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Contents

Vol. 13, No. 2

From the Editor 7

CONFLICT ON THE SEAS

Zumwalt, Holloway, and the Soviet Navy Threat: Leadership in a Time of Strategic, Social, and Cultural Change 19
John T. Kuehn, PhD

Allies through Thick and Thin: U.S. Navy Strategic Communication, 1986–1994, in Transatlantic Context 33
Jon-Wyatt Matlack

Neglected Maritime Terrain in the Bay of Bengal: An Examination of the Future of the Andaman and Nicobar Islands 56
Major Evan Phillips, USMC

The Port-Hopping War: Littoral and Amphibious Operations in the War of the Pacific, 1879–1884 79
Tommy Jamison, PhD

The Maritime Silk Road: Concerns for U.S. National Security 99
Major Lindsey Madero, USA

The Black Sea Thread in Russian Foreign Policy and How the United States Can Respond 119
Adam Christopher Nettles

Like the Sea, So Cyberspace: A Brief Exploration of Establishing Cyberspace Norms through a Maritime Lens 142
Lieutenant Commander Travis D. Howard, USN (Ret); and Jose de Arimateia da Cruz, PhD/MPH

The Cyber Sea: Conflict and Security 154
Major Kevin Doherty, USA

Cyberspace and Naval Power 167
Matthew J. Flynn, PhD

The Army and Sea Control: Reconsidering Maritime Strategy in the Twenty-first Century 182
Nathan A. Jennings, PhD

REVIEW ESSAY

Reformists Posing as Revolutionaries: The Penchant for the Endless Repetition of Past Mistakes 197
Faoud Mami, PhD

BOOK REVIEWS

Bridging the Theory-Practice Divide in International Relations edited by Daniel Maliniak, Susan Peterson, Ryan Powers, and Michael J. Tierney 209
Reviewed by Evren Altinkas, PhD

The Global Village Myth: Distance, War, and the Limits of Power by Patrick Porter 213
Reviewed by Lieutenant Colonel Alexandra Gerbracht, USMC

The Command of the Air by Giulio Douhet 216
Reviewed by Master Sergeant Bonnie L. Rushing, USAF

The Other Face of Battle: America's Forgotten Wars and the Experience of Combat by Wayne E. Lee, Anthony E. Carlson, David L. Preston, and David Silbey 218
Reviewed by Daniel Ward

Grey Wars: A Contemporary History of U.S. Special Operations by N. W. Collins 221
Reviewed by Christopher D. Booth, JD/MA

On Contested Shores: The Evolving Role of Amphibious Operations in the History of Warfare edited by Timothy Heck and B. A. Friedman 223
Reviewed by Samantha Boelter, MAH

[50.242.250.185] Project MUSE (2024-03-06 17:37 GMT)

Strategy Shelved: The Collapse of Cold War Naval Strategic Planning by Steven T. Wills
Reviewed by Daniel Ward 225

Spymaster's Prism: The Fight against Russian Aggression by Jack Devine
Reviewed by Sara Ferragamo 227

Meeting China Halfway: How to Defuse the Emerging US–China Rivalry by Lyle J. Goldstein
Reviewed by Eric Shibuya, PhD 234

Immortal: A Military History of Iran and Its Armed Forces by Steven R. Ward
Reviewed by Thomas Zacharis 235

Between Desert Storm and Iraqi Freedom: U.S. Army Operations in the Middle East, 1991–2001 by Jourden T. Moger
Reviewed by James Bowden, MA 237

Shocks and Rivalries in the Middle East and North Africa edited by Imad Mansour and William R. Thompson
Reviewed by Satgin Hamrah, MA/MPA 238

The Maritime Silk Road
Concerns for U.S. National Security

Major Lindsey Madero, USA

Abstract: This article examines how China's twenty-first century Maritime Silk Road impacts U.S. national security. While the literature frequently discusses the Belt and Road Initiative, the Maritime Silk Road and its impact on U.S. national security is notably lacking. This article examines the specific impacts on the U.S. Department of Defense and other government departments and agencies. The main findings reveal that the Maritime Silk Road is a U.S. national security concern because it degrades operational security, alters military force projection, and bypasses ethical procurement norms. The author articulates the importance of U.S. action in response to China's global port influence, as well as recommends ways to counter each threat China imposes on the United States through the Maritime Silk Road.
Keywords: operational security, surveillance, force projection, international norms, procurement

The maritime domain continues to display its importance as countries around the world enhance their capabilities in a global race to impact sea control and power projection. China's twenty-first century Maritime Silk Road impacts multiple geographic combatant commands as well as the U.S. Transportation Command's (USTRANSCOM) ability to project forces through military sealift. China's increasing support to global maritime infrastructure directly impacts the U.S. Department of Defense and several other government departments. This article argues that the Maritime Silk Road is a U.S. national security concern because it degrades operational security, al-

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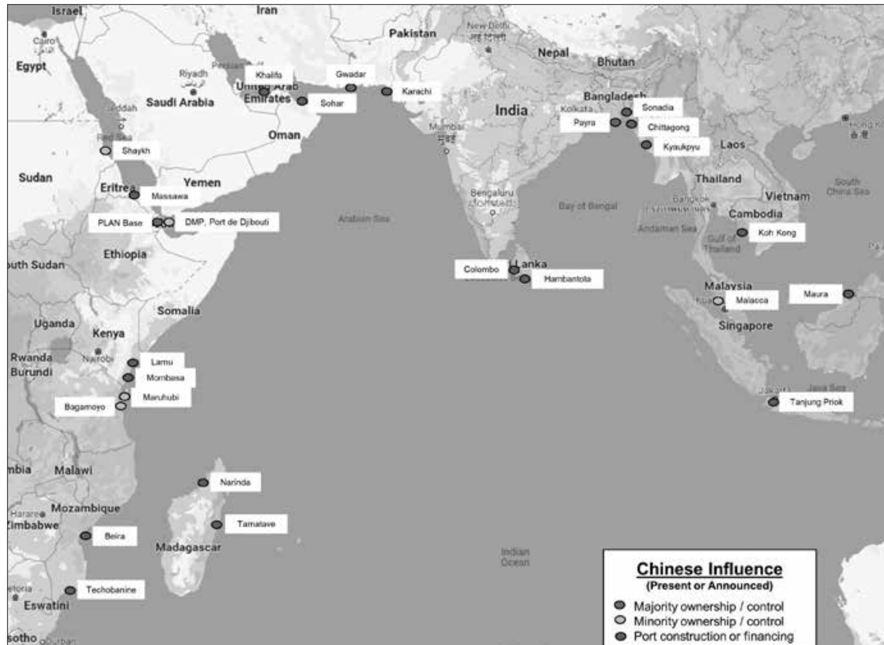
ters military force projection, and bypasses ethical procurement norms. The article examines the history of the Maritime Silk Road and provides the current and desired future states for foreign port surveillance against the United States, U.S. Navy port access for power projection, and China's procurement practices compared to international norms. The article additionally provides recommendations on alternative U.S. sealift and financial options, enhancing military lethality and intelligence sharing, and maintaining strong international relationships under an ethical framework.

Background

President Xi Jinping announced China's Belt and Road Initiative (BRI) in 2013. China designed the Maritime Silk Road (MSR), under the BRI, to connect China to Europe for trade purposes. With the Indian Ocean alone hosting 80 percent of Chinese imported oil and 95 percent of Chinese trade with the Middle East, Africa, and Europe, China prioritized port infrastructure projects to bypass choke points and increase trade route options.[1] The Maritime Silk Road created ports, enhanced existing infrastructure, and financed maritime projects with the incentive for the host nation being an increase in tourism and economic growth. There was an initial mixed, global response to the MSR. In 2017, the international community became skeptical of China's economic diplomacy when Sri Lanka leased the Hambantota International Port to a Chinese company for 99 years in exchange for $1.12 billion.[2] Even though Sri Lanka used the money to strengthen their foreign reserves and was therefore not a victim of "debt diplomacy," news outlets suggested that China intentionally created a loan agreement that would result in a payment default.[3] In 2018, Vice President Michael R. Pence further elevated the debt diplomacy narrative when he stated, "just ask Sri Lanka, which took on massive debt to let Chinese state companies build a port of questionable commercial value. Two years ago, that country could no longer afford its payments, so Beijing pressured Sri Lanka to deliver the new port directly into Chinese hands."[4] After the Hambantota Port deal, Chinese official media reported "another milestone along [*sic*] path of #BeltandRoad."[5] That behavior suggested that China's MSR intentions were to expand global influence by controlling critical infrastructure.

Chinese companies initially announced their intentions to invest in nine overseas ports, with the majority located in the Indian Ocean.[6] Today, MSR port influence expands globally and ranges from Chinese port construction or financing to majority port ownership. MSR contract details are often difficult to obtain, which presents a unique challenge when compiling data on foreign ports with Chinese influence. Also, if MSR nations refinance their loan plans with China in the future, the potential exists for China to increase their ownership or operational control of those foreign ports as a part of the refinancing agreement. Likewise, if a nation defaults on the loan repayment, China may

Map 1. China's Maritime Silk Road global influence



Source: courtesy of the author, adapted by MCUP.

control majority ownership over the port, such as in the case with Sri Lanka. For these reasons, China's international port ownership and/or influence continues to change.

Since announcing the MSR initiative, several friction points such as territorial claims in the South China Sea, espionage by China in the United States, and Chinese human rights violations compounded to create a fractured diplomatic relationship between the United States and China. In response to China building artificial islands and military outposts in the South China Sea in 2018, the U.S. Department of Commerce barred American companies from exporting to Chinese companies involved in the South China Sea construction.[7] After Chinese theft of U.S. technology in the same year, the United States increased tariffs on Chinese imports, to which China responded with their own retaliatory sanctions.[8] In 2018, the *National Defense Strategy* identified China as "a strategic competitor using predatory economics to intimidate its neighbors while militarizing features in the South China Sea."[9] In late 2021, the United States then sanctioned Chinese imports, restricted visas, and imposed investment restrictions against a Chinese surveillance company for enabling human rights abuse against Muslim ethnic minority groups.[10] While these examples depict the diplomatic strain between the United States and China, the MSR also impacts the U.S. military.

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Concern #1: Degraded Operational Security

The Current State

China previously required surveillance cooperation as a part of MSR agreements, and they will likely continue this strategy with future projects. During negotiations for the Hambantota Port, China required Sri Lanka to share intelligence as a part of the deal.[11] While the specific details of the intelligence support are publicly unknown, one can assume that China had interest in foreign vessel capability, port call frequency, and port call tactics used by foreign nations. China also manages surveillance facilities at the Cocos Islands, deep in the Bay of Bengal, to observe foreign naval movement throughout the bay and monitor India's missile testing.[12] As China gains influence and control over international ports used by the U.S. military, operational security concerns increase. Since 2011, U.S. Marines have been using Australia's Darwin port on a rotational basis for training.[13] China acquired the port in 2015 on a 99-year lease, which created tension between the United States and Australia.[14] In 2019, Australia announced they would build a new port for American use at Glyde Point.[15] The new port is likely to reduce U.S. security concerns with China, but not every nation will build separate infrastructure. If China owns a berth, controls the port, or holds port stake, they are likely collecting information on countries operating in or near the facilities. While this strategy is not unique to China, the U.S. military must still be aware that Chinese companies likely have the means and motive to collect against them.

China currently tests the U.S. military's operational security in Djibouti, where both nations operate a military base. Djibouti is a strategic location, resting on the Bab el-Mandeb Strait, which is one of the choke points in the Indian Ocean. Shipping lanes from Africa, Asia, and Europe converge here and tension exists between the U.S. Navy base and the People's Liberation Army Navy (PLAN) base.[16] Friction occurs because the bases are extremely close together and one international airport means all militaries are using the same facility.[17] The current accommodations provide China with opportunities to collect intelligence on U.S. forces and allies, like France and the United Kingdom. In 2018, commanders at the U.S. naval base in Camp Lemonnier, Djibouti, claimed several accounts of Chinese personnel attempting to collect information on U.S. military operations.[18] Likewise, China has made several claims against the United States for surveilling their operations in Djibouti.

Desired Future State

The desired future state is for U.S. military forces to enhance operational security while accessing ports throughout the Indian Ocean. This implied end state derives from the description of the strategic environment in the 2018 *National Defense Strategy* as well as the required environment for USTRANSCOM to successfully conduct military sealift. There are a few obstacles that impede the United States from achieving the desired future state. The first obstacle is the covert tactics that China uses to collect information. As previously stated, Chi-

na influences port operations in the Indian Ocean through operational control, port ownership, and economic and diplomatic relationships with MSR nations. China's port influence provides opportunities to surveil foreign nations during port calls. The host nation may surveil U.S. forces and provide the intelligence to China, whether willingly or because of coercive influence techniques. The second obstacle impeding the United States from achieving increased operational security is Chinese intelligence collection platforms. China's cargo-data system, called Logink, is a network that tracks shipments throughout China and giant ports globally.[19] The digitized cargo data provides China with a way to monitor equipment moving around the world, including military equipment moving through commercial ports.

To reach the desired future state, the United States can take several actions to improve operational security. The first action is to enhance relationships with U.S. partners. If the United States is using the ports from a partnered nation, there is an element of trust between the two nations. The concern is that some countries support the United States through partnerships while simultaneously supporting China through the Maritime Silk Road. The United States expects the host nation to deter foreign surveillance. To receive that level of security and deterrence support, the United States must build stronger relationships with partnered nations. Specifically, the United States can reallocate foreign assistance to incentivize partners through cash transfers, training courses, research projects, or debt relief. In addition to economic incentives, the United States can use diplomacy with other nations to describe the benefits of safeguarding sensitive data by denying the use of systems like Logink for military equipment tracking.

The second action the United States can take is to improve the military's operational security measures at the tactical level. Information sharing, whether intentional or not, is an extreme risk to the force. Operational security degrades as soon as sensitive information is publicly released. To suppress the release or distribution of essential friendly information, tactical military units must impose strict operational security measures and consider the risks during planning. The third action is to develop and use defensive capabilities that can deny surveillance and information collection. China will likely know when the U.S. Navy or commercial vessels move through MSR ports but employing defensive measures can reduce the transparency of U.S. port call procedures. The fourth action is to conduct counterintelligence from the tactical to the national level. These operations identify China's intelligence collection tactics and conduct security activities to counter foreign threats.

Risk

There is a significant amount of risk if the United States does not respond to China's growing surveillance threat. If the United States does not attempt to increase operational security, China will better understand U.S. port operations. With that knowledge, China can exploit the U.S. military and predict

movement timelines, resupply operations, and organic security. To reduce the risk and potential harm to U.S. forces, the United States must maintain international relationships, enforce operational security at the tactical level, and enhance defensive capabilities for counterintelligence operations.

Concern #2: Force Projection

Current State

Force projection is the military's ability to project power. The U.S. Navy's Military Sealift Command (MSC), in support of USTRANSCOM, moves more than 90 percent of military equipment and supplies by sea.[20] The MSC "is the leading provider of ocean transportation for the Navy and the rest of the Department of Defense, operating approximately 125 ships daily around the globe."[21] The United States also has several redundancies to move military equipment via sea, including USTRANSCOM, the Department of Transportation, and U.S. flagged commercial ships. These redundancies provide opportunities to surge equipment into a foreign theater.

Currently, the United States can project forces into the Indian and Pacific Ocean region, but China's influence could limit the U.S. military's ability to access foreign ports in the future. During a congressional hearing in 2019, leaders discussed the potential for the U.S. Navy to face "restricted access to important maritime chokepoints and supply routes" as well as general competition for access to ports.[22] In 2019, China denied several requests from U.S. Navy warships to call at Hong Kong.[23] While this example is within China, a similar approach of denying port call requests may surface where China owns or operates foreign ports. Another concern is the increased maritime traffic caused by Maritime Silk Road projects. China's creation of a new container terminal in Port Khalifa, United Arab Emirates, will likely increase port traffic and may delay the U.S. Navy in the future.[24] Traffic directly impacts the U.S. Navy's timely ability to resupply and repair vessels.[25] Disruption of U.S. naval operations may occur in the future from the PLAN as well.

The PLAN is the largest naval force in the world, with more than 300 ships.[26] The PLAN is focusing on blue water capable warships and creating opportunities in the northern Indian Ocean and South China Sea to sustain their naval fleet.[27] Additionally, China conducts military exercises with commercial vessels, violating international norms and creating increased risk for foreign commercial vessels traveling through the South China Sea.[28] The PLAN has several limitations to include air defense, anti-submarine capabilities, logistics, and the inability to sustain a carrier strike group in the Indian Ocean.[29] By increasing port control through the Maritime Silk Road, the PLAN enhances sustainability and extends operational reach. The ports in Gwadar and Hambantota are examples of locations where the PLAN could leverage refueling or docking as a part of the Maritime Silk Road.[30] In this sense, the PLAN uses the MSR to increase operational reach.

U.S. allies and partners collaborate to mutually support freedom of naviga-

tion and deterrence against China in the Indian and Pacific Ocean. The United States is currently involved in multiple international organizations that promote security and freedom of navigation. The Combined Maritime Forces is an example of U.S. commitment to international rules and unified effort. The United States is one of 34 nations involved in the Indian Ocean who combat illegal actions while maintaining security and prosperity for international trade.[31] The United States is also one of eight nations in the International Maritime Security Construct who ensure freedom of navigation and continuation of trade in the international waters of the Middle East region.[32] Additionally, the United States permanently stages military forces on the British-owned island of Diego Garcia. The ability to use that strategic location enables U.S. force projection into multiple combatant commander area of responsibilities. American and British forces also deter Chinese aggression in the South China Sea through joint military exercises.[33] India is another strategic partner that the United States relies heavily on for intelligence sharing, foreign military sales, and naval escort operations through the Malacca Strait.[34] The U.S. relationships with the United Kingdom and India are extremely important to counter the negative impacts to force projection because of their aligned national objectives of deterring Chinese aggression.

While many partnered nations have aligned interests, not all partners maintain the same view toward China. Some countries are partners with the United States while they simultaneously support the Maritime Silk Road. An example of this is the relationship between the United States and Sri Lanka. In 2017, a Chinese company paid $1.12 billion for a 99-year lease of the Hambantota Port, along with majority ownership.[35] Two years later, the U.S. and Sri Lankan military conducted a Joint naval exercise as a part of the Cooperation Afloat Readiness and Training through the Hambantota International Port.[36] With majority ownership of Hambantota, the possibility exists for China to interfere with future operations that rely on the port's access.

Desired Future State

The desired future state is for the United States to enhance foreign port access and maintain redundancies for force projection. This implied future state derives from the requirements of USTRANSCOM and the U.S. Navy to access international ports. China's increasing port control and influence techniques are obstacles impeding this desired future state. Based on data from the U.S. Foreign Corrupt Practices Act enforcement actions, China contained the highest concentration of bribery.[37] In 2009, the World Bank barred the Chinese Harbour Engineering Company from engaging in infrastructure projects due to fraud and the company later offered bribes to government officials in Bangladesh in support of the Maritime Silk Road.[38] In general, "60% to 87% of Chinese firms said they had paid a 'tip' or bribe to obtain a license in connection with business transactions in Africa."[39] A low income African nation accepting a monetary bribe is not surprising. What is surprising is the percentage of Chi-

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nese firms admitting to bribery when commercial bribery under PRC Criminal Law holds entities liable who commit bribery, even outside of China.[40] It is challenging for the United States to compete with bribery, while supporting international norms and maintaining ethical business practices.

To reach the desired future state, the United States can enhance relationships with partners and allies. While the United States already has strategic partners and engages in information sharing and military exchanges, the continuation of unifying nations with diplomatic values who support international norms is imperative. Through multinational exercises, intelligence support, training opportunities, and other joint efforts, the U.S. and partnered nations can become more unified to counter Chinese MSR expansion. The United States could also leverage the U.S. Agency for International Development to support economic growth in developing nations and offer alternative options to the MSR. While the U.S. Navy will continue relying on foreign ports for force projection, strong relationships with foreign nations enable multiple options for U.S. port access and strategic basing.

Risk

If the United States does not act to enhance force projection, the military risks losing operational tempo. With reduced port availability and/or increased port threats, timelines will likely extend for transporting military equipment from ports of embarkation to ports of debarkation. There are also risks if the United States takes action to reduce the impact on force projection. Increasing security cooperation, growing financial aid packages, and/or enhancing naval lethality all require significant funds. While all three actions are important to maintain international relationships and secure foreign port use, the military budget may not support all actions simultaneously. The United States continues to analyze and adapt foreign assistance through the Department of State and Department of Defense.

Concern #3: Violating International Norms

Current State

Organizations like the World Bank Group and the United Nations create an international norm for investment and procurement processes. The International Bank for Reconstruction and Development (IBRD), under the World Bank Group, offers loans and developmental assistance for low- to middle-income countries. IBRD, supported by multiple countries, uses rigorous formal steps to ensure fair and reasonable loans for the receiving nation. IBRD ensures their projects are "economically justified," reinforcing the intent of the World Bank to support developing nations.[41] Additionally, projects must assist with reducing poverty in the host nation and encourage sustainable economic growth.[42] This standard shows how the bank considers the host nation's financial situation, beyond the initial loan. Also, the World Bank provides transparency on their international support, unlike the hidden details of MSR loan agreements.

China's success in MSR loan agreements and procurement practices reduce the international appeal to conform to the strict and fair processes used by the World Bank. As the largest shareholder in the World Bank, U.S. preferences impact the bank's decision making. If more nations seek Chinese financial support instead, U.S. influence may decrease.

Besides the World Bank, the United States is also a member of the International Monetary Fund (IMF) along with 189 other nations.[43] The IMF provides exchange rate stability as well as economic, financial, and legal support.[44] China and the United States became members of the IMF in 1945 and the United States is currently the largest shareholder.[45] The IMF surveils global economics and standards of living to assess the requirements for or effectiveness of IMF support.[46] The surveillance is extremely important because it displays the IMF system for collecting information, conducting analysis, and making decisions that enhance future economic stability or quality of life. Because the United States and China are members of the IMF, there is little room to leverage the IMF toward projects or support that only favors one of the nations. The United States could be more successful in countering Chinese bank support to MSR nations by providing independent options or coordinating with partners and allies to present alternative options.

Meanwhile, China is the largest shareholder of the Asian Infrastructure Investment Bank (AIIB), which focuses on Asian nation economic development and infrastructure projects.[47] Some nations believe that AIIB acts on behalf of China because China controls half of the voting shares.[48] The United States previously questioned AIIB's standards and safeguards but despite the concerns, many allied nations are members of the bank.[49] To quell these concerns, AIIB frequently conducts joint ventures with the World Bank.[50] The BRI listed the AIIB as a financier and the bank competes with the Asian Development Bank and the World Bank.[51] As a baseline and global standard, the World Bank's environmental and social framework contains eight areas of analysis.[52] In comparison, the AIIB only imposes specifications on resettlement and indigenous people, increasing the risk potential for people and the environment.[53] As of late 2021, the AIIB updated their environmental and social framework, reducing vulnerabilities pointed out by external parties.[54] With an enhanced framework and global reach, the AIIB is a competitor to other multilateral development banks (MDBs) with U.S. involvement and interest.

Regarding MSR financing, China is more likely to use the China Development Bank and the China Export-Import (EXIM) Bank, which are institutional banks that implement the state policy.[55] State-owned banks are less scrutinized and do not require the democratic voting methods displayed in MDBs. The China Development Bank, for example, is "China's largest bank specialized in medium- and long-term lending and bond issuance."[56] State-owned banks may provide China a faster way of approving and providing loans to developing nations. For some nations, the reduced timeline is more beneficial. For these reasons, Chinese banks may appeal more to lower- and middle-class nations

seeking immediate financial support. Currently, lending for the Belt and Road Initiative is greater than all combined efforts of MDBs, which includes the World Bank.[57]

A noticeable difference between the United States and China involves MDBs. The United States is a member of five MDBs, but they are not involved in subregional MDBs like China.[58] Commitment to a subregional MDB may provide personal appeal to a country within that region seeking financial support. Additionally, a nation participating in MDBs and subregional MDBs may claim higher levels of support through the global reach of their bank investments. With that being said, the United States is still the "largest shareholder of global and regional MDBs."[59] China's loan process and contract requirements are vastly different from MDB norms. If a supported country makes national policy or legal changes, China can terminate the supporting contract and demand immediate repayment of a loan.[60] This locks a host nation into operating under the status quo, without the ability to adapt and change. Another difference with "government-to-government lending," as opposed to an MDB, is that if the host nation does not reelect "the preferred China incumbent," China can cancel their loan.[61] This scenario gives China enormous power to expand their influence globally and can lead to the host nation using manipulation and corruption to shape the political outcome.

As a counter, "China's debt risk is performing at US $1 billion for every US $142 billion in BRI assets, meaning a 1-142 chance of problems" with BRI loans.[62] This data suggests that China is very successful in creating loans that ensure the host nation does not default. While it may be true that China's loans are well structured to ensure a successful return, the data does not show the level of Chinese influence and manipulation. As mentioned previously, China's ability to influence foreign politics through economic agreements shows a tremendous amount of control and manipulation to achieve personal gain. Also, the World Bank's rigorous process for creating loan agreements may result in the decision to deny a loan to a developing nation because the forecasted projection does not support economic growth. The World Bank exists to create a better standard of living and ensure sustainable growth, resulting in more selective investment decisions. China's banks do not use the same rigorous processes, meaning they can offer loans faster to countries supporting their national agenda. This makes it difficult for the World Bank and other international banks to justify high standards focused on assessments impacting the environment and social well-being, all while denying corrupt behavior.[63]

One of the biggest violations of international norms is China's current contractor bidding process. The international norm is to award the contract to the local firm "if the bid does not exceed the lowest foreign bid by a specified percentage (often 15)."[64] MDB projects, for example, favor local contractors 40.8 percent of the time, with the remaining percentage awarded to other national bidders.[65] In comparison, China wins the contracts for the Maritime

Silk Road 89 percent of the time.[66] That leaves both local and foreign countries to compete for the contracts only 11 percent of the time. Additionally, China denies some nations from bidding, creating an unfair and unequal bidding process.[67] Sometimes China even enforces a closed bidding, and the host nation must select the construction company that supports China's national agenda.[68] An example of this is the procurement for China-Pakistan Economic Corridor projects, where the EXIM Bank restricted bidding to Chinese contractors.[69] When China controls the contractors, they deny the host nation with the complete project details, creating a further dependency on China in the future to provide maintenance and technical assistance.[70]

While China's bid rigging disregards international norms, it does not violate international law because China is not a member of the Organisation for Economic Co-operation and Development (OECD), which promotes economic and social well-being.[71] China does have laws stating, "No unit or person may illegally restrict or exclude legal persons or other organizations from other areas or systems to take part in bidding or interfere in tender and bid activities in any form" and that bidders may not use deceptive methods for winning.[72] These laws only apply for "tender and bid activities in the territory of the People's Republic of China," which does not impact Chinese infrastructure projects overseas.[73] China is a charter member of the United Nations (UN), and the UN expects member nations to support the UN's guiding principles. The UN Convention against Corruption enforces international standards and the Model Law on Public Procurement states that "all procedures are subject to rigorous transparency mechanisms and requirements to promote competition and objectivity."[74] The Model Law aims to assist other nations in developing procurement law and is therefore not an enforceable law against China. The UN can apply pressure on China for violating international norms, but China is not violating international laws. Laws and procurement frameworks in the OECD and the World Bank do not guide China's financial decisions, enabling China to create a new financial norm through MSR projects.

Out of the 178 agreements in the BRI in 2018, more than 50 percent of host nations did not have government procurement provisions, while another 33 percent had provisions that were so unspecific, they were not enforceable.[75] China is selecting countries for the Maritime Silk Road that offer a strategic advantage with the geographic positioning of the ports, as well as nations that China can influence. With most agreements made with countries that have no enforceable procurement laws or standards, China controls the procurement process. In 2019, the U.S. House of Representatives Committee on Transportation and Infrastructure documented that "non-Chinese companies will compete for BRI contracts on an uneven playing field and participate in projects on Beijing's terms."[76] Three years later, it appears that China's power and influence continues to create an unequal procurement process that bypasses international norms.

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Desired Future State

The desired future state is for the United States to reduce China's success in bypassing international procurement norms. The inverse is for the United States to reinvigorate the use of international norms for investments and procurement to solidify those practices as preferred business models. This implied future state derives from the requirement of the United States to remain competitive and counter actions that reduce U.S. economic effectiveness. If China adjusts the international norms through their global influence, the United States must evolve to fit the new standards or risk experiencing a competitive disadvantage. The obstacle impeding the United States from achieving this future state is China's influence tactics that play to the personal appeals of the low- to middle-class countries. Countries who are eager or desperate to enhance their standard of living through the economy are likely to request a loan from China as a part of the Maritime Silk Road. In some cases, countries agree to infrastructure development or port expansion with the promise of increased tourism and economic growth. By coordinating with China, the host nation's current and forecasted economic growth are less scrutinized as a part of the loan development process. Also, the loans supporting the MSR are coming from one country, as opposed to the World Bank. This allows China to quickly decide if investing in a nation is a part of their national interest.

To reach the desired future state, the United States can enhance relationships with partnered nations. If a country is receiving security force assistance or economic relief from the United States, they may be less inclined to support China through the MSR. The second action the United States can take is to increase global information sharing. As a member of the World Bank, the United States can increase awareness of international procurement practices and educate others on effective techniques. This would reduce the number of countries who do not have existing or enforceable government procurement provisions. The third action the United States can take is to offer alternative options for financial and advisory support, as discussed later under recommendations. Such options would require sustainability, efficient processes for loan selection, and fair procurement practices.

Risk

If the United States does not react to China bypassing international norms, China will continue to spread their influence globally and create a new standard for the loan and procurement process. The discriminatory procurement practices exhibited by China may lead other nations to conduct business in a similar manner. There is also risk associated with the United States reacting to Chinese business practices. If the United States reduces the success of China's MSR investments by proposing alternative investment options and educating countries on government procurement provisions, China could respond using information operations. China would likely spread the message globally that the United States is attempting to control the procurement process interna-

tionally by training others to their own standard. The United States can combat these messages through transparency and proof of concept from successful business practices used by the World Bank.

Recommendations

The *Interim National Security Strategy Guidance* stated, "We will confront unfair and illegal trade practices, cyber theft, and coercive economic practices that hurt American workers, undercut our advanced and emerging technologies, and seek to erode our strategic advantage and national competitiveness."[77] This guidance clearly states that the United States will respond to coercive measures, as previously described through China's bribery tactics and bid rigging. While Chinese attempts at surveilling U.S. military operations are not new, the United States must continuously adapt to maintain the competitive advantage. To do so, the author recommends exercising sealift redundancies, strengthening partnerships, creating alternative investment options, enhancing U.S. force lethality through research and development, supporting increased global awareness, and maintaining our ethical framework.

1. Sealift Redundancies

The United States currently has several redundancies for military sealift as well as prepositioned stock afloat. The U.S. Navy, in support of USTRANSCOM, moves most of the military equipment, but the Department of Defense, U.S. flagged commercial volunteers, and vessels in the Voluntary Intermodal Sealift Agreement are designated as alternative options. To increase readiness, those parties are working together through training scenarios. In 2021, "DoD, the Department of Transportation's Maritime Administration (MARAD), commercial sealift carriers, and maritime labor" conducted a tabletop exercise, reenacting the requirement to use commercial ships in support of the Department of Defense (DOD).[78] Even if China's influence does not close ports to U.S. access in the future, the DOD may still require commercial ships to move the large equipment volume in a crisis or contingency. Military Sealift Command has 17 prepositioned ships globally to support all branches of the Services.[79] While the prepositioned assets are essential for surging forces into a theater, the sustainment is for immediate and short duration. With sealift redundancies currently established, the United States must continue to exercise all alternate capabilities to increase readiness.

2. Partnerships

Guidance from the U.S. president, secretary of defense, chairman of the Joint Chiefs of Staff, and combatant commanders identified the requirement for strong alliances and partnerships. The *Interim National Security Strategy Guidance* stated that between our partnerships and making smart defense investments, "we will also deter Chinese aggression and counter threats to our collective security, prosperity, and democratic way of life."[80] The *National Mil-*

itary Strategy listed several mission areas including "reassur[ing] allies and partners and compet[ing] below the level of armed conflict."[81] Admiral Philip S. Davidson added to the importance of partnerships when he stated, "Persistent presence through forward-based and rotational joint forces is the most credible way to demonstrate our commitment and resolve to potential adversaries while simultaneously assuring allies and partners."[82]

The United States conducts global security cooperation and collaboration with partners and allies. Fusion centers are a way in which partners share information and combat national threats. The United States is currently a member of a fusion center that synchronizes efforts by Singapore, Australia, New Zealand, and other Association of Southeast Asian Nations to focus on countering terrorism.[83] Fusion centers like this will initially build collaboration and then continue to refine and enhance capabilities that are more focused on threats from nation-state threats, such as China. The United States is also a member of the Quadrilateral Security Dialogue (or the Quad), along with Japan, Australia, and India. The Quad convened for the fourth time in May 2022 to welcome the new joint initiative of "Indo-Pacific Partnership for Maritime Domain Awareness (IPMDA)."[84] The Quad Infrastructure Coordination Group also synchronizes national strategies to coordinate each nation's financial efforts toward sustainable infrastructure.[85]

The United States is also involved in several maritime partnerships. The International Maritime Security Construct involves the United States, the United Kingdom, and six other nations who ensure "freedom of navigation and the free flow of trade for legitimate mariners in the international waters of the Middle East region."[86] This is especially important because it shows a collaborative effort to ensure the free flow of goods and vessels through major choke points such as the Bab el-Mandab Strait and the Strait of Hormuz. Additionally, the United States, France, Australia, and the UK are all members of the Combined Maritime Forces, along with 29 other nations.[87] The force patrols international waters, upholds "International Rules-Based Order (IRBO)," and promotes security.[88]

The United States must assess current partnerships and look for ways to increase readiness. This can include multinational exercises that test the compatibility of systems and communication. The U.S. military should also train for contingencies, especially for force projection and sustainment with contested port access. To counter China's growing global influence, the United States must assess if current joint and multinational efforts are sufficient. An example of this was in 2021 with the creation of the Australia–UK–U.S., or AUKUS security pact. Through the pact, the United States shared nuclear-powered submarine technology with Australia, which will increase allied capabilities in the Indo-Pacific region.[89] The United States must continue to increase collaborative efforts to show a united front, such as with Rim of the Pacific (RIMPAC), the U.S. Navy's multinational exercise conducted every other year. In 2022, 26 nations participated in RIMPAC to display capabilities and promote a free and

open Indo-Pacific.[90] If the United States continues the exercises into the future with enhanced scenarios, the United States can unify a more lethal global force that is both trained on organic capabilities as well as prepared to coordinate and communicate with multiple naval forces.

3. Alternative Investment Options

Because the Maritime Silk Road plays to the personal appeals of developing nations who desire economic growth, it is difficult to persuade those nations to look at alternate options. The United States must use information operations to increase global awareness of alternate options required to counter China's loans. Australia, Japan, and the United States currently have a "trilateral investment initiative" operating in the Indo-Pacific region to support infrastructure needs.[91] This is important because China's current and future initiatives intend to support the Indo-Pacific region and gain more support to expand their influence. The United States, as a key player in the World Bank, has the power and opportunity to offer alternative options to the MSR that are sustainable for the economy and environment.[92] The United States should continue working with allies and partners to offer debt relief to BRI countries who risk defaulting on their payments.[93] This assistance opportunity would reduce the probability of a nation defaulting, resulting in China assuming majority or full port ownership.

The United States could specifically leverage the International Development Association (IDA), a component of the World Bank focused on providing zero- or low-interest loans and reducing inequalities.[94] While the United States and China are both members of the IDA, the United States could propose debt relief initiatives for a low-income nation as either a proactive measure against an MSR contract or as a reactive measure if an MSR nation requires refinancing. The United States is also a member of five MDBs, which include "the World Bank, Inter-American Development Bank, Asian Development Bank, the African Development Bank, and the European Bank for Reconstruction and Development."[95] The United States applies leadership through these banks by promoting transparency, advocating for grants, and adopting new lending policies that analyze results and performance.[96] The United States has the opportunity to continue encouraging changes to MDBs to instill strict standards that support developing nations and appeal to those experiencing financial struggle. In doing so, the United States maintains a competitive edge over China who attempts to bypass international norms.

The United States also has the largest economy in the world and there are opportunities to leverage that economic advantage.[97] The Better Utilization of Investments Leading to Development (BUILD) Act of 2018 creates the U.S. International Development Finance Corporation (IDFC) with the mission to "promote private investment in support of both U.S. global development goals and U.S. economic interests."[98] This opportunity expands options for the United States to invest in developing nations beyond the Overseas Private Investment Corporation, the predecessor to the new IDFC.[99] The BUILD Act differs

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from China's financing through mandatory reporting requirements and transparency. The act requires the IDFC to create desired development outcomes, measures of performance, and release of the assessments to the public through a database.[100] This formalized process shows that the United States wants to enhance developing nation capabilities, as well as adhere to international norms of transparency and feasibility assessments. The United States can present this loan option to counter MSR proposals.

4. Lethal Force: Research and Development

The 2018 *National Defense Strategy* described the need for a more lethal force, including technological innovation.[101] The United States can create a more lethal force by "increasing funding for federal research and development and boosting investment in basic science, technology, engineering, and mathematics (STEM) education."[102] Army Futures Command and Army Materiel Command continue to innovate and compare the required capabilities for the current and future scenarios in conflict and competition.

As China enhances their capabilities through multidomain operations (MDO), the United States must counter these enhancements. The U.S. goals are to be MDO-capable by 2028 and MDO-ready by 2035.[103] China is enhancing their capabilities in areas such as "artificial Intelligence (AI), hypersonics, robotics, and swarming."[104] According to the *2019 Army Modernization Strategy*, the Army assumes that the budget will remain flat in the future, but research and development will mature.[105] To counter threats to the United States, the Army's focus includes "long range precision fires, next generation combat vehicles, future vertical lift, network, air and missile defense, and soldier lethality."[106] These initiatives can counter China's increasing military capabilities and global influence through the Maritime Silk Road. As the Army surges energy and resources to modernize the force, there is risk to the readiness of the current force.[107] To ensure readiness, the military must continue to war-game all applicable contingencies, including contested waters and limited port access.

5. Increased Awareness

The information instrument of national power is essential to message joint initiatives and collaborate with partners and allies. The United States can aggregate data on Maritime Silk Road agreements and analyze that information to exploit malpractice and unethical standards, including bribery and other coercive influence tactics. The United States should work with that host nation and neighboring nations to share the information publicly, as a warning to others. Secondly, the United States can work with MDBs, such as the World Bank, to raise awareness and provide procurement guidance to developing nations that do not have enforceable guidelines.[108] In doing so, China will have less control in dictating the financial support and contract bidding process. Additionally, the United States should continue developing fusion centers that focus on sharing intelligence. The Counter-Terrorism Information Facility, hosted by Singa-

pore, is an example of a fusion center that works with the United States to share information.[109] The United States must enhance networking between allies and partners to deter Chinese aggression.

6. Ethics

The *Interim National Security Strategy Guidance* stated, "We will ensure that U.S. companies do not sacrifice American values in doing business in China."[110] Having a strong moral code and using ethics to drive decisions is how the United States maintains mutual trust with partners and allies. As examined earlier, China uses coercive influence techniques to manipulate developing nations. It would be easy for the United States to counter these actions in the same manner. What distinguishes the United States is the ethical decision making. The United States, like any nation, conducts operations that meet their national interests. Not every country, however, uses ethical business practices. By offering alternative financial options and enhancing partnerships to ensure mutual support, the United States maintains the mutual trust required to counter China's Maritime Silk Road and enable force projection

Conclusion

China is using their global power and economic strength to achieve their national objectives. As key terrain in the Indian Ocean becomes contested, the United States must use all instruments of national power to strengthen alliances and partnerships while countering Chinese port influence. At the current state, the Maritime Silk Road impacts the United States by reducing military operational security, altering port availability for force projection, and creating an unethical new norm for internationally financed projects. To counter such impacts, the United States must exercise sealift redundancies, implement alternate investment options, enhance military lethality, and increase global awareness, all while sustaining partnerships and maintaining a strong ethical framework. To achieve these recommendations, the United States must work as a united front in a whole-of-government approach. If the United States fails to act, support from partnered nations will decrease and China will increase their international control over financial procurement standards and infrastructure projects.

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EXHIBIT 82

U.S.-China Economic and Security Review Commission

Issue Brief

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LOGINK: Risks from China's Promotion of a Global Logistics Management Platform

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Table of Contents

Executive Summary....3
Introduction: From Physical to Digital Connectivity 4
LOGINK's Background and Evolution....4
  LOGINK's Development from a Domestic to International Platform 5
  LOGINK Advances Key CCP Objectives....6
China's International Promotion of LOGINK....8
Potential Impact on U.S. Commercial and Security Interests 10
Considerations for Congress....11

Executive Summary

As part of a broader effort to become a transportation superpower,* China aims to create an efficient, integrated platform for the transmission of logistics data called the National Transportation and Logistics Public Information Platform, branded as LOGINK. Beginning as a Chinese provincial initiative in 2007, LOGINK became part of a regional network in Northeast Asia in 2010 and a global platform after 2014. The state-sponsored and -supported platform has now expanded to partner with over 20 ports worldwide as well as numerous Chinese and international companies.

LOGINK provides users with a one stop shop for logistics data management, shipment tracking, and information exchange needs between enterprises as well as from business to government. China's government is encouraging global ports, freight carriers and forwarders, and other countries and entities to adopt LOGINK by providing it free of charge. In addition to offering LOGINK itself as a platform for data management, China is promoting logistics data standards that would support the platform's widespread use. A second generation of LOGINK, now under development, would offer a cloud-based suite of enterprise software applications, such as advanced data analytics and business partner relationship management tools. These upgrades would afford LOGINK even greater access to global commercial data, potentially giving China's government an unparalleled window into commercial transactions and trading relationships.

Widespread adoption of LOGINK could create economic and strategic risks for the United States and other countries. As with other Chinese entities sponsored or subsidized by the government, LOGINK could undercut U.S. firms that provide more innovative products at higher costs without state support. LOGINK's visibility into global shipping and supply chains could also enable the Chinese government to identify U.S. supply chain vulnerabilities and to track shipments of U.S. military cargo on commercial freight. Though LOGINK claims users can share only the data they want, the security of the platform is unclear. The Chinese Communist Party (CCP) could potentially gain access to and control massive amounts of sensitive business and foreign government data through LOGINK.

Background: Advances and Changing Market Dynamics in Logistics Technology

The transportation and distribution of goods involves a complex sequence of logistical tasks to ship items between manufacturers and warehouses, through ports and customs, to wholesalers, retailers, and ultimately to consumers. All of these steps involve transmission of data: key documents and information, such as bills of lading and customs approvals, follow goods along the supply chain. Until recently, the systems for transmitting this information relied on hardcopy paper and file storage, with processes and data fragmented by region and function.

Technical advances beginning in the mid-2000s made it possible to streamline dataflows and improve communication between partners within logistics networks.[1] The internet of things (IOT) enabled tracking of goods in international freight and customs using cloud computing, satellite navigation systems like the Global Positioning System (GPS), and connected technologies such as smart sensors and radio-frequency identification (RFID).[†] [2] Logistics paperwork also became far more efficient as businesses and customs agencies transitioned to online portals and other digital processes. Globally, standards-setting organizations facilitated the interoperability of these advances between countries.

Logistics business models continue to change today due to greater availability of data, the shift from brick-and-mortar retail to e-commerce, and supply chain disruptions from the novel coronavirus (COVID-19) pandemic.

* In 2019, China's government released a key document that essentially lays out a thirty-year plan to become an international leader in transportation, including innovation in transportation equipment and infrastructure as well as operation of transportation and logistics services. Chinese Communist Party Central Committee and State Council, *Logistics Superpower Construction Outline* (《交通强国建设纲要》), September 19, 2019. Translation. *http://webcache.googleusercontent.com/search?q=cache:WUS1w0i1QNEJ:www.gov.cn/zhengce/2019-09/19/content_5431432.htm+&cd=1&hl=en&ct=clnk&gl=us*.

† RFID technology identifies people and objects using radio waves and wireless devices called "tags." RFID readers transmit radio signals that activate tags, which in turn send data, such as location and package contents, back to the reader. The technology became commercially available in the 1970s but only become widespread in the 2000s with decreased equipment cost, improvements in performance, and unification of global standards. Chong Ryol Park and Ki Hwan Eom, "FID Label Tag Design for Metallic Surface Environments," *Sensors* 11:1 (January 17, 2011). *https://doi.org/10.3390%2Fs110100938*; Mario Cardullo, "Genesis of the Versatile RFID Tag," *RFID Journal* (April 21, 2003). *https://www.rfidjournal.com/genesis-of-the-versatile-rfid-tag*.

Startups are competing with conventional freight forwarding services—companies like DHL that arrange cargo for shippers—on a number of fronts, including more agile price quotes, efficient robot-run warehouses, and blockchain document validation.[3] Supply chain disruptions have also increased demand for supply chain visibility and intelligence services that allow customers to track production and anticipate delays. With venture-backed logistics technology platforms disrupting traditional freight forwarders, the market for these services may also be more susceptible to distortion at a time when China's government is intervening to support Chinese platforms and interests.

Introduction: From Physical to Digital Connectivity

China aims to become a transportation superpower, supporting its expanding global reach through the Belt and Road Initiative (BRI) and related efforts. These ambitions involve exercising substantial control or influence over the physical movement of goods around the world, including through ownership of key nodes in international transportation like ports and by accruing dominant market position in shipbuilding and shipping—goals Chinese firms have already reached or are rapidly making inroads toward achieving.[*] As part of its Digital Silk Road strategy, China also aims to control data and information flows that accompany the movement of goods. This includes the information and communications infrastructure that supports the global logistics industry as well as the software platforms and databases that track goods in transit and enable communication between different participants in a supply chain.

To increase China's influence in international logistics, China's Ministry of Transportation (MOT) is promoting a unified logistics platform formally called the National Transportation and Logistics Public Information Platform and abbreviated as LOGINK (for "logistics link"). Unlike shipbuilding, shipping, and port equipment—in which Chinese companies are competing for a share in well-established markets—logistics management platforms are a new and evolving service. China's state-funded effort to obtain first mover advantage could enable LOGINK to shape how the market evolves, setting the rules of the road in a way that favors Chinese firms and otherwise advances China's interests. It could also give China's government access to sensitive data, including commercial transport of U.S. military cargo, insight into supply chain vulnerabilities, and critical market information. All this could help Chinese firms compete on unequal footing in the nearly $1 trillion third-party logistics industry, in particularly the freight forwarding services market estimated at just under $200 billion.[4]

LOGINK's Background and Evolution

LOGINK is a logistics management platform that allows users to communicate and exchange documents and data with each other as well as look up information such as cargo location or price quotes from freight carriers.[5] It also facilitates customs clearance through the provision of cargo data, tariff code designations, and other relevant information. Operated by the Zhejiang Province Transportation Department, LOGINK is meant to be a "one stop shop" for the exchange of all logistics information (see Table 1).[6] It is subsidized by MOT and offered free of charge for participants in a supply chain, such as shippers and receivers, freight carriers, and port operators, but they must adopt LOGINK's standards to exchange data with the platform.[7] LOGINK also allows access to shared data on the platform by third parties, like information services that offer supply chain data analytics.[8]

LOGINK incorporates elements of "single window" or "single national window," a term used in international trade and customs to refer to a unified portal for electronic filing and exchange of information between businesses and a

[*] As analysts at the Center for Strategic and International Studies note, in 2019 Chinese companies controlled the second-largest global shipping fleet; produced over a third of ships and more than 80 percent of ship-to-shore cranes; and owned seven of the ten busiest ports in the world (including Hong Kong). Jude Blanchette et al., "Hidden Harbors: China's State-Backed Shipping Industry," *Center for Strategic and International Studies*, July 8, 2020. *https://www.csis.org/analysis/hidden-harbors-chinas-state-backed-shipping-industry*.

government.[*] [9] However, its scope of information exchange and its geographic ambitions extend far beyond comparable single window systems.

Table 1: Information Flows Enabled by LOGINK as of 2018*

Direction of Information Flow	Types of Information Exchanged
Government to business (G2B)	• *Vessel and cargo status:* Tracking and schedule data for ocean carriers, railway, air freight, and trucks; entry and exit status for cargo in ports, warehouses, and other hubs; customs, quarantine, and inspection status of cargo; etc. • *Corporate registries and due diligence:* Business registration, credit, regulatory compliance, and violation information; drivers' licenses and permit information for truck fleets; etc. (15 databases total) • *Transit conditions:* Road, waterway, and rail conditions; information on delays at ports and in drayage; etc. • *General information:* Policies, regulations, standards, and statistics from governments and industry associations.
Business to government (B2G)	• Customs clearance • Other regulatory information, such as declarations on hazardous materials • Electronic way billing for port authorities and railway • Geolocation data (e.g., on trucks[†]) from satellite navigation systems and sensors
Business to business (B2B)	• Electronic booking (e.g., for freight forwarding services) • Price inquiries and freight price indices[‡] • Financing and insurance • Billing and payment • Search for services on the platform • Document exchange

* G2B sources taken from LOGINK's 2018 data catalogue, the most current publicly available.
Source: Various.[10]

LOGINK's Development from a Domestic to International Platform

LOGINK began as an initiative to reduce logistics costs in the wealthy coastal province and commercial hub Zhejiang, home to e-commerce giant Alibaba.[11] Since its launch in 2007, LOGINK has evolved through three phases: an initial phase focused on standardizing domestic logistics across provinces from 2007 to 2012; an intermediate phase focused on regional integration with ports primarily in Northeast Asia from 2010 to 2016; and a period of international expansion beginning in 2014. Beyond international expansion, LOGINK's intended future involves offering a wider variety of utilities through the platform, potentially disrupting or capturing a greater share of the nearly $200 billion freight forwarding market and related services and gaining access to a wider variety of data.[12]

[*] China has a separate single window for customs called China E-Port that began development in the late 1990s and was unveiled in 2000. E-Port windows for major Chinese ports, such as Ningbo, link directly to LOGINK. United Nations Economic and Social Commission for Asia and the Pacific Committee, "Regional Study: The Use of Logistics Information Systems for Increased Efficiency and Effectiveness," July 4, 2016, 14–20, 247. *https://www.unescap.org/resources/regional-study-use-logistics-information-systems-increased-efficiency-and-effectiveness*.

[†] According to LOGINK, the platform provides the satellite position data of more than five million freight trucks. LOGINK, "Tracking Data" (跟踪数据). Translation. *https://webcache.googleusercontent.com/search?q=cache:gXlrhu2J5iUJ:https://www.logink.cn/col/col173/index.html&cd=2&hl=en&ct=clnk&gl=us*.

[‡] Some of these indices are aggregated from enterprises but provided by a government platform, such as China's National Road Freight Transport Price Index System, which is maintained by MOT.

1. *Domestic standardization*. As international logistics was transitioning from analog to digital and becoming more streamlined in the mid-2000s, fragmentation of logistics processes was especially acute in China.[13] To address this, numerous provinces had launched their own attempts to digitize truck fleet tracking and regulatory filings. LOGINK unified these concurrent efforts by standardizing document and data formats.[14] In 2008, 15 provinces joined Zhejiang's platform, and between 2009 and 2012 MOT established a plan to expand the platform nationally.[15] As LOGINK evolved, it also developed functionalities enabling firms to submit various regulatory documents through a unified portal, rather than separately with different agencies and local governments throughout China.[16]
2. *Regional integration*. MOT developed LOGINK from a primary focus on tracking domestic truck fleets in China to encompass regional ocean shipping beginning in 2010 with its integration in the launch of the Northeast Asia Logistics Information-Sharing Network, or NEAL-NET. [17] Established to promote logistics data exchange among China, Japan, and South Korea, NEAL-NET initially shared information on container ships in Ningbo-Zhoushan Port in Zhejiang Province; Tokyo-Yokohama Port, Japan; and Busan, Korea.[18] By 2016, it had expanded to 11 Chinese ports, 5 Japanese ports, and 3 South Korean ports.[19] Through integrating with NEAL-NET, LOGINK linked to public logistics platforms in Japan and South Korea, necessitating interoperable standards for exchanging bills of lading and other information.[20] Regional multilateral institutions further helped LOGINK and NEAL-NET grow their international footprint beyond the three participating countries. For instance, in 2013 the Asian Development Bank extended a $400,000 grant used to employ outside experts, including European consultants who developed draft standards for LOGINK to submit to the International Organization for Standardization (ISO).[*] [21]
3. *International expansion*. In 2014, the year after BRI was launched, China's central government made international logistics information exchange a policy priority in its Medium and Long-Term Development Plan for the Logistics Industry (2014–2020).[22] MOT has since expanded LOGINK's international purview considerably through partnerships with global ports, intergovernmental shipping organizations, and logistics companies. Following the 2014 plan, MOT and other Chinese agencies and firms also began participating in international standards development fora to improve the compatibility of LOGINK's messaging and data formats with international intelligent transport system standards.[23] (See "China's International Promotion of LOGINK" below.)

Going forward, MOT envisions LOGINK becoming even more of an integrated solution for all manner of commercial logistics needs. In a 2015 presentation on LOGINK to the UN Economic and Social Commission for Asia and the Pacific (UNESCAP), a researcher at MOT's internal think tank indicated the platform would become a "Business Process as a Service" (BPaaS), a cloud-based software platform that allows users to manage numerous aspects of their business through one portal.[24] The next generation of LOGINK would offer a suite of software applications, such as partner lifecycle management, settlement with transport providers, and even contingency planning tools that allow users to project various future scenarios.[25] Such services would potentially put LOGINK in competition with many private sector firms, including U.S. freight forwarders, supply chain visibility platforms, and various logistics data analytics and enterprise resource planning (ERP) startups.

LOGINK Advances Key CCP Objectives

The development and international expansion of LOGINK advances several broader and overlapping Chinese policy initiatives, including BRI and the Digital Silk Road, China's goal of becoming a transportation superpower, the "going out" of Chinese firms, and promotion of Chinese technical standards internationally.

- *BRI and the Digital Silk Road*. Often called CCP General Secretary's Xi Jinping's signature foreign policy initiative, BRI aims to create a global commercial and political order centered around China by financing and building infrastructure connecting the world to China.[†] Launched in 2013 with an initial focus on

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[*] ISO develops and publishes interoperability standards used internationally. Headquartered in Geneva, Switzerland, it counts 166 member countries as of 2022. International Organization for Standardization, "Members." *https://www.iso.org/members.html*.

[†] For more background on BRI, see "Belt and Road Initiative" in U.S.-China Economic and Security Review Commission, *2018 Annual Report to Congress*, 259–303. For more background on China's attempts to influence global governance through BRI, see "The China Model: Return of the Middle Kingdom," in U.S.-China Economic and Security Review Commission, *2020 Annual Report to Congress*, 80–135.

Eurasia and the Indo-Pacific region, BRI has now expanded to include economic corridors or passages on all continents. The Digital Silk Road is one such corridor, but rather than a specific geographic focus, it aims to foster export markets for Chinese tech firms and increase the adoption of Chinese technical standards and governance norms globally.[26] LOGINK's international expansion advances the goals of BRI and the Digital Silk Road in several respects. First, China's government is promoting LOGINK as a model for other countries to develop similar platforms and adopt LOGINK's standards, more deeply integrating their trade with China.[27] Second, connecting more BRI countries to LOGINK will allow China's government to access data on those countries' logistics systems, giving it greater visibility into and potential influence over global supply chains.[28] Third, Chinese logistics providers and related services will be more easily able to enter markets that have adopted Chinese technical standards (see "Promotion of Chinese technical standards" below).

- *Transportation superpower*. In 2019, the CCP and China's State Council issued a sweeping nine-point plan for China to become a world leader in domestic infrastructure, transportation equipment, and global connectivity by 2050.[29] LOGINK dovetails with two pillars of the plan in particular: (1) developing smart transportation systems, including setting standards in intelligent logistics networks, integrating smart warehouses into logistics platforms, and promoting BeiDou Satellite Navigation System, China's state-backed alternative to GPS; and (2) increasing China's maritime, rail, and air connection to international shipping hubs as well as China's influence in global governance related to international shipping.[30] Efficiency improvements in domestic transport from LOGINK are also vital to China's strategy to retain China's global manufacturing position, as the government hopes to offset rising factory wages by reducing logistics costs in the price of exports.[31]
- *Going out of Chinese firms*. Since the late 1990s, China's government has provided extensive support for Chinese firms, particularly state-owned enterprises (SOEs), to expand business beyond China's borders.[32] LOGINK continues this trend in providing a government-funded platform that connects China to ports and other hubs throughout the world. In particular, LOGINK works with major Chinese SOEs, namely China Ocean Shipping Company (COSCO) and China Merchants Group, a logistics conglomerate under MOT that includes freight forwarder SINOTRANS and port operator China Merchants Port Holdings.[33] LOGINK also supports the expansion of nonstate e-commerce platforms and logistics companies beyond China's borders, for instance partnering with Alibaba and its logistics arm Cainiao to develop a blockchain bill of lading system.[34] Given MOT's vision for the platform to incorporate an array of cloud-based software applications, LOGINK could also become a vehicle for Huawei, Aliyun (Alibaba's cloud service), and other Chinese cloud providers to expand their international services.
- *Promotion of Chinese technical standards*. China's government aims to build export markets for Chinese goods and services by influencing technical standards-setting fora in ways that favor Chinese firms, consistent with its China Standards 2035 Strategy.[*] Though logistics standards are mostly data and document formats and are seldom associated with high-value intellectual property,[†] their widespread adoption can still confer tremendous commercial advantages.[35] International ports' use of data exchange standards interoperable with LOGINK paves the way for Chinese logistics firms such as Cainiao and SINOTRANS to access new markets. Interoperability with Chinese services also helps expand China's

[*] China's 2035 strategy seeks to position Chinese firms and research institutes to set foundational rules governing next-generation technologies such as artificial intelligence, quantum information, and biotechnology. The plan itself is not public, but in October 2021 the CCP Central Committee and State Council released an outline of the strategy. According to the American National Standards Institute, a private nonprofit organization that oversees development of voluntary U.S. standards and conformity assessment and represents U.S. industry in standards-setting organizations, China has had roughly a 50 percent overall success rate in proposals submitted to ISO and thus far has not submitted many standards that align with the advanced technologies targeted in the outline. American National Standards Institute, "Comments of the American National Standards Institute on FR Doc. 2021-24090, Request for Information on the Study on People's Republic of China (PRC) Policies and Influence in the Development of International Standards for Emerging Technologies," *National Institute of Standards and Technology*, December 6, 2021, 9. *https://www.regulations.gov/comment/NIST-2021-0006-0013*.

[†] By contrast, technical standards for international telecommunications, such as the specifications for fifth-generation wireless (5G) devices, are associated with standard-essential patents. These provide the patent holder substantial licensing revenue, as any firm using the specification to design 5G devices must pay royalties on the underlying intellectual property. Qualcomm Incorporated, "Annual Report Pursuant to Section 13 Or 15(D) of the Securities Exchange Act of 1934 for the Fiscal Year Ended September 27, 2020," *U.S. Securities and Exchange Commission*, November 2, 2020, 12–13. *https://www.sec.gov/Archives/edgar/data/804328/000172894920000067/qcom-20200927.htm*.

export markets through cost and time savings. For example, streamlined logistics from a factory in China to a European wholesaler may make the difference between the wholesaler buying from China or from a supplier within the eurozone. Additionally, greater influence in intelligent logistics standards could also enable Chinese firms to make inroads in setting standards for adjacent technologies that have valuable intellectual property, like smart sensors and satellite positioning systems.[36]

- *Potential access to and utilization of shipping, customs, and logistical data*. State control of the LOGINK platform potentially provides the CCP access to all data collected and stored on the platform. These data would enable the Chinese government to gain insights into shipping information, cargo valuations via customs clearance forms, and destination and routing information. This would provide considerable economic and intelligence insights for the government.

China's International Promotion of LOGINK

LOGINK has expanded its global remit considerably since China's government announced plans to promote the platform internationally in 2014. It has cooperation agreements with at least 24 ports, freeports, and port operators outside of China, including twelve in Asia, nine in Europe, and three in the Middle East (see Table 2). In addition to cooperation with ports and port operators, LOGINK's expansion has occurred through partnerships with major international logistics firms, both Chinese and non-Chinese, as well as participation in international organizations like UNESCAP. Among these are standards-setting bodies like ISO, which LOGINK is using to increase its ease of adoption in more advanced economies and to steer the direction of logistics development in emerging economies.

- *Cooperation with ports*. LOGINK's cooperation with ports and port operators has focused chiefly on sharing vessel and container status, improving the platform's ability to monitor cargo movement globally. Several of LOGINK's cooperation agreements are also explicitly intended to be footholds for regional expansion. A letter of intent with Port Klang in Malaysia notes the agreement is part of a broader effort to promote information exchange in ASEAN.[37] Similarly, a cooperation protocol with the Port of Sines and Algarve Authority in Portugal indicates information exchange and process streamlining is "a further step in reinforcing Sines as the Atlantic hub of the New Maritime Silk Road."[38] Both the agreement with Sines and an agreement with Maqta Gateway in Abu Dhabi—LOGINK's first in the Middle East—indicate that other countries see connectivity with LOGINK and visibility into Chinese port status as means to boost trade with China.[39] Aside from strengthening data exchange and trade ties, LOGINK's agreements with port operators in Odessa and Haifa include cooperating on the blockchain bill of lading system with Alibaba, noted above.[40]

Table 2: LOGINK's Cooperation Agreements with International Ports*

Port	Year Cooperation Initiated	Notes
Tokyo-Yokohama, Japan	2010	Part of NEAL-NET
Busan, South Korea	2010	
Kawasaki, Japan	2012	
Osaka, Japan	2012	
Kobe, Japan	2012	
Incheon, South Korea	2012	
Gwangyang, South Korea	2012	
Yokkaichi, Japan	2015	
Niigata, Japan	2015	
Ulsan, South Korea	2015	
Pyeongtaek, South Korea	2015	
Klang, Malaysia	2017	Agreement indicates the exchange is intended to promote greater connectivity throughout ASEAN
Sines, Portugal	2017	Cooperation agreement references BRI
Barcelona, Spain	2017	

Abu Dhabi, United Arab Emirates (UAE)	2017	Cooperation agreement notes UAE intent to trade more with China
Antwerp, Belgium	2017	
Jebel Ali, Dubai, UAE	2017	Linked through Maqta Gateway, a port community system based in Abu Dhabi
Odessa, Ukraine	2018	Includes blockchain bill of lading initiative
Haifa, Israel	2018	Includes blockchain bill of lading initiative
Freeport of Riga, Latvia	2018	Also a sister port to Shenzhen
Ventspils, Latvia	2018	
Rotterdam, Netherlands	2019	Agreement mentions cooperation on standards
Hamburg, Germany	2019	
Bremen, Germany	2019	

* Cooperation includes agreements with port authorities and community system operators. For instance, LOGINK's cooperation with Rotterdam is facilitated by an information exchange agreement with Portbase, a port community system operator. Portbase, "Cooperation Agreement between Portbase and LOGINK," November 11, 2019. *https://www.portbase.com/en/cooperation-agreement-between-portbase-and-logink/.*
Source: Various.[41]

- *Partnerships with companies*. LOGINK partners with numerous Chinese firms, including SOEs and nonstate logistics startups, but a few key partnerships have vastly increased the platform's scope and access to data. Chief among these is a data sharing arrangement with CargoSmart, a shipping management software provider, signed in 2016.[*] After the agreement to exchange ship, booking, and customs data, domestic Chinese news sources reported that LOGINK had access to data on live movements of more than 90 percent of the world's container ships through CargoSmart.[42] Another key partnership is LOGINK's integration with Cainiao, given its network of more than 200 warehouses globally.[43] In the past few years, Cainiao has focused on expansion in Europe, building a major hub at Liège Airport in Belgium; launching regional warehouses in Madrid, Paris, Bremen, and Rome and announcing plans for several more in late 2021; and establishing an intra-Europe trucking fleet and system of delivery lockers throughout Europe.[44] Where many of LOGINK's initial partnerships focused on conventional logistics (i.e., containers rather than parcels), information exchange with Cainiao provides LOGINK a comprehensive view of China's cross-border e-commerce transactions and transactions. In so doing, it positions LOGINK to adapt to changes in logistics services as the industry evolves to accommodate the rise of e-commerce and decline of traditional wholesale and brick and mortar retail.
- *Participation in international organizations and standards-setting bodies*. LOGINK's participation in well-established global fora appears aimed chiefly at increasing potential partners and joining standards-setting efforts to improve its interoperability with other platforms. In April 2022, it joined a proof-of-concept project that will link some 70 ports and 10 airports, allowing them to share vessel and container status. Participation in the project, called the "Network of Trusted Networks" and launched by International Port Community Systems Association (IPSCA), could more than double LOGINK's cooperation with global ports.[†] [45] LOGINK is also contributing to an associated ISO standard for "visibility data interchange between logistics information service providers" currently under development.[46] In contrast to its participation in fora serving more advanced economies, China has tried to set the regional agenda for logistics standards development in Asia. For instance, from 2012 to 2016 the Chinese government funded

[*] CargoSmart is a subsidiary of Orient Overseas (International) Limited (OOIL), which was acquired by COSCO in 2018. COSCO Shipping, "OOIL Recorded a Net Profit Attributable to Shareholders for 2019 of US$1.3 Billion and Its Recurring Net Profit Significantly Increased by 80% Year-on-Year," March 25, 2020. *https://en.coscoshipping.com/art/2020/3/25/art_6923_152933.html.*

[†] IPSCA is an international organization composed of port authorities, port community system (a type of platform for facilitating communication between public and private entities using the port) operators, and single window operators. Established in 2011 as a European economic interest grouping—an unincorporated not-for-profit association of entities working across borders in the EU—it counts 48 full members and four associate members as of September 2022. While most IPSCA members hail from Europe and North America, the organization expanded in 2014 to include operators from all other major regions around the globe. During this expansion, the association also began to participate in standards work with various UN bodies, the World Customs Organization, and ISO, among other standards-setting bodies. International Port Community Systems Association, "The History of IPCSA," 2021. *https://ipcsa.international/about/the-history-of-ipcsa/*; John Kerkhof, "Port Community Systems – Port Authority Perspectives, Challenges and Expectations," *IPCSA*, September 13, 2016. *https://erticonetwork.com/wp-content/uploads/2016/09/6.-John-Kerkhof-.pdf.*

a UNESCAP project on regional logistics integration. For the project, UNESCAP hosted a series of seminars, mostly in China, to showcase LOGINK and encourage other East Asian countries to build similar national logistics platforms and adopt LOGINK and NEAL-NET standards.[47] To date, Malaysia's Port Klang is the only East Asian port cooperating with LOGINK outside of NEAL-NET, but the UNESCAP project follows China's well-established strategy of coopting UN agencies and other international organization to advance the CCP's agenda.[*]

Potential Impact on U.S. Commercial and Security Interests

Widespread use of LOGINK could expand the Chinese government's power and influence and pose commercial and strategic risks to the United States. It could also threaten users' data security and position China to shape data governance norms in ways that run counter to U.S. interests.

Commercial risks

- LOGINK's aggregation of global commercial data could provide an informational edge, further enabling Chinese firms to compete on unfair footing. If LOGINK makes data on global transactions available to Chinese entities free or for less cost than it provides them to other users, or if it only provides certain data to Chinese entities, these entities may be able to act with an unfair advantage on international market trends ahead of other firms. For instance, if LOGINK tracked increasing export orders from a non-Chinese vendor for a product that Chinese planners had hoped to export more, the Chinese government could use the information to attempt to undercut the non-Chinese vendor. If LOGINK becomes a full-fledged marketplace, matching importers with exporters and logistics companies, it could also skew the data it provides to bias users toward selecting Chinese providers.
- The Chinese government's subsidization of LOGINK and LOGINK's partnership with Chinese firms, such as logistics provider Cainiao, could undermine the development of more innovative U.S. logistics technology companies.
- China's government may use insights gleaned from LOGINK to expand and more precisely target its use of economic coercion. Data aggregated through the platform may enable China to block or disrupt trade flows to countries or entities in retaliation for expressions of support for Taiwan, statements of opposition to China's repression of civil liberties in Hong Kong or mass detention of Uyghurs, and other opinions contrary to the CCP's official narrative.

Strategic risks

- Shipping information from sources like LOGINK could provide Chinese military planners with trends and early warnings for U.S. logistics, as the U.S. Department of Defense uses commercial transportation and ports around the world to ship military equipment. Commenting on BRI, a spokesman for the U.S. Transportation Command stated, "China is seeking to enhance its visibility into the global supply chain, including U.S. military logistics."[48]
- Chinese control over shipping information in LOGINK could also enable Chinese military planners to conceal PLA actions and disrupt U.S. military operations. As U.S. Naval War College assistant professor Isaac Kardon explains, "If you control the information, you can move things around without others knowing, or jumble up someone else's information."[49]

[*] For more on China's influence in the UN, see "The China Model: Return of the Middle Kingdom," in U.S.-China Economic and Security Review Commission, *2020 Annual Report to Congress*, 80–135. For a list of Chinese nationals in leadership position in international organizations, see U.S.-China Economic and Security Review Commission, "PRC in International Organizations," July 18, 2022. *https://www.uscc.gov/research/prc-international-organizations*.

- In their discussions of establishing "strategic strong points" or military support facilities abroad, Chinese military strategists consider "intelligence monitoring" to be one of six key lines of effort.* [50] Depending on how LOGINK is configured, connects to port networks, and is managed, the platform could provide a source of data and surveillance in peacetime as well as vulnerability for the Chinese military to use to coerce or disrupt port operators during a crisis or conflict. In particular, visibility into global shipping data gained through LOGINK could enable the interdiction or disruption of U.S. operations or actions, including foreign military arms and munitions sales (such as to Ukraine or Taiwan), movement of U.S. military forces, or the sustainment of U.S. overseas strategic, military, intelligence, or other operations.

Data security risks

- The security of LOGINK is unclear, and the sponsorship of the platform by the state raises significant concerns. The platform could share data without users' permission, including confidential business data. China's 2017 Intelligence Law requires any Chinese citizen or organization to "support, provide assistance, and cooperate in national intelligence work," suggesting the Chinese government could legally compel the platform to share data it deemed a matter of national intelligence.[51] Moreover, the law forbids disclosing that any support was provided to Chinese intelligence services.[52] Additionally, since at least 2015, CCP media and commissions have called for the inclusion of "reserved interfaces," or backdoors, that could provide access to transportation, information, and communication infrastructure.[53] Even if the LOGINK platform is not intentionally set up to allow unauthorized access, Chinese software products provided by other vendors often show indications of insecure software development practices. For instance, a 2019 investigation of Huawei firmware and software by Ohio-based cybersecurity firm Finite State found hundreds of potential vulnerabilities.[54]
- In gaining a bigger market share and taking an active role in standards-setting bodies, LOGINK is also positioning the Chinese government to have greater influence in data governance norms.† China's promotion of LOGINK within Asia has been more assertive in attempting to steer regional development. The growing predominance of LOGINK and related technical standards may allow the Chinese government to advance its restrictive approach to data governance. Similarly, adoption of LOGINK in emerging economies may foster greater reliance on China-headquartered cloud computing services and other firms to provide digital infrastructure.

Considerations for Congress

China's development and state sponsorship of a unified logistics management platform occurs in a global context that supports its rapid growth. Logistics data standards have moved to greater openness and exchange with technology improvements in satellite navigation, connected technologies, and cloud computing. There are clear benefits to this model: provided data is exchanged securely, ready communication between logistics partners improves efficiency, reduces transportation costs and emissions, and enables businesses and customers to anticipate and plan for disruption. However, the open system has evolved without considering control of data and information or the strategic implications of providing a global view of shipping routes and commerce to potential adversaries.

Given the CCP's clear ambitions of increasing global reliance on China and reducing external dependence, the United States should be wary of embracing China's unbridled participation in global logistics data exchange. Congress can help safeguard U.S. interests by identifying and addressing gaps in U.S. policy to respond to China's

* "Strategic strong points" are not limited to military bases and include overseas ports that may provide support for overseas military operations. In addition to intelligence monitoring, other lines of effort for these strong points are comprehensive replenishment, naval ship repair, maritime rescue, medical assistance, and maritime rights protection. Conor Kennedy, "Strategic Strong Points and Chinese Naval Strategy," *China Brief*, March 22, 2019. *https://jamestown.org/program/strategic-strong-points-and-chinese-naval-strategy/*.

† For more on China's data governance regime, see Emma Rafaelof, "China's Evolving Data Governance Regime," *U.S.-China Economic and Security Review Commission*, July 26, 2022. *https://www.uscc.gov/sites/default/files/2022-07/Chinas_Evolving_Data_Governance_Regime.pdf*.

promotion of LOGINK, raising awareness of its risks, and working with the executive branch to better understand its capabilities and development. The following considerations may merit congressional attention:

- The adoption of LOGINK by ports around the world could subject U.S. military logistics to more surveillance by Chinese intelligence and military operators, increasing the difficulty for U.S. Department of Defense planners to maintain secrecy in movements and constraining options for ports deemed safe from such surveillance.
- Information security requirements for U.S. facilities and businesses involved in logistics networks are limited in scope, are seldom binding, and do not address risks from aggregation of data across multiple sources. Current U.S. regulatory requirements for data and information security in U.S. ports focus on preventing unauthorized access to controlled networks but do not establish principles for transfer and storage of data or prescribe categories of sensitive data.[*] Chinese shipping firm COSCO, a LOGINK partner, currently operates terminals at Long Beach, Los Angeles, and Seattle, potentially granting LOGINK a window into vessel, container, and other data at those ports.[55] Additionally, the Port of Los Angeles is a members of IPSCA and may potentially share data with LOGINK through IPSCA's Network of Trusted Networks currently under development.[56]
- China's subsidization and promotion of a nominally public good in a private market could undermine the dynamism of comparable U.S. services. The United States lacks tools to address market distortions from Chinese digital services. While antidumping and countervailing duties enable the United States to respond to subsidized goods, the U.S. government does not have comparable tools to respond to digital services offered when the price is below market value.
- The United States is engaged in a number of trade negotiations, including through the Indo-Pacific Economic Framework (IPEF). One of the pillars of the IPEF will include efforts to promote "trade facilitation," which would include steps to promote customs clearance and logistical streamlining. Congress may want to evaluate how the utilization of LOGINK by IPEF countries would impact U.S. interests.

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EXHIBIT 83

Exhibit Not Used

EXHIBIT 84

An official website of the United States government Here's how you know

U.S. NAVY'S

SEALIFT PROGRAM (PM5)

More than 90 percent of U.S. war fighters' equipment and supplies travels by sea.

Our Sealift Program (PM5) program provides high-quality, efficient and cost-effective ocean transportation for the Department of Defense and other federal agencies during peacetime and war. More than 90 percent of U.S. war fighters' equipment and supplies travels by sea. By DOD policy, MSC must first look to the U.S - flagged market to meet customer sealift requirements. Government-owned ships are used when suitable U.S.-flagged commercial ships are unavailable.

SHIP TYPES

Air Force ships place ammunition and supplies for their prepositioning program.

Army Prepositioned Stock-3 ships strategically place U.S. Army combat equipment at sea to supply and sustain deployed U.S. troops during national crises. Five of the APS-3 ships are government-owned cargo ships, called large, medium-speed, roll-on/roll-off ships, or LMSRs. Each ship has a cargo-carrying capacity of more than 300,000 square feet.

LMSRs are ideal for the rapid loading and off-loading of Army wheeled and tracked vehicles, as well as other outsized Army equipment. A series of internal and external ramps makes this possible, and shipboard cranes allow cargo to be lifted without relying on local port infrastructure. In addition to LMSRs, APS-3 ships include two container ships that store ammunition at sea for the Army.

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With a shrinking U.S. merchant fleet, the importance of ready and available surge vessels increases each year. The **Ready Reserve Force**, owned and maintained by the Maritime Administration, provides a resource to offset the shortage of militarily useful U.S.-flagged ships. The RRF consists of fast sealift ships, roll-on/roll-off ships, lighter aboard ships, heavy lift ships, crane ships and government-owned tankers. Maintained in four-, five-, 10- or 20-day readiness status, these ships are activated when needed, fully crewed and placed under the operational control of MSC in support of U.S. wartime, humanitarian and disaster-relief operations. RRF ships are also used for some military exercises.

Air Force Containers

MV MAJ Bernard F. Fisher

MV CAPT David I. Lyon

Army Containers

MV SSG Edward A. Carter, Jr.

MV LTC John U. D. Page

Large, Medium-Speed Roll-on/Roll-off

USNS Charlton

USNS Pomeroy

USNS Red Cloud

USNS Soderman

USNS Watkins

USNS Watson

EXHIBIT 85

Boxed In at the Docks: How a Lifeline From China Changed Greece

When Chinese shipping giant Cosco snapped up the historic port of Piraeus, it threw Greece an economic lifeline. Now the port's success is reshaping the Greek political landscape—and generating choppy waters for China in Europe.

BY **VIVIENNE WALT**

July 22, 2019 at 4:30 AM EDT

A container pier at Piraeus. Since Cosco installed state-of-the-art cranes, the port's annual cargo processing rate has increased more than fivefold.

ALFREDO D'AMATO—PANOS PICTURES FOR FORTUNE

On a steamy night earlier this summer, about a thousand people poured into a public square in Athens to cheer on Greece's leading left-wing politician, Alexis Tsipras. Tsipras was in the waning weeks of his term as Prime Minister—and trailing in a race against a pro-business opponent.

Leaping onto a makeshift stage in front of a banner reading "We have the power," Tsipras shouted over the crowd. "This is a battle between two worlds, the elites against the many!" Then he took aim at foreign companies eyeing investment prospects in Greece, one of the countries hardest hit by Europe's long financial crisis. "We have managed to get back to growth after eight straight years of recession," Tsipras said. "Electricity, health, education, water, energy—they are not for sale!"

The promise to keep the country's state-owned assets in Greek hands elicited a deafening roar. And yet Tsipras didn't mention the most prized Greek asset of all: the port of Piraeus. Situated at the edge of Athens—a short sail from the Middle East and Africa—the port has been a strategic jewel for nearly 2,500 years, ever since the Athenians and Spartans defeated the Persian emperor in a nearby sea battle for Mediterranean supremacy. But as the crowd in the square knew, Tsipras's own government had sold off Piraeus, years earlier, to a modern-day empire intent on expanding its own power: China.

When Chinese President Xi Jinping unveiled the ambitious vision he called the Belt and Road Initiative, or BRI, in 2013, he had commerce, not conquest, in mind. Xi announced that China would build a network of highways and rail lines (the "belt") and sea routes (the "road") across thousands of miles, linking Asia to Europe and Africa. The idea was to re-create the old Silk Road—the trade routes between East and West that were the foundations of the world's first truly global commerce. The ultimate strategic goal: to expand and solidify a web of trading relationships that would cement China's position as a dominant economic and political power for decades to come.

Piraeus has become a showcase display of the BRI in action—a project capable of transforming not just one port but perhaps an entire economy. It's also an object lesson in the ways China's biggest companies both execute and benefit from the BRI. The port has been majority-owned since 2016 (and operated since 2009) by China Cosco Shipping—a state-owned giant established nearly 60 years ago by Communist founding father Mao Zedong.

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When Cosco stepped in, Piraeus "was a pretty backward container terminal that nobody took seriously," says Olaf Merk, the ports and shipping expert at the International Transport Forum at the Organization for Economic Cooperation and Development (OECD). "China saw an opportunity that was underdeveloped." New management has brought dizzying change: This year, the port will handle five times as much cargo volume as it did in 2010, according to the Piraeus Port Authority. And it's on track to become the biggest container port in the Mediterranean, perhaps as soon as this year, overtaking Valencia in Spain.

Cosco, meanwhile, has undergone its own rapid growth, thanks in large part to the BRI and to substantial Chinese government support. After several mergers with other transport companies, Cosco is now the third-biggest shipping company in the world by volume, with $43 billion in revenue—and significant stakes in other ports that ring Europe.

In recent years, China has trumpeted Piraeus as a model for what the BRI can achieve. And its impact is visible throughout Athens: in more jobs at the port, in Chinese-language advertisements for local real estate, and in plans to remake Piraeus as a tourist destination for the burgeoning Chinese upper classes.

But Piraeus's revival also coincides with growing doubts in Europe about the strings attached to Chinese investment—as leaders question whether its sheer scale is a threat to Europe's sovereignty, and perhaps even its security. Already, the political landscape in Greece has shifted in ways critics see as too friendly to China. Chinese naval vessels have docked at Piraeus—raising hackles at NATO, of which

Greece is a member. This spring, as Xi toured the continent to stump for the BRI, European Union leaders issued a tough statement that for the first time called China a "systemic rival" whose political values—a centralized government with no tolerance for dissent, run by a leader with a lifelong grip on power—clash with Europe's own.

The EU also called out Chinese state-owned enterprises like Cosco for having unfair advantages over the continent's own private-sector companies. "The balance of challenges and opportunities presented by China has shifted," the EU statement warned. Whether that balance should still tip toward cooperation is a debate now playing out on Piraeus's docks.

When Westerners think about competition with China, the conversation often involves advanced technology—think artificial intelligence or 5G Internet. But the BRI underscores the importance of the infrastructure of trade itself: railways, roads, harbors. Ports may be the most vital link in that network. Roughly 90% of goods traded internationally makes its way around the world by sea. Control the shipping lanes and ports, and you wield great power over the global economy. "Xi thought, 'What will my legacy be?' " says Nicolas Vernicos, a fourth-generation Greek shipowner and vice chairman of the Silk Road Chamber of International Commerce, a trade organization headquartered in China. "He decided to be the Marco Polo of the 21st century."

If completed, the BRI will be one of history's biggest infrastructure projects. Already Chinese companies are laying highways, operating ports, and creating railway networks in as many as 60 countries as varied as Sri Lanka, Malaysia, and Kazakhstan. Chinese government spending and subsidies keep the shovels moving. The Council on Foreign Relations estimates that China has spent about $200 billion on BRI projects so far; that investment could reach $1.2 trillion by 2027, according to Morgan Stanley. The result, Xi said in 2015, will bring "a real chorus comprising all countries along the route, not a solo for China."

European voices make up only a small share of the chorus so far: The biggest BRI projects are underway in Asia and Africa. But outside of the BRI, Europe has seen Chinese investment rise quickly. With most EU economies still sluggish in the

aftermath of the financial crisis, and heavy debt loads restraining government spending, Chinese companies have filled a void.

Indeed, as trade tensions impair China's ability to invest in the U.S., Europe now accounts for almost a quarter of China's direct foreign investment—about $22 billion in the first half of 2018, according to law firm Baker McKenzie. State-owned ChemChina bought Swiss agribusiness giant Syngenta in 2017, for $43.1 billion. In 2016, China's Midea spent $5.3 billion to buy German robotics manufacturer Kuka—which, among other things, keeps Volkswagen's factories ticking. Technology player Huawei, which the Trump administration has branded as a national-security threat, maintains its largest logistics center outside China in Hungary, where it employs 2,000 people.

WHERE EMPIRES OVERLAP Athens is home to a community of some 10,000 Chinese expats.

PHOTOGRAPH BY ALFREDO D'AMATO—PANOS PICTURES FOR FORTUNE

A Chinese crossing the street with a trolley carrying article of clothing.

PHOTOGRAPH BY ALFREDO D'AMATO—PANOS PICTURES FOR FORTUNE

Cosco hopes to expand Piraeus as a tourism destination to compete with sites like the Acropolis for affluent Chinese visitors.

PHOTOGRAPH BY ALFREDO D'AMATO—PANOS PICTURES FOR FORTUNE

A Chinese man buying fruits at the local market.

PHOTOGRAPH BY ALFREDO D'AMATO—PANOS PICTURES FOR FORTUNE

"Money does not like a vacuum," says Yanis Varoufakis, Greece's left-wing former finance minister, who helped negotiate the country's bailout with the International Monetary Fund and the EU in 2015. Varoufakis blames EU leaders for leaving companies vulnerable to takeovers. "European decision-makers [are] keeping investment at the slowest level in history and leaving the Chinese to come in as the only investors," he says.

Cosco has quietly become one of the busiest of those investors. Even before the BRI was unveiled, it began acquiring stakes in numerous key ports, piecing together a network of terminals around Europe. (The company signs long-term concessions with local governments; Piraeus is the only European port where it owns outright a controlling stake.) Its holdings include 47.5% of the huge Euromax terminal in the Dutch city of Rotterdam; 100% of the container port in Zeebrugge, Belgium; and stakes in terminals in Valencia and Bilbao, Spain. In Israel, on Europe's edge, it's building ports in Haifa and Ashdod.

Cosco's rise also shows how state-owned companies benefit when they subsume their strategy to the government's grand plans. Growth and profitability are virtually assured—an advantage no U.S. or European company can match. "Operational losses of Cosco are compensated by state subsidies, and capital investments are made possible by generous credit lines," explains Merk, the OECD analyst.

China's government has given an astonishing $1.3 billion worth of tax subsidies to Cosco since 2010, according to shipping-research organization Alphaliner. Alphaliner estimates that Cosco's 2018 profit of $251 million from shipping activities was attributable almost entirely to subsidies, which Cosco reported at $230 million. State-owned banks offer other largesse, often in the form of low-interest loans. In 2016, China's Export-Import Bank provided Cosco with $18 billion in financing to buy ships and acquire companies. In 2017, Cosco got $26 billion in financing from the China Development Bank for BRI projects—work that Cosco now leverages to expand globally.

Cosco's Chinese executive in Piraeus, Capt. Fu Cheng Qiu, declined multiple requests for interviews; Cosco officials elsewhere in Europe and China did not respond to interview requests. But publicly, the company's officials aren't shy about their plans for global growth. "Scale-up will still be the long-term trend for our industry," Zhang Wei, executive director of Cosco's port arm, said in April.

When you drive into Piraeus, five miles from downtown Athens, past auto-body repair shops and small cafés, there is no sense that you're entering a flash point of controversy. Though some 450,000 people live in the town and its surrounding neighborhoods, Piraeus has the feel of a suburb that has seen better days. At lunchtime, the plastic tables at the café on the pier fill with dockworkers, smoking cigarettes and discussing their lives over $5 plates of sardines—offering a window into the tumultuous decade they have endured.

Giorgos Alevizopoulos, a burly man of 64 with a mustache and beard, says he began working in the port at 17, in 1972—when shipbuilding was Greece's powerhouse industry. He ultimately became a welder, working on vessels under repair or maintenance on dry and floating docks where dozens of small companies operate on piecemeal jobs.

But by early this century, work in Piraeus had slowed to a crawl, as companies sought cheaper repairs in other nations or patronized more modern shipyards. Years of labor strife also reduced the port's appeal. Alevizopoulos says he worked only about 50 days a year between 2005 and 2014. "My entire life changed, and my outlook on life changed. I even contemplated suicide," he says. "Some days we just ate bread. If there was a question about what we eat that day, the answer was always whatever is cheapest."

For years, the Greek government seemed content to run Piraeus largely as a commuter port for the ferryboats that take millions of locals and tourists to islands in the Aegean Sea. The shipyards and cargo port, meanwhile, deteriorated year by year. Laden with debt and bogged down by political schisms and bureaucracy, the government neglected the upgrades that could have retrofitted Piraeus to serve the rapidly growing large-container shipping industry. By 2010, yearly cargo traffic

had fallen to 880,000 TEUs, or twenty-foot equivalent units, the standard measurement for container throughput—a paltry fraction of the capacity of Europe's biggest ports.

In 2008, China made its move. Cosco, then known as the China Ocean Shipping Group, signed a concession with the Greek government to operate Piraeus's container terminal for 35 years, in a deal worth about 1.2 billion euros ($1.4 billion) in rent and facility upgrades and another 2.7 billion euros in revenue sharing. The powerful dockworker unions, anxious at the prospect of foreign ownership, went on strike for six weeks. They hung a banner on Piraeus's waterfront on the day the Chinese company took over that read "Cosco go home!" But with the global recession at its nadir, and few other options, the strikers soon returned to work.

Cosco quickly overhauled one of Piraeus's piers and implemented a major upgrade of its loading cranes. That vastly expanded Piraeus's capacity, turning the port almost overnight into an attractive destination for container vessels. Cosco also ran the port more efficiently. "Before, the employees were public servants," says Vernicos, the shipowner. "They were working less than eight hours a day and fishing most of the time."

Most important, Cosco now directs more of its own huge container-vessel traffic to Piraeus. As the ancient Greeks understood, Piraeus's location makes it potentially invaluable. It is the closest major container terminal on the European mainland for ships emerging from the Suez Canal—and a gateway to a huge swath of southeastern Europe. "Before Cosco arrived, Chinese products had to go to Hamburg or Britain, and then they would go perhaps to the Balkans," says Wu Hailong, owner of the *Greece China Times*, a newspaper catering to the 10,000 or so Chinese residents of Athens. "Now it saves about 10 days on the route."

WELDING A BOND Cosco has achieved labor peace, for now, with Piraeus's historically fractious dockworkers and shipbuilders.
PHOTOGRAPH BY ALFREDO D'AMATO—PANOS PICTURES FOR FORTUNE

Even as Piraeus got healthier, Greece labored under heavy austerity conditions imposed by its creditors. Its lenders demanded that the government make deep cuts to public spending—prompting hundreds of thousands of already-suffering Greeks to flood the streets in protest. Alexis Tsipras and Syriza won elections in 2015, campaigning on promises never to sell certain public assets. In the end, however, Greece had to do just that as a condition of a bailout by the EU and the IMF. Consider this: It sold its rail lines to Italy's state-owned railway company for a tiny 43 million euros, less than some pro athletes earn in a year. Its natural-gas holdings were sold off to a private group; China State Grid, another state-owned company, bought a stake in Greece's national utility. "Greece had choices, and it did not choose bankruptcy," says Panagiotis Liargovas, an economist who headed the Greek Parliament's budget office at the time.

In 2016, Greece agreed to sell 51% of Piraeus to Cosco, including 100% of its container terminal, for a bargain price of 368.5 million euros, plus 760 million euros in upgrades and revenue sharing. Piraeus became Chinese-owned, effectively in perpetuity. And in 2018, it processed 4.9 million TEUs, making it Europe's sixth-largest cargo port.

Alevizopoulos, the welder, says his life has drastically changed for the better since then. He says he made nearly 20,000 euros last year—about four times as much as his earnings before the government sold the port. Even so, Greece's economic ordeal has left its mark. "Psychologically, we have not recovered," he says. "Like the rest of the people, we are still afraid."

In August 2018, Greece finally exited the eight-year austerity program imposed by its creditors. Although the economy returned to growth in 2017, Greece's GDP had shrunk an astonishing 45% between 2008 and 2016—the largest depression ever to strike a country in peacetime. It will take years more for outside lenders to feel secure about financing projects in Greece, says Yannis Stournaras, governor of the Bank of Greece, "so we hope for equity investment." Such an influx is needed not just to boost the economy but also to literally rejuvenate Greece, the governor explains. Thousands of educated young people fled during the crash, and those who stayed have been reluctant to start families. "Only by producing good jobs will young couples produce more children," Stournaras says.

Cosco says it is generating such jobs. While many Greeks worried that Chinese control would mean that imported workers would displace Athenians, only a handful of the port's staff is Chinese, and those are managers, rarely seen amid the ships and stacks of containers. Cosco's chairman, Xu Lirong, recently told Chinese media that the company has created 3,100 jobs for Greeks and added about $337 million a year to the Greek economy—a meaningful sum in a country with GDP of about $200 billion. The port's revenues were about $151 million last year, up 19.2% from 2017, and Cosco says it is aiming to more than double the container volume Piraeus handles.

Boosters see Chinese money also bolstering other sectors that suffered during the dark years. Vaggelis Kteniadis, president of V2, one of Greece's biggest real estate development companies, says he has had only five Greek buyers for his properties in Athens's upscale seaside suburbs during the past 10 years. Kteniadis helped persuade Greece's government to launch a "golden visa" program in 2013, offering foreigners resident status in exchange for investing 250,000 euros in Greek property.

Kteniadis estimates that Chinese buyers since then have snapped up more than 4,000 houses and apartments in Athens, about 450 from him alone, bought as second homes or short-term rental properties. Today, V2's advertisements, in Chinese, are plastered across the baggage-claim area in Athens's airport, offering home ownership as a rapid path to EU residency—an invaluable advantage for businesspeople. "The Chinese have saved Greek real estate," says Kteniadis, who now has offices in four Chinese cities.

Chinese money could reshape the real estate of Piraeus itself. Guiding a reporter around the port one afternoon, Nektarios Demenopoulos, spokesman for the Piraeus Port Authority, points out a large abandoned wheat silo, which Cosco wants to convert into one of five high-end hotels; the company also envisions building a luxury shopping mall. The idea is to invest some 600 million euros to transform the sleepy town into a tourist hub, catering to cruise ships (some Chinese-owned) for which Piraeus is a stop. There is little to do in town currently, and passengers, if they disembark at all, make a beeline for the Acropolis 6.5 miles away. “The Chinese already have respect for ancient Greek culture,” Demenopoulos says. “But we still have a very small number of Chinese tourists compared to the thousands of Chinese millionaires.”

In 2017, not long after Cosco bought Piraeus, the European Union drew up a resolution to present to the United Nations condemning China’s crackdown on human-rights activists. The EU had presented such statements on multiple previous occasions. But this time, Greece blocked the resolution, and a Greek foreign ministry spokesman called it “unconstructive criticism of China.” That incident exposed a deepening divide among EU countries over how to deal with China—and stoked the fears of China hawks that countries would be willing to sacrifice principles for monetary gain.

This year, the stakes rose dramatically. In March, when President Xi landed in Rome for a state visit, Italy’s presidential guards lined up on horseback to greet him, as they do for the Pope. Later, tenor Andrea Bocelli serenaded Xi at a formal dinner. Italian companies signed deals with China worth $2.8 billion, and Italy agreed, in principle, to join the BRI, becoming the first member of the G7 group of major Western economies to sign on. Here, as in Piraeus, China’s maritime ambitions play a role: Italy is courting Chinese investment in four of its ports, including Trieste, a city whose direct-rail connections to Belgium and Germany represent some of Europe’s most valuable trade routes.

It was Xi’s splashy Italy visit that jolted EU officials into issuing their warning about China as a “systemic rival.” The EU plans to more rigorously monitor investments by state-owned companies like Cosco. It has begun rolling out guidelines to prevent countries from ceding control of strategic infrastructure or sensitive technology—an attempt to mirror the U.S. Treasury’s Committee on

Foreign Investment in the U.S., or CFIUS, which examines deals involving American companies. Closer examination of security threats and unfair competition “could severely affect China’s investment footprint in Europe,” concludes a recent report by the Rhodium Group and the Mercator Institute for China Studies in Berlin. Indeed, data on Chinese investment in Europe shows that its pace is already slowing.

Within Greece itself, divisions over foreign investment—including in Piraeus—run deep. Some critics have long griped that the government sold too low, even though Cosco was the highest bidder in an open process. Local officials have, for now, blocked Cosco’s hotel and mall plans, on the grounds that they would disturb archaeological sites.

Some business leaders want the state to prevent Cosco from replacing Greek know-how with Chinese infrastructure. Piraeus’s cranes, for example, are supplied by ZPMC, a subsidiary of yet another Chinese state-owned entity. “Even the screws come from China,” says Thodoris Dritsas, a former Greek shipping minister. “There are Greek companies that could do this.” The dockworkers suspect Cosco has designs to replace their union members with freelance labor acquired through recruitment agencies.

At the national level, events are moving in Cosco’s favor. After campaigning against foreign takeovers, Tsipras’s Syriza Party was trounced in elections in early July. Voters wrung out from years of tax increases and belt-tightening voted in the New Democracy Party. Its leader, new Prime Minister Kyriakos Mitsotakis, is a 51-year-old, Harvard-educated former venture capitalist who promises to lure big investors. In a conference about the BRI in Athens weeks before the election, the vice president of New Democracy, Adonis Georgiadis, said the party “welcomes Chinese companies to invest and grow in Greece.”

On a walk through Piraeus, worries about China's influence seem dwarfed by the towers of containers on the dockside—bulky symbols of the port's prosperity. Giorgos Gogos, general secretary of the local Dockworkers Union, says the era of strikes and protests is over—for now. That harmony could end if Cosco threatens union workers' incomes. Still, after a decade of recession and pain, Piraeus's dockworkers sense the chance for growth—or, at least, stability. "We are tired of struggling all the time," Gogos says. "We need a period of peace." For now, that desire for peace seems to outweigh national pride.

Additional reporting by Pavlos Kapantais

A version of this article appears in the August 2019 issue of Fortune with the headline "Boxed in at the Docks."

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WSJ NEWS EXCLUSIVE

Pentagon Sees Giant Cargo Cranes as Possible Chinese Spying Tools

Equipment at U.S. ports could pose risk of surveillance or sabotage, officials say; China says concerns are 'paranoia-driven'

By Aruna Viswanatha Follow *, Gordon Lubold* Follow *and Kate O'Keeffe* Follow

Updated March 5, 2023 11:30 am ET

WASHINGTON—U.S. officials are growing concerned that giant Chinese-made cranes operating at American ports across the country, including at several used by the military, could give Beijing a possible spying tool hiding in plain sight.

Some national-security and Pentagon officials have compared ship-to-shore cranes made by the China-based manufacturer, ZPMC, to a Trojan horse. While comparably well-made and inexpensive, they contain sophisticated sensors that can register and track the provenance and destination of containers, prompting concerns that China could capture information about materiel being shipped in or out of the country to support U.S. military operations around the world.

The cranes could also provide remote access for someone looking to disrupt the flow of goods, said Bill Evanina, a former top U.S. counterintelligence official.

"Cranes can be the new Huawei," Mr. Evanina said, referring to the Chinese telecom giant Huawei Technologies Co., whose equipment U.S. officials have effectively banned after warning that it could be used to spy on Americans. "It's the perfect combination of legitimate business that can also masquerade as clandestine intelligence collection." Huawei has said its products aren't a national-security risk.

A representative of the Chinese Embassy in Washington called the U.S. concerns about the cranes a "paranoia-driven" attempt to obstruct trade and economic cooperation with China. "Playing the 'China card' and floating the 'China threat' theory is irresponsible and will harm the interests of the U.S. itself," it said.

Representatives of ZPMC, whose full name is Shanghai Zhenhua Heavy Industries Co., didn't respond to requests for comment.

The recent tension over high-altitude balloons as an alleged means of Chinese surveillance has cast a spotlight on the changing nature of espionage and how nations keep tabs on each other, beyond the more conventional intelligence-gathering tools of spies and satellites.

In recent years, U.S. national-security officials have pointed to a range of equipment manufactured in China that could facilitate either surveillance or disruptions in the U.S., including baggage-screening systems and electrical transformers, as well as broader concerns about China's growing control of ports around the world through strategic investments. China makes almost all of the world's new shipping containers and controls a shipping-data service.

In that context, the giant ship-to-shore cranes have drawn new attention. The $850 billion defense policy bill lawmakers passed in December requires the Transportation Department's maritime administrator, in consultation with the defense secretary and others, to produce an unclassified study by the end of this year on whether foreign-manufactured cranes pose cybersecurity or national-security threats at American ports.

National-security officials haven't detailed any instances of cranes being used to nefarious ends. In the case of the high-altitude balloon shot down in February, U.S. authorities said the vehicle was made by a manufacturer with a direct relationship with the Chinese military and carried antennas and sensors for collecting intelligence and communications. Western law-enforcement authorities have identified the threat posed by Chinese espionage, including the theft of technology, as a priority.

A ZPMC facility for manufacturing heavy equipment in Shanghai. PHOTO: SHEN CHUNCHEN/VCG/GETTY IMAGES

ZPMC cranes entered the U.S. market around two decades ago, offering what industry executives described as good-quality cranes that were significantly cheaper than Western suppliers. In recent years, ZPMC has grown into a major player in the global automated-ports industry, working with Microsoft Corp. and others to connect equipment and analyze data in real time.

“We used to sell equipment, but now we are selling systems,” said Hailiang Song, ZPMC’s then-chairman, in a 2017 video on Microsoft’s website. In the video, then-President Qingfeng Huang added: “Through our main office in Shanghai, you can monitor all the cranes” to help troubleshoot. Microsoft didn’t respond to a request for comment.

ZPMC executives were often celebrated around the U.S., where no comparable cranes are manufactured. During a visit to the Charleston, S.C., port in 2018, Mr. Huang presented a model of a crane to a local middle school.

Hailiang Song, former chairman of ZPMC, has said the company is a seller of systems as much as of equipment. PHOTO: YUAN CHEN/VCG/GETTY IMAGES

Today, ZPMC says it controls around 70% of the global market for cranes and has sold its equipment in more than 100 countries. A U.S. official said the company makes nearly 80% of the ship-to-shore cranes in use at U.S. ports.

The huge cranes are generally delivered to U.S. ports fully assembled on ships and are operated through Chinese-made software. In some cases, U.S. officials said, they are supported by Chinese nationals working on two-year U.S. visas, factors they described as potential avenues through which intelligence could be collected.

The Defense Intelligence Agency conducted a classified assessment in 2021 and found that Beijing could potentially throttle port traffic or gather intelligence on military equipment being shipped. U.S. officials didn't say whether they had found any specific instances of ZPMC cranes being used for espionage.

"DIA's analytic efforts assist the U.S. military in anticipating and mitigating threats to global mobility, which relies in part on commercial transportation and shipping," DIA spokesman Lt. Col. Dean Carter said.

In the past two years, ports in Virginia, South Carolina and Maryland that are at times used by nearby U.S. military bases acquired new cranes from ZPMC, prompting concern within the U.S. national-security community and the Federal Bureau of Investigation, according to people familiar with the concerns.

In 2021, FBI agents searched a cargo ship delivering ZPMC cranes to the Baltimore port and found intelligence-gathering equipment on board, some of the people said. The Wall Street Journal couldn't determine what action, if any, was taken as a result.

The Port of Baltimore, where intelligence-gathering equipment was found in a search of a ship delivering ZPMC cranes. PHOTO: EVELYN HOCKSTEIN/REUTERS

By one estimate, 80% of ship-to-shore cranes in use at U.S. ports are made by ZPMC. PHOTO: DAMIAN DOVARGANES/ASSOCIATED PRESS

William Doyle, executive director of the Maryland Port Administration, said the Baltimore port had purchased four cranes from ZPMC and hasn't found any issues while assembling and testing them, and is continually scanning the networks for security. A spokesman for the port of Norfolk, Va., said the facility has deployed ZPMC cranes for two decades and uses its own employees to operate and maintain them. A spokeswoman for the Charleston port declined to provide comment.

ZPMC is a subsidiary of China Communications Construction Co., a leading contractor for Chinese leader Xi Jinping's Belt and Road initiative to develop infrastructure and trade links across Asia, Africa and beyond. In 2020, U.S. authorities limited five CCCC units' access to U.S. technology, citing its role in Beijing's military-civil fusion program, among other factors.

"It wouldn't be hard for an attacker to disable one sensor on a crane and prevent the crane from moving," said Chris Wolski, who formerly ran cybersecurity for the port of Houston. "These systems aren't designed for security, they are designed for operations."

Some industry executives said while they didn't think the cranes had access to sensitive data that wasn't otherwise accessible, some ports have turned to software provided by Swiss company ABB Ltd. to operate ZPMC cranes. Other ports, including Savannah, Ga., the East

Coast's second-biggest cargo port, use cranes of Finnish provider Konecranes, which usually cost around a third more than their Chinese rivals, industry experts said.

Rep. Carlos Giménez (R., Fla.) introduced legislation last year to ban future U.S. purchases of Chinese cranes and encourage other manufacturers. The congressman, a former mayor of Miami Dade County, whose port has some ZPMC-manufactured cranes, said he proposed the legislation when he became aware that the software on ZPMC cranes could be used for nefarious purposes.

Rep. Carlos Giménez proposed legislation last year to ban future U.S. purchases of Chinese cranes. PHOTO: BILL CLARK/CQ ROLL CALL/ZUMA PRESS

"The physical and logistical technology infrastructure at ports is a critical area of vulnerability," Mike Wessel, a member of the U.S.-China Economic and Security Review Commission, a congressionally-convened commission known for its hawkish perspective on China, said in a statement. The commission was briefed on the cranes-security issue last year by defense officials, according to people familiar with the matter. Mr. Wessel declined to acknowledge the briefing or comment on any specifics discussed there.

Early in the Trump administration, officials in the National Security Council's strategic planning office came to consider cranes as a unique point of interest, said Sean Plankey, a former cybersecurity official who was involved in those discussions. "Where would someone attack first and how would they do it?" he asked, characterizing the discussion. He said the officials determined that if Beijing's military could access the cranes, they could potentially shut down U.S. ports without drawing on their navy.

A National Maritime Cybersecurity Plan, released in December 2020, found that no single U.S. agency had responsibility for maritime network security, leaving port directors without

EXHIBIT 87

INSIGHTS

Antitrust Alert: China Blocks Global Shipping Alliance

JUNE 2014 | ALERT

China's Ministry of Commerce ("MOFCOM") announced on 17 June 2014 that it had prohibited the P3 Alliance among three large shipping companies. This is only the second time in five years that MOFCOM has blocked a transaction under China's Anti-Monopoly Law ("AML").

This decision shows once more that MOFCOM does not hesitate to flex its muscles in global transactions, especially when the interests of Chinese companies – even competitors – are at stake.

The P3 Alliance

Three of the leading worldwide shipping companies, Moller-Maersk, CMA CGM and MSC Mediterranean, entered into a cooperative agreement, the P3 Alliance. The purpose of the Alliance was to share the capacity of the three shipping companies on Asia-Europe, Trans-Pacific and Trans-Atlantic shipping lanes. They would create a joint vessel operation center to coordinate the fleets of the alliance members. Importantly, the parties had structured the transaction to ensure that each of them would "retain its separate identity and shall have fully separate and independent sales, pricing and marketing functions." Thus, while they would coordinate capacity, they would continue to compete against each other.

The Alliance was approved by the US Federal Maritime Commission ("FMC"). The EU Commission similarly decided not to open a formal investigation into the alliance.

MOFCOM's Decision

China took a different approach.

MOFCOM considered that the relevant market was that of international container liner shipping services. Its investigation was particularly focused on the Asia-Europe routes. MOFCOM considered that the combined market shares of the three shipping companies on these routes would amount to 47% in terms of capacity. It found that this would lead to a significant increase in the parties' market power and also increase concentration in the market. In addition, MOFCOM found that the transaction would increase barriers to entry, although without offering further details. Of greatest significance, MOFCOM considered that other competitors would be put at a competitive disadvantage and that customers as well as ports have weak bargaining power against shipping companies.

According to the published decision, the parties attempted to negotiate possible remedies with MOFCOM but could not offer an acceptable remedy package.

MOFCOM concluded that the P3 Alliance would have the effect of restricting or eliminating competition on the Asia-Europe container liner shipping services market, and prohibited the transaction.

Key Takeaways

"

1. MOFCOM had not outright blocked a transaction since 2009, when it prohibited Coca-Cola's acquisition of Huiyuan, a Chinese producer of soft drinks. It has imposed remedies in a number of transactions, including "hold-separate" remedies that force the buyer to keep the acquired business separate and to ensure that the two entities continue to compete independently (see for example) While these hold-separate remedies are in effect "soft prohibitions," because they prevent the buyer from exercising control over the acquired business, MOFCOM had not formally blocked a combination since 2009. The P3 Alliance decision, and the failure of the parties to come up with acceptable remedies, demonstrate that in some cases MOFCOM will take a hard line. Interestingly, in this particular case, the three shipping companies already had

put measures in place to hold separate some aspects of their commercial policies, but these apparently were not viewed by MOFCOM as sufficient to allay its concerns.

2. The decision raises interesting questions about the interplay between Article 13 of the AML (prohibiting anticompetitive agreements between competitors) and the merger control provisions. In principle, the merger control provisions only apply when there is acquisition of control over another undertaking. In this case, although the alliance technically involved the creation of a new entity, the parties' cooperation did not entail the acquisition of control over any pre-existing entity, but rather was a cooperative agreement between competitors. In addition, the three members of the alliance would continue to compete independently in most respects.
”

The US FMC and the EU Commission reviewed the P3 Alliance under provisions relating to anticompetitive agreements, rather than merger control. The MOFCOM decision does not further explain why MOFCOM considered that the Alliance fell under the merger control provisions of the AML, other than by saying that this would be a tight alliance. It is generally understood that MOFCOM views the creation of a new separate legal entity as resulting in the acquisition of control over that entity – in this case presumably joint control by the three parties – and thus to be a "concentration" under the AML. However, it would have been useful guidance to understand why this particular structure, leaving the alliance members competing separately, actually would constitute a concentration. It could also be that the parties themselves preferred to characterize their alliance as a concentration in China.

One benefit of the AML merger control provisions is that they force MOFCOM to issue a decision within a certain period of time. There are no such binding deadlines when the other anti-monopoly regulators review an agreement under Article 13 of the AML and the alliance otherwise could have been subject to future antitrust scrutiny at any time in the future.

“

3. The Chinese shipping industry – the parties' competitors – vehemently objected to the P3 Alliance and asked MOFCOM to block it. Under the AML, MOFCOM must consider industrial policy considerations, such as the effect on the development of the national economy. This may explain why MOFCOM took a decision contradicting the findings of the European Commission on the Asia-Europe routes, although the facts reviewed by both regulators presumably were identical.
"

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European Markets

China's shipping alliance rejection underscores protectionist worries

Reuters

June 18, 2014 5:55 AM EDT · Updated 10 years ago

summary

China turns down P3 shipping alliance on competition

concerns

* Maersk, MSC & CMG planned to pool 250 ships on 3 main trade routes

* Deal rejected to insulate domestic shippers from competition-analysts

* Alliance would have had too much market power -China shipping body

SHANGHAI, June 18 (Reuters) - China's scuppering of a planned alliance of the world's top three container shipping lines signals its protectionist stance on key industries and is a reminder to foreign firms to not take Beijing's nod for granted on deals, analysts and lawyers said.

China's Ministry of Commerce (MOFCOM) said on Tuesday it would not approve the P3 ship-pooling network, a plan dreamt up last year by Denmark's A.P. Moller-Maersk, Swiss firm Mediterranean Shipping Co (MSC) and France's CMA CGM, due to competition concerns.

Its rejection marks the first time China has blocked a deal proposed by foreign firms since its anti-monopoly regulator was granted greater powers six years ago, and indicates a keenness to protect local shipping interests when an approval could have been better for the wider industry, analysts said.

"China's rejection of the P3 is likely more an effort to insulate Chinese domestic shipping companies...from competing with a more effective rival than it is an effort to maintain industry fair play, in our view," Barclays analyst Jon Windham said.

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Feedback

"The best hope for improved industry earnings in the long-term was from consolidation. China's rejection of the P3 is not a positive step in that direction," he said.

MOFCOM did not immediately respond to a faxed query by Reuters.

The three firms had hoped to pool about 250 ships together on three trade routes, including Asia-Europe, helping them to cut costs and increase efficiencies at a time when the global shipping industry is battling overcapacity. The plan had already been approved by United States and European regulators.

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Should it have succeeded, P3 would have handled more than 40 percent of Asia-Europe and trans-Atlantic trade, posing greater competition to China's state-backed shippers China COSCO and China Shipping Container Lines (CSCL).

STIFLING COMPETITION

China's goods trade topped the $4 trillion mark last year, allowing it to overtake the United States as the world's largest trading nation just 13 years after joining the World Trade Organisation.

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Its shipping industry, however, has been fighting a capacity overhang since the global financial crisis after new vessels ordered earlier flooded the market, pushing down freight rates that have led COSCO and CSCL to report deep losses.

MOFCOM said on Tuesday one of the reasons it had blocked the alliance was that it would have significantly boosted the firms's joint market share to 47 percent on the Asia-Europe service route, even though each had already held a substantial share.

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Feedback

It also said that it had held several talks with the companies to discuss how the companies might alleviate the alliance's impact on competition, but in the end were not sufficiently convinced by their proposals.

Ahead of the decision, local groups such as the China Shippers' Association (CSA) had lobbied the government against approving the alliance, arguing that it would give the firms too much market power and stifle competition.

"We're very happy, we think it's a fair result," Cai Jiangxiang, CSA's vice-chairman, told Reuters. "All the small and medium firms are very happy because they were worried about being squeezed out by P3 from the market."

CRUCIAL INDUSTRY

Up to last year, MOFCOM reviewed 740 merger proposals, blocking one - Coca-Cola's bid to buy top juice maker Huiyuan - and imposing conditions on 22 others.

In April the U.S. Chamber of Commerce sent a letter to U.S. Secretary of State John Kerry and Treasury Secretary Jacob Lew, urging Washington to get tough with Beijing on its use of anti-competition rules, noting that "concerns among U.S. companies are intensifying".

P3, which was not strictly a merger as it would have been an independently operated network, won approval from the U.S. Federal Commission in March and was cleared by European antitrust regulators this month.

Shang Ming, MOFCOM's anti-monopoly bureau director-general, told reporters in February, that mergers involving several jurisdictions are not already viewed in the same way by all related parties.

"You can't say that if there's not a problem in another jurisdiction, then there won't be a problem in China," he said.

Lawyers said the move by MOFCOM did not come as a surprise and that China has repeatedly intervened when there were concerns over negative impact on its local industries.

"This is about an industry which is very important for China, which is the manufacturing powerhouse of the world. It is very important that shipping remains competitive and shipping rates remain low to allow Chinese producers to export their goods," said Marc Waha, an anti-trust lawyer at Norton Rose Fulbright.

"It is a very strong signal to the shipping industry that they need to be careful because China is adopting a more stringent approach."

Additional reporting by Keith Wallis and Saeed Azhar in SINGAPORE, Matthew Miller in BEIJING; Reporting by Shanghai newsroom; Writing by Brenda Goh; Editing by Kazunori Takada and Muralikumar Anantharaman

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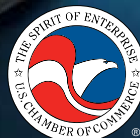
COMPETING INTERESTS IN CHINA'S COMPETITION LAW ENFORCEMENT:

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



U.S. CHAMBER OF COMMERCE

International Affairs

A Message from the U.S. Chamber of Commerce

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

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

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

i. Competition policy and trade policy should be complementary. The benefits of international trade will be lost if markets do not operate in pro-competitive ways.

ii. Governments should not use competition policy as an industrial policy tool to achieve protectionist goals that circumvent commitments to trade and open markets.

iii. Antitrust enforcement should be transparent, predictable, reasonably stable over time, and consistent across jurisdictions.

iv. All antitrust investigations and enforcement decisions should be based on sound economic analysis.

v. Antitrust remedies should enhance consumer welfare and make sense in an interconnected world where markets are often global.

vi. Due process is critical in any antitrust investigation.

vii. Competition policy and antitrust enforcement should apply competition law neutrally with respect to private, state-owned, and state-supported firms.

viii. Cooperation and consistency among international regulators – including agencies responsible for antitrust enforcement, trade and investment – facilitate open and competitive market operations.

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

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

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

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

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COMPETING INTERESTS IN CHINA'S COMPETITION LAW ENFORCEMENT:

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

Table of Contents

Executive Summary 1

I. Background: AML Enforcement Institutions 7

  A. Tripartite Division of Competition Law Enforcement Responsibilities 8

  B. The AMC 12

II. The AML's Prioritization of Industrial Policy over Competition Law 13

  A. Text of the AML 14

    1. Industrial policy objectives in the text of the AML 14

    2. Burden of proof on the notifying parties 18

  B. Legislative History 19

  C. Official Statements after Enactment of the AML 24

III. Merger Review 27

  A. Discriminatory Scope of Application 28

  B. Promotion of Industrial Policy 32

    1. Protection of national champions 33

    2. Controls on price and supply 37

    3. Protection of famous Chinese brands 42

  C. Promotion of Industrial Policy through National Security Review 45

  D. Procedural Deficiencies 47

    1. *Sub rosa* role of third-party agencies 48

    2. Lack of access to counsel of choice 48

    3. Burden on notifying parties to identify solutions before being informed of the supposed problem 49

    4. Manipulation of timing of reviews 50

IV. Investigations and Penalties 53

  A. Promotion of Industrial Policy 56

    1. Price controls 56

2. Pressure to license IP at below-market rates ... 62
B. Procedural Deficiencies ... 67
C. SAIC's 8th Draft Rules ... 69
1. Essential facilities doctrine ... 70
2. Mandatory licensing of SEPs ... 71
3. Burden of proof ... 72
V. Judicial Enforcement ... 73
VI. Conclusions and Recommendations ... 77

COMPETING INTERESTS IN CHINA'S COMPETITION LAW ENFORCEMENT

Executive Summary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[6] *See* Michael Martina, "Exclusive: Tough-Talking China Pricing Regulator Sought Confessions from Foreign Firms," Reuters (Aug. 21, 2013). Similar public reports related to SAIC have not surfaced.
[7] *See* Zhao Yinan, "Anti-trust team lacks real muscle for enforcement," China Daily (Aug. 18, 2014).
[8] *See supra* note 4.
[9] *See infra* Section IV.A.2.a). The suspension of NDRC's investigation was part of a settlement in which InterDigital made specific commitments. *See id.*
[10] *See* "NDRC: Six Industries Including Aviation, Household Chemicals, Automobiles, Telecommunications, Pharmaceuticals and Home Appliances Center the AML's Field of Vision," Beijing Business Today (Nov. 25, 2013). For a summary, *see* USCBC, "USCBC Summary of the National Development and Reform Commission (NDRC) 2014 Work Plan" (Feb. 5, 2014); *see* also *supra* note 2.
[11] *See* "NDRC: Further Exploit the Supporting Role of IP," State Intellectual Property Office (Feb. 27, 2014), *available at* http://www.sipo.gov.cn/mtjj/2014/201402/t20140226_907655.html.

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

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

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[12] In addition, MOFCOM announced that it launched a review of potential anti-competitive behavior across 80 major industries including automobiles, pharmaceuticals, and alcoholic beverages. Samuel Shen & Kazunori Takada, "China launches antitrust review across 80 industries, includes cars, pharmaceuticals," Reuters (June 9, 2014).
[13] European Union Chamber of Commerce in China, "European Chamber releases statement on China AML-related investigations," Press Release (Aug. 13, 2014) ("The European Chamber has received numerous alarming anecdotal accounts from a number of sectors that administrative intimidation tactics are being used to impel companies to accept punishments and remedies without full hearings. Practices such as informing companies not to challenge the investigations, bring lawyers to hearings or involve their respective governments or chambers of commerce are contrary to best practices.").
[14] *See* "China: NDRC Refutes Bias against Foreign Firms, External Lawyers," Competition Policy International (Sept. 17, 2013), *available at* https://www.competitionpolicyinternational.com/china-ndrc-refutes-bias-against-foreign-firms-external-lawyers.
[15] *See* Joy C. Shaw, "China's NDRC to use global revenue as basis for fines in patent probes – ABA Antitrust in Asia," PaRR (May 25, 2014). Xu Kunlin, Director-General of NDRC's Price Supervision and Anti-Monopoly Bureau, stated at the American Bar Association's May 2014 Antitrust Asia conference in Beijing that "'when it comes to issues such as patents, the effect [for an antitrust violation] is felt in the global market, which in turn affects the China market. Under these circumstances, we may use global revenue as the basis for calculating fines." *Id.* (bracketed text in original). Article 46 of the AML authorizes AMEAs to impose a fine between 1% and 10% of total turnover in the preceding year on any company found to have concluded a monopoly agreement. However, the AML does not specify the geographic basis for such turnover calculations.
[16] *See* Several Opinions of the State Council to Promote Fair Market Competition and Protect Normal Market Order, issued by the State Council (June 4, 2014), Guo Fa [2014] No. 20, *available at* http://www.gov.cn/zhengce/content/2014-07/08/content_8926.htm#.
[17] *See* Joy C. Shaw & Lisha Zhou, "China SAIC's Microsoft investigation triggered by complaint from Kingsoft, sources say," PaRR (Aug. 6, 2014); "China's SAIC launches another antitrust raid of Microsoft premises," PaRR (Aug. 6, 2014); Colum Murphy, "Car Makers Face Hits in China," Wall St. Journal (Aug. 5, 2014).

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

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

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

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

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

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

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

[22] *See id.*, para. 65.

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

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

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

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

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

I. Background: AML Enforcement Institutions[28]

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

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[25] U.S. Department of the Treasury, "UPDATED: U.S.-China Joint Fact Sheet Sixth Meeting of the Strategic and Economic Dialogue," Press Release (July 11, 2014), *available at* http://www.treasury.gov/press-center/press-releases/Pages/jl2561.aspx.
[26] *See infra* Section IV.A.1.c).
[27] SAIC released the final Draft Rules for public comment until July 10, 2014. *See* SAIC, "Announcement calling for public comment for SAIC Rules on the Prohibition of Abuses of Intellectual Property Rights for the Purposes of Eliminating or Restricting Competition (Draft for Public Comment)," Press Release (June 11, 2014), *available at* http://www.saic.gov.cn/gzhd/zqyj/201406/t20140610_145803.html.
[28] The AML is enforceable within mainland China and is not enforceable in Hong Kong, Macau, or Taiwan.

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

A. Tripartite Division of Competition Law Enforcement Responsibilities

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

MOFCOM is China's most outward-facing economic agency, with responsibility for most aspects of China's international trade and economic policy, including foreign trade and investment policy, WTO affairs, and trade remedies. Under the AML, MOFCOM's Anti-Monopoly Bureau (AMB) is responsible for reviewing proposed "concentrations"—*i.e.*, mergers, acquisitions, and the formation of joint ventures (whether full-function or not).[30] The AML states that any concentration satisfying certain monetary thresholds[31]

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

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

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

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

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

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

[32] *See* Section III.A.

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

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

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

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

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

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

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[37] *See* AML, Art. 32.

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

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

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

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

[42] *See supra* note 27.

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

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

[43] During the drafting process for the AML, U.S. officials and practitioners explained that the divided structure in the United States was an artifact of history that should not be emulated. *See* "Joint Submission of the American Bar Association's Sections of Antitrust Law, Intellectual Property Law and International Law on the Proposed Anti-Monopoly Law of the People's Republic of China" (May 2005), at 4 & note 28, *available at* http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_prc2005wapp.authcheckdam.pdf. However, the rivalries between different Chinese government departments made it impossible to heed this advice.

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

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

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

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

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

B. The AMC

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Text of the AML

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

1. Industrial policy objectives in the text of the AML

The AML includes provisions (i) encouraging the "healthy development of [a] socialist market economy,"[56] (ii) establishing a special role for SOEs (described as the "lifeline of the national economy"),[57] (iii) carving out a privileged role for administrative monopolies,[58] and (iv) providing a prohibition on abuse of dominance that is specific to IPR.[59] "Socialist" in this context means "public ownership"—a reference to SOEs. Although many competition laws contain vague statements regarding the public good that are subject to misinterpretation, this and other references to industrial policy in the text of the AML arguably put China outside international competition law norms. For example, even in the European Union—a competition law jurisdiction considered to give greater weight to industrial policy[60]—competition law does not identify the development of the economy as a goal of competition law, does not explicitly carve out a special role for SOEs, and does not treat anti-competitive conduct involving IP any differently from other forms of anti-competitive conduct.

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

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

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

[56] Art. 1.

[57] Art. 7.

[58] Art. 8.

[59] Art. 55.

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

> *promoting the healthy development of the socialist market economy*.[61]

In addition, Article 4 provides:

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

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

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

> With respect to the industries which are under the control of the State-owned economic sector and have a bearing on the lifeline of the national economy or national security, and the industries which exercise monopoly over the production and sale of certain commodities according to law, the State shall protect the lawful business operations of undertakings in these industries, and shall, in accordance with the law, supervise and regulate their business operations and the prices of the commodities and services provided by them, in order to protect consumers' interests and facilitate technological advancement.
>
> The undertakings mentioned in the preceding paragraph shall do business according to law, be honest, faithful and strictly self-disciplined, and subject themselves to public supervision, and they

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[61] Emphasis added.

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

[63] Emphasis added.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Burden of proof on the notifying parties

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

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

[75] *Id.*

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

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

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

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

B. Legislative History

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

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

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

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

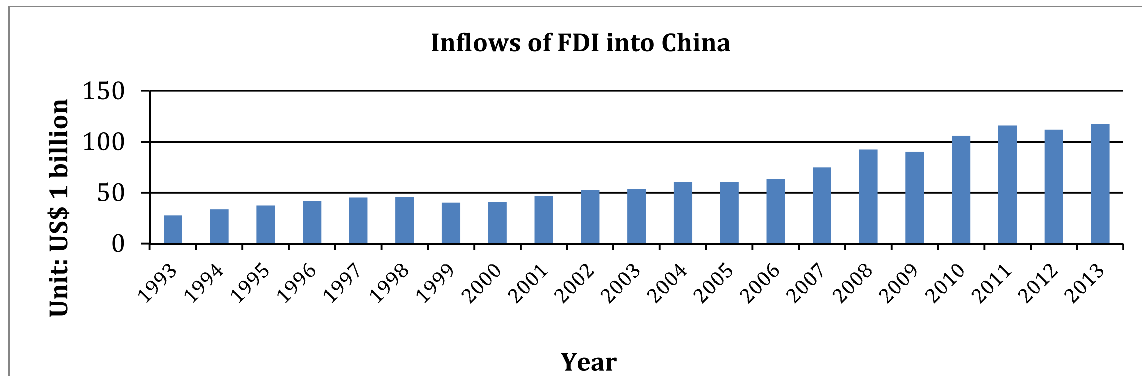
[80] For ease of exposition, the term "foreign companies" is used to refer to "foreign-invested companies." "Foreign-invested" means a company registered in China with at least 25% foreign investment.

[81] *See* Lester Ross, "China's Antimonopoly Law," Antitrust (Spring 2008), at 66.

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

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

Figure 1



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

The steady increase of FDI in China helped to propel the economy forward, leading to double-digit GDP growth for most of the 1990–2010 period.[84] However, it also sparked nationalist and protectionist sentiments against the expansion of foreign companies in China's economy, which ultimately provided additional impetus for finally enacting a new set of competition laws in the 2000s.[85] For example, a document published by the then Fair Trade Bureau of SAIC[86] in *Industry and Commerce Administration*, an official publication of SAIC, on March 1, 2004, stated:

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

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

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

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

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

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

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

These policy goals were also reflected in two sets of regulations that were forerunners to the AML: the Provisional Regulations Regarding Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, promulgated in 2003, and the Regulations on Mergers and Acquisitions by Foreign Investors, promulgated in 2006.[90] These laws imposed merger review requirements on foreign companies alone—not on domestic companies.

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

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

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

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

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

- "We should proceed from two aspects of thinking in our mind when drafting the anti-monopoly law. First, we should bear in mind the effect brought by the law to protect and create a favorable environment for competition in the market. Second, we shouldn't ignore the industrial policy of our country, which is to facilitate the enterprises to acquire bigger and stronger development with the economy of scale."[91]

- "Multinationals usually purchase the good assets from those [acquired domestic] companies while leaving us many leftover problems. If we allow pillar companies which the country has fostered for years to be taken over by multinationals, the country will face the danger of losing dominant power on industrial development and technological progress."[92]

- "We welcome the investment of large foreign companies in China but will prevent them from taking market monopolistic positions which are not good for fair competition in a market economy. … Now it is a good time for Chinese companies, for instance steel companies, to form up industry association[s] when negotiating with other countries in raw material purchase in [the] international market, and so coordination within the industry is necessary."[93]

- "[D]omestic Chinese enterprises are still at the preliminary stage of development. With the exception of a small number of industries, where administrative or state-mandated monopolies exist due to the planned economic modality and the needs of national interests, the so-called free competition in other industries are basically competitions of an excessive, vicious and unfair nature. This not only includes general consumer industries, but also the steel and automobile sectors, wherein the original plans to have three to four players in each have given way to several dozen or even more businesses co-existing with each other. At present, we are still at the preliminary stage of developing a market economy. The domestic market would still need to focus on how to improve the level of concentration, technical strengths and competitive competence."[94]

[91] Yao Xiangcheng, member of the NPC Standing Committee. Emphasis added.
[92] Ni Yuefeng, member of the NPC Standing Committee. Emphasis added.
[93] Cheng Siwei, Vice Chairman of the NPC Standing Committee. Emphasis added.
[94] Lu Yongxiang, Vice Chairman of the NPC Standing Committee. Emphasis added.

- "[T]he relationship between the Anti-Monopoly Law and the security of domestic industries, and particularly strategic industries, should be handled properly. In general, Chinese enterprises are small and weak and industries remain segmented. The major question is how can we build Chinese companies in size and strength and also address the problem of unfair and out-of-order competition. Only by expanding size and improving the economy of scale can competition flourish. For instance, powerful foreign-funded companies are acquiring or merging domestic companies, creating unfair competition."[95]

- "Anti-monopoly is a must-do in a market economy. However at the present stage we still need to facilitate the efforts of Chinese companies in increasing their market share. And price alliance remains necessary in external trade while vicious competition must be eradicated in order to safeguard national interest. Therefore we must have a sense of propriety to, on the one hand, help Chinese companies expand their size and market share and strive for a more advantageous position in international competition and, on the other hand, oppose any monopoly."[96]

- "The question is how do we crack down on local protectionism and at the same time enable our companies to grow stronger and bigger. Chapter 2 [of the draft AML] forbids monopoly agreements, which are usually reflected by a price alliance. In our foreign trade, products made in China are often sold in the international market at low prices . … The current situation is partly a result of the vicious competition among our domestic companies. Therefore, sometimes it is necessary to adopt a proper price [*i.e.*, apparently, through price agreements] to safeguard the overall interest of the industry. … From the perspective of enhancing international competitiveness, I think we should encourage our companies to expand their market share."[97]

- "Currently, two kinds of monopoly practices exist in the market economy of our country. The first is monopoly by public utilities, such as those in the areas of telecommunications, water supply, railway, public transportation, freight, aviation, crude oil and natural gas in particular. Second is monopoly by multinationals in China, such as computer operating systems, photosensitive material, tires, network equipment, cameras and soft-packaging. These two types of practices seriously harm the legitimate rights and interests of market operators and consumers. The society would strongly react to both behaviors, calling for the investigation and handling of them, which involves several departments and regulators."[98]

[95] Liu Zhenwei, member of the NPC Standing Committee. Emphasis added.
[96] Zheng Gongcheng, member of the NPC Standing Committee. Emphasis added.
[97] Zheng Gongcheng, member of the NPC Standing Committee. Emphasis added.
[98] Jiang Zhuping, member of the NPC Standing Committee. Emphasis added.

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

C. Official Statements after Enactment of the AML

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

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

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

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

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

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

- Xu Kunlin, Director-General of NDRC's Price Supervision and Anti-Monopoly Bureau, stated in 2013: "Given that China is still at the 'catch up and overtake' stage, <u>industrial policy needs to play its critical role in China's economic development</u>."[101]

- At a training session for AML enforcement personnel in 2011, Zhao Xiaoguang, Director of the Department of Industry, Transport, and Commerce of the Legislative Affairs Office of the State Council, stated: "Companies of our country are not well developed as market players yet. As for the actual situation, market competition is insufficient or not at proper levels. The development of various kinds of companies is not in balance, and their competitiveness needs improvement. As a whole, the scale of companies of our country is relatively small, the concentration level of industries is not high, and competitiveness is not strong. <u>The industrial policy of the state is to encourage companies to develop themselves and become bigger and stronger through means such as mergers and restructuring, to develop the economies of scale, increase economic efficiency, strengthen enterprise innovation ability, and thus increase the overall developing level and international competitiveness of our economy</u>. Therefore, the guiding role and regulatory functions of the Anti-Monopoly Law have to be exercised, make the Anti-Monopoly Law a powerful policy tool of inhibiting monopoly, encouraging competition, increasing the quality of introduced foreign investment,

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

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

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

- At a competition law conference in late 2012, MOFCOM Minister Gao Hucheng signaled that China should use competition law to secure control over natural resources abroad. He stated: "China must pay attention to global consolidation in raw materials, agriculture and energy. … The country's antitrust system should develop to help address the problem of the gulf between growing demand and a shortage of supply, said the Minister. … To protect China's public interest, MOFCOM should leverage the extraterritorial effect of the Anti-Monopoly Law. Among all the Chinese economic laws, the AML is the only one that has extraterritorial effect . … After four years of anti-monopoly enforcement, we found that extraterritorial jurisdiction plays an important and irreplaceable role in maintaining effective competition in the Chinese market and safeguarding China's national economic benefits[.]"[103]

- In a March 19, 2014, commentary titled "A Preliminary Discussion of Anti-Monopoly Rules Regarding IPR Abuse," two officials in NDRC's Price Supervision and Anti-Monopoly Bureau stated: "We should base ourselves on indigenous situations, and reflect stringency in enforcement. China's real circumstances should be taken into full account in the anti-monopoly regulation against abuse of IPR: on the one hand, China's IPR legal system is still young, and IPR receives insufficient protection and the administration and enforcement of the [IPR] legal system are weak; and on the other, due to lack of awareness of fair and orderly competition, IPR is often being used as a tool to practice monopolies; there is the issue that IPR is being alienated. As such, at the current stage, even more strict administration and enforcement should be exercised against abuse of IPR, for it is not only a widely applied and common principle in the early years of any competition law's enforcement activity, it is also a rational choice based on China's current IPR status and market competition conditions."[104]

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

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

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

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

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

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

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

III. Merger Review

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

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

[106] *Id.*

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

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

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

A. Discriminatory Scope of Application

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

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

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

[109] *See* AML, Art. 21.

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

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

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

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

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

[111] *See* Yan Sobel, "Domestic-to-Domestic Transactions—A Gap in China's Merger Control Regime?" Antitrust Source (Feb. 2014), at 5.

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

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

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

Such discrimination is not a feature of mature competition law jurisdictions. For example, in the United States, only 32.4% of conditional approvals and rejections between October 1, 2008 and September 30, 2012 involved foreign companies.[114] Similarly, in the EU, only 54.3% of conditional approvals and rejections between August 1, 2008 and December 31, 2013 involved non-EU companies.[115] By contrast, as the table above illustrates, all conditional approvals and rejections in China from August 1, 2008 to June 18, 2012 (the latest date for which data were available prior to this report's publication) involved mergers or acquisitions by foreign companies.[116,117] Moreover, as discussed in Section III.B, the remedies applied in individual cases often appear designed to tilt the competitive landscape in favor of domestic companies at the expense of foreign ones, in violation of the spirit, if not also the letter, of China's WTO commitments.[118]

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

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

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

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

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

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

B. Promotion of Industrial Policy

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

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

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[119] *See also supra* note 113.

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

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

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

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

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

1. Protection of national champions

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

a) Glencore/Xstrata

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

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

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

[125] *See* Firat Kayakiran & Jesse Riseborough, "Glencore to Buy Xstrata for $41 Billion in Biggest Mine Deal," Bloomberg (Feb. 8, 2012).

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

Neither Glencore nor Xstrata owned or operated productive assets in China. Moreover, their market shares in the copper concentrate market were relatively low: 1.5% and 6.1%, respectively, in terms of world production in 2011, and 5.3% and 4%, respectively, in terms of supply in 2011. In China itself, Glencore and Xstrata had respective market shares of 9% and 3.1% in terms of the supply of copper concentrate (and again, as noted above, they did not have any productive assets in China). With such low levels of market concentrations, competition authorities in other jurisdictions like the ACCC in Australia might have easily concluded that the proposed transaction concluded no threat with respect to the copper concentrate market[126]—indeed, the European Commission presumes an absence of restrictive effects for transactions that would result in a market concentration of 25% or less.[127]

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

[126] The ACCC approved the transaction in early July 2012. The ACCC cited the merged company's "relatively low share of global production" and the existence of several "remaining substantial competitors" post-transaction in concluding that any effect the deal may have on global markets would pose "minimal impact on Australian users of those products or end-consumers." *See* John Tivey et al., "Glencore's Long March to Take Over Xstrata," White & Case (Apr. 2013).
[127] *See* Hanna C. L. Ha et al., "MOFCOM Orders Extraterritorial Divestiture of Key Mining Asset in Glencore/Xstrata Merger: Lessons for Future Notifications," Mayer Brown (May 6, 2013), at 1.
[128] Under the terms of the merger, if Glencore failed to sell the mine by August 31, 2014, under specified financial conditions, then Glencore had to submit a proposal to MOFCOM for the appointment of a divestiture trustee empowered to sell another Glencore copper mining project in Latin America or Southeast Asia. *See* MOFCOM Announcement [2013] No. 20 (Apr. 16, 2013), *available at* http://fldj.mofcom.gov.cn/article/ztxx/201304/20130400091222.shtml; "China Group Buys $6bn Glencore Peru Copper Mine," BBC News (Apr. 13, 2014), *available at* http://www.bbc.com/news/business-27017623.
[129] *See* Yvonne Lee et al., "Chinese Bid for Glencore Mine Is Delayed: Offer for Las Bambas Project in Peru Stumbles over Price," Wall St. Journal (Feb. 24, 2014). The lead stakeholder in the consortium is the Australian company MMG Ltd., which is controlled by China Minmetals Corporation through its subsidiary China Minmetals Nonferrous Metals Co. Ltd., and therefore should also be regarded as Chinese-controlled.

Peru, which began in December 2013.[130] Notably, China Minmetals Corporation, CITIC Group Corp., and Chinalco Mining Corp. all reported their transactions to MOFCOM and they were unconditionally approved.

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

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

b) Marubeni/Gavilon

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

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[130] *See* Alexis Flynn, "Glencore Xstrata Sells Las Bambas Mine to Chinese Consortium: Peruvian Copper Project Fetches $5.8 Billion after Months of Talks," Wall St. Journal (Apr. 13, 2014).
[131] *See* ACCC, "Glencore International plc—Proposed Acquisition of Xstrata plc.," Mergers register, *available at* http://registers.accc.gov.au/content/index.phtml/itemId/1063438/fromItemId/75104.3.
[132] *See* John Tivey et al., "Glencore's Long March to Take Over Xstrata," White & Case (Apr. 2013). Specifically, DOJ allowed the Hart-Scott-Rodino waiting period (30 days) to expire without taking any action or seeking any type of remedy.
[133] *See* European Commission, "Mergers: Commission Approves Glencore's Acquisition of Xstrata, Subject to Conditions," Press Release IP/12/1252 (Nov. 22, 2012), *available at* http://europa.eu/rapid/press-release_IP-12-1252_en.htm. The other commitments made by Glencore were (i) to terminate its exclusive long-term off-take agreement with Nyrstar; (ii) not to buy directly or indirectly any European Economic Area (EEA) zinc metal quantities from Nyrstar for a period of 10 years; and (iii) not to engage, for 10 years, in any other practices that have the effect of materially restricting Nyrstar's ability or incentive to compete effectively with Glencore in zinc metal in the EEA.
[134] *See* "UPDATE 2—China Conditionally Clears $5.6 bln Marubeni/Gavilon Deal," Reuters (Apr. 23, 2013).

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

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

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

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

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

[136] *See generally* Dexter Roberts, "The Chinese Want Their Own Cargill," Bloomberg Businessweek (Mar. 20, 2014).

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

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

[139] *See* MOFCOM Announcement [2013] No. 22 (Linklaters trans., Apr. 2013), *available at* http://www.linklaters.com/pdfs/mkt/beijing/MOFCOM_Conditional_Clearance_on_Marubeni_v_Gavilon_2.pdf.

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

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

2. Controls on price and supply

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

a) Uralkali/Silvinit

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

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

[140] *See* James Topham, "COFCO Deals Threaten to Undermine Marubeni's China Dreams," Reuters (Mar. 13, 2014).
[141] *Id*.
[142] The European Commission unconditionally cleared the deal under simplified procedure in August 2012. FTC unconditionally cleared the deal in November 2012 with an early termination of review. *See* Hannah C. L. Ha et al., "MOFCOM Conditionally Approves Marubeni/Gavilon: Competition Law and Industrial Policy in the Agricultural Sector," Mayer Brown (May 8, 2013).
[143] *See, e.g.*, Ann Tracy Mueller, "Food Security Top Priority in China, Say Soy Farmers Meeting in Beijing," AgriPulse (Mar. 28, 2014).
[144] Another example is the Thermo Fisher/Life Technologies case, in which MOFCOM required Thermo Fisher to reduce prices of certain products by 1% each year. *See* MOFCOM Announcement [2014] No. 3 (Jan. 15, 2014), *available at* http://fldj.mofcom.gov.cn/article/ztxx/201401/20140100461603.shtml.

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

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

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

b) Google/Motorola

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

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

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

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

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

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

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

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

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

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

Both the U.S. and EU competition authorities reviewed the Google/Motorola transaction, and neither jurisdiction required any remedy regarding the Android Platform, and they cleared the transaction 96 days before MOFCOM, on February 13, 2012.[151] Although

[150] *See* USCBC, "China's Strategic Emerging Industries: Policy, Implementation, Challenges & Recommendations" (Mar. 2013), *available at* http://uschina.org/sites/default/files/sei-report.pdf.
[151] *See* European Commission, "Mergers: Commission Approves Acquisition of Motorola Mobility by Google," Press Release (Feb. 13, 2013); DOJ, "Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigations of Google Inc.'s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp. and Research in Motion Ltd." (Feb. 13, 2012), *available at* http://www.justice.gov/atr/public/press_releases/2012/280190.htm.

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

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

c) Microsoft/Nokia

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

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

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

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

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

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

- With respect to SEPs, Microsoft must make SEPs available to SSOs, and not seek to exclude other companies from SEPs through injunctions or otherwise. (This obligation applies only with respect to companies that undertake reciprocal obligations.) This condition applies indefinitely, until MOFCOM agrees to amend or terminate it.

- With respect to non-SEPs for Android smartphones and other licensing programs, Microsoft must continue to make patents available at current royalty rates, and on terms and conditions substantially similar to those offered by Microsoft pre-concentration. However, MOFCOM also required that in negotiations for new licenses (which the U.S. Chamber of Commerce believes mostly involve Chinese original equipment manufacturers, or OEMs, and renewals, Microsoft will consider the "unique" circumstances of licensees and market conditions. This condition applies for eight years, until April 8, 2022.

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

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

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

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

3. Protection of famous Chinese brands

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

a) Coca-Cola/Huiyuan

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

Some 182 days after Coca-Cola submitted its initial notification, MOFCOM released its decision on March 18, 2008.[160] It identified the following adverse impacts from the transaction:

[157] *See also, e.g.*, Section IV.C.
[158] *See* 2006 Regulations, Art. 12 ("When an acquisition of a domestic enterprise by a foreign investor results in … transfer of an actual control in a domestic enterprise which owns any well-known trademarks or Chinese historical brands, the parties concerned shall report to and apply for approval from MOFCOM.").
[159] *See* Sundeep Tucker et al., "China Blocks Coca-Cola Bid for Huiyuan," Financial Times (Mar. 19, 2009).
[160] MOFCOM Announcement [2009] No. 22 (Mar. 18, 2009), *available at* http://fldj.mofcom.gov.cn/article/ztxx/200903/20090306108494.shtml.

- Coca-Cola could use its market dominance in carbonated soft drinks to limit competition in the market for juice through tying, bundling, or other exclusive transactions, resulting in consumers being forced to accept higher prices and reduced variety.

- Coca-Cola's market power on the juice market would be significantly enhanced by controlling two famous juice brands, *i.e.*, Meizhiyuan (Minute Maid) and Huiyuan. The transaction would significantly raise entry barriers for potential competitors in the fruit drink market.

- The concentration would reduce the space available for small and medium-sized juice companies to compete and independently innovate in the fruit drink market.

- The transaction would have an adverse effect on the structure of competition in China's fruit juice drink market.

- MOFCOM apparently considered claimed efficiencies, because their decision refers to the effects of the transaction on technological advances and on consumers. However, MOFCOM determined that the parties failed to provide sufficient evidence to prove that the positive impact of the transaction on competition would outweigh the negative impact, or that the transaction "conformed to the requirements of social and public interests."

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

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

[161] *See* Sundeep Tucker, "Coca-Cola's $2.4 bn China Deal at Risk," Financial Times (Mar. 17, 2009).
[162] *See* Wang Shanshan et al., "How the Coke-Huiyuan Deal Fizzled Out," Caijing (Apr. 3, 2009).
[163] *See, e.g.*, Sundeep Tucker et al., "China Blocks Coca-Cola Bid for Huiyuan," *supra* note 161; Ted Henneberry & Jonathan Palmer, "Competition Goes Flat: China's Refusal to Allow Coca-Cola's Huiyuan Bid Suggests a Worrying Move toward Protectionism," Asialaw (Apr. 2009).

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

b) InBev/Anheuser-Busch

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

MOFCOM conditionally approved the transaction on November 18, 2008.[168] MOFCOM noted that it had consulted a variety of sources, including by "reviewing the materials submitted, consulting with relevant government agencies, and soliciting opinions from relevant beer industrial associations, principal domestic manufacturers of beer and raw materials, and distributors of beer products." However, MOFCOM did not discuss any of these sources further. MOFCOM also stated that the proposed transaction had an "enormous size" and would "significantly enhance the combined market share and competitiveness of the new enterprises," but it did not explain this finding further. Based on this, MOFCOM imposed the following three conditions on the transaction: (i) InBev may not increase the stake in Tsingtao Brewery above Anheuser-Busch's then-current level of 27%; (ii) InBev's stake in Guangdong Zhujiang Brewery may not rise above the

[164] *See, e.g.*, Sundeep Tucker & Jamil Anderlini, "Coke's Rejection Is to Chinese Public's Taste," Financial Times (Mar. 18, 2014); Ted Henneberry & Jonathan Palmer, "Competition Goes Flat: China's Refusal to Allow Coca-Cola's Huiyuan Bid Suggests a Worrying Move toward Protectionism," *supra* note 163.
[165] *See* He Wen & Hu Yilin, "Coca-Cola: Juice Market Share Will Not Exceed 20% after the Acquisition," EEO.com.cn (Sept. 13, 2008).
[166] *See* Mu Xuequan, "Coca-Cola, Juice Maker Huiyuan Both 'Respect' Chinese Gov't Rejection of Purchase Bid," Xinhuanet (Mar. 19, 2009).
[167] *See* Michael J. de la Merced, "InBev to Buy Anheuser-Busch for $52 Billion," New York Times (Jul. 14, 2008).
[168] *See* MOFCOM Announcement [2008] No. 95 (Nov. 18, 2008), *available at* http://fldj.mofcom.gov.cn/article/ztxx/200811/20081105899216.shtml.

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

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

C. Promotion of Industrial Policy through National Security Review

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

The scope of the NSR covers not only foreign M&A in the defense sector, but also foreign M&A involving important agricultural products, important energy and resources, important infrastructure, important transport, key technology, and major assembly manufacturing, whereby the foreign investors may acquire actual control rights.[174] These reviews are mainly administered by MOFCOM's Foreign Investment Administration Department.[175] When conducting an NSR, a Ministerial Panel[176] will consider the impact of the transaction not only on national security, but also on national economic stability,

[169] A fourth condition was that InBev must inform MOFCOM of changes in its controlling shareholders. *Id.*
[170] *See, e.g.*, Jonathan Soble, "Beijing Holds Up Japanese Takeover of Lucite," Financial Times (Apr. 12, 2009).
[171] *See* AML, Art. 31.
[172] *See supra* note 117.
[173] On March 4, 2011, MOFCOM issued the Interim Regulations on the Implementation of Matters Concerning the Security Review System for Foreign Mergers and Acquisitions of Domestic Enterprises, which had a trial period from March 5, 2011 through August 31, 2011.
[174] *See* NSR Notice, Art. 1(1).
[175] *See* Eliot Gao, "China's National Security Review Regime Lacks Clarity, Competition Lawyers Say," PaRR (Jul. 6, 2012).
[176] The Ministerial Panel consists of representatives of NDRC, MOFCOM, and other relevant departments according to the industries and fields involved in the transaction. *See* NSR Notice, Art. 3(1).

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

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

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

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

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[177] *See* NSR Notice, Art. 2.
[178] However, including well-known trademarks and Chinese historical brands within the definition of national security would likely run afoul of WTO law. *See* Kevin B. Goldstein, "Reviewing Cross-Border Mergers and Acquisitions for Competition and National Security: A Comparative Look at How the United States, Europe, and China Separate Security Concerns from Competition Concerns in Reviewing Acquisitions by Foreign Entities," 3 Tsinghua China Law Review 215, 217 (2011); *see also* Section III.B.3.
[179] *See* Timothy J. Keeler et al., "National Security Review by U.S. Government Clears Acquisition of Smithfield Foods by Chinese Meat Processor, Shuanghui International," Mondaq (Sept. 12, 2013). Shuanghui International is now known as WH Group.
[180] The frozen-pork reserves are China's one-of-a-kind version of the strategic stockpiling practiced in other parts of the world for the most economically sensitive commodities, such as petroleum in the United States. *See* Chuin-Wei Yap, "China Launches New Round of Pork Stockpiling," Wall St. Journal (May 7, 2014).
[181] *See* NSR Regulations, Art. 4.
[182] *See* NSR Notice, Art. 4.

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

D. Procedural Deficiencies

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

- Chinese government agencies with no formal role in merger review participate indirectly in MOFCOM merger reviews and can block MOFCOM's approval of proposed transactions, subject to the satisfaction of their industrial policy objectives.

- Companies under review are denied full access to counsel during in-person meetings with MOFCOM as part of the investigation into proposed transactions.

- Companies are required to propose remedies without being informed of the legal problems or the theories of economic harm that their proposed transaction supposedly poses, let alone have an opportunity to respond to such proposed concerns.

- Flexibility regarding filing requirements allows MOFCOM to extend merger review deadlines beyond what AML regulations provide.

- Companies lack a meaningful right to appeal MOFCOM determinations, including because any relief would likely be too late to save a transaction that has been suspended while the merger review is pending, and also due to fear of retribution.[185]

- Remedies imposed by MOFCOM in individual transactions are not necessarily tailored to address the competitive concerns identified in MOFCOM's analysis (as discussed above in Section III.B).

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[183] *See supra* note 105.
[184] *See* Lester Ross & Kenneth Zhou, "China's Temporary 'CFIUS' Implementing Regulations," WilmerHale (Mar. 25, 2011), http://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=94240.
[185] *See generally* Lester Ross & Kenneth Zhou, "Administrative and Civil Litigation under the Anti-Monopoly Law," *in* Adrian Emch & David Stallibrass (eds.), China's Anti-Monopoly Law: The First Five Years, Wolters Kluwer (2013), at 325–328.

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

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

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

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

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

2. Lack of access to counsel of choice

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

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

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

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

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

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

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

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

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

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

4. Manipulation of timing of reviews

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

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

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

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

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

[191] AML, Art. 23.

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

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

Selected MOFCOM Merger Review Timelines

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

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

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

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

By contrast, in the United States and the EU, competition law authorities provide extensive guidance for determining when a submission is complete, and timing is dictated by considerations of obtaining sufficient information to make accurate decisions grounded in competition law considerations. For example, the FTC has published detailed instructions to specify the information that must be provided in premerger notifications.[195] In the EU, the Implementing Regulation[196] includes annexes that set out the applicable forms with requested information, including documents. In addition, companies may contact the Directorate-General for Competition beforehand to see how

[194] In the Samsung/Seagate case, the European Commission unconditionally cleared the deal on October 19, 2011 (54 days before MOFCOM), and the FTC unconditionally cleared the deal on December 7, 2011 (5 days before MOFCOM); in the case of Google/Motorola, the European Commission and DOJ cleared the deal unconditionally on February 13, 2012 (96 days before MOFCOM); in the Glencore/Xstrata case, DOJ unconditionally cleared the deal in July 2012 (9 months before MOFCOM), and the European Commission approved the deal with conditions on November 22, 2012 (145 days before MOFCOM); in the Marubeni/Gavilon case, the European Commission unconditionally cleared the deal under simplified procedure in August 2012 (8 months before MOFCOM), and the FTC unconditionally cleared the deal in November 2012 with an early termination of review (5 months before MOFCOM).
[195] *See* FTC, "Enforcement, Premerger Notification Program, the Form and Instructions," *available at* http://www.ftc.gov/enforcement/premerger-notification-program/form-and-instructions.
[196] *See* C.2 Commission Regulation (EC) No 802/2004 (Apr. 7, 2004) implementing Council Regulation (EC) No 139/2004 (OJ L 133, 30.04.2004, at 1) amended by Commission Regulation (EC) No 1033/2008 of October 20, 2008 (OJ L 279, 22.10.2008, at 3)—consolidated version of October 23, 2008, *available at* http://ec.europa.eu/competition/mergers/legislation/merger_compilation.pdf.

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

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

IV. Investigations and Penalties

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

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

[198] The revocation provisions in the Tentative Guiding Opinions might lead to substantial uncertainties over "simple case" status. *See supra* note 197. The Tentative Guiding Opinions are also silent on the procedural benefits of a concentration being classified as a simple case. The lack of any mention of an indicative merger review timeframe means that there is no assurance of Phase I clearance. *See* Michael Gu, "At Last, MOFCOM Formally Adopts Simplified Merger Review Procedure," AnJie Publications (May 13, 2014). As for the Provisional Regulations, it is not clear whether the "not engage in economic activities in China" requirements in Art. 2(iv) and (v) for determination of a simple case apply to *de minimis* economic activities in China. In addition, there is no clear time limit for MOFCOM's decision to retroactively void a clearance under Art. 4. This presents uncertainties to the closing of relevant transactions. *See* Lester Ross & Kenneth Zhou, "China Establishes Expedited Preliminary Merger Review Procedure," WilmerHale (Feb. 20, 2014), *available at* http://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=10737423411.

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

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

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

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

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

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

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

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

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

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

aviation, cosmetics, automobiles, telecommunications, pharmaceuticals, and household appliances, and will "impose severe punishments for illegal pricing behavior."[205] Indeed, according to Lu Yanchun, deputy director of NDRC's Price Supervision and Anti-Monopoly Bureau, NDRC has already initiated pricing-related investigations in the following industries: aviation, books, paper manufacturing, insurance, telecoms, liquid crystal displays, pharmaceuticals, *baijiu*,[206] infant formula, gold, and construction materials.[207] It has also initiated investigations of companies in the automobile and medical devices industries that appear to be focusing on foreign companies,[208] concluded an RPM investigation of the optical lens market and imposed fines totaling more than RMB 19 million on five foreign companies[209] and announced plans to focus on international shipping, IP, e-commerce, and medical devices in 2014.[210] In addition, NDRC recently announced that it will assess fines in patent-related cases on the basis of global revenue rather than domestic revenue, as it has done in the past – a policy that will have a disproportionate impact on foreign IPR holders.[211]

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

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[205] *See supra* note 10.
[206] *Baijiu* is a potent white spirit typically distilled from sorghum.
[207] *See* "NDRC: Six Industries Including Aviation, Household Chemicals, Automobiles, Telecommunications, Pharmaceuticals and Home Appliances Center the AML's Field of Vision," Beijing Business Today (Nov. 25, 2013).
[208] *See, e.g.*, "Dominance of foreign medical equipments [sic] in Chinese market arouses concerns – report (translated)," PaRR (Nov. 8, 2013) ("Imported medical equipment overwhelmingly dominates China's market, not only because of foreign brands' more advanced technology but 'high sum' of kickbacks involved…."); Lisha Zhou & Joy C. Shaw, "Chinese antitrust authorities probe kidney dialysis machine makers," PaRR (Dec. 3, 2013) (reporting that NDRC initiated AML investigations of hemodialysis equipment makers, including at least one European company).
[209] *See* "Several optical lens manufacturers have received investigations and fines for RPM," NDRC Work Dynamic (May 29, 2014). Essilor, Nikon, Zeiss, Bausch & Lomb and Johnson & Johnson were fined RMB 8.79 million, RMB 1.68 million, RMB 1.77 million, RMB 3.69 million and RMB 3.64 million, respectively, for entering into RPM agreements. *Id.* The levels of fines were calibrated to each company's degree of cooperation with NDRC, and Hoya and Weicon (a domestic contact lens manufacturer) were exempted from fines because they had "proactively reported to NDRC, provided evidence and rectified their behavior." *Id.*
[210] *See* "NDRC Lists Shipping, IP, e-Commerce and Medical Devices as 2014 Enforcement Priorities," MLex (Apr. 15, 2014); "NDRC: Further Exploit the Supporting Role of IP," SIPO (Feb. 27, 2014), *available at* http://www.sipo.gov.cn/mtjj/2014/201402/t20140226_907655.html.
[211] *See* Joy C. Shaw, "China's NDRC to use global revenue as basis for fines in patent probes – ABA Antitrust in Asia," *supra* note 15.
[212] *See* Liu Xu, "Three Anti-Monopoly Law Enforcement Authorities: What Have They Done Wrong in Law Enforcement," Caixin Online (Aug. 6, 2014) (describing "selective punishment" as one of several problems with China's enforcement of the AML).

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

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

A. Promotion of Industrial Policy

1. Price controls

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

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

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

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

[216] *See* Section IV.C.

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

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

a) Soaps and detergents

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

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

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

[219] *But see supra* note 23.

[220] *See supra* note 24.

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

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

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

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

b) Infant formula

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

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

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

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

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

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

[227] *See* Amie Tsang & Louise Lucas, "Chinese Thirst for Formula Spurs Rationing," Financial Times (Apr. 7, 2013).

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

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

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

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[229] *See* Louise Lucas, "Baby Milk Makers Slash Prices in Bow to Beijing Regulators," Financial Times (Jul. 3, 2013).
[230] *See* Patti Waldmeir, "Nestlé 'Co-Operating' with China Probe into Baby Milk Prices," Financial Times (Jul. 2, 2013).
[231] *See* Louise Lucas, "Baby Milk Makers Slash Prices in Bow to Beijing Regulators," Financial Times (Jul. 3, 2013).
[232] *See* Tom Mitchell & Neil Hume, "China Fines Milk Formula Makers in Pricing Probe," Financial Times (Aug. 7, 2013).
[233] *See* "Biostime and Other Milk Power Enterprises Were Fined a Total of RMB 668.73 Million for Conducts Restricting Competition That Violate the AML," NDRC News Center (Aug. 7, 2013).
[234] *See* Ding Liang, "After Many Twists and Turns China's First Vertical Monopoly Agreement Dispute Has Ended—Comments on Rainbow v. Johnson & Johnson," Wolter Kluwer (Aug. 5, 2013).
[235] The ruling in *Rainbow v. Johnson & Johnson* has not been adopted by the SPC in an interpretation of the AML or recognized by the SPC as a model case to be studied by lower courts.
[236] *See* Yang Lina, "Chinese Premier Vows to Boost Dairy Industry," *supra* note 228. NDRC's efforts may have been counterproductive, as the foreign companies' price reductions likely further entrenched foreign companies in the domestic infant formula market. As of April 1, 2014, a Chinese-language label for imported infant formula products must be printed on the package for the smallest unit of sale before entering China; labeling within the territory of China is no longer allowed. In addition, as of May 1, 2014, infant formula products manufactured by foreign companies may not be imported into China unless the manufacturer has been registered with the General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ). *See* Announcement on Strengthening Regulation of Importation of Infant Formula, Art. 2, AQSIQ [2013] No. 133 (Sept. 23, 2013).

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

c) Automobiles and Automobile Parts

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

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

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

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

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

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

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

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

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

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

A wave of price reductions followed. Jaguar Land Rover announced on July 25 that it would cut prices on three popular car models by an average of RMB 200,000 ($32,334) starting August 1.[244] Mercedes announced on August 3 that it would cut spare parts prices by an average of 15% following an earlier average a 20% reduction in maintenance service prices.[245] Audi and Chrysler also cut prices.[246]

Yet NDRC's investigations continued. NDRC raided Mercedes' Shanghai offices on August 4,[247] and NDRC's Jiangsu affiliate subsequently raided Mercedes dealerships in five cities in the province.[248] On August 12 NDRC fined FAW-Volkswagen, Audi's Chinese joint venture – which had reportedly "closely cooperated" with NDRC's investigation – as much as RMB 1.8 billion ($292 million), and 11 Hubei-based dealers would reportedly also receive fines ranging from RMB 6 million to over RMB 50 million. on August 12.[249] Li Pumin, NDRC's secretary-general, asserted that Chrysler and Audi "definitely engaged in monopolistic behavior, according to the investigations [carried out by NDRC's Hubei affiliate]," Li said. "They will receive punishment in the near term."[250] Meanwhile, China's state media has dedicated significant airtime to accusing foreign luxury-automobile makers of earning exorbitant profits in China by dominating the market, overcharging consumers, and controlling automobile parts sales.[251]

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

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

[244] Joy C. Shaw & Lisha Zhou, "China NDRC may impose antitrust fines on auto manufacturers soon, sources say," *supra* note 242.
[245] *See* "Mercedes-Benz offices in Shanghai raided by NDRC-report (*translated*)," PaRR (Aug. 5, 2014).
[246] *See* Rose Yu & Liyan Qi, "BMW Cuts Spare-Parts Prices in China," Wall St. *Journal* (Aug. 8, 2014).
[247] Lisha Zhou & Joy C. Shaw, "China's NDRC launches formal vertical restraint probe of Mercedes-Benz, sources say," *supra* note 243.
[248] "Chinese antitrust authority accuses Mercedes-Benz of imposing vertical restraints," PaRR (Aug. 18, 2014). The five cities were Suzhou, Wuxi, Huaian, Yangzhou, and Danyang. *Id.*
[249] "China NDRC likely to impose CNY 1.8bn fine on Audi's China unit-report (translated)," PaRR (Aug. 12, 2014).
[250] *See* "China's NDRC says 12 Japanese car parts suppliers face fines; Chrysler, Audi probe nears conclusion," PaRR (Aug. 6, 2014).
[251] *See* Colum Murphy, "Car Makers Face Hits in China," Wall St. Journal (Aug. 5, 2014); "CCTV once again exposed foreign automobile makers profiteering, pointing fingers to BMW, Mercedes, Cayenne and Touareg," QQ Finance (May 28, 2014) (reporting that the CCTV 2 television show "Half an Hour Economy" broadcast a special program regarding the exceptionally high prices of foreign automobiles in China, alleging that certain models cost three times more in China than in overseas markets, quoting scholars as saying that monopolistic RPM practices conducted are to blame)

> hearings or involve their respective governments or chambers of commerce are contrary to best practices.
>
> While the European Chamber recognises that a number of Chinese companies have been investigated for AML violations, the European business community is also increasingly considering the question of whether foreign companies are being disproportionately targeted in the investigations.
>
> In some of the industries under investigation, domestic companies have not been targeted for similar violations. Furthermore, in some cases that involve joint ventures, it has only been the foreign partner that has been named as being a party to the investigations. A core tenet of a globalised economy is that all business operators, regardless of nationality, should be held accountable to the same criteria and be treated equally. Competition law should not be used as an administrative instrument to harm targeted companies or serve other aims, such as administratively forcing price reductions.[252]

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

2. Pressure to license IP at below-market rates

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

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

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

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

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

a) InterDigital

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

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

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[255] *See* Joy C. Shaw, "China's NDRC to use global revenue as basis for fines in patent probes – ABA Antitrust in Asia," *supra* note 15. Art. 47 of the AML does not specify the geographic basis for turnover calculations which gives the AMEAs discretion.
[256] USCBC, "China's Strategic Emerging Industries: Policy, Implementation, Challenges & Recommendations" (Mar. 2013), *available at* http://uschina.org/sites/default/files/sei-report.pdf.
[257] *See* Lin Jinbiao, "A Battle across the Pacific Ocean: Conclusion of Trial by the Higher People's Court of Guangdong Province of the Case of Anti-Monopoly Dispute between Huawei and IDC Regarding Abuse of Market Dominance," People's Court News (Oct. 29, 2013). The article was released by People's Court News, and was reprinted by other newspapers and websites, including an official government website for Guangdong courts, *available at* http://www.gdcourts.gov.cn/gdcourt/front/front!content.action?lmdm=LM22&gjid=20131101104516982014.
[258] *See* U.S. International Trade Commission "In the Matter of Certain Wireless Devices with 3G Capabilities and Components Thereof; Notice of Institution of Investigation," 76 Fed. Reg. 54,252 (Aug. 31, 2011); *see also* "InterDigital Communications Inc. et. al. v. Huawei Technologies Co. Ltd et. al. Complaint for Patent Infringement" filed January 2, 2013, in the U.S. District Court for the District of Delaware.
[259] *See* InterDigital 10-Q report, filed October 31, 2013, *available at* http://files.shareholder.com/downloads/IDCC/2771353934x0xS1405495-13-40/1405495/filing.pdf. In an article published by NDRC's Price Supervision and Anti-Monopoly Bureau in *Price Supervision and Anti-Monopoly in China*, NDRC was reported to have started the probe in June 2013, and called in relevant personnel in InterDigital for investigation and interviews in July 2013 and January 2014. *See* Price Supervision and Anti-Monopoly Bureau of NDRC, "NDRC suspends investigation on US company IDC for alleged price monopoly," Price Supervision and Anti-Monopoly in China, Issue 6 of 2014.

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

InterDigital actively cooperated with NDRC during the investigation, and reached a settlement with Huawei regarding terms other than licensing fees, and pledged to negotiate licensing with other Chinese enterprises using Huawei's licensing terms as reference. InterDigital submitted an application for suspension of the investigation in March 2014.[261] NDRC announced that it had decided to suspend its investigation on May 22, 2014, based on InterDigital's commitments (i) to offer Chinese licensees the option of taking a worldwide license of InterDigital's SEPs only, on FRAND terms and without requiring royalty-free, reciprocal cross-licensing of SEPs; (ii) not to require licensees to provide InterDigital with royalty-free, reciprocal cross-licensing of SEPs; and (iii) before commencing any action to seek injunctive or other exclusionary relief, to offer the potential Chinese licensee the option to determine the royalty rate and other non-agreed terms of a worldwide license under InterDigital's SEPs through binding arbitration.[262] Xu Kunlin, Director-General of NDRC's Price Supervision and Anti-Monopoly Bureau, stated that NDRC "will monitor the implementation of these commitments and if they are not well executed we will resume the investigation according to law."[263]

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

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

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

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

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

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

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

The investigation also appears to have had significant procedural irregularities. For example, one of InterDigital's submissions to NDRC labeled "Confidential Materials" was displayed on state television; it is unclear whether NDRC allowed state media or other third parties to access the document in its entirety.[266] In addition, NDRC reportedly declined to guarantee the personal safety of InterDigital executives invited to attend a meeting regarding the investigation on December 18, 2013.[267] The meeting eventually took place in January 2014, and in February 2014 InterDigital issued a press release describing statements NDRC officials made during the January meeting about concerns regarding the detention of foreign executives and the ability of foreign counsel to attend NDRC investigatory meetings. A corrected press release indicated the company's "apologies" for misunderstanding Chinese law and NDRC rules in that regard.[268] It remains unclear why InterDigital corrected its press release to make this public apology. Chinese state media thereafter reported that InterDigital "vow[ed] to stop … charging Chinese companies license fees that are discriminatory and exploitative."[269]

b) Qualcomm

NDRC's second AML investigation of a U.S. company in the telecommunications sector targeted Qualcomm (and apparently remains ongoing). Qualcomm disclosed that it was being investigated by the NDRC for possible violations of the AML on November 25, 2013.[270] Some observers suspect that it was related to China Mobile's launch of 4G in 2014, from which Qualcomm stands to earn license fees for its patents[271]—although

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

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

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

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

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

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

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

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

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

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[272] *See* "NDRC Held a Press Conference Themed 'Price Supervision and Anti-Monopoly Work,'" China.com.cn (Feb. 19, 2014), *available at* http://www.china.com.cn/zhibo/2014-02/19/content_31502397.htm (quoting Xu Kunlin as stating: "People are so bent on guessing the background of these antimonopoly investigations. Actually in all the cases we've dealt with so far, there's none of those conjectured 'background'. These two investigations originated from complaints filed to us and are not related to 4G or 3G.").
[273] *See* "China's Communications Industry Files Complaint against Qualcomm," CCTV (Feb. 10, 2014).
[274] *See* "Qualcomm president answered anti-monopoly investigation inquiries in his third visit to NDRC," Work Dynamics, NDRC (July 11, 2014), *available at* http://jjs.ndrc.gov.cn/gzdt/201407/t20140711_618477.html. One Chinese legal scholar has objected to the "one-stop" enforcement adopted by NDRC in the Qualcomm investigation, under which NDRC investigates allegations of both pricing- and non-pricing-related (*e.g.*, bundled sales and unreasonable non-price conditions) in the same investigation. *See* Liu Xu, "Three Anti-Monopoly Law Enforcement Authorities: What Have They Done Wrong in Law Enforcement," Caixin Online (Aug. 6, 2014). According to this scholar, non-price-related AML violations fall outside the scope of NDRC's authority. *Id.*
[275] *See* "NDRC Has 'Substantial' Evidence against Qualcomm," DM Asia (Dec. 16, 2013).
[276] *See* Zheng Yangpeng, "Probes 'Note Targeting' Foreign Firms: Official," China Daily (Feb. 20, 2014). In another incident, Director-General Xu announced that an individual had been removed from the AMC's advisory board due to allegedly improper lobbying on behalf of Qualcomm. *See* Joy C. Shaw & Lisha Zhou, "China's NDRC urges sacking of state antitrust advisor for alleged Qualcomm lobbying," PaRR (July 31, 2014); *see also supra* note 48.

also arguably inconsistent with Chinese law, which forswore the power to regulate royalties imposed by Chinese licensees when the Regulations on Administration of Technology Introduction Contracts was abolished in 2002.[277] In addition, procedural irregularities in the Qualcomm investigation, such as Mr. Xu's public remarks, raise concerns regarding the fairness of the investigation.

B. Procedural Deficiencies

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

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

- *Lack of access to counsel*. Like MOFCOM, NDRC has often barred foreign counsel from participating in meetings in connection with investigations under the AML.

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

[277] Arts. 4 and 5 of the Regulations on Administration of Technology Introduction Contracts (promulgated by the State Council in 1985, amended in 1991, and abolished in 2002) required that technology introduction contracts concluded by the parties be filed with the Ministry of Foreign Economic Relations and Trade (MOFCOM's predecessor) or any other agency authorized by such Ministry for examination and approval. Under these Regulations, the contracting parties were required to specify in contract the amount and composition of remuneration, among other things.
[278] *See* Michael Martina, *supra* note 6.
[279] *Id.*
[280] To date, it is unclear whether SAIC's investigations also have the same shortcomings.

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

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

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

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

[281] *See, e.g.*, Lester Ross & Kenneth Zhou, "Administrative and Civil Litigation under the Anti-Monopoly Law," *in* Adrian Emch & David Stallibrass (eds.), *supra* note 185, at 325 ("[G]overnment agencies do not like to be sued and are sometimes prone to irregular means to dissuade parties from engaging in litigation.").
[282] NDRC has, however, published a monthly magazine entitled *China Price Supervision and Anti-Monopoly* announcing major events under the Price Law and the AML since 2005.
[283] Although Article 53 of the AML provides that any company may appeal administrative decisions regarding the AML, either to the administrative organ itself or to the courts, requests for information are apparently not appealable. On the United States, s*ee* DOJ, "Antitrust Division Manual" (5th ed. Mar. 2014) at III-74, *available at* http://www.justice.gov/atr/public/divisionmanual/.
[284] *See, e.g.*, Susan Decker, "InterDigital Says China Made Threats on Huawei Patent Royalties," *supra* note 267; "InterDigital Execs Fear Arrest, Won't Meet China Antitrust Agency," Reuters (Dec. 16, 2013).
[285] *See* Press Release, "CORRECTION – InterDigital Continues to Cooperate With Investigation by China's National Development and Reform Commission," InterDigital (Feb. 12, 2014), *available at* http://ir.interdigital.com/releasedetail.cfm?ReleaseID=825422.

C. SAIC's 8th Draft Rules

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

1. Requiring rights holders to license patents on FRAND terms if they are deemed "essential" to other parties, even in cases where the rights holder has not made any commitment to an SSO to license its patents. As a result, the value of the patents may be diminished, merely because they are widely used and thus deemed "essential."

2. Requiring rights holders to disclose to SSOs any patents they believe to be essential to industry standards under consideration, even if they are not members of the SSO. In effect, this means that foreign rights holders would be forced to join Chinese SSOs and accept FRAND commitments on their patents—in contrast to other countries, where this choice is voluntary.

3. Imposing a burden of proof on rights holders to demonstrate that their conduct does not constitute abuse of market dominance. In effect, this set of provisions heightens the legal risk associated with licensing patents that are widely used.[286]

These rules are part of a broader push by Chinese legal authorities and regulators to assume the power to declare certain patents "essential," and therefore subject to licensing on FRAND terms, regardless of the right holder's preferences. This tendency is also evidenced by the remedies imposed in MOFCOM's review of the Google/Motorola and Microsoft Nokia cases, discussed above at Sections III.B.2.b) and III.B.2.c), respectively. In addition, an SPC draft judicial interpretation on Patent Infringement Cases (II) ("Draft Judicial Interpretation") released July 31, 2014[287] would authorize Chinese courts to

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

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

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

1. Essential facilities doctrine

Article 7 of the Draft Rules provides:

> Without due justification, an undertaking with a dominant market position is not allowed to refuse to license its intellectual property rights to other undertakings on reasonable terms and conditions, if such intellectual property rights constitute essential facilities for production and operations.
>
> To identify whether an intellectual property right constitutes an essential facility for production and operations, factors to be considered include: whether the intellectual property right has reasonable substitutes in the relevant market and is necessary for

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

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

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

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

Thus, any company with IPR that is deemed "essential … for production and operations"[291] under the four-factor[292] test of Article 7 would be obligated to accept any "reasonable" offer to license its IP, regardless of the nature of the company's dominance or the IP involved, unless it has "due justification" for refusing to do so. Moreover, companies will have no way to know *ex ante* how SAIC or the Chinese judiciary would interpret any of these terms. Rather, the definitions of "essential" and "dominant," and the meaning of each of the four factors, will have to be articulated through litigation. Particularly in light of the Chinese judiciary's due process deficiencies (discussed in Section V), as well as its track record of issuing rulings that are highly favorable to Chinese licensees (as in *Huawei v. InterDigital*), this enunciation of the essential facilities doctrine heavily favors licensees at the expense of licensors, which often are foreign companies.

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

2. Mandatory licensing of SEPs

[291] The phrase "production and operations" may be intended to exclude parts of a business that are purely administrative in nature.
[292] The catch-all open-ended "so on" is arguably a fourth factor.
[293] For example, the EU has an essential facilities doctrine which applies only in cases of abuse of dominance, and the application of which has generally been limited to cases of refusal to deal. *See* Sébastien J. Evrard, "Essential Facilities in the European Union: *Bronner* and Beyond," 10 Colum. J. Eur. L. 491, 491-492 (2003-2004).
[294] *See* Maureen K. Ohlhausen, Commissioner, FTC, "Special Address at the 2013 Standards and Patents Conference, London, UK: A Pragmatist's Approach to Navigating the Intersection of IP and Antitrust" (Dec. 4, 2013), at 16, *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/pragmatists-approach-navigating-intersection-ip-antitrust/131204ukantitrust.pdf (reporting that in China "I heard people claim that the United States has a well-established essential facilities doctrine, which is not exactly correct. … This is not an accurate reading of relevant U.S. law.").

Article 13 of the Draft Rules states:

> Undertakings must not, when exercising intellectual property rights, engage in conduct that eliminates or restricts competition in the process of setting and implementing standards (including mandatory requirements under national technical specifications).
>
> Without due justification, an undertaking with a dominant market position is not allowed to engage in the following conduct in the process of setting and implementing standards:
>
> (1) intentionally omitting to disclose information about its rights, or expressly waiving its rights, but claiming patent rights against standard implementers after the patent becomes a mandatory standard, if the undertaking knows the patent may be included in the relevant standard; …

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

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

3. Burden of proof

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

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

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

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

V. Judicial Enforcement

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

The deficiencies of the Chinese judicial system include the following:

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

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[297] Draft Rules, Arts. 9–11.
[298] *See* AML, Art. 50 ("Where the monopolistic conduct of an undertaking has caused losses to another person, it shall bear civil liabilities according to law.").
[299] *See generally* Stanley B. Lubman, Bird in a Cage: Legal Reform in China after Mao, Stanford University Press, 1999; *see also, e.g.*, Ji Weidong, "The Judicial Reform in China: The Status Quo and Future Directions," 20 Ind. J. Global Legal Stud. 185, 186 (2013) (arguing that "the principle of judicial independence is not established" in China's judiciary).
[300] Angela Meng & Keith Zhai, "Communist Party Pledges to Improve Judicial Independence, Transparency—To a Point" (Nov. 15, 2013) (quoting Tong Zhiwei, identified as a law professor at Shanghai's East China University of Political Science and Law).

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

- *Poorly reasoned decisions*. As one Chinese legal commentator stated: "Chinese judges are, unfortunately, too many in quantity and too poor in quality."[302] Inexperience is particularly acute in the area of competition law.[303] Combined with the lack of an independent judiciary and the lack of transparency, judges' inexperience often leads to decisions based on bad reasoning.

- *Inadequate protections for confidential information*. China has no formal procedures analogous to judicial protective orders, which allow companies to litigate competition issues while ensuring that only outside counsel have access to any commercially sensitive information at issue. As a result, parties to litigation in China are often forced to argue on the basis of an incomplete factual record.

- *Lack of transparency.* As noted above, Communist Party personnel often drive judicial decisions from behind the scenes, and in addition, judges consult *ex parte* with government officials and others.[304] Moreover, until November 2013, many court decisions were not publicly available.[305]

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

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

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

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

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

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

example to date is *Huawei v. InterDigital*. In this case, after years of unsuccessful negotiations between Huawei, ZTE, and InterDigital over InterDigital's SEP portfolio related to 2G and 3G standards—which InterDigital has characterized as a constructive refusal to negotiate by those companies—InterDigital initiated actions in the United States in August 2011, at the U.S. International Trade Commission and a federal district court, to prevent the importation of Huawei's allegedly infringing products.[306] This assertion of IPR reportedly annoyed Huawei,[307] which retaliated by suing InterDigital in China in February 2012.[308] In particular, Huawei initiated actions at the Shenzhen Intermediate People's Court, alleging that InterDigital had abused its dominant market position and seeking a determination of the maximum royalty rate that Huawei would have to pay InterDigital for a license under its Chinese patents.

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

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

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[306] *See* USITC, "In the Matter of Certain Wireless Devices with 3G Capabilities and Components Thereof; Notice of Institution of Investigation," 76 Fed. Reg. 54,252 (Aug. 31, 2011); *see also* "InterDigital Communications Inc. et. al. v. Huawei Technologies Co. Ltd et. al. Complaint for Patent Infringement," filed on January 2, 2013, in the U.S. District Court for the District of Delaware.
[307] *See* Lin Jinbiao, "A Battle across the Pacific Ocean: Conclusion of Trial by the Higher People's Court of Guangdong Province of the Case of Anti-Monopoly Dispute between Huawei and IDC Regarding Abuse of Market Dominance," *supra* note 257.
[308] InterDigital 10-Q report, filed October 31, 2013, *available at* http://files.shareholder.com/downloads/IDCC/2771353934x0xS1405495-13-40/1405495/filing.pdf.
[309] Eventually, on December 24, 2013, InterDigital and Huawei reportedly settled and agreed to resolve their disputes through nonbinding arbitration, although the Chinese judicial case may still be under appeal. *See* Complainant's Rule 210.50(A)(4) Submission on the Public Interest in International Trade Commission Investigation No. TA-337-800 at 2 (Public Version) (Aug. 9, 2013); Everdeen Mason, "InterDigital, Huawei Technologies Agree to Resolve Patent Licensing Disputes," Wall St. Journal (Dec. 24, 2013).
[310] InterDigital 10-Q report, filed October 31, 2013, *available at* http://files.shareholder.com/downloads/IDCC/2771353934x0xS1405495-13-40/1405495/filing.pdf.
[311] *Id.*
[312] Eric Stasik, "Royalty Rates and Licensing Strategies for Essential Patents on LTE (4G) Telecommunications Standards," Les Nouvelles (Sept. 2010), at 116.

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

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

> Due to the fact that domestic companies are far behind companies of developed countries in terms of independent innovation, the establishment of standards and the ownership of patent rights in many fields are substantially controlled by multinational companies of developed countries. Even in the Chinese market, many patents are owned by foreign companies, the use of which requires overseas licensing. Many Chinese enterprises end up with the situation of "working for foreigners" by engaging in business with low profits and low added-value. …
>
> Huawei's success in the anti-monopoly lawsuit is quite meaningful. Qiu Yongqing, the Chief Judge [of the Guangdong Higher People's Court], believes that Huawei's strategy of using anti-monopoly laws as a countermeasure is worth learning by other Chinese enterprises. Qiu suggests that Chinese enterprises should bravely employ anti-monopoly lawsuits to break technology barriers and win space for development.[315]

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

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[313] InterDigital 10-Q report, filed October 31, 2013, *available at* http://files.shareholder.com/downloads/IDCC/2771353934x0xS1405495-13-40/1405495/filing.pdf.
[314] *See* Lin Jinbiao, "A Battle across the Pacific Ocean: Conclusion of Trial by the Higher People's Court of Guangdong Province of the Case of Anti-Monopoly Dispute between Huawei and IDC Regarding Abuse of Market Dominance," *supra* note 257.
[315] *See* Lin Jinbiao, "A Battle across the Pacific Ocean: Conclusion of Trial by the Higher People's Court of Guangdong Province of the Case of Anti-Monopoly Dispute between Huawei and IDC Regarding Abuse of Market Dominance," *supra* note 257.

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

VI. Conclusions and Recommendations

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

- *China appears to be using the AML to promote industrial policy goals, even at the expense of competition—the very goal that other countries' competition laws are designed to enforce.* MOFCOM has used merger remedies to clear the way for national champions to achieve greater market concentrations both within China and abroad, to negotiate down prices on goods and IP for domestic consumers/licensees, and at least in some cases to protect famous domestic brands. These remedies are often imposed in strategic sectors like commodities and high technology. Likewise, NDRC uses its power to investigate and punish violations of the AML to regulate prices and artificially lower IP licensing fees. SAIC's policy statements in the run-up to the implementation of the AML, its investigations of Tetra Pak and Microsoft, and its forthcoming Rules on the Abuse of Dominance Through IPR suggest an orientation similar to that of NDRC.

- *Systemic, officially sanctioned curtailment of IP rights.* By definition, IPR consists of the right to exclude others from the practice of IP. This right is recognized under China's domestic law[318] as well as internationally, including in the WTO TRIPS Agreement and China's Protocol of Accession to the WTO.[319] With respect to SEPs in particular, licensees generally incur FRAND obligations

[316] *See* InterDigital Form 8-K Report, filed December 23, 2013, *available at* http://www.sec.gov/Archives/edgar/data/1405495/000140549513000044/a2013_12x23-form8xk.htm.
[317] The rule of law will be high on the agenda for the Fourth Plenum of the 18th Central Committee of the Chinese Communist Party in October 2014. *See* "The Fourth Plenum to convene in October, 'Rule of Law' set as the central theme for the first time," People's Daily (Jul. 30, 2014), *available at* http://politics.people.com.cn/n/2014/0730/c1001-25367561.html.
[318] *See, e.g.*, Patent Law (1984, and as amended in 1992, 2000, and 2008), Trademark Law (1982, and as amended in 2013), Copyright Law (1990, and as amended in 2001 and 2010), Regulations on New Varieties of Plants (1997, and as amended in 2013).
[319] Although exceptions may apply in limited circumstances, China has not invoked such exceptions in the context of the AML.

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

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

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

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

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

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

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

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

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

[321] *See* "The Decision on Major Issues Concerning Comprehensively Deepening Reforms," adopted at the Third Plenum of the 18th Central Committee of the Chinese Communist Party on November 12, 2013.
[322] The rule of law will be high on the agenda for the Fourth Plenum of the 18th Central Committee of the Chinese Communist Party in October 2014. *See* "The Fourth Plenum to convene in October, 'Rule of Law' set as the central theme for the first time," *supra* note 317.
[323] China and the United States are currently negotiating a BIT. *See* Betsy Bourassa, "U.S. and China Breakthrough Announcement on the Bilateral Investment Treaty Negotiations," Treasury Notes (Jul. 15, 2013), *available at* http://www.treasury.gov/connect/blog/Pages/U.S.-and-China-Breakthrough-Announcement-.aspx.
[324] *See, e.g.*, ICN, *Recommended Practices for Merger Notification Procedures*, at 19, *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf ("Foreign firms should be treated no less favorably than domestic firms in like circumstances in all aspects of the merger review process, including with respect to procedural fairness.").

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

  - Conducting merger reviews solely for the purpose of identifying and preventing or remedying anti-competitive effects, and disclosing any non-competition-related factors that influence the outcome of merger reviews.[327] Moreover, any remedies imposed on proposed transactions must be narrowly tailored to the competition-related concerns identified in the analysis.[328] For example, MOFCOM should not impose price caps as a behavioral remedy unless MOFCOM demonstrates that higher prices would have anti-competitive effects.

  - Recognizing that merger review remedies that vary from those imposed by other jurisdictions should be avoided.[329]

- *Respect IPR by:*

  - Refraining from applying the excessive high pricing provisions of Article 17 (Abuse of Dominance) in the IP license area, and/or limiting application to situations where the licensing conduct has the clear effect of foreclosing downstream competition, strengthening the dominant position of the licensor, and directly harming Chinese consumers.

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[325] *See supra* note 111.

[326] *See supra* note 314 & accompanying text.

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

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

[329] *Id*.

- Limiting AML application in the FRAND licensing area to breaches of actual FRAND licensing or disclosure commitments made through an SSO, and applying the choice of law provisions adopted by the SSO for purposes of interpreting the meaning of those commitments.

- Recognizing that SEP and other IPR rights holders have the legal right to seek injunctive or exclusionary remedies where necessary to protect their IP rights, including in cases where infringing companies are unwilling to accept a license offered on FRAND terms. In other words, licensee hold-out is at least as much of a problem as licensor hold-up.

- Establishing a clear, unbiased, transparent mechanism for determining whether any patent is an "essential facility," so that the "essential facilities" doctrine does not become a point of leverage for licensees only. This process should be designed to inform rights holders *ex ante* whether their IPR constitutes an essential facility, and should provide a clear legal framework for challenging such determinations.

- *Safeguard due process and fundamental fairness by:*

  - Making the role of any third-party agencies (*e.g.*, NDRC, MIIT, or MOA) explicit, transparent, and rules-based. *Sub rosa* participation by third-party agencies should be prohibited.[330]

  - Issuing and publishing well-reasoned decisions regarding any AML violations identified in either the merger review or the investigation context.[331] In addition, in the investigation context, NDRC and SAIC should issue rules establishing the conditions for leniency in investigations, to ensure that the investigating authority does not accord lenient treatment on the basis of political considerations.[332]

  - Issuing guidance regarding the analytical framework that will be applied in merger reviews and other AML investigations. This should take a form

[330] *See, e.g.*, *id*. at 29 ("Interagency coordination should be conducted in accordance with applicable laws and other legal instruments and doctrines") (emphasis deleted); *id.* at 36 ("Competition agencies should have sufficient independence to ensure the objective application and enforcement of merger review laws.") (emphasis deleted).
[331] To date, NDRC has not published any determinations, although it has meted out penalties and extracted concessions from foreign companies on several occasions. In addition, while MOFCOM's decisions are much more sophisticated than they were in 2008, MOFCOM still often fails to draw a connection between its theory of competitive harm and the remedies imposed. MOFCOM should improve its analysis going forward.
[332] NDRC was reportedly planning to draft rules on leniency in October 2013, but no such rules have been issued. *See* Joy C. Shaw, "NDRC defends use of 'leniency' in vertical restraints cases," PaRR (Oct. 21, 2013).

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

- Informing parties to a proposed transaction of any potential competition-related problems as early as possible in the merger review.[334] It should be prohibited to ask parties to propose remedies before they are informed of the supposed threat to competition.

- Establishing clear limits on the timeline for merger reviews. The elastic pre-notification period should be eliminated, and MOFCOM should stop asking parties to withdraw and resubmit notifications.[335] Rather, approval should be automatic at the end of the statutory limit of 180 days.[336]

- Providing for the protection of business secrets and other confidential information obtained from any private parties in the context of administrative and judicial enforcement of the AML, while providing for a means for the target of an investigation to understand the evidence against them so as to avoid an overly broad determination and subsequent reliance on confidential information.

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

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

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

[336] *See* AML, Arts. 25–26.

- Providing for an effective right to appeal AMEA enforcement actions to the judiciary, preferably to an independent AML court or tribunal.[337] This should include the right to appeal requests for information issued in the context of AML investigations—similar to the right of private parties in the United States to move to quash civil investigative demands from DOJ in connection with antitrust investigations. Moreover, China should establish safeguards to protect companies against retribution from administrative agencies whose decisions they appeal.

- Guaranteeing access to counsel. MOFCOM and NDRC should always allow foreign counsel to participate in meetings related to merger reviews and other investigations under the AML, in accordance with China's commitment made at the 2014 S&ED.[338]

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

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

[337] An SPC judge recently suggested using "three-in-one" (*i.e.*, civil, administrative, and judicial) IPR courts – which are planned for the future, but are not yet operational – to resolve appeals against administrative decisions by AMEAs. *See* Joy C. Shaw & Lisha Zhou, "China's 'three-in-one' IPR courts may hear administrative lawsuits on antitrust decisions, Supreme Court judge says," PaRR (May 28, 2014). The NPC Standing Committee will review the SPC proposal to establish specialized IP courts in Beijing, Shanghai and Guangzhou at its 10th meeting. *See* "NPC Standing Committee will review the proposal to establish specialized IP court next week." China's Crackdown on Infringements and Counterfeits Network (Aug. 19, 2014), *available at* http://www.ipraction.cn/2014/08/19/ARTI1408429599632504.shtml.
[338] *See supra* note 188.
[339] U.S. Department of the Treasury, "UPDATED: U.S.-China Joint Fact Sheet Sixth Meeting of the Strategic and Economic Dialogue," Press Release (July 11, 2014), *see* also *supra* note 25.
[340] *See supra* Section IV.A.3.

price controls[341] appear to guide much of its AML enforcement activity targeting foreign companies. Moreover, AML enforcement staff is exposed to political pressure from other agencies as well, as illustrated by NDRC, MIIT, and MOA interference in MOFCOM merger reviews.[342] As a result, AML enforcement activity is often politically motivated and serves industrial policy rather than neutral competition-related objectives.

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

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

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

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

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[341] *See* USCBC, "USCBC Summary of the National Development and Reform Commission (NDRC) 2014 Work Plan" (Feb. 5, 2014); *see* also *supra* note 2.
[342] *See* Section III.D.1.
[343] *See* Section I.A.
[344] *See* Freny Patel & Joy C. Shaw, "Consolidation of China's Antitrust Agencies Not Ruled Out but Not Imminent—MOFCOM Official," PaRR (Dec. 9, 2013) (reporting that Huang Yong and Wang Xiaoye, prominent antitrust scholars and key members of the Expert Advisory Board hired by the AMC, have advocated consolidation of China's three AMEAs into a unified agency with ministry-level status).
[345] *See* Information Office of the State Council, *Judicial Reform in China* (Oct. 9, 2012), *available in translation at* http://news.xinhuanet.com/english/china/2012-10/09/c_131895159.htm.
[346] *See* "The Fourth Plenum to convene in October, 'Rule of Law' set as the central theme for the first time," *supra* note 317.

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

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

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

EXHIBIT 90

PRESS RELEASE

Texas Man Convicted of Conspiracy to Commit Theft of Trade Secrets

Monday, July 29, 2019

For Immediate Release

Office of Public Affairs

A Texas man was convicted today by a federal jury in Washington D.C. of conspiracy to commit theft of trade secrets.

Following a nine-day trial, Shan Shi, 54, of Houston, Texas, was convicted of one count of conspiracy to commit theft of trade secrets. Shi was originally indicted in June 2017 for conspiracy to commit theft of trade secrets, and a superseding indictment containing one count of conspiracy to commit economic espionage and one count of conspiracy to commit money laundering charges issued in April 2018. Shi was acquitted on the other charges.

“Shan Shi and his coconspirators went to great lengths to cash in on the Chinese government’s desire to obtain syntactic foam technology,” said Assistant Attorney General Brian A. Benczkowski of the Justice Department’s Criminal Division. “As this case demonstrates, the Department of Justice is and will remain on the front lines of defending U.S. companies against the theft of their trade secrets.”

“The jury’s verdict makes clear that Shan Shi conspired to steal trade secrets by poaching employees from a U.S. company and enticing them to bring technical data to his company,” said Assistant Attorney General for National Security John C. Demers. “He did this against the backdrop of China’s strategic plan to close the gap between China and United States in buoyancy technology and with the benefit of millions of dollars of funding from China. Like our many other prosecutions implicating China’s economic aggression, this case exemplifies both the threat to American companies and our commitment to confront it.”

“We take very seriously the theft of intellectual property that was developed in the United States through long years of research, development, and innovation,” said U.S. Attorney Jessie K. Liu for the District of Columbia. “Shi chose to steal the secrets of a U.S. company rather than do the hard work necessary to succeed honestly in the free market. He is now being held accountable for that choice.”

“Shan Shi attempted to obtain sophisticated U.S. technology with both military and civilian uses for the ultimate benefit of China,” said Assistant Director John Brown of the FBI’s Counterintelligence Division. “It is no secret that China is determined to achieve superiority in virtually all high-tech areas, and the FBI is equally determined to stop individuals who commit illegal acts to help China achieve its goals. The stakes are high both for U.S. national security and for American companies who invest so much money and time on research and development.”

“FBI Houston’s elite counterintelligence investigators worked for years to dismantle Mr. Shi’s prolific network and bring him to justice,” said Special Agent in Charge Perrye K. Turner of the FBI’s Houston Field Office. “Our highly trained agents and intelligence analysts work every day to protect American businesses from unscrupulous foreign adversaries. We are pleased by today’s verdict, and we will continue to aggressively protect America's economic security and intellectual property from those who would do us harm.”

Evidence introduced at trial established that Shi conspired with others to steal trade secrets from a Houston-based company, Trelleborg Offshore, relating to syntactic foam, a strong, lightweight material with commercial and military uses that is essential for deep-sea oil and gas drilling. In public statements of its national priorities, China has made clear its desire to develop this technology. Shi sought to obtain information about syntactic foam for the benefit of CBM-Future New Material Science and Technology Co. Ltd. (CBMF), a Chinese company based in Taizhou, and for the ultimate benefit of the People’s Republic of China. Four of Shi’s codefendants — some of whom worked at Trelleborg — had pleaded guilty to conspiring to steal trade secrets, and two testified as cooperating witnesses at trial. From 2014 to 2017, CBMF sent Shi’s company in Houston approximately $3.1 million from China in order to promote Shi’s activity in the United States.

Sentencing has been set for Oct. 25, 2019.

The FBI’s Houston Field Office conducted the investigation. Senior Counsel Joss Nichols of the Criminal Division’s Computer Crime and Intellectual Property Section and Assistant U.S. Attorneys Jeffrey Pearlman and Luke Jones for the District of Columbia are prosecuting the case.

Updated July 29, 2019