



4-12-2016

Antitrust or Industrial Protectionism?: Emerging International Issues in China's Anti-Monopoly Law Enforcement Efforts

Thomas J. Horton

Follow this and additional works at: <http://digitalcommons.law.scu.edu/scujil>

Recommended Citation

Thomas J. Horton, *Antitrust or Industrial Protectionism?: Emerging International Issues in China's Anti-Monopoly Law Enforcement Efforts*, 14 SANTA CLARA J. INT'L L. 109 (2016).

Available at: <http://digitalcommons.law.scu.edu/scujil/vol14/iss1/6>

This Article is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Journal of International Law by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

Antitrust or Industrial Protectionism? Emerging International Issues in China's Anti- Monopoly Law Enforcement Efforts

Thomas J. Horton*

* Professor of Law and Heidepriem Trial Advocacy Fellow, The University of South Dakota School of Law and Member of the Advisory Board, American Antitrust Institute. The author wishes to thank Thomas Geu for his helpful comments, and Ashlee Wendt, Brenda Walker, and Teresa Carlisle for their assiduous efforts.

I. Introduction

Seeking to ground antitrust in theoretical economics,¹ we too often forget how deeply rooted and pervasive political, cultural, and historical values are in antitrust regulation and enforcement.² In the words of former American Antitrust Institute Chairman Bert Foer, “antitrust should not be an isolated island grounded in theoretical models, but must be firmly attached to the mainland of political and economic life in America and elsewhere.”³

Following the values-driven assertion of Chicago School disciples that “[b]asic microeconomic theory is of course a science,”⁴ American antitrust enforcement has sought since the late 1970s, to ground itself in supposedly neutral and scientific neoclassical economic models.⁵ Unfortunately, as the United States, the founder of

-
1. Eleanor M. Fox & Lawrence A. Sullivan, *Retrospective and Perspective: Where Are We Coming From? Where Are We Going?* in REVITALIZING ANTITRUST IN ITS SECOND CENTURY 2, 3 (H. First, E. Fox & R. Pitofsky eds., 1991) (arguing that antitrust analyses have been “seduced by siren calls of theoretical [economic] purity”).
 2. See e.g., Harry First & Spencer Weber Waller, *Antitrust’s Democracy Deficit*, 81 FORDHAM L. REV. 2543, 2544 (2013) (discussing “the democratic, economic, and political goals of the antitrust laws”); Fox & Sullivan, *supra* note 1, at 2 (discussing how antitrust’s strength flows from its “core values,” including “a preference for pluralism, freedom of trade, access to markets, and freedom of choice”); Maurice E. Stucke, *Reconsidering Antitrust’s Goals*, 53 B.C.L. REV. 551, 556 (2012) (noting how “some enforcers [have] viewed antitrust’s more . . . political, social, and moral goals as somehow diluting antitrust policy,” and how “some courts and enforcers [have] sacrificed important political, social, and moral values to promote certain economic beliefs”); Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979); Thomas J. Horton, *Competition or Monopoly? The Implications of Complexity Science, Chaos Theory, and Evolutionary Biology for Antitrust and Competition Policy*, 51 ANTITRUST BULL. 195, 201 (2006) (“The history of the continuing debates as to antitrust legislation and regulation reveals that how people think about antitrust issues is generally tied to their underlying assumptions and premises, as well as their implied values”); ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 7 (1978) (discussing the fundamental disagreements about “the goals or values the [antitrust] law[s] may legitimately and profitably implement”).
 3. Albert Foer e-mail of December 31, 2014, to American Antitrust Institute Advisory Board (copy on file with author). Mr. Foer adds: “Antitrust plays a crucial role within a democratic political economy, doing its part to define the best balance for the time, recognizing the state of knowledge, of technology, and of institutional realities.” *Id.*
 4. BORK, *supra* note 2, at 8. Judge Richard Posner long has argued that Chicago School economics are “scientific, not ideological.” RUDOLPH J.R. RERITZ, COMPETITION POLICY IN AMERICA: HISTORY, RHETORIC, LAW 228 (1996), discussing RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (1973); RICHARD POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976).
 5. Thomas J. Horton, *Confucianism and Antitrust: China’s Emerging Approach to Anti-Monopoly Law*, 47 INT’L LAW 193, 204 (2013) (discussing the “conservative economic agenda that has dominated American antitrust since the 1980s”); First & Waller, *supra* note 2, at 2545 (discussing America’s “move away from more democratically controlled institutions toward greater reliance on technical experts”); Stucke, *supra* note 2, at 563-66 (discussing the ascendance of neoclassical economic theories in antitrust jurisprudence since the late 1970s); Jesse W. Markham, Jr., *Lessons for Competition Law from the Economic Crisis: The Prospect for Antitrust Responses to the ‘Too-Big-to-Fail’ Phenomenon*, 16 FORDHAM J. CORP. & FIN. L. 261, 281 (observing that “Post-Chicago antitrust theory departs from the Chicago School views mostly around the margins”).

antitrust regulation, enters into its 126th year of antitrust regulation and enforcement, some critics, including this author, believe that the lax antitrust enforcement that began in the 1980s,⁶ has catalyzed a “slide of [American] antitrust into political irrelevance.”⁷

Ironically, however, antitrust regulation and enforcement today is thriving globally.⁸ One country where antitrust enforcement is taking off is China, which is entering into only its eighth year of antitrust regulation and enforcement.⁹ China’s ascendance as a global antitrust enforcer is especially ironic, as until the late 1970s, China viewed the term competition as a “capitalist monster.”¹⁰

Although “anti-monopoly efforts are a very new phenomenon in China,”¹¹ China today finds itself under an intense global microscope. “Though many jurisdictions have adopted competition laws in recent decades, none of those laws has engendered the level of interest sparked by China’s Anti-Monopoly Law (AML).”¹² Such

-
6. See e.g. Robert Pitofsky, *Does Antitrust Have a Future?*, in *REVITALIZING ANTITRUST*, *supra* note 2, at 530 (“During the 1980s, we witnessed the most lenient antitrust enforcement program in fifty years”); Fox & Sullivan, *supra* note 1, at 10 (“...the blueprint of the Reagan Administration has not been seriously shaken...European competition policy has surpassed American policy in its vigilance against anticompetitive restraints”); Stucke, *supra* note 2, at 553-557 (describing how “antitrust’s influence in the United States has diminished”).
 7. First & Waller, *supra* note 2, at 2543; See also HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 1-10 (2005); Jonathon B. Baker, *Preserving a Political Bargain: The Political Economy of the Non-Interventionist Challenge to Monopolization Enforcement*, 76 *ANTITRUST L. J.* 605 (2010).
 8. See e.g. Stucke, *supra* note 2, at 551-552 (“The past twenty years witnessed more countries with antitrust laws and the birth and growth of the international organization of governmental competition authorities, the International Competition Network (ICN), with over 100 member countries”).
 9. “In August 2008, 118 years after the Sherman Act and 50 years after the Treaty of Rome, China’s own Anti-Monopoly Law (AML) came into effect.” CHINA’S ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS xxxvii (Adrian Emch & David Stallibrass, eds., 2013); see also Wing Gar Cheng, *China’s Watchdog intensifies efforts to enforce regulatory conditions*, *FINANCIAL TIMES* (Nov. 26, 2013) (“... the country’s relatively young antitrust regime is moving towards a more complete and enforced regulatory framework”).
 10. Xiaoye Wang, *The New Chinese Anti-Monopoly Law: A Survey of a Work in Progress*, 54 *ANTITRUST BULL.* 579, 580 (2009); See also Stucke, *supra* note 2, at 552. In China’s 1980 Political Economic Dictionary, “competition’ was defined as ‘fighting between producers for economic benefit, under a system of private ownership;’ in a capitalist system, ‘due to competition and lack of government planning in production, society’s labour and resources cannot achieve rational allocation or full utilization, leading to a serious waste of productive power...without government control, regulation of competition and production is ineffectual.’” WANG *supra* note 10, at 30, quoting *POLITICAL ECONOMICS DICTIONARY* 597-99 (Xu Dixin, ed., 1980).
 11. CHINA’S ANTI-MONOPOLY LAW, *supra* note 9, at xxxvii.
 12. H. STEPHEN HARRIS, JR., PETER J. WANG, YIZHE ZHANG, MARK A. COHEN & SEBASTIAN J. EVRARD, *ANTI-MONOPOLY LAW AND PRACTICE IN CHINA* 8 (2011). The reasons for the high level of global interest include: “the sheer scale and astounding growth of China’s markets, the vast amounts of foreign capital invested in China, the burgeoning sales of Chinese goods abroad, the substantial growth in the participation of Chinese firms in foreign markets, and a recognition of the significant challenge posed by the establishment of free market competition in China’s socialist market

international scrutiny seems natural and expected given that the promulgation of China's AML can "be regarded as a great achievement of international cooperation."¹³ Furthermore, as observed by former U.S. Antitrust AAG Hewitt Pate, "U.S. and European officials have often approached China like a recruiting prospect – as a new player to be won over to U.S. or European styles of antitrust."¹⁴

Although China's legal system and anti-monopoly regulatory efforts are still "a work in progress,"¹⁵ key trends and patterns in China's enforcement of its AML are emerging. First and foremost, China is aggressively charting its own course.¹⁶ China sees its AML enforcement as an integral part of its mission of "safeguarding market order and achieving social fairness and justice [in] establish[ing] an initial law regime for the socialist market economy."¹⁷ China's leaders view "socialism with Chinese characteristics and the Chinese dream [as] the main theme of our age."¹⁸ So it should hardly come as a surprise or shock anyone that China will continue to see one of its primary anti-monopoly missions as carrying out AML Article 1's mandate of "promoting the healthy development of the socialist market economy."¹⁹

Of course, the Chinese are astute enough to recognize that it was the United

economy." *Id.*

13. XIAOYE WANG, THE EVOLUTION OF CHINA'S ANTI-MONOPOLY LAW 313 (2014). Professor Wang further notes: "[I]t is no surprise that many good provisions from other well-established antitrust laws have been incorporated into the Chinese AML." *Id.* See also Horton, *Confucianism and Antitrust*, *supra* note 5, at 196 ("American, European, and Japanese antitrust and competition regulators, lawyers, and economists have taken understandable pride in counseling and helping China in drafting, adopting, and interpreting its new AML"); HARRIS, ET AL., *supra* note 12, at 2-3 ("The core provisions of the AML were modeled on EU competition law, and to a lesser extent, on the laws of the United States, Germany, Japan, and other countries").
14. R. Hewitt Pate, *What I Heard in the Great Hall of the People – Realistic Expectations of Chinese Antitrust*, 75 ANTITRUST L. J. 195 (2008). See also Horton, *Confucianism and Antitrust*, *supra* note 5, at 212.
15. Pittman B. Potter, *Legal Reform in China: Institutions, Culture, and Selective Adaptation*, 29 L. & SOC. INQUIRY 465, 486 (2004).
16. See MARTIN JACQUES, WHEN CHINA RULES THE WORLD: THE END OF THE WESTERN WORLD AND THE BIRTH OF A NEW GLOBAL Order 582 (2d ed. 2012) ("It would be wrong to assume that [China] will behave like the West; that cannot be discounted, but history suggests something different"); Thomas Velk, Olivia Gong & Ariel S.N. Zuckerbrot, *A Trans-Pacific Partnership*, 60(1) ANTITRUST BULL. 4, 5 (2015) ("By means of a unique, clearly evident capacity to mix, balance, and then apply its own special plays and stratagems, China will evolve into a highly efficient but quite different superpower from the United States"); Horton, *Confucianism and Antitrust*, *supra* note 5, at 212 ("China's long and impressive history and culture, however, ensure that China will do what it has done throughout its long history—chart its own course"); JOHN KING FAIRBANK & MERLE GOLDMAN, CHINA: A NEW HISTORY 164 (2006) (arguing that China's market economy will "be to a large extent in Chinese hands").
17. The State Council Info. Office, China, *China's Efforts and Achievements in Promoting the Rule of Law*, 7 CHINESE J. INT'L LAW 513, 514-17 (2008).
18. See e.g. CCP Document No. 9, April 22, 2013, *Communique on the Current State of the Ideological Sphere: A Notice from the Central Committee of the Communist Party of China's General Office*, translation available at <http://www.chinafile.com/document-9-chinafile-translation>.
19. AML, Ch. I, art. 1.

States “that smoothed the way for Beijing’s entry into the World Trade Organization.”²⁰ They also know that they owe a substantial part of their “economic miracle” to trade with the West.²¹ So there is little doubt that the Chinese are likely to continue “selectively adapting elements of Western learning and technology to China’s needs.”²²

This does not mean, however, that China is likely to follow western Chicago School economic theories in interpreting or enforcing its Anti-Monopoly Laws.²³ China is unapologetically basing its current AML enforcement activities and decisions on social, political and moral, as well as economic, considerations.²⁴ “China’s leaders believe that economic and social responsibilities exist together and cannot meaningfully be separated.”²⁵

Whether we like it or not, China’s leaders suspect that many in the West are trying “to obscure the essential differences between the West’s value system and the value system [the Chinese] advocate, ultimately using the West’s value systems to

-
20. Andrew Jacobs, *The War of Words in China*, N.Y. TIMES, Aug. 2, 2014; see also JACQUES, *supra* note 16, at 580 (“As a rising power, [China] has been obliged to converge with and adapt to the existing international norms, and in particular to defer to and mollify the present superpower, the United States, since the latter’s cooperation and tacit support have been preconditions for China’s wider acceptance”).
 21. See e.g., Jacobs, *supra* note 20. (“[S]ince the 1980s, when the pragmatic Deng Xiaoping urged his people to learn from the West in an effort to tackle endemic poverty, Chinese leaders have set aside their economic cudgels. In the decades that followed, Adam Smith-style market economics turned former factory workers into millionaires...”); Xiaoye Wang, *WTO Accession and the Formulation of China’s Anti-Monopoly Law*, in WANG, *supra* note 13, at 99 (“Entering the WTO in 2001 was a milestone for China’s economic reforms. This significant event not only indicated that the Chinese economic system had been generally transformed into a market economy system, but also signified China’s increased integration with the rest of the world and the increasing globalization of the Chinese economy”).
 22. JONATHON D. SPENCE, *THE SEARCH FOR MODERN CHINA* 216 (1990). See also Velk, Gong & Zuckerbrot, *supra* note 16, at 10 (China “is now undergoing a process through which it may amalgamate its natural culture with some of the better social and economic ideas of the west”).
 23. See, e.g., JACQUES, *supra* note 16, at 563 (arguing that China will continue developing “in very much its own way, based on its own history and traditions, which will owe little or nothing to any Western inheritance”).
 24. See e.g. Horton, *Confucianism and Antitrust*, *supra* note 5, at 213 (“China’s future AML enforcement is likely to be based on social, moral, and political considerations”); JACQUES, *supra* note 16, 562 (“The reason for China’s transformation . . . has been the way it has succeeded in combining what it has learnt from the West, and also its East Asian neighbours, with its own history and culture, thereby tapping and releasing its own native sources of dynamism”).
 25. Horton, *Confucianism and Antitrust*, *supra* note 5, at 213. See also Geoffrey Kok Heng See, *Harmonious Society and Chinese CSR: Is There Really a Link?* 89 J. BUS. ETHICS 1, 2 (2009) (discussing the CCP’s recognition that it must deal with social and economic issues as an interwoven “national priority”); *Harmonious Society, The 17th National Congress of the Communist Party of China* (Sept. 30, 2007, 9:14 AM), <http://english.peopledaily.com.cn/90002/921691/92211/6274973.html>, at 1-2 (discussing how economic growth in China must be balanced by tackling serious social and economic dislocations).

supplant the core values of Socialism.”²⁶ As an example, when China’s President Xi Jinping first came to power in October, 2013, he blasted what he characterized as western efforts to “denigrate the socialist system— all to promote the Euro-American model of capitalism and constitutionalism.”²⁷ President Xi’s predecessor, Hu Jintao, similarly warned that “international forces are intensifying the strategic plot of Westernizing and dividing China”, and called on his countrymen to “sound the alarm and remain vigilant.”²⁸

China’s leaders consequently are seeking to eschew the teachings and ideologies of unrestrained free-market economics that have underpinned the United States’ antitrust enforcement efforts since the late 1970s.²⁹ Blasting neoliberalism, China’s leaders allege that Western critics “aim to change [China’s] economic infrastructure and weaken the government’s control of the national economy.”³⁰ CCP Document No. 9, for example, charges: “They brag on about how we should use Western standards to achieve so-called ‘thorough reform.’”³¹ The harsh rhetoric currently coming from China indicates that “[a]fter a lull in xenophobia, anti-Western invective [in China] is back.”³²

26. Doc. No. 9, *supra* note 18. “Document No. 9, as it [is] known, called for eradicating seven subversive strains of thinking. Beginning with ‘Western constitutional democracy.’ The list included press freedom, civic participation, ‘universal values’ of human rights, and what it described as ‘nihilist’ interpretations of the Party’s history. The ‘seven taboos’ were delivered to university professors and social media celebrities, who were warned not to cross the line.” EVAN OSNOS, *AGE OF AMBITION: CHASING FORTUNE, TRUTH, AND FAITH IN THE NEW CHINA* 365-66 (2014).

27. *Id.* at 365.

28. *Id.* at 319.

29. For example, CCP Document No. 9 additionally excoriates Western efforts at “promoting Neoliberalism, [and] attempting to change China’s basic economic system.” Doc. No. 9, *supra* note 18. See also Beina Xu & Eleanor Albert, *The Chinese Communist Party* (Nov. 17, 2014) available at <http://www.cfr.org/china/chinese-communist-party/p29443>; Chris Buckley, *China Takes Aim at Western Ideas*, N.Y. TIMES, Aug. 19, 2013; Noah Feldman, *CCP’s Plan for Pro-Democracy Voices: Repression*, JAPAN TIMES, Aug. 27, 2013; Andrew McKillop, *China’s 7 Perils Are All Western*, MKT. ORACLE, Aug. 20, 2013 (discussing Document No. 9’s criticisms of the doctrines of “free markets” and “neo-liberalism”); Stanley Lubman, *Document No. 9: The Party Attacks Western Democratic Ideals*, WALL ST. J., Aug. 27, 2013.

30. Doc. No. 9, *supra* note 18, at pt 4. The CCP’s Document No. 9 adds:

Neoliberalism advocates unrestrained economic liberalization, complete privatization, and total marketization, and it opposes any kind of interference by the state. Western countries like the United States, carry out their neoliberal agendas under the guise of ‘globalization,’ visiting catastrophic consequences...[including] the international financial crisis from [which] they have yet to recover.

31. Doc. No. 9, *supra*, note 18. The Document continues: “Essentially they oppose the general and specific policies emanating from the road taken at the Third Plenum of the Eleventh Party Congress and they oppose socialism with Chinese characteristics.”

32. Andrew Jacobs, *The War of Words in China*, N.Y. TIMES, Aug. 2, 2014. See also Murong Xuecan, *The New Face of China’s Propaganda*, N.Y. TIMES, Dec. 22, 2013; Orville Schell, *Comrade Xi’s Choice*, WALL ST. J., Oct. 4, 2014, at C1. (“The party’s strenuous denunciation of such ‘hostile forces’ is instructive. It suggests that our own assumptions over the past few decades – that open markets

China's determination to chart its own antitrust course without following or adhering to western ideologies has resulted in four major trends during the first six years of AML enforcement. First, China aspires to protect and buttress its socialist market economy by safeguarding what it perceives to be "fair market competition" and the "consumer and public interests" of China's citizens.³³ Second, China is determined to protect at all costs its own perceived long-term security and economic interests. Third, China is focused on protecting its indigenous business and entrepreneurs, including its diverse multitude of small and medium-sized businesses. And, fourth, China is demonstrating a strong propensity to focus on potential barriers to entry and the use of exclusionary practices by dominant firms.

China's AML enforcement activities have drawn harsh and scathing criticism from Western governmental and business interests—especially those in the United States.³⁴ Major themes of such criticisms are that China "is relying on non-competition factors" in its antitrust analyses and enforcement actions, especially in the context of international mergers and acquisitions, and the protection of Intellectual Property (IP) rights; and that China is discriminating against foreign businesses and countries through uneven enforcement of its AML laws.³⁵ "According to Lester Ross, Vice Chairman of the American Chamber of Commerce in China, this is a strategy by the Chinese government to help its domestic companies catch up in industries in which they are lagging."³⁶

This article first reviews the major emerging trends in China's current AML enforcement efforts, and how they relate to China's social, political, and economic values, culture, and history (Pt. II A-C). The article then discusses some of the recent

would somehow lead inevitably to open societies and redirect China from what President Bill Clinton once called 'the wrong side of history'—were pipe dreams.").

33. AML *supra*, note 19, at Ch. I, Art. 1.

34. *See, e.g.*, Velk, Gong & Zuckerbrot, *supra* note 16, at 9 ("In 2014, many American and other foreign companies claimed that they were singled out in antitrust investigations that discriminated against non-Chinese corporations").

35. *See e.g.* Maureen K. Ohlhausen, Commissioner, Federal Trade Commission, Second Annual GCR Live Conference, *Antitrust Enforcement in China—What's Next?* (Sept. 16, 2014), at 3-4 ("...a growing chorus is claiming that the Chinese are using the AML to promote industrial policy...[and] the AML may be used to protect and promote domestic industry"); U.S. Chamber of Commerce, *Competing Interests in China's Competition Law Enforcement*, Sept. 9, 2014, at ii ("...China's 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...").

36. Velk, Gong & Zuckerbrot, *supra* note 16, at 9. *See also* *China Targeting Foreign Companies, American Chamber Says*, BLOOMBERG NEWS, Sept. 2, 2014, available at: <http://www.bloomberg.com/news/2014-09092/u-s-companies-say-china-subjectively-enforcing-laws.html>.

cases, rulings, and investigative activities that highlight China's growing focus on the erection and maintenance of barriers to entry and the employment of exclusionary practices by perceived dominant firms (Pt. II. D.). Part III addresses the ongoing criticisms of China's AML enforcement activities by Western governmental and business entities, and whether they are merited or likely to catalyze material changes in China's AML activities.

II. Current Major Emerging Trends in China's AML Enforcement Efforts

To understand China's AML and its recent enforcement efforts, it is "necessary and crucial not only to carefully examine the words of the AML, but to read them in the context and light of Chinese history, culture, and traditions."³⁷ First and foremost, we must recognize that China may be "the only civilization the world has known upon which Western thought exercised little or no influence until modern times."³⁸ "China's historical culture was largely independent of Western influences and its responses to its peoples' economic needs are often peculiar to China and sharply differentiated from other countries."³⁹

Second, it is important to keep in mind that China's political system does not share "the same values of the Western legal traditions."⁴⁰ China is not in any sense "a western-style democracy,"⁴¹ and, "in reality, the country still is without rule of law."⁴² Furthermore, the leaders of the Chinese Communist Party (CCP), including its President Xi Jinping, are not interested in "bring[ing] about a change of

-
37. Thomas J. Horton & Jenny Xiaojin Huang, *Analyzing Information Exchanges between Competitors under the Anti-Monopoly Law*, in CHINA'S ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS, 95, 98 (Adrian Emch & David Stallibrass, eds., 2013); See also, Pate, *supra* note 14, at 211 ("Whether we like it or not, Chinese antitrust is going to be different from the U.S. and European varieties. Close attention to the underlying conditions and attitudes that will drive Chinese enforcement will yield more insight than comparing the AML with that of the U.S. and European statutes and court decisions"); Wentong Zheng, *Transplanting Antitrust in China: Economic Transition, Market Structure, and State Control*, 32 U. PA. J. INT'L. 643, 720 (2010) ("...the mold of Western antitrust laws takes place under local conditions that are not entirely compatible with Western antitrust models...despite having a Western-style antitrust law, China has not developed and likely will not develop Western-style antitrust jurisprudence in the near future due to these local conditions").
38. NORMAN KOTKER & CHARLES PATRICK FITZGERALD, THE HORIZON HISTORY OF CHINA 10 (Norman Kotker, ed., 1969); See also Horton, *Confucianism and Antitrust*, *supra* note 5, at 197.
39. Horton, *Confucianism and Antitrust*, *supra* note 5, at 197, citing KOTKER & FITZGERALD, *supra* note 38, at 11.
40. Ignazio Castelluci, *Rule of Law With Chinese Characteristics*, 13 ANN. SURV. INT'L. & COMP. L. 35, 64 (2007). See also Horton & Huang, *supra* note 37, at 98.
41. See Horton, *Confucianism & Antitrust*, *supra* note 5, at 197.
42. Velk, Gong & Zuckerbrot, *supra* note 16, at 8. The authors add: "China does not have an independent judiciary that acts as a check on executive power . . . Constitutionally prescribed limits on the sovereign power of the Communist party are mere rhetorical devices."

allegiance by bringing Western political systems to China.”⁴³ Indeed, one of the CCP’s conspicuous slogans is “A strong Communist Party means happiness to the Chinese people.”⁴⁴ CCP Document No. 9 warns Chinese leaders that one of the goals of the West “is to obscure the essential differences between the West’s value system and the value system we advocate, ultimately using the West’s value systems to supplant the core values of Socialism.”⁴⁵

A key concern of the CCP is “to maintain social stability, which ensures the CCP stays in power.”⁴⁶ As an authoritarian single-party regime, the CCP believes it must “reinforce [its] management of all types and levels of propaganda on the cultural front, perfect and carry out related administrative systems, and allow absolutely no opportunity or outlets for incorrect thinking or viewpoints to spread.”⁴⁷ In simple terms, China’s AML and the authorities that interpret and enforce it ultimately are beholden to the CCP and its “Chinese dream of the great rejuvenation of the Chinese nation” through the continuing development and implementation of “socialism with Chinese characteristics.”⁴⁸ Therefore, China’s AML enforcement activities ultimately are not directed towards carrying out or reinforcing western neoclassical economic ideologies, but towards helping “to perfect a Socialist rule of law system with Chinese characteristics.”⁴⁹

A. China Aspires To Protect Its Socialist Market Economy By Safeguarding What It Perceives to Be “Fair Market Competition” And The “Consumer and Public Interests” Of Its Citizens

In Article 1 of Chapter 1, China’s AML sets out its broad goals of “preventing and prohibiting monopolistic conduct, safeguarding fair market competition, improving the efficiency of economic operation, protecting the consumer and public interests, and promoting the healthy development of the socialist market economy.”⁵⁰ Article

43. Doc. No. 9, *supra* note 18, at 3.

44. Xuecan, *supra* note 32.

45. Doc. No. 9, *supra* note 18, at 3.

46. *Monthly Analysis of U.S. – China Trade Data*, Report by the U.S. – China Economic and Security Review Commission, Nov. 4, 2014, at 5. The USCC Report further characterizes the CCP as “remain[ing] above the law.” *Id.* See also The Right Honourable Brian Mulroacy, *The Growth of a Giant*, 60(1) ANTITRUST BULL. 14, 16 (2015) (arguing that in China there is no “serious consideration of whether China should be open to options beyond a single-party control vehicle or, indeed, whether more clarity needs to be brought to such fundamental issues as whether the party is (according to most current interpretations) above the law or subject to it”).

47. Doc. No. 9, *supra* note 18, at p. 7. See also *Monthly Analysis*, *supra* note 40, at 5 (“The government is well aware of the need to maintain the public’s trust in the system”).

48. Doc. No. 9, *supra* note 18, at 2. Indeed, the CPC has gone so far as to pronounce that Chinese television should be dedicated to promoting “socialist core values.” OSNOS, *supra* note 26, at 320.

49. See *President Xi’s Plenum Speech Emphasizes the Law*, CHINESE MEDIA DIG., Nov. 10, 2014, at 2.

50. AML Ch. 1, Art. 1. See note 11

4 adds that “The State shall formulate and implement competition rules compatible with the socialist market economy, perfect macroeconomic supervision, and develop a united, open, competitive and orderly market system.”⁵¹

From the outset, China’s AML is ambiguous, and includes both industrial and competition policies.⁵² As noted by distinguished Chinese Anti-Monopoly Law Professor Xiaoye Wang, “[b]ecause consumer interests and the public interest may not be parallel, it may still be difficult for the anti-monopoly authority to make a choice.”⁵³ What is not ambiguous, however, is the CCP’s determination that the public interest “is a critical part of the law,”⁵⁴ and that China’s AML is seen as part of the State’s control over an orderly market system designed to promote the healthy development of China’s socialist market economy, and “the universal good of the Chinese people.”⁵⁵

As China moves forward into its eighth year of AML enforcement, it is becoming clear that China has not accepted western competition policy as a normative organizing principle.⁵⁶ Current United States Federal Trade Commissioner Maureen K. Ohlhausen believes that in spite of the rhetoric about China wanting to move “away from a planned economy and toward a market system,” there is still a strong “continuing impulse to factor in effects on Chinese industry and employment rather than focusing simply on efficiency and consumer welfare, as well as ongoing support for more direct government intervention in the market.”⁵⁷ Such interests are seen as important in “building a harmonious socialist society,” and in promoting “the prosperity of the nation, and the vitality and happiness of the Chinese people.”⁵⁸

All this points to China’s emerging intent to be “guided by social, moral, and

-
51. AML Ch. I, Art. 4. See also Susan Beth Farmer *The Impact of China’s Antitrust Law and Other Competition Policies on U.S. Companies*, 23 LOY. CONS. L. REV. 34, 42-43, 45 (2010) (discussing how “AML Articles 1 and 4 diverge from the traditional model of antitrust analysis that is based solely on competition principles”).
52. See e.g. WANG, *supra* note 13, at 322-23.
53. *Id.* at 323.
54. *Id.* at 322.
55. *Id.* at 323.
56. *Impact of China’s Antitrust Law and Other Competition Policies on U.S. Companies: Hearing Before the Subcomm. On Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. 7 (July 13, 2010) (testimony of Shankar A. Singham); See also Maureen K. Ohlhausen, *Illuminating the Story of China’s Anti-Monopoly Law*, ANTITRUST SOURCE 1, 4 (Oct. 2013) available at: www.antitrustsource.com (observing that during a July 31-August 1, 2013, celebration of the fifth anniversary of China’s AML, Chinese “antitrust officials were more mixed in their endorsement of free-market competition, with several officials emphasizing the need for maintaining regular market order”).
57. Ohlhausen, *supra* note 35, at 8. See also Farmer, *supra* note 52, at 45 (discussing how the AML allows consideration of effects on “social public interests and economic development”).
58. WANG, *supra* note 13, at 21, quoting CCP’s Central Committee’s October 11, 2006, *Decisions Regarding Several Major Issues With Building a Harmonious Society*.

ethical considerations” in interpreting and enforcing its AML.⁵⁹ A key objective includes “preserving and protecting China’s traditional cultural and historical values,”⁶⁰ including Chinese Confucianism.⁶¹ China is determined to regulate competitive behavior it deems to be ethically and socially irresponsible.⁶² China is therefore focused on maintaining fair and orderly competition, which “assumes a harmonious business relationship between competitors, as well as suppliers, customers, and partners.”⁶³ We should not therefore be surprised to see an emphasis on encouraging fair competition, preventing unfair competition practices, and protecting the legal rights and interests of business operators, as well as Chinese consumers.⁶⁴

Recent Chinese administrative rulings and guidelines, as well as court decisions, point in this direction. For example, on August 23, 2014, China’s State Administration for Industry and Commerce (SAIC),⁶⁵ issued the *Interim Regulation on the Disclosure of Enterprise Information*, which took effect on October 1, 2014. SAIC’s Guidelines emphasize that enterprise information disclosure is designed to ensure fair market competition, and to promote integrity and self-discipline among

59. Horton, *Confucianism and Antitrust*, *supra* note 5, at 196.

60. *Id.* at 199.

61. *Id.* at 205; *see also* JACQUES, *supra* note 16, at 565 (“The [Chinese] state remains as pivotal in society and sacrosanct as it was in imperial times. Confucius, its great architect, is in the process of experiencing a revival and his precepts still, in important measure, inform the way China thinks and behaves. Although there are important differences between the Confucian and Communist eras, there are also strong similarities”).

62. *See e.g.*, Horton, *Confucianism and Antitrust*, *supra* note 5, at 209; William E. Shafer, Kyoko Fukukawa & Grace Meina Lee, *Values and the Perceived Importance of Ethics and Social Responsibility: The U.S. Versus China*, 70 J. BUS. ETHICS 265, 268 (2007) (discussing how many Chinese fear that “the transition to a market-based economy has been characterized by behavior that is less than ethical and socially irresponsible”); SPENCE, *supra* note 22, at 699 (1990) (discussing China’s longstanding fear of decadent Western influences, including “spiritual pollution”).

63. Horton, *Confucianism and Antitrust*, *supra* note 5, at 214. *See also* Lei Wang & Heikki Juslin, *The Impact of Chinese Culture on Corporate Social Responsibility: The Harmony Approach*, 88 J. BUS. ETHICS 433, 443-44 (2009).

64. *See e.g.*, Horton, *Confucianism and Antitrust*, *supra* note 5, at 217.

65. China’s SAIC “is a ministerial-level entity, directly under the State Council, charged with supervision and regulation of the markets and protecting the rights of businesses and consumers. It has responsibility for administering numerous commercial regulations, ranging from business and trademark registration, consumer protection, and trademark registration, to street market regulation.” HARRIS-ET AL., *supra* note 12, at 273. SAIC is responsible for “handling anticompetitive conduct that has a major national impact or other monopolistic practices that it may find within its jurisdiction.” *Id.* at 274. *See also* Yang Jie, *SAIC’s Antitrust Enforcement Practice: The Progress Made in the Past Five Years*, in CHINA’S ANTI-MONOPOLY LAW, *supra* note 9, at 377 (SAIC “is responsible for antitrust enforcement that is not related to anti-competitive pricing practices and merger control. In particular, it is responsible for enforcement against monopoly agreements, abuses of a dominant market position and abuses of administrative powers to eliminate or restrict competition”); WANG, *supra* note 13, at 408-9 (discussing “antitrust enforcement by SAIC”).

market participants, while also expending “social supervision.”⁶⁶ Terms such as “guarantee[ing] fair competition” and “promot[ing] the integrity and self discipline of enterprises” highlight China’s focus on social, moral, and ethical considerations in market competition.⁶⁷

Similar terms have been employed in recent anti-monopoly investigations and announcements by China’s National Development and Reform Commission (NDRC).⁶⁸ For example, on September 26, 2014, the NDRC announced an administrative monopoly investigation of the Hebei Provincial Government’s Transport Department, Price Bureau, and Finance Department.⁶⁹ The NDRC struck down a preferential toll policy that favored Hebei transport businesses over their out-of-province competitors. The NDRC “found that the policy harmed fair competition and constituted an abuse of administrative power in breach of Article 8 of the AML.”⁷⁰ Thus, the NDRC sent a strong message that local governmental officials should work to ensure fair competition and an orderly market within their borders.⁷¹

Similarly, China’s courts have recently focused on “unfair competition” issues. For example, on September 22, 2014, the Beijing No. 1 Intermediate People’s Court ruled that Kingsoft, a Chinese internet company, had engaged in unfair competition by using an advertisement filter to block the video ads of Youku, one of China’s largest online video-sharing companies.⁷² The Court’s ruling is consistent with

-
66. Interim Regulation on Enterprise Information Disclosure (promulgated by the State Council, Aug. 7, 2014, effective Oct. 1, 2014) (P.R.C.)). Article 1, for example, states: “This Regulation is formulated to guarantee fair competition, promote the integrity and self-discipline enterprises, regulate enterprise information disclosure, intensify enterprise credit restraint, maintain transaction safety, improve the effectiveness of government regulation, and expand social supervision.” *Id.* at Art. 1.
67. Similarly, China’s government procurement system is to be based on the “principles of openness and transparency, fair competition, impartiality, and good faith.” CHINA COMPETITION BULL. 1 (25th ed. 2013); China’s Rules on Retailing Fees were promulgated “for the purpose of maintaining market order and fair trading and promoting the healthy development of the retail industry.” CHINA COMPETITION BULL. 2 (17th ed. 2012).
68. China’s NDRC “is a ministerial-level entity directly under the State Council. It is charged with the formulation and implementation of national economic and development policies.” The NDRC “also enforces [China’s] Price Law, which prohibits certain ‘unfair pricing behaviors,’ including price-fixing, predatory pricing, price discrimination, and deceptive pricing.” HARRIS, ET AL., *supra* note 12, at 277. See also WANG, *supra* note 13, at 407-08 (discussing “antitrust enforcement by the NDRC”).
69. *NDRC Investigates Administrative Monopoly in Hebei Province*, in CHINA COMPETITION BULL. 3 (34th ed. 2014), NDRC opinion available at http://jjs.ndrc.gov.cn/gzdt/201409/t20140926_626773.html.
70. *Id.*
71. “Reports indicate[d] that the NDRC investigation was initiated in response to a complaint by the South Korean embassy, which passed on a complaint by a Chinese-Korean company in Tianjin who was unable to take advantage of the [toll] discount[s].” *Id.*
72. *Beijing Court Rules Against Kingsoft in Unfair Competition Case*, in CHINA COMPETITION BULL. 5

China's Internet Information Service Rules, which prohibit Internet information services from engaging in conduct that may damage the legal rights of their competitors and consumers.⁷³

China's Ministry of Commerce (MOFCOM) also repeatedly and consistently has emphasized that intellectual property and patents must be licensed on "fair, reasonable, and non-discriminatory terms" in allowing various mergers and acquisitions to proceed. For example, in its 2012 conditional approval of Google's acquisition of Motorola Mobility, MOFCOM required that "Google must honor Motorola Mobility's existing commitment to license its patents on fair, reasonable, and non-discriminatory terms."⁷⁴ Similarly, in Microsoft's 2014 acquisition of Nokia's devices and services business, MOFCOM required Microsoft to make various licenses committed to industry standards available on fair, reasonable, and non-discriminatory terms ("FRAND"); and to offer fair royalty rates and conditions for patents not committed to any industry standard.⁷⁵

MOFCOM has employed similar remedies requiring fair, reasonable, and non-discriminatory behavior in supplying various products to Chinese businesses post-merger. For example, in the 2013 *Glencore/Xstrata* merger, MOFCOM imposed requirements that for a period of eight years, Glencore has to supply certain volumes of copper, zinc and lead concentrates to Chinese customers with prices and other conditions that are fair, reasonable, and consistent with the then prevailing terms used in the international market.⁷⁶ Likewise, in the *General Motors/Delphi*

-
- (34th ed. 2014); opinion available at <http://bj1zy.chinacourt.org/article/detail/2014/09/id/1449430.shtml>.
73. See e.g. CHINA COMPETITION BULL. 1 (12th ed. 2011) ("The draft Internet Information Services Rules contain 22 articles and prohibit Internet information services from engaging in conduct that may damage the legal rights of their competitors and consumers."); CHINA COMPETITION BULL. 1 (8th ed. 2011) (discussing how China's Service Codes for E-Commerce Third Party Transaction Platforms forbid "imped[ing] the legitimate interests of other business operators and consumers").
74. CHINA COMPETITION BULL. 4-5 (20th ed. 2012).
75. CHINA COMPETITION BULL. 3-4 (31st ed. 2014); and <http://fdj/mofcom.gov.cn/article/ztxx/201404/20140400542415.shtml>; and <http://www.mofcom.gov.cn/article/ae/slfw/201404/2014040054254.shtml>. It is especially interesting to note that MOFCOM required such conditions after the deal was unconditionally approved by a number of leading international enforcement authorities, including those of the United States and the European Union. *Id.* MOFCOM has been the only major competition authority to impose restrictive conditions in a number of other deals that have been approved unconditionally by authorities in the United States, Europe and Japan, including: Mitsubishi Rayon/Lucite International (MOFCOM Publ. Ann. No. 28, April 24, 2009); General Motors/Delphi (MOFCOM Publ. Ann. No. 76, Sept. 28, 2009); Seagate/Samsung (MOFCOM Publ. Ann. No. 90, Dec. 12, 2011); and Google/Motorola Mobility (MOFCOM Publ. Ann. No. 25, May 19, 2012). See HARRIS, ET AL., *supra* note 12, at 38. Furthermore, MOFCOM has not been afraid to impose "remedies that were different to or went beyond those required by other jurisdictions," for example in the InBev/Anheuser Busch [MOFCOM Publ. Ann. No. 95, Nov. 18, 2008] and Western Digital/Hitachi transactions. *Id.* at 38-39.
76. *Merger Update—MOFCOM Approval and Management Update*, Glencore International p/c News

Corporation merger in 2009, MOFCOM required that GM would “continue with its principle of multiple sourcing and nondiscrimination with respect to all auto parts, and to conduct nondiscriminatory procurement..., and not to specially formulate any unreasonable conditions favorable toward Delphi but unfavorable toward other suppliers.”⁷⁷

Taken together, these rulings and statements confirm China’s belief that fair market competition at all levels is crucial to “protecting the consumer and public interests, [and] promoting the healthy development of the socialist market economy.”⁷⁸ Such judicial and administrative rulings and statements are consistent with and advance the CCP’s own pronouncements that “fairness and justice” are crucial keys to a successful socialist economy and country.⁷⁹ It is important to keep in mind that “Confucian morality traditionally has decried selfishness and greed ‘as an antisocial evil.’”⁸⁰ Fears and concerns with “the social evils of unbridled capitalism and extreme individualism in the West”⁸¹ are therefore likely to continue the push for implementing antitrust policies “that ensure all market participants have a level competitive field.”⁸²

One substantive area in which China’s focus on fairness appears to be leading to dramatic substantive differences is in resale price maintenance (RPM). In contrast to antitrust enforcers in the United States, China’s AML enforcement authorities have paid special attention in the last several years to potential resale price maintenance (RPM) policies and activities.⁸³ For example, on February 23, 2013, China’s NDRC “fined two Chinese state-owned liquor manufacturers through its

Release (April 16, 2013), at 2.

77. MOFCOM Announcement [2009] No. 76 (Sept. 28, 2009), at pt. 7.

78. AML Ch. I, Art. 1.

79. See e.g., The State Council Info. Office, China, *China’s Efforts and Achievements in Promoting the Rule of Law*, 7 CHINESE J. INT’L LAW (2008). The government listed “fairness and justice [as critical to China’s future]”, as well as “safeguarding market order and achieving social fairness and justice [in] establish[ing] an initial law regime for the socialist market economy.” *Id.* at 514, 517; see also *Chinese Scholars Debate Rule of Law and Economy*, *supra* note 44, at 3 (observing that “a market economy governed by law must fulfill three basic requirements: the law must command the highest authority; uphold fundamental principles like fairness and justice, with protection of rights at its core; and develop in harmony with the economy and society...[and] Chinese society must share the values of a ‘market economy governed by law,’ including freedom, equality, fairness, and trust”).

80. Horton, *Confucianism and Antitrust*, *supra* note 5, at 216, quoting FAIRBANK & GOLDMAN, *supra* note 16, at 258-59.

81. See SPENCE, *supra* note 22, at 17.

82. Horton, *Confucianism and Antitrust*, *supra* note 5, at 216, quoting Hongbin Cai & Qiao Liu, *Competition and Corporate Tax Avoidance: Evidence from Chinese Industrial Firms*, 119 ECON. J. 764, 794 (2009).

83. See e.g. Shan Jiang & D. Daniel Sokol, *Resale Price Maintenance in China: An Economic Perspective*, J. ANTITRUST ENFORCEMENT (forthcoming 2015), available at SSRN, at i138 (“Administrative enforcement of RPM has been a significant priority in recent years”); Dennis Lu & Guofu Tan, *Resale Price Maintenance and the Anti-Monopoly Law*, in CHINA’S ANTI-MONOPOLY LAW, *supra* note 9, at 119.

local authorities for restricting competition and harming consumers by using minimum RPM in their distribution agreements.”⁸⁴ Six months later, on August 7, 2013, NDRC fined Biostime and five other infant formula makers for enforcing RPM in various forms, “including fixing the prices of commodities resold to a third party or restricting the minimum prices for commodities resold to a third party....”⁸⁵

More recently, NDRC enforcement investigations and fines have been targeted towards major foreign eyeglass manufacturers,⁸⁶ as well as foreign automobile companies, including Mercedes Benz, Audi, Volkswagen, and Chrysler.⁸⁷ For example, on April 23, 2015, the Jiangsu Price Bureau (the NRDC's local Jiangsu Province counterpart) fined Mercedes Benz RMB 350 million and several of its local dealers a total of RMB 7.9 million for implementing resale price maintenance through checks, warnings, and penalties such as reducing policy support.⁸⁸ The increasing crackdowns against RPM by foreign companies in China has led some commentators to ask whether the NDRC considers RPM to be an essentially per se violation.⁸⁹ There is little doubt that RPM in China will continue to be a hot issue.

B. China Is Determined To Protect And Enhance Its Own Perceived Long-Term Security and Economic Interests

China's AML expressly sets forth China's strong interest in protecting and enhancing China's national and economic security.⁹⁰ Article 31 of the AML requires

84. Lu & Tan, *supra* note 83, at 127.

85. Jiang & Sokol, *supra* note 83, at 9.

86. See e.g. Jiang & Sokol, *supra* note 83, at 10, and *NDRC Fines Lens Manufacturers for Vertical Price-Fixing*, CHINA COMPETITION BULL. 6 (32nd ed. 2014). The NDRC imposed aggregate fines in excess of RMB 19 million against a number of large foreign eyeglass and contact lens manufacturers, including Essior, Nikon, Carl Zeiss, Johnson & Johnson, and Bausch & Lomb. Interestingly, two key Chinese companies, Hoya and Shanghai Weicon Optical “were exempt from penalties as they reported the anti-competitive conduct and provided important evidence to the NDRC.” *Id.*

87. See e.g. *FAW-Volkswagen and Audi Dealers Fined in Hubei Province for Resale Price Maintenance and Price Fixing*, CHINA COMPETITION BULL. 2 (34th ed. 2014); *Shanghai Price Bureau Sanctions Chrysler and Chrysler Dealers for Resale Price Maintenance and Price Fixing*. *Id.* at 3.

88. See *The NRDC imposed a fine of RMB 350 million on Mercedes Benz and over RMB 7 million on local dealers*, CHINA COMPETITION BULL. 3 (36th ed. 2015), citing http://www.jszjj.gov.cn/office_new/eo_comm_zxnrxs.php.

89. For example, a January 14, 2015, CLE webinar brochure advertised that: “Crackdowns are increasing in China against alleged RPM practices by foreign and domestic companies. The [NDRC]...appears to consider resale price maintenance to be a per se violation of the law.” Strafford, *Intensified Resale Price Maintenance Enforcement in China, the EU and the US: Mitigating Antitrust Risk*, Jan. 14, 2015, available at <https://www.straffordpub.com/products/intensified-resale-price-maintenance...>; See also Freshfields Bruckhaus Deringer, *Resale Price Maintenance: Is it 'per se' illegal in China?*, Feb. 6, 2013 (copy of memorandum on file with author). *But see* Jiang & Sokol, *supra* note 83 (arguing that China should pursue a “prohibition plus exemption” enforcement model that analyses economic and competitive effects factors).

90. See e.g. Farmer, *supra* note 51, at 36-37 (“In another departure from American antitrust policy, the

mergers or acquisitions involving foreign companies or investors “which implicate national security” to “go through national security reviews according to relevant laws and regulations.”⁹¹ AML Article 27 additionally requires China’s competition authorities to review “the effect of [a] concentration on national economic development,” as well as “[o]ther factors affecting market competition as determined by the AMEA [Anti-Monopoly Enforcement Authorities].”⁹²

AML Articles 27 and 31 mesh with Article 1’s broad goals of “promoting the healthy development of the socialist market economy” and AML Article 4’s admonition that “[T]he State shall formulate and implement competition rules compatible with the socialist market economy, perfect macroeconomic supervision and control, and develop a united, open, competitive and orderly market system.”⁹³ Together, these articles provide strong incentives to China’s AML authorities to regulate business conduct that “would not only impede competition but also harm Chinese national security [and economic interests].”⁹⁴

These AML provisions further reflect long-standing Chinese concerns and internal debates “regarding the perceived national security issues arising from foreign acquisitions of domestic [Chinese] companies, with particular concern focused on ‘strategic and sensitive’ industries and Chinese national champions.”⁹⁵ It is difficult for Westerners to fully appreciate China’s intense security concerns based on the horrific and “long history of destructive imperialism in China, which has led to ‘social disruption and psychological demoralization,’ and, at times, threatened China’s ‘entire way of life.’”⁹⁶ But such concerns remain powerful throughout China

Chinese antitrust law explicitly incorporates additional, non-competition factors into the analysis...The agency guidelines and language of the available decisions employ mainstream analytic concepts, but also may import non-economic factors such as ‘national economic development’ and ‘national security’ in mergers involving foreign investors.”

91. AML Ch. IV, Art. 31.

92. AML Ch. IV, Art. 27. *See also* Ohlhausen, *Illuminating*, *supra* note 35, at 6 (discussing how AML Article 27 expressly allows for consideration of broad factors that are inconsistent “with market competition analysis . . . [including] the effect of the proposed deal on the development of the national economy, and any other factors determined by the State Council Anti-Monopoly Enforcement Authority”).

93. AML Ch. I, Art. 4.

94. WANG, *supra* note 13, at 320.

95. HARRIS ET. AL., *supra* note 12, at 134, quoting NDRC, *Special Review Mechanism Needs to be Established for Mergers and Acquisitions Involving Foreign Parties*, Dec. 27, 2006. *See also* MARK FURSE, *ANTITRUST LAW IN CHINA, KOREA AND VIETNAM* 107 (2009). In all fairness, it must be noted that in the United States and Canada, serious concerns about China using investments in western companies and technology for military and strategic purposes have led to increasing careful monitoring and review in both countries of Chinese investments and acquisitions. *See, e.g.*, Nicholas Raffin & Eric Wiebe, *A Timeline of the East-West Relationship: Past, Present, and Future Acquisitions*, 60(1) *ANTITRUST BULL.* 19 (2015). Indeed, the Committee on Foreign Investment in the United States (CFIUS) “applied mitigation measures to sixteen cases from 2008 to 2010.” *Id.* at 28.

96. Horton, *Confucianism and Antitrust*, *supra* note 5, at 199-200, citing FAIRBANK & GOLDMAN, *supra*

today. As recently noted by the U.S. – China Economic and Security Review Commission in its November 2014 Report to Congress: “Published Chinese views on China-Japan security relations encompass a mix of suspicion, alarm, and concern—especially on the issues of Japan’s increasing robust defense and security establishment, the development of the U.S.—Japan alliance, and perceived lack of Japanese atonement over its wartime past.”⁹⁷

Alarmingly, China has increasingly begun leveraging its economic successes into a major military build-up. For example, the U.S.-China Economic Security Review Commission (USCC) Report adds: “China is engaged in a sustained and substantial military buildup that is shifting the balance of power in the region, and is using its growing military advantages to support its drive for a dominant sphere of influence in East Asia.”⁹⁸ The Association of Southeast Asian Nations (ASEAN) has raised particular concerns over China’s naval build-up, which has “served to crystallize the doubts and fears about China’s long-term intentions.”⁹⁹

Some commentators have sought to argue that China’s intense focus on protecting its own economic security partially could be a result of “the national security hurdles encountered by Chinese companies overseas....”¹⁰⁰ Indeed, China appears to have modelled its AML security provisions on United States’ regulations that were used to block foreign purchases in the United States based “on purported national security grounds.”¹⁰¹ In any event, it seems likely that security concerns on both

note 16, at 189. As described by Fairbank and Goldman, “[t]oday’s historians are more likely to stress the social disruption and psychological demoralization caused by foreign imperialism. In these dimensions the long-term foreign invasion[s] of China proved to be a disaster so comprehensive and appalling that we are still incapable of fully describing it.” *Id.* See also RANA MITTER, *FORGOTTEN ALLY: CHINA’S WORLD WAR II – 1937-1945* (2013) (describing in detail the horrors of Japanese atrocities in WWII); MICHAEL BURLEIGH, *MORAL COMBAT: GOOD AND EVIL IN WWII 14-21* (2011) (describing Japan’s horrific invasion of China and the barbaric slaughter and torture of Chinese civilians and soldiers); IRIS CHANG, *THE RAPE OF NANKING: THE FORGOTTEN HOLOCAUST OF WORLD WAR II* (1997) (describing the horrors of Japan’s invasion of China during World War II).

97. USCC 2014 Report to Congress, *Competing Interests*, *supra* note 35, at 21.

98. *Id.* at 22.

99. JACQUES, *supra* note 16, at 591. Jacques adds: “It would seem that the Chinese government made little or no attempt to inform, let alone consult, its ASEAN partners about the new naval deployments.” *Id.*

100. HARRIS, ET. AL., *supra* note 12, at 134.

101. *Id.* Indeed, AML Article 31 “was formulated after CNOOC’s proposed acquisition of Unocal in 2005 in the United States, which failed in the face of heavy opposition on national security and other grounds.” *Id.* at 134, n. 36. See also Michael Petrusie, *Recent Development Oil and the National Security: CNOOC’s Failed Bid to Purchase UNOCAL*, 84 N. CAR. L. REV. 1373 (2006). Professor Xiaoye Wang perceptively adds that China’s AML security provision “is not unlike the United States, United States’ Exon-Florio merger review of certain foreign investments involving national security.” WANG, *supra* note 13, at 320-21, citing 50 U.S.C.A §2170. See also Moritz Lorentz, *The New Chinese Competition Act*, 29 EUR. COMPETITION L. REV. 257, 261 (2008); Nathan Bush & Zhou Zhaofeng, *Chinese Antitrust—Act II, Scene I*, 8(1) THE ANTITRUST SOURCE 1, 9 (2008); Raffin &

sides will increasingly impact economic relations between China and the west.¹⁰²

A potential complicating factor in attempting to predict how boldly China will apply security concerns in its interpretation and enforcement of its AML is that the term “national security” conceivably could be defined broadly and “used to promote domestic [Chinese] economic protectionism.”¹⁰³ Indeed, MOFCOM’s 2011 implementing regulations broadly cover military or military-related enterprises surrounding a key or sensitive military infrastructure or unit otherwise related to the military; and national security-related enterprises regarding important agricultural and energy products and resources, as well as important infrastructure, transportation, technology and major equipment manufacturing.¹⁰⁴ Potential factors to be considered include the influence of potential transactions over China’s national defense, the stable running of China’s economy, China’s basic social life and order, and research and development of key national security technologies.¹⁰⁵ The potential practical breadth of these national security concerns is enormous, and highlights China’s obsession with protecting its national security interests against foreign investments. Therefore, it is likely that national security concerns will play a crucial role in China’s AML review of the activities of foreign companies and investors in China in the coming years.

Furthermore, as discussed above, China’s AML specifically identifies the protecting of “the public interest and the impact on the Chinese national economy” as key goals and objectives.¹⁰⁶ Once again, such considerations in the context of industrial conduct and transactions, including mergers and acquisitions, “is a very

Wiebe, *supra* note 96, at 35-37 (discussing increasing American and Canadian hostility to Chinese investments that could confer strategic military advantages).

102. See, e.g., CAPITOL FORUM, May 12, 2015, *China’s Anti-Monopoly Law: An Interview with Professor Tom Horton of USD Law* (on file with author).

103. *Competition Policy in China, Report by the U.S.—China Business Council*, Sept. 2014, at 13. See also Hannah C. L. Ho, *China’s Security Review System for Foreign Investment: Where Do We Stand?*, MONDAQ (April 7, 2014) (discussing the possibility of overbroad interpretations of sensitive or key competitive areas); Christine Kahler, *Foreign M & A in China Face Security Review*, CHINA BUS. REV. (April 1, 2011) (observing that “the security review will analyze the M & A deal’s effects on national security, China’s economy, social stability, and the R & D capabilities of key national security technologies. Transactions found to have ‘significant effects on national security’ will be terminated or approved conditionally”).

104. MOFCOM Regulation on Implementing the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, of September 1, 2011. See also McDermott, Will & Emery, *China Formalises National Security Review System for M & A Transactions by Foreign Firms*, available at <http://www.nationalreview.com/article/china-formalises-national-security-review-system-ma-transactions-foreign-investors>. See also JANE M. ZIMMERMAN, CHINA LAW DESKBOOK: A LEGAL GUIDE FOR FOREIGN INVESTED BUSINESSES 930, n. 114 (3d ed. 2010).

105. *Id.*

106. Gregory K. Leonard & Yizhe Zhang, *Considering the Unique Aspects of the Merger Review Process in China*, ANTITRUST SOURCE, 1 (2014). See also AML, Ch. I, Arts. 1 & 4.

broad concept.”¹⁰⁷ Combined with the “insufficient independence” for antitrust enforcement authorities in China,¹⁰⁸ such broad economic policy goals for antitrust create potential vulnerabilities for “officials at MOFCOM, NDRC, and SAIC, [who] are part of larger organizations whose functions include the formulation and implementation of macroeconomic and other policies.”¹⁰⁹

There should be little doubt that broad macroeconomic concerns are given priority over competition concerns in China today. For example, in 2014, China’s “Party leaders placed their highest priority on maintaining public support through rapid economic growth and job creation.”¹¹⁰ As a result, some commentators argue that “[d]uring the course of 2014, foreign companies investing in China faced increased regulatory burdens and barriers to business dealings that do not similarly encumber China’s highly favored ‘national champions.’”¹¹¹ Throughout 2014, “China used [its] AML to investigate foreign firms in sectors designated by the government as ‘strategic and emerging,’ including automobiles and information technology.”¹¹² Such developments reveal a continuing intention to heavily factor in perceived effects on Chinese industry and employment.

China’s President Xi Jinping announced at China’s 2013 Third Plenum that reforms were important, but the state would continue to play a key role in the economy.¹¹³ Such pronouncements are more than rhetoric. CCP Document No. 9 confirms that such speeches are designed to “unif[y] the thought of the entire Party, the entire country, and the people enormously.”¹¹⁴ Combined with the CCP’s promises to “accelerate[e] economic transformation as the main thread, and increas[e] the quality and efficiency of the economy at its core,”¹¹⁵ it is likely that protecting and enhancing China’s perceived long-term security and economic interests will play a key role in China’s future interpretation and enforcement of its

107. Xiaoye Wang & Adrian Emch, *Five Years of Implementation of China's Anti-Monopoly Law—Achievements and Challenges*, 2013 J. ANTITRUST ENF. 1, 23 (2013).

108. *Id.* at 21-22.

109. *Id.* at 22.

110. U.S.—CHINA ECONOMIC AND SECURITY REVIEW COMMISSION 2014 REPORT TO CONGRESS, *supra* note 46, at 33.

111. *Id.* at 34. Furthermore, “[f]or the first time, in 2014, foreign direct investment (FDI) from China into the United States exceeded FDI from the United States to China.” *Id.*

112. U.S.—CHINA ECONOMIC AND SECURITY REVIEW, *supra* note 40, at 60. The European Union Chamber of Commerce has emphasized similar concerns. See Michael Martina, *EU Lobby Piles in on Foreign Criticism of China's Antitrust Enforcement*, REUTERS, Sept. 9, 2014.

113. *China's Third Plenum: Xi Jinping consolidates Power*, TELEGRAPH, Nov. 12, 2013, available at <http://www.telegraph.co.uk/news/worldnews/asia/china/1044176/Chinas-Third-Plenum>. (“The free market, [the conference statement] said, would be given a ‘decisive role in allocating resources,’ but the Communist party will continue to shape the economic landscape”).

114. Doc. No. 9, *supra* note 18, at 2.

115. *Id.*

AML.¹¹⁶ As observed by AML scholar Wendy Ng, “[w]here an important or sensitive Chinese industry is involved, it appears that MOFCOM might be more concerned about the potential negative effects of the transaction on the industry and national economic development more generally.”¹¹⁷

C. China Is Further Focused On Protecting Its Indigenous Businesses and Entrepreneurs, Including Its Diverse Multitude Of Small And Medium-Sized Businesses

Although China’s economy is plagued today by the continuing existence of State-Owned Enterprises (SOEs),¹¹⁸ China has a strong backbone of small and medium-size businesses, sometimes referred to as “a fast-growing thicket of bamboo capitalism.”¹¹⁹ This “astonishing force” of private entrepreneurs is a crucial contributor to economic innovation and growth in China.¹²⁰ Not surprisingly, “China continues to show a keen interest in protecting the long-term health and economic opportunities of [these] smaller competitors.”¹²¹ Encouraging small businesses and

-
116. *Id.* at 46. Brookings Institution scholar Arthur Kroeber adds that “[t]he respective roles of state and market need to be clarified, but the state role will remain very large.” Arthur Kroeber, *After the NPC: Xi Jinping’s Roadmap for China*, (Brookings Instit.), March 11, 2014, available at <http://www.brookings.edu/research/opinions/2014/03/11-after-npc-xi-jinping-roadmap-for-china-kroeber>. Moreover, the IMF observed in a 2014 report on China that its economic reform blueprint “has not been followed up with details on the specific reforms or timetables.” *Id.*
117. Wendy Ng, *Policy Objectives of Public Enforcement of the Anti-Monopoly Law: The First Five Years*, in CHINA’S ANTI-MONOPOLY LAW, *supra* note 9, at 35, 44. Interestingly, “the involvement of a well-known Chinese brand appears to be an [additional potential] important factor in MOFCOM’s decision-making.” *Id.* at 45. See also Wang & Emch, *supra* note 107, at 22 (“An important weakness of the three antitrust authorities is that they are inserted within larger ministries or commissions under the State Council. In other words, their level in the Chinese hierarchy is not high enough for enforcing the AML in an entirely independent and ‘neutral’ manner”).
118. A wealth of excellent scholarship discussing economic issues relating to China’s SOEs is available. For example, Professor Xiaoye Wang observes: “State-owned enterprises face the biggest problems in China’s current economic reforms...Currently, the key to China’s economic reform is the reform of state-owned enterprises, and promoting competition and breaking up monopolies are the keys to turning the state-owned enterprises into legal person.” WANG, *supra* note 10, at 151. See also *id.* at 138-39 (“Based on primarily historical and structural reasons, China should concentrate its current anti-monopoly effects on state-owned enterprises”); Thomas Brook, *China’s Anti-Monopoly Law: History, Application, and Enforcement*, 16 APPEAL 31, 38 (2011) (“SOEs have retained significant if not strengthened control of many industries despite attempts by the Chinese government to introduce competition”). A fuller discussion of China’s SOEs and ongoing reform efforts by China is beyond the scope of this article.
119. Wesley Harris, *China Energy: A Crossroads Historiography*, 37 T. MARSHALL L. REV. 255, 259 (2012), quoting *China’s Economy: Bamboo Capitalism*, ECONOMIST (Mar. 10, 2011), <http://www.economist.com/node/18332610>.
120. *Id.* at 258-59. See also JACQUES, *supra* note 16, at 621 (arguing that “a major reason why the Chinese economy has been so dynamic is the intense competition between the various provinces and their firms”).
121. Horton, *Confucianism and Antitrust*, *supra* note 5, at 225. See also Thomas J. Horton & Jenny Xiaojin Huang, *Analyzing Information Exchanges between Competitors un the Anti-Monopoly Law*,

entrepreneurs is viewed as a key part of China's efforts to promote "the healthy development of the socialist market economy."¹²²

China sees the protection of small and medium-size competitors and producers in a competitive market as beneficial in several key ways.¹²³ First, their continuing presence "allows local producers to participate in an evolving and innovative market, thereby increasing the possibility of capturing technological expansions."¹²⁴ They also help fuel China's economic growth and promote its long-term economic stability.¹²⁵

China's AML unapologetically sets forth China's interest in protecting its small businesses' competitive opportunities. For example, AML Article 15 (3) sets forth the express objective of "improving operational efficiency and enhancing the competitiveness of small and medium-sized enterprises."¹²⁶ AML Articles 1 and 4 bolster and buttress this clear objective by seeking to "safeguard[] fair market competition" and by "develop[ing] a united, open, competitive and orderly market system."¹²⁷ Similarly, Article 6 forbids dominant undertakings from abusing their market positions "to eliminate or restrict competition."¹²⁸ Such provisions have led some scholars to raise the "worrisome possibility" that "the drafters intended the AML as a tool to promote [China's] domestic economy...."¹²⁹

In interpreting and carrying out these mandates, China's AML regulators unapologetically have sought to limit activities or transactions that could have an adverse impact on domestic small and medium-size businesses. For example, at a

in CHINA'S ANTI-MONOPOLY LAW, *supra* note 9, at 101 (discussing China's interest in "protecting the long-term health and stability of smaller competitors, as part of its interest in an orderly market and 'industry self-discipline'").

122. See e.g. FAIRBANK & GOLDMAN, *supra* note 16, at 408. Former Chinese Premier Deng Xiaoping, for example, saw government encouragement of small and medium-size businesses as part of a program of economic reforms called "Socialism with Chinese characteristics." *Id.*

123. See Jared A. Berry, *Anti-Monopoly Law in China: A Socialist Market Economy Wrestles with Its Antitrust Regime*, 2 INT'L L. & MGMT. REV. 129, 144 (2005).

124. *Id.*

125. See *Id.*

126. AML Ch. II, Art. 15 (3).

127. AML Ch. II, Arts. 1 & 4.

128. AML Ch. I, Art. 6. See also AML Ch. IV, Arts. 27-28. Article 27 states that the effect of economic concentrations on "consumers and other undertakings" must be considered in "the review of concentrations." Other undertakings can be interpreted to include both competitors and customers. Article 28 adds that "where a concentration of undertakings results in or may result in the effect of eliminating or restricting competition, the AMEA shall make a decision to prohibit the concentration." This stern and mandatory language suggests a strong interest in protecting small and medium-sized competitors.

129. Oliver Q. C. Zhong, *Dawn of a New Constitutional Era or Opportunity Wasted? An Intellectual Reappraisal of China's Anti-Monopoly Law*, 24 COL. J. ASIAN L. 87, 106 (2010); See also *Competition Policy and Enforcement in China*, U.S.—China Bus. Council (Sept. 2014), at 12 ("Many questions remain unanswered about the objectives of China's competition regime. Among them: Will China use the AML to protect domestic industry rather than promote fair competition?").

May 2014 Conference in Beijing co-sponsored by the ABA Section of Antitrust Law and the Expert Advisory Committee of the Anti-Monopoly Commission of the State Council of the People's Republic of China (PRC), Shang Ming, the Director General of MOFCOM's Anti-Monopoly Bureau, admitted that "MOFCOM seeks comments from industrial regulators in its merger review practices and will continue to do so."¹³⁰ Director Ming further stated that "MOFCOM will continue to balance competition policies and industrial policies in its merger review."¹³¹

An early well-known example of MOFCOM's interest in protecting small and medium-size Chinese businesses is MOFCOM's 2009 decision to block Coca-Cola's proposed acquisition of Huiyan, a Chinese juice producer.¹³² In its Public Announcement, MOFCOM indicated that it looked at several important factors under AML Art. 27, including "[t]he effect of the concentration on the development of the national economy."¹³³ MOFCOM concluded that "[t]he transaction would have an adverse impact on domestic small-and medium-sized enterprises in the fruit juice market and impair their ability to compete and innovate, negatively affecting the sound development of the Chinese juice industry."¹³⁴

More recent MOFCOM decisions have shown a continuing concern for protecting and enhancing competitive opportunities for Chinese firms. For example, in conditionally approving Merck's acquisition of AZ Electronic Materials on April 30, 2014, MOFCOM imposed licensing and behavioral remedies due to its concern that competitors could face unfair bundling and cross-subsidization competition that could "result in the marginalization or exit of competitors from the market."¹³⁵ Similarly, on June 17, 2004, MOFCOM prohibited the formation of the proposed P3 Network shipping alliance between Maersk, Mediterranean Shipping, and CMA GGM in part because the network could "suppress competitors' room for development, increase the parties' bargaining power vis-a-vis ports, and harm the

130. Client Memorandum from Davis Polk Law Firm 2 (June 5, 2014) (on file with author).

131. *Id.* at 3. The Director added that "[i]ndustrial regulators know their respective industries well and their comments often include information on industrial development trends, which helps MOFCOM identify competition problems and solve competition concerns." *Id.* at 2-3.

132. Coca-Cola/Huiyan, MOFCOM Publ. Ann. No. 22, March 18, 2009.

133. *Id.* at 2(5).

134. Wang and Emch, *supra* note 108, at 9. In section 4(3) of its Public Announcement, MOFCOM explained:

The concentration would squeeze out small and medium-sized juice producers in China, and restrain local producers from participating in competition in the juice beverage market and their ability for proprietary innovation, which would have a negative effect over effective competition in the Chinese juice beverage market, and would prove adverse to the sustained sound development of the juice beverage market in China.

MOFCOM Publ. Ann. 22, *supra* note 132, at 4(3).

135. CHINA COMPETITION BULL. (32nd ed. 2014), at 3; citing <http://fldj.mofcom.gov.cn/article/ztxx/201404/20140400569060.shtml>.

interest of cargo owners.”¹³⁶ More recently, MOFCOM played a potentially decisive role in catalyzing American and Japanese semiconductor and display industry giants Applied Materials and Tokyo Electron to abandon their proposed merger. MOFCOM believed that the proposed merger would have “a severe impact on the interests of Chinese chip manufacturing customers.”¹³⁷

Watching MOFCOM's increasingly aggressive enforcement efforts unfold, it seems fair to predict that China will continue focusing, at least in the near term, on protecting its diverse multitude of small and medium-sized businesses, as well as national champions and core Chinese competitors in strategic businesses.¹³⁸

D. China Has Shown A Strong Propensity To Focus on Potential Barriers To Entry And The Use of Exclusionary Practices by Dominant Firms

“[H]aving co-opted Western capitalism and mirrored many of its surface features, China today poses an unprecedented and profound challenge to Western capitalism that scholars and policymakers have only begun to grasp.”¹³⁹ As previously discussed, divergent views about antitrust enforcement and different regulatory focuses “may arise from the unique and economic-specific national policies each country's antitrust laws are designed to promote.”¹⁴⁰ Consequently, “culturally embedded” competition laws, despite similarities in wordings, “may mean different things in different societies.”¹⁴¹ We should not therefore be surprised that Chinese Anti-Monopoly Law regulators are taking “into account specific social and economic

136. CHINA COMPETITION BULL. (32nd ed. 2014), at 4, *citing* <http://fldgj.mofcom.gov.cn/article/ztxx/201406/20140600628586.html>. Interestingly, both the United States and European authorities had previously determined “that the alliance would not result in unreasonable increases in transportation costs through a reduction in competition.” *Id.* at 5. Unlike MOFCOM, “both took into account the parties’ argument that the alliance would result in operational efficiencies and benefit consumers.” *Id.*

137. *See* CHINA COMPETITION BULL. 4 (36th ed. 2015), *citing* <http://www.mofcom.gov.cn/article/ae/ail201504/2015040095517.shtml>; Interview with Tom Horton, Professor of Law at Univ. of S.D., *supra* n. 102, at 3-6 (discussing the various strategic considerations of the proposed deal from the perspectives of the United States, Japan, and China).

138. *See* Lawrence S. Liu, *All About Fair Trade? – Competitors Law in Taiwan and East Asian Economic Development*, 57 ANTITRUST BULL. 259, 298 (2012) (arguing that China “resorts to serious industrial policy to foster national champions in strategic sectors...”); *see also* Berry, *supra* note 123, at 152 (predicting that China’s AML enforcement “will likely reflect the CCP’s historically protectionist tendencies...”); Deborah Healey, *Anti-Monopoly Law and Mergers in China: An Early Report Card on Procedural and Substantive Issues*, 3 TSINGHUA CHINA L. REV. 17, 26 (2010) (arguing that China’s “policy of promoting mergers and acquisitions to form large companies which will be internationally competitive, thereby creating national champions, is inconsistent with competition law principles”).

139. Marshall W. Meyer, *Is it Capitalism?*, 7 MGMT. & ORG. REV. 5, 8 (2010).

140. Farmer, *Impact of China's Antitrust Law*, *supra* note 51, at 41.

141. Liu, *supra* note 138, at 269.

circumstances in China, rather than uncritically importing the legislative models used in the U.S. and the E.U.”¹⁴²

The Chinese do not appear to be buying into the current extreme American judicial tolerance and even encouragement of concentrated industries¹⁴³ and predatory conduct, as allegedly “important element[s] in the free market system.”¹⁴⁴ Instead, the Chinese are showing an increased interest in controlling and arresting the growth of monopolies and dominant firms. China’s current interest parallels an ongoing trend in China towards economic decentralization.¹⁴⁵ As previously discussed, many of China’s industries, “are characterized by small-scale firms and low market concentration ratios.”¹⁴⁶ Throughout “China’s bustling cities, vast numbers of small businesses exist alongside the towers of industrial and corporate giants.”¹⁴⁷

Chapter III of China’s AML covers “Abuse of Dominant Market Position.”¹⁴⁸ Recent Chinese AML investigations show an emphasis on enforcing Chapter III. The focus seems to be on lowering potential barriers to entry for Chinese firms and controlling the use of potential exclusionary practices by dominant firms.¹⁴⁹

-
142. Dr. Yijun Tian, *The Impacts of the Chinese Anti-Monopoly Law on IP Commercialization in China & General Strategies for Technology-Driven Companies and Future Regulators*, 2010 DUKE L. & TECH. REV. 004, ¶ 55 (2010).
143. See e.g. Sam Peltzman, *Industrial Concentration Under the Rule of Reason*, 57 J. L. & ECON. S101 (2014) (finding that concentration for American manufacturing has increased since 1982, due largely to the relaxation of antitrust merger standards); Horton, *Confucianism and Antitrust*, *supra* note 5, at 224 (discussing the trend of growing economic consolidation in the United States); WALTER A. ADAMS & JAMES W. BROCK, *THE BIGNESS COMPLEX: INDUSTRY, LABOR, AND GOVERNMENT IN THE AMERICAN ECONOMY* (2d ed. 2004); TED NACE, *GANGS OF AMERICA: THE RISE OF CORPORATE POWER AND THE DISABLING OF DEMOCRACY 100* (2005) (discussing the rapidly accelerating trend to concentration); KENNETH M. DAVIDSON, *MEGA MERGERS: CORPORATE AMERICA’S BILLION-DOLLAR TAKEOVERS* (2003).
144. Rudolph J. R. PERITZ, *COMPETITION POLICY IN AMERICA: 1888-1992: HISTORY, RHETORIC, LAW* 239 (1996) (quoting RICHARD A. POSNER, *ANTITRUST LAW* 28 (2d ed. 2001)). See also *Verizon Commc’ns, Inv. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407 (2004); Thomas J. Horton, *Unraveling the Chicago/Harvard Antitrust Double Helix. Applying Evolutionary Theory to Guard Competitors and Revive Antitrust Jury Trials*, 41 U. BALT. L. REV. 615, 616 (2012); Stucke, *Reconsidering Antitrust Goals*, *supra* note 2, at 555-557 (discussing how antitrust in the United States is no longer interested in “arresting economic power in its incipiency”).
145. See e.g. Zheng, *Transplanting Antitrust in China*, *supra* note 37, at 656; Yingyi Qian & Chenggang Xu, *Why China’s Economic Reforms Differ: The M-Form Hierarchy and Entry/Expansion of the Non-State Sector*, 1 ECON. TRANSITION 135, 145-47 (1993).
146. Zheng, *Transplanting Antitrust in China*, *supra* note 37, at 710. Zheng adds that “[o]fficial statistics indicate that market concentration ratios in China have been unusually low when compared to both developed and developing countries.” *Id.*; see Horton, *Confucianism and Antitrust*, *supra* note 5, at 224-26.
147. *Id.* at 224.
148. AML Ch. III.
149. AML Article 17 defines a “dominant market position” as one that “enables the undertakings to control the price or quantity of products or other trading conditions in the relevant market or to impede or affect the entry of other undertakings into the relevant market.” Articles 18 and 19 set

In several recent merger investigations, MOFCOM has found that proposed transactions were likely to lead to heightened barriers to entry and the suppression of possible growth and development by competitors. As an example in imposing various conditions on Merck's acquisition of AZ Electronic Materials, MOFCOM observed "that there were high barriers to entry," including Merck's holding more than 3,500 patents in the liquid crystals display market.¹⁵⁰ MOFCOM expressed similar concerns about high barriers to entry in its second decision unconditionally blocking a proposed merger. MOFCOM announced that the transaction would "increase the already high barriers to entry, [and] suppress competitors' room for development" in blocking the proposed P3 Network Shipping Alliance among Maersk, Mediterranean Shipping, and CMA CGM.¹⁵¹

Special attention also has been paid in recent months to bundling, and the licensing of intellectual property and technology.

1. Bundling

AML Article 17(5) forbids undertakings with dominant market positions "[w]ithout valid justification, tying in products or imposing other unreasonable trading conditions."¹⁵² In 2013, China's SAIC began investigating Microsoft's alleged bundling of various software products and functions, "raising the prospect of China revisiting the software bundling issue at the heart of past antitrust complaints against the firm in the West."¹⁵³ In a July 29, 2014, Press Release, SAIC suggested that its investigation concerns "Microsoft's Windows operating system and its Office software suite, and relate[s] to issues of interoperability, bundling and document

forth a number of factors that can be employed in determining whether undertakings have a dominant market position, including market share, financial and technical status, and the "difficulty for other undertakings to enter the relevant market." AML Ch. III, Art. 18. A single undertaking with a 50% share of a relevant market is presumed under Article 19 to have a dominant market position.

150. *MOFCOM Conditionally Approves Merck's Acquisition of AZ Electronic Materials*, CHINA COMPETITION BULL. 3 (32nd ed. 2014). Additional barriers to entry included photoresist suppliers having to go through a technical certification process that lasts two to three years. *Id.*
151. *MOFCOM Prohibits the Formation of the P3 Network Shipping Alliance Among Maersk, Mediterranean Shipping, and CMA CGM*, CHINA COMPETITION BULL. 4 (32nd ed. 2014). MOFCOM has consistently voiced concerns about transactions potentially increasing barriers to entry since 2009. *See e.g.* MOFCOM Announcement [2009] No. 77 Regarding Conditional Approval of Pfizer's Acquisition of Wyeth, Sept. 29, 2009, at 4 (3) (iii) (discussing the high barriers to entry in imposing conditions on Pfizer's acquisition of Wyeth).
152. AML Ch. III, Art. 17(3).
153. Reuters in Beijing, *Chinese antitrust regulator targets Microsoft software bundling*, S. CHINA MORNING POST, August 26, 2014, available at <http://www.scmp.com/print/news/china/article/1580794/chinese-antitrust-regulator-targets>. *See also* Gerry Shih & Paul Carsten, *Chinese antitrust regulator targets Microsoft's web browser, media player*, REUTERS, August 26, 2014, available at <http://www.reuters.com/assets/print?aid=USKBN0GQ06920140826>.

authentication.”¹⁵⁴ SAIC’s high profile and controversial investigation was accompanied by a corresponding article in *The People’s Daily*, the CCP’s chief newspaper, warning foreign companies that: “In the future, the focus on market order will continue to be constantly enhanced. Every kind of business should adjust its behavior and thinking to this new regulatory normal.”¹⁵⁵

San Diego-based chipmaker Qualcomm also recently found itself punished severely by China’s NDRC for bundling patent licenses to the sale of chips and imposing unreasonable conditions on patent licensing and chip sales.¹⁵⁶ China’s NDRC announced in late December, 2014, that it was nearing a settlement with Qualcomm following a controversial thirteen month probe.¹⁵⁷ China defended its controversial probe of Qualcomm as “in line with the global reaction.”¹⁵⁸ A little over two months later, on February 10, 2015, the NDRC announced its findings that Qualcomm had abused its dominant market position, and imposed a massive fine of RMB 6.088 billion, which was equal to 8% of Qualcomm’s 2013 sales revenues in China.¹⁵⁹

Like SAIC, MOFCOM also has shown great interest in curbing potential bundling by dominant firms. For example, in conditionally approving Merck’s acquisition of AZ Electronic Materials on April 30, 2014, “MOFCOM found that the acquisition would give Merck the ability to bundle sales of liquid crystal displays (LCD) and photoresist.”¹⁶⁰ MOFCOM therefore required Merck “not to bundle the sale of or cross-subsidise LCD and photoresist products or otherwise directly or indirectly force Chinese companies to purchase the products together.”¹⁶¹

China also has begun announcing substantial penalties against foreign companies for price-fixing and market sharing. For example, on August 20, 2014,

154. Avmeric Dumas-Eumard, *China Ramps Up Antitrust Enforcement With Second Round of Raids of Microsoft Today*, CONSTANTINE CANNON ANTITRUST TODAY BLOG, August 6, 2014, <http://www.antitrusttoday.com/2014/08/06/china>.

155. Neil Gough, Chris Buckley & Nick Wingfield, *China’s Energetic Enforcement of Antitrust Rules Alarms Foreign Firms*, N.Y. TIMES, Aug. 10, 2014, available at <http://www.nytimes.com/2014/08/11/business/international/china8217s-energetic-enforcement-of-antitrust-rules-alarms-foreign-firms.html>.

156. See e.g. *Update on the NDRC’s Investigation of Qualcomm*, CHINA COMPETITION BULL. 5 (33rd ed. 2014); Reuters, *China Investigating Qualcomm’s Pricing*, N.Y. TIMES, Feb. 19, 2014, available at <http://www.nytimes.com/2014/02/20/technology/china-investigating-qualcomms-pricing.html>.

157. See e.g. Michael Perrault, *Qualcomm Antitrust Probe Reportedly Nearing End*, INVESTOR’S BUS. DAILY, Dec. 26, 2014, available at <http://news.investors.com/technology/122614-732175-qualcomm>.

158. See Zhang Lulu, *How Qualcomm got involved in China’s antitrust probes*, CHINA. ORG. CN., October 16, 2014, available at http://www.china.org.cn/business/2014-10/16/content_33780954.htm.

159. CHINA COMPETITION BULL. 3 (35th ed. 2015) citing <http://jjs.ndrc.gov.cn/g2dt/201502/t2015021a663872.html>. The NDRC found that Qualcomm had abused its dominant position in licensing patents essential to wireless communication to Chinese licensees.

160. *Mofcom Conditionally Approves Merck’s Acquisition of AZ Electronic Materials*, CHINA COMPETITION BULL. 3 (32nd ed. 2014).

161. *Id.*

the NDRC announced record fines totaling over RMB 1.2 billion against eight Japanese auto parts and four Japanese bearings manufacturers.¹⁶²

China's investigations of Microsoft, Merck, Qualcomm, and others have sparked fierce protests of unfair discrimination against foreign companies.¹⁶³ China inevitably responds to criticisms of discrimination against foreign companies by arguing that its AML regulators have not been afraid to pursue local investigations. They point out that China's AML enforcers have brought numerous local price-fixing and market sharing cases.¹⁶⁴ Similarly, in the abuse of dominance sector, China can point to several local bundling investigations and cases.¹⁶⁵ For example, on July 30, 2014, China's SAIC fined the Inner Mongolia Tobacco Company (Chifeng Tobacco) "for abusing its dominant market position in the cigarette wholesale market in Chifeng by bundling the sales of various brands of cigarettes."¹⁶⁶ Similarly, on July 28, 2014, a Beijing trial court fined Baidu for bundling Qihoo 360's software with Baidu's products.¹⁶⁷ However, such minor investigations and cases are unlikely to quell the rising storm of foreign protests against China's allegedly discriminatory and protectionist AML enforcement activities.

2. Licensing of Intellectual Property and Patents

Expansively pressing for the fair, reasonable, and non-discriminatory (FRAND) licensing of intellectual property rights (IPR) is perhaps the single area where the Chinese have been the most aggressive against foreign companies. Although AML

-
162. *NDRC Imposes Record Fines on Japanese Auto Parts and Bearing Manufacturers for Price-Fixing*, CHINA COMPETITION BULL. 2 (33rd ed. 2014). The Japanese companies included such giants as Hitachi, Mitsubishi Electric, Mitsuba, and Sumitomo Electric.
163. See, e.g., Gough, Buckley & Wingfield, *supra* note 155 ("Foreign companies worry that investigations could represent the rise of a newer, subtler form of protectionism, one cloaked in regulatory impartiality but intended to promote Chinese companies, especially the big, powerful state-owned companies"); Bruce Einhorn, *Foreigners Cry Foul as China Widens Antimonopoly Probes*, BLOOMBERG BUSINESSWEEK, Aug. 14, 2014, available at <http://www.businessweek.com.printer/articles/219299-foreigners>. ("The backlash to China's latest campaign against foreign companies has begun. The country's antimonopoly enforcers have been on a tear....").
164. See, e.g., *Hainan Price Bureau Fines Aerated Bricks Cartel*, CHINA COMPETITION BULL. 3 (33rd ed. 2014); *Three Cement Companies in Jilin Province Fined RMB 114 Million for Price-Fixing*, CHINA COMPETITION BULL. 2 (34th ed. 2014); *Insurance Industry Players in Zhejiang Province Fined More than RMB 110 Million*, *Id.* at 1.
165. As an example, at the annual World Economic Forum in Tianjin in September 2014, Chinese Premier Li Keqiang argued that "only 10% of AML investigations involved foreign companies. Premier Li defended China's antitrust enforcement, stating that Chinese AML enforcement agencies would not enforce regulations selectively or target certain groups of companies." CHINA COMPETITION BULL. 5 (34th ed. 2014). Anti-Unfair Competition Bureau Director-General Ren Airong similarly argued that of thirty-nine then current SAIC investigations, only two involved foreign companies. *Id.*
166. *Inner Mongolia AIC Sanctions Abuse of Dominance in the Cigarette Wholesale Market*, CHINA COMPETITION BULL. 4 (33rd ed. 2014).
167. *Baidu Loses Bundled Sales Case Against Qihoo 360*, CHINA COMPETITION BULL. 4 (33rd ed. 2014).

Article 55 initially exempts from its ambit the use of IPR, it immediately adds: “however, this Law is applicable to conducts of undertakings that abuse their intellectual property rights to eliminate or restrict competition.”¹⁶⁸ China’s AML enforcement authorities have interpreted and applied Article 55 aggressively and expansively, especially in the context of requiring FRAND licensing of IPR in conditional merger and acquisition approvals.

On June 11, 2014, SAIC released a revised draft regulations concerning the abuse of IPR.¹⁶⁹ SAIC ultimately published its final Regulation on the Prohibition of Conduct Eliminating or Restricting Competition Through the Abuse of Intellectual Property Rights (IPR Regulation) on April 7, 2015.¹⁷⁰ Articles 4 through 15 describe at length potential prohibited uses of IPR, and are especially pointed at “undertakings with dominant market positions.”¹⁷¹ Article 1 observes that the rules have been drafted “in order to protect competition and encourage innovation, as well as to prohibit the use of [IPR] by undertakings to eliminate or restrict competition.”¹⁷² The IPR Regulation effectively imposes obligations on dominant companies to license their IPR on “reasonable terms” if that IPR is an essential facility for production or operation unless they can provide a valid reason for not doing so.¹⁷³

Prior to SAIC’s new IPR rules, several major Chinese cases addressed IPR issues. In the *Huawei v. InterDigital* cases,¹⁷⁴ Chinese courts found that InterDigital had abused its dominant position in exercising its IPR rights through such conduct as bundling the licensing of its standard essential patents (SEPs) with non-SEPs.¹⁷⁵

168. AML Ch. VII, Art. 55. See also WANG, *supra* note 10, at 217-229.

169. See Rules of the Administration for Industry and Commerce on the Prohibition of Abuses of Intellectual Property Rights for the Purposes of Eliminating or Restricting Competition, June 11, 2014. (Draft IP Rules) SAIC hopes to finalize the regulations in 2015. SAIC has been drafting the regulations since 2009, and has received numerous comments from Chinese and foreign entities throughout the long process. Article 5 of the draft rules includes several important “safe harbor” provisions.

170. See CHINA COMPETITION BULL. 2 (36th ed. 2015).

171. See Draft IP Rules Arts. 4-15. A full discussion of SAIC’s draft rules is beyond the scope of this paper.

172. Draft IP Rules Art. 1. Article 2 adds that “[t]he AML shares the same goal with intellectual property protection, which is to promote innovation and competition, improve efficiency and consumer welfare and public interest of the society.”

173. *Id.*, citing http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201504/t20150414_155126.html.

174. Shenzhen Intermediate People’s Court, *Huawei v. InterDigital*, Feb. 4, 2013, [2011] Shen Zhong Fa Zhi Min Chu Zi No. 857 and No. 858; Guangdong High People’s Court, *Huawei v. InterDigital*, Oct. 16, 2013, [2013] Yue Gao Fa Min San Zhong Zi No. 305 and 306.

175. See Ye Ruosi, Zhu Jianjun & Chen Wenquan, *Determination of Whether Abuse of Dominance by Standard Essential Patent Owners Constitutes Monopoly: Comments on the Antitrust Lawsuit Huawei v. InterDigital*, 3 ELECTR. INTELL. PROP. 46 (2013). On May 22, 2014, the NDRC announced the suspension of its investigation into InterDigital after InterDigital reached a settlement with Chinese company Huawei, and committed to not charge Chinese companies discriminatory and high licensing fees, not bundle non-SEPs with SEP licenses, not require that Chinese companies

Building upon such cases, SAIC's rules contain ten articles that address the potential abuse of dominance in exercising IPR. "With regard to the types of abusive conduct, the draft SAIC IPR Regulation focuses on refusal to license; exclusive dealing; tying [bundling]; imposing unreasonable conditions; discrimination; patent pools; standard essential patents; copy right collecting societies; and abuses through warning letters."¹⁷⁶ A number of unreasonable conditions in dominant companies' exercise of their IPR also are set forth.¹⁷⁷

Considered together with MOFCOM's aggressive use of IPR licensing requirements in its conditional approval of mergers,¹⁷⁸ it appears that China increasingly will use its AML to help its indigenous companies gain favorable access to IPR held by foreign companies. This aggressive posture likely reflects China's recognition that "the country's innovators still have a way to go before they can meet the Communist Party's expectations."¹⁷⁹ While "China has strengthened its commitment to R & D to support the government's drive towards innovation..., [t]he reality is that China remains heavily reliant on foreign IP."¹⁸⁰ Even though China has surpassed the United States and Japan in filing patents, "many of them [have] little value; they [have] been filed to meet political targets or attract funding."¹⁸¹ Consequently, "[a]ccess to technology and development of domestic, 'indigenous' technology are key factors in China's development strategy."¹⁸² Such developments lend strong credence to increasing foreign concerns that China will use its AML to promote its domestic research and development needs.

license their IP for free to InterDigital, and not force Chinese companies to accept unreasonable licensing conditions through litigation. See *NDRC Suspends Its Investigation Into InterDigital*, CHINA COMPETITION BULL. 7 (32nd ed. 2014).

176. Adrain Emch & Liyang Hou, *Antitrust Regulation of IPRs –China's First Proposal*, COMPETITION POLICY INT'L 7 (2014).
177. *Id.* at 8. These include among others exclusive dealing and exclusive grant-backs for derived technology.
178. See, e.g., *MOFCOM Conditionally Approves Merck's Acquisition of AZ Electronic Materials*, CHINA COMPETITION BULL. 3 (32nd ed. 2014) (discussing MOFCOM's requirements that Merck "offer LCD patent licenses on a non-exclusive, non-transferable, fair, reasonable, and non-discriminatory basis").
179. Bruce Einhorn, *China's Government Admits Chinese Patents Are Pretty Bad*, BLOOMBERG BUSINESSWEEK, June 23, 2014. See also Christina Larson, *A Peek Into the 'Black Box' of Where China's Hefty R & D Budget Goes*, BLOOMBERG BUSINESSWEEK, Oct. 1, 2014, (discussing the massive graft and corruption in China's research fields).
180. Dr. Zhan Hao, *SAIC Moves Closer to Antitrust Rules for IP*, CHINA LAW VISION, July 10, 2014, available at <http://www.chinalawvision.com/2014/07/articles/competitionantitrust-law-of-the/saic-mov>.
181. OSNOS, *supra* note 26, at 320. Similarly, while China is producing more scientific papers than anywhere but the United States, they are not even ranked in the top ten in terms of quality. *Id.* OSnos argues that academic fraud is still rampant in China. *Id.*
182. Emch & Hou, *supra* note 9, at 10.

III. China's Recent AML Enforcement Activities Have Drawn Harsh and Scathing Criticisms From Western Governments and Business Interests

China's aggressive AML enforcement activities are coming under increasing international scrutiny and rapidly escalating criticism. Perhaps the harshest criticism has come from the U.S. Chamber of Commerce, which released a scathing report on September 9, 2014, on the "Competing Interest in China's Competition Law Enforcement."¹⁸³ In its well-written and comprehensive 85-page Report, the Chamber alleges that China's AML and its enforcement are not living up to the ideal of competitive markets, and that China is using its AML "to advance policy and boost national champions."¹⁸⁴ The Chamber is especially appalled by what it considers to be China's "[s]ystemic, officially sanctioned curtailment of IP rights,"¹⁸⁵ and the "[d]ue process deficiencies, [which] facilitate these problems."¹⁸⁶ The Chamber adds that "foreign companies suffer disproportionately from China's patterns of enforcing the AML. In fact, all transactions blocked or conditionally approved to date have involved foreign companies, and the curtailment of IP rights appears designed to strengthen the bargaining position of domestic licenses."¹⁸⁷ Indeed, the Chamber alleges that China's AML enforcement is violating the commitments that China undertook in joining the World Trade Organization (WTO).¹⁸⁸

The U.S. Chamber of Commerce is hardly alone in voicing such concerns. For example, in a September 2014 Report, the U.S.—China Business Council (USCBC) observed that "foreign companies have well-founded concerns about how investigations are conducted and decided. China's legal framework for antitrust enforcement provides opportunities for protectionism and industrial policy to sway decisions."¹⁸⁹

Joining this growing chorus, the USCC filed a lengthy report with the United

183. United States Chamber of Commerce, *Competing Interests in China's Competition Law Enforcement: China's Anti-Monopoly Law Application and the Role of Industrial Policy*, Sept. 9, 2014.

184. *Id.* at ii. The Chamber adds that "[t]he beneficiaries of these policies are often Chinese national champions in industries that China considers strategic, such as commodities and high technology." *Id.* at 2.

185. *Id.* at 77.

186. *Id.* at 78.

187. *Id.* at 2.

188. Neil Gough, *China's Antitrust Campaign Seen as Possible Breach of W.T.O. Rules*, N.Y. TIMES (Sept. 8, 2014), <http://www.nytimes.com/2014/09/09/business/international/us-group-says-china>.

189. U.S.-CHINA BUS. COUNCIL, COMPETITION POLICY AND ENFORCEMENT IN CHINA 13 (2014), available at https://www.uschina.org/sites/default/files/AML%202014%20Report%20FINAL_0.pdf. The Report adds that "Chinese competition practices can create *de facto* discrimination against foreign companies by not giving proper weight to market considerations." *Id.*

States Congress in November, 2014.¹⁹⁰ Noting the steadily growing trade imbalance between the United States and China, the Commission concluded that “[t]he bilateral trade imbalance is driven, in large part, by China’s mercantilist and state-directed policies.”¹⁹¹ The Commission additionally alleged that “[i]n 2014, China ramped up its use of Anti-Monopoly Law (AML) against foreign firms in what appears to be unequal enforcement in order to create favorable market conditions for Chinese competitors.”¹⁹² The American Chamber of Commerce in China and the European Union Chamber of Commerce have issued similar 2014 reports “accusing China of unfair enforcement of the AML.”¹⁹³

More recently, on December 5, 2014, the Congressional Research Service prepared a Report for Congress summarizing the various business community criticisms of China’s AML enforcement.¹⁹⁴ The scope and intensity of such concerns should not be minimized. John Frisbie, the President of the USCBC, noted that a recent survey “found that 86% of respondents said they are least somewhat concerned about the way the AML has been implemented.”¹⁹⁵ Widespread reported concerns included unfair treatment and discrimination, a lack of due process and regulatory transparency, lengthy time for merger reviews, and the process through which remedies and fines are determined.¹⁹⁶

Various United States antitrust officials also have joined the chorus. For example, on September 16, 2014, Federal Trade Commissioner Maureen K. Ohlhausen expressed strong concerns that “the Chinese may be moving away from rather than towards international norms.”¹⁹⁷ Commissioner Ohlhausen expressed strong support for “a growing chorus claiming that the Chinese are using the AML to promote industrial policy.”¹⁹⁸ FTC Chairwoman Edith Ramirez has voiced similar

190. U.S.-CHINA ECON. AND SEC. REVIEW COMM’N, 2014 ANNUAL REPORT TO CONGRESS (2014), *available at* http://origin.www.uscc.gov/sites/default/files/annual_reports/Complete%20Report.PDF.

191. *Id.* at 3. The Report continues: “Although China promised extensive market reforms when it joined the WTO, it has been reluctant to implement them. Instead, the Chinese government has institutionalized preferences for state-owned enterprises and favored industries, particularly in areas designated as ‘strategic.’” *Id.*

192. *Id.* at 60. The Report adds: “Chinese regulators and state media have disproportionately targeted foreign firms operating in China with accusations ranging from monopolistic behavior to exploitation of Chinese consumers.” *Id.*

193. *Id.* See also Michael Martina, *EU Lobby Piles in on Foreign Criticism of China’s Antitrust Enforcement*, REUTERS (Sept. 9, 2014), <http://uk.reuters.com/article/2014/09/09/uk-china-antitrust-eu-idUKKBN0H40SB20140909>.

194. WAYNE M. MORRISON, CONGR. RESEARCH SERV., CHINA–U.S. TRADE ISSUES 25-27 (2014), *available at* <https://www.hsdl.org/?view&did=761176>.

195. *U.S.–China Business Relations: Rough Waters Ahead?*, KNOWLEDGE@WHARTON, UNIV. OF PA. (Dec. 14, 2014), <http://knowledge.wharton.upenn.edu/article/u-s-china-business-relations-face-rough-waters-ahead>.

196. *Id.*

197. Ohlhausen, *Antitrust Enforcement*, *supra* note 35, at 2-3.

198. *Id.* at 3.

concerns,¹⁹⁹ as has United States Deputy Assistant Attorney General for Antitrust Bill Baer.²⁰⁰ Furthermore, “China and the United States’ adversarial relationship has been marked by frequent litigation in the World Trade Organization (WTO).”²⁰¹

Not surprisingly, Chinese officials deny that they are targeting or discriminating against foreign companies in enforcing their AML.²⁰² For example, on September 10, 2014, the day after the U.S. Chamber of Commerce Report was released, Chinese Premier Li Keqiang delivered a speech to 1000 business leaders attending a World Economic Forum meeting in Tianjin. China Premier Li observed: “China continues to welcome foreign investment, and the door will open even further.”²⁰³ The next day, Key Chinese AML enforcement officials held an additional briefing to refute the various allegations.²⁰⁴ Similarly, on April 15, 2015, Zhang Handong, the new Director General of the NDRC Price Supervision and Anti-Monopoly Bureau, met with the Chairman of the USCC and representatives of such companies as GE, Dell, and Intel in an attempt to convince them “that antitrust enforcement in China does not discriminate against any particular company or sector.”²⁰⁵

Unfortunately, notwithstanding China’s vigorous protestations and denials, a review of China’s AML enforcement activities since 2008 lends strong credence to the allegations that the primary targets of major AML enforcement initiatives have

-
199. Edith Ramirez, Chairwoman, U.S. Fed. Trade Comm’n, Speech at Georgetown University’s Global Antitrust Conference, Standards-Essential Patents and Licensing: An Antitrust Enforcement Perspective (Sept. 10, 2014), *available at* https://www.ftc.gov/system/files/documents/public_statements/582451/140915georgetownlaw.pdf (expressing concerns that China’s approach to IPR and AML suggests “an enforcement policy focused on reducing royalty payments for local implementers as a matter of industrial policy, rather than protecting competition and long-run consumer welfare”).
200. Bill Baer, Assistant Attorney General, Antitrust Division, U.S. Dep’t of Justice, Remarks as Prepared for Delivery at Fordham University School of Law’s 41st Annual Conference on International Antitrust Law and Policy, International Antitrust Enforcements Progress Made, Work To Be Done (Sept. 12, 2014), *available at* <http://www.justice.gov/atr/file/517736/download>. Indeed, during his 2012 election campaign, President Obama told China to behave like a “grown up.” Matt Spetalnick & Doug Palmer, *Obama to China: Behave Like a “Grown Up,”* REUTERS (Nov. 14, 2011), <http://www.reuters.com/article/2011/11/14/us-apec-idUSTRE7AB12920111114>.
201. Velk, Gong & Zuckerbrot, *supra* note 16, at 9.
202. *See e.g.*, Neil Gough, *China’s Antitrust Campaign Seen as Possible Breach of W.T.O. Rules*, N.Y. TIMES (Sept. 8, 2014), <http://www.nytimes.com/2014/09/09/business/international/us-group-says-china-could-be-violating-trade-accords.html> (stating that “senior Chinese officials have repeatedly said that they are not focusing specifically on foreign companies and that equal treatment is being extended to all”).
203. Dexter Roberts, *Premier Li Keqiang Says China Market Is Still Open to Foreign Investors*, BLOOMBERG (Sept. 10, 2014), <http://www.bloomberg.com/bw/articles/2014-09-10/chinas-premier-to-investors-we-want-you>. Premier Li defended China’s antitrust enforcement, stating that “only 10% of AML investigations involved foreign companies.” *See* CHINA COMPETITION RESEARCH CTR., CHINA COMPETITION BULLETIN, CHINA RESPONDS TO CONCERNS ABOUT AML ENFORCEMENT 5 (34th ed. 2014).
204. *See* CHINA COMPETITION RESEARCH CTR., *supra* note 203, at 5-6.
205. CHINA COMPETITION BULL. 5-6 (36th ed. 2015).

been foreign companies. Chinese officials and their CCP-controlled press have been unapologetic in simultaneously issuing warnings that foreign companies need “to get used to tougher scrutiny,”²⁰⁶ and “must strictly comply with Chinese rules and laws and fulfill their social obligations.”²⁰⁷

China’s unwillingness to give more serious consideration to the escalating allegations and criticisms of its AML enforcement activities is cause for grave concern. Given the rising rhetoric and concerns on both sides, it seems that we may be headed for a dangerous clash sparked by two very different antitrust regulatory systems.²⁰⁸

IV. Conclusion

China’s recent AML enforcement activities and initiatives confirm that China is determined to chart its own course, and not be “the tail of someone else’s dog.”²⁰⁹ China’s current course indicates that China will aggressively pursue AML enforcement with the goal of creating “fair market competition” and protecting the “consumer and public interests” of China’s citizens. China is likely to continue using its AML to protect its long-term security and economic interest, and to protect the competitive opportunities for its small and medium-sized businesses. In so doing, China is likely to continue aggressively seeking to break down perceived barriers to entry and to block exclusionary practices by firms with perceived dominant market positions.

Like it or not, the United States and other Western countries and businesses are going to have to accept that China views itself as different, and that its view of its “socialist market economy” is vastly different from our view of free markets.²¹⁰ We need to come to grips with the reality that Chinese antitrust in the next decade is unlikely to mimic our post-Chicago antitrust system, and its grounding in

206. See Gough, Buckley & Wingfield, *supra* note 155 (stating that “[l]ate last week, The People’s Daily, the chief newspaper of the party, told foreign companies to get used to tougher scrutiny”).

207. CHINA COMPETITION RESEARCH CTR., CHINA COMPETITION BULLETIN, MOFCOM AND THE EU CHAMBER OF COMMERCE COMMENT ON THE RECENT AML INVESTIGATIONS INTO FOREIGN BUSINESSES 7 (33rd ed. 2014).

208. See *e.g.*, Arthur Kroeber & Donald Clark, *Is a Trade War with China Looming? A ChinaFile Conversation*, CHINAFILE (Sept. 12, 2014), <http://www.chinafile.com/conversation/trade-war-china-looming>. See also Velk, Gong & Zuckerbrot, *supra* note 16, at 10 (describing the current trading relationship between China and the United States as “combative”).

209. FAIRBANK & GOLDMAN, *supra* note 16, at 322.

210. See, *e.g.*, JACQUES, *supra* note 16, at 563 (stating that “[t]he desire to measure China primarily, sometimes even exclusively, in terms of Western yardsticks, while understandable, is flawed. At best it expresses a relatively innocent narrow-mindedness; at work it reflects an overweening Western hubris, a belief that the Western experience is universal in all matters of importance. This can easily become an excuse for not bothering to understand or respect the wisdom and specificities of other cultures, histories, and traditions”).

supposedly neutral and scientific neoclassical economic models.

Rather than wasting time criticizing China and trying to lure it into following current American models, we should humbly ask ourselves whether we might learn from the Chinese and their Confucian traditions and values. As this author previously has argued, China should be lauded for seeking to pursue an aggressive antitrust policy that takes into account Confucian norms of ethics, morals, and fairness, and seeks to inspire increased corporate social responsibility.²¹¹

On the other hand, the Chinese and their AML enforcers are going to need to pay more attention going forward to their own Confucian traditions and values, as well.²¹² Ongoing business and governmental corruption in China must be aggressively addressed. Furthermore, the Chinese need to acknowledge and realistically address the pressures on their AML enforcers to aggressively target foreign companies in order to protect and bolster indigenous Chinese companies and businesses. Instead of trying to pretend that they are acting neutrally and objectively in their AML enforcement, the Chinese need to find better ways to focus primarily on competition policies, as opposed to industrial protectionism. The ultimate regulatory question must become what is best for economic competition in China, rather than what is best for the CCP's long-term interest in maintaining its tight grip on power.

As always, the future is uncertain. But the stakes could not be higher. Whether we like it or not, China's and our economies are inextricably linked and positively correlated.²¹³ Both China and the West must continue their ongoing dialogues, and seek to continue building strong economic, cultural, and political bridges.²¹⁴ After all, much more than future international antitrust enforcement is at stake.

211. See Horton, *Confucianism and Antitrust*, *supra* note 5, at 228.

212. In the words of Chinese Academy of Social Sciences Professor Zhou Hanhua: "Chinese society must share the values of a 'market economy governed by law,' including freedom, equality, fairness, and trust." *Chinese Scholars Debate Rule of Law and Economy*, CHINESE MEDIA DIG., Nov. 10, 2014, at 3.

213. See, e.g., Jingling Liu & Zhixiao Zheng, *The Economic Link Between China and North America*, 60(1) ANTITRUST BULL. 40, 44 (2015) (discussing studies and research showing "a moderate and positive [economic] correlation between China and North America").

214. See, e.g., Danjie Peng, Yi Tzu Tsao & Nicholas Glaudemans, *Agents of Change*, 60(1) ANTITRUST BULL. 46 (2015) ("Improved Sino-Western cooperation requires better communication between China and the West. China should not be dismissive of Western work habits and skills, and the West should not display hostility toward China's advancing economic and political importance").