatory Commission. *See* Notice on the Guidelines on the Definition of the Relevant Market, AMC under the State Council (May 24, 2009) (providing a list of member agencies). MOFCOM provides AMC's secretariat. The AMC as well as some of its member agencies have issued anti-monopoly regulations and rules within their own sphere of authority. For example, CBRC, CIRC, CSRC, MOFCOM, and PBC jointly promulgated the Measures for Calculating the Turnover for the Declaration of Business Concentration in the Financial Industry on July 15, 2009.

⁵³ An exception is the Guidance on the Definition of the Relevant Market issued by the AMC on May 24, 2009.

⁵⁴ *See* Liu Xu, "Three Anti-Monopoly Law Enforcement Authorities: What Have They Done Wrong in Law Enforcement," *Caixin Online* (Aug. 6, 2014) (reporting that, as far as publicly available information indicates, the AMC has been passive and has not fully performed its duties during the past six years).

⁵⁵ This paper primarily addresses the problematic aspects of the AML. However, other Chinese laws, such as the Price Law and the AUCL, can also serve as a vehicle for pernicious industrial policies. For example, NDRC recently opened an investigation into pricing practices of foreign pharmaceutical companies under the Price Law. *See* Rui Yang, "Anti-Monopoly Targeting at Pharmaceutical Industry, Two Pharmaceutical Companies in Shandong Fined 7 Million for Forcing Up Price," *National Business Daily* (Nov. 15, 2011). Moreover, currently China is in the process of amending the AUCL, which could lead to revisions that tilt China's overall competition law regime further in the direction of industrial policy and/or curtailment of

The image shows a scale of justice on the left, symbolizing law and equity. On the right, there is a map of China with various cities and regions labeled, such as Yinchuan, Lanzhou, and Xining. The title 'COMPETING INTERESTS IN CHINA'S COMPETITION LAW ENFORCEMENT' is overlaid on the right side of the image in a bold, white, sans-serif font.

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A. Text of the AML

The AML requires that the AMEAs use the tools of competition law to advance China's broader, non-competition-related industrial objectives. It also imposes a legal burden on companies participating in certain types of potentially innocent commercial agreements to demonstrate affirmatively that their conduct does not have anti-competitive effects. When coupled with the AMEAs' limited willingness or capability to conduct economic analysis (as discussed above at Section I.A) and the absence of an independent judiciary (as discussed below at Section V), the AMEAs have wide latitude to inject industrial policy concerns into their AML enforcement activity.

1. Industrial policy objectives in the text of the AML

The AML includes provisions (i) encouraging the “healthy development of [a] socialist market economy,”⁵⁶ (ii) establishing a special role for SOEs (described as the “lifeline of the national economy”),⁵⁷ (iii) carving out a privileged role for administrative monopolies,⁵⁸ and (iv) providing a prohibition on abuse of dominance that is specific to IPR.⁵⁹ “Socialist” in this context means “public ownership”—a reference to SOEs. Although many competition laws contain vague statements regarding the public good that are subject to misinterpretation, this and other references to industrial policy in the text of the AML arguably put China outside international competition law norms. For example, even in the European Union—a competition law jurisdiction considered to give greater weight to industrial policy⁶⁰—competition law does not identify the development of the economy as a goal of competition law, does not explicitly carve out a special role for SOEs, and does not treat anti-competitive conduct involving IP any differently from other forms of anti-competitive conduct.

First, the integration of competition law into industrial policy starts at Article 1 of the AML, which provides:

This Law is enacted for the purpose of preventing and restraining monopolistic conduct, protecting fair market competition, enhancing economic efficiency, safeguarding the interests of consumers and the interests of the society as a whole, and

widely used IP. See SAIC, “SAIC Has Formally Initiated the Task of Revising the AUCL,” (Mar. 3, 2014), available at http://www.saic.gov.cn/fldyfbzdzjz/gzdt/201403/t20140303_142680.html.

⁵⁶ Art. 1.

⁵⁷ Art. 7.

⁵⁸ Art. 8.

⁵⁹ Art. 55.

⁶⁰ See, e.g., D. Daniel Sokol, “Merger Control under China’s Anti-Monopoly Law,” Minnesota Legal Studies Research Paper No. 13-05 (Jan. 27, 2013), at 6–7.



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*promoting the healthy development of the socialist market economy.*⁶¹

In addition, Article 4 provides:

The State shall establish and implement competition rules *appropriate for the socialist market economy*,⁶² shall improve macroeconomic regulation and control, and shall establish a unified, open, competitive and well-ordered market system.⁶³

These provisions indicate that competition law is a tool for Chinese policymakers in shaping the “socialist market economy.” This is confirmed by the “Three Musts” doctrine discussed in Section II.C, which specifically refers to Article 4, and which indicates that the AML is designed to encourage the concentration of market power by SOEs and national champions.

Second, Article 7 also recognizes that certain SOEs and national champions should play a special role:⁶⁴

With respect to the industries which are under the control of the State-owned economic sector and have a bearing on the lifeline of the national economy or national security, and the industries which exercise monopoly over the production and sale of certain commodities according to law, the State shall protect the lawful business operations of undertakings in these industries, and shall, in accordance with the law, supervise and regulate their business operations and the prices of the commodities and services provided by them, in order to protect consumers’ interests and facilitate technological advancement.

The undertakings mentioned in the preceding paragraph shall do business according to law, be honest, faithful and strictly self-disciplined, and subject themselves to public supervision, and they

⁶¹ Emphasis added.

⁶² The socialist market economy is the official economic model employed by China. It is based on socialist public ownership (*i.e.*, ownership by SOEs) and is designed to enable market mechanisms to play a basic role in allocating society’s resources under national macro-control. The concept was introduced by Deng Xiaoping as a major economic reform policy following his tour to southern China in 1992. *See* Shi Kaifeng, “Deng Xiaoping’s Theory on Socialist Market Economy and Its Significance,” *Special Economic Zone* (1996), Issue 8.

⁶³ Emphasis added.

⁶⁴ Art. 7 was weakened during the AML’s drafting process. An earlier draft would have granted industry regulators a “right of first refusal” in enforcing the law, authorizing the anti-monopoly authorities to step in only when the industry regulators fail to act. *See* Nathan Bush, “The PRC Antimonopoly Law: Unanswered Questions and Challenges Ahead,” *Antitrust Source* (Oct. 2007) at 5.



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shall not harm consumer interests by taking advantage of their position of control or their monopolistic production and sale of certain commodities.

Thus, Article 7 confirms the privileged role of SOEs that “have a bearing on the lifeline of the national economy,” stating that they may lawfully “exercise monopoly over the production and sale of certain commodities according to law.” Article 7 then provides that the State “shall protect” these industries. Article 7 also provides that these companies shall be “strictly self-disciplined,” implying that they are required to ensure their own conformity with competition law because they are relatively immune to enforcement by the AMEAs compared with private companies. Indeed, the heads of SOEs may have political rank equal to or greater than that of officials in the AMEAs.⁶⁵

Third, the AML has a separate and less restrictive set of rules governing administrative monopolies.⁶⁶ In particular, several provisions of the AML imply that use of monopoly power by an administrative monopoly may be permitted in some cases where it would not be permitted by a private actor. For example, Article 51 provides:

If the laws or administrative regulations contain other provisions regarding conduct eliminating or restricting competition by administrative authorities and organizations authorized by laws or regulations to perform public functions through the abuse of their administrative powers, those provisions shall apply.

Accordingly, the AML does not disturb other legal provisions that permit administrative bodies to “abuse . . . their administrative powers.” No such exception applies to other types of monopolies. Although the AML prohibits “abuse of administrative power to eliminate or restrict competition,”⁶⁷ and SAIC has promulgated rules empowering it to

⁶⁵ See “Administrative Levels of First Chiefs,” Phoenix Finance (Oct. 31, 2013). Some 54 centrally supervised SOEs listed by SASAC are of vice-ministerial level, ranking higher than the local enforcement agencies of NDRC and SAIC; in addition, China Railway Corporation and National Investment Co., Ltd. are ministerial-level enterprises with rank equal to the three AMEAs. Talk of canceling administrative ranks of SOEs began at least as far back as 1999 with the Decisions on Major Issues Regarding the Reform and Development of SOEs issued by the 15th Central Committee of the Communist Party in the Fourth Plenary Session, but to date there has been no major cutback owing to the political influence and vested interests enjoyed by SOEs and their leaders.

⁶⁶ AML, Art. 32. Although earlier drafts of the AML called for stricter regulation of administrative monopolies, these provisions were weakened in the final version. See Lester Ross, “China’s Antimonopoly Law,” *Antitrust* (Spring 2008), at 70.

⁶⁷ AML, Art. 8. The AML specifies several types of prohibited administrative monopolistic conduct, such as discriminatory pricing, licensing, imposing investment restrictions, or engaging in other trade-restrictive conduct that results in protectionism at the local level. See AML, Arts. 35, 36. In addition, administrative agencies may not “compel” private companies to engage in conduct that is otherwise prohibited by the AML. See AML, Art. 37.



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enforce this prohibition,⁶⁸ these prohibitions have in practice been enforced mainly with respect to local administrative monopolies or other monopolies that have not been approved by the central government.⁶⁹ Meanwhile, administrative monopolies promoting vested interests supported by the central government have not been curbed.^{70,71}

Fourth, with respect to IP licensing, Article 55 provides:

This Law shall not apply if a business operator exercises its intellectual property rights pursuant to the laws and administrative regulations relating to intellectual property rights. However, this Law shall apply to the conduct of a business operator which eliminates or restricts competition by abusing intellectual property rights.

Thus, Article 55 identifies a special category of prohibited monopolistic behavior: the abuse of IPR.⁷² As such, this provision potentially recognizes a legitimate tension between IPR and competition law in the context of China's IP environment. For example, in theory, patent holders could use leverage acquired as the result of a standard-setting process to demand a higher royalty rate or other favorable terms for SEPs than they could credibly have demanded beforehand.⁷³ However, in context, Article 55 arguably has a protectionist cast as well, because at present and in certain industries most licensees are domestic Chinese companies, which in some cases may be SOEs with great bargaining

⁶⁸ SAIC, Provisions for Administrative Authorities for Industry and Commerce to Prevent Abuses of Administrative Powers to Exclude or Restrain Competition (2010); *see also supra* note 41

⁶⁹ *See, e.g.*, SAIC, "Show the Sword to Protect Fairness: Anti-Monopoly Work Summary of SAIC" (Jul. 31, 2013), *available at* http://news.xinhuanet.com/food/2013-07/31/c_125095644.htm (reporting that SAIC and its local counterparts have stopped 30 administrative monopolies since 2008).

⁷⁰ These administrative monopolies include industrial trade barriers and administrative companies. Examples of industrial trade barriers include government departments responsible for certain industry or trade associations using their regulatory power to block new entrants. Administrative companies are companies that have the power to both regulate an industry and simultaneously compete in it. Seven industries including tobacco, electricity, oil extraction and processing, transportation, radio and television, and banking and finance have the most administrative monopolies in China. *See* Unirule, "Chinese Administrative Monopolies May Be Easily Used by Groups with Vested Interests," Phoenix Finance (Dec. 1, 2010).

⁷¹ However, the Central Committee of the Chinese Communist Party has recently decided to "vigorously develop" a "composite ownership economy" to curb SOEs to some extent. *See* Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensively Deepening the Reform (Decision Document) adopted at the Third Plenum of the 18th Central Committee of the Chinese Communist Party on November 12, 2013, *available at* http://www.china.org.cn/china/third_plenary_session/2014-01/16/content_31212602.htm.

⁷² Neither the SPC nor any of the AMEAs has yet issued any official interpretation of this provision.

⁷³ *See* Statement of FTC before U.S. Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights, "Standard Essential Patent Disputes and Antitrust Law" (Jul. 30, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-concerning-standard-essential-patent-disputes-and/130730standardessentialpatents.pdf.



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power. Indeed, in China, the problem of licensee hold-out —*i.e.*, an unwillingness to agree to an IP agreement on reasonable terms—arguably poses at least as great a threat to competition as licensor hold-up, given that AMEAs have previously enforced the AML in a manner that increases domestic licensees' bargaining power (as discussed in relation to InterDigital in Section IV.A.2.a)). Furthermore, Article 55 is not limited to SEPs, but rather applies to IPR more generally. Particularly in light of the AMEAs' demonstrated tendency to curtail IPR by restricting foreign licensors' ability to license both SEPs and non-SEPs on terms of their own choosing (as discussed in Sections III.B.2.b), III.B.2.c), and IV.A.2, and as proposed in SAIC's Draft Rules),⁷⁴ Article 55 appears to signal that the AML may curtail the legitimate use of IPR to favor domestic licensees over foreign licensors.

By contrast, under the competition laws of the United States and the EU, IPR is not specifically identified as a potential source of competition law violations, nor is IPR curtailed for the sake of protecting competition. Moreover, although the United States and EU competition law authorities have issued guidelines on the relationship between IPR and competition law,⁷⁵ China has not yet issued such guidelines, and its draft guidelines are highly problematic, as discussed at Section IV.C below.

2. Burden of proof on the notifying parties

The AML provides that certain types of agreements *per se* violate the AML, unless the participants are able to prove otherwise.⁷⁶ In other words, companies alleged to participate in such agreements are “guilty until proven innocent.” In particular, Articles 13 and 14 provide blanket prohibitions of certain types of agreements between competitors (“horizontal” agreements), as well as agreements between businesses and their “trading parties” (“vertical” agreements).⁷⁷ However, the agreements covered by

⁷⁴ Under U.S. and EU law, as under Chinese law, competition law can reach abuses of IPR that harm competition. U.S. antitrust enforcement agencies have indicated that they will apply the same antitrust principles to patents, copyrights, and trade secrets. *See* DOJ and FTC, Antitrust Guidelines for the Licensing of Intellectual Property (1995), Sec. 1. Recently, some officials have highlighted the importance of maintaining this symmetry between antitrust rules in the IP context and elsewhere. *See, e.g.*, Joshua D. Wright, Commissioner, FTC, “2014 Milton Handler Lecture at the New York City Bar Association: Antitrust in the 21st Century” (Mar. 11, 2014). In addition, the EU competition rules for licensing agreements set out in Article 101 of the Treaty on the Functioning of the European Union prohibit agreements between companies that lead to an appreciable restriction of competition. Enforcement of this primary rule is complemented by two instruments, the technology transfer block exemption regulation and accompanying Technology Transfer Guidelines.

⁷⁵ *Id.*

⁷⁶ Art. 15 identifies the specific showings that are required.

⁷⁷ *See* AML, Arts. 13, 14. Horizontal agreements include monopoly agreements on fixing or changing commodity prices, restricting the quantity of commodities manufactured or marketed, splitting the sales market or the purchasing market for raw and semi-finished materials, restricting the purchase of new technologies or equipment or the development of new technologies or products, joint boycotting of transactions, and other monopoly agreements confirmed as such by the relevant AMEA. Vertical agreements include monopoly agreements on fixing the prices of commodities resold to a third party, restricting the lowest prices for commodities resold to a third party, and other monopoly agreements



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Articles 13 and 14 are not necessarily anti-competitive. For example, one such type of agreement—*i.e.*, vertical agreements fixing or limiting the price of products for resale to third parties (so-called Resale Price Maintenance or RPM agreements)—was recognized by the Shanghai Higher People's Court in *Rainbow v. Johnson & Johnson* as not *per se* illegal under the AML.⁷⁸ Nonetheless, any company that enters into an agreement covered by Articles 13 and 14 has the burden of proof that its conduct is not anti-competitive, as implementing regulations confirm.⁷⁹

This burden-of-proof structure likely has a disproportionate effect on foreign companies,⁸⁰ which may have less political influence in China. Moreover, as discussed in Sections III.A and IV.A, AML enforcement activity is disproportionately directed at such companies. As a result, the AML's onerous burden-of-proof rules are likely to place foreign companies at a particular disadvantage.

B. Legislative History

Efforts to draft a unified Chinese competition law began in 1994 and continued into the 2000s.⁸¹ During this period, there were many competing visions for the AML, including a continuation of China's transition to a market economy. However, part of the impetus for enacting the AML was to reduce the influence of foreign companies in the Chinese economy, and to protect domestic favorites from competition that might constitute a threat to their growth—or in the words of one statement in a semiofficial SAIC publication, to impose “counter-measures to regulate multinationals' anti-competition behavior.”⁸² These objectives have had an influence on the text of the AML (as discussed above in Section II.A), as well as its implementation (as discussed in Sections III–V).

confirmed as such by the relevant AMEA. *Id.* Other jurisdictions have held that vertical agreements should be analyzed under a *rule of reason* rather than deemed to be *per se* illegal. *See, e.g.*, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

⁷⁸ *See* Ding Liang, “After Many Twists and Turns China's First Vertical Monopoly Agreement Dispute Has Ended—Comments on *Rainbow v. Johnson & Johnson*,” *Wolter Kluwer* (Aug. 5, 2013). The SPC has yet to rule on an RPM case and has not cited *Rainbow v. Johnson & Johnson* as a model case.

⁷⁹ *See also* Anti-Price Monopoly Regulation (2010), NDRC Order No. 7, Art. 10; Regulation on the Administrative Enforcement Procedure for Anti-Price Monopoly (2010), NDRC Order No. 8, Art. 13. In addition, NDRC's announcement regarding penalties in the infant formula investigation stated that “during the investigation, all relevant enterprises admitted their illegal RPM practices, and were unable to prove that their conduct of price-fixing met the conditions for exemption under Article 15 of the AML.” *See* “Biostime and Other Milk Power Enterprises Were Fined a Total of RMB 668.73 Million for Conducts Restricting Competition That Violate the AML,” NDRC News Center (Aug. 7, 2013); *see also infra* Section IV.A.1.b). This statement confirms that in NDRC's view, the burden is on the party under investigation to prove that its conduct is not anti-competitive.

⁸⁰ For ease of exposition, the term “foreign companies” is used to refer to “foreign-invested companies.” “Foreign-invested” means a company registered in China with at least 25% foreign investment.

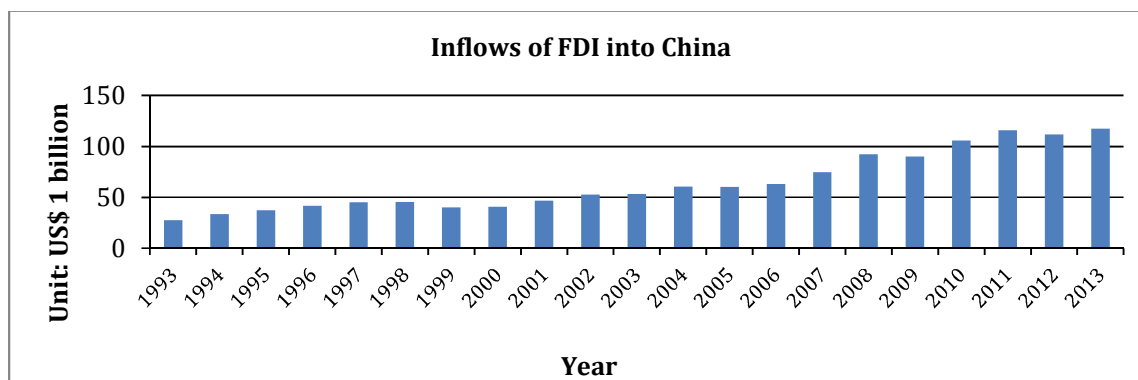
⁸¹ *See* Lester Ross, “China's Antimonopoly Law,” *Antitrust* (Spring 2008), at 66.

⁸² SAIC Fair Trade Bureau, “Multinationals' Anti-Competition Behavior in China and Counter-Measures Therefor” (“Multinationals' Anti-Competition Behavior”), Industry and Commerce Administration (Mar. 1, 2004), *translation available at* http://apps.americanbar.org/antitrust/at-committees/at-ic/pdf/programs/Multinationals_anti_competition_behavior_eng_v1.pdf.

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In the 1990s and the 2000s, foreign companies became increasingly significant in China's economy, as reflected in the increase of foreign direct investment (FDI) inflows into China, as shown in Figure 1.

Figure 1



Source: China Statistics Yearbook 2013. All data are from MOFCOM.⁸³

The steady increase of FDI in China helped to propel the economy forward, leading to double-digit GDP growth for most of the 1990–2010 period.⁸⁴ However, it also sparked nationalist and protectionist sentiments against the expansion of foreign companies in China's economy, which ultimately provided additional impetus for finally enacting a new set of competition laws in the 2000s.⁸⁵ For example, a document published by the then Fair Trade Bureau of SAIC⁸⁶ in *Industry and Commerce Administration*, an official publication of SAIC, on March 1, 2004, stated:

After the entry to the WTO, China has further speeded up its steps of opening up to the outside world. Many well-known multinationals have entered China for China's huge market and economic development potential. Now more than 400 of the world's top 500 companies have come and invested in China.

⁸³ Some portion of FDI inflows consists of money round-tripped from China to capture foreign investment preferences.

⁸⁴ See The World Bank, "Foreign Direct Investment—The China Story" (Jul. 16, 2010), available at <http://www.worldbank.org/en/news/feature/2010/07/16/foreign-direct-investment-china-story> ("According to MOFCOM, foreign invested enterprises account for over half of China's exports and imports; they provide for 30% of Chinese industrial output, and generate 22% of industrial profits while employing only 10% of labor—because of their high productivity. In addition, industries with higher FDI seem to have higher productivity increases than other industries, suggesting that technology spillover also has a positive effect.").

⁸⁵ At the time, China already had several competition-related laws in place, such as the AUCL, the Law on the Protection of Consumers' Rights, and the Price Law. See Lester Ross, "China's Antimonopoly Law," *supra* note 81, at 66.

⁸⁶ The Fair Trade Bureau became the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau in 2008.



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While promoting China's economic and technical development, they also brought some negative effects to China. Compared with domestic companies, these multinationals possess huge advantages in technology, scale, capital etc. It is easy for them to gain a competitive edge, even monopoly positions, in the market. Thus they may curb competition and jeopardize other players' and consumers' interests.⁸⁷

The document went on to identify two foreign companies—the U.S. software company Microsoft and the Swedish sterilized packaging company Tetra Pak—as companies with “an obvious market edge or even a monopoly in the market in China.” Indeed, since the AML took effect, SAIC has targeted both of these companies with investigations under the AML.⁸⁸ In addition, the document also delineated three categories of alleged “anti-competitive behavior by multinationals”: (i) abuse of dominance, (ii) anti-competitive agreements, and (iii) mergers and acquisitions. In conclusion, the document called, *inter alia*, for drafting of the AML to be completed, because: “We do not have adequate laws, and the existing laws are insufficient as a legal basis to deal with the anti-competition behavior of the multinationals.”⁸⁹

These policy goals were also reflected in two sets of regulations that were forerunners to the AML: the Provisional Regulations Regarding Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, promulgated in 2003, and the Regulations on Mergers and Acquisitions by Foreign Investors, promulgated in 2006.⁹⁰ These laws imposed merger review requirements on foreign companies alone—not on domestic companies.

⁸⁷ See *Multinationals' Anti-Competition Behavior*, *supra* note 82.

⁸⁸ See *Multinationals' Anti-Competition Behavior*, *supra* note 82; *see also*, e.g., Joy C. Shaw & Lisha Zhou, “China SAIC’s Microsoft investigation triggered by complaint from Kingsoft, sources say,” PaRR (Aug. 6, 2014); “China’s SAIC launches another antitrust raid of Microsoft premises,” PaRR (Aug. 6, 2014); “Tetra Pak’s Dependency Syndrome, SAIC Threw a Punch of Investigation,” Southern Metropolis Daily (Jul. 6, 2013).

⁸⁹ See *Multinationals' Anti-Competition Behavior*, *supra* note 82.

⁹⁰ Provisional Regulations Regarding Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (promulgated jointly by MOFCOM’s predecessor Ministry of Foreign Trade and Economic Cooperation, SAT, SAIC, and State Administration of Foreign Exchange (SAFE) on March 13, 2003, effective April 12, 2003) (2003 Regulations); Regulations on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (promulgated jointly by MOFCOM, SASAC, SAT, SAIC, CSRC, and SAFE on August 8, 2006, effective September 8, 2006) (2006 Regulations). Under the 2006 Regulations, MOFCOM and SAIC had to review and approve any direct foreign acquisition of domestic enterprises if certain turnover or other business-related thresholds were satisfied. Approval by MOFCOM and SAIC was also required for offshore transactions if separate assets, turnover, or other business-related thresholds were satisfied. *See* 2006 Regulations, Art. 53. The thresholds are (i) a party’s Chinese assets equaled or exceeded RMB 3 billion; (ii) a party’s annual turnover in China exceeded RMB 1.5 billion in the current year; (iii) a party, together with its affiliates, had a 20% or larger market share in China; (iv) the transaction would result in a party, together with its affiliates, having a 25% or larger market share in China; or (v) the transaction would result in a party, directly or indirectly, having more than 15 foreign-invested enterprises in China in the relevant industry.



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In 2006, the National People's Congress (NPC, China's national legislature) debated a draft version of the AML, with legislators stressing the importance of using competition law to curb the influence of foreign companies, and also of circumscribing competition law to make room for domestic industries to consolidate and expand. For example, NPC members stated:

- “We should proceed from two aspects of thinking in our mind when drafting the anti-monopoly law. First, we should bear in mind the effect brought by the law to protect and create a favorable environment for competition in the market. Second, we shouldn't ignore the industrial policy of our country, which is to facilitate the enterprises to acquire bigger and stronger development with the economy of scale.”⁹¹
- “Multinationals usually purchase the good assets from those [acquired domestic] companies while leaving us many leftover problems. If we allow pillar companies which the country has fostered for years to be taken over by multinationals, the country will face the danger of losing dominant power on industrial development and technological progress.”⁹²
- “We welcome the investment of large foreign companies in China but will prevent them from taking market monopolistic positions which are not good for fair competition in a market economy. ... Now it is a good time for Chinese companies, for instance steel companies, to form up industry association[s] when negotiating with other countries in raw material purchase in [the] international market, and so coordination within the industry is necessary.”⁹³
- “[D]omestic Chinese enterprises are still at the preliminary stage of development. With the exception of a small number of industries, where administrative or state-mandated monopolies exist due to the planned economic modality and the needs of national interests, the so-called free competition in other industries are basically competitions of an excessive, vicious and unfair nature. This not only includes general consumer industries, but also the steel and automobile sectors, wherein the original plans to have three to four players in each have given way to several dozen or even more businesses co-existing with each other. At present, we are still at the preliminary stage of developing a market economy. The domestic market would still need to focus on how to improve the level of concentration, technical strengths and competitive competence.”⁹⁴

⁹¹ Yao Xiangcheng, member of the NPC Standing Committee. Emphasis added.

⁹² Ni Yuefeng, member of the NPC Standing Committee. Emphasis added.

⁹³ Cheng Siwei, Vice Chairman of the NPC Standing Committee. Emphasis added.

⁹⁴ Lu Yongxiang, Vice Chairman of the NPC Standing Committee. Emphasis added.



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- “[T]he relationship between the Anti-Monopoly Law and the security of domestic industries, and particularly strategic industries, should be handled properly. In general, Chinese enterprises are small and weak and industries remain segmented. The major question is how can we build Chinese companies in size and strength and also address the problem of unfair and out-of-order competition. Only by expanding size and improving the economy of scale can competition flourish. For instance, powerful foreign-funded companies are acquiring or merging domestic companies, creating unfair competition.”⁹⁵
- “Anti-monopoly is a must-do in a market economy. However at the present stage we still need to facilitate the efforts of Chinese companies in increasing their market share. And price alliance remains necessary in external trade while vicious competition must be eradicated in order to safeguard national interest. Therefore we must have a sense of propriety to, on the one hand, help Chinese companies expand their size and market share and strive for a more advantageous position in international competition and, on the other hand, oppose any monopoly.”⁹⁶
- “The question is how do we crack down on local protectionism and at the same time enable our companies to grow stronger and bigger. Chapter 2 [of the draft AML] forbids monopoly agreements, which are usually reflected by a price alliance. In our foreign trade, products made in China are often sold in the international market at low prices The current situation is partly a result of the vicious competition among our domestic companies. Therefore, sometimes it is necessary to adopt a proper price [i.e., apparently, through price agreements] to safeguard the overall interest of the industry. . . . From the perspective of enhancing international competitiveness, I think we should encourage our companies to expand their market share.”⁹⁷
- “Currently, two kinds of monopoly practices exist in the market economy of our country. The first is monopoly by public utilities, such as those in the areas of telecommunications, water supply, railway, public transportation, freight, aviation, crude oil and natural gas in particular. Second is monopoly by multinationals in China, such as computer operating systems, photosensitive material, tires, network equipment, cameras and soft-packaging. These two types of practices seriously harm the legitimate rights and interests of market operators and consumers. The society would strongly react to both behaviors, calling for the investigation and handling of them, which involves several departments and regulators.”⁹⁸

⁹⁵ Liu Zhenwei, member of the NPC Standing Committee. Emphasis added.

⁹⁶ Zheng Gongcheng, member of the NPC Standing Committee. Emphasis added.

⁹⁷ Zheng Gongcheng, member of the NPC Standing Committee. Emphasis added.

⁹⁸ Jiang Zhuping, member of the NPC Standing Committee. Emphasis added.



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These statements confirm that industrial policy goals played a significant role in the drafting process for the AML.

C. Official Statements after Enactment of the AML

After the text of the AML was finalized, Chinese legal authorities and government officials continued to make statements confirming that the AML is designed at least in part to implement industrial policy and curb the influence of foreign companies. For example, in May 2008—after the AML was promulgated, but before it came into effect—the Legislative Affairs Commission of the NPC Standing Committee issued a book of commentary on the draft AML text, and articulated a doctrine known as the “Three Musts”:

It is a noticeable character of AML to be based on our unique national conditions. The principle of AML is to protect competition and prevent monopoly, but these must be done with national situation in mind and in conformity with socialist market economy. We must [(i)] protect the basic national economic system, strengthen and develop economy of public ownership, and also encourage, support and guide the development of economy of private ownership. We must [(ii)] establish principled rules for market competition in accordance with the requirements of a socialist market economy, and make sure that under national macroeconomic regulation and control, all types of enterprises including SOEs conduct business through fair and orderly market competition. Based on the reality of our current national economic society development, we must [(iii)] bear in mind the requirements to enlarge and strengthen, concentrate and improve the market competitiveness of our enterprises, macro-coordinate the relations between anti-monopoly and the implementation of national industrial policies, make sure that the business operators compete fairly and combine voluntarily, so as to legally achieve concentration, enlargement of business scale and improvement of market competitiveness. These three “musts” reflect the characters of AML and should be the basic principle of this law.⁹⁹

Thus, according to the Legislative Affairs Commission, the “national situation” and the “socialist market economy” can trump the AML’s pro-competition role. Moreover, the first and third “musts” both confirm that the AML is expected to enable SOEs and other domestic enterprises to play an even stronger role than they already do. The third “must”

⁹⁹ *Translation of Legislative Affairs Commission, “Interpretation of the Anti-Monopoly Law of the People’s Republic of China,” Law Press China (2008), at 4. The “Three Musts” doctrine relates specifically to Article 4 of the AML. Id.*



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is particularly troubling, because it explicitly ties the AML to the implementation of China's industrial policy.¹⁰⁰

In addition, Chinese government officials' public statements have repeatedly confirmed that industrial policy—including curbing the role of foreign companies, allowing domestic SOEs and national champions to achieve greater market concentrations, facilitating China's access to commodities worldwide, and curtailing foreign companies' IPR—should sometimes trump competition-related concerns in the context of AML enforcement. For example:

- Xu Kunlin, Director-General of NDRC's Price Supervision and Anti-Monopoly Bureau, stated in 2013: “Given that China is still at the ‘catch up and overtake’ stage, industrial policy needs to play its critical role in China's economic development.”¹⁰¹
- At a training session for AML enforcement personnel in 2011, Zhao Xiaoguang, Director of the Department of Industry, Transport, and Commerce of the Legislative Affairs Office of the State Council, stated: “Companies of our country are not well developed as market players yet. As for the actual situation, market competition is insufficient or not at proper levels. The development of various kinds of companies is not in balance, and their competitiveness needs improvement. As a whole, the scale of companies of our country is relatively small, the concentration level of industries is not high, and competitiveness is not strong. The industrial policy of the state is to encourage companies to develop themselves and become bigger and stronger through means such as mergers and restructuring, to develop the economies of scale, increase economic efficiency, strengthen enterprise innovation ability, and thus increase the overall developing level and international competitiveness of our economy. Therefore, the guiding role and regulatory functions of the Anti-Monopoly Law have to be exercised, make the Anti-Monopoly Law a powerful policy tool of inhibiting monopoly, encouraging competition, increasing the quality of introduced foreign investment,

¹⁰⁰ The Legislative Affairs Commission's commentary is not legally binding so in this respect its commentary differs from judicial interpretations issued by the SPC, which are legally binding. However, the Legislative Affairs Commission's commentary likely reflects the preponderance of drafters' views regarding the AML. Moreover, as China does not have a separation of powers, the NPC is ultimately superior to the SPC, so the latter is likely to pay particular heed to such commentary.

¹⁰¹ See Xu Kunlin, transcript of press conference regarding China's economy, Beijing (Sept. 24, 2013), available at <http://www.chinanews.com/gn/2013/09-24/5315630.shtml> (emphasis added). Xu went on to say: “I suggest that China should establish a pre-consultative mechanism revolving around industrial policy and competition policy, enabling the competition policy to be the fundamental economic policy and the industrial policy to be subject to competition policy. This mechanism should not interrupt fair and competitive market order, but ensure the market to play its role to enhance the efficiency of the allocation of resources.” It is unclear precisely what is meant by having “industrial policy to be subject to competition policy,” although it could refer to having industrial policy be implemented through competition policy.



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and promoting the adjustment of the economic structure and the development of economies of scale."¹⁰²

- At a competition law conference in late 2012, MOFCOM Minister Gao Hucheng signaled that China should use competition law to secure control over natural resources abroad. He stated: "China must pay attention to global consolidation in raw materials, agriculture and energy. ... The country's antitrust system should develop to help address the problem of the gulf between growing demand and a shortage of supply, said the Minister. ... To protect China's public interest, MOFCOM should leverage the extraterritorial effect of the Anti-Monopoly Law. Among all the Chinese economic laws, the AML is the only one that has extraterritorial effect. ... After four years of anti-monopoly enforcement, we found that extraterritorial jurisdiction plays an important and irreplaceable role in maintaining effective competition in the Chinese market and safeguarding China's national economic benefits[.]"¹⁰³
- In a March 19, 2014, commentary titled "A Preliminary Discussion of Anti-Monopoly Rules Regarding IPR Abuse," two officials in NDRC's Price Supervision and Anti-Monopoly Bureau stated: "We should base ourselves on indigenous situations, and reflect stringency in enforcement. China's real circumstances should be taken into full account in the anti-monopoly regulation against abuse of IPR: on the one hand, China's IPR legal system is still young, and IPR receives insufficient protection and the administration and enforcement of the [IPR] legal system are weak; and on the other, due to lack of awareness of fair and orderly competition, IPR is often being used as a tool to practice monopolies; there is the issue that IPR is being alienated. As such, at the current stage, even more strict administration and enforcement should be exercised against abuse of IPR, for it is not only a widely applied and common principle in the early years of any competition law's enforcement activity, it is also a rational choice based on China's current IPR status and market competition conditions."¹⁰⁴

Thus, China is well aware of the tension between competition law objectives and industrial policy, and it has often decided to subordinate the former to the latter, as illustrated below with respect to each AMEA's enforcement activity.

¹⁰² See Nate Bush & Yue Bo, "Disentangling Industrial Policy and Competition Policy in China," Antitrust Source (Feb. 2011) at 3 (emphasis added). As the quoted text indicates, NDRC has a broader policy of encouraging concentrations of domestic industry, rather than letting markets be determinative. See also, e.g., USCBC, "USCBC Summary of the National Development and Reform Commission (NDRC) 2014 Work Plan" (Feb. 5, 2014); see also *supra* note 2.

¹⁰³ See Lisha Zhou et al., "MOFCOM Tightens Review on Resources and Commodity Mergers—Analysis," PaRR (Mar. 19, 2013).

¹⁰⁴ See Lu Yanchun & Liu Jian, "滥用知识产权反垄断规制刍议 [A Preliminary Discussion of Anti-Monopoly Rules Regarding IPR Abuse]," Legal Daily (Mar. 19, 2014).



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Notably, this approach to competition law stands in tension with China's more recently renewed and broader, higher-level commitment to "let[ting] the market play the decisive role in allocating resources," decided at the 2014 Third Plenum, a major Communist Party conclave that set high-level policy goals for the rest of the decade.¹⁰⁵ The Decision Document from the Third Plenum stated:

We must actively and in an orderly manner promote market-oriented reform in width and in depth, greatly reducing the government's role in the direct allocation of resources, and promote resources allocation according to market rules, market prices and market competition, so as to maximize the benefits and optimize the efficiency. The main responsibility and role of the government is to maintain the stability of the macro-economy, strengthen and improve public services, safeguard fair competition, strengthen oversight of the market, maintain market order, promote sustainable development and common prosperity, and intervene in situations where market failure occurs.¹⁰⁶

This statement suggests that the market and efficiency should dictate the terms of competition and market prices, regardless of the nationality of the market actors or their shareholders or other industrial policy considerations. As discussed below, China's enforcement of the AML often fails to live up to this ideal.

III. Merger Review

Merger review is a basic tool to modify or block proposed transactions that would harm competition in the marketplace. MOFCOM has applied this tool exclusively to transactions involving foreign companies, imposing remedies that tend to promote China's industrial policy—*e.g.*, by promoting national champions, capping commodity

¹⁰⁵ See Decision Document adopted at the Third Plenum of the 18th Central Committee of the Chinese Communist Party on November 12, 2013. The State Council subsequently issued a directive in accordance with the guidance of the Decision Document to promote fair competition, including facilitating market entry and severely punishing anti-competitive behavior. The directive calls for NDRC, MOFCOM and the Ministry of Finance to lead an effort to cut red tape in government agencies at all levels that may hinder the operation of a unified national market and fair competition, and end discrimination against non-local products and services. The NDRC will also lead an effort to introduce competition in public utilities and basic infrastructure, opening up businesses in industries with natural monopolies. MOFCOM, NDRC, SAIC and SIPO will oversee an effort to thoroughly investigate and punish anti-competitive behavior, monopoly agreements that harm innovation and abuses of market dominance, strengthen merger reviews, and reform the regulation of industries with natural monopolies to strengthen monopoly supervision. See Several Opinions by the State Council to Promote Fair Market Competition and Protect Normal Market Order, issued by the State Council (June 4, 2014), Guo Fa [2014] No.20, available at http://www.gov.cn/zhengce/content/2014-07/08/content_8926.htm#.

¹⁰⁶ *Id.*



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prices and IP royalties, or protecting Chinese brands. By contrast, many purely domestic transactions have been *de facto* exempted from MOFCOM's filing requirements altogether.¹⁰⁷

These features of MOFCOM's merger review regime are inconsistent with those of other major competition law jurisdictions, such as the United States and the EU. In fact, MOFCOM, like the other two AMEAs, has refrained from joining the International Competition Network (ICN), an international consulting body that issues recommended practices and guidance for conducting fair, transparent, and nondiscriminatory merger reviews as well as other enforcement activity, to which the competition authorities of most countries (including the United States and EU member states) belong. MOFCOM's failure to join ICN is all the more surprising in light of China's willingness to join similar organizations in other regulatory areas, such as banking and insurance.¹⁰⁸

At the outset, it is important to note that although there is more evidence regarding discrimination in the context of merger review, this does not necessarily indicate that MOFCOM enforces the AML in a more discriminatory manner than other AMEAs. Rather, MOFCOM has a longer track record, owing to the fact it has been reviewing mergers since the AML took effect in August 2008, whereas regulations enabling NDRC and SAIC to enforce the AML were not in place until February 2011. Indeed, in important respects, MOFCOM's enforcement activity has been more transparent than that of other AMEAs (*e.g.*, MOFCOM publishes decisions that at least attempt to explain the rationale for conditionally approving or blocking proposed transactions, whereas NDRC does not publish decisions explaining its legal rationale for investigating or punishing companies under the AML).

A. Discriminatory Scope of Application

In principle, every concentration satisfying the applicable monetary thresholds must be reported to MOFCOM in order to close.¹⁰⁹ However, in practice, most purely domestic transactions have gone unreported, whether or not reportable under the thresholds. From August 2008 (when the AML came into effect) through the second quarter of 2014, 864 transactions were decided by MOFCOM. Only 60 of these 793 transactions—7.6%—were domestic-to-domestic.¹¹⁰ Furthermore, third-party data appear to suggest that there

¹⁰⁷ Indeed, foreign investment decisions are increasingly left to local or provincial review, whereas AML merger review (and national security review, discussed in Section III.C) elevate them to central government review. *See* MOFCOM, Notice on Decentralizing the Examination and Approval Power for Foreign Investment (issued June 10, 2010), Art. 1 (raising notification thresholds for provincial [and equivalent] governments from \$100 million to \$300 million encouraged/permitted investments).

¹⁰⁸ For example, Chinese financial regulators are members of the Basel Committee on Banking Supervision and the International Association of Insurance Supervisors.

¹⁰⁹ *See* AML, Art. 21.

¹¹⁰ *See* Lester Ross & Kenneth Zhou, "MOFCOM to Publicize Administrative Penalties for Illegal Implementation of Concentrations," *WilmerHale* (Apr. 21, 2014), <http://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=17179872193>.



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is no dearth of large domestic-to-domestic M&A transactions in China, contrary to what the small number of domestic-to-domestic MOFCOM notifications may suggest. Domestic-to-domestic transactions account for approximately 80% of M&A deals with a Chinese target.¹¹¹ Thus, it appears that the great majority of reportable domestic-to-domestic transactions were not reported. Under the AML, the parties failing to report transactions should have been sanctioned and the concentrations potentially unwound.¹¹² Instead, many domestic-to-domestic transactions were effectively exempted from AML notification requirements or rigorous merger review. In March 2014, MOFCOM decided to beef up enforcement by publicizing penalty decisions for mergers in which MOFCOM has not been notified in accordance with the law.¹¹³

Furthermore, all of the instances in which MOFCOM has blocked transactions or imposed conditions (*i.e.*, remedies) on their approval have involved one or more foreign companies. To date, MOFCOM has rejected 2 transactions, and imposed conditions to clearance on 24 others. All 26 of the cases resulting in rejections or conditions involved foreign companies, 22 of which involved transactions between foreign companies exclusively (Table 1).

Table 1. Conditional Approvals and Rejections by MOFCOM under the AML

No.	Date of decision	Parties	Foreign-to-foreign transaction	Foreign-to-domestic transaction	Domestic-to-domestic transaction
1.	11/18/2008	InBev/Anheuser-Busch	✓		
2.	3/18/2009	Coca-Cola/Huiyuan (rejection)		✓	

¹¹¹ See Yan Sobel, “Domestic-to-Domestic Transactions—A Gap in China’s Merger Control Regime?” Antitrust Source (Feb. 2014), at 5.

¹¹² Indeed, there are examples of several notable concentrations going unreported. For example, in 2008, China Netcom and China Unicom, two state-owned telecommunications firms, merged. China Netcom’s annual turnover was RMB 84.0 billion in 2007, and China Unicom’s was RMB 100.4 billion. See Biqiang Wang, “The China Unicom and China Netcom Merger May Infringe the AML,” Economic Observer (Apr. 30, 2009). In addition, in 2013, the Chinese dairy company Mengniu acquired 85% of Yashili, another dairy company. Mengniu’s annual turnover was RMB 36.1 billion in 2012, and Yashili’s was RMB 3.7 billion. See Neil Gough, “China Mengniu Dairy Offers \$1.6 Billion for Baby Formula Firm,” New York Times (Jun. 18, 2013). Thus, it is likely that both of these transactions satisfied the notification thresholds. However, MOFCOM’s published data indicate that neither of these transactions was reported to MOFCOM—even though under State Council rules, reportable transactions may not be consummated if they are not reported.

¹¹³ See “MOFCOM Will Disclose Administrative Penalty Decisions for Illegal Implementation of Business Concentrations,” Central People’s Government of the PRC (Mar. 20, 2014). Administrative punishments for concentrations under investigation for failing to file from May 1, 2014, will be published on MOFCOM’s website. MOFCOM issued the Provisional Rule on Failure to Notify Concentrations of Business Operators (2012) governing merger deals that met the filing threshold but were nonetheless not filed with MOFCOM.



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3.	4/24/2009	Mitsubishi Rayon/Lucite	✓		
4.	9/28/2009	General Motors/Delphi	✓		
5.	9/29/2009	Pfizer/Wyeth	✓		
6.	10/30/2009	Panasonic/Sanyo	✓		
7.	8/13/2010	Novartis/Alcon	✓		
8.	6/2/2011	Uralkali/Silvinit	✓		
9.	10/31/2011	Alpha V/Savio	✓		
10.	11/10/2011	General Electric (China)/Shenhua		✓	
11.	12/12/2011	Seagate/Samsung	✓		
12.	2/9/2012	Henkel (Hong Kong)/Tiande Chemical	✓		
13.	3/2/2012	Western Digital/Hitachi	✓		
14.	5/19/2012	Google/Motorola Mobility	✓		
15.	6/15/2012	United Technologies/Goodrich	✓		
16.	8/13/2012	Wal-Mart/Yihaodian		✓	
17.	12/6/2012	ARM/Giesecke & Devrient/Gemalto	✓		
18.	4/16/2013	Glencore/Xstrata	✓		
19.	4/22/2013	Marubeni/Gavilon Holdings	✓		
20.	8/8/2013	Baxter International/Gambro AB	✓		
21.	8/26/2013	MediaTek/Cayman MStar	✓		
22.	1/14/2014	Life Technologies/Thermo Fisher Scientific	✓		
23.	4/8/2014	Microsoft/Nokia	✓		
24.	4/30/2014	Merck/AZ	✓		
25.	6/17/2014	Maersk/Mediterranean Shipping/CMA CGM (rejection)	✓		
26.	7/2/2014	Corun/Toyota China/PEVE/New Source/Toyota Tsusho		✓	



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Such discrimination is not a feature of mature competition law jurisdictions. For example, in the United States, only 32.4% of conditional approvals and rejections between October 1, 2008 and September 30, 2012 involved foreign companies.¹¹⁴ Similarly, in the EU, only 54.3% of conditional approvals and rejections between August 1, 2008 and December 31, 2013 involved non-EU companies.¹¹⁵ By contrast, as the table above illustrates, all conditional approvals and rejections in China from August 1, 2008 to June 18, 2012 (the latest date for which data were available prior to this report's publication) involved mergers or acquisitions by foreign companies.^{116,117} Moreover, as discussed in Section III.B, the remedies applied 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.¹¹⁸

¹¹⁴ See FTC & DOJ, Hart-Scott-Rodino Annual Report: Fiscal Year 2012; FTC & DOJ, Hart-Scott-Rodino Annual Report: Fiscal Year 2011; FTC & DOJ, Hart-Scott-Rodino Annual Report: Fiscal Year 2010; FTC & DOJ, Hart-Scott-Rodino Annual Report: Fiscal Year 2009. (These annual reports are available at <http://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports>.) Thirty-five of the 108 cases challenged by the DOJ or FTC involved foreign companies.

¹¹⁵ The European Commission's competition case database indicates that 38 of the 70 conditionally approved merger review decisions dated August 1, 2008 to December 31, 2013 involved non-EU companies. See <http://ec.europa.eu/competition/elojade/isef/>.

¹¹⁶ The most recent MOFCOM rejection involved the proposed P3 operational alliance among the EU-based container shipping companies Maersk, Mediterranean Shipping, and CGA CGM, for Europe-Asia shipping routes. See MOFCOM Announcement [2014] No. 46 (Jun. 17, 2014), available at <http://fldj.mofcom.gov.cn/article/ztxx/201406/20140600628586.shtml>. MOFCOM reportedly consulted with the domestic Chinese shipping industry as well as NDRC and MOT, which has separate regulatory authority with respect to competition in the shipping industry, in advance of its decision. See Joy C. Shaw, "China's MOFCOM seeks input from local competitors, industry groups on P3 Network," PaRR (Mar. 18, 2014). MOFCOM issued its decision after U.S. and EU regulators had cleared the proposed deal. See Dominic Chopping, "China Scuppers European Shipping Alliance: Chinese Antitrust Regulator Blocks Deal Between Maersk, Others That Had Been Blessed by U.S., Europe," Wall St. Journal (June 17, 2014). First Financial Daily reported on May 7, 2014 that three leading state-owned shipping companies, Pan Asian Shipping, Shanghai Puhai Shipping, and Sinotrans Container Lines (subsidiaries of COSCO, CSCL, and Sinotrans, respectively), entered into a low-profile agreement to collaborate in the China-Japan container shipping market. However, this agreement was not submitted to MOFCOM for clearance, and there is no indication that MOFCOM's AMB has investigated the matter. See Liu Xu, "Three Anti-Monopoly Law Enforcement Authorities: What Have They Done Wrong in Law Enforcement," Caixin Online (Aug. 6, 2014).

¹¹⁷ In addition, in the EU, 49.7% of proposed transactions notified to the European Commission for merger review from August 1, 2008, to December 31, 2013, were between EU companies. *Id.* (showing that 777 of the 1,562 merger review decisions dated between August 1, 2008 and December 31, 2013 were between EU companies); (Comparable data are not available for the United States.) By contrast, as noted above, the figure for China is 7.6%.

¹¹⁸ See, e.g., Working Party on the Accession of China, "Report of the Working Party on the Accession of China," WT/ACC/CHN/49 (Oct. 1, 2001), para. 65 ("the Government of China encouraged fair competition and was against unfair competition of all kinds"); see also para. 203 ("Permission to invest . . . would be granted without regard to the existence of competing Chinese domestic suppliers. Consistent with its obligations under the WTO Agreement and the Draft Protocol, the freedom of contract of enterprises would be respected by China.").



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Part of the reason for this discrimination may lie in the novelty of the AML—and hopefully, as MOFCOM gains more experience and political credibility with respect to enforcement of the AML, it will punish companies that fail to report transactions in advance.¹¹⁹ Another factor may be the impact of national security considerations in merger reviews, particularly prior to the promulgation of a separate national security review procedure for foreign acquisition of domestic companies and assets in 2011, a procedure administered by MOFCOM.¹²⁰ However, other countries that have also introduced new competition law statutes in the past five years have not had problems with discrimination or industrial policy on the same scale as China.¹²¹ Other countries have also not established a track record of conducting inordinately long reviews, or of pressuring parties to suggest remedies without being informed of the supposed threat to competition posed by the proposed transaction. Thus, MOFCOM's discriminatory enforcement of the AML appears to be the result at least in part of a deliberate policy, likely imposed at the behest of other ministries and companies, rather than inexperience.

B. Promotion of Industrial Policy

Three categories of MOFCOM merger review decisions are discussed below: those that (i) seek to weaken foreign companies competing with Chinese national champions, and/or clear space in the competitive landscape for domestic competitors that do not yet exist; (ii) maintain the *status quo* with respect to the price and supply of goods and IP marketed by foreign companies to Chinese purchasers/licensees; and (iii) serve to protect famous Chinese brands. Moreover, although these decisions are couched in the language of competition law and cite supposed threats to competition, their outcomes do not actually promote competition, and in some cases they actually hinder it, in furtherance of Chinese industrial policy objectives.

Notably, this discrimination has persisted despite international efforts to coordinate the merger review process with China. In particular, the FTC and DOJ, which administer competition laws in the United States, signed a Memorandum of Understanding (MOU) with MOFCOM in July 2011, which is designed to facilitate coordination between the United States and China regarding the timing of specific cases of investigations, as well as technical consultation, training, and exchanges of information.¹²² The European Union,

¹¹⁹ See also *supra* note 113.

¹²⁰ Regulations of the Implementation of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors was promulgated by MOFCOM on August 25, 2011, and became effective on September 1, 2011; see also Section III.C.

¹²¹ For example, the Malaysian Parliament passed the Competition Act 2010 in April 2010. The act came into force in January 2012 and prohibits anti-competitive activities and abuse of dominance. In addition, the Peruvian government enacted an Unfair Competition Law in June 2008 that unifies in a single normative body the regulation of unfair competition and commercial advertising. Yet these countries have not been criticized for allowing industrial policy to influence the implementation of competition law.

¹²² See FTC, "Federal Trade Commission and Department of Justice Sign Antitrust Memorandum of Understanding with Chinese Antitrust Agencies," Press Release (Jul. 27, 2011).



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Australia and Kenya signed similar MOUs with China in September 2012, May 2014 and June 13, 2014, respectively.¹²³

However, the MOUs appear to be counterproductive for two reasons. First, they may result in MOFCOM obtaining advance information on the substance and timing of other competition law authorities' decisions, which enables MOFCOM to ensure that its decisions are harsher. Indeed, in all of the cases discussed below that were reviewed by U.S. and EU competition law authorities (*i.e.*, all except Coca-Cola/Huiyuan and Uralkali/Silvinit), MOFCOM's decisions were both the last and the most restrictive. Second, the MOUs arguably impart a veneer of international approval to MOFCOM's merger review process. As noted above, MOFCOM has not joined ICN, and it is outside the international mainstream both in terms of the outcomes of its merger reviews and its procedural defects, which are discussed in Section IV.B.

1. Protection of national champions

China has an official policy of promoting “industrial concentration” in industries that it considers strategic, including steel, aluminum, agriculture, and others.¹²⁴ In line with this policy, several MOFCOM merger review decisions have restricted the expansion of foreign competitors in certain Chinese and international commodities markets. The effect of this policy is to allow national champions and SOEs to grow and achieve a stronger, more dominant market position, including through acquisitions—contrary to the general purpose of competition law—while inhibiting further such transactions by foreign companies. This was the case, for example, in the Glencore/Xstrata and Marubeni/Gavilon decisions.

a) Glencore/Xstrata

In the Glencore/Xstrata deal, Glencore, a Swiss commodity trading and mining company, sought to acquire Xstrata, a Swiss mining company, for \$41 billion.¹²⁵ Some 376 days

¹²³ See European Commission, “Competition: Commission Signs EU Cooperation Agreement with China,” Press Release IP/12/993 (Sept. 20, 2012), available at http://europa.eu/rapid/press-release_IP-12-993_en.htm; ACCC, “Australia and China to increase cooperation on mergers regulation,” Press Release (May 22, 2014); MOFCOM, “Shang Ming, head of MOFCOM’s AMB Met David O. Ong’olo, head of Kenya’s competition agency, and exchanged opinions on anti-monopoly enforcement and cooperation,” Press Release (June 16, 2014). In addition, NDRC has signed an MOU with its Korean counterpart, available at <http://www.accc.gov.au/media-release/australia-and-china-to-increase-cooperation-on-mergers-regulation>; NDRC, “价监局许昆林局长率团访问韩国 [Director-General Xu Kunlin’s Visit to South Korea]” (May 19, 2014), available at http://www.ndrc.gov.cn/gzdt/201405/t20140519_612028.html (reporting that Mr. Xu and his Korean counterparts engaged in bilateral consultations regarding abuse of dominance involving IPR).

¹²⁴ See, e.g., 2013 MIIT Joint Opinions, *supra* note 3 (listing the following targets for industrial consolidation: automobiles, steel, cement, shipbuilding, electrolytic aluminum, rare earths, electronic information, pharmaceuticals, and agriculture).

¹²⁵ See Firat Kayakiran & Jesse Riseborough, “Glencore to Buy Xstrata for \$41 Billion in Biggest Mine Deal,” Bloomberg (Feb. 8, 2012).



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after Glencore submitted its initial notification (and 139 days after its second notification was accepted), on April 16, 2013, MOFCOM approved the transaction conditionally, forcing Glencore to divest a copper mine in Peru known as Las Bambas—apparently with the goal of transferring this mine to Chinese state-owned enterprises, in accordance with China's goal of securing greater access to natural resources in Latin America.

Neither Glencore nor Xstrata owned or operated productive assets in China. Moreover, their market shares in the copper concentrate market were relatively low: 1.5% and 6.1%, respectively, in terms of world production in 2011, and 5.3% and 4%, respectively, in terms of supply in 2011. In China itself, Glencore and Xstrata had respective market shares of 9% and 3.1% in terms of the supply of copper concentrate (and again, as noted above, they did not have any productive assets in China). With such low levels of market concentrations, competition authorities in other jurisdictions like the ACCC in Australia might have easily concluded that the proposed transaction concluded no threat with respect to the copper concentrate market¹²⁶—indeed, the European Commission presumes an absence of restrictive effects for transactions that would result in a market concentration of 25% or less.¹²⁷

Nonetheless, MOFCOM required Glencore to divest the Las Bambas mine in Peru by August 31, 2014, to a buyer that also had to be approved by Chinese authorities.¹²⁸ Glencore complied with MOFCOM's remedy and announced on April 13, 2014, that it had reached an agreement to complete the divestiture, transferring control over the Las Bambas mine to a consortium of companies dominated by Chinese SOEs: MMG Limited, a subsidiary of China Minmetals Corporation; CITIC Metal Co. Ltd., a subsidiary of CITIC Group Corp.; and Guoxin International Investment Co. Ltd.¹²⁹ This supplements China's existing portfolio of mining assets in Latin America, which includes Chinalco Mining Corp. International's copper concentrate operations at the Toromocho project in

¹²⁶ The ACCC approved the transaction in early July 2012. The ACCC cited the merged company's "relatively low share of global production" and the existence of several "remaining substantial competitors" post-transaction in concluding that any effect the deal may have on global markets would pose "minimal impact on Australian users of those products or end-consumers." See John Tivey et al., "Glencore's Long March to Take Over Xstrata," White & Case (Apr. 2013).

¹²⁷ See Hanna C. L. Ha et al., "MOFCOM Orders Extraterritorial Divestiture of Key Mining Asset in Glencore/Xstrata Merger: Lessons for Future Notifications," Mayer Brown (May 6, 2013), at 1.

¹²⁸ Under the terms of the merger, if Glencore failed to sell the mine by August 31, 2014, under specified financial conditions, then Glencore had to submit a proposal to MOFCOM for the appointment of a divestiture trustee empowered to sell another Glencore copper mining project in Latin America or Southeast Asia. See MOFCOM Announcement [2013] No. 20 (Apr. 16, 2013), available at <http://fldj.mofcom.gov.cn/article/ztxx/201304/20130400091222.shtml>; "China Group Buys \$6bn Glencore Peru Copper Mine," BBC News (Apr. 13, 2014), available at <http://www.bbc.com/news/business-27017623>.

¹²⁹ See Yvonne Lee et al., "Chinese Bid for Glencore Mine Is Delayed: Offer for Las Bambas Project in Peru Stumbles over Price," Wall St. Journal (Feb. 24, 2014). The lead stakeholder in the consortium is the Australian company MMG Ltd., which is controlled by China Minmetals Corporation through its subsidiary China Minmetals Nonferrous Metals Co. Ltd., and therefore should also be regarded as Chinese-controlled.



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Peru, which began in December 2013.¹³⁰ Notably, China Minmetals Corporation, CITIC Group Corp., and Chinalco Mining Corp. all reported their transactions to MOFCOM and they were unconditionally approved.

MOFCOM's decision was ostensibly based on competition-related considerations: MOFCOM noted that China relies heavily on imports of raw materials, and also pointed out the importance of China as a major market for both Glencore and Xstrata to the proposed transaction. However, MOFCOM failed to address how the merger would result in the combined entity having the ability to exert an anti-competitive influence despite its low market share. Thus, China appears to have used the Glencore/Xstrata merger opportunistically to effectively transfer control of an important foreign mine to Chinese state ownership. Indeed, the outcome in this case is potentially anti-competitive, as it facilitated the potential formation of an international cartel controlling a higher share of natural resources abroad if the several Chinese owners of different mines work together.

By contrast, before MOFCOM issued its decision, the ACCC had approved the deal unconditionally on July 3, 2012, after just an 84-day review,¹³¹ and a few days later DOJ did the same.¹³² The European Commission approved the transaction on November 22, 2012, after a 51-day review, subject only to the condition that Glencore divest a minority shareholding in Nyrstar, a zinc producer, because “the merged entity would have ... the ability and incentive to control the level of zinc metal supplies in [Europe].”¹³³ The European Commission did not perceive any competitive threat with respect to the copper concentrate market.

b) Marubeni/Gavilon

In the Marubeni/Gavilon deal, Marubeni Corp., a Japanese trading company, sought to acquire Gavilon Holdings, the third-largest grain purchasing, storage, and distribution company in North America, for \$5.6 billion.¹³⁴ Some 305 days after submission of the initial notification (and 78 days after the second notification was accepted), MOFCOM

¹³⁰ See Alexis Flynn, “Glencore Xstrata Sells Las Bambas Mine to Chinese Consortium: Peruvian Copper Project Fetches \$5.8 Billion after Months of Talks,” *Wall St. Journal* (Apr. 13, 2014).

¹³¹ See ACCC, “Glencore International plc—Proposed Acquisition of Xstrata plc.,” Mergers register, available at <http://registers.accc.gov.au/content/index.phtml/itemId/1063438/fromItemId/75104.3>.

¹³² See John Tivey et al., “Glencore’s Long March to Take Over Xstrata,” *White & Case* (Apr. 2013). Specifically, DOJ allowed the Hart-Scott-Rodino waiting period (30 days) to expire without taking any action or seeking any type of remedy.

¹³³ See European Commission, “Mergers: Commission Approves Glencore’s Acquisition of Xstrata, Subject to Conditions,” Press Release IP/12/1252 (Nov. 22, 2012), available at http://europa.eu/rapid/press-release_IP-12-1252_en.htm. The other commitments made by Glencore were (i) to terminate its exclusive long-term off-take agreement with Nyrstar; (ii) not to buy directly or indirectly any European Economic Area (EEA) zinc metal quantities from Nyrstar for a period of 10 years; and (iii) not to engage, for 10 years, in any other practices that have the effect of materially restricting Nyrstar’s ability or incentive to compete effectively with Glencore in zinc metal in the EEA.

¹³⁴ See “UPDATE 2—China Conditionally Clears \$5.6 bln Marubeni/Gavilon Deal,” *Reuters* (Apr. 23, 2013).



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issued a decision that effectively required Marubeni and Gaviion to keep their soybean exporting and selling operations completely separate.¹³⁵ The apparent purpose of this condition was to weaken Marubeni and in turn expand the opportunities for the Chinese state-owned commodities giant (COFCO) and other Chinese national champions to achieve greater concentration in the market.¹³⁶

In 2012, Marubeni accounted for 14%–18% of Chinese soybean imports, the relevant market identified by MOFCOM, reflecting the injection of import-dependency into the merger review. (This market definition is an aberration compared with other jurisdictions, which would include import sales as part of overall sales in a domestic or global market, rather than defining a narrower market consisting only of imports.)¹³⁷ In addition, Gaviion's soybean market share in China was less than 1%,¹³⁸ although MOFCOM's decision did not cite this statistic. Thus, the proposed transaction would not have significantly increased concentration in the Chinese soybean market.

Nonetheless, MOFCOM concluded that the transaction posed a threat to competition, because “Marubeni may take advantage of Gaviion's capability in the procurement, storage and logistics of soybeans in North America,” and “Marubeni may, by virtue of its complete marketing network and rich customer resources in China, substantially increase its export of soybeans into China, so as to further strengthen its leading position in the import market of soybeans in China and to strengthen its power to control the import market of soybeans in China.”¹³⁹ Based on this reasoning, MOFCOM required Marubeni and Gaviion to set up two independent legal entities for exporting and selling soybeans on the China market. After two years, Marubeni and Gaviion could ask MOFCOM to reconsider.

As a result of these conditions, Marubeni and Gaviion were prevented from integrating their sales to China to create efficiencies, paving the way as a consequence for COFCO, an SOE competitor, to increase its market presence. COFCO has since agreed to purchase a majority stake in the Dutch grains trader Nidera and in Noble Group's agribusiness

¹³⁵ This condition applies indefinitely. However, after two years, Marubeni and Gaviion may reapply to MOFCOM to remove this condition. See MOFCOM Announcement [2013] No. 22 (Apr. 23, 2013), available at <http://fldj.mofcom.gov.cn/article/ztxx/201304/20130400100376.shtml>.

¹³⁶ See generally Dexter Roberts, “The Chinese Want Their Own Cargill,” Bloomberg Businessweek (Mar. 20, 2014).

¹³⁷ See, e.g., DOJ & FTC, *Horizontal Merger Guidelines* (Aug. 19, 2010), Section 4.2.

¹³⁸ See Hannah C. L. Ha et al., “MOFCOM Conditionally Approves Marubeni/Gaviion: Competition Law and Industrial Policy in the Agricultural Sector,” Mayer Brown (May 8, 2013). Imports of several key agricultural commodities (wheat, corn, rice, cotton, but not soybeans) are subject to tariff rate quotas that restrict imports.

¹³⁹ See MOFCOM Announcement [2013] No. 22 (Linklaters trans., Apr. 2013), available at http://www.linklaters.com/pdfs/mkt/beijing/MOFCOM_Conditional_Clearance_on_Marubeni_v_Gaviion_2.pdf.



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arm; more deals are being considered.¹⁴⁰ Accordingly, COFCO appears to be gaining an edge, both in China and in the Latin America market, while expansion through merger by Marubeni and other foreign companies is constrained by China's enforcement of the AML.¹⁴¹ MOFCOM's decision in the Marubeni/Gavilon deal thus prevented efficiencies that would have benefited Chinese consumers in order to protect the interests of Chinese competitors. By contrast, both U.S. and EU competition authorities cleared the proposed deal unconditionally, approximately eight months and five months, respectively, before MOFCOM.¹⁴²

Part of the basis for MOFCOM's decision may have been an interest in protecting domestic food security, for which soybean supply is an important element.¹⁴³ However, MOFCOM's decision does not discuss any such interests, nor is the AML merger review an appropriate forum for addressing them (as opposed to the national security review discussed in Section III.C).

2. Controls on price and supply

MOFCOM has used several merger review decisions to maintain the *status quo* with respect to price and supply of goods and IP that are important in strategic sectors of China's economy. Examples include the Uralkali/Silvinit case in the potash market, and the Google/Motorola and Microsoft/Nokia cases in markets for IP for smartphone operating platforms.¹⁴⁴ In each of these cases, MOFCOM benefited Chinese market participants by constraining foreign companies' ability to price their products in accordance with normal commercial practice.

a) Uralkali/Silvinit

China is a major consumer of potash, a naturally occurring mined chemical used to produce agricultural fertilizers. When two of the world's largest Russian potash producers, Silvinit and Uralkali, proposed to merge, China took advantage of the opportunity to cap potash prices in the future.

MOFCOM's decision, issued on June 2, 2011, stated that MOFCOM had examined both the global and the domestic markets for potash, including the domestic import market

¹⁴⁰ See James Topham, "COFCO Deals Threaten to Undermine Marubeni's China Dreams," Reuters (Mar. 13, 2014).

¹⁴¹ *Id.*

¹⁴² The European Commission unconditionally cleared the deal under simplified procedure in August 2012. FTC unconditionally cleared the deal in November 2012 with an early termination of review. See Hannah C. L. Ha et al., "MOFCOM Conditionally Approves Marubeni/Gavilon: Competition Law and Industrial Policy in the Agricultural Sector," Mayer Brown (May 8, 2013).

¹⁴³ See, e.g., Ann Tracy Mueller, "Food Security Top Priority in China, Say Soy Farmers Meeting in Beijing," AgriPulse (Mar. 28, 2014).

¹⁴⁴ Another example is the Thermo Fisher/Life Technologies case, in which MOFCOM required Thermo Fisher to reduce prices of certain products by 1% each year. See MOFCOM Announcement [2014] No. 3 (Jan. 15, 2014), available at <http://fldj.mofcom.gov.cn/article/ztxx/201401/20140100461603.shtml>.



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(although, as noted above, competition authorities in other jurisdictions typically would not consider the import market for a product to be separate from the overall domestic market). MOFCOM found that Silvinit and Uralkali together accounted for one-third of the global export market, more than half of China's imports (together with Silvinit's and Uralkali's affiliated trading companies), and a third of China's total potassium imports.

China found that the proposed combination would affect relevant industries in China, particularly agriculture. MOFCOM approved the transaction subject to the condition that the merged company maintain existing sales practices and procedures, maintain current levels of supply both by rail and by sea, and continue to offer "a complete array" of potassium chloride products. In addition, the post-merger entity had to meet each Chinese customer's demand, in terms of category and quantity, for all applications including industrial and special industrial purposes.¹⁴⁵

Although there may be legitimate competition concerns that would justify such remedies, such as the fact that global trade in potash was dominated by several export cartels,¹⁴⁶ MOFCOM failed to identify such concerns in its decision. However, MOFCOM's decision had the effect of stabilizing prices for Chinese National Agricultural Means of Production Group Corp., a state-owned enterprise that is the largest potash consumer in the world.¹⁴⁷ Indeed, the group has been able to negotiate significantly lower prices from Uralkali than other purchasers.¹⁴⁸ Accordingly, although there may have been a competition-based rationale for MOFCOM's decision, its reasoning was unclear but the benefits to domestic SOEs and domestic purchasers are apparent.¹⁴⁹

b) Google/Motorola

In the Google/Motorola case, MOFCOM took advantage of an acquisition of one U.S. technology firm by another to ensure that its own domestic companies would 1) enjoy access to the acquired Motorola SEPs subject to FRAND commitments on *status quo*

¹⁴⁵ In addition, the merged company had to "maintain the customary negotiation process" with respect to Chinese customers and "the uniqueness of the Chinese market," and also report its compliance with the conditions of the merger on a semiannual basis or at MOFCOM's request. MOFCOM would appoint a trustee to monitor implementation of the restrictive conditions. See MOFCOM Announcement [2011] No. 33 (Jun. 2, 2011), available at <http://fldj.mofcom.gov.cn/article/ztxx/201106/20110607583288.shtml>.

¹⁴⁶ At the time, there was a Russian-Canadian marketing cartel consisting of Canpotex and Belarusian Potash Co., which reportedly controlled 70% of global potash exports. See James Regan & Tracy Zheng, "Analysis: Possible Change in Potash Pricing Worries China," Reuters (Aug. 24, 2010).

¹⁴⁷ See Lukas I. Alpert, "Uralkali Signs Potash Deal with China: Signing Could Indicate End to Market Uncertainty," Wall St. Journal (Jan. 20, 2014).

¹⁴⁸ See, e.g., Yuliya Fedorinova & Michelle Yun, "Uralkali Agrees to 24% Cut in Potash Price for China," Bloomberg (Jan. 21, 2014) (noting that Uralkali offered a price to Chinese purchasers that was \$95 per ton lower than to Belarussian purchasers). It is unclear what role MOFCOM's conditional merger approval played in determining the price of the January 2014 contract between Uralkali and the Chinese National Agricultural Means of Production Group Corp.

¹⁴⁹ MOFCOM may have avoided clarity in this case because China wishes to preserve its own national export cartels.



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terms and conditions at the time of MOFCOM's decision on Google/Motorola, regardless of any future change in commercial circumstances; 2) lock Google into its chosen business model for its Android Platform. Neither of these requirements appeared to be merger-specific, and the decision seems to be consistent with a broader Chinese government policy to foster the domestic "next generation information technology" industry.¹⁵⁰

Google, the U.S.-based Internet search company, proposed to acquire Motorola, the U.S.-based mobile phone company, for \$12.5 billion. On May 19, 2012, MOFCOM approved the transaction subject to the condition that Google would continue to honor Motorola's existing FRAND commitments on its existing FRAND-encumbered SEPs, establishing itself effectively as a regulator of those obligations.

MOFCOM approved the transaction also subject to the condition that Google would continue licensing its Android platform on the free and open basis, consistent with Google's current business practices. However, MOFCOM never clarified how this acquisition would change Google's ability or incentive, at the time of the acquisition, to keep the Android Platform open and free, or discriminate as a result of owning the Motorola business. To the extent that MOFCOM could have had concerns that the acquisition changed Google's incentives or abilities, the commitment lapses on any subsequent sale of Motorola.

MOFCOM attempted to justify its decision by pointing out that mobile phone manufacturers, software developers, and end users had all become reliant on the Android Platform, and switching to another platform would entail significant costs. While Google's Android Platform is licensed on an open-source basis, and once licensed Google cannot withdraw the rights to use the licensed code, subject to the conditions of the license, MOFCOM evidently wanted to ensure, through an extra regulatory obligation which entails additional compliance cost (*e.g.*, reporting obligation and engagement of a monitoring trustee) and potentially without the procedural protections associated with the monitoring mechanism which is often built into other regimes, that Chinese users of the Platform would continue to have access for free.

Both the U.S. and EU competition authorities reviewed the Google/Motorola transaction, and neither jurisdiction required any remedy regarding the Android Platform, and they cleared the transaction 96 days before MOFCOM, on February 13, 2012.¹⁵¹ Although

¹⁵⁰ See USCBC, "China's Strategic Emerging Industries: Policy, Implementation, Challenges & Recommendations" (Mar. 2013), *available at* <http://uschina.org/sites/default/files/sei-report.pdf>.

¹⁵¹ See European Commission, "Mergers: Commission Approves Acquisition of Motorola Mobility by Google," Press Release (Feb. 13, 2013); DOJ, "Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigations of Google Inc.'s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp. and Research in Motion Ltd." (Feb. 13, 2012), *available at* http://www.justice.gov/atr/public/press_releases/2012/280190.htm.



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the U.S. expressed concern about FRAND commitments,¹⁵² it indicated that such concern is not merger specific as the acquisition of patents by Google did not substantially lessen competition. Thus, as in several other cases, MOFCOM was the last of the three competition authorities to issue a decision, and its decision was the harshest.

MOFCOM's approach in similar cases could be interpreted to foreshadow future application of the essential facilities doctrine to IP: patented or copyrighted technology becomes so widely used that it is deemed essential, and the rights holder thereby incurs an obligation to license the IP.¹⁵³ Although it may make sense in a voluntary standards setting context to require rights holders to license IP on FRAND terms, and the rights holders do have their right to stay with or leave the standard setting organization, it would be a drastic curtailment of IP rights for a regulatory authority to impose a licensing requirement on owners of IP merely because the IP is widely used, without a demonstrably justifiable basis for mandating access on regulated terms.

c) Microsoft/Nokia

In the Microsoft/Nokia case, MOFCOM took the U.S. software company's acquisition of a Finnish mobile handset manufacturer as an opportunity to cap license fees for domestic licensees of mobile handset-related software. In doing so, MOFCOM gave significant weight to a speculative possibility of licensor hold-up that neither the U.S. nor the EU competition authorities recognized in their own unconditional approvals of the decision,¹⁵⁴ while ignoring the significant potential for hold-out by domestic Chinese licensees. Thus, like the Google/Motorola case, the Microsoft/Nokia case is consistent with a broader Chinese government policy to foster the domestic "next generation information technology" industry.¹⁵⁵

In this case, Microsoft sought to acquire sole control over substantially all of the devices and services business of Nokia, a Finnish cellular telephone manufacturer, for \$7 billion. On April 8, 2014, MOFCOM approved the decision, subject to the following conditions, *inter alia*:

¹⁵² In approving the deal, DOJ announced that Google had "made commitments concerning [its] SEP licensing policies. . . . Google's commitments were more ambiguous [than those of other companies] and do not provide the same direct confirmation of its SEP licensing policies." DOJ, "Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigations of Google Inc.'s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp. and Research in Motion Ltd." (Feb. 13, 2012), *available at* http://www.justice.gov/atr/public/press_releases/2012/280190.htm.

¹⁵³ SAIC is considering AML-related legislation that would impose an expansive version of the essential facilities doctrine. *See also* Section IV.C.

¹⁵⁴ *See* European Commission, "Merger: Commission Clears Acquisition of Nokia's Mobile Device Business by Microsoft," Press Release (Dec. 4, 2013); FTC Early Termination Notice, "20140115: Microsoft Corporation; Nokia Corporation" (Nov. 29, 2013), *available at* <http://www.ftc.gov/enforcement/premerger-notification-program/early-termination-notices/20140115>.

¹⁵⁵ *See* USCBC, "China's Strategic Emerging Industries: Policy, Implementation, Challenges & Recommendations" (Mar. 2013), *available at* <http://uschina.org/sites/default/files/sei-report.pdf>.



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- With respect to SEPs, Microsoft must make SEPs available to SSOs, and not seek to exclude other companies from SEPs through injunctions or otherwise. (This obligation applies only with respect to companies that undertake reciprocal obligations.) This condition applies indefinitely, until MOFCOM agrees to amend or terminate it.
- With respect to non-SEPs for Android smartphones and other licensing programs, Microsoft must continue to make patents available at current royalty rates, and on terms and conditions substantially similar to those offered by Microsoft pre-concentration. However, MOFCOM also required that in negotiations for new licenses (which the U.S. Chamber of Commerce believes mostly involve Chinese original equipment manufacturers, or OEMs, and renewals, Microsoft will consider the “unique” circumstances of licensees and market conditions. This condition applies for eight years, until April 8, 2022.

MOFCOM’s rationale for these conditions was that Microsoft could limit or exclude competition in the Chinese smartphone market after the merger. In particular, MOFCOM found that Microsoft has both SEPs and non-SEPs that constitute “must-have” technical components for producing and manufacturing Android smartphones. MOFCOM found that because of its acquisition of Nokia, Microsoft would have an incentive to eliminate and restrict competition in the downstream smartphone market by refusing to license its SEPs and non-SEPs related to Android.

MOFCOM’s remedies were apparently unnecessary, however, because no evidence was cited in MOFCOM’s decision that Microsoft intended to withdraw its Android licensing program or to raise its royalties, nor was there any discussion of whether Microsoft had the ability to modify any existing Android licenses post-merger—licenses that cover roughly 80% of Android smartphones sold worldwide (excluding China). Also left unaddressed by MOFCOM is whether the licensees of Microsoft’s Android licensing program were in some cases unwilling licensees, *i.e.*, hold-outs, even though at least some licensees in this sector (*e.g.*, Huawei, discussed below at Section IV.A.2) have previously benefited from pressure by NDRC in the context of licensing negotiations. Instead, MOFCOM merely capped license fees at current levels for eight years, without attempting to address the possibility that license fees might rise over time even under perfectly competitive conditions.¹⁵⁶

¹⁵⁶ In a similar decision, MOFCOM required Merck to license all liquid-crystal display (“LCD”) IPR on “a non-exclusive and non-transfer licensing basis” and on terms that are “reasonable and non-discriminatory principles (RAND)”—even though MOFCOM did not find that Merck’s IP portfolio related to LCDs was meaningfully expanded through the transaction under review, which involved a U.K. company that produces specialty chemical materials for the electronics market, AZ Electronic Materials S.A. *See* MOFCOM Announcement [2014] No. 30 (Apr. 30, 2014), *available at* <http://fldj.mofcom.gov.cn/article/ztxx/201404/20140400569060.shtml>.



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Thus, MOFCOM's decision in this case reflects a broader tendency in China's enforcement of the AML to emphasize the competitive threats posed by patent hold-up, while discounting the threat posed by licensee hold-out.¹⁵⁷ The companies that stand to suffer from this policy are most often foreign rights holders like Microsoft, whose widely used IP reflects a significant investment in innovation that they are increasingly unable to recoup in China.

3. Protection of famous Chinese brands

In its first two published decisions, MOFCOM prevented Coca-Cola and Anheuser-Busch from acquiring famous Chinese brands in the beverage industry. Both decisions were extremely short—less than 1,500 Chinese words for the Coca-Cola case and about 500 Chinese words for the Anheuser-Busch case. They failed to state competition concerns with regard to the proposed acquisitions, and the decisions appear to have been based more on industrial policy than on genuine competition concerns (indeed, as discussed above, the AML permits MOFCOM to take account of “the development of the national economy” and “other considerations that may affect market competition as identified by MOFCOM”). Absent any basis to believe that a foreign takeover would actually harm competition, rather than simply result in foreign ownership of a traditionally Chinese brand, these decisions should not be regarded as strong competition law precedents abroad, and quite possibly not even in China. In fact, these decisions appear to be a carry-over of an explicit policy in earlier competition-related law to protect “well-known trademarks” and “Chinese historical brands.”¹⁵⁸

a) Coca-Cola/Huiyuan

The Coca-Cola Company (Coca-Cola), a U.S. company, sought to acquire China Huiyuan Juice Group Limited, a famous Chinese juice manufacturer, for \$2.4 billion.¹⁵⁹ However, in the only such instance to date, and in its first published decision under the AML, MOFCOM blocked the transaction altogether, apparently to keep the famous Huiyuan brand in Chinese hands.

Some 182 days after Coca-Cola submitted its initial notification, MOFCOM released its decision on March 18, 2008.¹⁶⁰ It identified the following adverse impacts from the transaction:

¹⁵⁷ See also, e.g., Section IV.C.

¹⁵⁸ See 2006 Regulations, Art. 12 (“When an acquisition of a domestic enterprise by a foreign investor results in ... transfer of an actual control in a domestic enterprise which owns any well-known trademarks or Chinese historical brands, the parties concerned shall report to and apply for approval from MOFCOM.”).

¹⁵⁹ See Sundeep Tucker et al., “China Blocks Coca-Cola Bid for Huiyuan,” *Financial Times* (Mar. 19, 2009).

¹⁶⁰ MOFCOM Announcement [2009] No. 22 (Mar. 18, 2009), available at <http://fldj.mofcom.gov.cn/article/ztxx/200903/20090306108494.shtml>.



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- Coca-Cola could use its market dominance in carbonated soft drinks to limit competition in the market for juice through tying, bundling, or other exclusive transactions, resulting in consumers being forced to accept higher prices and reduced variety.
- Coca-Cola's market power on the juice market would be significantly enhanced by controlling two famous juice brands, *i.e.*, Meizhiyuan (Minute Maid) and Huiyuan. The transaction would significantly raise entry barriers for potential competitors in the fruit drink market.
- The concentration would reduce the space available for small and medium-sized juice companies to compete and independently innovate in the fruit drink market.
- The transaction would have an adverse effect on the structure of competition in China's fruit juice drink market.
- MOFCOM apparently considered claimed efficiencies, because their decision refers to the effects of the transaction on technological advances and on consumers. However, MOFCOM determined that the parties failed to provide sufficient evidence to prove that the positive impact of the transaction on competition would outweigh the negative impact, or that the transaction "conformed to the requirements of social and public interests."

Aside from this reasoning, MOFCOM did not provide any additional explanation for blocking the transaction.¹⁶¹ With respect to the possible leveraging concern, MOFCOM was reportedly influenced by the experience of Australia, which had previously blocked a bid by Coca-Cola Amatil (an Australian Coca-Cola affiliate) to purchase Berri, the country's largest juice producer, on the grounds that it could potentially limit consumer choice for carbonated soft drinks and juice drinks, which were generally supplied by separate companies in Australia up to that point.¹⁶² However, MOFCOM did not cite the Australian example (or indeed any precedent) or attempt to explain how the circumstances of both cases were supposedly similar.

International media reaction was almost universally negative, citing sources saying that MOFCOM conditioned its approval on Coca-Cola agreeing to not control the Huiyuan brand.¹⁶³ It is doubtful that MOFCOM would have applied the same rationale had

¹⁶¹ See Sundeep Tucker, "Coca-Cola's \$2.4 bn China Deal at Risk," *Financial Times* (Mar. 17, 2009).

¹⁶² See Wang Shanshan et al., "How the Coke-Huiyuan Deal Fizzled Out," *Caijing* (Apr. 3, 2009).

¹⁶³ See, e.g., Sundeep Tucker et al., "China Blocks Coca-Cola Bid for Huiyuan," *supra* note 161; Ted Henneberry & Jonathan Palmer, "Competition Goes Flat: China's Refusal to Allow Coca-Cola's Huiyuan Bid Suggests a Worrying Move toward Protectionism," *Asialaw* (Apr. 2009).



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Huiyuan been a foreign brand (if, for example, Coca-Cola was proposing to acquire Pepsi's China operations). Various press reports criticized MOFCOM for basing its decision on questionable logic and being driven by nationalism, protectionism, and a motive to retaliate against the U.S. for past prohibitions on Chinese investments in the U.S.¹⁶⁴ Indeed, the combined company would not have created any significant new concentrations in the bottled beverage market, because the combined entity's share of the juice market (including 100% pure fruit juice, concentrated juice, and fruit juice beverage) would not have exceeded 20%.¹⁶⁵ Moreover, by blocking the transaction, MOFCOM appears to have harmed Huiyuan, as its stock price fell nearly 20% on the issuance of MOFCOM's decision.¹⁶⁶ MOFCOM also forced Coca-Cola to grow organically in China, rather than with Huiyuan as a partner. Thus, MOFCOM's decision seems to have been motivated by a narrow and perhaps shortsighted desire in response to domestic political pressure to maintain domestic ownership of the Huiyuan brand.

b) InBev/Anheuser-Busch

InBev, a Belgian company, sought to acquire Anheuser-Busch, a U.S. company, for \$52 billion.¹⁶⁷ However, MOFCOM imposed restrictive conditions on the transaction, which apparently were designed to ensure that InBev could not take control of any of four leading Chinese alcoholic beverage makers and famous brands: Guangzhou Zhujiang Brewery, Tsingtao Brewery, China Resources Snow Breweries (China) Co., Ltd., and Beijing Yanjing Brewery Co., Ltd.

MOFCOM conditionally approved the transaction on November 18, 2008.¹⁶⁸ MOFCOM noted that it had consulted a variety of sources, including by "reviewing the materials submitted, consulting with relevant government agencies, and soliciting opinions from relevant beer industrial associations, principal domestic manufacturers of beer and raw materials, and distributors of beer products." However, MOFCOM did not discuss any of these sources further. MOFCOM also stated that the proposed transaction had an "enormous size" and would "significantly enhance the combined market share and competitiveness of the new enterprises," but it did not explain this finding further. Based on this, MOFCOM imposed the following three conditions on the transaction: (i) InBev may not increase the stake in Tsingtao Brewery above Anheuser-Busch's then-current level of 27%; (ii) InBev's stake in Guangdong Zhujiang Brewery may not rise above the

¹⁶⁴ See, e.g., Sundeep Tucker & Jamil Anderlini, "Coke's Rejection Is to Chinese Public's Taste," *Financial Times* (Mar. 18, 2014); Ted Henneberry & Jonathan Palmer, "Competition Goes Flat: China's Refusal to Allow Coca-Cola's Huiyuan Bid Suggests a Worrying Move toward Protectionism," *supra* note 163.

¹⁶⁵ See He Wen & Hu Yilin, "Coca-Cola: Juice Market Share Will Not Exceed 20% after the Acquisition," *EEO.com.cn* (Sept. 13, 2008).

¹⁶⁶ See Mu Xuequan, "Coca-Cola, Juice Maker Huiyuan Both 'Respect' Chinese Gov't Rejection of Purchase Bid," *Xinhuanet* (Mar. 19, 2009).

¹⁶⁷ See Michael J. de la Merced, "InBev to Buy Anheuser-Busch for \$52 Billion," *New York Times* (Jul. 14, 2008).

¹⁶⁸ See MOFCOM Announcement [2008] No. 95 (Nov. 18, 2008), *available at* <http://fldj.mofcom.gov.cn/article/ztxx/200811/20081105899216.shtml>.



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then-current level of 28.56%; and (iii) InBev may not seek to purchase any shares in two other famous breweries, China Resources Snow Breweries (China) Co., Ltd. and Beijing Yanjing Brewery Co., Ltd.¹⁶⁹

Thus, MOFCOM skirted the competition analysis, asserting that the concentration posed a threat to competition but failing to explain why. However, the outcome of the decision promoted the Chinese government's industrial policy goals of keeping leading Chinese beverage manufacturers and famous Chinese brands in domestic hands.¹⁷⁰

C. Promotion of Industrial Policy through National Security Review

The AML provides that when a foreign investor participates in a concentration by merging and acquiring a domestic enterprise that involves national security, the matter shall be subject to national security review (NSR) in addition to MOFCOM's merger review.¹⁷¹ The State Council formally established the NSR system by publishing the Notice on Launching the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors on February 3, 2011, which became effective on March 5, 2011 (the NSR Notice). On August 25, 2011, MOFCOM promulgated the Regulations of the Implementation of Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (the NSR Regulations).¹⁷² The NSR Regulations came into effect on September 1, 2011, and replaced interim regulations issued by MOFCOM earlier that year, which had had a trial period of six months.¹⁷³

The scope of the NSR covers not only foreign M&A in the defense sector, but also foreign M&A involving important agricultural products, important energy and resources, important infrastructure, important transport, key technology, and major assembly manufacturing, whereby the foreign investors may acquire actual control rights.¹⁷⁴ These reviews are mainly administered by MOFCOM's Foreign Investment Administration Department.¹⁷⁵ When conducting an NSR, a Ministerial Panel¹⁷⁶ will consider the impact of the transaction not only on national security, but also on national economic stability,

¹⁶⁹ A fourth condition was that InBev must inform MOFCOM of changes in its controlling shareholders. *Id.*

¹⁷⁰ See, e.g., Jonathan Soble, "Beijing Holds Up Japanese Takeover of Lucite," *Financial Times* (Apr. 12, 2009).

¹⁷¹ See AML, Art. 31.

¹⁷² See *supra* note 117.

¹⁷³ On March 4, 2011, MOFCOM issued the Interim Regulations on the Implementation of Matters Concerning the Security Review System for Foreign Mergers and Acquisitions of Domestic Enterprises, which had a trial period from March 5, 2011 through August 31, 2011.

¹⁷⁴ See NSR Notice, Art. 1(1).

¹⁷⁵ See Eliot Gao, "China's National Security Review Regime Lacks Clarity, Competition Lawyers Say," *PaRR* (Jul. 6, 2012).

¹⁷⁶ The Ministerial Panel consists of representatives of NDRC, MOFCOM, and other relevant departments according to the industries and fields involved in the transaction. See NSR Notice, Art. 3(1).



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basic societal order, and R&D capacity for key technology related to national security.¹⁷⁷ The terms used in the NSR Notice are deliberately vague and broad. Overall, it is apparent that the NSR process is not limited to “national security” within the traditional definition of a focus on military technology and defense applications. The NSR definition more accurately reflects the wide scope that appears to be in actual use, encompassing many important industries beyond those directly defense-related, such as natural resources, energy, and even well-known trademarks or Chinese historical brands expected to grow into internationally competitive brands.¹⁷⁸ This gives the Ministerial Panel greater leeway to consider a number of factors to block deals they find objectionable.

By contrast, the U.S. analog to MOFCOM’s national security review—*i.e.*, the Committee on Foreign Investment in the United States (CFIUS)—appears to take a much less expansive view of the scope of the national security review. For example, when the Chinese meat processor Shuanghui International acquired Smithfield Foods, Inc., a U.S. pork processor and hog producer, CFIUS approved the deal unconditionally.¹⁷⁹ It is unclear whether China’s national security review would unconditionally approve a foreign acquisition of a large domestic producer of sensitive foods.¹⁸⁰

With respect to the timeline for review, foreign investors may conduct a pre-filing consultation with MOFCOM on NSR procedural issues relating to the proposed M&A transaction. This pre-filing procedure is not mandatory and the result does not have binding effect and cannot be relied on as the basis for making a formal application.¹⁸¹ MOFCOM has 15 working days for preliminary review before it decides to clear the transaction or forward the case to the Ministerial Panel for substantive general review. The Ministerial Panel’s general review lasts up to 30 working days. The transaction may enter into a second special review phase that can last up to 60 working days if the Ministerial Panel determines that a transaction triggers national security concerns.¹⁸²

In practice, the NSR procedure has created considerable uncertainty and delay in the approval of foreign investment projects even during its trial period. Local commerce

¹⁷⁷ See NSR Notice, Art. 2.

¹⁷⁸ However, including well-known trademarks and Chinese historical brands within the definition of national security would likely run afoul of WTO law. See Kevin B. Goldstein, “Reviewing Cross-Border Mergers and Acquisitions for Competition and National Security: A Comparative Look at How the United States, Europe, and China Separate Security Concerns from Competition Concerns in Reviewing Acquisitions by Foreign Entities,” 3 *Tsinghua China Law Review* 215, 217 (2011); see also Section III.B.3.

¹⁷⁹ See Timothy J. Keeler et al., “National Security Review by U.S. Government Clears Acquisition of Smithfield Foods by Chinese Meat Processor, Shuanghui International,” Mondaq (Sept. 12, 2013). Shuanghui International is now known as WH Group.

¹⁸⁰ The frozen-pork reserves are China’s one-of-a-kind version of the strategic stockpiling practiced in other parts of the world for the most economically sensitive commodities, such as petroleum in the United States. See Chui-Wei Yap, “China Launches New Round of Pork Stockpiling,” *Wall St. Journal* (May 7, 2014).

¹⁸¹ See NSR Regulations, Art. 4.

¹⁸² See NSR Notice, Art. 4.



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commissions or bureaus in some localities have directed the parties in routine foreign M&A transactions, even in industries not subject to the NSR Regulations, to report the transactions to MOFCOM for NSR before considering them for approval. By doing so, as with merger review,¹⁸³ approval authority even on small transactions is elevated from local governments up to the central government, even though approval authority for larger transactions has to a considerable degree been gradually devolved to local levels.¹⁸⁴

D. Procedural Deficiencies

MOFCOM's merger review has significant procedural flaws, including the following:

- Chinese government agencies with no formal role in merger review participate indirectly in MOFCOM merger reviews and can block MOFCOM's approval of proposed transactions, subject to the satisfaction of their industrial policy objectives.
- Companies under review are denied full access to counsel during in-person meetings with MOFCOM as part of the investigation into proposed transactions.
- Companies are required to propose remedies without being informed of the legal problems or the theories of economic harm that their proposed transaction supposedly poses, let alone have an opportunity to respond to such proposed concerns.
- Flexibility regarding filing requirements allows MOFCOM to extend merger review deadlines beyond what AML regulations provide.
- Companies lack a meaningful right to appeal MOFCOM determinations, including because any relief would likely be too late to save a transaction that has been suspended while the merger review is pending, and also due to fear of retribution.¹⁸⁵
- Remedies imposed by MOFCOM in individual transactions are not necessarily tailored to address the competitive concerns identified in MOFCOM's analysis (as discussed above in Section III.B).

¹⁸³ See *supra* note 105.

¹⁸⁴ See Lester Ross & Kenneth Zhou, "China's Temporary 'CFIUS' Implementing Regulations," WilmerHale (Mar. 25, 2011), <http://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=94240>.

¹⁸⁵ See generally Lester Ross & Kenneth Zhou, "Administrative and Civil Litigation under the Anti-Monopoly Law," in Adrian Emch & David Stallibrass (eds.), *China's Anti-Monopoly Law: The First Five Years*, Wolters Kluwer (2013), at 325–328.



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These procedural flaws are troubling in and of themselves. They also reinforce the discriminatory aspects of MOFCOM's merger review process, and facilitate the influence of industrial policy over the outcome of MOFCOM's decisions.

1. *Sub rosa* role of third-party agencies

Although MOFCOM's AMB is nominally the government agency with exclusive responsibility for conducting merger reviews, in practice other government agencies including NDRC, MIIT, and MOA participate in the merger review process as well. The role of these agencies is not spelled out expressly in the AML or any regulation, except to the extent that they participate in AMC. Indeed, they generally do not communicate their interest in the transaction directly to the notifying parties. Rather, MOFCOM informs the parties that a third-party agency has concerns regarding the transaction, and then the parties must approach the agency independently and through informal channels to try to understand their concerns.

Such interference has reportedly occurred in a wide array of cases, including Microsoft/Nokia, Coca-Cola/Huiyuan, Walmart/Yihoudian, Seagate/Samsung, and Western Digital/Hitachi.¹⁸⁶ NDRC, MIIT, and MOA appear to be particularly active in this regard, and notably these three agencies also have strong industrial policy mandates.¹⁸⁷ Review can be slowed or halted until the notifying parties assuage such third-party agencies' concerns, undertake commitments that appease stakeholders, or agree to conditions that advance industrial policy. Thus, the *sub rosa* participation of third-party agencies in MOFCOM's merger review process allows other parts of the Chinese government to use the AML merger review opportunistically to extract concessions from notifying parties who may be unrelated to safeguarding competition.

This process has no parallel in the United States or the EU. Third-party agencies may participate in merger review in those jurisdictions but typically only in a consulting role (depending on the subject matter of the transaction), and the competition authorities are the sole point of contact for discussion with the notifying parties and have sole discretion to approve or deny proposed transactions.

2. Lack of access to counsel of choice

¹⁸⁶ See Joy C. Shaw, "China Worries Nokia Could Become 'Super NPE' After Microsoft Deal, MIIT Think Tank Official Says," PaRR (Dec. 16, 2013); Daniel Sokol et al., "为何《反垄断法》反而带来困扰? [Why Is the Anti-Monopoly Law Causing Problems?]" Forbes China (Aug. 14, 2013).

¹⁸⁷ In addition to seeking nods from other government agencies, MOFCOM often seeks opinions and information from trade associations, upstream and downstream firms, and competitors. MOFCOM has hired outside economic experts, including Chinese academics and international economic consulting firms in at least six cases so far: Coca-Cola/Huiyuan, Seagate/Samsung, Western Digital/Hitachi, MediaTek/Cayman MStar, UPS/TNT Express, and Thermo Fisher/Life. See Fei Deng, "A Five Year Review of Merger Enforcement in China," Antitrust Source (Oct. 2013); Lisha Zhou & Joy Shaw, "SAIC Welcomes External Economic Analysis Services in Antitrust Investigations—ABA Spring Meeting," *supra* note 90.



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MOFCOM often bars foreign outside counsel from participating in merger reviews. Indeed, MOFCOM typically allows only company representatives and companies' local Chinese counsel. MOFCOM has not stated this policy publicly, and its reasons for restricting access to foreign counsel are unclear, although apparently related to protection of the local bar by the Ministry of Justice.

Whatever its motivation, however, this violation of due process also undermines the quality of MOFCOM's decisions. Frequently, outside counsel of parties involved in MOFCOM merger reviews are part of large international law firms that are handling the concentration on a multijurisdictional or even worldwide basis and are therefore more familiar with the concentration, both in China and elsewhere. Thus, barring their participation alongside local counsel affects the quality of MOFCOM's decisions and contributes to a perception of bias and unfairness, and it is also inconsistent with China's commitment at the 2014 S&ED to "provide to any party under investigation . . . [an] effective opportunity to present evidence in its defense."¹⁸⁸

MOFCOM's practice of excluding foreign counsel from merger review proceedings has no parallel in the United States or the EU except for proceedings related to narrowly tailored national security concerns conducted outside and independent from merger reviews.

3. Burden on notifying parties to identify solutions before being informed of the supposed problem

MOFCOM often arrives at particular remedies in merger cases through a process of negotiation with the companies involved in the transaction. However, MOFCOM will often request that the parties to the transaction themselves propose the remedies, without first informing them of the supposed competition problem that the proposed transaction poses.

This technique results in a dynamic that is in effect a form of regulatory coercion. To obtain regulatory approval, companies must negotiate against themselves and offer concessions without being informed of the supposed inconsistency with the AML. This plays into the Chinese government's efforts to use merger review to weaken foreign companies and tilt the competitive landscape in favor of domestic ones.

Again, MOFCOM's practice has no close parallel in the United States or the EU. Competition law authorities in those jurisdictions may ask the parties to propose remedies, but they engage constructively and relatively transparently with the parties to address well-defined competition law concerns.

¹⁸⁸ U.S. Department of the Treasury, "UPDATED: U.S.-China Joint Fact Sheet Sixth Meeting of the Strategic and Economic Dialogue," Press Release (July 11, 2014); *see also supra* note 25.



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4. Manipulation of timing of reviews

Although the AML provides what appears to be a 180-day time limit for most merger reviews, in practice MOFCOM can extend this time limit considerably by taking advantage of flexibility to deem merger notifications incomplete. In some cases, the result is merely a slow process that is inconvenient and costly to the notifying parties. In other cases, as noted above, MOFCOM appears to withhold a decision until other competition law jurisdictions, such as the United States and the EU, issue their decisions, so that MOFCOM can ensure that its own decision goes at least as far, and in cases of importance to China, one or more steps further.

Under the AML, there are up to three phases in a merger review: (i) an initial 30-day review period;¹⁸⁹ (ii) a further review period of up to 90 days, which MOFCOM initiates if it determines that the merger requires “further review”; and (iii) a further review period of up to 60 days, which MOFCOM may initiate if the companies involved agree to the extension, the application materials are “inaccurate and therefore need further verification,” or “major changes have taken place after the undertakings made the [initial] notification.”¹⁹⁰ Thus, from the time that MOFCOM declares a notification complete and “lists” it (*li an*), it has a maximum of 180 days to review the proposed concentration.

However, MOFCOM has broad latitude to deem notifications incomplete upon submission, and to require the submission of additional documents before accepting a notification as complete. The AML states that business operators that file a notification of a concentration must submit documents and information such as the notification, impact explanation, concentration agreement, and final accounting reports, as well as “other documents and information as requested by [MOFCOM].”¹⁹¹ MOFCOM in its discretion may refrain from declaring a notification complete by identifying deficiencies in the filing and/or requesting additional documents and information.¹⁹²

¹⁸⁹ A new review procedure for “simple” concentrations may allow for expedited review in the initial period. *See* Tentative Guiding Opinions on Notification of Simple Cases of Concentration Between Operations issued by MOFCOM on Apr. 18, 2014 and became effective on the same day; Provisional Regulations Concerning Standards to be Applied to Simple Cases of Concentrations Between Operations issued by MOFCOM on February 11, 2014 and became effective as of February 12, 2014. The Tentative Guiding Opinions enable third parties to challenge the simple case eligibility by filing an objection within the public announcement period of 10 days. If MOFCOM considers that a concentration does not qualify for the simplified procedure, “simple case” status will be revoked and the notifying party must resubmit the notification under the standard notification procedure. Even during the substantive review phase, if MOFCOM considers that the concentration does not qualify, it may still revoke the simple case certification and require a standard notification. Such revocation provisions may lead to substantial uncertainty over “simple case” status. *See* Michael Gu, “At Last, MOFCOM Formally Adopts Simplified Merger Review Procedure,” AnJie Publications (May 13, 2014).

¹⁹⁰ AML, Arts. 25, 26. The AML identifies the third phase as an extension of the second phase. *Id.*

¹⁹¹ AML, Art. 23.

¹⁹² *See* MOFCOM Notification and Review Rules on Merger Control Filing Rules [2009], Art. 14 (“if, upon review, MOFCOM believes that the filing documents meet the relevant legal requirements, it shall decide to accept and file the transaction in its review docket”).



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In practice, this discretion gives rise to an elastic time period, between when notification actually occurs and when MOFCOM declares it complete. This elastic time period can be quite lengthy.¹⁹³ Furthermore, if MOFCOM has failed to complete its review, parties to a concentration may be forced to withdraw and then refile a notification as the 180-day deadline approaches—in effect, resetting the clock altogether. Below is a sample of the cases where MOFCOM has extended the time for merger review far beyond the 180 days set in the AML, either by requiring withdrawal and resubmission as an alternative to rejection or by imposing an elastic pre-listing period before the notification is declared complete.

Selected MOFCOM Merger Review Timelines

Case	Pre-Notification Period	Phase I (30 days)	Phase II (90 days)	Extended Phase II (60 days)	Withdrawal and Resubmission	Phase I (30 days)	Phase II (90 days)	Extended Phase II (60 days)	Total (days)
Panasonic/Sanyo	1/21/09-5/3/09 (103 days)	5/4/09-6/2/09 (30 days)	6/3/09-9/3/09 (93 days)	9/4/09-10/30/09 (57 days)					283
Seagate/Samsung	5/19/11-6/12/11 (25 days)	6/13/11-7/12/11 (30 days)	7/13/11-10/10/11 (90 days)	10/11/11-12/12/11 (63 days)					208
Western Digital/Hitachi	4/2/11-5/9/11 (38 days)	5/10/11-6/7/11 (29 days)	6/8/11-9/6/11 (91 days)	9/7/11-10/31/11 (55 days)	11/1/11-11/6/11 (6 days)	11/7/11-12/6/11 (30 days)	12/7/11-3/2/12 (87 days)		336
Google/Motorola Mobility	9/30/11-11/20/11 (52 days)	11/21/11-12/20/11 (30 days)	12/21/11-3/19/12 (90 days)	3/20/12-5/19/12 (61 days)					233
Wal-Mart/Yihaodian	12/16/11-2/15/12 (62 days)	2/16/12-3/15/12 (29 days)	3/16/12-6/12/12 (89 days)	6/13/12-8/13/12 (62 days)					242
Glencore/Xstrata	4/1/12-5/16/12 (46 days)	5/17/12-6/14/12 (29 days)	6/15/12-9/13/12 (91 days)	9/14/12-11/5/12 (53 days)	11/6/12-11/23/12 (18 days)	11/29/12-12/27/12 (29 days)	12/28/12-3/28/13 (91 days)	3/29/13-4/16/13 (19 days)	376
Marubeni/Gavilon	6/19/12-7/30/12 (42 days)	7/31/12-8/29/12 (30 days)	8/30/12-11/27/12 (90 days)	11/28/12-1/24/13 (58 days)	1/25/13-1/31/13 (7 days)	2/5/13-3/4/13 (28 days)	3/5/13-4/23/13 (50 days)		305

¹⁹³ In the case of Panasonic/Sanyo, MOFCOM took 102 days to officially accept the notification for review. See MOFCOM Announcement [2009] No. 82, available at <http://fldj.mofcom.gov.cn/article/ztxx>. The elastic time period takes an average of 47 days. It has also been reported that Sina's proposed acquisition of Focus Media was never accepted by MOFCOM for review because of the variable interest entity (VIE) problem. Because MOFCOM's notification form requires companies to make a compliance commitment regarding incorporation, many companies with VIE structures face problems even in the merger notification filing period. See Lisha Zhou, "China Should Bring VIEs under Antitrust Regulation, State Council Adviser Says," PaRR (Feb. 25, 2014).



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Case	Pre-Notification Period	Phase I (30 days)	Phase II (90 days)	Extended Phase II (60 days)	Withdrawal and Resubmission	Phase I (30 days)	Phase II (90 days)	Extended Phase II (60 days)	Total (days)
Baxter International/Gambro AB	12/31/12-3/11/13 (71 days)	3/12/13-4/9/13 (29 days)	4/10/13-7/8/13 (90 days)	7/9/13-8/13/13 (36 days)					226
MediaTek/Cayman MStar	7/6/12-9/3/12 (60 days)	9/4/12-9/28/12 (25 days)	9/29/12-12/27/12 (90 days)	12/28/12-2/21/13 (56 days)	2/22/13-3/11/13 (18 days)	3/12/13-4/8/13 (28 days)	4/9/13-7/7/13 (90 days)	7/8/13-8/27/13 (51 days)	418
Microsoft/Nokia	9/13/13-10/9/13 (27 days)	10/10/13-11/7/13 (29 days)	11/8/13-2/6/14 (91 days)	2/8/14-4/8/14 (60 days)					207

As the table indicates, the delay precipitated by the pre-merger notification period enabled MOFCOM to arrive at a determination after the United States and the EU in the Samsung/Seagate, Google/Motorola, Glencore/Xstrata, and Marubeni/Gavilon cases—all of which involved harsher remedies than MOFCOM’s U.S. and EU counterparts imposed.¹⁹⁴ The delay apparently enabled MOFCOM to use other jurisdictions’ conditions to clearance as a baseline for its own decisions, enabling it to impose more onerous remedies.

By contrast, in the United States and the EU, competition law authorities provide extensive guidance for determining when a submission is complete, and timing is dictated by considerations of obtaining sufficient information to make accurate decisions grounded in competition law considerations. For example, the FTC has published detailed instructions to specify the information that must be provided in premerger notifications.¹⁹⁵ In the EU, the Implementing Regulation¹⁹⁶ includes annexes that set out the applicable forms with requested information, including documents. In addition, companies may contact the Directorate-General for Competition beforehand to see how

¹⁹⁴ In the Samsung/Seagate case, the European Commission unconditionally cleared the deal on October 19, 2011 (54 days before MOFCOM), and the FTC unconditionally cleared the deal on December 7, 2011 (5 days before MOFCOM); in the case of Google/Motorola, the European Commission and DOJ cleared the deal unconditionally on February 13, 2012 (96 days before MOFCOM); in the Glencore/Xstrata case, DOJ unconditionally cleared the deal in July 2012 (9 months before MOFCOM), and the European Commission approved the deal with conditions on November 22, 2012 (145 days before MOFCOM); in the Marubeni/Gavilon case, the European Commission unconditionally cleared the deal under simplified procedure in August 2012 (8 months before MOFCOM), and the FTC unconditionally cleared the deal in November 2012 with an early termination of review (5 months before MOFCOM).

¹⁹⁵ See FTC, “Enforcement, Premerger Notification Program, the Form and Instructions,” available at <http://www.ftc.gov/enforcement/premerger-notification-program/form-and-instructions>.

¹⁹⁶ See C.2 Commission Regulation (EC) No 802/2004 (Apr. 7, 2004) implementing Council Regulation (EC) No 139/2004 (OJ L 133, 30.04.2004, at 1) amended by Commission Regulation (EC) No 1033/2008 of October 20, 2008 (OJ L 279, 22.10.2008, at 3)—consolidated version of October 23, 2008, available at http://ec.europa.eu/competition/mergers/legislation/merger_compilation.pdf.



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to best prepare their notification. Notifications are effective once all information is received by the Commission.

MOFCOM recently promulgated tentative and provisional guidelines for an expedited merger review procedure, for cases that are deemed “simple” by virtue of satisfying one of six requirements.¹⁹⁷ Although these guidelines are a step in the right direction, they are lacking in detail in several respects,¹⁹⁸ and it remains unclear whether they will materially alleviate the burden imposed by MOFCOM’s current regime. Indeed, from May 22 to August 14, 2014, MOFCOM has published 14 simple merger cases for public comments, only one of which was cleared without conditions.¹⁹⁹

IV. Investigations and Penalties

In February 2011, the State Council promulgated regulations giving NDRC and SAIC the authority to conduct investigations and impose penalties under the AML.²⁰⁰ Although

¹⁹⁷ See Tentative Guiding Opinions on Notification of Simple Cases of Concentration Between Operations (Apr. 18, 2014), available at <http://fldj.mofcom.gov.cn/article/xgxz/201404/20140400555353.shtml>, and MOFCOM, Provisional Regulations Concerning Standards to Be Applied to Simple Cases of Concentrations between Operations (Feb. 11, 2014), available at <http://www.mofcom.gov.cn/article/b/c/201402/20140200487038.shtml>. A “simple case” is defined as one that meets the following six requirements: (i) the sum of all market shares of parties to the transactions in the same market is less than 15%; (ii) each vertical party to the transaction (upstream and downstream) has a market share of less than 25% in its market (upstream or downstream); (iii) in all cases other than (i) and (ii), each party to the transaction has a market share of less than 25% in its market; (iv) the transaction is an offshore joint venture that does not engage in economic activities in China; (v) the transaction is an offshore merger or assets acquisition and the target does not engage in economic activities in China; and (vi) a joint venture under joint control by two or more parties becomes controlled by one of these parties.

¹⁹⁸ The revocation provisions in the Tentative Guiding Opinions might lead to substantial uncertainties over “simple case” status. See *supra* note 197. The Tentative Guiding Opinions are also silent on the procedural benefits of a concentration being classified as a simple case. The lack of any mention of an indicative merger review timeframe means that there is no assurance of Phase I clearance. See Michael Gu, “At Last, MOFCOM Formally Adopts Simplified Merger Review Procedure,” AnJie Publications (May 13, 2014). As for the Provisional Regulations, it is not clear whether the “not engage in economic activities in China” requirements in Art. 2(iv) and (v) for determination of a simple case apply to *de minimis* economic activities in China. In addition, there is no clear time limit for MOFCOM’s decision to retroactively void a clearance under Art. 4. This presents uncertainties to the closing of relevant transactions. See Lester Ross & Kenneth Zhou, “China Establishes Expedited Preliminary Merger Review Procedure,” WilmerHale (Feb. 20, 2014), available at

<http://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=10737423411>.

¹⁹⁹ See Publication of Simple Merger Cases on MOFCOM website, available at <http://fldj.mofcom.gov.cn/article/jyzjzjyajs/>. Rolls-Royce Holding’s proposed acquisition of the remaining 50% stake in Rolls-Royce Power Systems, its JV with Daimler was published for public comment on May 22, 2014, and was cleared without conditions on June 9, 2014.

²⁰⁰ Regulations on Procedures for Enforcement of Administrative Law on Anti-Price Monopoly and Provisions on Anti-Price Monopoly were both promulgated by NDRC on December 29, 2010, and became effective on February 1, 2011. SAIC’s Regulations on Prohibiting Monopolistic Agreements, Regulations on Prohibiting Abuse of Dominant Market Positions, and Regulations on Prohibiting Abuse of



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domestic companies have been subject to investigations, NDRC has enforced the AML disproportionately against foreign companies in order to achieve industrial policy goals unrelated to the protection of competition, such as dictating artificially low prices for goods sold to Chinese customers and pressuring foreign companies to license IP to Chinese licensees at below-market rates. Indeed, in these respects, NDRC's enforcement record recalls its prior role as the State Planning Commission, which set prices in China's centrally planned economy.²⁰¹ In addition, although SAIC's AML enforcement activity to date has been relatively limited,²⁰² it recently initiated an investigation of Microsoft involving two rounds of raids in 10 locales throughout China, in response to a complaint filed by the rival domestic software company Kingsoft.²⁰³

Furthermore, NDRC has repeatedly resorted to heavy-handed tactics to enforce the AML, such as threatening higher penalties for companies that seek to offer arguments in their defense, leaking information about their investigations and disparaging foreign companies in the press before enforcement decisions have been reached, and demanding changes in company pricing and other behavior before the investigation has concluded. These activities are outside international norms for *bona fide* competition enforcement, which are limited to protecting the *competitive process* and do not permit imposing mandates on foreign or foreign-invested companies merely to lower costs for domestic business concerns or prices faced by consumers. In addition, NDRC's practices fall short of basic standards of transparency, since NDRC has never published the rationale for any of its investigations, penalties, or other determinations in the context of AML enforcement.

This disturbing trend appears likely to continue on the same trajectory, at least in the near term. The State Council issued a directive in June 2014 announcing that MOFCOM, NDRC, SAIC, and SIPO will oversee an effort to intensify their "severe punishment" of "monopolistic and anti-competitive behavior."²⁰⁴ Furthermore, according to the NDRC's 2014 Work Plan, NDRC plans to monitor several "key industries," namely

Administrative Powers to Eliminate or Restrict Competition were promulgated on December 31, 2010, by SAIC and became effective on February 1, 2011.

²⁰¹ NDRC was formerly known as the State Planning Commission, the once all-encompassing manager of China's centrally planned economy.

²⁰² According to the head of SAIC's Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau, between August 1, 2008 and July 31, 2013, SAIC (alone and together with its local counterparts) initiated 23 AML investigations and made public decisions on 12 of them; stopped 30 instances of abuse of dominance by administrative monopolies; and conducted 1,347 investigations under the AUCL regarding elimination or restriction of competition by public utility companies. See SAIC, "Achievements over the Five Years since the AML's Implementation," SAIC Important News (Jul. 31, 2013), available at http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201308/t20130828_137635.html.

²⁰³ Joy C. Shaw & Lisha Zhou, "China SAIC's Microsoft investigation triggered by complaint from Kingsoft, sources say," PaRR (Aug. 6, 2014); "China's SAIC launches another antitrust raid of Microsoft premises," PaRR (Aug. 6, 2014).

²⁰⁴ See Several Opinions by the State Council to Promote Fair Market Competition and Protect Normal Market Order, issued by State Council (June 4, 2014), Guo Fa [2014] No.20, available at http://www.gov.cn/zhengce/content/2014-07/08/content_8926.htm#.



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aviation, cosmetics, automobiles, telecommunications, pharmaceuticals, and household appliances, and will “impose severe punishments for illegal pricing behavior.”²⁰⁵ Indeed, according to Lu Yanchun, deputy director of NDRC’s Price Supervision and Anti-Monopoly Bureau, NDRC has already initiated pricing-related investigations in the following industries: aviation, books, paper manufacturing, insurance, telecoms, liquid crystal displays, pharmaceuticals, *baijiu*,²⁰⁶ infant formula, gold, and construction materials.²⁰⁷ It has also initiated investigations of companies in the automobile and medical devices industries that appear to be focusing on foreign companies,²⁰⁸ concluded an RPM investigation of the optical lens market and imposed fines totaling more than RMB 19 million on five foreign companies²⁰⁹ and announced plans to focus on international shipping, IP, e-commerce, and medical devices in 2014.²¹⁰ In addition, NDRC recently announced that it will assess fines in patent-related cases on the basis of global revenue rather than domestic revenue, as it has done in the past – a policy that will have a disproportionate impact on foreign IPR holders.²¹¹

To be clear, NDRC and SAIC do not enforce the AML only against foreign companies. On the contrary, both agencies and their provincial and local counterparts have enforced the AML with respect to domestic companies as well. However, penalties are generally milder than with respect to foreign companies,²¹² particularly for state-owned enterprises or otherwise politically influential domestic companies. For example, NDRC initiated an investigation into price discrimination by China Telecom and China Unicom, two SOEs,

²⁰⁵ See *supra* note 10.

²⁰⁶ *Baijiu* is a potent white spirit typically distilled from sorghum.

²⁰⁷ See “NDRC: Six Industries Including Aviation, Household Chemicals, Automobiles, Telecommunications, Pharmaceuticals and Home Appliances Center the AML’s Field of Vision,” Beijing Business Today (Nov. 25, 2013).

²⁰⁸ See, e.g., “Dominance of foreign medical equipments [sic] in Chinese market arouses concerns – report (translated),” PaRR (Nov. 8, 2013) (“Imported medical equipment overwhelmingly dominates China’s market, not only because of foreign brands’ more advanced technology but ‘high sum’ of kickbacks involved...”); Lisha Zhou & Joy C. Shaw, “Chinese antitrust authorities probe kidney dialysis machine makers,” PaRR (Dec. 3, 2013) (reporting that NDRC initiated AML investigations of hemodialysis equipment makers, including at least one European company).

²⁰⁹ See “Several optical lens manufacturers have received investigations and fines for RPM,” NDRC Work Dynamic (May 29, 2014). Essilor, Nikon, Zeiss, Bausch & Lomb and Johnson & Johnson were fined RMB 8.79 million, RMB 1.68 million, RMB 1.77 million, RMB 3.69 million and RMB 3.64 million, respectively, for entering into RPM agreements. *Id.* The levels of fines were calibrated to each company’s degree of cooperation with NDRC, and Hoya and Weicon (a domestic contact lens manufacturer) were exempted from fines because they had “proactively reported to NDRC, provided evidence and rectified their behavior.” *Id.*

²¹⁰ See “NDRC Lists Shipping, IP, e-Commerce and Medical Devices as 2014 Enforcement Priorities,” MLex (Apr. 15, 2014); “NDRC: Further Exploit the Supporting Role of IP,” SIPO (Feb. 27, 2014), available at http://www.sipo.gov.cn/mtjj/2014/201402/t20140226_907655.html.

²¹¹ See Joy C. Shaw, “China’s NDRC to use global revenue as basis for fines in patent probes – ABA Antitrust in Asia,” *supra* note 15.

²¹² See Liu Xu, “Three Anti-Monopoly Law Enforcement Authorities: What Have They Done Wrong in Law Enforcement,” Caixin Online (Aug. 6, 2014) (describing “selective punishment” as one of several problems with China’s enforcement of the AML).



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but then appeared to terminate the investigation without imposing a fine.²¹³ Similarly, SAIC closed an investigation into Beijing Shengkai Sports Development without imposing a fine, even though the company admitted to anti-monopolistic conduct.²¹⁴ By contrast, in the infant formula case discussed below, NDRC levied unprecedented penalties totaling \$110 million.²¹⁵

In addition, SAIC has drafted an IPR Regulation for implementing the AML, which, if promulgated in its current form, would drastically curtail IP rights, including in relation to patents that could potentially be deemed “essential.” This approach would put China at odds with current practices in major antitrust-enforcement jurisdictions around the world.²¹⁶ Moreover, it is unclear how the process for revising the Anti-Unfair Competition Law (AUCL), which recently resumed, will affect enforcement of competition law.²¹⁷

A. Promotion of Industrial Policy

1. Price controls

With respect to soaps and detergents, infant formula and automobiles—three categories of widely used consumer products—NDRC has initiated investigations under the AML that appear aimed at dictating price reductions, not by preserving free-market competition but rather by imposing pricing mandates. Moreover, in all three cases, NDRC’s investigations targeted foreign companies disproportionately, and due process defects are reportedly widespread.

²¹³ See Deng Fei & Gregory K. Leonard, “The Role of China’s Unique Economic Characteristics in Antitrust Enforcement,” in Adrian Emch & David Stallibrass (eds.), *supra* note 185, at 63; Joy C. Shaw & Lisha Zhou, “China Sets Antitrust Milestone with Investigation into Large SOEs,” *Financial Times* (Nov. 15, 2011). On March 13, 2012, Zhang Guangyuan, Deputy Director of the NDRC Price Supervision and Anti-Monopoly Bureau, said that the companies had completed a 100G bandwidth expansion and committed to further reduce Internet access charges. See King & Wood Mallesons, “China: Latest Development re NDRC’s Antitrust Investigation against China Telecom and China Unicom,” *Mondaq* (Mar. 21, 2012). No further enforcement activity in this case has been reported.

²¹⁴ “SAIC suspends antitrust investigation into Beijing Shengkai – report (Translated,” PaRR (translation of China News Service article) (June 6, 2014).

²¹⁵ In the InterDigital case, NDRC suspended an AML investigation of InterDigital (*i.e.*, the non-Chinese party being investigated for supposed AML violations) without imposing a fine or requiring any specific reduction in the royalties that it seeks from licensees. See *infra* Section IV.A.2.a). The suspension was part of a settlement in which InterDigital made specific commitments. See *id.* It remains unclear whether similar arrangements in future cases may provide an avenue for foreign companies to avoid sanctions.

²¹⁶ See Section IV.C.

²¹⁷ See SAIC, “SAIC Has Formally Initiated the Task of Revising the Anti-Unfair Competition Law” (Mar. 3, 2014), available at http://www.saic.gov.cn/fldyfbzdjz/gzdt/201403/t20140303_142680.html; see *supra* note 38.



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Reportedly, NDRC and the Chinese government more broadly view the AML as a tool for avoiding WTO disciplines on mandatory price reductions of foreign goods.²¹⁸ However, if this is indeed the view of the Chinese government, it is arguably legally incorrect. WTO rules do not provide a safe harbor for price reductions imposed under the guise of competition law, and this particular form of disguised protectionism is no less susceptible to WTO legal challenge than any other.²¹⁹ Indeed, as the WTO panel in *Argentina – Import Restrictions* recently found, an unwritten regulatory requirement that foreign companies limit the volume and/or price of imports violates Article XI:1, and the same reasoning could apply to China as well.²²⁰

a) Soaps and detergents

In late March 2011, NDRC faced popular pressure to combat a rapid rise in inflation in several categories of consumer goods, including soaps and detergents.²²¹ Although the cause of the inflation was apparently a rise in raw materials costs, rather than collusion or other anti-competitive behavior, NDRC responded by punishing one foreign company responsible for the price rises—local subsidiaries of the Anglo-Dutch company Unilever—and by demanding that other companies reduce their prices.

Chinese state media reported that Unilever, Procter & Gamble (P&G), and two Chinese companies (Guangzhou Liby Enterprise Group and Nice Group) planned to raise prices on detergents, soaps, and shampoos by 5%–15% in April 2011. According to Unilever and P&G, the price rises were due to increases in raw materials costs, especially for petroleum. The price increase announcements sparked panic buying.²²² NDRC in late March 2011 called executives at the companies and informed them that NDRC would not tolerate any unreasonable price rises. NDRC also began to investigate the companies, apparently pursuant to Article 13 of the AML (*i.e.*, regarding whether there had been “an agreement, decision or concerted practice” between competitors). However, there is no indication in the public record that NDRC considered whether the price increases resulted from independent action in response to raw materials price increases, which could be a legitimate result of market-based, free and open competition. In this regard, NDRC imputed “bad intentions” to the companies, as if they aimed to “test market intentions”

²¹⁸ See, e.g., Jamil Anderlini, “Multinationals fret as China’s antimonopoly probes intensify,” *Financial Times* (Aug. 6, 2014) (“Jiang Liyong, a former diplomat and Commerce Ministry official with China’s WTO mission in Geneva and now a partner at Gaopeng Law Firm, says the use of anti-monopoly legislation to punish foreign companies is intentional because such actions are not expressly forbidden under WTO or other international trade and investment rules.”).

²¹⁹ *But see supra* note 23.

²²⁰ *See supra* note 24.

²²¹ At about the same time, NDRC also initiated a parallel investigation into violations of the AML by companies that marketed instant noodles, another widely used consumer product. See Nathan Bush, “China’s NDRC Punishes Rice Noodle Cartel Members,” O’Melveny & Myers LLP (Apr. 2, 2010), available at <http://www.omm.com/china-rice-noodle-cartel-04-02-2010/>.

²²² See Jason Subler & Melanie Lee, “P&G, Unilever Up China Prices, Fuel Inflation Fears,” *Reuters* (Mar. 28, 2011).



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and engage in “tacit collusion,” as opposed to communicating their pricing policies to the public and the government in a transparent manner.²²³

By April 1, 2011, Unilever, Liby, and Nice had agreed not to implement the planned price rises.²²⁴ Nonetheless, on May 6, 2011, Unilever was fined RMB 2 million.²²⁵ There are no published reports regarding similar fines for any of the other companies involved in this specific investigation.²²⁶

b) Infant formula

Infant formula has been a politically sensitive issue in China since at least 2008, when domestically manufactured melamine-spiked infant formula killed 6 babies and left 300,000 sick.²²⁷ In the wake of the ensuing scandal, many Chinese consumers developed a preference for foreign infant formula brands, which they saw as a safer alternative. In May 2013, China's State Council announced its intention to win back the public's confidence in domestically produced infant formula, and counter foreign firms' increasing market shares.²²⁸

However, in July 2013, prices for infant formula surged across the board, apparently as a result of increased consumer demand. Supermarkets in the United Kingdom and Australia had to ration infant formula and Hong Kong imposed export restrictions. According to a survey at the time conducted by sina.com.cn—reprinted by *People's Daily*—82.3% of

²²³ See “NDRC Answers Journalists' Questions Regarding Its Prosecution on Unilever China Disseminating Price Rise Information and Disturbing the Market Order,” NDRC News Center (May 6, 2011).

²²⁴ See “Unilever, Liby and Nice, Three Consumer Goods Giants Suspended Raising Prices,” Sina News (Apr. 1, 2011), available at sh.sina.com.cn/news/s/2011-04-01/0806178045.html.

²²⁵ *Id.* Although the legal basis NDRC relied on in imposing the fine on Unilever was the Price Law, the Q&A posted by NDRC on its website cited the AML as one of the laws business operators should abide by.

²²⁶ In addition, in April 2011, the EU fined Unilever and P&G €104.0 million and €211.2 million, respectively, for alleged anti-competitive practices in the powdered detergent market in 2003–2005. Although this EU fine appears substantively unrelated to the NDRC investigation, Chinese news media have drawn parallels between the two. See, e.g., “China Voice: Fine Signals Zero-Tolerance towards Foreign Cartels,” China Daily (Jan. 5, 2013) (“Some large companies even took advantage of the country's slack supervision and lagging legislation. For instance, Unilever (China) Co., Ltd. was fined merely 2 million yuan in 2011 over statements it made regarding planned price hikes in China. But in Europe, it was fined, together with another consumer goods giant . . . Procter & Gamble, a total of 315.2 million euros for fixing washing powder prices during the same period.”).

²²⁷ See Amie Tsang & Louise Lucas, “Chinese Thirst for Formula Spurs Rationing,” Financial Times (Apr. 7, 2013).

²²⁸ See Yang Lina, “Chinese Premier Vows to Boost Dairy Industry,” Xinhua (May 31, 2013), available at http://news.xinhuanet.com/english/china/2013-05/31/c_132423178.htm. China's efforts to bolster the domestic industry at the expense of foreign companies have persisted. See, e.g., Lucy Hornby, “China Clamps Down on Baby Formula Imports,” Financial Times (May 5, 2014) (“New rules issued over the weekend require dairy products produced overseas to be registered with the quality watchdog, or be barred from entry at China's ports. A second regulation requires all formula sold in China to carry Chinese-language labelling affixed at the source.”).



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respondents said foreign producers should be investigated because of price rises.²²⁹ Soon afterward, NDRC reportedly initiated an investigation into infant formula manufacturers, including Abbott Laboratories, Danone, Mead Johnson Nutrition, and Wyeth Nutrition (owned by Nestlé), for possible violations of the AML.²³⁰ Within three days, Nestlé/Wyeth pledged to lower prices by 20%. Danone also reportedly proposed a price reduction.²³¹ Then in August 2013, NDRC imposed more than \$100 million in fines: \$33 million for Mead Johnson, a U.S. company; RMB 163 million for Biostime, a Chinese-controlled company; and RMB 4 million for Fonterra, a New Zealand company. Wyeth was among the companies not fined, apparently as a reward for announcing a price reduction quickly.²³² The supposed legal basis for these penalties was that the penalized companies had concluded RPM agreements with Chinese resellers, with NDRC apparently treating such agreements as *per se* unlawful.²³³ However, the Shanghai Higher People's Court had previously found in *Rainbow v. Johnson & Johnson* that RPM agreements are not *per se* illegal.²³⁴ It is unclear whether NDRC took account of this legal complexity in its investigations.²³⁵

Thus, like the March-April 2011 investigation of soap and detergent manufacturers, this set of investigations appears to have been designed to combat a short-term price increase in consumer products. Also like the soap and detergent investigation, NDRC in effect required the targets of the investigations—predominantly foreign companies—either to acquiesce by retracting planned price increases or to pay a fine. Indeed, the infant formula investigations seem to be part of a broader effort by China's government to protect the domestic dairy industry.²³⁶ However, as far as the public record indicates, the markets were not concentrated and there was no monopolistic conduct, such as cartel

²²⁹ See Louise Lucas, "Baby Milk Makers Slash Prices in Bow to Beijing Regulators," *Financial Times* (Jul. 3, 2013).

²³⁰ See Patti Waldmeir, "Nestlé 'Co-Operating' with China Probe into Baby Milk Prices," *Financial Times* (Jul. 2, 2013).

²³¹ See Louise Lucas, "Baby Milk Makers Slash Prices in Bow to Beijing Regulators," *Financial Times* (Jul. 3, 2013).

²³² See Tom Mitchell & Neil Hume, "China Fines Milk Formula Makers in Pricing Probe," *Financial Times* (Aug. 7, 2013).

²³³ See "Biostime and Other Milk Power Enterprises Were Fined a Total of RMB 668.73 Million for Conducts Restricting Competition That Violate the AML," NDRC News Center (Aug. 7, 2013).

²³⁴ See Ding Liang, "After Many Twists and Turns China's First Vertical Monopoly Agreement Dispute Has Ended—Comments on *Rainbow v. Johnson & Johnson*," *Wolter Kluwer* (Aug. 5, 2013).

²³⁵ The ruling in *Rainbow v. Johnson & Johnson* has not been adopted by the SPC in an interpretation of the AML or recognized by the SPC as a model case to be studied by lower courts.

²³⁶ See Yang Lina, "Chinese Premier Vows to Boost Dairy Industry," *supra* note 228. NDRC's efforts may have been counterproductive, as the foreign companies' price reductions likely further entrenched foreign companies in the domestic infant formula market. As of April 1, 2014, a Chinese-language label for imported infant formula products must be printed on the package for the smallest unit of sale before entering China; labeling within the territory of China is no longer allowed. In addition, as of May 1, 2014, infant formula products manufactured by foreign companies may not be imported into China unless the manufacturer has been registered with the General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ). See Announcement on Strengthening Regulation of Importation of Infant Formula, Art. 2, AQSIQ [2013] No. 133 (Sept. 23, 2013).



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activity or abuse of dominance, but rather legitimate price increases in response to market conditions.

c) Automobiles and Automobile Parts

NDRC's ongoing investigation into foreign automobile companies' alleged RPM practices in distribution and aftermarkets has the same troubling characteristics as prior investigations into soaps and detergents and infant formula: disproportionate targeting of foreign companies, forced price reductions, and reports of deficiencies in due process. Moreover, the investigations undercut prior statements by NDRC that it would address these defects.²³⁷

NDRC began investigating foreign automobile companies for RPM at least as early as 2012, when a complaint by the government-backed China Automobile Dealers Association (CADA) triggered an informal investigation into Mercedes Benz.²³⁸ By August 2013, NDRC had reportedly initiated informal investigations of several other foreign automobile companies and Chinese joint ventures that market foreign brands, including BMW.²³⁹ The investigations reportedly targeted certain types of vertical restraints, including so-called "tie-in sales," where car makers sometimes require dealers to sell their other products.²⁴⁰ In response, the companies under investigation made certain "adjustments," according to a CADA official, including disgorging money that they had collected through allegedly unfair agreements with dealers.²⁴¹

By May 2014, NDRC had initiated formal investigations of foreign automobile companies. The targets included Jaguar Land Rover, Chrysler, and Audi, which were reportedly investigated for alleged vertical restraints involving the aftermarket – specifically, agreements that make after-sales service by brand dealers (*i.e.*, "4S" stores that handle sales, spare parts, service and surveys) more expensive.²⁴² In addition, Mercedes was again under investigation for "value added service agreements" allegedly involving tie-in sales and RPM agreements, and was initially not aware that it was under investigation.²⁴³

²³⁷ See, e.g., "China: NDRC Refutes Bias against Foreign Firms, External Lawyers," Competition Policy International (Sept. 17, 2013), available at <https://www.competitionpolicyinternational.com/china-ndrc-refutes-bias-against-foreign-firms-external-lawyers>; "NDRC defends use of 'leniency' in vertical restraints cases," PaRR (Oct. 21, 2013) (reporting that NDRC planned to issue rules on leniency in AML, after being accused of according leniency in a nontransparent manner in the context of the infant formula investigations).

²³⁸ See Lisha Zhou & Joy C. Shaw, "China's NDRC launches formal vertical restraint probe of Mercedes-Benz, sources say," PaRR (Aug. 5, 2014)

²³⁹ Joy C. Shaw, "China's NDRC gets car makers' attention with light touch," PaRR (Nov. 18, 2013).

²⁴⁰ Joy C. Shaw, "China's NDRC gets car makers' attention with light touch," *supra* note 239.

²⁴¹ Joy C. Shaw, "China's NDRC gets car makers' attention with light touch," *supra* note 239.

²⁴² Joy C. Shaw & Lisha Zhou, "China NDRC may impose antitrust fines on auto manufacturers soon, sources say," PaRR (Jul. 25, 2014).

²⁴³ Lisha Zhou & Joy C. Shaw, "China's NDRC launches formal vertical restraint probe of Mercedes-Benz, sources say," PaRR (Aug. 5, 2014).



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A wave of price reductions followed. Jaguar Land Rover announced on July 25 that it would cut prices on three popular car models by an average of RMB 200,000 (\$32,334) starting August 1.²⁴⁴ Mercedes announced on August 3 that it would cut spare parts prices by an average of 15% following an earlier average a 20% reduction in maintenance service prices.²⁴⁵ Audi and Chrysler also cut prices.²⁴⁶

Yet NDRC's investigations continued. NDRC raided Mercedes' Shanghai offices on August 4,²⁴⁷ and NDRC's Jiangsu affiliate subsequently raided Mercedes dealerships in five cities in the province.²⁴⁸ On August 12 NDRC fined FAW-Volkswagen, Audi's Chinese joint venture – which had reportedly “closely cooperated” with NDRC's investigation – as much as RMB 1.8 billion (\$292 million), and 11 Hubei-based dealers would reportedly also receive fines ranging from RMB 6 million to over RMB 50 million. on August 12.²⁴⁹ Li Pumin, NDRC's secretary-general, asserted that Chrysler and Audi “definitely engaged in monopolistic behavior, according to the investigations [carried out by NDRC's Hubei affiliate],” Li said. “They will receive punishment in the near term.”²⁵⁰ Meanwhile, China's state media has dedicated significant airtime to accusing foreign luxury-automobile makers of earning exorbitant profits in China by dominating the market, overcharging consumers, and controlling automobile parts sales.²⁵¹

On August 13, 2014, the European Chamber of Commerce issued the following statement regarding the NDRC investigation:

The European Chamber has received numerous alarming anecdotal accounts from a number of sectors that administrative intimidation tactics are being used to impel companies to accept punishments and remedies without full hearings. Practices such as informing companies not to challenge the investigations, bring lawyers to

²⁴⁴ Joy C. Shaw & Lisha Zhou, “China NDRC may impose antitrust fines on auto manufacturers soon, sources say,” *supra* note 242.

²⁴⁵ See “Mercedes-Benz offices in Shanghai raided by NDRC-report (*translated*),” PaRR (Aug. 5, 2014).

²⁴⁶ See Rose Yu & Liyan Qi, “BMW Cuts Spare-Parts Prices in China,” *Wall St. Journal* (Aug. 8, 2014).

²⁴⁷ Lisha Zhou & Joy C. Shaw, “China's NDRC launches formal vertical restraint probe of Mercedes-Benz, sources say,” *supra* note 243.

²⁴⁸ “Chinese antitrust authority accuses Mercedes-Benz of imposing vertical restraints,” PaRR (Aug. 18, 2014). The five cities were Suzhou, Wuxi, Huaian, Yangzhou, and Danyang. *Id.*

²⁴⁹ “China NDRC likely to impose CNY 1.8bn fine on Audi's China unit-report (*translated*),” PaRR (Aug. 12, 2014).

²⁵⁰ See “China's NDRC says 12 Japanese car parts suppliers face fines; Chrysler, Audi probe nears conclusion,” PaRR (Aug. 6, 2014).

²⁵¹ See Colum Murphy, “Car Makers Face Hits in China,” *Wall St. Journal* (Aug. 5, 2014); “CCTV once again exposed foreign automobile makers profiteering, pointing fingers to BMW, Mercedes, Cayenne and Touareg,” *QQ Finance* (May 28, 2014) (reporting that the CCTV 2 television show “Half an Hour Economy” broadcast a special program regarding the exceptionally high prices of foreign automobiles in China, alleging that certain models cost three times more in China than in overseas markets, quoting scholars as saying that monopolistic RPM practices conducted are to blame)



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hearings or involve their respective governments or chambers of commerce are contrary to best practices.

While the European Chamber recognises that a number of Chinese companies have been investigated for AML violations, the European business community is also increasingly considering the question of whether foreign companies are being disproportionately targeted in the investigations.

In some of the industries under investigation, domestic companies have not been targeted for similar violations. Furthermore, in some cases that involve joint ventures, it has only been the foreign partner that has been named as being a party to the investigations. A core tenet of a globalised economy is that all business operators, regardless of nationality, should be held accountable to the same criteria and be treated equally. Competition law should not be used as an administrative instrument to harm targeted companies or serve other aims, such as administratively forcing price reductions.²⁵²

The targeting of foreign companies but not domestic companies, administratively forced price reductions, failure to provide a public justification for commencing investigations,²⁵³ and announcements that violations have occurred even before an investigation has concluded suggest that the automobile investigations involve the same procedural deficiencies and discriminatory treatment as NDRC's earlier investigations of soaps, detergents, and infant formula

2. Pressure to license IP at below-market rates

Since 2013, NDRC has launched investigations of several foreign companies,²⁵⁴ and at least two U.S. companies, InterDigital and Qualcomm, in an apparent attempt to enhance the competitive position of these companies' potential or existing licensees, including Huawei and other Chinese telecommunications and electronic equipment producers. In effect, NDRC appears to be using its investigative power under the AML to give additional leverage to would-be Chinese licensees, affording them a competitive advantage in both the domestic and global telecommunications markets—and depriving foreign licensors of part of the license fees that they would otherwise be able to charge on

²⁵² European Union Chamber of Commerce in China, "European Chamber releases statement on China AML-related investigations," Press Release (Aug. 13, 2014).

²⁵³ To date, NDRC has not released any explanation of the supposedly anti-competitive conduct that is being investigated and punished.

²⁵⁴ See Joy C. Shaw & Lisha Zhou, "UPDATE: China NDRC investigates Dolby, Technicolor for alleged patent abuses — sources," PaRR (June 27, 2014) (reporting NDRC has launched two separate, formal investigations into Dolby Laboratories and Technicolor for possible abuse of market dominance through licensing of SEPs).



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their technology. Such enforcement actions caution foreign IP licensors which demand market-based royalties from Chinese licensees that they may be subject to investigation by NDRC. Moreover, as stated above, NDRC appears poised to impose higher fines for supposed violations of the AML related to IP than other types of cases, by basing the penalty amounts on global rather than domestic revenue.²⁵⁵ Overall, this pattern of enforcement is consistent with a broader policy of fostering the growth of domestic “next generation information technology” industries.²⁵⁶

a) InterDigital

NDRC’s first reported investigation of a U.S. company in the telecommunications sector targeted InterDigital. Since at least November 2008, InterDigital had been involved in negotiations with Huawei and ZTE over a license for its portfolio related to 2G, 3G, and 4G standards.²⁵⁷ After years of unsuccessful negotiations on a license, in July 2011, InterDigital filed actions at the U.S. International Trade Commission and U.S. district court to prevent the importation to the United States of Huawei and ZTE products that infringed on InterDigital’s patents.²⁵⁸ This led to private party litigation in China, which is discussed further in Section V. On September 23, 2013, NDRC informed InterDigital that it had initiated a formal AML investigation of the company with respect to its licensing practices.²⁵⁹

In the investigation, NDRC found that InterDigital had abused its dominant position in the wireless telecommunications SEP market by levying unfairly high royalties on

²⁵⁵ See Joy C. Shaw, “China’s NDRC to use global revenue as basis for fines in patent probes – ABA Antitrust in Asia,” *supra* note 15. Art. 47 of the AML does not specify the geographic basis for turnover calculations which gives the AMEAs discretion.

²⁵⁶ USCBC, “China’s Strategic Emerging Industries: Policy, Implementation, Challenges & Recommendations” (Mar. 2013), available at <http://uschina.org/sites/default/files/sei-report.pdf>.

²⁵⁷ See Lin Jinbiao, “A Battle across the Pacific Ocean: Conclusion of Trial by the Higher People’s Court of Guangdong Province of the Case of Anti-Monopoly Dispute between Huawei and IDC Regarding Abuse of Market Dominance,” *People’s Court News* (Oct. 29, 2013). The article was released by People’s Court News, and was reprinted by other newspapers and websites, including an official government website for Guangdong courts, available at <http://www.gdcourts.gov.cn/gdcourt/front/front!content.action?lmdm=LM22&gjid=20131101104516982014>.

²⁵⁸ See U.S. International Trade Commission “In the Matter of Certain Wireless Devices with 3G Capabilities and Components Thereof; Notice of Institution of Investigation,” 76 Fed. Reg. 54,252 (Aug. 31, 2011); see also “InterDigital Communications Inc. et. al. v. Huawei Technologies Co. Ltd et. al. Complaint for Patent Infringement” filed January 2, 2013, in the U.S. District Court for the District of Delaware.

²⁵⁹ See InterDigital 10-Q report, filed October 31, 2013, available at <http://files.shareholder.com/downloads/IDCC/2771353934x0xS1405495-13-40/1405495/filing.pdf>. In an article published by NDRC’s Price Supervision and Anti-Monopoly Bureau in *Price Supervision and Anti-Monopoly in China*, NDRC was reported to have started the probe in June 2013, and called in relevant personnel in InterDigital for investigation and interviews in July 2013 and January 2014. See Price Supervision and Anti-Monopoly Bureau of NDRC, “NDRC suspends investigation on US company IDC for alleged price monopoly,” *Price Supervision and Anti-Monopoly in China*, Issue 6 of 2014.



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Chinese enterprises, requiring Chinese enterprises to provide royalty-free cross-licensing, bundling SEPs with non-SEPs, and so on.²⁶⁰

InterDigital actively cooperated with NDRC during the investigation, and reached a settlement with Huawei regarding terms other than licensing fees, and pledged to negotiate licensing with other Chinese enterprises using Huawei's licensing terms as reference. InterDigital submitted an application for suspension of the investigation in March 2014.²⁶¹ NDRC announced that it had decided to suspend its investigation on May 22, 2014, based on InterDigital's commitments (i) to offer Chinese licensees the option of taking a worldwide license of InterDigital's SEPs only, on FRAND terms and without requiring royalty-free, reciprocal cross-licensing of SEPs; (ii) not to require licensees to provide InterDigital with royalty-free, reciprocal cross-licensing of SEPs; and (iii) before commencing any action to seek injunctive or other exclusionary relief, to offer the potential Chinese licensee the option to determine the royalty rate and other non-agreed terms of a worldwide license under InterDigital's SEPs through binding arbitration.²⁶² Xu Kunlin, Director-General of NDRC's Price Supervision and Anti-Monopoly Bureau, stated that NDRC "will monitor the implementation of these commitments and if they are not well executed we will resume the investigation according to law."²⁶³

This settlement is broadly consistent with the outcome of an EU case involving Samsung.²⁶⁴ Thus, it may represent an attempt by NDRC to bring its competition law enforcement practices in line with international standards and, if so, it should be welcomed. However, the NDRC investigation also appears designed to boost Huawei and ZTE's negotiating position with InterDigital, and potentially to punish InterDigital for seeking to enforce its IP portfolio in the United States. Indeed, the suspension of NDRC's investigation coincided with a commercial licensing agreement between InterDigital and Huawei.²⁶⁵

²⁶⁰ See Price Supervision and Anti-Monopoly Bureau of NDRC, "NDRC suspends investigation on US company IDC for alleged price monopoly," Price Supervision and Anti-Monopoly in China, Issue 6 of 2014.

²⁶¹ See Price Supervision and Anti-Monopoly Bureau of NDRC, "NDRC suspends investigation on US company IDC for alleged price monopoly," Price Supervision and Anti-Monopoly in China, Issue 6 of 2014.

²⁶² InterDigital, "China's NDRC Accepts InterDigital's Commitments and Suspended Its Investigation," Press Release (May 22, 2014). The first commitment applies only to Chinese manufacturers of cellular terminal units licensing InterDigital's patent portfolio for 2G, 3G, and 4G wireless mobile standards.

²⁶³ John Ruwittch & Matthew Miller, "China suspends InterDigital anti-monopoly probe," Reuters (May 22, 2014).

²⁶⁴ See European Commission, "Antitrust: Commission consults on commitments offered by Samsung Electronics regarding use of standard essential patents," Press Release IP/13/971 (Oct. 17, 2013), available at http://europa.eu/rapid/press-release_IP-13-971_en.htm; see also Press Release, "FTC Finalizes Settlement in Google Motorola Mobility Case: Agency Makes Technical Modifications to Final Order in Response to Public Comments," FTC (July 27, 2011) (announcing the issuance of a settlement requiring Google to license its SEPs on FRAND terms, which is comparable in some respects to the settlements in the InterDigital and Samsung cases).

²⁶⁵ See "NDRC suspends price monopoly investigation into IDC," NDRC Work Dynamic (May 22, 2014).



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The investigation also appears to have had significant procedural irregularities. For example, one of InterDigital's submissions to NDRC labeled "Confidential Materials" was displayed on state television; it is unclear whether NDRC allowed state media or other third parties to access the document in its entirety.²⁶⁶ In addition, NDRC reportedly declined to guarantee the personal safety of InterDigital executives invited to attend a meeting regarding the investigation on December 18, 2013.²⁶⁷ The meeting eventually took place in January 2014, and in February 2014 InterDigital issued a press release describing statements NDRC officials made during the January meeting about concerns regarding the detention of foreign executives and the ability of foreign counsel to attend NDRC investigatory meetings. A corrected press release indicated the company's "apologies" for misunderstanding Chinese law and NDRC rules in that regard.²⁶⁸ It remains unclear why InterDigital corrected its press release to make this public apology. Chinese state media thereafter reported that InterDigital "vow[ed] to stop ... charging Chinese companies license fees that are discriminatory and exploitative."²⁶⁹

b) Qualcomm

NDRC's second AML investigation of a U.S. company in the telecommunications sector targeted Qualcomm (and apparently remains ongoing). Qualcomm disclosed that it was being investigated by the NDRC for possible violations of the AML on November 25, 2013.²⁷⁰ Some observers suspect that it was related to China Mobile's launch of 4G in 2014, from which Qualcomm stands to earn license fees for its patents²⁷¹—although

²⁶⁶ See "Qualcomm, InterDigital under probe for discriminatory licensing," CCTV (Feb. 19, 2014), available at <http://english.cntv.cn/program/bizasia/20140219/103893.shtml>. At 00:20, the video displays InterDigital's supplemental materials submitted to NDRC's Price Supervision and Anti-Monopoly Bureau, marked "confidential materials" on the top right corner of the cover. At 00:24, the video displays a document entitled "Application for Ending the Anti-Monopoly Investigation by NDRC," including the text: "Investigation regarding IDC's patents (essential to) 2G, 3G and 4G wireless mobile standards according to Art. 45 of the AML and Art. 15 of the Regulations on Administrative Procedures."

²⁶⁷ See Susan Decker, "InterDigital Says China Made Threats on Huawei Patent Royalties," Bloomberg Businessweek (Dec. 17, 2013); "InterDigital execs fear arrest, won't meet China antitrust agency," Reuters (Dec. 16, 2013), available at <http://www.reuters.com/article/2013/12/16/us-interdigital-china-idUSBRE9BF0CW20131216>. While it is unclear whether NDRC would have been in position to provide such guarantee, China's predilection for preventing foreign citizens from leaving the country while an investigation is being conducted, without a court order or an opportunity for judicial intervention, creates understandable concern regarding personal safety.

²⁶⁸ See Press Release, "CORRECTION – InterDigital Continues to Cooperate With Investigation by China's National Development and Reform Commission," InterDigital (Feb. 12, 2014), available at <http://ir.interdigital.com/releasedetail.cfm?ReleaseID=825422>.

²⁶⁹ See "InterDigital vows to stop discriminatory licensing: China," CCTV (Feb. 19, 2014). According to Chinese state media, "NDRC will further study the case before making any decisions." *Id.*

²⁷⁰ See Supantha Mukherjee & Neha Alawadhi, "Qualcomm Faces Antitrust Probe in China," Reuters (Nov. 25, 2013).

²⁷¹ See, e.g., Adam Century, "Qualcomm Is Targeted," International Herald Tribune (Nov. 27, 2013) (quoting a financial analyst as stating: "investigation is related to the forthcoming launch of TD-LTE by China Mobile in early 2014 and the negotiations on chip pricing and license pricing").



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NDRC officially denies this.²⁷² But it seems to be confirmed by the fact that, in February 2014, a group of Chinese telecommunications firms filed a complaint against Qualcomm with NDRC, alleging that it was “overcharging Chinese mobile makers on patent fees and boosting sales by tying products.”²⁷³ In July 2014, NDRC announced that Qualcomm executives, led by President Derek Aberle, met with the Price Supervision and Anti-Monopoly Bureau on anti-monopoly investigation findings and possible solutions. The company’s alleged illegal practices include calculating royalties on the basis of a complete mobile device, bundling SEPs with non-SEPs, demanding that Chinese companies cross-license their patents to it free of charge, charging for expired patents, bundling patent licenses with chip sales, and refusing patent licenses to chip producers, as well as attaching unreasonable terms to patent licenses and chip sales.²⁷⁴

Xu Kunlin, Director-General of NDRC’s Division of Price Supervision and Anti-Monopoly Bureau, has made several remarks regarding the investigation, seeming to prejudge the outcome. In particular, he told *China Daily* in December 2013 that NDRC had amassed “substantial evidence” against Qualcomm in the AML investigation.²⁷⁵ In addition, in February 2014, Mr. Xu publicly described Qualcomm as a “patent rogue.”²⁷⁶

Thus, NDRC’s investigation of Qualcomm appears designed to bias licensing negotiations in favor of would-be Chinese licensees. In particular, the threat of AML penalties against Qualcomm could potentially help Chinese telecommunications firms secure lower license fees in connection with the planned 4G rollout. Such intrusions into private party licensing negotiations for the purpose of giving one party more bargaining leverage than the other are an inappropriate use of a competition law authority’s power to investigate, and are inconsistent with international competition enforcement norms. It is

²⁷² See “NDRC Held a Press Conference Themed ‘Price Supervision and Anti-Monopoly Work,’” *China.com.cn* (Feb. 19, 2014), available at http://www.china.com.cn/zhibo/2014-02/19/content_31502397.htm (quoting Xu Kunlin as stating: “People are so bent on guessing the background of these antimonopoly investigations. Actually in all the cases we’ve dealt with so far, there’s none of those conjectured ‘background’. These two investigations originated from complaints filed to us and are not related to 4G or 3G.”).

²⁷³ See “China’s Communications Industry Files Complaint against Qualcomm,” *CCTV* (Feb. 10, 2014).

²⁷⁴ See “Qualcomm president answered anti-monopoly investigation inquiries in his third visit to NDRC,” *Work Dynamics, NDRC* (July 11, 2014), available at

http://jjs.ndrc.gov.cn/gzdt/201407/t20140711_618477.html. One Chinese legal scholar has objected to the “one-stop” enforcement adopted by NDRC in the Qualcomm investigation, under which NDRC investigates allegations of both pricing- and non-pricing-related (e.g., bundled sales and unreasonable non-price conditions) in the same investigation. See Liu Xu, “Three Anti-Monopoly Law Enforcement Authorities: What Have They Done Wrong in Law Enforcement,” *Caixin Online* (Aug. 6, 2014). According to this scholar, non-price-related AML violations fall outside the scope of NDRC’s authority. *Id.*

²⁷⁵ See “NDRC Has ‘Substantial’ Evidence against Qualcomm,” *DM Asia* (Dec. 16, 2013).

²⁷⁶ See Zheng Yangpeng, “Probes ‘Note Targeting’ Foreign Firms: Official,” *China Daily* (Feb. 20, 2014). In another incident, Director-General Xu announced that an individual had been removed from the AMC’s advisory board due to allegedly improper lobbying on behalf of Qualcomm. See Joy C. Shaw & Lisha Zhou, “China’s NDRC urges sacking of state antitrust advisor for alleged Qualcomm lobbying,” *PaRR* (July 31, 2014); see also *supra* note 48.



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also arguably inconsistent with Chinese law, which forswore the power to regulate royalties imposed by Chinese licensees when the Regulations on Administration of Technology Introduction Contracts was abolished in 2002.²⁷⁷ In addition, procedural irregularities in the Qualcomm investigation, such as Mr. Xu's public remarks, raise concerns regarding the fairness of the investigation.

B. Procedural Deficiencies

NDRC regularly resorts to heavy-handed tactics in its implementation of the AML, particularly with respect to foreign companies. For example, at an August 2013 conference celebrating the first five years of the AML, Xu Xinyu, chief of NDRC's Price Supervision and Anti-Monopoly Bureau, casually informed a group of 30 foreign companies that half of them were under investigation under the AML, and threatened to initiate an investigation of one company merely for asking a question.²⁷⁸ He also warned the companies not to "put up a fight" or use external lawyers, or they would face fines that were doubled or tripled.²⁷⁹

This episode is emblematic of NDRC's conduct of investigations under the AML.²⁸⁰ Other shortcomings have included the following:

- *Lack of access to counsel.* Like MOFCOM, NDRC has often barred foreign counsel from participating in meetings in connection with investigations under the AML.
- *Lack of effective appeal process for NDRC information requests.* Companies under investigation by NDRC have no procedural tools to prevent abuses of power by NDRC during the course of the investigation. If NDRC issues information requests, the respondents have no means to challenge the request through the court system. Once NDRC issues a determination or a penalty, firms technically have the legal right to appeal either administratively (*i.e.*, to NDRC itself) or judicially. However, firms are generally reluctant to appeal, either because NDRC's determination is the outcome of an "agreement" with the respondent, or because they fear retribution for appealing NDRC determinations, given NDRC's broad regulatory powers over investment projects and the

²⁷⁷ Arts. 4 and 5 of the Regulations on Administration of Technology Introduction Contracts (promulgated by the State Council in 1985, amended in 1991, and abolished in 2002) required that technology introduction contracts concluded by the parties be filed with the Ministry of Foreign Economic Relations and Trade (MOFCOM's predecessor) or any other agency authorized by such Ministry for examination and approval. Under these Regulations, the contracting parties were required to specify in contract the amount and composition of remuneration, among other things.

²⁷⁸ See Michael Martina, *supra* note 6.

²⁷⁹ *Id.*

²⁸⁰ To date, it is unclear whether SAIC's investigations also have the same shortcomings.



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economy as a whole.²⁸¹ Moreover, NDRC does not issue any written determinations explaining its reasoning in cases where penalties are imposed, resulting in an inadequate administrative record on which to base an appeal.²⁸²

By contrast, in the United States for example, parties that receive a civil investigative demand (CID) for information from DOJ in connection with an antitrust investigation may move to quash it at the federal court with jurisdiction over the matter.²⁸³ In addition, any administrative determinations and remedies imposed by the U.S. FTC are subject to judicial review on the basis of a complete and detailed administrative record.

- *Threats to personal safety.* In the past, NDRC has reportedly threatened not to guarantee the personal safety of individuals attending meetings in connection with ongoing investigations if high-ranking corporate executives do not appear before NDRC.²⁸⁴

There are some signs of small improvements in NDRC's procedures. NDRC has publicly announced that it would in the future allow foreign counsel to attend meetings in the context of AML investigations, and reportedly told InterDigital that executives of any foreign company should have no concerns about being detained or arrested if they travel to China to meet with NDRC in response to an AML investigation.²⁸⁵ Also, NDRC recently agreed to suspend its investigation of InterDigital based on commitments proposed by the company, and did not impose any fines on InterDigital or require any specific reduction in the royalties that it seeks from licensees. Similar arrangements in future cases may provide an avenue for foreign companies to avoid sanctions. However, these steps do not suffice to allay concerns that the procedural shortcomings in AML investigations facilitate NDRC's efforts to pressure foreign companies to reduce prices, license IP to Chinese licensees for below-market prices, and/or take other steps that favor NDRC's stakeholders.

²⁸¹ See, e.g., Lester Ross & Kenneth Zhou, "Administrative and Civil Litigation under the Anti-Monopoly Law," in Adrian Emch & David Stallibrass (eds.), *supra* note 185, at 325 ("[G]overnment agencies do not like to be sued and are sometimes prone to irregular means to dissuade parties from engaging in litigation.").

²⁸² NDRC has, however, published a monthly magazine entitled *China Price Supervision and Anti-Monopoly* announcing major events under the Price Law and the AML since 2005.

²⁸³ Although Article 53 of the AML provides that any company may appeal administrative decisions regarding the AML, either to the administrative organ itself or to the courts, requests for information are apparently not appealable. On the United States, see DOJ, "Antitrust Division Manual" (5th ed. Mar. 2014) at III-74, available at <http://www.justice.gov/atr/public/divisionmanual/>.

²⁸⁴ See, e.g., Susan Decker, "InterDigital Says China Made Threats on Huawei Patent Royalties," *supra* note 267; "InterDigital Execs Fear Arrest, Won't Meet China Antitrust Agency," Reuters (Dec. 16, 2013).

²⁸⁵ See Press Release, "CORRECTION – InterDigital Continues to Cooperate With Investigation by China's National Development and Reform Commission," InterDigital (Feb. 12, 2014), available at <http://ir.interdigital.com/releasedetail.cfm?ReleaseID=825422>.

The image shows a scale of justice on the left, symbolizing law and equity. To its right is a map of China with various cities and regions labeled, such as Yinchuan, Lanzhou, and Xi'an. The title 'COMPETING INTERESTS IN CHINA'S COMPETITION LAW ENFORCEMENT' is written in large, bold, white capital letters across the top right of the image.

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C. SAIC's 8th Draft Rules

Since 2009, SAIC has been drafting Rules on the Prohibition of Abuses of Intellectual Property Rights for the Purposes of Eliminating or Restricting Competition (Draft Rules). To date, SAIC has issued eight drafts, the most recent on June 11, 2014. The Draft Rules propose a significant curtailment of IP rights in several ways, including by:

1. Requiring rights holders to license patents on FRAND terms if they are deemed “essential” to other parties, even in cases where the rights holder has not made any commitment to an SSO to license its patents. As a result, the value of the patents may be diminished, merely because they are widely used and thus deemed “essential.”
2. Requiring rights holders to disclose to SSOs any patents they believe to be essential to industry standards under consideration, even if they are not members of the SSO. In effect, this means that foreign rights holders would be forced to join Chinese SSOs and accept FRAND commitments on their patents—in contrast to other countries, where this choice is voluntary.
3. Imposing a burden of proof on rights holders to demonstrate that their conduct does not constitute abuse of market dominance. In effect, this set of provisions heightens the legal risk associated with licensing patents that are widely used.²⁸⁶

These rules are part of a broader push by Chinese legal authorities and regulators to assume the power to declare certain patents “essential,” and therefore subject to licensing on FRAND terms, regardless of the right holder’s preferences. This tendency is also evidenced by the remedies imposed in MOFCOM’s review of the Google/Motorola and Microsoft Nokia cases, discussed above at Sections III.B.2.b) and III.B.2.c), respectively. In addition, an SPC draft judicial interpretation on Patent Infringement Cases (II) (“Draft Judicial Interpretation”) released July 31, 2014²⁸⁷ would authorize Chinese courts to

²⁸⁶ The Draft Rules curtail IP-related rights in other ways as well. For example, Article 12 of the Draft Rules prohibits companies with a dominant market position or dominant patent pool management organization from “prohibiting the licensee from challenging the validity of the pooled patents” or “accord[ing] different transactional terms [条件] to patent pool participants that meet the same requirements [条件], or to licensees in the same relevant market.” Thus, the Draft Rules prohibit conduct related to patent pools that is not necessarily monopolistic. By contrast, under the Contract Law, parties have freedom of contract, allowing them the freedom to enter into a patent pool agreement of their own will unless such agreement is invalid because, *e.g.*, it licenses expired or invalid patents, illegally monopolizes technology, or restricts technological competition and technological development. Contract Law, Arts. 329, 343, and 344. Article 12 appears designed to counter a successful challenge to a Chinese patent included in the 4C patent pool for DVD technologies managed by Philips at SIPO, as well as the unsuccessful antitrust claims in the United States against the same patent pool by two Chinese DVD manufacturers. *See* Li Jing, “Patent Power,” *China Daily* (Mar. 12, 2007); *Wuxi Multimedia, Ltd. v. Koninklijke Philips Elecs.*, 2006 WL 6667002 (S.D. Cal. 2006), *aff’d* 280 Fed. Appx. 968 (Fed. Cir. 2008).

²⁸⁷ *See* SPC, “SPC Interpretations on Patent Infringement Cases (II) for public comment,” SPC website (July 31, 2014), available at http://www.court.gov.cn/xwzx/yw/201407/t20140731_197079.htm.



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allow an alleged infringement to continue if (i) the patent-holder negotiates in bad faith and in violation of the FRAND principle over the licensing terms of an SEP;²⁸⁸ or (ii) the cessation of the infringement may cause harm to “social and public interests” or “grave imbalance” between the interests of the parties, in which case “reasonable compensation” should instead be provided to the patent holder.²⁸⁹ Courts would also have the authority to set the terms of an SEP based on FRAND principles and in consideration of other factors, if the parties cannot agree on such licensing terms through negotiation.²⁹⁰ The Draft Judicial Interpretation and the Draft Rules, if enacted in their current form, would appear to provide Chinese courts and SAIC with great discretion to intervene in patent licensing negotiations purely based on commercial considerations between the parties, and tilt the balance in favor of the Chinese licensees within the context of industrial policies which aim to protect and support national champions at the expense of the patent holder. Thus, the Draft Rules are one of several concurrent efforts to curtail the interests of right holders of widely used patents – which, in practice, are often foreign companies.

1. Essential facilities doctrine

Article 7 of the Draft Rules provides:

Without due justification, an undertaking with a dominant market position is not allowed to refuse to license its intellectual property rights to other undertakings on reasonable terms and conditions, if such intellectual property rights constitute essential facilities for production and operations.

To identify whether an intellectual property right constitutes an essential facility for production and operations, factors to be considered include: whether the intellectual property right has reasonable substitutes in the relevant market and is necessary for

²⁸⁸ See Article 27 of the Draft Judicial Interpretations (“If the accused infringer claims there has been no infringement based on the argument that the implementation of standards does not require the licensing of a patent from the patent holder, if the patent concerned is included in non-compulsory national, industrial or local standards, the people’s court will generally not sustain such argument. However, if the patent holder, in violation of FRAND principles, negotiates in bad faith with the accused infringer over the licensing terms of an SEP, the people’s court will generally sustain the accused infringer’s claim not to cease the implementation of the SEP.”)

²⁸⁹ See Article 30 of the Draft Judicial Interpretations (“The people’s court may rule the infringer not to cease implementing relevant patents, if the cessation of which will damage social and public interests or cause grave imbalance between the interests of the parties, and order the infringer to provide reasonable compensation to use such patent.”)

²⁹⁰ See Article 27 of the Draft Judicial Interpretations (“The licensing terms of an SEP shall be determined by the patent holder and the accused infringer; if the parties cannot reach an agreement through thorough consultation and negotiations, they may ask the people’s court to decide. The people’s court shall determine the licensing terms based on FRAND principles and in overall consideration of such factors as the degree of innovativeness of the patent and the utility of the patent in the standard, the technical sector concerning the standard, the nature of the standard, scope of implementation of the standard, and the relevant licensing conditions.”)



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other undertakings to compete in the relevant market; whether refusal to license the intellectual property right would adversely affect competition and innovation in the relevant market; whether licensing the intellectual property right would cause unreasonable harm to the right holder; and so on.

Thus, any company with IPR that is deemed “essential ... for production and operations”²⁹¹ under the four-factor²⁹² test of Article 7 would be obligated to accept any “reasonable” offer to license its IP, regardless of the nature of the company’s dominance or the IP involved, unless it has “due justification” for refusing to do so. Moreover, companies will have no way to know *ex ante* how SAIC or the Chinese judiciary would interpret any of these terms. Rather, the definitions of “essential” and “dominant,” and the meaning of each of the four factors, will have to be articulated through litigation. Particularly in light of the Chinese judiciary’s due process deficiencies (discussed in Section V), as well as its track record of issuing rulings that are highly favorable to Chinese licensees (as in *Huawei v. InterDigital*), this enunciation of the essential facilities doctrine heavily favors licensees at the expense of licensors, which often are foreign companies.

Indeed, no other competition law jurisdiction has such a broad, unbalanced essential facilities doctrine.²⁹³ In other jurisdictions, such as the United States, a patent holder may be obligated to license declared essential IP on FRAND terms only, by making a voluntary contractual commitment to an SSO, thereby turning the IP into a declared SEP. No essential facilities doctrine applies under U.S. law.²⁹⁴ By contrast, the Draft Rules propose to force IP rights holders to abide by FRAND terms regardless of the commercial circumstances or whether FRAND commitments have been made regarding the IP. For example, if a patent is widely used simply by virtue of a license to one licensee (even if it is not a FRAND-encumbered SEP), the rights holder could potentially lose the right to revoke the license in the future.

2. Mandatory licensing of SEPs

²⁹¹ The phrase “production and operations” may be intended to exclude parts of a business that are purely administrative in nature.

²⁹² The catch-all open-ended “so on” is arguably a fourth factor.

²⁹³ For example, the EU has an essential facilities doctrine which applies only in cases of abuse of dominance, and the application of which has generally been limited to cases of refusal to deal. See Sébastien J. Evrard, “Essential Facilities in the European Union: *Bronner* and Beyond,” 10 Colum. J. Eur. L. 491, 491-492 (2003-2004).

²⁹⁴ See Maureen K. Ohlhausen, Commissioner, FTC, “Special Address at the 2013 Standards and Patents Conference, London, UK: A Pragmatist’s Approach to Navigating the Intersection of IP and Antitrust” (Dec. 4, 2013), at 16, available at http://www.ftc.gov/sites/default/files/documents/public_statements/pragmatists-approach-navigating-intersection-ip-antitrust/131204ukantitrust.pdf (reporting that in China “I heard people claim that the United States has a well-established essential facilities doctrine, which is not exactly correct. ... This is not an accurate reading of relevant U.S. law.”).



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Article 13 of the Draft Rules states:

Undertakings must not, when exercising intellectual property rights, engage in conduct that eliminates or restricts competition in the process of setting and implementing standards (including mandatory requirements under national technical specifications).

Without due justification, an undertaking with a dominant market position is not allowed to engage in the following conduct in the process of setting and implementing standards:

- (1) intentionally omitting to disclose information about its rights, or expressly waiving its rights, but claiming patent rights against standard implementers after the patent becomes a mandatory standard, if the undertaking knows the patent may be included in the relevant standard; ...

Thus, under Article 13, if a company is aware that a Chinese SSO may set a standard incorporating one or more of its patents, then the company must declare the patent(s) to the SSO. In so doing, the company would also incur an obligation to license the patent(s) on FRAND terms within China. This practice is particularly worrisome because the Chinese government is involved in setting Chinese standards.²⁹⁵ Thus, in effect, this proposed provision allows the Chinese government to constrain foreign companies' ability to license patents at market-based rates.

In other jurisdictions throughout the world, the decision to declare patents to an SSO is voluntary, at least for patent holders that are not members of the relevant SSO. By contrast, with this proposed provision, the decision would be compulsory in any case where a proposed Chinese standard may involve a rights holder's patents.

3. Burden of proof

Several provisions of the Draft Rules would impose liability on rights holders deemed "dominant" for abuse of dominance unless their conduct is shown to be "justified."²⁹⁶ For example, Article 13 (quoted above) forbids companies from failing to disclose patents to SSOs "without due justification." The Draft Rules impose a similar procedural burden on companies that engage in tying of IP; require the licensee to grant technology back to the

²⁹⁵ See PRC Standardization Law, Art. 5 ("The department of standardization administration under the State Council shall be in charge of the unified administration of standardization in China, and competent administrative authorities under the State Council shall, in line with their respective functions, be in charge of standardization in their respective departments and trade.").

²⁹⁶ The relevant language in the Draft Rules parallels Article 15 of the AML, which has also been interpreted to impose a burden of proof on the rights holder to demonstrate no abuse of dominance. See also Section II.A.2.



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licensor; prohibit the licensee from challenging the validity of the IPR being licensed; restrict the licensee's ability to use competing products or technologies after the expiration of the license agreement; and require the licensee to continue paying royalties after the period of validity of the IP has expired.²⁹⁷ Although all of these types of conduct can constitute abuse of dominance, they can also be legitimate. The burden should be on enforcement agencies or licensees to demonstrate anti-competitive conduct, rather than on the licensor to prove the opposite. By contrast, the approach proposed under the Draft Rules would give more leverage to licensees, which at present are likely to be Chinese companies—although this may change in the future, as Chinese companies file more high-quality patents. Thus, both procedurally and substantively, the Draft Rules would significantly diminish IPR of foreign rights holders under Chinese law, and eventually the Draft Rules may have similarly harmful effects on Chinese rights holders as well, leading to a weaker environment for innovation within China itself.

V. Judicial Enforcement

Like competition law in other countries, the AML creates a broad private cause of action to enforce the AML judicially.²⁹⁸ However, the Chinese judicial system has deep systemic flaws, such as a lack of independence and transparency. As a result, judicial causes brought under the AML are susceptible to illegitimate outcomes driven by the same industrial policy and anti-IP policies that influence administrative agencies' enforcement of the AML. In the *Huawei v. InterDigital* case, these concerns came to the fore.

The deficiencies of the Chinese judicial system include the following:

- *Absence of an independent judiciary.* In China, the political-legal branch or committee of the Communist Party in every part of the country and at every level of the judiciary has the power to drive the reasoning and outcome of particular cases from behind the scenes.²⁹⁹ As one commentator stated: “In practice, it is almost impossible for judges at local courts to make independent rulings by relying solely on the law and evidence, as they are subject to the party's political decisions.”³⁰⁰ Thus, one study found that Chinese government-owned firms have

²⁹⁷ Draft Rules, Arts. 9–11.

²⁹⁸ See AML, Art. 50 (“Where the monopolistic conduct of an undertaking has caused losses to another person, it shall bear civil liabilities according to law.”).

²⁹⁹ See generally Stanley B. Lubman, *Bird in a Cage: Legal Reform in China after Mao*, Stanford University Press, 1999; see also, e.g., Ji Weidong, “The Judicial Reform in China: The Status Quo and Future Directions,” 20 *Ind. J. Global Legal Stud.* 185, 186 (2013) (arguing that “the principle of judicial independence is not established” in China's judiciary).

³⁰⁰ Angela Meng & Keith Zhai, “Communist Party Pledges to Improve Judicial Independence, Transparency—To a Point” (Nov. 15, 2013) (quoting Tong Zhiwei, identified as a law professor at Shanghai's East China University of Political Science and Law).



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strikingly high win rates in litigation against individuals (89.66%) and companies (85.84%) in Shanghai courts.³⁰¹

- *Poorly reasoned decisions.* As one Chinese legal commentator stated: “Chinese judges are, unfortunately, too many in quantity and too poor in quality.”³⁰² Inexperience is particularly acute in the area of competition law.³⁰³ Combined with the lack of an independent judiciary and the lack of transparency, judges’ inexperience often leads to decisions based on bad reasoning.
- *Inadequate protections for confidential information.* China has no formal procedures analogous to judicial protective orders, which allow companies to litigate competition issues while ensuring that only outside counsel have access to any commercially sensitive information at issue. As a result, parties to litigation in China are often forced to argue on the basis of an incomplete factual record.
- *Lack of transparency.* As noted above, Communist Party personnel often drive judicial decisions from behind the scenes, and in addition, judges consult *ex parte* with government officials and others.³⁰⁴ Moreover, until November 2013, many court decisions were not publicly available.³⁰⁵

In the context of the AML, these deficiencies increase the likelihood of judicial determinations that are irregular, both substantively and procedurally. The most troubling

³⁰¹ See Xin He & Yang Su, “Do the ‘Haves’ Come out Ahead in Shanghai Courts?” 10 J. Empirical Legal Stud. 120, 132 (Mar. 2013). Institutionally, the courts are beholden to the government as a whole. Socially, the penetration of the courts can take the form of personal deals behind the scenes through powerful connections.

³⁰² Ji Weidong, “The Judicial Reform in China: The Status Quo and Future Directions,” 20 Ind. J. Global Legal Stud. 185 (2013), at 218. The author is identified as the Dean and Presiding Chair Professor of KoGuan Law School, Shanghai Jiao Tong University, China. *Id.*, at 185 & note a1.

³⁰³ “The Chinese court system still faces challenges in handling antitrust lawsuits, ... said Kong Xiangjun, Chief Judge of the Intellectual Property (IP) Tribunal of the SPC. Courts in China have ... accumulated some experience, but there are still many judicial questions to be further clarified and solved, Kong said at the first Peking University-Stanford University Conference on Internet Law and Public Policy.” See Eliot Gao, “Chinese Courts Still Face Challenges in Handling Antitrust Cases, SPC Judge Says,” PaRR (Jun. 14, 2012).

³⁰⁴ See Xin He & Yang Su, “Do the ‘Haves’ Come out Ahead in Shanghai Courts?” 10 J. Empirical Legal Stud. 120, 132 (Mar. 2013). Chinese judges lack professionalism and are more susceptible to extra-legal influences.

³⁰⁵ In November 2013, the SPC of China issued a welcome Regulation Concerning the Publication of People’s Courts’ Judgments and Rulings on the Internet, under which people’s courts at all levels throughout China must submit their judgments and rulings for publication on a central website (www.court.gov.cn/zgcpwsw). The website is active. Judgments and rulings involving national secrets or personal privacy, relating to juvenile crimes, resulting from cases settled through conciliation, or otherwise unsuitable for publication are exempt from the requirement to publish. Under the last “catch-all” criterion, should the presiding judge or tribunal believe the decision is unsuitable for publication, he or she must submit a reasoned written opinion, first to the relevant department head for review and then to the Deputy President of the people’s court for approval.



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example to date is *Huawei v. InterDigital*. In this case, after years of unsuccessful negotiations between Huawei, ZTE, and InterDigital over InterDigital's SEP portfolio related to 2G and 3G standards—which InterDigital has characterized as a constructive refusal to negotiate by those companies—InterDigital initiated actions in the United States in August 2011, at the U.S. International Trade Commission and a federal district court, to prevent the importation of Huawei's allegedly infringing products.³⁰⁶ This assertion of IPR reportedly annoyed Huawei,³⁰⁷ which retaliated by suing InterDigital in China in February 2012.³⁰⁸ In particular, Huawei initiated actions at the Shenzhen Intermediate People's Court, alleging that InterDigital had abused its dominant market position and seeking a determination of the maximum royalty rate that Huawei would have to pay InterDigital for a license under its Chinese patents.

The court found in favor of Huawei in both actions, and the decisions were affirmed on appeal to the Guangdong Higher People's Court.³⁰⁹ The result was that Huawei's royalty payments to InterDigital for 2G, 3G, and 4G SEPs were capped at 0.019% of the actual sales price of each Huawei product—and in addition, InterDigital had to pay monetary damages to Huawei of RMB 20 million.³¹⁰ However, according to InterDigital's Securities and Exchange Commission filings, the court failed to provide any explanation as to how it arrived at this calculation.³¹¹ Indeed, on its face, this figure seems extremely low, given that published royalty rates for LTE-related SEPs range from 0.80% to 3.25% of the sales price of the telephone.³¹² Even Huawei and ZTE set their own royalty rates at 1.50% and 1.00%, respectively, of the handset sales price—at least 52 times higher than the 0.019% rate that the Chinese courts forced InterDigital to accept.

The rulings in *Huawei v. InterDigital* had other irregularities as well. For example, it was supposedly based on FRAND obligations that InterDigital had incurred through the European Telecommunications Standards Institute (ETSI), an SSO—but ETSI refers to

³⁰⁶ See USITC, "In the Matter of Certain Wireless Devices with 3G Capabilities and Components Thereof; Notice of Institution of Investigation," 76 Fed. Reg. 54,252 (Aug. 31, 2011); see also "InterDigital Communications Inc. et. al. v. Huawei Technologies Co. Ltd et. al. Complaint for Patent Infringement," filed on January 2, 2013, in the U.S. District Court for the District of Delaware.

³⁰⁷ See Lin Jinbiao, "A Battle across the Pacific Ocean: Conclusion of Trial by the Higher People's Court of Guangdong Province of the Case of Anti-Monopoly Dispute between Huawei and IDC Regarding Abuse of Market Dominance," *supra* note 257.

³⁰⁸ InterDigital 10-Q report, filed October 31, 2013, available at

<http://files.shareholder.com/downloads/IDCC/2771353934x0xS1405495-13-40/1405495/filing.pdf>.

³⁰⁹ Eventually, on December 24, 2013, InterDigital and Huawei reportedly settled and agreed to resolve their disputes through nonbinding arbitration, although the Chinese judicial case may still be under appeal. See Complainant's Rule 210.50(A)(4) Submission on the Public Interest in International Trade Commission Investigation No. TA-337-800 at 2 (Public Version) (Aug. 9, 2013); Everdeen Mason, "InterDigital, Huawei Technologies Agree to Resolve Patent Licensing Disputes," Wall St. Journal (Dec. 24, 2013).

³¹⁰ InterDigital 10-Q report, filed October 31, 2013, available at

<http://files.shareholder.com/downloads/IDCC/2771353934x0xS1405495-13-40/1405495/filing.pdf>.

³¹¹ *Id.*

³¹² Eric Stasik, "Royalty Rates and Licensing Strategies for Essential Patents on LTE (4G) Telecommunications Standards," *Les Nouvelles* (Sept. 2010), at 116.



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French law for the construction of FRAND commitments, whereas the Chinese courts evaluated InterDigital's FRAND commitments under Chinese law.³¹³ Moreover, there is no indication that the Chinese courts seriously considered whether Huawei rather than InterDigital was responsible for failure of the licensing negotiations, which—if accurate—would seem to suggest that no abuse of dominance had taken place.

Indeed, it appears that the judges paid more attention to industrial policy concerns than the legal details of the case. An article posted on the official website of the Guangdong Courts titled “A Great Weapon to Break Technology Barriers”³¹⁴ stated:

Due to the fact that domestic companies are far behind companies of developed countries in terms of independent innovation, the establishment of standards and the ownership of patent rights in many fields are substantially controlled by multinational companies of developed countries. Even in the Chinese market, many patents are owned by foreign companies, the use of which requires overseas licensing. Many Chinese enterprises end up with the situation of “working for foreigners” by engaging in business with low profits and low added-value. ...

Huawei's success in the anti-monopoly lawsuit is quite meaningful. Qiu Yongqing, the Chief Judge [of the Guangdong Higher People's Court], believes that Huawei's strategy of using anti-monopoly laws as a countermeasure is worth learning by other Chinese enterprises. Qiu suggests that Chinese enterprises should bravely employ anti-monopoly lawsuits to break technology barriers and win space for development.³¹⁵

Thus, the judges deciding *Huawei v. InterDigital* viewed it as a question of “breaking technology barriers” and claiming independence for domestic Chinese companies—not strictly as a question of InterDigital's obligations regarding its portfolio of patents that it had declared essential to ETSI and promised to license on FRAND terms. In this regard, they seem to share the same industrial policy objectives as NDRC, which initiated an investigation of InterDigital under the AML as the litigation was pending, apparently to increase Huawei's leverage (as discussed above at Section IV.A.2.a)).

³¹³ InterDigital 10-Q report, filed October 31, 2013, available at

<http://files.shareholder.com/downloads/IDCC/2771353934x0xS1405495-13-40/1405495/filing.pdf>.

³¹⁴ See Lin Jinbiao, “A Battle across the Pacific Ocean: Conclusion of Trial by the Higher People's Court of Guangdong Province of the Case of Anti-Monopoly Dispute between Huawei and IDC Regarding Abuse of Market Dominance,” *supra* note 257.

³¹⁵ See Lin Jinbiao, “A Battle across the Pacific Ocean: Conclusion of Trial by the Higher People's Court of Guangdong Province of the Case of Anti-Monopoly Dispute between Huawei and IDC Regarding Abuse of Market Dominance,” *supra* note 257.



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Many of the legal issues in *Huawei v. InterDigital* are complex, and are on the cutting edge of the relationship between IP law and competition law. However, there is no sign that the Chinese courts handled these issues in an intellectually rigorous manner. Rather, the courts seem to have exploited the extraterritorial reach of the AML, and the nexus between the AML and IP rights, as an opportunity to curtail the IP rights of a foreign licensor seeking reasonable remuneration for its SEPs. It remains to be seen whether the SPC, to which some of the rulings in the *InterDigital* case were appealed (*i.e.*, those involving the determination of a FRAND rate),³¹⁶ will correct any of these errors.³¹⁷

VI. Conclusions and Recommendations

From the text of the AML and the way it has been implemented, three basic themes emerge:

- *China appears to be using the AML to promote industrial policy goals, even at the expense of competition—the very goal that other countries' competition laws are designed to enforce.* MOFCOM has used merger remedies to clear the way for national champions to achieve greater market concentrations both within China and abroad, to negotiate down prices on goods and IP for domestic consumers/licensees, and at least in some cases to protect famous domestic brands. These remedies are often imposed in strategic sectors like commodities and high technology. Likewise, NDRC uses its power to investigate and punish violations of the AML to regulate prices and artificially lower IP licensing fees. SAIC's policy statements in the run-up to the implementation of the AML, its investigations of Tetra Pak and Microsoft, and its forthcoming Rules on the Abuse of Dominance Through IPR suggest an orientation similar to that of NDRC.
- *Systemic, officially sanctioned curtailment of IP rights.* By definition, IPR consists of the right to exclude others from the practice of IP. This right is recognized under China's domestic law³¹⁸ as well as internationally, including in the WTO TRIPS Agreement and China's Protocol of Accession to the WTO.³¹⁹ With respect to SEPs in particular, licensees generally incur FRAND obligations

³¹⁶ See *InterDigital Form 8-K Report*, filed December 23, 2013, available at

http://www.sec.gov/Archives/edgar/data/1405495/000140549513000044/a2013_12x23-form8xk.htm.

³¹⁷ The rule of law will be high on the agenda for the Fourth Plenum of the 18th Central Committee of the Chinese Communist Party in October 2014. See "The Fourth Plenum to convene in October, 'Rule of Law' set as the central theme for the first time," *People's Daily* (Jul. 30, 2014), available at <http://politics.people.com.cn/n/2014/0730/c1001-25367561.html>.

³¹⁸ See, e.g., Patent Law (1984, and as amended in 1992, 2000, and 2008), Trademark Law (1982, and as amended in 2013), Copyright Law (1990, and as amended in 2001 and 2010), Regulations on New Varieties of Plants (1997, and as amended in 2013).

³¹⁹ Although exceptions may apply in limited circumstances, China has not invoked such exceptions in the context of the AML.



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only as a result of a voluntary decision to have their IP used as a standard. Yet in cases like Google/Motorola and Microsoft/Nokia, MOFCOM uses merger reviews to deem patents as SEPs, effectively extracting concessions in the domain of IP in exchange for engaging in corporate M&A activity. NDRC's use of its investigative power seems intended to give Huawei more leverage in its IP licensing discussions with InterDigital and Qualcomm. And SAIC's forthcoming Rules on Abuse of Dominance Through IPR may introduce an expansive and out-of-the-mainstream version of the essential facilities doctrine applicable to IPR, which presumes that a failure to license patents deemed "essential" *ex post* can constitute an abuse of dominance inconsistent with the AML. Thus, the AMEAs appear to be pursuing a concerted policy of using the AML to roll back IP rights, particularly for foreign companies.

- *Due process deficiencies facilitate these problems.* In MOFCOM and NDRC investigations, the parties under review have limited access to counsel and no meaningful opportunity to appeal unreasonable decisions or enjoin unreasonable information requests. In MOFCOM merger reviews, agencies with no statutory competition law role play a *sub rosa* role in the merger review. The result is that companies whose proposed transactions are not unconditionally approved—foreign companies in every single case to date—must make concessions that are not necessarily related to protecting competition. In NDRC investigations, the procedural rules for initiating investigations are so loose that the Division Chief casually threatened to initiate investigations against foreign companies assembled to celebrate the fifth anniversary of the AML.³²⁰ Moreover, in China's judiciary, there are widespread procedural problems, such as the lack of judicial independence, *ex parte* conduct, and inadequate protections for confidential information. Fear of retribution prevents private companies from attempting to appeal administrative determinations. Although these problems extend beyond the domain of competition law, they are particularly severe in the context of the AML, due to the AMEAs' politically motivated enforcement of that law and the prominent role that proprietary information often plays in competition law determinations.

These trends harm not only the international business community, but also China itself. As Chinese companies play an increasingly prominent role on the world stage, they will represent an ever-increasing proportion of international M&A deals and joint ventures, and more generally they will be engaged in business that comes under the purview of foreign competition law authorities. It is in China's interest that these foreign competition law authorities treat Chinese businesses in an even-handed, apolitical manner, without regard to the national origin of the company or to the strategic non-competition-related interests of the foreign government. Yet through the AML, China is depriving itself of a credible basis to advocate for competition law to be implemented in a fair and neutral

³²⁰ See also Section IV.B and *supra* note 279.



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manner around the globe. In other words, China is threatening the global antitrust commons, which is at least as valuable to China as to any other country.

Furthermore, at the Third Plenum in 2013, the Communist Party leadership committed to reducing government involvement and regulation, increasing the role of market forces, and greater utilization of IP.³²¹ China's current pattern of implementing the AML appears to be inconsistent with these goals.

Accordingly, the government of China can take a significant step toward becoming a competition law jurisdiction that implements competition law in a fair and neutral manner by committing to the following four-point action plan:

1. Officially endorse principles of competition law, IPR protection, and due process to bring the AML in line with international norms. Whether in the context of bilateral discussions with the United States, the upcoming Fourth Plenum in October 2014,³²² or otherwise, China should endorse and commit to implementing the following principles consistent with mainstream international practice. China should also implement these commitments under domestic law through legal instruments that are binding across government agencies, such as notices issued under the AMC or directly by the State Council, or through SPC interpretations. Furthermore, these principles should also be formally reflected in any bilateral investment treaty (BIT) that China concludes with the United States.³²³

- *Separate industrial policy from competition law, by:*
 - Specifying that industrial policy factors will not influence the initiation or conduct of AML investigations by AMEAs, particularly with regard to foreign companies, nor play any part in enforcement agency or court decisions on the existence of AML violations.
 - Committing to eliminate all aspects of AML enforcement that have the effect of discriminating on the basis of national origin.³²⁴ Thus, China

³²¹ See "The Decision on Major Issues Concerning Comprehensively Deepening Reforms," adopted at the Third Plenum of the 18th Central Committee of the Chinese Communist Party on November 12, 2013.

³²² The rule of law will be high on the agenda for the Fourth Plenum of the 18th Central Committee of the Chinese Communist Party in October 2014. See "The Fourth Plenum to convene in October, 'Rule of Law' set as the central theme for the first time," *supra* note 317.

³²³ China and the United States are currently negotiating a BIT. See Betsy Bourassa, "U.S. and China Breakthrough Announcement on the Bilateral Investment Treaty Negotiations," Treasury Notes (Jul. 15, 2013), available at <http://www.treasury.gov/connect/blog/Pages/U.S.-and-China-Breakthrough-Announcement-.aspx>.

³²⁴ See, e.g., ICN, *Recommended Practices for Merger Notification Procedures*, at 19, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf> ("Foreign firms should be treated no less favorably than domestic firms in like circumstances in all aspects of the merger review process, including with respect to procedural fairness.").



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should penalize domestic firms that fail to comply with the merger review notification requirements, as MOFCOM has already pledged to do.³²⁵ In addition, China should apply merger review remedies to domestic-to-domestic transactions as well as transactions involving foreign companies. In the context of investigations, NDRC and SAIC should establish clear procedural guidelines regarding the initiation of investigations, safeguards against forced confessions, rights of investigated parties to review evidence against them and to make arguments in their defense without fear of retribution, and internal protocols to ensure that public officials' statements meet high standards of professionalism.³²⁶

- Conducting merger reviews solely for the purpose of identifying and preventing or remedying anti-competitive effects, and disclosing any non-competition-related factors that influence the outcome of merger reviews.³²⁷ Moreover, any remedies imposed on proposed transactions must be narrowly tailored to the competition-related concerns identified in the analysis.³²⁸ For example, MOFCOM should not impose price caps as a behavioral remedy unless MOFCOM demonstrates that higher prices would have anti-competitive effects.
- Recognizing that merger review remedies that vary from those imposed by other jurisdictions should be avoided.³²⁹
- *Respect IPR by:*
 - Refraining from applying the excessive high pricing provisions of Article 17 (Abuse of Dominance) in the IP license area, and/or limiting application to situations where the licensing conduct has the clear effect of foreclosing downstream competition, strengthening the dominant position of the licensor, and directly harming Chinese consumers.

³²⁵ See *supra* note 111.

³²⁶ See *supra* note 314 & accompanying text.

³²⁷ ICN, *Recommended Practices for Merger Analysis*, at 1, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf> (“The legal framework for competition law merger review [‘merger review law’] should focus exclusively on identifying and preventing or remedying anti-competitive mergers. A merger review law should not be used to pursue other goals.”); *id.* at 23 (“If a jurisdiction’s merger test includes consideration of non-competition factors, the way in which the competition and non-competition considerations interact should also be made transparent.”).

³²⁸ ICN, *Recommended Practices for Merger Notification Procedures* at 31, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf> (“Reviewing agencies should seek remedies tailored to cure domestic competitive concerns and endeavor to avoid inconsistency with remedies in other reviewing jurisdictions.”) (emphasis deleted).

³²⁹ *Id.*



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- Limiting AML application in the FRAND licensing area to breaches of actual FRAND licensing or disclosure commitments made through an SSO, and applying the choice of law provisions adopted by the SSO for purposes of interpreting the meaning of those commitments.
- Recognizing that SEP and other IPR rights holders have the legal right to seek injunctive or exclusionary remedies where necessary to protect their IP rights, including in cases where infringing companies are unwilling to accept a license offered on FRAND terms. In other words, licensee hold-out is at least as much of a problem as licensor hold-up.
- Establishing a clear, unbiased, transparent mechanism for determining whether any patent is an “essential facility,” so that the “essential facilities” doctrine does not become a point of leverage for licensees only. This process should be designed to inform rights holders *ex ante* whether their IPR constitutes an essential facility, and should provide a clear legal framework for challenging such determinations.
- *Safeguard due process and fundamental fairness by:*
 - Making the role of any third-party agencies (*e.g.*, NDRC, MIIT, or MOA) explicit, transparent, and rules-based. *Sub rosa* participation by third-party agencies should be prohibited.³³⁰
 - Issuing and publishing well-reasoned decisions regarding any AML violations identified in either the merger review or the investigation context.³³¹ In addition, in the investigation context, NDRC and SAIC should issue rules establishing the conditions for leniency in investigations, to ensure that the investigating authority does not accord lenient treatment on the basis of political considerations.³³²
 - Issuing guidance regarding the analytical framework that will be applied in merger reviews and other AML investigations. This should take a form

³³⁰ *See, e.g., id.* at 29 (“Interagency coordination should be conducted in accordance with applicable laws and other legal instruments and doctrines”) (emphasis deleted); *id.* at 36 (“Competition agencies should have sufficient independence to ensure the objective application and enforcement of merger review laws.”) (emphasis deleted).

³³¹ To date, NDRC has not published any determinations, although it has meted out penalties and extracted concessions from foreign companies on several occasions. In addition, while MOFCOM’s decisions are much more sophisticated than they were in 2008, MOFCOM still often fails to draw a connection between its theory of competitive harm and the remedies imposed. MOFCOM should improve its analysis going forward.

³³² NDRC was reportedly planning to draft rules on leniency in October 2013, but no such rules have been issued. *See* Joy C. Shaw, “NDRC defends use of ‘leniency’ in vertical restraints cases,” PaRR (Oct. 21, 2013).



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similar to the Horizontal Merger Guidelines in the United States, and could be supplemented with other materials such as speeches.³³³

- Informing parties to a proposed transaction of any potential competition-related problems as early as possible in the merger review.³³⁴ It should be prohibited to ask parties to propose remedies before they are informed of the supposed threat to competition.
- Establishing clear limits on the timeline for merger reviews. The elastic pre-notification period should be eliminated, and MOFCOM should stop asking parties to withdraw and resubmit notifications.³³⁵ Rather, approval should be automatic at the end of the statutory limit of 180 days.³³⁶
- Providing for the protection of business secrets and other confidential information obtained from any private parties in the context of administrative and judicial enforcement of the AML, while providing for a means for the target of an investigation to understand the evidence against them so as to avoid an overly broad determination and subsequent reliance on confidential information.

³³³ See, e.g., ICN, *Dominance/Substantial Market Power Analysis Pursuant to Unilateral Conduct Laws*, at 6, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc317.pdf> (“Agencies should seek to make their dominance/substantial market power assessments transparent, subject to the appropriate protection of confidential information.”) (emphasis deleted); *id.* at 6–7 (“There are many ways that competition agencies can foster transparency. To give guidance, agencies can publish their decisions or enforcement guidelines or provide other formal guidance to the business community concerning dominance/substantial market power. In addition, competition officials can give speeches explaining their policies and cases. To the extent feasible, such pronouncements should be updated periodically to reflect current practice.”).

³³⁴ See, e.g., ICN, *Recommended Practices for Merger Notification Procedures*, at 20, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf> (“Without compromising the effectiveness of an investigation or the outcome of enforcement proceedings, the competition agency should consider apprising merging parties of specific concerns as soon as feasible during the investigation, so the parties can express their views.”); *id.* at 15 (“Merging parties should be advised not later than the beginning of a second-stage inquiry why the competition agency did not clear the transaction within the initial review period.”) (emphasis deleted).

³³⁵ See, e.g., *id.* at 8 (“In suspensive jurisdictions, initial waiting periods should expire within a specified period following notification and any extended waiting periods should expire within a determinable time frame.”) (emphasis deleted); *id.* at 9 (“Uncertainty with respect to applicable waiting periods can be avoided only if the parties can readily ascertain the commencement and the anticipated expiration dates thereof. Competition agencies should therefore provide notifying parties with timely notice as to any deficiencies in their submissions, and should inform the parties of the specific details of any such deficiencies to facilitate the prompt submission of corrective filings.”); *id.* at 14 (“Merger investigations should be conducted in a manner that promotes and effective, efficient, transparent and predictable merger review process.”) (emphasis deleted).

³³⁶ See AML, Arts. 25–26.



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- Providing for an effective right to appeal AMEA enforcement actions to the judiciary, preferably to an independent AML court or tribunal.³³⁷ This should include the right to appeal requests for information issued in the context of AML investigations—similar to the right of private parties in the United States to move to quash civil investigative demands from DOJ in connection with antitrust investigations. Moreover, China should establish safeguards to protect companies against retribution from administrative agencies whose decisions they appeal.
- Guaranteeing access to counsel. MOFCOM and NDRC should always allow foreign counsel to participate in meetings related to merger reviews and other investigations under the AML, in accordance with China's commitment made at the 2014 S&ED.³³⁸

At the 2014 S&ED with the United States, China made a limited step towards endorsing minimum standards of due process in AML investigations by stating: “China commits that its three Anti-Monopoly Enforcement Agencies (AMEAs) are to provide to any party under investigation information about the AMEA’s competition concerns with the conduct or transaction, as well as effective opportunity for the party to present evidence in its defense.”³³⁹ However, China has not explained what “information about the AMEA’s competition concerns” must be disclosed to the party subject to investigation, or at what stage of the investigation, nor has it explained what, in its view, constitutes an “effective opportunity ... to present evidence in [] defense” of an AMEA’s accusations. Moreover, NDRC’s conduct during the automobile investigations – which continued during and after the S&ED – raises serious questions about China’s intention to implement its S&ED commitments.³⁴⁰

2. Insulate AML enforcement activity from political pressures. Currently, the bureaus within MOFCOM, NDRC, and SAIC that enforce the AML are exposed to the institutional pressures of the agencies that house them. For example, NDRC’s objectives to develop domestic strategic industries and strengthen supervision and adjustment of

³³⁷ An SPC judge recently suggested using “three-in-one” (*i.e.*, civil, administrative, and judicial) IPR courts – which are planned for the future, but are not yet operational – to resolve appeals against administrative decisions by AMEAs. See Joy C. Shaw & Lisha Zhou, “China’s ‘three-in-one’ IPR courts may hear administrative lawsuits on antitrust decisions, Supreme Court judge says,” PaRR (May 28, 2014). The NPC Standing Committee will review the SPC proposal to establish specialized IP courts in Beijing, Shanghai and Guangzhou at its 10th meeting. See “NPC Standing Committee will review the proposal to establish specialized IP court next week.” China’s Crackdown on Infringements and Counterfeits Network (Aug. 19, 2014), available at <http://www.ipraction.cn/2014/08/19/ARTI1408429599632504.shtml>.

³³⁸ See *supra* note 188.

³³⁹ U.S. Department of the Treasury, “UPDATED: U.S.-China Joint Fact Sheet Sixth Meeting of the Strategic and Economic Dialogue,” Press Release (July 11, 2014), see also *supra* note 25.

³⁴⁰ See *supra* Section IV.A.3.



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price controls³⁴¹ appear to guide much of its AML enforcement activity targeting foreign companies. Moreover, AML enforcement staff is exposed to political pressure from other agencies as well, as illustrated by NDRC, MIIT, and MOA interference in MOFCOM merger reviews.³⁴² As a result, AML enforcement activity is often politically motivated and serves industrial policy rather than neutral competition-related objectives.

China needs to make a concerted effort at the political level to give AML enforcement staff autonomy from other agencies and insulation from political pressures. Potentially, this could be achieved by combining the enforcement activities of MOFCOM, NDRC, and SAIC into a standalone competition law agency. This approach would also help to develop a deeper well of competition law expertise, and reduce the risk of inconsistent interpretations of the AML in the future. Indeed, most other countries in the world also have a standalone competition law authority,³⁴³ and some prominent Chinese intellectuals have already suggested that China should follow their example.³⁴⁴

Critically, however, this institutional change will lead to meaningful improvement in AML enforcement only if the new competition law agency is sufficiently autonomous from other agencies and political influences. Otherwise, the problems that currently pervade AML enforcement in MOFCOM, NDRC, and SAIC are likely to persist.

3. Continue to accelerate judicial reforms. China already recognizes the need for judicial reform, and it has made progress in this regard. For example, China has established a Central Leading Group for Judicial Reform, which in 2012 issued a white paper proposing specific policy recommendations.³⁴⁵ China should continue and accelerate these reforms, including at the upcoming Fourth Plenum,³⁴⁶ particularly as they relate to (i) the quality of reasoning, (ii) procedural safeguards for privileged and confidential information, and (iii) the right to appeal administrative determinations, including information requests from AMEAs in the context of investigations of abuse of dominance and monopoly agreements. Only then will fair and predictable enforcement of the AML be possible.

4. Join ICN. ICN is the international standard-setting body to which most competition law authorities in the world belong, including those of the United States and the EU.

³⁴¹ See USCBC, “USCBC Summary of the National Development and Reform Commission (NDRC) 2014 Work Plan” (Feb. 5, 2014); see also *supra* note 2.

³⁴² See Section III.D.1.

³⁴³ See Section I.A.

³⁴⁴ See Freny Patel & Joy C. Shaw, “Consolidation of China’s Antitrust Agencies Not Ruled Out but Not Imminent—MOFCOM Official,” PaRR (Dec. 9, 2013) (reporting that Huang Yong and Wang Xiaoye, prominent antitrust scholars and key members of the Expert Advisory Board hired by the AMC, have advocated consolidation of China’s three AMEAs into a unified agency with ministry-level status).

³⁴⁵ See Information Office of the State Council, *Judicial Reform in China* (Oct. 9, 2012), available in translation at http://news.xinhuanet.com/english/china/2012-10/09/c_131895159.htm.

³⁴⁶ See “The Fourth Plenum to convene in October, ‘Rule of Law’ set as the central theme for the first time,” *supra* note 317.



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However, Chinese AMEAs have so far refrained from joining the ICN, despite China having joined similar organizations for banking, insurance, and other areas of regulation.³⁴⁷ Thus, even by China's own standards, the AML is anomalous for its inconsistency with international legal norms.

China should cure this defect and begin to restore its international credibility in the competition law arena by having its AMEAs join ICN and explicitly endorsing its guidelines, which include many of the principles outlined above.

³⁴⁷ *E.g.*, the Basel Committee on Banking Supervision, the International Association of Insurance Supervisors and the International Organization of Securities Commissions.