

The Chinese Antitrust Paradox

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Antitrust law faces a fundamental paradox between protecting competition and protecting competitors. This paradox is more structurally durable in China than in Western societies thanks to the oversized role of the Chinese state in its economy. This Article examines the changing market conditions in China following the adoption of China's Antimonopoly Law (AML), and how these changes have led to paradoxical developments in Chinese antitrust. In a number of areas relating to enforcement authorities, transparency, courts, State-Owned Enterprises, cartels, internet platforms, and foreign companies, the tensions between protecting competition and protecting competitors have persisted or even deepened in the post-AML era. How China will resolve its antitrust paradox will be largely determined by how China's state-capitalism development model will evolve.

I. INTRODUCTION	392
II. ANTITRUST IN CHINA: THE ORIGINAL SINS	394
III. THE RISE OF CHINESE STATE CAPITALISM.....	396
A. SOE Reforms and Consolidations.....	396
B. Industrial Policy and Innovation.....	400
C. Supply-Side Structural Reforms.....	401
D. Emerging Internet Platform Economy	402
IV. PARADOXICAL DEVELOPMENTS IN CHINESE ANTITRUST.....	403
A. Enforcement Authorities.....	404
B. Transparency.....	407
C. Courts	413
D. SOEs	416
E. Cartels	418
F. Internet Platforms.....	421
G. Foreign Companies	424
V. CONCLUDING REMARKS: THE PATH FORWARD	426

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I. INTRODUCTION

In his seminal treatise published more than forty years ago, Robert Bork pointed out the fundamental paradox of American antitrust laws: while the policies of antitrust favored the protection of competition and consumer welfare, the enforcement of antitrust laws in the United States had led to the protection of inefficient competitors to the detriment of the interests of consumers.¹ According to Bork, while it was appropriate to ban price-fixing agreements among competitors, certain exclusionary practices, such as resale price maintenance, tying, and price discrimination, do not harm consumers and therefore should not be prohibited. This “competition-versus-competitor” paradox, along with the debates and policy changes it generated, has deeply influenced the subsequent trajectory of antitrust in the United States.²

Fast-forward to today. China, the second largest economy in the world, is reckoning with a similar, yet more enduring, antitrust paradox. China’s first comprehensive antitrust law, the Anti-Monopoly Law (AML), went into effect in 2008, at a time when China was still transitioning from a Soviet-style planned economy to a market economy.³ It took China twenty years to draft and enact the AML, in large part because the anticompetitive forces in the Chinese economy were primarily those exerted

¹ ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978).

² The U.S. Supreme Court has adopted Bork’s views in several landmark cases. *See, e.g.*, *Continental Television, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (holding that business practices are subject to the per se rule of illegality only when they are manifestly anticompetitive); *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979) (holding that blanket licenses issued to copyrighted musical compositions at negotiated fees did not constitute price-fixing subject to the per se illegality rule); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993) (holding that single-firm conduct could be held to be unlawful attempted monopolization only when there is a “dangerous probability that [the firm] would monopolize a particular market and specific intent to monopolize”); *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (holding that vertical maximum price-fixing should be analyzed under the rule of reason); *Verizon v. Trinko*, 540 U.S. 398 (2004) (refusing to extend the essential facilities doctrine beyond the facts of *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985)); *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (holding that resale price maintenance agreements should be analyzed under the rule of reason).

³ *See* Zhonghua Renmin Gongheguo Fan Longduan Fa (中华人民共和国反垄断法) [The Antimonopoly Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 517 (China).

by the government, through administrative agencies or state-owned enterprises (SOEs).⁴

While antitrust laws are designed to protect competition, the primary problem in the Chinese economy when the AML was being drafted was that many key economic sectors were closed off to competition because of state control, resulting in little or no competition that needed to be protected in the first place. In those sectors, powerful incumbent firms were able to fend off competitors using state power. If the competition-versus-competitor paradox in American antitrust law results from different conceptualizations of what the goal of antitrust is, the competition-versus-competitor paradox in Chinese antitrust law is more structural: the design and enforcement of antitrust law in China tends to favor incumbent firms, which enjoy proximity and access to state power, even though the policies of antitrust would mandate otherwise.

To be sure, the contours of the competition-versus-competitor paradox in Chinese antitrust law were not preordained. Although a Western-style, competition-focused antitrust law was not entirely compatible with China when the AML was first introduced, given the outsized role of the government in its economy, China could have continued down a path of reforms that would nudge its economy as well as its antitrust law towards competition. In other words, while China's AML was endowed with a competitor-versus-competition paradox, whether and how that paradox would be resolved was far from certain at the AML's inception. The enactment of the AML marked the beginning, not the end, of China's efforts to transplant a Western-style antitrust law into its economy.⁵

More than a decade has passed since the AML went into effect. What happened to Chinese antitrust during its first fourteen years? This Article discusses the evolution of Chinese antitrust law and policy in the AML era, with a particular focus on the competition-versus-competitor paradox. Since the inception of the AML, China witnessed the rapid rise of a development model that combined market forces with guidance and support from the

⁴ China first assembled a team to draft the AML in 1987, twenty years before its eventual enactment. The initial efforts, however, were met with repeated delays. It was not until the AML drafters were alarmed by the potential monopolization of the Chinese market by multinational corporations that a consensus to enact the AML was reached. See Wentong Zheng, *Transplanting Antitrust in China: Economic Transition, Market Structures, and State Control*, 32 U. PA. J. INT'L L. 643, 715–19 (2010).

⁵ See *id.* at 721.

state, a model often referred to as “state capitalism.”⁶ Not surprisingly, Chinese antitrust law and policy has since been caught in a tug of war between forces pushing for market competition and forces preserving state-favored competitors. In other words, the competition-versus-competitor paradox has persisted through the first fourteen years of the AML and, in some respects, has even deepened.

II. ANTITRUST IN CHINA: THE ORIGINAL SINS

The AML entered China’s legal scene relatively late in China’s campaign to overhaul its legal systems to promote its burgeoning economy.⁷ The law borrows heavily from Western antitrust laws, particularly European Union antitrust laws.⁸ Like its Western counterparts, the AML imposes antitrust liability for monopolistic agreements⁹ and abuse of dominant market position,¹⁰ and mandates a notification and approval regime for corporate mergers.¹¹ The AML also exhibits some unique Chinese characteristics. Notably, it imposes restrictions on “administrative monopolies,” barring anticompetitive conduct by government agencies.¹²

Analysis of antitrust laws has to move beyond their formal languages, as antitrust laws are deeply embedded in the political-economic ecosystem of a country. At the time of the enactment of the AML, China’s economic conditions were not particularly friendly to a competition-oriented agenda.¹³ China’s decentralized industrial structure, under which industries were duplicated across Chinese provinces and regions, led to low economies of scale and low market concentration ratios.¹⁴ There were still

⁶ See *infra* Part III.

⁷ Prior to the AML, other landmark legislation such as the Economic Contract Law (1981), the Anti-Unfair Competition Law (1993), the Patent Law (1984), the Company Law (1993), the Securities Law (1998), and the Contract Law (1999) had already made their impact on China’s economic life. See Bruce M. Owen, Su Sun & Wentong Zheng, *China’s Competition Policy Reforms: The Anti-Monopoly Law and Beyond*, 75 ANTITRUST L.J. 231, 233, 241 (2008).

⁸ The AML’s provisions on monopolistic agreements and abuse of dominant market position are heavily influenced by Articles 101 and 102 of the Treaty on the Functioning of the European Union, and the AML’s merger review regime appears to be drawn from the European Union Merger Regulation. See Zheng, *supra* note 4, at 648 & nn.14–15.

⁹ AML, *supra* note 3, ch. 2.

¹⁰ *Id.* ch. 3.

¹¹ *Id.* ch. 4.

¹² *Id.* ch. 5.

¹³ See Zheng, *supra* note 4, at 652–71.

¹⁴ See *id.* at 655–59.

numerous government-erected market entry barriers, explicit or implicit, against privately owned firms.¹⁵ China also maintained a large number of behemoth state-owned enterprises that were not entirely driven by profits in their operations, despite decades of market-oriented reforms.¹⁶

The aforementioned economic conditions have made it difficult for China to pursue a truly competition-oriented antitrust agenda.¹⁷ Specifically, the heavy hands of the central and local governments in the Chinese economy create tensions in all three pillars of the Western antitrust models: cartels, abuse of dominant market position, and merger control. First, China's low industry concentration ratios, caused in large part by the distortive roles of the government in the capacity formation and elimination processes, impede regulators' efforts to pursue a rigorous anti-cartel policy, as excess capacity in many industries gives the government an incentive to acquiesce in industry cartels aimed at counteracting downward pressures on prices.¹⁸ Second, dominance of key sectors by large SOEs results in there being too few competitors in the sectors, rendering it unnecessary for the SOE incumbents to resort to exclusionary anticompetitive conduct, the main target of the abuse-of-dominance provisions of Western antitrust laws.¹⁹ Instead, SOE incumbents in those sectors are more likely to engage in exploitative conduct that harms consumers directly.²⁰ For this reason, protecting competition under the AML has been only one, and arguably less important, component of China's competition policy, with the other more important component being "creating" competition through government action.²¹ Third and finally, the merger review process required by the AML is in direct conflict with the government's stated goal of consolidating the largest SOEs to cultivate China's national champions.²² For these reasons, the adoption of the AML marked only the beginning of a legal experiment whose outcomes would be very uncertain.

¹⁵ *See id.* at 659–62.

¹⁶ *See id.* at 662–67.

¹⁷ *See id.* at 671–91.

¹⁸ *See id.* at 692–708.

¹⁹ *See id.* at 700.

²⁰ *Id.*

²¹ *Id.* at 700–01.

²² *See id.* at 714–15.

III. THE RISE OF CHINESE STATE CAPITALISM

Since the AML went into effect in 2008, China has gone through significant changes in its political-economic ecosystem. This Part reviews these changes to lay the groundwork for understanding how China's evolving political and economic conditions are impacting its antitrust policies. The Part surveys several of these significant developments in the Chinese economy, including SOE reforms and consolidations, industrial policy and innovation, supply-side structural reforms, and emerging internet platforms. As shall become clear below, China in recent years has begun to fully embrace a development model that has become known as "state capitalism." The rise of this development model has led to the deepening of the paradoxical nature of Chinese antitrust, pitting the market-friendly, competition-promoting policies of anti-trust against statist policies aimed at protecting state-favored competitors and advancing other government priorities.

A. SOE Reforms and Consolidations

Reforming SOEs has long been a centerpiece of China's economic reforms. A watershed moment for China's SOE reforms came in 1992, when the Communist Party of China (CPC)'s 14th National Congress declared that "the goal of China's economic reform is to establish a socialist market economy."²³ Accordingly, in the subsequent decade, the main theme of China's SOE reforms was to make SOEs operate in a manner consistent with market principles. During this period, China privatized the majority of its small-sized SOEs under the slogan of "grasping the large and letting go the small,"²⁴ and converted the remaining large SOEs to the corporate form equipped with modern corporate governance structures.²⁵ Many of the corporatized SOEs were listed on the stock markets.²⁶ These market-oriented reforms culminated in the Chinese government breaking up SOE monopolies in the telecommunications and electricity generation and distribution

²³ See Karen J. Lin et al., *State-Owned Enterprises in China: A Review of 40 Years of Research and Practice*, 13 CHINA J. ACCT. RSCH. 31, 38 (2020).

²⁴ By the end of 1996, China had privatized up to 70% of small SOEs in key provinces and about half in many other provinces. Yingyi Qian, *The Process of China's Market Transition (1978-1998): The Evolutionary, Historical, and Comparative Perspectives*, 156 J. INST. & THEORETICAL ECON. 151, 163-64 (2000).

²⁵ See Jean Jinghan Chen, *Corporatization of China's State-Owned Enterprises and Corporate Governance*, 1 CORP. OWNERSHIP & CONTROL 82, 84-85 (2004).

²⁶ See Lin et al., *supra* note 23, at 38.

industries in the early 2000s in hopes of spurring competition among SOEs.²⁷

Since 2003, China's SOE strategy shifted in the direction of streamlining the management of SOE assets and further consolidating the largest SOEs in key industries. Following the CPC's 16th National Congress in November 2002, China established the State-Owned Assets Supervision and Administration Commission (SASAC) in March 2003 to act as the shareholders in large, important SOEs on behalf of the central government.²⁸ Since its creation, SASAC oversaw reforms aimed at improving the corporate governance of the central SOEs. Specifically, SASAC required central SOEs to hire outside directors to serve on corporate boards and required these outside directors to participate in important business and personnel decisions.²⁹ SASAC also set a goal of strengthening the role of state-owned capital in key industries. In December 2006, SASAC announced that the government would seek to maintain absolute control of seven strategic industries by SOEs, and exert strong influence by SOEs in other less strategic but still important industries.³⁰

These reform measures resulted in subtle changes in China's SOE strategy in the years leading up to the enactment of the AML. During this period, while market-oriented economic reforms largely continued, there was a clear reversal of the earlier policy in the 1990s to break up SOE monopolies. SASAC oversaw a series of SOE consolidations, resulting in a steady reduction of the number of central SOEs, which went from 189 at the time of SASAC's creation in 2003³¹ to 149 on the eve of the AML's implementation in August 2008.³² This trend continued after the AML

²⁷ In 2002, the Chinese government broke up China Telecom, China's primary telecommunications carrier, into four separate companies. In 2002, the already slimmed-down China Telecom was further divided into two parts along geographical lines. *See* Zheng, *supra* note 4, at 701 n.251, 701–02. In 2002, China also broke up the sole monopoly in its electricity sector, the State Power Corporation, into two parts—power generation and grids—and allocated the power generation assets into five companies and the grids assets into two companies. *See id.* at 703 n.254.

²⁸ *See* Lin et al., *supra* note 23, at 39.

²⁹ *Id.*

³⁰ The seven strategic industries included national defense, electrical power generation and grids, petroleum and petrochemicals, telecommunications, coal, civil aviation, and waterway transportation. The important industries included automobiles, steel, and technology. *See* Owen et al., *supra* note 7, at 244.

³¹ Lin et al., *supra* note 23, at 39.

³² Zheng, *supra* note 4, at 711 n.285.

went into effect, with the number of central SOEs standing at 98 as of December 31, 2022.³³

China's SOE strategy experienced yet another shift after President Xi Jinping came into power at the CPC's 18th National Congress in November 2012. In 2015, China published an SOE reform document entitled: Guiding Opinions on Deepening the Reform of State-Owned Enterprises.³⁴ This document, along with supplementary policy documents, laid out an SOE reform framework commonly referred to as the "1 + N" system.³⁵ The "1 + N" system classifies SOEs into either "commercial SOEs" or "public service SOEs."³⁶ Commercial SOEs are further divided into SOEs in "fully competitive" industries and SOEs in "key" industries. For the former, capital structure will be diversified to include non-state capital, but for the latter, the government will maintain control by state capital.³⁷ Public services SOEs are treated like public utilities and are subject to monitoring based on costs, product and service quality, operating efficiency, and supply capabilities.³⁸ Unlike previous SOE policy documents, the Guiding Opinions no longer exalt a "decisive role for markets in resource allocation"; instead, the Guiding Opinions signal a greater emphasis on the role of the "visible hand" of the state in SOE reforms.³⁹

Since the release of the Guiding Opinions, SOE reforms in China have proceeded on three fronts. First, China has taken steps to strengthen the leadership of the CPC in SOEs. In December 2019, the CPC Central Committee issued a provisional rule on the role of the CPC in SOEs.⁴⁰ The provisional rule mandates

³³ GUOWUYUAN GUOYOU ZICHAN JIANDU GUANLI WEIYUANHUI (国务院国有资产监督管理委员会) [STATE-OWNED ASSETS SUPERVISION AND ADMIN. COMM'N (SASAC)], YANGQI MINGLU (央企名录) [CENTRAL SOE DIRECTORY] (Dec. 31, 2022), <https://perma.cc/53MV-PQCK>.

³⁴ See Zhonggong Zhongyang, Guowuyuan Guanyu Shenhua Guoyou Qiye Gaige de Zhidao Yijian (中共中央、国务院关于深化国有企业改革的指导意见) [CPC Central Committee and State Council Guiding Opinions on Deepening the Reform of State-Owned Enterprises] (promulgated by Cent. Comm. of the Communist Party of China and State Council, Aug. 24, 2015, effective Aug. 24, 2015) St. Council Gaz., no. 27, 2015, at 6 [hereinafter Guiding Opinions].

³⁵ Lin et al., *supra* note 23, at 39. The "1" refers to the one core policy document and the "N" refers to the supporting policies.

³⁶ Guiding Opinions, *supra* note 34, ch. 2, art. 4.

³⁷ *Id.* ch. 2, art. 5.

³⁸ *Id.* ch. 2, art. 6.

³⁹ See Zoey Ye Zhang, *China's SOE Reforms: What the Latest Round of Reforms Mean for the Market*, CHINA BRIEFING (May 29, 2019), <https://perma.cc/M5WC-BHPP>.

⁴⁰ See CENT. COMM. POLITIBUREAU CPC, ZHONGGUO GONGCHANDANG GUOYOU QIYE JICENG ZUZHI GONGZUO TIAOLI SHIXING (中国共产党国有企业基层组织工作条例[试行]) [REGULATIONS ON THE WORK OF PRIMARY-LEVEL ORGANIZATIONS OF STATE-OWNED

the establishment of CPC committees or branches at SOEs that have more than three CPC members.⁴¹ It also requires SOEs to specify in their corporate bylaws that significant business matters must be deliberated by the relevant CPC committees or branches before they are decided by corporate boards and management.⁴²

Second, China has pushed to introduce private capital into SOEs through the so-called “mixed-ownership” reforms, which are a centerpiece of the reform agenda set forth in the Guiding Opinions.⁴³ According to SASAC, central SOEs have completed over 4,000 cases of mixed-ownership reforms since 2013, with the percentage of mixed ownership firms controlled by central SOEs exceeding seventy percent.⁴⁴ Among the central SOEs that have completed mixed ownership reforms is China Unicom, which allowed private investors such as Baidu, Tencent, Alibaba, JD.com, and China Life Insurance to hold thirty-five percent of the company’s shares.⁴⁵ In December 2020, China announced that it was establishing a 70.7 billion yuan (US \$10.8 billion) fund to facilitate mixed-ownership reforms of SOEs, adding a major impetus to such reforms.⁴⁶

Third, China has accelerated the pace at which it is consolidating the largest SOEs. Since the CPC’s 18th National Congress, China has completed twenty-one mergers involving thirty-nine central SOEs, reducing the number of central SOEs to ninety-six.⁴⁷ These mergers include some of the most important SOEs in China, such as the merger between China CNR Corp. and China

ENTERPRISES OF THE COMMUNIST PARTY OF CHINA (PROVISIONAL)] (Dec. 30, 2019), <https://perma.cc/XYA7-EZ82>.

⁴¹ *Id.* ch. 2, art. 4.

⁴² *Id.* ch. 4, art. 15.

⁴³ *See id.* ch. 5.

⁴⁴ *See* Liu Liang (刘亮), *Guowuyuan Guozi Wei: Yangqi Hunhe Suoyouzhi Qiye Hu Shu Zhan Bi Yi Yu Qi Cheng* (国务院国资委: 央企混合所有制企业户数占比已逾七成) [*SASAC of the State Council: The Number of Central Mixed-Ownership SOEs Accounts for More Than 70%*], ZHONGGUO XINWEN WANG (中国新闻网) [CHINA NEWS NETWORK] (Jan. 1, 2019), <https://perma.cc/G2HB-MXBD>.

⁴⁵ *China State-Owned Enterprises: China Unicom Pioneers SOE Reforms with Mixed-Ownership*, CHINA GLOBAL TELEVISION NETWORK (May 25, 2021) <https://perma.cc/6CBB-DMCG>.

⁴⁶ Liu Zhihua & Zhong Nan, *Fund to Spur Mixed-Ownership Reforms*, CHINA DAILY (Dec. 11, 2020), <https://perma.cc/V67R-72P9>.

⁴⁷ *See* Yangqi 2020 Nian Chongzu Zhenghe “San Lu Bingjin” (央企2020年重组整合“三路并进”) [*“Three-Pronged” Approach to Central SOE Consolidations in 2020*], JINGJI CANKAO BAO (经济参考报) [ECONOMIC REFERENCE DAILY] (Jan. 7, 2020), <https://perma.cc/M2WJ-UREV>.

CSR Corp. in 2015,⁴⁸ and the merger between China Shipbuilding Industry Co. (CSIC) and China State Shipbuilding Corp. (CSSC) in 2019.⁴⁹ These two mergers are indicative of a larger trend of reversing the competition-focused SOE strategy adopted in the 1990s and early 2000s, as the SOEs involved in these mergers were all created as a result of SOE monopoly breakups in that era.⁵⁰

In sum, since the implementation of the AML, SOE reforms in China have proceeded on a somewhat self-contradictory path. On one hand, China emphasizes the role of the market, as seen in the ongoing efforts to inject private capital into SOEs. On the other hand, China has solidified SOEs' control of key industries and put the SOEs under greater influence of the Party and the state. This self-contradictory path reflects the backdrop against which Chinese SOE reforms are taking place: "state capitalism," which itself is a mixture of market and state.

B. Industrial Policy and Innovation

One other major development after the AML went into effect was the increasingly prominent role of industrial policy in the Chinese economy, particularly in the high-tech and innovation fields. Industrial policy has long been used in China as a tool of economic planning and governance.⁵¹ During the planned economy era, China used industrial administration to directly set

⁴⁸ See GUOWUYUAN GUOYOU ZICHAN JIANDU GUANLI WEIYUANHUI (国务院国有资产监督管理委员会) [STATE-OWNED ASSETS SUPERVISION AND ADMIN. COMM'N [SASAC]], ZHONGGUO BEIFANG JICHE CHELIANG GONGYE JITUAN GONGSI HE ZHONGGUO NANCHE JITUAN GONGSI SHISHI LIANHE CHONGZU (中国北方机车车辆工业集团公司和中国南车集团公司实施联合重) [CNR AND CSR TO MERGE] (Aug. 6, 2015), <https://perma.cc/NR2M-592F>.

⁴⁹ See GUOWUYUAN GUOYOU ZICHAN JIANDU GUANLI WEIYUANHUI (国务院国有资产监督管理委员会) [SASAC], ZHONGGUO CHUANBO GONGYE JITUAN YOUXIAN GONGSI YU ZHONGGUO CHUANBO ZHONGGONG JITUAN YOUXIAN GONGSI SHISHI LIANHE CHONGZU (中国船舶工业集团有限公司与中国船舶重工集团有限公司实施联合重组) [CSIC AND CSSC TO MERGE] (Oct. 25, 2019), <https://perma.cc/D8BN-75Y4>.

⁵⁰ China CNR and China CSR were both spun off in 2000 from China Locomotive & Rolling Stock Industry Corporation, which itself was separated from the Ministry of Railroad. See Wang Min (王敏), *Nanche Beiche Qianshi Jinsheng: 14 Nianqian An Diyu Chaifen Feishou Dapei* (南车北车前世今生: 14年前按地域拆分肥瘦搭配) [History of CNR and CSR: Broken Up Along Geographical Lines 14 Years Ago], ZHONGGUO QIYE BAO (中国企业报) [CHINA ENTERPRISES DAILY] (Nov. 7, 2014), <https://perma.cc/6299-KR36>. CSIC was spun off from CSSC as a separate entity in 1999, with CSIC controlling state-owned shipbuilding assets in northern China and CSSC retaining state-owned shipyards in southern China. See *CSIC-CSSC Re-Merger Completed*, MARITIME EXECUTIVE (Nov. 26, 2019), <https://perma.cc/K4P9-YUD4>. The CSIC-CSSC merger essentially restored CSSC to its original form prior to its 1999 breakup. *Id.*

⁵¹ See Sebastian Heilmann & Lea Shih, *The Rise of Industrial Policy in China, 1978-2012* (Harvard-Yenching Institute Working Paper Series, 2013).

production targets and allocate resources.⁵² In the late 1980s, China began efforts to adopt what resembled modern industrial policies.⁵³ The quantity and sectoral coverage of such industrial policy programs, however, remained very limited until the mid-2000s.⁵⁴ It was from the late 2000s onward that China saw a marked increase in national industrial policy programs.⁵⁵ This timeline coincided with the adoption and implementation of the AML. The competition-promoting agenda of the AML, therefore, was to be carried out against this backdrop of the increased role of industrial policy.

China's use of industrial policy reached a new height under President Xi Jinping. In 2015, China issued the "Made in China 2025" plan, which sought to advance China's position in manufacturing and other emerging technology industries.⁵⁶ The plan identifies ten sectors as China's priority sectors, including new generation information technology, alternative-energy vehicles, new materials, biopharma, and high-tech medical devices.⁵⁷ The plan calls for technological breakthroughs in those sectors and aims to establish China's leading position in global manufacturing and innovation by the year 2049, the 100th anniversary of the founding of the People's Republic of China (PRC).⁵⁸ To achieve this goal, China envisions the use of a wide range of policy tools, including preferential tax and procurement policies, subsidies, and mandatory joint ventures and partnerships.⁵⁹

C. Supply-Side Structural Reforms

Yet another major policy shift since the implementation of the AML is the launch of the so-called supply-side structural reforms in 2015. These reforms are so named because they are aimed at reducing distortions on the supply side of the economy.⁶⁰ They attempt to limit the distortive roles of the government at various levels in the capacity formation and elimination processes, so that market supply can adjust to changes in market

⁵² *Id.* at 2.

⁵³ *Id.* at 3.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See KAREN M. SUTTER, CONG. RSCH. SERV., IF10964, "MADE IN CHINA 2025" INDUSTRIAL POLICIES: ISSUES FOR CONGRESS (Aug. 11, 2020).

⁵⁷ *Id.* at 1.

⁵⁸ *Id.*

⁵⁹ *Id.* at 1–2.

⁶⁰ See JOHN BOULTER, RESERVE BANK OF AUSTRALIA BULLETIN, CHINA'S SUPPLY-SIDE STRUCTURAL REFORMS 2 (Dec. 2018).

demand. One major objective of supply-side structural reforms is to cut excess industrial capacity. The reforms cover all industrial sectors, but the government has focused on several high-priority sectors, including steel, coal, and electricity. To achieve its goals, the government sets capacity reduction targets for local authorities and gives greater enforcement power to the Ministry of Environmental Protection. The government is also mandating or facilitating the bankruptcy of so-called “zombie” firms in industrial sectors.⁶¹

These aggressive government actions have alleviated excess capacity in Chinese industries. In 2018 alone, China reduced its steel capacity by 35 million tons and coal capacity by 270 million tons.⁶² In Hebei province, one of China’s major steel producing provinces, the number of steel manufacturers was cut in half.⁶³ As a result of these reforms, prices and profit margins in the industrial sectors have stabilized or increased.

For sure, the supply-side structural reforms have a positive impact on the Chinese economy because they aim to stamp out long-lasting sources of distortions, which were created by government overreach in the capacity formation and elimination processes.⁶⁴ Correcting these distortions would lay a solid foundation for a truly competition-promoting antitrust regime.⁶⁵ However, consistent with the paradoxical nature of state capitalism, the supply-side structural reforms smack of self-contradiction. While the supply-side structural reforms elevate market forces as determinants of firm entries and exits, the primary means used to accomplish these reforms is government fiat, the antithesis of market forces. It is far from clear, therefore, that such reforms address the root causes of the distortions in the Chinese economy.

D. Emerging Internet Platform Economy

Finally, a major development in the Chinese economy that has fundamentally changed China’s competitive landscape is the emergence of a highly innovative, internet-based platform

⁶¹ *Id.* at 5–8.

⁶² See *Jinnian Jiegou Xing Qu Channeng Jiama Jianbing Chongzu* (今年结构性去产能加码兼并重组) [Additional Capacity Reduction and Industry Restructuring This Year], JINGJI CANKAO BAO (经济参考报) [ECONOMIC REFERENCE DAILY] (Mar. 20, 2019), <https://perma.cc/LWZ9-BG7L>.

⁶³ *Id.*

⁶⁴ For detailed discussions of these distortions in the Chinese economy, see Zheng, *supra* note 4, at 677–82.

⁶⁵ The supply side structural reforms indeed helped with China’s anti-cartel enforcement. See *infra* Part IV.E.

economy. In recent years, China has been home to what is arguably the world's most dynamic start-up scene for internet-based industries.⁶⁶ Between 2014 and 2017 alone, China produced thirty-four “unicorns” (private companies valued at more than US \$1 billion) in technology industries, thanks to a combination of private venture capital investment, government subsidies, and government-supported incubators.⁶⁷ At the top of these industries are a handful of giant technology companies whose market capitalizations and technological capabilities rival those of their American counterparts.⁶⁸

The emergence of a cluster of highly competitive technology industries has enormous implications for China's antitrust regime. Unlike their SOE counterparts, privately owned technology companies in China had to compete their way to prominence, at least before they were successful enough to attract the support of the government.⁶⁹ China's technology landscape, therefore, is littered with competitive abuses that antitrust laws are designed to prevent.⁷⁰ This development single-handedly made the AML more relevant to China than when it was first enacted. However, as shall become clear in Parts IV and V below, efforts to reign in competitive abuses in technology industries are fraught with contradictions, since these efforts benefit SOEs and other incumbents whose turf is being encroached upon by technology platforms. In some sense, the tension between technology platforms and incumbent SOEs is emblematic of the tension inherent in state capitalism itself—a tension between the opposite pulls from the market and the state.

IV. PARADOXICAL DEVELOPMENTS IN CHINESE ANTITRUST

The foregoing discussion suggests a nuanced picture of the macro-environment of Chinese antitrust law. China's pursuit of a hybrid development model, one that combines free market with strong government, accentuates the competition-versus-

⁶⁶ See John Lee, *The Rise of China's Tech Sector: The Making of an Internet Empire*, THE INTERPRETER (May 4, 2017), <https://perma.cc/SH42-3K4P>.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ For example, China's Huawei achieved its early success by developing a digital telephone switch system with greater capacity than any other products available on the Chinese market at the time. See Curtis J. Milhaupt & Wentong Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm*, 103 GEO. L.J. 665, 694 (2015).

⁷⁰ One of the most notorious practices in the Chinese technology industries is exclusive dealing, whereby platforms require their users not to use apps or services developed by their rivals.

competitor paradox. In this Part, this Article discusses developments in Chinese antitrust law in a number of areas, relating to enforcement authorities, transparency, courts, SOEs, cartels, internet platforms, and foreign companies. Some of these developments are friendly to market competition, while some others are statist in nature. These developments demonstrate the paradoxical nature of Chinese antitrust in the post-AML era.

A. Enforcement Authorities

Institutions are “humanly devised constraints that shape human interaction.”⁷¹ In China, a particular group of institutions—administrative agencies charged with enforcing the AML—are of utmost importance to the trajectory of antitrust law and policy because of the sheer impact of bureaucratic politics on resource allocation and economic regulations.⁷² As detailed below, the evolution of China’s antitrust enforcement authorities reveals the tremendous tensions China faces in developing its antitrust policy and, to some extent, its broader economic policies.

At the inception of the AML, the responsibility for enforcing it was divided among three government agencies: the Ministry of Commerce (MOFCOM), which was responsible for merger review; the National Development and Reform Commission (NDRC), which was responsible for enforcement against price-related monopolistic agreements and abuse of dominance; and the State Administration of Industry and Commerce (SAIC), which was responsible for enforcement against non-price-related monopolistic agreements and abuse of dominance.⁷³ The fragmented nature of China’s antitrust enforcement structure during the early days of the AML was rooted in China’s bureaucratic reality. Prior to the enactment of the AML, various government agencies were already charged with enforcement against activities that would later fall under the purview of the AML. The MOFCOM was already charged with reviewing mergers and acquisitions of domestic companies by foreign companies under a 2006 rule.⁷⁴ The

⁷¹ DOUGLAS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 3 (1990).

⁷² For detailed discussions of how China’s bureaucratic structure and political processes shape the outcome of antitrust enforcement in China, see Angela Huyue Zhang, *Bureaucratic Politics and China’s Anti-Monopoly Law*, 47 CORNELL INT’L L.J. 671 (2014).

⁷³ See *id.* at 680, 689.

⁷⁴ See *Guanyu Waiguo Touzizhe Binggou Jingnei Qiye de Guiding* (关于外国投资者并购境内企业的规定) [Rules on Acquisition of Domestic Enterprises By Foreign Investors] (promulgated by Ministry of Commerce of the People’s Republic of China, Aug. 8, 2006, effective Sep. 8, 2006) ST. COUNCIL GAZ., no. 22, 2006, at 29.

NDRC, China's powerful economic planning agency and price regulator, was already authorized to investigate price-fixing under a 2003 provisional rule.⁷⁵ The SAIC was China's long-time market regulator and was already investigating violations of the 1993 Anti-Unfair Competition Law.⁷⁶ The internal battles among the three enforcement agencies to become the sole agency enforcing the AML contributed to the long delays in the AML's enactment.⁷⁷ Eventually, when the AML was enacted in 2007, the law did not specify which agency would be designated as the antimonopoly enforcement agency, and it was not until later that the government determined the respective roles of the three agencies.⁷⁸

The AML's tripartite enforcement structure in the early days impeded the development of antitrust laws in China. When there are multiple agencies enforcing the AML, and when the enforcement agencies can largely self-define their power, "they are inclined to take an expansive approach, inevitably resulting in unclear and overlapping enforcement power of multiple agencies."⁷⁹ This enforcement structure indicates that the AML in its early days was not a priority of the government—or at least not a priority high enough for the government to overcome bureaucratic resistance to a unified enforcement authority.

However, the dynamics of China's bureaucratic politics changed rather dramatically at the height of the state capitalism era following the enactment of the AML. President Xi Jinping, known as an "anti-bureaucratic crusader,"⁸⁰ ushered in a series of measures to strengthen the Party's control over the government

⁷⁵ See Zhizhi Jiage Longduan Xingwei Zanxing Guiding (制止价格垄断行为暂行规定) [Provisional Rules on Prevention of Monopolistic Pricing] (promulgated by National Development and Reform Commission [NDRC], June 18, 2003, effective Nov. 1, 2003) ST. COUNCIL GAZ., no. 31, 2003, at 32.

⁷⁶ See Zhonghua Renmin Gongheguo Fanbuzhengdang Jingzheng Fa (中华人民共和国反不正当竞争法) [The Anti-Unfair Competition Law of the People's Republic of China] (promulgated by the Standing Committee of National People's Congress, Sep. 2, 1993, effective Dec. 1, 1993) 1993 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ., no.5.

⁷⁷ An early draft of the AML in 2014 proposed to establish the future antimonopoly enforcement agency under MOFCOM. But that provision was eventually deleted from the final draft. See Owen et al., *supra* note 7, at 261.

⁷⁸ Under China's legal system, the State Council determines the role of each central government agency in a special order that specifies the functions, internal organizational structure and staff size (commonly referred to as "Three-Designation Order"). This precludes statutes passed by the legislature from assigning responsibilities to a specific agency. See Qian Hao, *The Multiple Hands: Institutional Dynamics of China's Competition Regime*, in CHINA'S ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS (Adrian Emch & David Stallibrass eds., 2013) § 2.02[B].

⁷⁹ *Id.*

⁸⁰ See Andrew G. Walder, *Back to the Future? Xi Jinping as an Anti-Bureaucratic Crusader*, 16 CHINA INT'L J., no. 3, at 18 (2018).

following a constitutional amendment that boosted his power.⁸¹ In 2018, China undertook one of the most significant overhauls of its government structure by eliminating, reshuffling, or consolidating many of the central government agencies.⁸² This government overhaul was hailed as key to overcoming the “bureaucratic inertia” that had hampered China’s efforts to shift its economy away from “wasteful investment.”⁸³

As part of the 2018 government overhaul, China merged the antitrust enforcement authority—previously scattered across MOFCOM, NDRC, and SAIC—into a newly established State Administration for Market Regulation (SAMR).⁸⁴ By now, China had accomplished what was once deemed an impossible task: to have a unified antitrust enforcement authority unfettered by inter-agency entanglements and turf wars. This development signified a markedly different environment in which antitrust laws were to operate in China. Compared to when the AML was first adopted, the state now plays a much greater role in China’s economy.

Unfortunately, the long-term impact of this development is not clear. On one hand, a unified enforcement authority is supposedly beneficial to a well-functioning competition law regime. With the necessary authority and resources, a unified agency is better equipped to enforce antitrust law and protect competition.⁸⁵ On the other hand, a unified, all-powerful antitrust enforcement authority will also be more effective in implementing government edicts on competition-related matters. To the extent that such government edicts are motivated by broader social-economic policy goals, not by competition policy goals—a real possibility in a state-dominated economy—a unified enforcement authority might facilitate the protection of state-favored competitors. In essence, which one of these two opposing forces will dominate the other will determine how the Chinese antitrust paradox will resolve itself in the coming years.

⁸¹ See Chun Han Wong, *China Unveils Overhaul of Government Bureaucracy*, WALL ST. J. (Mar. 13, 2018), <https://perma.cc/D42V-A8MF>.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See J. Mark Gidley, Z. Alex Zhang & Yi Ying, *China Merges Antitrust Enforcement Agencies into One, as its Anti-monopoly Law Approaches 10th Anniversary*, WHITE & CASE (Mar. 29, 2018), <https://perma.cc/VAA6-2RQH>.

⁸⁵ See Owen et al., *supra* note 7, at 259–62. Even before the adoption of the AML, scholars had argued that it would be in China’s best interest to establish a unified AML enforcement authority under the State Council at the ministry level. See, e.g., *id.* at 261.

B. Transparency

Transparency is of central importance to a competition law regime.⁸⁶ In the global antitrust community, the term transparency generally means that “all laws, regulations, and administrative decisions should be publicly available; agencies should explain the reasons behind their actions; and the limits on administrative discretion should be testable and publicly defined.”⁸⁷ Various international organizations have focused on transparency in their antitrust advocacy work.⁸⁸

In the Chinese context, transparency is a central parameter in gauging how the Chinese antitrust paradox resolves itself. By establishing clear expectations, transparency in competition law enforcement protects competition. Conversely, opaqueness begets favoritism and unfairness, making it easier for competition laws to protect competitors.

Nowhere are the changing dynamics of transparency clearer than in the area of merger control. By conventional metrics, merger control in China is a success story. As of the first quarter of 2018—the eve of the consolidation of the AML enforcement agencies—a total of 2,151 merger filings were made, of which 2,052 were approved unconditionally, 36 were approved with conditions, and 2 were rejected outright.⁸⁹ Over the years, the number of merger reviews completed showed a steady increase, rising from 80 in 2009 to 337 in 2017.⁹⁰ Among all of the merger review cases, international transactions accounted for the vast majority, with 80–90 percent of the transactions reviewed involving at least one international party.⁹¹

While impressive, these numbers alone do not fully represent how important Chinese merger review has become for the international business community. A quick look at the list of recently concluded Chinese merger review cases offers additional clues. These cases include many of the largest global mergers and acquisitions in recent years: Bayer/Monsanto, Dow/Dupont,

⁸⁶ See Diane P. Wood, *Antitrust at the Global Level*, 72 U. CHI. L. REV. 309, 315 (2005).

⁸⁷ *Id.*

⁸⁸ See, e.g., OECD COMPETITION COMM., PROCEDURAL FAIRNESS AND TRANSPARENCY: KEY POINTS (2012), <https://perma.cc/L29G-RBPX>; INT'L COMPETITION NETWORK, COMPETITION AGENCY TRANSPARENCY PRACTICES (2013), <https://perma.cc/ZG9F-L46F>.

⁸⁹ See Fei Deng & Cunzhen Huang, *A Ten-Year Review of Merger Enforcement in China*, ANTITRUST L. SOURCE, Aug. 2018, at 1, <https://perma.cc/NL9P-X5V2>.

⁹⁰ *Id.*

⁹¹ *Id.*

Dell/EMC, and AB InBev/SABMiller, to name just a few examples. These M&A deals by and large were not motivated by the Chinese market, yet they had to file for Chinese merger review because of their impact on the Chinese market.⁹² In the age of the AML, the new reality for global business executives is that in addition to obtaining approvals from antitrust regulators in Washington and Brussels, they now have to worry about also getting the blessing of antitrust regulators in Beijing. While Chinese antitrust regulators tend to follow U.S. and EU regulators in rendering merger review decisions, occasionally China has been the sole holdout, delaying or even jeopardizing business deals.⁹³

Although the AML has seen its star rising in merger review, one of the important factors that contributed to its elevated status is arguably not the AML merger review regime itself, but the juggernaut Chinese economy. For sure, economic growth has decelerated in China in recent years, but China still boasts an enormous manufacturing base and a growing domestic market. Chinese industries are so closely integrated into global supply chains that major business reorganizations in the international markets are bound to have Chinese implications, necessitating antitrust review in China. In this sense, the eminence of the AML in merger review was preordained, no matter how the law is implemented.

That said, the way the AML was enforced with respect to merger review played a positive role in raising the profile of the law. The single most important factor—other than China's growing economy—that helped boost the status of the AML in merger review was the selection of the Ministry of Commerce (MOFCOM) as the initial agency in charge of merger review. Prior to the enactment of the AML, MOFCOM was already overseeing a merger review regime established under an administrative regulation. That gave MOFCOM years of experience in dealing with matters that would eventually come under the purview of the AML. Furthermore, among all of China's government bureaucracies, MOFCOM is perhaps the most business-friendly and possesses the best human and technical resources in interacting with international markets. In early 2018, SAMR replaced MOFCOM as

⁹² The AML extends its jurisdiction to cover anticompetitive conduct outside of China that has the effect of excluding or impeding competition in the Chinese domestic market. See AML, *supra* note 3, art. 2.

⁹³ For example, in 2014, Microsoft had to miss its initial deadline for acquiring Nokia's cellphone business because of delays in antitrust clearance in China. Stephen Shankland, *Nokia, Microsoft to Miss Deadline for Selling Phone Division*, CNET (Mar. 23, 2014), <https://perma.cc/Z39A-8GGV>.

the merger review authority, but the merger review staff at SAMR still largely consists of MOFCOM's merger review staff. While MOFCOM itself is limited by broader political and policy constraints, it is probably the case that no other agency would have done a better job than MOFCOM of navigating the complex terrain in Chinese merger control. MOFCOM climbed a steep learning curve and displayed increasing familiarity with sophisticated economic and legal analyses in its published decisions. MOFCOM has even frequently consulted with outside economic, legal, and industry experts in its decision-making.⁹⁴

To be sure, since the adoption of the AML, China has come a long way in creating a rule-based merger control regime. Throughout the years, MOFCOM and SAMR promulgated a series of landmark regulations aimed at providing clear guidance for firms in the merger review process.⁹⁵ The success of China's merger control regime is due in part to these efforts to enhance transparency. According to government statistics, China's merger review authority has been more efficient in reviewing and approving merger applications in recent years. The average pre-notification period (the number of days between case notification and case acceptance) decreased from 40.8 days in the five-year period between 2011 and 2015 to 17.8 days in the five-year period

⁹⁴ Deng & Huang, *supra* note 89, at 8–9.

⁹⁵ See ZHONGHUA RENMING GONGHEGUO SHANGWUBU (中华人民共和国商务部) [MOFCOM], JINGYINZHE JIZHONG SHENCHA BANFA (经营者集中审查办法) [Measures on Review of Concentration of Undertakings] (Nov. 24, 2009), <https://perma.cc/2K62-M2U3>; ZHONGHUA RENMING GONGHEGUO SHANGWUBU (中华人民共和国商务部) [MOFCOM], GUANYU PINGGU JINGYINZHE JIZHONG JINGZHENG YINGXIANG DE ZANXING GUIDING (关于评估经营者集中竞争影响的暂行规定) [INTERIM PROVISIONS ON ASSESSMENT OF THE EFFECTS OF CONCENTRATIONS ON COMPETITION] (Aug. 29, 2011), <https://perma.cc/4BXA-XD42>; ZHONGHUA RENMING GONGHEGUO SHANGWUBU (中华人民共和国商务部) [MOFCOM], GUANYU JINGYINZHE JIZHONG JIANYI ANJIAN SHIYONG BIAOZHUN DE ZANXING GUIDING (关于经营者集中简易案件适用标准的暂行规定) [INTERIM PROVISIONS ON STANDARDS FOR SIMPLE CASES OF CONCENTRATIONS ON COMPETITION] (Feb. 11, 2014), <https://perma.cc/KV5T-SK82>; ZHONGHUA RENMING GONGHEGUO SHANGWUBU (中华人民共和国商务部) [MOFCOM], GUANYU JINGYINZHE JIZHONG JIANYI ANJIAN SHENBAO DE ZHIDAO YIJIAN (SHIXING) (关于经营者集中简易案件申报的指导意见 (试行)) [GUIDELINES ON THE NOTIFICATION OF SIMPLE CASES OF CONCENTRATIONS ON COMPETITION (TEMPORARY)] (April 18, 2014), <https://perma.cc/6SG6-RCRj>; ZHONGHUA RENMING GONGHEGUO SHANGWUBU (中华人民共和国商务部) [MOFCOM], GUANYU JINGYINZHE JIZHONG SHENBAO DE ZHIDAO YIJIAN (关于经营者集中申报的指导意见) [GUIDANCE FOR NOTIFICATION OF CONCENTRATIONS OF UNDERTAKINGS] (June 6, 2014), <https://perma.cc/4WZ4-HLRQ>; Jingyinzhe Jizhong Shencha Zanxing Guiding (经营者集中审查暂行规定) [Interim Provisions on Review of Concentrations of Undertakings] ST. COUNCIL GAZ., no. 34, 2020, at 51.

between 2016 and 2020.⁹⁶ The average review time for accepted cases also decreased from 41.2 days between 2011 and 2015 to 24.2 days between 2016 and 2020.⁹⁷ This improved efficiency was due in part to the introduction of simplified review procedures for transactions deemed less likely to result in competition issues.⁹⁸

That said, despite China's accomplishments in building a transparent, market-friendly merger review regime, there still remain many structural remnants of a regulatory system that serves state macroeconomic policies. As shall become clear below, the AML actually reinforced some of these structural remnants.

The lack of total transparency in China's merger review process can be seen in several areas. First, despite the reduction in review time for cases that do not raise competitive concerns, there are still substantial delays in merger reviews for complex cases in which the government decides to intervene. The average review time for these intervention cases has steadily increased since the adoption of the AML, reaching 276 days in the five-year period between 2016 and 2020.⁹⁹ In theory, the period of review was limited to six months, but this period was often exceeded because the merging parties may be required or encouraged to withdraw their filings and refile if MOFCOM could not complete the review by the end of the review period.¹⁰⁰ Under the AML, the merger review authority has essentially unlimited discretion in deciding whether a filing is complete.¹⁰¹ The merger review authority could, therefore, artificially delay the approval process by not accepting a filing as complete and continuing to request supplemental materials. In the Advanced Semiconductor Engineering/Siliconware Precision Industries (ASE/SPII) case filed in

⁹⁶ GUOJIA SHICHANG JIANDU GUANLI ZONGJU FANLONGDUANJU (国家市场监督管理总局反垄断局) [STATE ADMIN. MKT. REGUL. (SAMR)], ZHONGGUO FANLONGDUANFA ZHIFA NIANDU BAOGAO (2020) (中国反垄断法执法年度报告(2020)) [CHINA ANTITRUST ENFORCEMENT ANNUAL REPORT 2020] 3.

⁹⁷ *Id.*

⁹⁸ Elizabeth Xiao-Ru Wang et al., *A Reflection on China's Merger Reviews—Key Messages from the Latest Five-Year Report and Insights from Economists*, COMPETITION POLICY INT'L (Oct. 8, 2021), <https://perma.cc/NRK9-MZVE>. Between 2016 and 2020, over 70 percent of merger cases were reviewed under simplified procedures. *Id.*

⁹⁹ *Id.* Long review periods were also the norm in the MOFCOM era. See Fei Deng & Cunzhen Huang, *A Five Year Review of Merger Enforcement in China*, ANTITRUST L. SOURCE, Oct. 2013, at 1, 5 [hereinafter Deng & Huang, *Five-Year Review (2013)*], <https://perma.cc/M3GW-HFSR>; Fei Deng & Cunzhen Huang, *A Ten-Year Review of Merger Enforcement in China*, ANTITRUST L. SOURCE, Aug. 2018, at 1, 4 [hereinafter Deng & Huang, *Ten-Year Review (2018)*], <https://perma.cc/DH2C-DPXH>.

¹⁰⁰ Deng & Huang, *Five-Year Review (2013)*, *supra* note 99, at 5; also Deng & Huang, *Ten-Year Review (2018)*, *supra* note 99, at 4.

¹⁰¹ AML, *supra* note 3, art. 24.

August 2016, it took MOFCOM almost four months to accept the filing as complete.¹⁰² In 2009, Chinese internet giant Sina.com scrapped its \$1.4 billion purchase of the advertising assets of Focus Media Holding Ltd. after MOFCOM repeatedly rejected its merger filing as incomplete. In addition to delays in acceptance of filings, it is not uncommon for merger reviews to stretch beyond the maximum 180-day review period set forth under the AML. In July 2018, Qualcomm cancelled its planned acquisition of NXP Semiconductors because SAMR failed to issue a decision on whether to approve the deal after over twenty months of review.¹⁰³ These irregularities in the merger review process are keeping China's merger review regime from becoming truly on par with the merger review regimes of other jurisdictions.

Second, when merger decisions were issued in time, there had been instances where the decisions were based on factors that are generally considered irrelevant by international standards. In 2009, for example, MOFCOM blocked Coca-Cola's proposed acquisition of Huiyuan Juice Group Limited, a Chinese juice manufacturer, despite the fact that Coca-Cola and Huiyuan had non-overlapping businesses and so the merger ought not to have prompted any antitrust concerns. It is widely believed that the desire to protect a famous national brand played an important role in MOFCOM's decision. Moreover, practitioners generally believe that other government agencies directly intervened in the merger review process, resulting in MOFCOM putting conditions on merger approval for reasons unrelated to antitrust.¹⁰⁴

Third, China's merger review regime focuses more on mergers involving foreign companies than on mergers involving domestic companies, raising concerns that the regime is primarily designed to curb foreign mergers. Until late 2012, MOFCOM had published only its decisions to impose restrictive conditions on, or

¹⁰² See ZHONGHUA RENMING GONGHEGUO SHANGWUBU (中华人民共和国商务部) [MOFCOM], GUANYU FUJIA XIANGZHIXING TIAOJIAN PIZHUN RIYUEGUANG BANDAOTI ZHIZAO GUFEN YOUXIAN GONGSI SHOUGOU XIPIN JINGMI GONGYE GUFEN YOUXIAN GONGSI GUQUAN AN JINGYINZHE JIZHONG FANLONGDUAN SHENCHA JUEDING DE GONGGAO (关于附加限制性条件批准日月光半导体制造股份有限公司收购矽品精密工业股份有限公司股权案经营者集中反垄断审查决定的公告) [ANNOUNCEMENT ON ANTI-MONOPOLY REVIEW DECISION CONCERNING CONDITIONAL APPROVAL OF CONCENTRATION OF UNDERTAKINGS IN THE CASE OF ACQUISITION OF EQUITY INTERESTS OF SILICONWARE PRECISION INDUSTRIES CO., LTD BY ADVANCED SEMICONDUCTOR ENGINEERING, INC.] (Nov. 24, 2017), <https://perma.cc/WTQ2-NP6N>.

¹⁰³ Don Clark, *Qualcomm Scraps \$44 Billion NXP Deal After China Inaction*, N.Y. TIMES (July 25, 2018), <https://perma.cc/U7TG-LTR7>.

¹⁰⁴ D. Daniel Sokol, *Merger Control Under China's Anti-Monopoly Law*, 10 NYU J.L. & BUS. 1, 24–25, 33 (2013).

to prohibit, a notified merger. Each of the twenty-two published decisions up to that time involved at least one foreign party; none of the decisions involved transactions with only domestic parties.¹⁰⁵ Starting in September 2012, MOFCOM went beyond the disclosure requirements under the AML and began regularly identifying all cases approved without conditions.¹⁰⁶ A review of all of MOFCOM's unconditional clearances from August 2008 until the end of 2013 shows that a very small number of notifications are domestic-to-domestic transactions. Out of 750 notifications, only approximately 8 percent, or 57 transactions, were domestic-to-domestic.¹⁰⁷ And there is evidence indicating that the low filing rate for domestic transactions was not merely due to a lack of such transactions in China.¹⁰⁸ The low filing rate for domestic-to-domestic transactions persisted in subsequent years as well.¹⁰⁹

All in all, these irregularities have led to a widely shared belief among practitioners that China's merger review regime is a "black box."¹¹⁰ Despite the promulgation of many rules and guidances, practitioners often complain that it is difficult to understand the merger review process in China.¹¹¹ For instance, MOFCOM would request information without explaining why the

¹⁰⁵ See Yuni Yan Sobel, *Domestic-to-Domestic Transaction—A Gap in China's Merger Control Regime?*, ANTITRUST L. SOURCE, Feb. 2014, at 1, 4, <https://perma.cc/4PFM-UABA>.

¹⁰⁶ PRESS RELEASE, SHANGWUBU (商务部) [MOFCOM], SHANGWUBU ZHAOKAI "2012 NIAN FANLONGDUAN GONGZUO JINZHAN" ZHUANTI XINWEN FABUHUI (商务部召开"2012年反垄断工作进展"专题新闻发布会) [MOFCOM PRESS CONFERENCE ON "ANTITRUST WORK PROGRESS IN 2012"] (Dec. 28, 2012), <https://perma.cc/W93W-DH3X>.

¹⁰⁷ According to a 2013 study, among all transactions reviewed by MOFCOM from August 2008 through June 2013 approximately 18% of acquisitions involved a domestic acquirer and domestic seller, while 10% of non-acquisitions (typically joint ventures) involved a domestic acquirer and domestic seller. The nationality of each firm in this study is defined based on the location of its headquarters and the study includes as "domestic" companies those with headquarters in Mainland China, Hong Kong, Macau, and Taiwan. See Deng & Huang, *Five Year Review (2013)*, *supra* note 99, at 3.

¹⁰⁸ Using Thomson Reuters data from August 1, 2008 through December 31, 2013, there were a total of 19,480 M&A transactions involving a target whose primary business was located in mainland China, of which 15,177 deals, or approximately 78 percent, involved an acquirer whose primary business was also located in Mainland China. See International Mergers database, Thomson Reuters (SDC Platinum). Data from Dealogic appear to be consistent in suggesting that domestic M&A deals accounted for approximately 81 percent of China-targeted deals from the same period in terms of number of deals.

¹⁰⁹ See Yuni Yan Sobel, *Domestic-to-Domestic Transactions (2014-2015)—A Narrowing Gap in China's Merger Review Regime*, ANTITRUST L. SOURCE, Feb. 2016, at 1, 3–4.

¹¹⁰ In a survey of attorneys practicing antitrust law in China, more than half of all respondents used the term "black box" without any prompting to describe the merger review process, and nearly all respondents, after being prompted, agreed that "black box" was an accurate description. See Sokol, *supra* note 104, at 29.

¹¹¹ *Id.* at 30.

information is relevant to the specific transaction.¹¹² Practitioners also believe anecdotally that confidentiality of data submitted might be breached and many information requests are driven by other government ministries or even Chinese competitors trying to understand how to compete with the filer.¹¹³

In some sense, the lingering opaqueness of China's merger review regime is the hallmark of a state-dominated economic model, whereby the state has to maintain tight control over firms, sometimes at the expense of sound antitrust policy. Since this bias cannot be effectuated through explicit policy, it is convenient for the government to carry it out in a surreptitious manner. Therefore, it might be in the best interest of the government to maintain transparency of the merger review regime for the most part and reserve certain elements of opaqueness for special circumstances where the government may want to exercise tighter control than antitrust law permits. Unless there will be a fundamental change in the dynamics of China's state capitalism, China's mixed record on antitrust transparency is likely to persist.

C. Courts

Courts play an important role in shaping the competition culture of a society.¹¹⁴ To survive constant assault from those who stand to lose from competition and those who stand to gain from anticompetitive practices, competition law and policy must provide for a competent judiciary that "supports, defines, and gives shape and integrity to the competition program that a nation creates and staffs."¹¹⁵ In a state-dominated economy like China's, however, courts must find ways to defer to the state's prerogative in setting the competition agenda. As detailed below, this compromise can come at the expense of a consistent antitrust jurisprudence.

The tension between Chinese courts and the rest of China's antitrust enforcement apparatus is most apparent in the policing

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ See David C. Shonka, Assistant Gen. Couns., Fed. Trade Comm'n, *The Role of the Judiciary in Enforcing and Legitimizing Competition Law and Policy*, Remarks before the Asian Competition Law Conference, at 1 (Dec. 12, 2005) <https://perma.cc/2ZDR-5ZRG> (asserting that for competition policies and programs to survive, "[t]he final decisions of the competition authorities and the results of the program must be viewed as legitimate by all sectors of the society, even by those who do not prevail in the process.").

¹¹⁵ *Id.* at 5.

of vertical restraints.¹¹⁶ One of the most common vertical restraint practices is Resale Price Maintenance (RPM), whereby manufacturers and distributors agree on restrictions on product resale prices.¹¹⁷ RPM is generally considered to have both procompetitive and anticompetitive effects.¹¹⁸ In Western jurisdictions, RPM is now subject to the rule-of-reason standard, which determines the legality of RPM agreements based on their competitive impact.¹¹⁹ In China, however, courts and government enforcement agencies have developed different analytical standards for RPMs, setting up a split that reveals the fundamental contradictions of antitrust in a state-capitalism economy.

Since the RPM issue was first litigated in Chinese courts, the courts have consistently adopted evidence-based methodologies and made it clear that, in private litigation involving RPM disputes, RPMs will be evaluated under the rule-of-reason standard. In the landmark *Rainbow v. Johnson & Johnson* case in 2013, the Shanghai High People's Court held that it was necessary to prove that an RPM had a significant adverse effect on competition in the relevant market in order to find that the RPM constituted a vertical monopoly agreement under the AML.¹²⁰ This decision was explicitly referenced and confirmed by the Supreme People's Court (SPC) in the *Hainan Yutai* case decided in December 2018 and released in June 2019. In that case, the SPC stated that in civil litigation, it is not improper for courts to evaluate an RPM agreement's competitive effects to determine its legality.¹²¹

This rule-of-reason standard employed in civil litigation stands in sharp contrast to the approach used by NDRC/SAMR in government enforcement actions. Over the years, NDRC took actions against RPMs in a number of industries, including infant formula, optical lenses, automobiles, and medical devices. In all

¹¹⁶ Vertical restraints are restraints imposed through agreements among entities at different levels of the production and distribution process. See Sandra Marco Colino, *Vertical Restraints (or Restrictions)*, CONCURRENCES, <https://perma.cc/W6VU-EVUF> (last visited Feb. 1, 2023).

¹¹⁷ Gregory T. Gundlach, *Overview and Contents of the Special Issue: Antitrust Analysis of Resale Price Maintenance After Leegin*, 55 ANTITRUST BULL. 1 (2010).

¹¹⁸ For detailed analyses of the procompetitive and anticompetitive effects of RPM, see *id.* at 4–7.

¹¹⁹ See, e.g., *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

¹²⁰ See Susan Ning et al., *Chinese Court Rendered Final Judgment on Rainbow v. Johnson & Johnson – the First Antitrust Private Action of Vertical Monopolistic Agreement*, CHINA LAW INSIGHT (Aug. 5, 2013), <https://perma.cc/28LC-63BL>.

¹²¹ See Lester Ross & Tingting Liu, *WilmerHale Client Alert: China's Supreme People's Court Rules RPM Is Illegal Per Se*, WILMERHALE (Jul. 3, 2019), <https://perma.cc/9E8B-XSzt>.

of these cases, NDRC found violations of the AML without considering the potential procompetitive effects of the RPMs at issue. This illegal per se approach has now been officially incorporated into an interim regulation promulgated by SAMR on monopoly agreements.¹²²

The SPC recently weighed in on the apparent divergence in the approaches taken by courts and enforcement agencies on RPMs. In the *Hainan Yutai* case referenced above, the SPC held that while subjecting RPMs to the rule of reason makes sense from an economic point of view, it is impracticable to do so at the current stage of development of both the economy and the AML. The SPC explained that the antimonopoly enforcement agencies should be allowed to treat RPMs as illegal monopoly agreements per se without the burden of proof being on the agencies to prove anticompetitive effects of RPMs, because doing otherwise “would substantially raise enforcement costs and impact enforcement efficiency, which would be incompatible with the present need for AML enforcement activity.”¹²³

The SPC’s approach in the *Hainan Yutai* case is an attempt to bridge the difference in the standards being used by courts and by enforcement agencies on RPMs. But in so doing, it creates more confusions and uncertainties than it eliminates. The SPC suggests that a defendant could rebut the enforcement agencies’ allegations of an illegal RPM with evidence that the RPM does not eliminate or restrict competition. But the SPC fails to clarify what the enforcement agencies would be required to do if the defendant successfully made the rebuttal. It appears that the SPC’s framing of this issue as a burden-of-proof one is disingenuous; what it really means is that the antimonopoly enforcement agencies need not worry about presenting any evidence of anticompetitive effects of RPMs under any circumstances. Such a rule would be more intellectually honest and less confusing. This rule, however, creates enormous uncertainties for businesses. When businesses enter into an RPM arrangement, they do not know beforehand whether they will be sued by a customer or will be investigated by the government for violations of the AML. So, whether an RPM could legally hold up appears to be decided purely by luck. This

¹²² See Jinzhi Longduan Xieyi Zanzing Guiding (禁止垄断协议暂行规定) [Interim Provisions on the Prohibition of Monopoly Agreements] (promulgated by State Admin. Mkt. Regul. (SAMR)), June 26, 2019, effective June 26, 2019) ST. COUNCIL GAZ., no. 25, 2019, art. 12 (listing RPMs as monopoly agreements subject to the illegal per se standard).

¹²³ See Ross & Liu, *supra* note 121.

undoubtedly creates a chilling effect, causing businesses to forego perfectly legal and beneficial RPM arrangements.

The split between courts and government enforcement authorities on RPM reveals the institutional constraints under which Chinese courts operate. In antitrust law, as in many other areas, Chinese courts still play a secondary role in enforcing the law. The SPC's handling of the RPM issue is significant not only in its outright recognition of two seemingly incompatible approaches, but also in the reason it gives for doing so. According to the SPC, both the rule-of-reason standard and the per-se-illegal standard are permissible—not for any inherent scientific reasons, but for “enforcement efficiency.” This *carte blanche* for the government to ignore economic evidence will enable the government to pursue its competition agenda as it sees fit, with no external constraints. This makes it easier for state-favored competitors to gain protection, potentially at the expense of competition. In other words, Chinese courts have not been able to lessen the paradox besetting the country's antitrust regime from the start; instead, they have contributed to it.

D. SOEs

As discussed earlier, a unique feature of China's economy that makes its antitrust paradox more structurally durable than the Western counterpart is the existence of a large, dominant state-owned sector. Thanks to their proximity to state power, China's SOEs have the incentive—and the means—to capture the state's antitrust policymaking. Therefore, Chinese antitrust is naturally predisposed to favoritism for SOEs. However, Chinese state capitalism supposedly differs from the traditional socialist economic model in that SOEs are intended to operate under market principles. A persistent dilemma, therefore, is how to strike a balance between the two goals.

This dilemma on SOEs can be best seen in the merger review area. Despite the robust merger review process China has developed for private—and mostly foreign—firms, there has been a continued absence of a meaningful merger review mechanism for the largest SOEs. Historically, SOEs have maintained monopoly or near-monopoly status in many of China's key industries, including banking, telecommunications, rail, petroleum, and electricity.¹²⁴ The AML stipulates that the legal operations of those SOEs will be protected, but at the same time they should not use

¹²⁴ See Owen et al., *supra* note 7, at 243–44.

their monopoly status to harm consumers.¹²⁵ The implementation of the AML, however, is decidedly tilted in favor of protecting the largest SOEs from antitrust scrutiny, at least in the merger review area. Since the AML went into effect in August 2008, the Chinese government has continued its campaign to consolidate the largest SOEs in already highly concentrated industries in an effort to forge China's national champions. Many of the SOE consolidations carried out so far raise grave competitive concerns. For example, the 2015 merger between CNR and CSR, China's only two manufacturers of train locomotives and rolling stock, resulted in only one nationwide manufacturer, CRRC.¹²⁶ Since it dramatically lessens competition in the marketplace, a merger like this would not have passed antitrust muster under a typical merger review regime. But all of these central SOE mergers were not even filed with MOFCOM or SAMR for merger review. Indeed, one of the rationales often cited to justify the central SOE mergers is the need to reduce "vicious" competition among them.¹²⁷ Therefore, a decade after the implementation of the AML, the most glaring contradiction in Chinese antitrust persists: the sectors most in need of antitrust interventions are still shielded from meaningful antitrust scrutiny.

The SOE dilemma also manifests in the abuse-of-dominance area. Since the enactment of the AML, Chinese SOEs have continued to dominate key industries despite China's push for diversification and greater competition in its economy. As noted earlier, one fundamental contradiction underlying the AML from the very beginning is the relative irrelevance of the AML's abuse-of-dominance provisions to China's economy, given that many of China's key economic sectors are dominated by SOEs with explicit or implicit support from the government.¹²⁸ SOEs in those sectors do not need to engage in exclusionary practices, as the government has already done the exclusion for them. In those SOE-dominated sectors, there are essentially no competitors to be excluded, and only consumers to be exploited. This can be seen from several lawsuits that were filed by private citizens immediately after the AML went into effect.¹²⁹ These lawsuits all targeted

¹²⁵ See AML, *supra* note 3, art. 7.

¹²⁶ See SASAC, *CNR and CSR to Merge*, *supra* note 48.

¹²⁷ See Zhao Jiani (赵嘉妮), Guozi Baogao: Nanbeiche Exing Jingzheng Zhi Guozi Liushi (国资委: 南北车恶性竞争致国资流失) [SASAC Reports: Vicious Competition Between CNR and CSR Leads to Loss of State-Owned Capital], RENMING WANG (人民网) [PEOPLE'S NET] (Jun. 17, 2015), <https://perma.cc/4SBR-GFSZ>.

¹²⁸ See *supra* notes 19–20 and accompanying text.

¹²⁹ For more details about these lawsuits, see Zheng, *supra* note 4, at 698–700.

unreasonable pricing practices by SOEs in monopoly industries, an indication that the main abuses by SOEs in those industries are exploitative, not exclusionary, in nature.¹³⁰

The central task for China, therefore, is to “create” more competition or at least more possibilities for competition in its economy, instead of simply relying on enforcing the AML to preserve competition. The conventional means of creating competition are breaking up existing SOE monopolies and allowing entry by new firms into monopolized industries. Prior to the adoption of the AML, China had made some progress on both fronts, but not enough to rein in exploitative abuses by SOEs.¹³¹ But since the AML took effect, progress on competition creation in monopoly industries has stalled, and in some cases has even been reversed. Instead of breaking up SOE monopolies, the government has further consolidated SOE monopolies in many industries. The number of “central SOEs,” or SOEs directly controlled by the State-Owned Assets Supervision and Administration Commission (SASAC), was reduced from 149 right before the AML took effect to only 95 in August 2019.¹³² In the meantime, despite encouragement by the government, private firms have not made many inroads into the monopolized industries.¹³³ SOEs in China’s monopoly industries have solidified their dominance, consistent with the state-driven model of Chinese state capitalism.

E. Cartels

As discussed earlier, one major challenge for China’s anti-trust regime at the inception of the AML was widespread excess capacity in China’s industries, which, as noted above, tied the government’s hands in pursuing a rigorous anti-cartel policy.¹³⁴

¹³⁰ One lawsuit alleged that China Construction Bank charged an unreasonable account management fee. Another lawsuit targeted China Netcom for its practice of offering price discounts only to subscribers with a Beijing certificate of residence. Yet another lawsuit alleged that China Mobile charged a monthly fee to subscribers using its global roaming services. *See id.* at 698 nn. 238–40.

¹³¹ For more detailed discussions of China’s efforts to break up existing SOEs and to allow private firms to enter SOE-dominated industries, *see id.* at 659–62, 701–03.

¹³² For a list of the central SOEs, *see* SASAC, CENTRAL SOE DIRECTORY, *supra* note 33. For all of the SOE consolidations, *see* *Yangqi Biangeng* (央企变更) [*Changes in Central SOEs*], GUOYOU ZICHAN JIANDU GUANLI WEIYUANHUI (国有资产监督管理委员会) [STATE-OWNED ASSETS SUPERVISION AND ADMIN. COMM’N (SASAC)] (accessed Feb. 2, 2023), <https://perma.cc/C836-C4NX>.

¹³³ Frank Tang, *China’s State Monopolies Cast a Big Shadow Over Private Enterprise, But Will Antitrust Law and Vows of Reform Help?*, SOUTH CHINA MORNING POST (Jan. 5, 2021), <https://perma.cc/B2FM-3ASD>.

¹³⁴ *See supra* note 18 and accompanying text.

But since 2013, the launch of supply-side structural reforms has aligned the goals of antitrust with those of macroeconomic policies, leading to a reinvigoration of China's anti-cartel policy.

A watershed change in China's economic policies, supply-side structural reforms are aimed at rectifying economic distortions caused by government interventions and eliminating excess capacity in the economy.¹³⁵ One of the unintended consequences of the supply-side structural reforms is that they invigorated China's anti-cartel policy, which was much needed. For the first time since the adoption of the AML, eliminating inefficient competitors from the marketplace has become a policy priority in many of China's industries. This has pushed China's antitrust regulators to conduct enforcement campaigns against cartels in industries identified as the key targets of supply-side structural reforms.

The impact of supply-side structural reforms on China's cartel policy can be seen from the enforcement data. Prior to the launch of supply-side structural reforms, there were few serious government efforts to crack down on price-fixing in China's industrial sectors. The National Development and Reform Commission (NDRC), the agency initially tasked with enforcing the AML's provisions on monopoly agreements before it was replaced by SAMR in 2018, took no systematic enforcement actions against domestic cartels prior to 2017. NDRC made headlines by imposing heavy fines on international LCD panel manufacturers in 2012 and on Japanese auto parts and bearings manufacturers in 2014, but these cases were follow-on cases involving price-fixing violations that were already penalized worldwide.¹³⁶ NDRC's actions against price-fixing by domestic companies prior to 2017 appeared to be sporadic and haphazard.¹³⁷

A new trend has emerged since 2017, however, when NDRC started taking aggressive actions against cartels in a number of industrial sectors. In 2017, NDRC conducted sixteen price-fixing

¹³⁵ See *supra* Part III.C.

¹³⁶ See *Korean, Taiwanese LCD Firms Fined for Alleged Price-Fixing in China—NDRC*, REUTERS (Jan. 4, 2013), <https://perma.cc/2V84-SPYW>; Matthew Miller & Yoko Kubota, *China Fines Japanese Auto Parts Makers Record \$201 Mln for Price-Fixing*, REUTERS (Aug. 19, 2014), <https://perma.cc/66N3-8KRY>.

¹³⁷ Notably, in 2016, NDRC concluded three investigations into price-fixing and other collusive practices by fourteen domestic drug and chemical companies and imposed penalties of 1%–8% of their annual gross sales. But these actions appear to be prompted by the government's decision to abandon price control for most drugs. See CLIENT MEMORANDUM: CHINA ANTITRUST REVIEW 2016, DAVIS POLK, at 4 (Jan. 25, 2017) <https://perma.cc/7CN6-7B85>.

investigations in a wide range of domestic industries, including electricity, PVC, papermaking, cement, shipping, telecommunications, and automobiles.¹³⁸ Representative cases include a case against an industrial association and twenty-three power-generating companies in the Shanxi Province for organizing and participating in a price-fixing agreement, and a case against eighteen PVC manufacturers nationwide for participating in thirteen price-fixing agreements. In 2018, SAMR continued this trend and imposed large fines on a number of companies in the pharmaceuticals and shipping industries for participating in price-fixing and market allocation agreements.¹³⁹ In its annual AML enforcement reports published since 2019, SAMR has highlighted its enforcement actions against cartels pursuant to the agenda of supply-side structural reforms.¹⁴⁰

Undoubtedly, supply-side structural reforms have reinvigorated China's anti-cartel policy, at least in industries targeted for excess capacity elimination. No longer are inefficient, subsidy-dependent firms in those industries allowed to prolong their existence through explicit or implicit price cartels. Granted, supply-side structural reforms are eliminating competitors, but they are eliminating competitors in a way that is conducive to competition: the competitors being eliminated would not have existed in the first place had there been no government distortions.

That said, the reinvigoration of China's anti-cartel policy is not entirely market-friendly. In many cases, the supply-side reform measures prompting the tightening of China's anti-cartel policy are implemented through government fiat and are not

¹³⁸ See SUSAN NING ET AL., ANTITRUST ENFORCEMENT OF THE NDRC AND SAIC: RETROSPECT AND PROSPECT 2 (2018), <https://perma.cc/3Y98-VALW>.

¹³⁹ See CLIENT MEMORANDUM: CHINA ANTITRUST REVIEW 2018, DAVIS POLK, at 5 (Jan. 31, 2019), <https://perma.cc/DX7U-H854>.

¹⁴⁰ See GUOJIA SHICHANG JIANDU GUANLI ZONGJU FANLONGDUANJU (国家市场监督管理总局反垄断局) [STATE ADMIN. MKT. REGUL. (SAMR)], ZHONGGUO FANLONGDUANFA ZHIFA NIANDU BAOGAO (2019) (中国反垄断法执法年度报告(2019)) [China Antitrust Enforcement Annual Report 2019] 12–13 (highlighting enforcement actions in the construction materials industry); GUOJIA SHICHANG JIANDU GUANLI ZONGJU FANLONGDUANJU (国家市场监督管理总局反垄断局) [STATE ADMIN. MKT. REGUL. (SAMR)], ZHONGGUO FANLONGDUANFA ZHIFA NIANDU BAOGAO (2020) (中国反垄断法执法年度报告(2020)) [China Antitrust Enforcement Annual Report 2020] 37 (highlighting enforcement actions in the construction materials industry); GUOJIA SHICHANG JIANDU GUANLI ZONGJU FANLONGDUANJU (国家市场监督管理总局反垄断局) [STATE ADMIN. MKT. REGUL. (SAMR)], ZHONGGUO FANLONGDUANFA ZHIFA NIANDU BAOGAO (2021) (中国反垄断法执法年度报告(2021)) [China Antitrust Enforcement Annual Report 2021] 8 (2021) (highlighting enforcement actions in the construction materials industry).

based on self-sustaining market mechanisms.¹⁴¹ Moreover, the fact that antitrust policy is being dictated by government policy priorities contradicts the notion of an antitrust jurisprudence built on an internal logic. The very mechanisms through which antitrust policy is being used to accomplish the goals of supply-side structural reforms may someday be used to implement policies harmful to competition.

F. Internet Platforms

China's internet platforms are at the frontier of antitrust law and policy. As discussed earlier, in China's monopolized industries, the AML's exclusion-focused abuse-of-dominance provisions are rendered largely irrelevant because the government has done the exclusion for the incumbent SOEs.¹⁴² Having become accustomed to government largesse, these SOEs generally lack incentives to innovate.¹⁴³ But they are able to keep out-competing firms through implicit, or even explicit, market-entry barriers erected or sanctioned by the government. Unless and until the government takes steps to dismantle these market-entry barriers, genuine competition can exist only outside of monopolized industries. This is where China's internet platforms come in: they fill this competition vacuum and operate in a new economic sector with unrestricted competition.

The emergence of China's major internet platforms was an unorthodox way of creating competition. Instead of introducing competition into tightly controlled monopoly industries, internet platforms—all private firms—created whole new industries outside of the industries dominated by SOE monopolies. Because of China's "growth imperative," private internet platforms were able to capture government support the same way SOEs captured government support in monopolized industries.¹⁴⁴

With no strong SOE incumbents, China's emerging internet industries are contending with robust, or even brutal, competition. In 2014, competition between two leading internet-based firms, Qihoo 360 and Tencent, resulted in the first AML private

¹⁴¹ See Pan Jie (潘洁) & Rong Qihan (荣启涵), *Lou Jiwei Weiyuan: Gongjice Jiegouxing Gaige Yao Pochu Chuantong Siwei*, (楼继伟委员: 供给侧结构性改革要破除传统思维) [Committee Member Lou Jiwei: Supply-Side Reforms Need to Think Outside the Box], XINHUA WANG (新华网) [XINHUA NET] (Mar. 8, 2018), <https://perma.cc/W24A-D4T8>.

¹⁴² See *supra* notes 128–30 and accompanying text.

¹⁴³ See Milhaupt & Zheng, *supra* note 69, at 699.

¹⁴⁴ For more detailed analysis of patterns of market dominance in Chinese industries, see *id.* at 697–700.

litigation heard by the Supreme People's Court. Qihoo 360 is China's leading anti-virus software company. In its lawsuit against Tencent, China's largest social media and gaming company, Qihoo 360 alleged that Tencent bundled its anti-virus software with its social media software (named "QQ") and prohibited QQ customers from using Qihoo 360's services. The lower court ruled against Qihoo 360. On appeal, the SPC upheld the lower court ruling. In arriving at its decision, the SPC considered sophisticated economic evidence presented by both sides. This marked a milestone in the development of China's antitrust jurisprudence.¹⁴⁵ But the *Qihoo v. Tencent* case is most significant not because of its legal or economic analyses, but because of the very nature of the alleged violations. Unlike previous AML private litigation, which focused on exploitative abuses by SOEs, the *Qihoo v. Tencent* case involved quintessential exclusionary abuses by private firms, such as bundling and refusals to deal. This indicates that in China's new industries, there is enough competition to motivate firms to resort to exclusionary practices. Therefore, the AML's abuse-of-dominance provisions are becoming more relevant—at least in segments of the economy that are bound to become ever more important.

The increased relevance of the abuse-of-dominance provisions of the AML is a double-edged sword for the Chinese economy. If not handled well, what has plagued China's traditional monopoly industries could happen to its emerging industries. The Chinese state has a tendency to play an active role in the markets, and has vast amounts of resources to throw around to achieve its goals. In the past, it has teamed up with the "best athletes" in the fields, whether state-owned or private, to promote economic development. But as private firms grow stronger and acquire dominant market positions in emerging industries, there is the natural tendency for them to develop a cozy relationship with the government. The risk is that once private firms lock in government support, they may become the new SOEs, with the government pulling strings to deter and restrict competition on their behalf. When that happens, the AML's exclusion-focused abuse-of-

¹⁴⁵ See Li Zhu, *Beijing Qihoo Technology Co., Ltd. v. Tencent Technology (Shenzhen) Co., Ltd. and Shenzhen Tencent Computer System Co., Ltd. (Dispute over the Abuse of Market Dominant Position)—Analysis Methods and Ideas for the Definition of the Relevant Markets and the Abuse of Market Dominant Position in the Internet Environment*, in 1 SELECTED CASES FROM THE SUPREME PEOPLE'S COURT OF THE PEOPLE'S REPUBLIC OF CHINA 325 (China Inst. Applied Juris. ed., 2020).

dominance provisions will become less relevant again, because there will be no competitors to be excluded.

As of now, it appears that China has avoided that pitfall. Indeed, since November 2020, China has ramped up efforts to crack down on prominent technology platforms for anticompetitive conduct. In November 2020, SAMR issued the landmark Guidelines on Antimonopoly for Platforms, which set out the principles governing antitrust enforcement in the internet platform sector.¹⁴⁶ In April 2021, SAMR imposed a record 18 billion yuan (US \$2.75 billion) fine on Alibaba, after the agency found that China's e-commerce giant had abused its dominant market position by preventing its merchants from using other e-commerce platforms.¹⁴⁷ The fine amounted to 4% of Alibaba's domestic revenues in 2019.¹⁴⁸ In the same month, SAMR imposed a \$700 million fine on Meituan, China's leading on-demand food delivery provider, for engaging in the same abuse-of-dominance conduct.¹⁴⁹ China has also imposed big fines on other internet platforms such as Pinduoduo, Didi, and Nice Tuan for unfair competition.¹⁵⁰ Given that anticompetitive abuses are widespread in China's tech sector, such enforcement is long overdue.

That said, rigorous antitrust enforcement against China's internet platforms might result in de facto, if not intentional, protection of SOE incumbents in traditional industries. Prior to the crackdowns, China's internet platforms were bent on encroaching upon the turf of SOE monopolies in industries such as banking.¹⁵¹ Therefore, China has to walk a tightrope: not cultivating internet platforms as the next monopolies, but also not protecting SOE

¹⁴⁶ See Guojia Shichang Jiandu Guanli Zongju Fanlongduanju (国家市场监督管理总局反垄断局) [State Admin. Mkt. Regul. (SAMR)], Guowuyuan Fanlongduan Weiyuanhui Guanyu Pingtai Jingji Lingyu de Fanlongduan Zhinan (国务院反垄断委员会关于平台经济领域的反垄断指南) [State Council Antitrust Committee's Guidelines on Antimonopoly for Platform Economics] (Feb. 7, 2021), <https://perma.cc/3GDV-QZL3>.

¹⁴⁷ See Scott Murdoch & David Stanway, *China Fines Alibaba Record \$2.75 bln for Anti-monopoly Violations*, REUTERS, Apr. 9, 2021, <https://perma.cc/X9ZD-VWT9>.

¹⁴⁸ *Id.*

¹⁴⁹ Minghe Hu & Tracy Qu, *Meituan Faces a Big Fine for Antitrust Violation, Just Like Alibaba, Analysts Say*, SOUTH CHINA MORNING POST (Apr. 28, 2021), <https://perma.cc/J7XN-AJHH>.

¹⁵⁰ Charlie Campbell, *How China is Cracking Down on Its Once Untouchable Tech Titans*, TIME (May 20, 2021), <https://perma.cc/5XUL-7KTT>.

¹⁵¹ For example, antitrust enforcement against Alibaba might weaken the e-commerce giant and prevent it from expanding into business areas controlled by state-owned commercial banks. See Liza Lin & Chong Koh Ping, *Alibaba he Mayi Jituan Milin Zhongguo Jianguo Zhengdun* (阿里巴巴和蚂蚁集团面临中国监管整顿) [Alibaba and Ant Group Face China's Regulatory Crackdown], Huaerjie Ribao (华尔街日报) [WALL STREET J.] (Sept. 3, 2021).

monopolies from competition with internet platforms. Balancing these two goals requires not only even-handed antitrust enforcement, but also a government refraining from using its immense resources to pick winners and losers.

G. Foreign Companies

Foreign companies operating in China epitomize the ultimate paradox in Chinese antitrust. On one hand, competitive abuses by multinational corporations need to be reined in to protect competition. But on the other hand, antitrust enforcement targeting foreign companies—and foreign companies only—gives rise to concerns that antitrust might be used for nationalist industrial policy purposes.

As discussed earlier, in merger review, foreign companies have been a consistent target of antitrust scrutiny.¹⁵² Foreign companies have also been the main targets of NDRC's enforcement actions against price-fixing in the initial decade of the AML.¹⁵³ As shall become clear below, the same pattern repeats itself in abuse-of-dominance enforcement as well.

Prior to the overhaul of the AML's enforcement agencies in 2018, the responsibilities for enforcing the AML's abuse-of-dominance provisions were initially split between NDRC, which was charged with handling price-related matters, and the State Administration of Industry & Commerce (SAIC), which was responsible for non-price-related matters. The highest-profile enforcement actions by both agencies in the abuse-of-dominance area happened to involve foreign companies.

NDRC's best-known enforcement action in the abuse-of-dominance area was its investigation into Qualcomm's licensing practices in China. In March 2015, NDRC announced its decision in the investigation.¹⁵⁴ NDRC concluded that Qualcomm possessed a dominant position in multiple product markets, and abused that dominant position by engaging in anticompetitive conduct.¹⁵⁵ Qualcomm's alleged offenses include charging royalties on expired patents, demanding free cross-licenses from licensees, tying licenses of Standard-Essential Patents (SEPs) to licenses of non-SEPs and charging royalties based on the net selling prices of devices, and conditioning the sale of certain chips upon purchasers

¹⁵² See *supra* notes 105–09 and accompanying text.

¹⁵³ See *supra* note 136 and accompanying text.

¹⁵⁴ See CLIENT MEMORANDUM, CHINA ANTITRUST REVIEW 2015, DAVIS POLK, at 4–5 (Jan. 19, 2016), <https://perma.cc/FG4D-C7KE>.

¹⁵⁵ *Id.*

agreeing not to challenge the validity of Qualcomm's patents.¹⁵⁶ NDRC imposed a fine of 6 billion yuan, or 8% of Qualcomm's sales in China in 2013, and ordered Qualcomm to cease the violations.¹⁵⁷

Similarly, two SAIC enforcement actions that gained the most spotlight in the agency's history of enforcing the AML's abuse-of-dominance provisions involved foreign companies operating in China. In July and August of 2014, SAIC officials raided four of Microsoft's offices in China as part of an SAIC investigation into Microsoft's alleged anticompetitive practices relating to compatibility, bundling, and document authentication for its Windows operating system and Office software.¹⁵⁸ Since then, in September 2014 and January 2016, SAIC twice conducted "inquiries" with executives at Microsoft's operations in China and demanded written responses to the antitrust allegations.¹⁵⁹ However, SAIC never publicly explained what exactly Microsoft's alleged violations were. Nor did it announce any official outcomes of its investigations.

In another high-profile enforcement action, SAIC conducted a nearly five-year-long probe of the sales and marketing practices of the Swedish food packaging giant Tetra Pak. It is no coincidence that Tetra Pak was the company whose practice of tying the sale of packaging equipment to the sale of packaging supplies in the early 2000s was a major factor that motivated China to adopt the AML.¹⁶⁰ In a final decision released in November 2016, SAIC concluded that Tetra Pak abused its dominant market positions in several product markets in China. SAIC found that Tetra Pak engaged in tying and exclusive dealing and provided loyalty discounts in violation of the AML.¹⁶¹ SAIC imposed a penalty equivalent to 7% of Tetra Pak's sales in China in 2011.¹⁶²

Foreign companies did not fare better defending antitrust allegations before Chinese courts either. In 2013, the Shenzhen Intermediate People's Court handed down an opinion in a landmark case filed by Chinese telecommunications giant Huawei against

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ See *China Anti-trust Regulator Conducts New Raids on Microsoft, Accenture*, REUTERS (Aug. 6, 2014), <https://perma.cc/2U4D-WL6G>.

¹⁵⁹ See *China Regulator Queries Microsoft on Findings in Anti-trust Probe*, REUTERS (Jan. 5, 2016), <https://perma.cc/4EN9-YGAL>.

¹⁶⁰ See Zheng, *supra* note 4, at 718.

¹⁶¹ See DAVIS POLK, *supra* note 137, at 5–6.

¹⁶² *Id.*

American company InterDigital.¹⁶³ The Shenzhen court found that InterDigital abused its dominant market position by tying its standard-essential patents with non-standard-essential patents during licensing negotiations, seeking an injunction against Huawei before a U.S. court and the U.S. International Trade Commission, and demanding excessive royalty payments from Huawei.¹⁶⁴ This case was litigated and decided in the context of worldwide disputes between patent holders and patent implementers over royalty payments for SEPs. In this case, China took an aggressive stance against foreign SEP holders by interpreting the AML to prohibit SEP holders from demanding royalty payments in excess of fair, reasonable and nondiscriminatory (FRAND) rates. This interpretation of antitrust law is not unique.¹⁶⁵ The opaqueness surrounding the *Huawei v. InterDigital* case, however, casts a negative light on the treatment of foreign companies under China's antitrust law.¹⁶⁶

V. CONCLUDING REMARKS: THE PATH FORWARD

More than a decade after the AML went into effect, the competition-versus-competitor paradox in Chinese antitrust law still persists and, in some respects, has deepened. Unlike its American counterpart, the paradox in China is rooted in the hybrid development model known as state capitalism and is structurally more durable. As is clear from the discussions above, the AML has not settled on a consistent trajectory in its first fourteen years. Some of the fundamental contradictions inherent in the AML have been alleviated due to changes in China's economic policies and industry conditions, but some other contradictions remain. The AML achieved remarkable successes in certain respects, but in some other respects, the AML's performance is seriously lagging. It

¹⁶³ The official opinion of this case was not released. Discussions of the case could be found in media reports and research articles. See, e.g., Michael Han & Kexin Li, *Huawei v. InterDigital: China at the Crossroads of Antitrust and Intellectual Property, Competition and Innovation*, COMPETITION POLICY INT'L (2013), <https://perma.cc/X7CG-EANJ>.

¹⁶⁴ *Id.* at 2–3.

¹⁶⁵ Similarly, in *Huawei v. ZTE* the Court of Justice of the European Union ruled that the holder of an SEP that has committed to license the SEP on FRAND terms may be found in breach of Article 102 of the Treaty on the Functioning of the European Union if it seeks an injunction against a potential licensee in certain circumstances. See C-170/13, *Huawei Technologies Co. Ltd. v. ZTE Corp.*, 2014 E.C.R. II-2391, <https://perma.cc/AZX2-28RX>.

¹⁶⁶ The trial court decision in *Huawei v. InterDigital* was never officially released. See D. Daniel Sokol & Wentong Zheng, *FRAND in China*, 72 TEX. INTELL. PROP. L.J. 71, 88 (2013). In addition, there were a number of irregularities in the trial court's handlings of the case. See *id.* at 91.

appears that fourteen years out, China's experiment with anti-trust is still an ongoing process, with its end far out of sight.

Despite the seemingly incoherent developments, an overarching theme of China's antitrust experiment is what can be referred to as legal incrementalism. Like its economic counterpart, legal incrementalism features incremental legal changes brought about by constant tinkering of policies in a pragmatic process. There are often grandiose goals in Chinese laws, such as protecting market competition in the case of the AML, but rarely are the paths for achieving the goals preordained from the outset. Instead, implementing these goals often relies on "crossing-the-river-by-groping-the-stones" style incrementalism. Furthermore, due to complex political, economic, and social conditions, Chinese laws often contain inconsistent or even contradictory elements. But this inconsistency has not deterred the development of jurisprudence that is effective in settling particular disputes at hand. Chinese courts and regulators are particularly adept at mastering and deploying technical analyses. Issues that have systemic significance, however, are often punted for a later time. Finally, Chinese-style legal incrementalism could lead to unexpected twists and turns in the development of a legal regime. In the case of the AML, although China's local conditions are not entirely amenable to an antitrust law that presupposes the existence of competition, changing economic policies and industry conditions have actually moved the AML in that direction.

Therefore, as China moves forward with its antitrust regime, the fate of the regime will be determined, to a large extent, by where China is going in terms of its development model. Will China elevate the "state" or "capitalism" element of "state capitalism"? China has been sending mixed signals on this question: while China has veered heavily in the direction of having more state control of its economy in the last decade or so, there are reasons to be hopeful that markets will continue to be relied upon as a primary mechanism for allocating resources. As long as state capitalism continues in China, so will its antitrust paradox.