

COMPETITION LAW ENFORCEMENT IN CHINA: BETWEEN TECHNOCRACY AND INDUSTRIAL POLICY

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I INTRODUCTION

China is a relative newcomer to competition law. Though many jurisdictions around the world adopted competition laws beginning in the early 1990s, China's Anti-Monopoly Law (AML) was enacted only in 2007.¹ At least three other features distinguish China's experience with competition policy. First, China enacted its competition law as part of a gradual evolution of domestic economic and regulatory policy, rather than as a result of pressure or conditionality from international development and funding bodies, such as the World Bank or the International Monetary Fund,² or from mature competition jurisdictions.³ Second, unlike the laws of some recent adopters,⁴ the AML is not a wholesale transplant of a pre-existing template of the competition law and enforcement apparatus of a mature jurisdiction. Although China sought to learn from the legal texts and enforcement experiences of established competition regimes, the AML

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1. Zhonghua Renmin Gongheguo Fan Longduan Fa (中华人民共和国反垄断法) [Anti-Monopoly Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) [hereinafter AML], http://www.china.org.cn/government/laws/2009-02/10/content_17254169.htm [<https://perma.cc/59KN-PJXC>].

2. See Deunden Nikomborirak, *The Political Economy Of Competition Law: The Case Of Thailand*, 26 NW. J. INT'L L. & BUS. 597, 598 (2006) (noting the IMF conditions in the case of Indonesia); D. I. Waked, *Adoption of Antitrust Laws in Developing Countries: Reasons and Challenges*, 12 J.L. ECON. & POL'Y 193, 200 (2016).

3. See Thomas J. Doleys, *Promoting Competition Policy Abroad: European Union Efforts in the Developing World*, 57 ANTITRUST BULL. 337, 340 (2012) (surveying "EU efforts to promote the introduction and competition policies in the developing world").

4. See, e.g., Michal Gal, *The "Cut and Paste" of Article 82 of the EC Treaty in Israel: Conditions for a Successful Transplant*, 9 EUR. J. L. REFORM 467 (2008) (analyzing the Israeli Competition Act).

reflects a more deliberate process of selecting features from different competition policy models⁵ and includes a number of rules specifically tailored to the Chinese setting.⁶ Finally, unlike with many other transplanted competition laws,⁷ the enactment of the AML was not followed by a long period of dormancy whereby the law went unenforced. Instead, even as the AML came into force and in the period thereafter, the responsible authorities issued a steady stream of decisions and have maintained consistent levels of enforcement activity over time.⁸

The relative global importance of the Chinese economy and the number of competition decisions affecting international firms have generated considerable interest both in understanding the reasons for the quick uptake of competition policy, as well as in characterizing and assessing China's emergent competition practice. A number of scholars have examined the legislative process behind the AML in an effort to explain the peculiar Chinese characteristics of the law.⁹ The degree of convergence of the AML with common international antitrust rules

5. See Nathan Bush, *The PRC Antimonopoly Law: Unanswered Questions and Challenges Ahead*, ANTITRUST SOURCE 1 (Oct. 2007), <http://www.abanet.org/antitrust/at-source/07/10/Oct07-Bush10-18f.pdf> [<https://perma.cc/SF3W-EM7U>]; see generally Lei Wang & Ivo Krizic, *External vs. Domestic: The Evolution of China's Competition Regime*, FIFTH MEETING OF THE UNCTAD RESEARCH PARTNERSHIP PLATFORM, (July 11, 2014) http://unctad.org/meetings/en/Contribution/CCPB_RPP_2014_Paper_KW_en.pdf [<https://perma.cc/C32D-N5YB>].

6. E.g., AML, *supra* note 1, at art. 7 (relating to business operations of companies in the state-owned economy); *id.* at art. 8, ch. V (relating to abuse of administrative power to restrict or eliminate competition); *id.* at arts. 9–10 (providing the basis for the unique tripartite enforcement regime). Consistent with the apparent emphasis on indigenous development, none of the Chinese competition authorities is a member of the International Competition Network, a broad-based transnational forum for exchange of antitrust best practices and model rules. China is, however, a founding member of the BRICS competition forum, as well as of APEC, which has its own Competition Policy and Law Group.

7. Cf. William Kovacic & Marianela Lopez-Galdos, *The Lifecycles of New Competition Agencies: Explaining Variation in Successful Implementation of New Competition Regimes*, 79 LAW & CONTEMP. PROBS., no. 4, 2016, at 115–16.

8. In 2008, the AML's first year, the Ministry of Commerce reviewed 17 mergers, of which 1 was approved conditionally. In 2009, the Ministry reviewed 77 mergers, of which 4 were approved conditionally and 1 blocked, with the number steadily increasing to 314 reviewed mergers in 2015 (2 approved conditionally). In total, the Ministry had reviewed 1456 mergers by mid-2016, blocking 2 and approving 26 more conditionally. While its enforcement ramped up gradually, by September 2014, the National Development and Reformed Commission was investigating 335 companies, making 29 violation findings in 2013, 13 in 2014, and 8 in 2015. The State Administration of Industry and Commerce opened 39 investigations by September 2014, and made 12 violation findings in 2013, 8 in 2014, and 14 in 2015. Data compiled based on announcements from the authorities' websites: Anti-monopoly Bureau, Ministry of Commerce of the People's Republic of China, <http://fldj.mofcom.gov.cn> [<https://perma.cc/43WQ-NYQV>]; Price Supervision & Anti-Monopoly Bureau, Nat'l Dev. & Reform Comm'n, <http://jjs.ndrc.gov.cn> [<https://perma.cc/HJX4-KHJW>]; and the Anti-monopoly & Anti-unfair Competition Enforcement Bureau, State Admin. of Indus. & Commerce, <http://www.saic.gov.cn/fldyfbzdzj/> [<https://perma.cc/5U9Y-MNRA>].

9. See generally Yong Huang, *Pursuing the Second Best: The History, Momentum, and Remaining Issues of China's Anti-Monopoly Law*, 75 ANTITRUST L.J. 117 (2008) (examining the driving forces and controversies in the AML legislative process); Qianlan Wu, *EU–China Competition Dialogue: A New Step in the Internationalisation of EU Competition Law?*, 18 EUR. L.J. 461 (2012) (discussing the impact of EU engagement with the Chinese government agencies on the AML); Zhenguo Wu, *Perspectives on the Chinese Anti-Monopoly Law*, 75 ANTITRUST L.J. 73 (2008) (discussing the drafting and enactment of the AML).

and best practices has been of particular interest due to the resulting impact on international business compliance.¹⁰ From the enforcement perspective, commentators have assessed Chinese practice by examining the outcomes and reasoning in antitrust decisions,¹¹ as well as the evolution of the competition regime over its first decade.¹² Though some contributors suggest that AML enforcement is largely in line with international practice, many have also argued that it exhibits a number of country-specific concerns.¹³ These include political concerns, such as consolidating decisionmaking powers by the central government vis-à-vis the regions,¹⁴ as well as economic concerns, such as balancing development needs and economic efficiency.¹⁵ Some have even argued that the AML has been abused as a competition instrument, by turning it into a protectionist tool to favor or shield domestic industry or local economic interests.¹⁶

10. See generally Bush, *supra* note 5 (arguing that the AML text leaves room for different evolutions of Chinese antitrust); Britton Davis, *China's Anti-Monopoly Law: Protectionism or a Great Leap Forward?* 33 B.C. INT'L & COMP. L. REV. 305 (2010) (discussing the role that protectionism, public interest concerns, and the advancement of a socialist economy play in AML merger review); Susan Beth Farmer, *The Impact of China's Antitrust Law and Other Competition Policies on U.S. Companies*, 23 LOY. CONSUMER L. REV. 34 (2010) (suggesting a divergence of Chinese from U.S. antitrust practice due to political and historical factors peculiar to the development of the Chinese economy); Dan Wei, *Antitrust in China: An Overview of Recent Implementation of Anti-Monopoly Law*, 14 EUR. BUS. ORG. L. REV. 119 (2013) (describing China's cautious and phased convergence with international antitrust practices to accommodate the needs of a growing transition economy); Dan Wei, *China's Anti-Monopoly Law and its Merger Enforcement: Convergence and Flexibility*, 14 J. INT'L ECON. L. 805 (2011).

11. Fei Deng & Cunzhen Huang, *A Five Year Review of Merger Enforcement in China*, ANTITRUST SOURCE 21 (Oct. 2013); Angela Huyue Zhang, *Problems in Following EU Competition Law: A Case Study of Coca-Cola/Huiyuan*, 3 PEKING UNIV. J. LEGAL STUD. 96 (2011).

12. See generally Liyang Hou, *An Evaluation of the Enforcement of China's Anti-Monopoly Law in 2008–2013* (2013), <http://ssrn.com/abstract=2292296> [<https://perma.cc/W7HL-RF8V>] (discussing public dissatisfaction with the AML's enforcement); Xiaoye Wang & Adrian Emch, *Five Years of Implementation of China's Anti-Monopoly Law—Achievements and Challenges*, 1 J. ANTITRUST ENFORCEMENT 247 (2013) (providing a general overview of achievements and challenges in AML enforcement); Angela H. Zhang, *The Enforcement of the Anti-Monopoly Law in China: An Institutional Design Perspective*, 56 ANTITRUST BULL. 630 (2011) (examining the tripartite enforcement structure and the concentration of authority in MOFCOM).

13. See Xinzhu Zhang & Vanessa Yanhua Zhang, *Chinese Merger Control: Patterns and Implications*, 6 J. COMPETITION L. & ECON. 477, 496 (2010) (discussing the enforcement and policy implications of three key merger cases).

14. Eric C. Ip & Michael K. H. Law, *Decentralization, Agency Costs, and the New Economic Constitution of China*, 22 CONST. POL. ECON. 355 (2011).

15. Wei, *Convergence and Flexibility*, *supra* note 10, at 842.

16. See Steven Van Uytsel, *China's Antimonopoly Law and Its Recurrence to Standards: Economic Development or Rent-Seeking?*, in LAW AND DEVELOPMENT IN ASIA 241–275 (Gerard Paul McAlinn & Caslav Pejovic eds., 2012); Eva Choi, *Seeking Stones in the Red River: The Inevitable Evolution of China's Anti Monopoly Law*, 7 J.L. ECON. & POL'Y 163, 175 (2010); see also AmCham China, *Competition Law*, in 2015 AMERICAN BUSINESS IN CHINA WHITE PAPER (2015), 36–48, <http://www.amchamchina.org/policy-advocacy/white-paper/2015-american-business-in-china-white-paper> [<https://perma.cc/52DC-B9JV>].

Mixed reviews notwithstanding, the adoption of competition law in the Chinese context over its first six years may be regarded as an overall success.¹⁷ Such an assessment may seem surprising given the AML's short tenure, as well as China's history of strong state intervention in the economy, its lack of experience with antitrust enforcement, and its gradualist and cautious adoption of competitive market principles. In seeking to provide an account of the reasons for the quick uptake, effectiveness, and success of Chinese competition enforcement, this article starts from the observation that legal transplants are more easily received in settings where there is demand (or need) for the transplanted rules by local actors.¹⁸ Such local demand allows for the transplant to be adapted to local circumstances, problems, and policy needs in the process of reception.¹⁹ The transplant can be adapted through the legislative process, so that local needs are reflected in an exercise of informed choice in selecting the rules.²⁰ The familiarity of local actors, such as administrators, judges, or private parties, with the principles of the transplanted law is also said to favor its effective enforcement.²¹

The existing literature has examined the legislative process of the AML, its enforcement structure, and the role of responsible bureaucratic and judicial actors. This contribution seeks to go further. Our goal is to examine the interactions between the competition authorities and the commercial and civil society stakeholders affected by investigated transactions or conduct. This is an important aspect of the successful domestication of competition law, particularly in the early stages of a competition regime, when there is considerable uncertainty about the appropriate role of competition law, the meaning of the legal norms, and the consequences of specific enforcement actions. In China, such uncertainty was heightened by the fact that the AML was enacted as part of an intense, longer-term debate about the evolution of economic policy focusing on questions about the pattern and sources of future growth, the restructuring of

17. See Andrew W. Eichner, *Battling Cartels in the New Era of Chinese Antitrust Enforcement*, 47 TEXAS INT'L L.J. 587, 616 (2012) ("China has made undeniably impressive progress in the . . . effort to develop an effective antitrust system"); Hannah C. L. Ha & John M. Hickin, *China: Merger Control*, GLOBAL COMPETITION REVIEW: THE ASIA-PACIFIC ANTITRUST REVIEW 2016 (2016), <http://globalcompetitionreview.com/reviews/78/sections/294/chapters/3156/> [https://perma.cc/XQ9Z-VEJE] ("MOFCOM is making significant strides towards becoming a world class competition authority").

18. See Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *Economic Development, Legality, and the Transplant Effect*, 47 EUR. ECON. REV. 165, 167 (2003).

19. *Id.*

20. *Id.* at 176.

21. *Id.* at 180.

industry (including the role of State Owned Enterprises (SOEs)²²), and the forms of beneficial interaction with the world economy.

This article studies three cases considered by the responsible authorities during or immediately following the AML legislative process and aims to show that in the face of uncertainty and absent well-defined policy preferences, the relevant authorities were open to input from various stakeholders. The reconstruction of the decisionmaking processes suggests that the shaping of competition policy in China has been subject to considerable contestation. Though both political and public opinion pressures existed for the authorities to use competition law as a protectionist tool, there were also countervailing policy considerations, including the importance of China's integration in the global economy as a source of economic development and prosperity.

One result of such contestation is that competition law enforcement in China may be far more politicized in that it is more openly sensitive to a broader set of policy goals than are the legal and technocratic antitrust templates of mature jurisdictions.²³ Consequently, criteria such as efficiency, short-run consumer prices, business autonomy, or market concentration are not singular touchstones for Chinese competition enforcement. Nor are other reductionist explanations such as industry policy, protectionism, or "economic patriotism."²⁴ This article argues that in the transition cases presented in part III, the relevant authorities regarded competition—and competition policy—as instruments for pursuing various policy objectives, without necessarily according them any primacy,²⁵ thus adopting a flexible balancing approach to deciding competition cases.

This open-search approach to consultation and decisionmaking through balancing policy considerations offers a number of advantages for enlivening a competition law transplant in a developing country. First, through such an approach, regulators can overcome political pressures that would either stymie competition law or seek to turn it into a protectionist instrument. Second, this approach enables the authorities to learn about relevant effects of competition decisions on development goals that they might overlook if simply following foreign templates or best practices. Third, even in a country such as China where a pre-existing authority is charged with competition enforcement, a broader

22. SOEs in China are business entities established by central and local governments with supervisory officials from the government. They are either wholly state-funded or their majority share is owned by central or local governments. Apart from being business entities, often transformed to modern corporations during China's gradual economic transition, SOEs also function as stabilizers to mitigate adverse effects from economic and social reform. See *State Owned Enterprises in China: Reviewing the Evidence*, OECD WORKING GROUP ON PRIVATISATION AND CORPORATE GOVERNANCE OF STATE OWNED ASSETS (Jan. 2009).

23. See Eleanor M. Fox, *Competition Policy: The Comparative Advantage of Developing Countries*, 79 LAW & CONTEMP. PROBS., no. 4, 2016, at 71–73, for a similar argument.

24. Nathan Bush, *Constraints on Convergence in Chinese Antitrust*, 54 ANTITRUST BULL. 87, 96 (2009); see also Ping Lin & Jingjing Zhao, *Merger Control Policy Under China's Anti-Monopoly Law*, 41 REV. IND. ORGAN. 109, 111 (2012).

25. See, e.g., Giorgio Monti, *Article 81 EC and Public Policy*, 39 COMMON MKT. L. REV. 1057 (2002) (suggesting a hierarchy between competition and other public policy objectives in EU enforcement).

conception of competition policy can sensitize the enforcer to how competitive rivalry affects its prior policy mandates and how competition law interacts with existing policy instruments. Finally, openings for consultation together with a conception of competition law as an instrument to pursue various policy objectives can provide triggers for stakeholders to invoke the law and build coalitions to affect decisionmaking. Such processes result in “local ownership” that can both enliven the legal transplant and contribute towards broader legal or institutional reform.²⁶

II

DOMESTICATING COMPETITION LAW IN CHINA

This part reviews the three key stages of domesticating competition law in China: the legislative process; the selection of the enforcement structure; and specific cases of implementation, and what they show about the local demand for competition law. The legislative text of the AML does not preordain a specific type of competition instrument, which leaves the enforcement authorities considerable discretion to shape China’s competition policy. The open texture of the law, as well as considerable uncertainty about the role of competition—and competition law—in ensuring continued growth and development and restructuring the Chinese economy create opportunities for market stakeholders to mold competition enforcement with their own demands. Arguably, this has allowed for a problem-solving, rather than legal or technocratic, evolution of Chinese competition policy.

A. Legislative Process And Policy Sequencing

Two factors suggest that the legislative process for the AML involved an exercise of informed choice manifesting local demand for competition law.²⁷ First, the AML went through a relatively long legislative process, with original discussions about a competition instrument in China dating back to 1987.²⁸ Second, the AML text was not a cut-and-paste of an existing template. Instead, the AML reflects a deliberate selection of rules from different jurisdictions, including provisions addressed to concrete Chinese problems and policy concerns.²⁹ The conclusion of local legislative tailoring is strengthened by the fact that China—unlike some transition economies—did not adopt its competition law as part of a big-bang market liberalization. Instead, China has been regarded as a successful example of gradualist economic reform attuned to rational policy

26. See Antonina Bakardjieva Engelbrekt, *Toward an Institutional Approach to Comparative Economic Law?*, in *NEW DIRECTIONS IN COMPARATIVE LAW* 213, 231 (A. Bakardjieva Engelbrekt & J. Nergelius eds., 2009).

27. See Berkowitz, Pistor & Richard, *supra* note 18.

28. See Xiaofei Mao & Jian Hu, *Fanlongduan Lifa de Huigu yu Zhanwang* (反垄断立法的回顾与展望) [*Review and Prospect of the Legislation of Anti-Monopoly Law*], 57 *J. OF E. CHINA U. OF POL. SCI. & L.* 121, 122 (2008).

29. See, e.g., AML, *supra* note 1, at arts. 7–10.

sequencing,³⁰ and China's relatively late adoption of competition law fits this larger pattern. Debates at the highest levels reflected concerns about the premature introduction of competition law that might disrupt the achievement of overarching policy goals, such as economic development and industrial restructuring.³¹

Two accounts of the appropriate sequencing of competition policy could have influenced the Chinese leadership to finally enact the AML. One comes from the view of development economists, such as Singh, who argued against premature adoption of efficiency or consumer-oriented antitrust in developing nations.³² Such antitrust enforcement was said to impair achievement of developmental goals by reducing the flexibility to implement policies that support industrialization and growth.³³ Following this reasoning, China could have opted for a consumer-oriented competition instrument, once developmental goals were largely achieved. An alternative view is that the AML was passed because policymakers required a neutral market regulation cover for industry policy decisions, particularly once the pursuit of nakedly protectionist policies was restricted by China's accession to the World Trade Organization.³⁴

Despite the long gestation and textual tailoring, the AML's definitions of objectives and specific violations are couched in relatively general and imprecise terms that encompass various conflicting views about the proper role of competition law expressed in governmental and academic circles.³⁵ As a result, the AML lists a wide range of legislative objectives ranging from enhancing efficiency and consumer interests, to safeguarding the "social public interest" and the "healthy development of the socialist market economy."³⁶ Through the AML, the State should aim to "advance a unified, open, competitive and *orderly* market system," as well as—more unusually—to "perfect" macroeconomic control.³⁷ Substantively, apart from standard violation provisions—for example price fixing or dominance abuse—as well as provisions applying competitive principles to

30. GÉRARD ROLAND, *TRANSITION AND ECONOMICS: POLITICS, MARKETS, AND FIRMS* 4–5 (2000).

31. Huang, *supra* note 9, at 118; Xiaoye Wang, *Issues Surrounding the Drafting of China's Anti-Monopoly Law*, 285 WASH. UNIV. GLOB. STUD. L. REV. 285, 292 (2004) (noting different views about the necessity of an anti-monopoly law in China).

32. See Ajit Singh, *Multilateral Competition Policy and Economic Development: A Developing Country Perspective on the European Community Proposals* 12 (Paper presented at the fifth session of the Intergovernmental Group of Experts on Competition Law and Policy, Geneva, July 2–4, 2003), <http://ideaswebsite.org/pdfs/mcp.pdf> [<https://perma.cc/5QTD-89UL>] (using the policy sequencing of the East Asian tiger economies as an example). Singh's argument was influential in generating opposition from developing countries to EU proposals for an international antitrust instrument in the 1990s and reflects the concerns expressed in A.E. Rodríguez & Ashok Menon, *The Causes of Competition Agency Ineffectiveness in Developing Countries*, 79 LAW & CONTEMP. PROBS., no. 4, 2016, at 61–63.

33. Singh, *supra* note 32.

34. See Bush, *supra* note 24, at 90.

35. See Bush, *supra* note 24, at 93–97 (exploring the contrasting views of antitrust-savvy officials and others who view competition policy as an "instrument of industrial policy").

36. AML, *supra* note 1, at art. 1.

37. AML, *supra* note 1, at art. 4.

administrative monopolies, the AML also includes provisions that are not susceptible to standard antitrust analytical categories.³⁸

The wide range of enumerated objectives and substantive provisions, as well as the reliance on open-textured standards rather than black-letter rules,³⁹ suggest that the AML text is unlikely to guide or constrain the responsible decisionmakers. The residual discretion can be filled through some combination of top-down policy preferences and bottom-up input from relevant actors and stakeholders. Bush, for example, has argued that the AML text leaves room for Chinese antitrust either to converge to prevailing international practice or to serve strategic industrial policy goals.⁴⁰ Yet the early enforcement pattern disclosed in the case studies suggests that Chinese competition policy followed neither of these paths, which this article argues is one of the reasons for its success.

B. Enforcement Structure

Because the AML text leaves large discretion to the implementing institutions, the literature also focuses on the law's enforcement structure.⁴¹ Here again, China did not follow the precedent of mature jurisdictions and establish a new, dedicated, and independent competition authority. Instead, the Chinese State Council divided AML enforcement responsibilities among three existing ministries with prior mandates similar in nature to different components of competition law.⁴² The Ministry of Commerce (MOFCOM), already China's foreign investment watchdog, leads merger review. The National Development and Reform Commission (NDRC), historically a powerful macroeconomic and industrial policy central planning body⁴³ (which also acted as a price regulator under the Price Law⁴⁴), has responsibility for all price-related AML violations, such as price-fixing cartels or other anti-competitive conduct affecting prices. Finally, the State Administration of Industry and Commerce (SAIC), responsible for the older Anti-Unfair Competition Law, enforces all non-price related AML

38. See, e.g., AML, *supra* note 1, at art. 7 (“protect[ing]” State-owned economic operators that constitute the “lifeline of national economy and national security”); see also *id.* at art. 31 (providing for national security examination in merger reviews).

39. See Angela Huyue Zhang, *Bureaucratic Politics and China's Anti-Monopoly Law*, 47 CORNELL INT'L L. J. 671, 676–677 (2014). As Zhang points out, the imprecision in the AML rules is not peculiar to China, given that a market regulation tool—such as antitrust—requires fact-specific decisionmaking sensitive to the effects of reviewed conduct and transactions.

40. See Bush, *supra* note 5.

41. See generally, Zhang, *supra* note 39.

42. See AML, *supra* note 1, at art. 10 (providing that “the [AML] enforcement agency designated by the State Council . . . shall be responsible for the [AML] enforcement work,” but not specifying the responsible institution).

43. Bush, *supra* note 24, at 103.

44. Pricing Law of the People's Republic of China, Adopted at the 29th Meeting of the Standing Committee of the Eighth National People's Congress on Dec. 29, 1997, promulgated by Order No. 92 of the President of the People's Republic of China on Dec. 29, 1997, http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383577.htm [<https://perma.cc/5YEL-WTWN>].

violations, such as market sharing agreements, industry association rules, and anti-competitive abuses of administrative power. The AML also provides for a second tier in the enforcement structure, made up of the new Anti-Monopoly Commission (AMC). The AMC operates directly under the State Council (the apex decisionmaker) and is composed of the heads of a number of ministries and departments, including the Ministry of Industry and Information Technology. It establishes general policy guidelines and coordinates the activities of the three enforcement agencies, without having any formal decisionmaking or review powers in individual cases.

In addition to these ministerial authorities, the Chinese judiciary has a formal role in AML enforcement through judicial review of administrative decisions and civil antitrust actions, for which the Supreme People's Court has recently elaborated specific procedural rules.⁴⁵ In practice, however, the role of the judiciary is quite limited. Zhang shows that even directly addressed or affected parties rarely seek judicial review of administrative decisions.⁴⁶ Further, though a number of private antitrust enforcement actions have been commenced before the courts, they have been largely unsuccessful.⁴⁷ Particularly in light of the limited role of the judiciary in reviewing authority decisions, Zhang suggests that a legal evolution—stabilizing the interpretation of the AML through judicial decisions and precedents—is unlikely.⁴⁸ This leaves the main role in elaborating competition law to the responsible ministerial authorities.

China's decision to place competition enforcement in the hands of existing ministerial authorities instead of a dedicated independent authority has been criticized,⁴⁹ even if it does offer some advantages. First, it prevents delayed enforcement by alleviating the resource and staff constraints that a wholly new agency would face immediately after it is established.⁵⁰ Existing authorities can use already established mechanisms for monitoring markets and disciplining companies to enforce the new law. Second, the local authorities' familiarity with the underlying principles of a transplanted law may facilitate effective enforcement.⁵¹ Third, the existing ministerial authorities are already well-

45. [Provisions on Several Issues Concerning the Application of Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conduct] (promulgated by the Sup. People's Ct., Jan. 30, 2012, effective June 1, 2012), <http://www.lawinfochina.com/display.aspx?id=9300&lib=law&SearchKeyword=Application%20of%20Law%20in%20the%20Trial%20of%20Civil%20Dispute%20Cases&SearchCKeyword=&EncodingName=big5> [<https://perma.cc/9WD7-JX6F>].

46. Zhang, *supra* note 39, at 679.

47. See Zhang, *supra* note 39, at 679 (suggesting that out of 100 civil actions filed under the AML, plaintiffs have won in only 2 cases).

48. *Id.* at 680.

49. Wang & Emch, *supra* note 12, at 267–68, suggest that early Chinese decisions reflected the lack of experience, resources, and autonomy of the competition enforcers, leading to an incorrect understanding of principles underlying foreign competition templates; see also Zhang, *supra* note 39, at 707.

50. See Umut Aydin & Tim Büthe, *Competition Law & Policy in Developing Countries: Explaining Variations in Outcomes; Exploring Possibilities and Limits*, 79 LAW & CONTEMP. PROBS., no. 4, 2016, at 15–16.

51. See, Berkowitz, Pistor & Richard, *supra* note 18. In China, MOFCOM already performed some

embedded in the political system and have channels of communication with industry and other market stakeholders, including foreign companies. Therefore, they may be seen as powerful and credible regulators.⁵²

At the same time, placing enforcement responsibility for a transplanted law in the hands of regulators with similar prior mandates also carries several risks. Weaknesses in the pre-existing enforcement structures will hamper the implementation efficacy of the transplanted law.⁵³ Even absent such weaknesses, pre-existing regulators may continue to follow the rules, policy goals, or decisionmaking routines under their former mandate, without adjusting to the novel goals or market discipline instruments introduced by the transplanted law.⁵⁴

Zhang has forcefully argued that understanding Chinese case law outcomes requires an examination of the bureaucratic structure of antitrust decisionmaking, including the policy processes, incentives, and constraints of the relevant enforcement agencies.⁵⁵ In the absence of textual constraint or judicial oversight, she suggests that competition decisions reflect an authority's assessment of the ultimate effects of the conduct under scrutiny and its understanding of the proper antitrust goals.⁵⁶ As a result, she agrees that case outcomes cannot be explained by a single factor, such as efficiency or protectionist industry policy.⁵⁷ Instead, they reflect the institutional dynamics of bureaucratic politics, including the decentralized delegation of enforcement responsibilities to multiple actors that have their own policy processes, incentives, and lines of consultation.⁵⁸ Thus, Zhang argues that "Chinese enforcement outcomes largely result from a struggle among government agencies which decide antitrust issues in terms of the personal consequence for their stature and power."⁵⁹ In the inter-agency consultation process, each agency evaluates the costs and benefits of the decision in terms of its own interests and policy objectives and each case requires a complex bargaining process to "hammer out a workable solution" satisfactory to all relevant agencies.⁶⁰

form of merger review in foreign investment cases, while the NDRC was responsible for price manipulation.

52. Aydin & Büthe, *supra* note 50, at 29–32 (discussing importance of embedded autonomy).

53. See Wang & Emch, *supra* note 12, at 271 (noting reasons for enforcement weaknesses).

54. This is a particular concern when shifting from planning and centralized surveillance to competitive rivalry and consumer choice as the forces that discipline industry. Marco Botta & Alexander Svetlicnii, *Article 102 TFEU as a Tool of Market Regulation: Excessive Enforcement Against Excessive Pricing in the new EU Member States and Candidate Countries*, 8 EUR. COMPETITION J. 473 (discussing use of competition law for price regulation in transition economies); see also Yane Svetiev, *How Consumer Law Travels* 23 J. CONSUMER POL'Y 209, 224–25 (2013) (describing problems with existing institutions enforcing transplanted consumer law).

55. Zhang, *supra* note 39, at 674.

56. *Id.* at 676–77.

57. *Id.* at 674.

58. *Id.* at 673, 702.

59. *Id.* at 674.

60. *Id.*

Two corollaries follow from the foregoing analysis. First, Zhang suggests that Chinese competition enforcement is a highly “centralized process.”⁶¹ Second, given that authorities with pre-existing responsibilities play the main role in both goal-setting and decisionmaking, non-competition related considerations seep in from the enforcement agencies’ prior policy mandates, such as industrial and commercial policy for MOFCOM,⁶² or macro price stability and industry planning for the NDRC.⁶³ Such muddling of goals, she argues, both diminishes competition law as a market discipline tool and weakens the efficacy of its enforcement.⁶⁴

C. Enforcement: Consultation And Input

As Aydin and Büthe argue, however, whatever its formal degree of independence, no competition authority can operate in a vacuum: effective enforcement requires communication with the general public⁶⁵ as well as consultation with affected stakeholders. While Zhang describes antitrust decisionmaking as a “highly pluralistic process,” the focus of her analysis is consultation between central government and local officials.⁶⁶ Yet even assuming that the responsible officials are focused on “personal consequences for their stature and power”⁶⁷ and influenced by prior policy mandates, they would still need to consult with market stakeholders, including industry participants, suppliers, retailers, customers, or workers so as to set enforcement priorities and understand the likely effects of their decisions.

In investigating the decisionmaking processes this article aims to go beyond the focus on authorities and inter-authority dialogue, and to examine the interests and pressures that come to bear on the enforcement agencies from outside the bureaucracy. Such an investigation reveals that uncertainty about how to enliven the competition mandate and about its interaction with prior policy mandates, led the agencies to seek considerable input from relevant industry and market stakeholders, who in turn sought to create new openings for input. This insight softens descriptions of Chinese enforcement as a centralized process. Although stakeholder input is not always reflected in the final decisions, it brings forth arguments that influence the decisionmaking process and the contours of Chinese competition policy. Whatever its immediate impact on decisions, such bottom-up input creates pressure for further enforcement efforts by building constituencies that view the AML as a helpful tool to pursue their goals. Such constituencies, in turn, enhance the autonomy of the authorities vis-à-vis each other and the political leadership in the exercise of their competition mandate.

61. *Id.* at 706.

62. *Id.* at 706.

63. *Id.* at 693, 698–99.

64. *Id.* at 706–07 (suggesting strengthening of judicial oversight to cure these problems).

65. Aydin & Büthe, *supra* note 50, at 11–12 (discussing goal of fostering a culture of competition).

66. Zhang, *supra* note 39, at 705.

67. *Id.* at 675.

III

THE EARLY ENFORCEMENT PRACTICE: THREE CASE STUDIES

A. Methodology

To investigate the domestication of competition policy through the process of implementation, this part presents in-depth case studies of the decisionmaking processes in three “transition” cases, decided by the relevant authorities in the lead up to or shortly after the promulgation of the AML. The aim is to compare the apparent policy needs and mandates of the authorities to how relevant industry stakeholders viewed the need for and utility of a competition law instrument. At the time of making these decisions, the studied authorities (MOFCOM and the NDRC) were unencumbered by stable antitrust practices and analytical categories.⁶⁸ This provided them with some freedom to either employ prior decisionmaking tools or to experiment with different approaches and arguments in analyzing and remedying anti-competitive conduct, while also being subject to various political and interest group pressures from above and below.

Notably all three cases involved foreign firms who were either seeking to acquire local target companies or were accused of anti-competitive conduct with local effects. Commentators have argued that the early decisions were particularly animated by protectionist industrial policy.⁶⁹ In light of such criticisms, two further objectives are to investigate the extent to which the authorities approached the cases with protectionist motives and whether stakeholders placed evidence and arguments before the authorities that could support a development-sensitive competition policy that is not necessarily protectionist.

The reconstruction of the decisionmaking processes goes beyond the published opinions and official statements of the authorities. It is based on contemporaneous legal and economic commentary by members of the business and legal communities, as well as materials produced by the stakeholders in these cases.⁷⁰ Specifically, the case studies were guided by three key questions:

What procedures do the relevant authorities use to acquire information and from whom do they obtain input as the basis for their decisions?

To what extent does the information acquired relate to consumer effects and efficiency as opposed to broader goals (related to economic development and

68. Two of the cases could not formally be decided under the AML because the conduct took place prior to its enactment.

69. *E.g.*, Lin & Zhao, *supra* note 24, at 111–12 (arguing that the analyses of the Carlyle/Xugong and Coca-Cola/Huiyuan mergers were informed by protectionism and economic patriotism even if the authorities have departed from such an approach since). As such, there is no claim that the cases selected are representative of Chinese enforcement either generally or at the present time, though they may be regarded as difficult cases.

70. Such a descriptive focus on decisionmaking processes has not been typically applied to China's competition practice, but it is essential particularly for new adopters where the final decisions do not disclose the full record, as well as the authority's weighing of different arguments presented.

restructuring, industrial policy, or the interests of other stakeholders) and how are such goals balanced procedurally and substantively?

In what ways are the procedures for acquiring information, decisionmaking, or balancing policy considerations formalized so as to make them tractable for companies subject to the AML, while also constraining the authorities' future decisionmaking and enabling them to learn from prior interventions?

B. Carlyle/Xugong

1. Background and Facts

In October 2005, the U.S. private equity firm, the Carlyle Group agreed to pay \$375 million for eighty-five percent of Xugong Group Construction Machinery. At the time, this was the biggest proposed foreign acquisition of a controlling stake in a leading SOE.⁷¹ Xugong specialized in construction equipment, including excavators, loaders, cranes, compactors, and shovels, and had been the market leader in China's machinery sector. However, Xugong was not particularly profitable, had a heavy pension burden for retired employees, and a large percentage of its assets were bank loans.⁷² It also faced competition from domestic privately owned firms and foreign multinationals, such as Volvo and Caterpillar.

Because this was a proposed SOE acquisition by a foreign entity, both MOFCOM and NDRC approval were potentially required.⁷³ Prior to the AML, MOFCOM was responsible for overseeing foreign investments in domestic companies. The NDRC, as the principal economic planning body, oversaw key national strategic manufacturing sectors and the restructuring of SOEs. Xugong was a municipal level enterprise, subject to oversight by the municipal authorities, though, given the case's sensitivity, they sought guidance from national institutions like the NDRC. While the proposal was under scrutiny, it was rumored that Xugong was included on the NDRC's list of key equipment manufacturing companies whose restructuring process required close review,⁷⁴ making the NDRC another potentially concerned regulator even absent a clear formal mandate.

Uncertainty about which body would review the proposed acquisition and on what basis highlighted the need for a merger approval instrument in China, particularly for transactions in which foreign capital targeted key Chinese

71. Dan Slater, *Carlyle Group Buys Chinese SOE*, FINANCE ASIA (Oct. 25, 2005), <http://www.financeasia.com/News/30144,carlyle-group-buys-chinese-soe.aspx> [https://perma.cc/S792-ZR8Z]. Xugong was controlled by Xuzhou Construction Machinery Group, which is owned by the Xuzhou Municipal government.

72. See *Xugong Yiyun (徐工疑云) [Mysteries of Xugong]*, 环球企业家 [GLOBAL ENTREPRENEUR MAGAZINE], http://www.gemag.com.cn/8/8022_1.html [https://perma.cc/MP2J-XR72].

73. *Kailei Touzi Rugu Xugong Jituan Gaochui (凯雷投资入股徐工集团告吹) [Carlyle Group Investment in Xugong Falls Through]*, SINA CAIJING [SINA FINANCE] (July 24, 2008), <http://finance.sina.com.cn/chanjing/b/20080724/09565127210.shtml> [https://perma.cc/56KR-F5KE].

74. *Id.*

sectoral players. In fact, the case is regarded as a tipping point that accelerated the AML legislative process.⁷⁵ Practitioner commentary suggests that, apart from the foreign ownership of strategic assets, the acquisition raised market power concerns and the question about the legal treatment of cases involving competition issues.⁷⁶ Li Deshui, a member of the Chinese People's Political Consultative Congress⁷⁷ and a champion of national economic security,⁷⁸ made an explicit link between this case and the enactment of an anti-monopoly law.⁷⁹ Thus, in June 2006, during the Xugong acquisition discussions and after having had a draft text in its hands for two years, the State Council submitted its own version to the top legislator, the National People's Congress. In finally passing the law, the legislator inserted Article Seven, dealing with SOEs that are of significant importance to the national economy and national security.⁸⁰

75. See Liaowang Wenzhang: *Fanlongduanfa Chutai Rengyou Sanda Nandian Xu Pojie* (《瞭望》文章：反垄断法出台仍有三大难点须破解) [Article from Liaowang: Three Key Challenges to be Tackled Before Anti-Monopoly Law Enactment], GX LAW, <http://www.gx-law.gov.cn/a2/4543.jhtml> [https://perma.cc/9EJS-F7J2]. The deal was announced in October 2005 and was abandoned by July of 2008. The AML was enacted in October of 2007 and effective from August 1, 2008. The fact that the review process for the merger was largely coterminous with the AML enactment suggests that it is informative about the policy needs and the perceptions of stakeholders about the objects of a merger review instrument.

76. Chen Shiju & Long Xiaoli, *On the Reconstruction of China's Foreign Investment Law: With Some Comments on the Carlyle/Xugong Merger Case*, LAWTIME LAWYER (Sept. 3, 2012), <http://www.lawtime.cn/article/11110389686710390196100133917> [https://perma.cc/2GF4-EKZ6].

77. The Chinese People's Political Consultative Conference is a political advisory body with delegates from the Communist Party, the United Front parties allied with the Communist Party and independent delegates who are not members of any party. Its National Committee holds its annual meeting at the same time as plenary sessions of the top legislator, the National People's Congress, <http://www.cppcc.gov.cn/zxww/zxyw/Brief/index.shtml> [https://perma.cc/PQZ9-4SN5].

78. See Kekoukele Shougou Huiyuan Bei Fou De Muhou Boyi [Games Behind the Scenes: Coca-Cola's Failed Acquisition of Huiyuan], FENGHUANGCHENG [PHOENIX NEWS] (March 25, 2009), <http://finance.ifeng.com/roll/20090325/480618.shtml> [https://perma.cc/Q6GL-7HDE] (Deshui is regarded as the "father of the [national] economic security" concept.).

79. See Shangwubu Qiantou Tingzheng Xugong San Tian Lian Yu Shu Shi Wen (商务部牵头"听证"徐工三天连遇数十问) [MOFCOM Leading the Hearing and Xugong Inquired by Dozens of Questions in Three Days], XINHUA NEWS (July 28, 2006, 8:17 PM), http://news.xinhuanet.com/fortune/2006-07/28/content_4886452.htm [https://perma.cc/V76M-QLPQ]; Kailei Konggu Xugong Zaisheng Bianshu Zhongguo Yushe Waizi Binggou Honglv deng Monopoly (凯雷控股徐工再生变数 中国预设外资并购红绿灯) [Carlyle Takeover of Xugong Becomes Uncertain China Planning Traffic Lights for Foreign Mergers], FINANCE SINA, (March 23, 2006), <http://finance.sina.com.cn/g/20060323/09582441236.shtml> [https://perma.cc/6VT5-GAZ8]; Daibiao Jianyi Jinzao Wancheng Fanlongduanfa Jinfang Longduanxing Waizi Binggou (代表建议尽早完成反垄断法 谨防垄断性外资并购) [Delegates Suggesting Immediate Enactment of Anti-Monopoly Law Against Monopoly from Foreign Takeovers], FINANCE SINA (Mar. 12, 2006), <http://finance.sina.com.cn/g/20060312/23302410092.shtml> [https://perma.cc/NT4Y-R8Q8].

80. Bush, *supra* note 24, at 113. AML, *supra* note 1, at art. 7 provides: "With respect to the industries controlled by the State-owned economy and concerning the lifeline of national economy and national security or the industries implementing exclusive operation and sales according to law, the state protects the lawful business operations conducted by the business operators therein."

2. Pressures and Interests

This merger fuelled existing widespread public concerns that China was selling strategic companies and successful local brands cheaply to foreign investors, creating pressure for the Chinese central authorities to block the deal. A key consideration in Carlyle/Xugong, like in the subsequent Huiyuan case, appeared to be the sensitivity of the central government and the relevant authorities to public opinion, as well as affected actors' attempts to use public opinion to influence decisionmaking by exploiting the uncertainty faced by the authorities and the complex lines of bureaucratic consultation. Apart from domestic pressure, the authorities were also careful about the signals sent to foreign investors. Given local opposition, by July 2006, Carlyle itself lobbied MOFCOM and NDRC about the transactions through prominent members of its board, including founder David Rubinstein and former U.S. Secretary of State, Collin Powell.⁸¹

Xugong's municipal owner regarded the Carlyle acquisition as a key aspect of the company's restructuring.⁸² Xugong's challenges were typical of many Chinese SOEs in the late 1990s and early 2000s and were attributed to the rigidity of public ownership.⁸³ The Chinese government, at both national and local levels, encouraged SOEs to restructure, including through privatizing a share to external investors as a way of obtaining adequate operational capital.⁸⁴ Foreign investors were often preferred over domestic ones for their more advanced management, potential to open up new markets, and possible technology transfers that could add value and boost under-performing SOEs.

Xugong was already among the candidate companies for restructuring by the Jiangsu Provincial government in 2002. Its market leading position and the divestiture that helped shed its debts made Xugong attractive to investors. Both Xugong and its municipal owner did not choose Chinese local investors, rejecting an offer from Sany Corporation, a leading, privately owned equipment manufacturer and one of Xugong's principal local competitors.⁸⁵ Caterpillar's offer was also rejected, apparently due to an unsuccessful earlier joint venture with Xugong in which only Caterpillar's brand was used and which suffered losses leading to substantial employee layoffs. Carlyle won after several rounds of bidding,⁸⁶ both because it was the highest bid and due to expectations that it was most likely to inject fresh blood into the SOE giant.⁸⁷ Carlyle argued that its

81. See *Shangwubu*, *supra* note 79.

82. See *Mysteries of Xugong*, *supra* note 72.

83. *Id.*

84. *Id.*

85. *Id.*

86. See *Jiema Xugong Binggouan Sanda Xuanyi, Xiang Wenbo Chengwei Zhongshi Zhidi* (解码徐工并购案三大悬疑 向文波成为众矢之的) [*Unpack Three Key Mysteries in Xugong Merger Case: Xiang Wenbo Attracts Criticisms From All Directions*], XINHUANNET NEWS (July 29, 2006), [<https://perma.cc/H9BE-NRN2>].

87. *Id.*

status as a financial entity made it a better buyer than foreign or local competitors precisely because it sought to maintain the existing local brand and know how.⁸⁸

Initially, the proposed acquisition proceeded smoothly. The agreement included a number of highly favorable provisions for Xugong's owners. Carlyle signalled its long-term commitment to Xugong's restructuring by limiting its ability to sell the shares of the new company for four years, as well as giving Xugong Group the priority to purchase the shares if the new company was listed on overseas markets.⁸⁹ In April 2006, a provision limiting hostile takeovers was also inserted, restricting Xugong's key local or foreign competitors from getting control of the new company.⁹⁰ Notably, though the proposed acquisition did not involve horizontal competitors, this provision promoted competition policy goals, by ensuring that Xugong would remain an independent rival in the market, while also committing Carlyle to its restructuring.

By June 2006, Xiang Wenbo, Sany's executive president, began to publicly vent criticism against the proposal on his blog. He argued that the change of ownership of Xugong, as a key manufacturer in a strategic industrial sector, could impact national economic security.⁹¹ Xiang suggested that Carlyle's offer was too low for premium state assets and that the Chinese government should screen such deals closely.⁹² He also criticized local governments for selling premium state assets to foreign investors, while rejecting offers from Chinese domestic investors.⁹³ In the ensuing five months, Xiang published forty-six critical blog posts with arguments on the basis of foreign investment, national security, strategic industries, cross-border mergers, competition, and discrimination against Chinese private companies.⁹⁴ His postings ensured substantial media

88. *Id.*

89. See Meiguo Kailei Jituan Shougou Xugong Jituan Gongcheng Jixie Youxian Gongsì Anquan Shencha Ji Waishang Touzi Xianzhi (美国凯雷集团收购徐工集团工程机械公司安全审查及外商投资限制) [*Carlyle Xugong Merger: Security Review and Restrictions on Foreign Investment*] GOOD LAWYER CHINA, (Nov. 5 2011), <http://www.goodlawyerchina.com/Specialty/87/Info/1972.html> [<https://perma.cc/6L77-VLRE>].

90. See Xugong Gaoguan Dujia Jiemi: Weihe Jia Kailei er Ju Sanyi (徐工高管独家解密: 为何嫁凯雷而拒三一) [*Top Executive of Xugong Reveals Why They Took Carlyle instead of Sany*], <http://finance.people.com.cn/GB/1039/4577894.html> [<https://perma.cc/5VF5-NXKD>].

91. See Wenbo Xiang, Sanyi Meiyuan (三一能否收购徐工? 三亿美元三一能否收购徐工?) [*Three Hundred Million US Dollars: Can Sanyi Take Over Xugong?*], SINA BLOG (June 8, 2006), http://blog.sina.com.cn/s/blog_487d2dfa010003pg.html [<https://perma.cc/9UG5-YTED>].

92. See blogs of Wenbo Xiang, Xugong Binggou :Yige Meili De Huangyan! (徐工并购: 一个美丽的谎言!) [*Xugong Merger: A Beautiful Liar!*], SINA BLOG (June 12, 2006), http://blog.sina.com.cn/s/blog_487d2dfa010003st.html [<https://perma.cc/KGS5-98K9>] and Xugong Buneng Bei Waizi Shougou De Sida Liyou (徐工不能被外资收购的四大理由) [*Four Reasons for Xugong not Being Taken-over by Foreign Investor*], (June 14, 2006), http://blog.sina.com.cn/s/blog_487d2dfa010003tu.html [<https://perma.cc/4Q9W-RNB2>].

93. See blog of Wenbo Xiang, Xugong Binggou An Zhong De Jiage Qipian (徐工案中的价格欺骗) [*Price Cheat in the Xugong Case*], SINA BLOG (June 14, 2006), http://blog.sina.com.cn/s/blog_487d2dfa010003tp.html [<https://perma.cc/K6F2-5J7M>].

94. See Archive of Blog Posts by Xiang Wenbo between June and October 2016, SINA NEWS: blog posts in June 2006 can be accessed at <http://blog.sina.com.cn/s/article>

focus on the takeover and stimulated debate about whether state-owned assets should be available for foreign investment.

3. Formalizing Decisionmaking Procedures

Given such public attention and the view that foreign investors are an important route for SOE restructuring, the Chinese central authorities were under pressure not to leave the deal completely in the hands of the Xuzhou municipal government.⁹⁵

The need for streamlining merger review was highlighted by doubts as to the responsible body and the basis for vetting the merger. MOFCOM, the State Owned Assets Supervision and Administration Commission, and NDRC were all potentially responsible. A *China Economic Weekly* legal report suggested that all relevant bodies had to be notified of the agreement.⁹⁶ It further asserted that prior approvals from the State Owned Assets Supervision and Administration Commission and NDRC were required before MOFCOM was approached for final approval.⁹⁷ In fact, both MOFCOM and NDRC formalized regulations in an apparent attempt to claim a mandate in important merger cases and set out approval criteria related to their existing responsibilities.

In February 2006, NDRC released Opinions of the State Council on Invigorating Equipment Manufacturing⁹⁸ providing that, where a majority share of an equipment manufacturer of key sectoral importance is to be sold to foreign companies, the deal shall be scrutinized by the State Council, with NDRC producing the leading opinion. Beyond the somewhat vague triggers of “key importance” and “majority share,” the opinion did not provide criteria upon which the approval would be based.⁹⁹

MOFCOM promulgated Interim Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors in August, 2006, claiming a vetting

_archive_1216163322_200606_1.html, in July 2006 at http://blog.sina.com.cn/s/article_archive_1216163322_200607_1.html, in August 2006 at http://blog.sina.com.cn/s/article_archive_1216163322_200608_1.html, in September 2006 at http://blog.sina.com.cn/s/article_archive_1216163322_200609_1.html, and in October 2006 at http://blog.sina.com.cn/s/article_archive_1216163322_200610_1.html.

95. This is not to say that there was agreement with Xiang's largely self-serving arguments by either authority or government officials. The deal had many supporters who disagreed with Xiang's arguments. Cf. *infra* note 206.

96. *Xugong An Jiutuo Weijue Yuanzi Bumen Yijian Buyi?* (徐公案久拖未决 缘自部门意见不一?) [*Prolonged Xugong Merger Approval Derived from Conflicting Opinions of Authorities?*], CHINA ECONOMIC WEEKLY (Nov. 27, 2006), http://paper.people.com.cn/zgjzk/html/2006-11/27/content_12105041.htm [<https://perma.cc/J4W8-PLZ9>].

97. *Id.* An anonymous NDRC official was quoted complaining that the Carlyle/Xugong merger had only been directly notified to MOFCOM and that the NDRC was receiving information indirectly via MOFCOM or the political leadership.

98. Guowuyuan Guanyu Jiakuai Zhenxing Zhuangbei Zhizaoye De Ruogan Yijian (国务院关于加快振兴制造业的若干意见) [Opinions of the State Council on Invigorating Equipment Manufacturing], GOV'T OF CHINA (Feb. 23, 2006), http://www.gov.cn/gongbao/content/2006/content_352166.htm [<https://perma.cc/59HV-7J2Q>].

99. See *id.*

power over foreign acquisitions of domestic enterprises based on sectoral importance, national economic security and ownership of famous local brands.¹⁰⁰ Article 12 specifically provided:

Where a foreign investor intends to obtain the actual controlling power of a domestic enterprise it plans to take over, and if *any important industry is concerned*, or if it has an impact on or *may have an impact on the national economic security*, or it will lead to the transfer of the actual controlling power of a domestic enterprise which holds a *famous trademark or China Time-honored Brand*, the parties concerned shall file an application with the MOFCOM.¹⁰¹

Apart from a sign of competition among these authorities, such regulatory activity also demonstrated how intertwined merger review is with restructuring (or dynamic efficiency) objectives related to growth and development and to foreign investment. The State Council ultimately designated MOFCOM and NDRC as responsible authorities for the AML. Further, special criteria for SOEs of key economic and security importance together with a national security layer of review in cases of a proposed foreign takeover of a domestic enterprise were included in the AML.¹⁰² The inclusion of such provisions supported suspicions that the AML was enacted to give a neutral, technocratic cover for interventions motivated by concerns about foreign ownership of strategically important assets. However, despite such criticisms, the authorities' analysis of the impact of the Carlyle/Xugong acquisition was based on more nuanced considerations than would be suggested by a straightforward account of favoring "national champions."¹⁰³

Stakeholder and public opinion pressures led the authorities to open procedures for the receipt of market input. In July 2006,¹⁰⁴ MOFCOM, together with the State-Owned Assets Supervision and Administration Commission, invited various stakeholders to Beijing for a three-day fact-finding hearing.¹⁰⁵ One of these meetings involved Xugong, central government agencies, municipal and provincial government departments, and a member of the People's Liberation Army—to confirm that Xugong did not produce any military

100. See Interim Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, MINISTRY OF COMMERCE PEOPLE'S REPUBLIC OF CHINA (Aug. 10, 2006), <http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045825.shtml> [<https://perma.cc/K2DB-J3M8>].

101. *Id.* The article goes on to provide that "[i]f the parties concerned fail to do so, but its takeover has had or may have a serious impact on the national economic security, the MOFCOM may . . . demand the parties concerned to terminate the transaction or transfer the relevant equities/assets or take other effective measures to eliminate the takeover's impact on the national economic security." *Id.*

102. AML, *supra* note 1, at art. 31, provides: "Where a foreign investor merges and acquires a domestic enterprise or participate in concentration by other means, if state security is involved, besides the examination on the concentration in accordance with this Law, the examination on national security shall also be conducted in accordance with the relevant State provisions."

103. Cf. D. Daniel Sokol, *Tensions Between Antitrust and Industrial Policy*, 22 GEO. MASON L. REV. 1247, 1247 (2015) ("industrial policy promotes government intervention for privileged groups or industries").

104. Thus, this occurred shortly after Sany's Xiang began posting against the acquisition on his blog.

105. See *Shangwubu*, *supra* note 79.

equipment.¹⁰⁶ But consultation was not limited to the bureaucracy: a further meeting was held with sectoral participants, including other manufacturers, dealers, upstream firms, the engineering equipment association and the machinery industry association.¹⁰⁷ Most participants in the second meeting were state-owned manufacturers, but private firms were also present, including Sany. This was the first time a central authority held a hearing on a business merger case.¹⁰⁸ The hearing was held for information-gathering purposes, but it led to the conclusion that the acquisition plan by Carlyle needed revision.¹⁰⁹

Because these hearings were not public, it is not possible to say what kinds of arguments and evidence were presented, or the way in which considerations related to competition, state asset restructuring, industry development, or other goals were weighed. From a competition standpoint, it is notable that key competitors of Xugong, including Sany, were invited and provided input at the meeting.¹¹⁰ In a subsequent interview, Xugong's CEO reported that, from among the various authorities and firms present, only Sany opposed the merger.¹¹¹ He also indicated that, despite the general support expressed for the merger, Carlyle, having obtained a better understanding of the landscape after the hearing, considered revising the offer by reducing its ownership share.¹¹²

NDRC also sought to bolster the technocratic legitimacy of its role in reviewing the transaction. The head of the Foreign Economic Research Committee of the NDRC's Academy of Macroeconomic Research was interviewed by *China Economic Weekly* in November 2006, indicating two principal concerns about the acquisition.¹¹³ First, he feared the loss of indigenous innovation sources if Xugong were to be sold to a foreign entity.¹¹⁴ This would reinforce the acutely perceived problem of China becoming the world's factory

106. *Id.*

107. *Kailei Shougu Xugong Anjian Huigu [Review of Carlyle/Xugong Case]*, SHANGYE BAODAO [WORLD BUS. REP.] (Oct. 26 2006, 4:47 PM), http://biz.icxo.com/htmlnews/2006/10/26/960407_0.htm [<https://perma.cc/C98U-GUK9>]; Ma Tao, *Kailei Shougou Xugong An Xiemu [The End of Carlyle/Xugong Case]*, NANFANG ZHOUMO [SOUTHERN WEEKLY], (Dec. 28, 2007, 1:09 PM), <http://www.infzm.com/content/8003> [<https://perma.cc/V64G-KXQ2>].

108. See *Shangwubu, supra* note 79; see also *Kailei Xugong Tijiao „Duwan” Jihua*, (凯雷徐工提交“毒丸”计划) [*Carlyle Xugong Submitted Plan against “Poison Pill”*], CAIJUNG NEWS, <http://www.caijing.com.cn/2006-05-13/10008163.html> [<https://perma.cc/C6YL-5T27>].

109. *Id.*

110. In U.S. courts, the antitrust injury doctrine may prevent competitors from complaining against a merger as the proper plaintiff because an anti-competitive merger benefits competitors through higher prices. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). In merger review, however, U.S. authorities (like the E.U. Commission) are open to submissions and evidence from competitors. E.g., U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES, 4–6 (2010) <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf> [<https://perma.cc/ZJZ4-3XDM>] (“The most common sources of reasonably available and reliable evidence are the merging parties, customers, other industry participants, and industry observers.”).

111. See *Kailei, supra* note 108.

112. By October 2006, the proposal was revised to increase the price to be paid by Carlyle by 20%, while reducing its ownership share in the new entity to 50%. *Id.*

113. See *Xugong, supra* note 96.

114. *Id.*

while lagging behind in innovation. Second, Carlyle's status as a financial entity was a concern, if it were able to manipulate its ownership share and increase it beyond 50%. The latter concern was important in the light of arguments made by Sany's Xiang about Carlyle's status as a private equity firm,¹¹⁵ with no experience, technology, or network in the relevant industry. Such lack of experience suggested that Carlyle was seeking to reach a majority share of Xugong at a discounted price and make a short-term profit by reselling the company's assets, rather than contributing to Xugong's long-term restructuring.¹¹⁶

The promulgation of new regulations, the delayed MOFCOM decision, and potential NDRC involvement signalled that the acquisition would not easily be approved. Furthermore, the reduction of its proposed share in the new entity from eighty-five percent to forty-five made the deal considerably less profitable for Carlyle. A joint statement by the two companies in July, 2008 indicated that Xugong would proceed independently with its restructuring.¹¹⁷

C. Coca-Cola/Huiyuan

Coca-Cola's proposed acquisition of Huiyuan Juice Company attracted attention as the first merger formally blocked by MOFCOM under the AML.¹¹⁸ The proximity in time to the abandonment of the Carlyle/Xugong deal and arguments about foreign takeover of a significant local brand fed the suspicion that the newly enacted AML would be used as a tool against foreign investment in strategic assets or national champions. Here again, fuller consideration of the record before the authority suggests a more nuanced conclusion about the different objectives and potential effects influencing MOFCOM's decision.

115. Wenbo Xiang, *supra* note 92.

116. For contemporaneous debates about the role of private equity firms in the United States, including Carlyle itself, see Thomas Heath, *Ambushing Private Equity: As SEIU Harries New Absentee Owners, Buyout Firms Dispute the Union's Agenda*, WASH. POST (Apr. 18, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/17/AR2008041704239.html> [https://perma.cc/4JA9-RF2Z]; Andrew Ross Sorkin, *Sound and Fury Over Private Equity*, N.Y. TIMES (May 20, 2007), <http://www.nytimes.com/2007/05/20/business/yourmoney/20deal.html> [https://perma.cc/ZHE5-VCJH].

117. See *Xugong Jituan He Kailei Touzi Jituan Fabiao Lianhe Shengming Zhongzhi Hezuo* (徐工集团和凯雷投资集团发表联合声明终止合作) [*Xugong and Carlyle Release Joint Statement Cooperation Terminated*], SOHU NEWS, (July 24, 2008), <http://news.sohu.com/20080724/n258343161.shtml> [https://perma.cc/4JH7-9WKQ].

118. Peter J. Wang et al., *Antitrust Alert: Coca-Cola / Huiyuan Deal is First Acquisition Blocked by China Antitrust Review*, JONES DAY PUBL'NS (Mar. 19, 2009), <http://www.jonesday.com/antitrust-alert--coca-cola--huiyuan-deal-is-first-acquisition-blocked-by-china-antitrust-review-03-19-2009/> [https://perma.cc/WCM9-2F2D]. In June 2014, MOFCOM blocked the tripartite merger of foreign-owned ocean container-shiping companies. See *MOFCOM Announcement No. 46 of 2014 on Decisions of Anti-Monopoly Review to Prohibit Concentration of Undertakings by Prohibiting Maersk, MSC and CMA CGM from Establishing a Network Center*, MINISTRY OF COMMERCE PEOPLE'S REPUBLIC OF CHINA (June 20, 2014), <http://english.mofcom.gov.cn/article/policyrelease/buwei/201407/20140700663862.shtml> [https://perma.cc/DM3L-QLUT].

1. Background and Facts

In September 2008, Coca-Cola announced its intent to acquire Huiyuan, the leading fruit-juice producer in China. By December 2008, the proposed acquisition entered a second phase of review under the AML.¹¹⁹ On March 18, 2009, MOFCOM issued a decision blocking Coca-Cola's \$2.4 billion acquisition of Huiyuan.¹²⁰

Coca-Cola's proposed acquisition also had a restructuring dimension, this time in the private sector, given the planned shift in business focus for Huiyuan's management. Zhu Xinli, Huiyuan's chairman, founder, and main shareholder, initiated a shift from juice production for retail markets to concentrated juice extract for juice manufacturers.¹²¹ Huiyuan began to invest in fruit plantations as part of this strategic restructuring and invested in facilities for concentrated juice production in several provinces, while its juice manufacturing entity was to be acquired by Coca-Cola. The blocking of the merger put a break on those plans. Zhu had to refocus on juice retailing, putting aside the new concentrated juice business.¹²² The blocking of the merger also disappointed expectations of Zhu's team because Huiyuan's founders would not be receiving merger-related financial rewards or have the opportunity to work for a prominent multinational company after the merger.

2. Interests and Pressures

As in Carlyle/Xugong, different stakeholders sought to influence public opinion and engage bureaucratic and political decisionmakers as part of the merger approval process.

Local juice producers (Huiyuan's competitors) formed an alliance in an effort to block the merger immediately after the MOFCOM filing.¹²³ Assisted by a number of consulting firms, they collected and produced documents, eventually requesting a public hearing from MOFCOM.¹²⁴ To argue against the merger, the juice producers invoked Pepsi Company's previous takeover of Tianfu Kele.¹²⁵

119. Under AML art. 25–26, initial review of an acquisition is done within a 30-day period of the notification, after which any more searching review is to be completed within a further 90 days. MOFCOM had already published the notification thresholds for mergers and acquisitions by August 2008.

120. See *Zhonghua Renmin Gongheguo Shangwubu Gonggao [2009 Nian] Di 22 Hao (Shangwubu Guanyu Jinzhi Kekou Kele Gonsi Shougou Zhongguo Huiyuan Gongshe Shencha Jueding De Gonggao)*, (中华人民共和国商务部公告 [2009 年] 第 22 号 (商务部关于禁止可口可乐公司收购中国汇源公司审查决定的公告)) [*MOFCOM Decision on Prohibition of Coca Cola's Acquisition of Huiyuan, MOFCOM Announcement No. 22 (2009)*], (Mar. 18, 2009), <http://fldj.mofcom.gov.cn/article/ztxx/200903/20090306108494.shtml> [<https://perma.cc/E4MK-N984>]. For English translation of the announcement, see *China's Statement Blocking Coca-Cola Huiyuan Deal*, THE WALL STREET J. BLOG, (Mar. 18, 2009, 6:58 AM) <http://blogs.wsj.com/chinarealtime/2009/03/18/china%E2%80%99s-statement-blocking-coca-cola-huiyuan-deal/> [<https://perma.cc/M24M-Y3D8>].

121. See PHOENIX NEWS, *supra* note 78.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* As such, they were invoking precedent-based arguments to gauge likely effects.

Pepsi formed a joint venture promising to continue to buy from Tianfu Kele and maintain the brand.¹²⁶ However, Pepsi subsequently started to change the management structure, lay-off employees, and introduce its own branded products, while reducing the share of Tianfu products sold.¹²⁷ Pepsi was also suspected of manipulating the joint venture's profitability, so Tianfu recorded losses allowing Pepsi to take full control and eliminate Tianfu's brand from its product range.¹²⁸

The Coca-Cola/Huiyuan deal generated substantial public interest, with nationalistic undertones and concerns about the loss of a famous Chinese brand to foreign control. According to a survey by China's largest online news portal, eighty percent of the people surveyed did not want the merger to proceed because they were concerned about foreign companies' tactics eliminating Chinese brands.¹²⁹ Further, sixty-four percent of respondents did not think the Huiyuan brand would have a better future after the merger.¹³⁰ Coca-Cola appears to have been sensitive to such public sentiment and made it clear that the Huiyuan brand would be retained under the deal.¹³¹ Additionally, Coca-Cola gave key Huiyuan personnel assurances that they would retain senior positions.¹³²

Apart from domestic opinion, the Chinese authorities were also subject to countervailing pressures, given the general signal the decision would send to foreign investors about government interference in their ability to profitably sell their Chinese assets. Specifically, Huiyuan's foreign shareholders supported the deal.¹³³ Warberg Pincus, a U.S. private equity firm, was regarded as the initiator of the deal because it held seven percent of the total share of Huiyuan and wanted to sell its shares for profit.¹³⁴ Danone, the French dairy giant, also held 21.3% of Huiyuan shares and coveted Huiyuan for many years, but decided to sell out as

126. See *Tianfu Qisu Baishi: Yige Peifang Yinfa De Guansi* (天府起诉百事: 一个配方引发的官司) [*Pepsi Sued: A Case Caused by a Formula*], SINA FINANCE (Sept. 1, 2010, 11:41 pm) <http://finance.sina.com.cn/chanjing/sdbd/20100901/23418589525.shtml> [<https://perma.cc/D6LN-UGAT>].

127. *Id.*

128. It is said that the entire transaction cost Pepsi only USD \$10.7 million. *Id.*

129. *Kekoukele Shougou Huiyuan Zhi Huo* [*Coca-Cola/Huiyuan Acquisition Confusion*], SINA NEWS (Sept. 12, 2008, 9:49 AM), <http://news.sina.com.cn/c/2008-09-12/094916280059.shtml> [<https://perma.cc/L5SG-AJTB>].

130. *Id.* See also Hannah C. L. Ha & John M. Hickin, *Coca-Cola/Huiyuan Deal Vetoed under China's Anti-Monopoly Law*, MAYER BROWN JSM LEGAL UPDATE, (Mar. 19, 2009), <https://www.mayerbrown.com/publications/coca-cola--huiyuan-deal-vetoed-under-chinas-anti-monopoly-law-03-19-2009/> [<https://perma.cc/F5ED-4QE4>].

131. See *Keko Kele Jihua Xianjin Shougou Huiyuan Chengnuo Jiang Baoliu Huiyuan Pinpai*, (可口可乐计划现金收购汇源 承诺将保留汇源品牌) [*Coca Cola Plan to Acquire Huiyuan in Cash: Promised to Retain Huiyuan Brand*], CE NEWS, (Sept. 4, 2008, 7:12 am), http://www.ce.cn/cysc/sp/info/200809/04/t20080904_16704746.shtml [<https://perma.cc/9DHW-YTBN>].

132. See *supra* note 78.

133. See *Neibu Baogao Xiangjie Huiyuan 196 Yi Gangyuan Jiaoyi*, (内部报告详解汇源 196 亿港元交易) [*Internal Report with Details about Huiyuan's 1.96 Billion HKD Transaction*], SOHU NEWS, (Sept. 4 2008, 7:19 am), <http://stock.sohu.com/20080904/n259363732.shtml> [<https://perma.cc/P32T-38LQ>].

134. *Id.*

part of restructuring its Chinese business in light of a dispute with its Chinese partner in the beverage industry.¹³⁵

3. Formalizing Decisionmaking Procedures

MOFCOM's decision came after an extensive investigation, during which—as in Xugong—the Ministry proceduralized stakeholder input.¹³⁶ MOFCOM solicited information not only from other governmental authorities, but also trade associations, juice beverage industry competitors, juice producers, concentrated juice suppliers, downstream retail sellers, the parties to the proposed merger, as well as legal, economic, and agricultural experts.¹³⁷ Given public interest in the case, MOFCOM held a press conference at which its spokesperson released details about the decisionmaking process and the forms of consultation used, which included the distribution of questionnaires, fact-finding events and hearings, on-site visits,¹³⁸ designated investigations, and interviews with the parties to the merger.¹³⁹ This suggests that MOFCOM had sufficient bureaucratic capacity to employ standard merger review techniques of more advanced regimes not long after the AML's enactment. MOFCOM included Huiyuan's competitors in the consultations: a December 2008 hearing involved a number of juice and beverage producers, as well as the China Beverage Industry Association.¹⁴⁰ However, the list of consulted parties released by MOFCOM did not include the farmers who supplied raw materials to Huiyuan,¹⁴¹ customers, or final consumers.

135. *Id.*

136. AML, *supra* note 1, at art. 27 requires MOFCOM to consider the *effects* of a proposed merger on market access and technological progress, on consumers and other business operators, and on national economic development, though it does not specify the procedures and sources for obtaining input relevant to gauging likely effects or for the balancing of different effects.

137. *See supra* note 120.

138. On-site visits involved relevant local and municipal authorities, many of which had granted privileges to Huiyuan in the form of land or tax concessions that would be cashed out through the merger for the benefit of the new owner, further highlighting policy interconnections at different levels of decisionmaking.

139. *Shangwubu Xinwenfayanren Yao Jian Jiu Kekoukele Gongsì Shougou Huiyuan Gongsì Fanlongduan Shencha Jueding Da Jizhe Wen* [Department of Commerce Spokesman Answers Reporter Questions About the Coca-Cola/Huiyuan Antitrust Investigation], ZHONGHUA RENMIN GONGHEGUO SHANGWUBU [MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA] (Mar. 25, 2009, 8:27 AM), <http://www.mofcom.gov.cn/article/zhengcej/bj/200903/20090306124140.shtml> [https://perma.cc/Z4AX-VNY5].

140. *See Shangwubu Kai Tingzhenghui Keko Kele Shougou Huiyuan 3 Yue Jianfenxiao (商务部开听证会 可口可乐收购汇源 3 月见分晓)* [MOFCOM Held Hearing On Coca Cola Huiyuan Merger: Decisions Expected Next March], FINANCE QQ (Jan. 6 2009, 7:53 AM), <http://finance.qq.com/a/20090106/000274.htm> [https://perma.cc/B6CA-4GR2].

141. Fruit farmers were one of the stakeholders negatively affected by the merger rejection, as Huiyuan had to go back on promises to purchase large quantities of fruit for the new concentrated juice business, for which affected farmers had been preparing for some years. Farmers failed to properly organize and communicate their concerns to MOFCOM, which reflects the fact that their interests are small and disaggregated and that they do not have a well-established producers' organization to give their concerns a national voice.

Certain stakeholders sought to advance objections to the transaction and supporting material before MOFCOM. Hejun Vanguard Group (Hejun) was a consulting firm working with local juice producers to obtain a MOFCOM hearing for the competitors. Hejun cooperated with a college student campaign group targeting Coca-Cola's "sweat factories" who had already written to MOFCOM requesting the merger to be blocked.¹⁴² The campaign group investigated labor conditions in Coca-Cola's Chinese factories, producing evidence of Coca-Cola's non-compliance with Chinese labor law.¹⁴³ In a further line of attack, Hejun and the student campaign group prepared a letter to the Minister of Commerce, made publicly available on Hejun's blog, in which they highlighted Coca-Cola's labor practices.¹⁴⁴ The letter sought to counter arguments of two prominent government officials¹⁴⁵ that the proposed merger should be treated as an ordinary commercial transaction raising no economic security issues. It pointed out that developed countries also aimed to maintain local ownership of famous brands as part of their merger review process.¹⁴⁶

The report on Coca-Cola's labor practices was also channelled to the top officials of the Chinese government through the CPPCC's Li Deshui.¹⁴⁷ Li Deshui was chosen by Hejun as a prominent advocate of national economic security, claiming that two-thirds of the Chinese companies were taken over by foreign business, which he viewed as a threat to the Chinese national economy.¹⁴⁸ Notwithstanding Li's arguments, neither the local juice producers'—represented by Hejun—nor the student campaign group's concerns were principally motivated by protectionist industrial policy.

Though different arguments and policy concerns were aired, MOFCOM's decision to block the transaction was written in standard competition-law language, as demonstrated by the six factors weighed in the approval process: the market shares of the merging parties; the relative market concentration; the merger's impact on market access and technological progress; the impact on consumers and competitors; the impact on national economic development; and

142. See PHOENIX NEWS, *supra* note 78.

143. *Id.* Members of the campaign group had procured short-term summer employment with Coca-Cola to obtain the evidence that was the basis of their 28-page report.

144. See *Jiu Keko Kele Binggou Huiyuan Gei Shangwu Buzhang Chen Deming Buzhang De Xin* (就可口可乐并购汇源给商务部长陈德铭部长的信) [A Letter to Minister of Commerce Chen Deming on Coca Cola/Huiyuan Merger], SINA NEWS BLOG (Mar. 19 2009, 11:55 pm), http://blog.sina.com.cn/s/blog_4be5ea890100db1b.html [<https://perma.cc/K5X9-WGV2>].

145. One was a member of MOFCOM's international trade research institute and the other was the chief negotiator of China's accession to the WTO. This demonstrates that core MOFCOM officials were not sympathetic to blocking the merger on protectionist grounds. *Cf. infra* note 206.

146. SINA NEWS BLOG, *supra* note 144. The letter cited French efforts to block PepsiCo's takeover of Danone by passing a law on strategic industries. For more recent reports of such screening of foreign investment, see Peter Lichtenbaum & David Fagan, *Lessons in Mediating for Dairy Warriors*, FIN. TIMES (Apr. 20, 2011, 8:12 PM), <http://www.ft.com/intl/cms/s/0/5d6d2e9e-6b75-11e0-a53e00144feab49a.html#axzz3PRp0H9U2> [<https://perma.cc/XH5X-T3FU>].

147. See PHOENIX NEWS, *supra* note 78.

148. *Id.*

the impact of the Huiyuan brand on competition in the relevant markets.¹⁴⁹ MOFCOM provided three reasons for blocking the transaction.¹⁵⁰

First, the merger would enable Coca-Cola to leverage its dominance in the carbonated soft drinks market into the juice beverage market.

Second, Coca-Cola's control over the juice beverage market would be appreciably strengthened by controlling two well-known juice brands, including Minute Maid as well as Huiyuan. Coupled with the leverage effect, this would raise barriers against any potential competitor seeking to access the juice beverage market.

Third, the transaction would squeeze out smaller juice manufacturers in China, restrain local manufacturers from participating in the juice beverage market, and diminish their innovation. This would harm competition in the Chinese juice beverage market and undermine its sustained and sound development.

The decision generated largely critical commentary from foreign antitrust practitioners and scholars. Although MOFCOM's justifications do not veer too far from antitrust orthodoxy and no mention is made of maintaining local ownership of key brands, practitioners argued that the decision poses a daunting obstacle to future mergers of foreign companies with famous Chinese local brands.¹⁵¹ An article in *Forbes* suggested that the AML decision reflected China's foreign investment laws and government policies, which do not support foreign firms buying controlling stakes in successful Chinese firms that do not require financial or management help, unless the Chinese firms obtain technology transfers or access to foreign markets.¹⁵²

One reason for the criticisms was that—in the absence of guidelines on assessing concentrations at the time—MOFCOM reached broad conclusions without offering supporting substantive evidence or analysis. For example, MOFCOM's decision did not reveal the methodology used to define the relevant market, discuss the market shares of the parties or their competitors, or the degree of demand or supply substitutability.¹⁵³ Relying on market shares to establish a *prima facie* case¹⁵⁴ is an understandable strategy to ease the burden of

149. See AML, *supra* note 1, at art. 27; *supra* note 120.

150. See *supra* note 120.

151. Wang et al., *supra* note 118 (citing concerns about MOFCOM's allocation of the burden of proof and unclear definition of market dominance); see also Jonathan Selvadurai, George Ji & Elaine Zhu, *Coca-Cola's Acquisition Of Huiyuan: A Lost Opportunity For MOFCOM*, MONDAQ BUS. BRIEFING (Apr. 29, 2009) (“market players would have all welcomed a detailed decision” to “provide[] well needed guidance and transparency”).

152. Shaun Rein, *What Coca-Cola Did Wrong, and Right, in China*, FORBES MAGAZINE (Mar. 24, 2009, 6:00 PM), <http://www.forbes.com/2009/03/24/coca-cola-china-leadership-citizenship-huiyuan.html>.

153. *Coca-Cola/Huiyuan: First Chinese Prohibition Decision Under New Merger Control Rules*, CLEARY GOTTlieb (Mar. 23, 2009), <https://www.clearlygottlieb.com/~media/cgsh/files/publication-pdfs/coca-cola-huiyuan-first-chinese-prohibition-decision-under-new-merger-control-rules.pdf> [<https://perma.cc/4JW3-FWRY>].

154. Zhang & Zhang, *Chinese Merger Control*, *supra* note 13, at 488.

proof for an agency still building enforcement and analytic capacity.¹⁵⁵ However, the decision provided no indication of how such presumptions could be rebutted, reducing the persuasiveness of MOFCOM's reasoning on consumer-oriented and efficiency considerations. Zhang has argued that the outcome may also have reflected MOFCOM's mis-borrowing of European Union competition law on leverage.¹⁵⁶ Finally, given explicitly stated concerns about the effect on local competitors or industry development and the lack of consultations about consumer effects, MOFCOM's decision was focused on producer rather than consumer interests.

Because this was the first blocked merger under the AML, which involved a large multinational company and attracted international scrutiny, it is unsurprising that MOFCOM's decision used template competition law language. MOFCOM had to justify its decision in the eyes of the international antitrust community and sought to use familiar competition law language. However, as this reconstruction seeks to show, the record before MOFCOM was much broader and touched on various policy goals potentially affected by the merger far beyond mere protectionism, including the impact on other juice producers, innovation, workers' conditions, as well as local farmers. Thus, the competition law rationales offered in MOFCOM's decision may not have convinced an international audience because they did not fully reflect the policy considerations brought to MOFCOM's attention.

Examining the fuller record suggests that the decision did not just reflect a single policy preference. Instead, it balanced a number of development-sensitive arguments in the face of uncertainty about the potential polycentric effects of the merger. First, the report prepared by Hejun and the student group documented Coca-Cola's labor practices in China.¹⁵⁷ From an orthodox antitrust point of view, an authority examining the labor market effects of mergers—typically whether the merger reduces total employment—injects non-competition considerations into merger analysis.¹⁵⁸ However, the evidence in this case focused on Coca-Cola's poor labor practices in its Chinese operations rather than total employment levels. Apart from a potential direct negative impact on Huiyian employees, Herrigel, Wittke, and Voskamp point out that poor or exploitative labor practices are typically associated with low-level or “stingy” upgrading of the production and innovation capabilities of local firms from integration with foreign partners.¹⁵⁹ Thus, if Coca-Cola's exploitative labor practices are seen as a

155. See Michal S. Gal, *When the Going Gets Tight: Institutional Solutions When Antitrust Enforcement Resources Are Scarce*, 41 *LOY. UNIV. CHI. L.J.* 417, 436 (2010) (positing that such a legal presumption would reduce administrative burdens for a less experienced authority).

156. Zhang, *Problems in Following EU Competition Law*, *supra* note 11, at 117.

157. See SINA NEWS BLOG, *supra* note 144.

158. MASSIMO MOTTA, *COMPETITION POLICY: THEORY AND PRACTICE* 15–17, 22, 26–27 (2004).

159. See Gary Herrigel, Volker Wittke & Ulrich Voskamp, *The Process of Chinese Manufacturing Upgrading: Transitioning from Unilateral to Recursive Mutual Learning Relations*, 3 *GLOBAL STRATEGY J.* 109, 114 (2013) (examining the insertion of Chinese firms in global supply chains in various manufacturing sectors).

proxy for poor upgrading potential of local productive capabilities from the merger, this may show that competition policy was colored by both distributive and development-sensitive considerations about the impact of foreign integration on labor conditions, local capabilities, and innovation.

The possible effects of the merger on local farmers is also not explicitly mentioned in MOFCOM's decision,¹⁶⁰ which is not surprising given their absence from the hearings and consultations. But unlike a dedicated competition agency, MOFCOM had previously issued other policy guidelines indicating a preference for direct relationships between farmers and buyers such as retail chains, rather than a reliance on middlemen.¹⁶¹ At the time of the Coca-Cola/Huiyuan decision, scholars and some competition agencies expressed concern that a purely consumer-oriented competition policy ignores the negative effects of high buyer concentration squeezing farmers' incomes.¹⁶² Though lower prices benefit final consumers, they have negative distributional consequences on farmers—often an already weak group—and also impact farmers' ability to innovate and satisfy food safety standards. The integrated policy mandate of MOFCOM—not limited to competition policy—could ensure that such effects would not fall in a policy blind spot,¹⁶³ particularly since they may be quite difficult to reverse.

D. The LCD Cartel

1. Background and Facts

The final case study involves the alleged price-fixing cartel among foreign producers of liquid crystal display (LCD) screens.¹⁶⁴ The case was investigated by

160. See *supra* note 120.

161. Zhu's direct arrangements to purchase products from farmers appeared to be consistent with MOFCOM's policy. However, empirical research showed some of the limits of MOFCOM's policy to encourage small-scale farmers to deal with large concentrated buyers. See Xiaofeng Liu, *Nongchao Duijie Moshi Xia Nonghu Canyu Yiyuan de Shizheng Yanjiu* (农超对接模式下农户参与意愿的实证研究) [*Empirical Research on the Participation Willingness of Farmers under the Mode of Direct Link Between Farmers and Supermarkets*], 188 J. OF ZHONGNAN UNIV. OF ECON. & L. 116 (2011) <http://xuebao.znufe.edu.cn/UploadFile/2011920205743163.pdf> [<https://perma.cc/73CF-HG2T>].

162. See Aravind R. Ganesh, *The Right to Food and Buyer Power*, 11 GERMAN L. J. 1190, 1197 (2010) (discussing the effect of buyer concentration on “the welfare of farmers producing at the bottom of the chain”).

163. See generally Yane Svetiev, *Competition Law and Development Policy: Subordination, Self-Sufficiency or Integration?* 4 EUR. Y.B. INT'L ECON. L. 223 (arguing in favor of integrating development policy goals into competition enforcement to avoid unintended conflicts between policy instruments). If the two mandates were wholly separate, consumer-oriented competition decisions could (often inadvertently) conflict with a policy to support farmer incomes.

164. Though this case involved only foreign producers, the NDRC is not selectively enforcing the law only against foreign producers. See, e.g., *Liang Yiyao Gongsi Longduan Fufang Lixueping Yuanliaoyao Shoudao Yanli Chufa* (两医药公司垄断复方利血平原料药受到严厉处罚) [*Harsh Penalties to Two Pharmaceutical Companies for Their Monopolization of the Supply of Key Ingredient of Compound Reserpine Tablets*], http://jjs.ndrc.gov.cn/fjgld/201203/t20120306_465386.html [<https://perma.cc/Y5U8-7TYM>] (NDRC fining two private pharmaceutical companies supplying the active ingredient for a popular hypertension medicine listed among China's national essential drugs); Chen Litony, (茅台酒、五粮液为什么被处罚) [*Why Moutai and Wuliangye Got Sanctioned?*], CAIXIN NEWS (May 8, 2013, 10:46

NDRC, which in January 2013, imposed fines totalling 353 million yuan (\$56.8 million U.S.) and corrective measures on six producers from South Korea and Taiwan, including Samsung, LG, AU Optronics, Chunhwa Picture Tubes, Chimei InnoLux, and HannStar Display for price-fixing violations between 2001 and 2006 in mainland China.¹⁶⁵ This was NDRC's first case against an international cartel where none of the members were from mainland China. It was also the largest fine ever imposed by NDRC for unlawful pricing conduct.¹⁶⁶

The NDRC found that the companies sold more than five million LCD screens when the cartel was operative between 2001 and 2006 and made illegal gains of 208 million yuan (or around \$33 million U.S.).¹⁶⁷ Given that LCD panels account for seventy to eighty percent of the production cost of flat screen televisions,¹⁶⁸ the cartel significantly increased production costs of television sets. Thus, the conduct harmed both China's television manufacturers' performance in international markets and final consumers by increasing the final prices of television sets.¹⁶⁹

2. Interests and Pressures

NDRC initiated the investigation only after receiving complaints about LCD price fixing—beginning in December 2006—from domestic television manufacturers and the China Video Industry Association, an association of producers of audio-visual equipment. The investigation was slow at the outset,¹⁷⁰ because it faced both legal and practical constraints. One obstacle was investigative resources: NDRC had only one division on pricing enforcement and

am), <http://opinion.caixin.com/2013-05-08/100524929.html> [<https://perma.cc/CK2V-3QMM>] (NDRC fining China's famous producers of premium liquor, Kweichow Moutai Co Ltd. and Wuliangye Group Co., Ltd. for resale price maintenance).

165. See Eric Lin, *China cracks down on price manipulation by global LCD cartels*, SIMMONS & SIMMONS ELEXICA, (Jan. 8, 2013), <http://www.elexica.com/zh-CN/legal-topics/antitrust-and-mergercontrol/08-china-cracks-down-on-price-manipulation-by-global-lcd-cartels> [<https://perma.cc/DS729XVG>].

166. See *Sanxing Deng 6 Qiye Beifa 3.52 Yi Yin Caozong Yejing Mianban Jiage* (三星等6 企业被罚 3.53 亿 因 操纵液晶面板价格) [*Six Companies including Samsung Fined 352 million yuan for Manipulating LCD Display Panel Prices*], SINA NEWS (Jan. 5, 2013), <http://finance.sina.com.cn/chanjing/gsnews/20130105/064814188769.shtml> [<https://perma.cc/PVZ9-8U92>]. In more recent cases pursued under the AML, such as those involving the suppliers of infant baby formula and auto parts, the fines have exceeded this amount.

167. See *Guojia Fazhan Gaigewei Youguan Fuzeren Jiu Yejing Mianban Jiage Longduan Da Jizhe Wen* (国家发展改革委有关负责人就液晶面板价格垄断案答记者问) [*NDRC Official Interviewed on LCD Cartel Case*], PEOPLE'S REPUBLIC OF CHINA: NAT'L DEV. & REF. COMM'N (Jan. 17, 2013), http://www.sdpc.gov.cn/fzgggz/jgjdyfld/jjszhd/201301/t20130117_523207.html [<https://perma.cc/6H57-LFQF>].

168. *Id.*

169. *Id.* As of 2008, the Chinese market had the largest demand for LCD screens in the world according to He Yabin, Vice President of the China Video Industry Association. See CHINA NEWS NETWORK, *infra* note 177.

170. See *Woguo Shouci Zhicai Jingwai Qiye Jiage Longduan Zhongfa 3.53 Yi* (我国首次制裁境外企业价格垄断 重罚3.53 亿) [*First China Sanction of 353 million yuan against a Cartel formed by Foreign Companies*], NETEASE NEWS, (Jan. 5, 2013), <http://news.163.com/13/0105/06/8KEFBGG400014AED.html> [<https://perma.cc/FSV4-EJU7>].

the investigated entities were aware of the agency's staff shortage.¹⁷¹ Another was legal: the investigated companies thought that NDRC was unable to bring a price-fixing case because the AML was not in force at the time of the alleged violations.¹⁷² For this reason, NDRC pursued the case under the 1998 Price Law.

Once the AML came into effect, NDRC expanded its anti-monopoly enforcement team from one division to three divisions. This led to more intense investigation of the LCD cartel beginning in 2011, including over 500 NDRC officials in fifty-five groups.¹⁷³ AU Optronics, the most highly fined cartel member, had already been heavily fined in the LCD cartel cases in the European Union and United States in 2008 and 2012.¹⁷⁴ Given the prior prosecutions and growing investigative pressure in China, AU Optronics decided to self-report the cartel activities to the NDRC in 2012 and LG and Chimei InnoLux followed suit.¹⁷⁵ The LCD Cartel members provided information to NDRC about price-fixing activities, including details of fifty-three almost monthly meetings hosted by each member in rotation, to exchange market information and discuss price.¹⁷⁶

Apart from price fixing, the TV manufacturers' complaints to the NDRC cited a number of other practices of LCD screen producers in the Chinese market that harmed their competitiveness.¹⁷⁷ LCD screen producers allegedly manipulated the supply schedule by withholding new technology products from the Chinese market. This was designed to extract higher prices for the older version of the product while inventories lasted.¹⁷⁸ The practice also allowed them to maintain a higher price for the newer versions of their product. The China Video Industry Association further complained that LCD screen producers randomly and deliberately terminated supply to Chinese manufacturers.¹⁷⁹ Finally, LCD manufacturers would not provide any quality guarantee on the Chinese market, until Samsung began to do so in 2010 by offering an eighteen-month warranty, considerably shorter than the standard warranty period of thirty-six months in other markets.¹⁸⁰

171. *Id.* Contemporaneous accounts suggest that the NDRC made no progress in the investigation in the five years following the complaints.

172. *Id.*

173. *Id.* The case was eventually closed in 2013 after this shorter but more intensive investigation. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. See Jiemi Zhongguo Yejing Mianban Fanlongduanan: Youda Shuaixian Zishou Mian Fakuan, (揭秘中国液晶面板反垄断案: 友达率先自首免罚款) [Revealing Details of China's LCD Cartel Case: Fines against AU Optronics Waived for its Early Confession], CHINA NEWS NETWORK (Jan. 4, 2013, 10:59 am), <http://finance.chinanews.com/cj/2013/01-04/4455217.shtml> [<https://perma.cc/Y5T4-6GNY>].

178. According to the China Video Industry Association Vice-Chairman, suppliers delayed the provision of new products to Chinese manufacturers for up to two years. *Id.*

179. *Id.*

180. *Id.*

3. Formalizing Procedures and Remedies

NDRC joined the competition enforcement game after MOFCOM, releasing its agency implementation rules, *The Regulations on Procedures for Administrative Enforcement of Anti-Price Monopoly*,¹⁸¹ at the end of 2010—two years after the AML came into force.¹⁸² NDRC has since been trying to catch up, ramping up enforcement after its increase in investigative capacities in 2011, with price cartels as a specific target.

Unlike MOFCOM, which receives a steady stream of mergers for review and has adopted a regulatory process of establishing fora for stakeholder input, the NDRC must both identify and investigate what are often clandestine arrangements. While the NDRC had to develop its own mix of investigative and punitive tools, it has also engaged in advocacy in building a competition culture.¹⁸³ The Director General of the Department of Price Supervision and Anti-Monopoly, has acknowledged both aspects of the NDRC's antitrust functions: "I told our staff, launching investigation cases [is] the real deal. No matter how much you tell people and educate them, it won't be as effective as an issued penalty."¹⁸⁴

One important source of information about clandestine cartels is customer complaints. For the LCD cartel, Chinese television manufacturers were originally reluctant to raise their concerns with the authorities to avoid disruptions of their relationships with key input suppliers.¹⁸⁵ The fact that the NDRC was a powerful and well-established economic regulator encouraged the local manufacturers to make their complaints even before the cartel prosecutions were successfully concluded in the United States and European Union.

Leniency applications from cartel participants are another important source of information about cartels in mature antitrust jurisdictions. However, as knowledgeable commentators have observed, instituting a leniency regime is not sufficient to receive cartel information: unless potential applicants perceive the antitrust bureau's investigative capabilities as credible, they have no incentive to

181. See Nat'l Dev. & Reform Comm'n, (反价格垄断行政执法程序规定 2010 年第 8 号令) [Anti-Price Monopoly Law Enforcement Procedural Requirements Decree 2010 8], http://www.sdpc.gov.cn/fzgggz/jgdyfld/fjgld/201402/t20140228_588564.html [https://perma.cc/F4GS-NCTS].

182. The regulations on merger notification and review were issued by MOFCOM by late 2009. See *Jingyingzhe Jizhong Shenbao Banfa* (经营者集中申报办法) [*Measures for the Declaration of Concentration of Business Operators*], MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA ANTI-MONOPOLY BUREAU (Nov. 27, 2009, 12:05 PM), <http://fldj.mofcom.gov.cn/article/c/200911/20091106639149.shtml> [https://perma.cc/MP9X-P47E]; *Jingyinzhe Jizhong Shencha Banfa* (经营者集中审查办法) [*Measures for the Review of Concentration of Business Operators*], MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA ANTI-MONOPOLY BUREAU (Nov. 27, 2009, 12:01 PM), <http://fldj.mofcom.gov.cn/article/c/200911/20091106639145.shtml> [https://perma.cc/73G3-QNZ7].

183. See Aydin & Büthe, *supra* note 50 at 11–12. The fact that clauses anti-competitive on their face are often included in contracts or model rules of industry associations suggests continued lack of awareness of the AML's requirements among Chinese businesses.

184. Veronica Lockyer, *China's Anti-Monopoly Law: No Longer Just Merger Control?* ANTITRUSTWATCH BLOG (Aug. 1, 2013), <http://blogs.orrick.com/antitrust/2013/08/01/chinas-anti-monopoly-law-no-longer-just-merger-control/> [https://perma.cc/K5LA-LG6B].

185. See *supra* note 177.

apply for leniency.¹⁸⁶ Thus, in the LCD cartel case, it was not until the NDRC substantially ramped up investigation capabilities with additional staff and visits that cartel members decided to self-report.

Pre-existing procedural law has been identified as one of the major legal constraints on effective enforcement of market regulation transplants in a new environment.¹⁸⁷ In the LCD cartel case, the 1998 Price Law made no provision for leniency or fine reduction for self-reporting, nor for extraterritorial application of the law, so NDRC imported these new procedural tools from the AML. Thus, rather than being constrained by prior decisionmaking procedures, the LCD Cartel case demonstrates a process of backflow, whereby AML procedures inform the NDRC's price law mandate.¹⁸⁸

Finally, remedial law can also impair effective antitrust enforcement by new adopters. Devising adequate remedies for competition violations is a notoriously difficult problem even in mature jurisdictions.¹⁸⁹ Ideally, antitrust remedies aim to correct the market distortion, deter violators and compensate victims. Public law remedies are often quite limited to be able to achieve any, yet alone all of those objectives. Private remedies are additionally subject to cost and other constraints on accessing the judicial system, particularly for relatively small and dispersed interests.

In this case, the NDRC creatively experimented with a set of hybrid remedies, responsive to a number of different objectives, including deterrence, compensation, market correction, and even industrial policy.¹⁹⁰ The final disposition involved levying an administrative fine on the defendant companies.¹⁹¹ However, the fine collected was transferred by way of compensation to the manufacturer victims of the cartel.¹⁹² As suggested by

186. See WOUTER P. J. WILS, *EFFICIENCY AND JUSTICE IN EUROPEAN ANTITRUST ENFORCEMENT* 125–27 (2008).

187. See Antonina Bakardjieva Engelbrekt, *Grey Zones, Legitimacy Deficits and Boomerang Effects: On the Implications of Extending the Acquis to Central and Eastern Europe*, 1 SWEDISH STUD. IN EUR. L. 1, 31 (2006) (legal transplants may require alternative remedial approaches).

188. Because the Price Law was silent on these points, such import could be justified on a dynamic theory of statutory interpretation. See, e.g., William N. Eskridge, *Dynamic Statutory Interpretation*, 134 UNIV. PENN. L. REV. 1479, 1479 (1987). Art. 14 of the Price Law prohibits “abnormal pricing behaviour” and because the Price Law and the AML have not been streamlined, this article defines a broader genus of prohibited conduct that includes price fixing cartels. See Yong Bay, *China Joins International Crackdown of Price-Fixing Cartel for the First Time*, CLIFFORD CHANCE BRIEFING NOTE (Jan. 16, 2013) (explaining that, unlike the AML, the Price Law does not require relevant markets to be identified) http://www.cliffordchance.com/briefings/2013/01/china_joins_internationalcrackdown.html [<https://perma.cc/T9UZ-R268>].

189. See Robert Pitofsky, *Antitrust at the Turn of the Twenty-First Century: The Matter of Remedies*, 91 GEO. L.J. 169, 180 (2002) (echoing Judge Posner's conclusion that “antitrust enforcement, including remedy law, is deficient”).

190. See *Guojia*, *supra* note 167.

191. *Id.*

192. See *Mianban Fanlongduan Chixu Fajiao 1.72yi yuan Tuikuan Liucheng Jidai Guifan* (面板反垄断持续发酵 1.72 亿元退款流程亟待规范) [LCD Cartel Case Continues Drawing Attention Calling for Immediate Refund Procedure Regulation of 172m yuan], CHINA NEWS NETWORK (Jan. 8 2013, 7:31 am),

television industry players, the fine was transferred to the Shenzhen China Television Union Corporation, a joint venture of nine leading Chinese television manufacturers formed in 2007 at the companies' initiative that was supported by a number of ministries.¹⁹³ The venture was intended to raise television manufacturing standards in China and safeguard competition by jointly managing research and development, solving intellectual property rights problems, and acting as an intellectual property incubator for the industry.

Apart from the fine, the NDRC imposed a set of "corrective measures" governing LCD manufacturers' contracting practices in the Chinese market.¹⁹⁴ The corrective measures included an undertaking by LCD manufacturers to supply Chinese television manufacturers in a "fair manner" and "provide all customers equal opportunity for procuring high-end products and new technology," as well as to extend the free-warranty period for products sold to Chinese buyers from eighteen to thirty-six months.¹⁹⁵ The corrective measures promote consumer welfare—because some of the impugned practices facilitated price fixing—but also reflect industrial policy—because they seek to advance the competitive position of Chinese manufacturers in world markets. Importantly, however, both aspects of the remedy do not involve protectionist industrial policy to shield local champions' profits, but one aiming to ensure that Chinese television manufacturers can compete globally on the merits.¹⁹⁶ Behavioral remedies are sometimes disfavored from a traditional antitrust perspective for their regulatory character, given the need to monitor implementation.¹⁹⁷ But if the authority has to monitor implementation, it can also evaluate the effects of its intervention over time instead of simply closing the case.¹⁹⁸ NDRC has reportedly closely monitored the activities of the six companies, with commentators suggesting that the prosecution has been of great significance for downstream television manufacturing in China.¹⁹⁹

<http://finance.china.com.cn/industry/20130108/1225156.shtml> [<https://perma.cc/8P8S-CGZY>].

193. *Id.*

194. Nathan Bush et al., *China's NDRC Penalizes Global LCD Panel Price Cartel*, O'MELVENY ALERTS & PUBL'NS. (Jan. 7, 2013).

195. *Id.*

196. Fox, *supra* note 23, at 76–77 (emphasizing developing country desire to not "fence out" local businesses); *cf.* Sokol, *supra* note 103, at 1248 ("industrial policy threatens consumer welfare").

197. *E.g.*, A. Douglas Melamed, *Antitrust: The New Regulation*, 10 ANTITRUST 13 (Fall 1995).

198. See Yane Svetiev, *Settling or Learning: Commitment Decisions as a Competition Enforcement Paradigm*, 33 Y.B. OF EUR. L. 466 (2014) (articulating the particular importance of monitoring as a source of ex post accountability in multi-objective competition policy).

199. See CHINA NEWS NETWORK, *supra* note 192.

IV CONCLUSION

What do these three enforcement case studies from China suggest about the conditions conducive to successful implementation of competition law in developing country jurisdictions? Three factors have been emphasized throughout the case study discussions: (i) uncertainty about the impact of competition and competition law on various public policy or bureaucratic objectives, (ii) the creation of fora for consultation and input not only within the bureaucracy, but also with affected market stakeholders, and (iii) the balancing of various policy goals in the course of decisionmaking.

The literature increasingly recognizes that tailoring a legal transplant during the legislative process is neither necessary nor sufficient for effective implementation.²⁰⁰ This is not least because the possible utility and effects—particularly of a novel market regulation instrument such as antitrust—may not be apparent either to legislators or stakeholders without reference to concrete problems.²⁰¹ As Pistor has argued more recently:

Institutions are ambiguous, and fraught with tensions because of the distributional issues they inevitably raise, and because of their inherent ambiguity or incompleteness. Once a rule has been pronounced, it sets in motion multiple processes to establish its meaning and scope of application. Rather than establishing definite rules of the game, institutions become the focal point for contestation.²⁰²

Such ambiguity is pervasive and cannot evade antitrust, which does not have a well-defined scope or metric of success, and has been used to pursue multiple goals even if the line of causation between competitive rivalry and those goals was not well understood. As a result, this article argues that facilitating “spaces for contesting the scope of rights and responsibilities of stakeholders”²⁰³ under the competition law is a key condition for successful transplant. Thus, one way to understand the factors that promote effective competition enforcement is to ask which factors are conducive to such contestation and which ones foreclose it.²⁰⁴

A narrow or rigid vision of the role and goals of antitrust, focused on consumer welfare, efficiency, or market structure, and either imported from foreign models or based on bureaucratic or political decisionmakers’ well-defined policy preferences would inhibit contestation.²⁰⁵ Rather than being

200. See Michal Gal, *supra* note 4 (analyzing the Israeli Competition Act); Svetiev, *supra* note 54 (analyzing case studies of transplant of consumer law); see generally Ralf Michaels, “One Size Can Fit All”—Some Heretical Thoughts on the Mass Production of Legal Transplants, in *ORDER FROM TRANSFER—STUDIES IN COMPARATIVE (CONSTITUTIONAL) LAW* 56 (Günter Frankenberg ed., 2013).

201. China may be peculiar in this respect in that contemporaneously with the AML legislative process, the Chinese authorities were reviewing cases that would ordinarily be subject to antitrust scrutiny (Carlyle/Xugong and the LCD cartel investigations were ongoing at the time).

202. Katharina Pistor, *Contesting Property Rights: Towards an Integrated Theory of Institutional and System Change*, 11 *GLOBAL JURIST* 1, 6 (2011).

203. *Id.* at 2.

204. Arguably, many of the factors of success theorized by Aydin and Büthe, *supra* note 50, can be understood through this prism.

205. See generally Fox, *supra* note 23 (discussing benefits of avoiding path dependency).

exceptional, the balancing of multiple objectives in enforcement should be viewed as unavoidable and desirable for a developing country's competition regime. This argument rationalizes China's almost Ulyssean effort to learn from foreign experiences while resisting wholesale adoption. It also underscores the advantages of the somewhat baroque AML enforcement structure, which taps the regulatory capacities of established authorities already embedded in the political system and with existing lines of communication with industry. Having somewhat different, if overlapping specializations, the three authorities provide sources of internal diversity in elaborating competition policy. Inter-agency competition and dialogue also promote contestation by further multiplying openings for stakeholder input. Even if the evidence generated by some stakeholders may be viewed as misguided or self-serving, they elicit alternative policy arguments and are a particular form of local stakeholder ownership of the new law.²⁰⁶

For similar reasons, conviction about the soundness of current market regulation or about the robustness of competitive advantages of local industry can also inhibit effective antitrust adoption. Rodriguez and Menon argue that competition policy undermines "surviving institutional organizations" that overcome "historical resource limits and institutional constraints" and are pro-competitive and economically advantageous.²⁰⁷ Yet China is probably not the only jurisdiction that has adopted competition law in the context of economic restructuring, presumably due to doubts about whether current economic policy and production arrangements are either satisfactory or sustainable as sources of development and prosperity. Where such doubts exist, competition law can be used as a tool of disruption, both for industry players and for policymakers. Limited uptake of a newly-enacted competition law would be expected if policy continuity is seen as desirable.

A recently promulgated State Council opinion²⁰⁸ buttresses the view that competition law is seen as a source of policy disruption in China. The Opinion institutes a Fair Competition Review System for all public authorities at all levels of government, requiring them to assess the competitive effects of all proposed measures, as well as to review pre-existing policies, so as to aid efficiency, resource allocation, and innovation through "fair competition." Such review will not be conducted by the national competition agencies, who are only to develop

206. Importantly, both in Carlyle/Xugong and in Coca-Cola/Huiyuan, actors seeking to engage public opinion formulated arguments that were contrary to the positions of both administrative and political officials and those arguments were channeled via the CPPCC, a consultative body to the legislature that plays a political role. *Contra* JESSICA C. WEISS, *POWERFUL PATRIOTS: NATIONALIST PROTEST IN CHINA'S FOREIGN RELATIONS* (2014) (arguing that the Chinese government tends to manipulate public opinion for its own public policy needs).

207. Rodriguez & Menon, *supra* note 32, at 61.

208. See *Guofa Hao Guowuyuan Guanyu Zai Shichang Tixi Jianshe Zhong Jianli Gongping Jingzheng Shencha Zhidu De Yijian* (国发号 国务院关于在市场体系建设中建立公平竞争审查制度的意见) [*State Council's Opinions on Establishing the Fair Competition Review System in the Development of Market System*], PEOPLE'S REPUBLIC OF CHINA STATE COUNCIL, (June 14, 2016), http://www.gov.cn/zhengce/content/2016-06/14/content_5082066.htm [<https://perma.cc/WF9C-E5Y5>].

implementation guidelines for public authorities to conduct self-assessments before proceeding with any proposed measure. This form of mainstreaming of competitive considerations above all imposes deliberative discipline on public authorities.²⁰⁹ Given that formulating economic regulation or industrial policy often results in competitive restrictions, either inadvertently or due to capture, this form of self-assessment forces authorities to make such policy trade-offs explicit.

The findings presented in this article also offer a refinement on the argument of a trade-off between “consumption” in new matters initiated and “investment” in building agency capabilities as a factor influencing enforcement success.²¹⁰ Investing in administrative capacity requires knowing what kind of capabilities are needed, which may presuppose commitment to a particular version of competition policy. Initiating new cases, by contrast, not only helps identify capacity gaps by reference to specific needs, but also allows the authority—through seeking input—to enlist the capabilities and resources of affected stakeholders. In the LCD investigation, the NDRC had built up investigative capacities and partially piggybacked on the efforts of foreign authorities. But it was input from Chinese television manufacturers that revealed additional local practices by the cartellists. Thus, rather than simply fining the cartel, the NDRC could remedy its specific manifestations in the Chinese setting, while also enhancing local actors’ ownership of competition policy.

Finally, one of the benefits of enlivening antitrust through contestation is that, as a result of such contest, either the output or the process of defining the scope of rights under the transplant can be accepted as legitimate.²¹¹ However, in the case studies presented, such legitimation may be lacking: where consultations are ad hoc and where only the result—and not the manner—of balancing various policy considerations in enforcement is disclosed by the authority, this leaves the impression of uncontrolled discretion. Strengthening independent judicial review of the authorities may correct this problem,²¹² but courts have typically not bolstered antitrust enforcement by new adopters.²¹³ Instead, both legitimation and policy learning objectives could be promoted by the authorities’ own formalization of decisionmaking practices, including both procedures for obtaining input from dispersed interests²¹⁴ and analytical categories for choosing

209. The Opinion requires public policies to “consult with interested parties or hold a public consultation while *formulating policies or implementing fair competition review.*” *Id.*

210. Kovacic & Lopez-Galdos, *supra* note 7, at 118.

211. Pistor, *supra* note 202, at 2.

212. Zhang, *supra* note 39, at 707.

213. Aydin & Büthe, *supra* note 50, at 16.

214. See *Jingyingzhe Jizhong Shencha Banfa* [Measures on Anti-monopoly Review in Connection with Concentration of Undertakings], (promulgated by the People’s Republic of China Ministry of Commerce on Nov. 24, 2009, effective Jan. 1, 2010), PEOPLE’S REPUBLIC OF CHINA MINISTRY OF COMMERCE <http://fldj.mofcom.gov.cn/article/c/200911/20091106639145.shtml> [https://perma.cc/WD84-GE5E]. The measures were adopted shortly after the Coca-Cola/Huiyuan decision.

or balancing policy considerations in competition cases.²¹⁵ Even if the AML text and judicial review do not sufficiently stabilize normative expectations, formalization of decisionmaking mechanisms could, over time, constrain the enforcement authorities. This provides an alternative route to promoting rule of law values *through* enforcing competition law, rather than regarding the rule of law and judicial control as essential prerequisites for its successful transplant.

215. See *State Council's Opinions*, *supra* note 208.