

STATEMENT OF THOMAS J. HORTON  
Professor of Law and Heidepriem Trial Advocacy Fellow  
The University of South Dakota School of Law

Before the  
SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

of the  
COMMITTEE ON THE JUDICIARY,  
UNITED STATES HOUSE OF REPRESENTATIVES

Concerning  
“INTERNATIONAL ANTITRUST ENFORCEMENT: CHINA AND BEYOND”

June 7, 2016

Chairman Goodlatte, Ranking Member Conyers, Subcommittee Chairman Marino, Ranking Subcommittee Member Johnson, and distinguished Committee Members, thank you for inviting me to this hearing on “International Antitrust Enforcement: China and Beyond.”<sup>1</sup>

## I. INTRODUCTION

In August 2007, the People’s Republic of China (PRC), through its National People’s Congress, enacted its Anti-Monopoly Law (AML), which first took effect in 2008. Areas of concern include “Monopoly Agreements,” “Abuses of Dominant Positions,” “Concentrations of Undertakings,” and “Prohibitions of Abuse of Administrative Powers to Restrict Competition.”

American, European, and Japanese antitrust competition regulators, lawyers, and economists have taken understandable pride in counseling and helping China in drafting, adopting, and interpreting its new AML.<sup>2</sup> Indeed, “[t]he core provisions of the AML were modeled on EU competition law, and to a lesser extent, on the laws of the United States, Germany, Japan, and other countries.”<sup>3</sup>

Although “anti-monopoly efforts are a very new phenomenon in China,”<sup>4</sup> China today finds itself under an intense global microscope. “Though many jurisdictions have adopted competition laws in recent decades, none of those laws has engendered the level of interest sparked by China’s Anti-Monopoly Law (AML).”<sup>5</sup> China’s rapid ascendance as an increasingly

---

<sup>1</sup> I am a Professor of Law and Heidepriem Trial Advocacy Fellow at the University of South Dakota School of Law. Following a 28-year career as an antitrust lawyer and complex litigator, I transitioned in 2009 to my current full-time position teaching Antitrust & Consumer Protection Law and Trial Advocacy. My career has included stints with the Antitrust Division and the Federal Trade Commission, as well as partnerships in several major international law firms. During the summers of 2012 and 2014, I taught Comparative Antitrust Law to Chinese and American law students at the Chinese Youth University for Political Science (CYUPS) in Beijing, and the Shanghai International Studies University (SISU) in Shanghai. My scholarly publications on China’s Anti-Monopoly Law and its enforcement include: *Antitrust or Industrial Protectionism? Emerging International Issues in China’s Anti-Monopoly Law Enforcement Efforts*, 14 SANTA CLARA J. INT’L L. 109 (2016); *Confucianism and Antitrust: China’s Emerging Evolutionary Approach to Anti-Monopoly Law*, 47 INT’L LAWYER 193 (2013); and *Analyzing Information Exchanges Between Competitors Under [China’s] Anti-Monopoly Law*, in CHINA’S ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS 95 (A. Emch & D. Stallibrass, eds. 2013) (with Jenny Xiaojin Huang).

<sup>2</sup> Noted Chinese competition scholar Professor Xiaoye Wang regards China’s AML “as a great achievement of international cooperation.” Xiaoye Wang, *Highlights of China’s New Anti-Monopoly Law*, 75 ANTITRUST L. J. 133, 134 (2008). Professor Wang observes that “[t]he competition enforcement agencies of other countries, in particular the U.S. Department of Justice, the U.S. Federal Trade Commission, and the European Commission contributed significant assistance.” *Id.*

<sup>3</sup> H. STEPHEN HARRIS, JR., PETER J. WANG, YIZHE ZHANG, MARK A. COHEN & SEBASTIAN J. EVRARD, ANTI-MONOPOLY LAW AND PRACTICE IN CHINA 2-3 (2011). The authors further note that “[m]any of the stated goals for the AML are broadly consistent with those of such other jurisdictions’ laws, including preventing or stopping monopolistic conduct, safeguarding and promoting the order of fair market competition, improving economic efficiency, and protecting the interests of consumers.” *Id.* See also Wang, *supra* note 2, at 134 (“[I]t is no surprise that many good provisions from other well-established antitrust laws have been incorporated in the Chinese AML.”).

<sup>4</sup> CHINA’S ANTI-MONOPOLY LAW, *supra* note 1, at xxxvii.

<sup>5</sup> HARRIS ET. AL., *supra* note 3, at 8. The reasons for the high level of global interest include: “the sheer scale and astounding growth of China’s markets, the vast amounts of foreign capital invested in China, the burgeoning sales of Chinese goods abroad, the substantial growth in the participation of Chinese firms in foreign markets, and a recognition of the significant challenge posed by the establishment of free market competition in China’s socialist market economy.” *Id.*

active and controversial global antitrust enforcer is especially ironic, as until the late 1970s, China viewed the term competition as a “capitalist monster.”<sup>6</sup>

Although China’s legal system and anti-monopoly regulatory efforts are still “a work in progress,”<sup>7</sup> key trends and patterns in China’s enforcement of its AML are emerging. First and foremost, China is aggressively charting its own course.<sup>8</sup> China sees its AML enforcement as an integral part of its mission of “safeguarding market order and achieving social fairness and justice [in] establish[ing] an initial law regime for the socialist market economy.”<sup>9</sup> China’s leaders view “socialism with Chinese characteristics and the Chinese dream [as] the main theme of our age.”<sup>10</sup> So it should hardly come as a surprise to anyone that China will continue to see one of its primary anti-monopoly missions as carrying out AML Article 1’s mandate of “promoting the healthy development of the socialist market economy.”<sup>11</sup>

Of course, the Chinese are astute enough to recognize that it was the United States “that smoothed the way for Beijing’s entry into the World Trade Organization.”<sup>12</sup> They also know that they owe a substantial part of their “economic miracle” to trade with the West.<sup>13</sup> So there is little doubt that the Chinese are likely to continue “selectively adapting elements of Western learning and technology to China’s needs.”<sup>14</sup>

This does not mean, however, that China is likely to follow western Chicago School

---

<sup>6</sup> Xiaoye Wang, *The New Chinese Anti-Monopoly Law: A Survey of a Work in Progress*, 54 ANTITRUST BULL. 579, 580 (2009).

<sup>7</sup> Pittman B. Potter, *Legal Reform in China: Institutions, Culture, and Selective Adaptation*, 29 L. & SOC. INQUIRY 465, 486 (2004).

<sup>8</sup> See MARTIN JACQUES, *WHEN CHINA RULES THE WORLD: THE END OF THE WESTERN WORLD AND THE BIRTH OF A NEW GLOBAL ORDER* 582 (2d ed. 2012) (“It would be wrong to assume that [China] will behave like the West; that cannot be discounted, but history suggests something different”); Thomas Velk, Olivia Gong & Ariel S.N. Zuckerbrot, *A Trans-Pacific Partnership*, 60(1) ANTITRUST BULL. 4, 5 (2015) (“By means of a unique, clearly evident capacity to mix, balance, and then apply its own special plays and stratagems, China will evolve into a highly efficient but quite different superpower from the United States”); Horton, *Confucianism and Antitrust*, *supra* note 1, at 212 (“China’s long and impressive history and culture, however, ensure that China will do what it has done throughout its long history—chart its own course”); JOHN KING FAIRBANK & MERLE GOLDMAN, *CHINA: A NEW HISTORY* 164 (2006) (arguing that China’s market economy will “be to a large extent in Chinese hands”).

<sup>9</sup> The State Council Info. Office, China, *China’s Efforts and Achievements in Promoting the Rule of Law*, 7 CHINESE J. INT’L LAW 513, 514-17 (2008).

<sup>10</sup> See, e.g., CCP Document No. 9, April 22, 2013, *Communique on the Current State of the Ideological Sphere: A Notice from the Central Committee of the Communist Party of China’s General Office*, translation available at <http://www.chinafile.com/document-9-chinafile-translation>.

<sup>11</sup> AML, Ch. I, Art. 1.

<sup>12</sup> Andrew Jacobs, *The War of Words in China*, N.Y. TIMES, Aug. 2, 2014; see also JACQUES, *supra* note 8, at 580 (“As a rising power, [China] has been obliged to converge with and adapt to the existing international norms, and in particular to defer to and mollify the present superpower, the United States, since the latter’s cooperation and tacit support have been preconditions for China’s wider acceptance”).

<sup>13</sup> See, e.g., Jacobs, *supra* note 12 (“[S]ince the 1980s, when the pragmatic Deng Xiaoping urged his people to learn from the West in an effort to tackle endemic poverty, Chinese leaders have set aside their economic cudgels. In the decades that followed, Adam Smith-style market economics turned former factory workers into millionaires”).

<sup>14</sup> JONATHON D. SPENCE, *THE SEARCH FOR MODERN CHINA* 216 (1990). See also Velk, Gong & Zuckerbrot, *supra* note 8, at 10 (China “is now undergoing a process through which it may amalgamate its natural culture with some of the better social and economic ideas of the west”).

economic theories in interpreting or enforcing its Anti-Monopoly Laws.<sup>15</sup> China is unapologetically basing its current AML enforcement activities and decisions on social, political and moral, as well as economic, considerations.<sup>16</sup> “China’s leaders believe that economic and social responsibilities exist together and cannot meaningfully be separated.”<sup>17</sup>

Whether we like it or not, China’s leaders suspect that many in the West are trying “to obscure the essential differences between the West’s value system and the value system [the Chinese] advocate, ultimately using the West’s value systems to supplant the core values of Socialism.”<sup>18</sup> As an example, when China’s President Xi Jinping first came to power in October, 2013, he blasted what he characterized as western efforts to “denigrate the socialist system—all to promote the Euro-American model of capitalism and constitutionalism.”<sup>19</sup> President Xi’s predecessor, Hu Jintao, similarly warned that “international forces are intensifying the strategic plot of Westernizing and dividing China”, and called on his countrymen to “sound the alarm and remain vigilant.”<sup>20</sup>

China’s leaders consequently are seeking to eschew the teachings and ideologies of unrestrained free-market economics that have underpinned the United States’ antitrust enforcement efforts since the late 1970s.<sup>21</sup> Blasting neoliberalism, China’s leaders allege that Western critics “aim to change [China’s] economic infrastructure and weaken the government’s control of the national economy.”<sup>22</sup> CCP Document No. 9, for example, charges: “They brag on

---

<sup>15</sup> See, e.g., JACQUES, *supra* note 8, at 563 (arguing that China will continue developing “in very much its own way, based on its own history and traditions, which will owe little or nothing to any Western inheritance”).

<sup>16</sup> See, e.g., Horton, *Confucianism and Antitrust*, *supra* note 1, at 213 (“China’s future AML enforcement is likely to be based on social, moral, and political considerations”); JACQUES, *supra* note 8, at 562 (“The reason for China’s transformation . . . has been the way it has succeeded in combining what it has learnt from the West, and also its East Asian neighbours, with its own history and culture, thereby tapping and releasing its own native sources of dynamism”).

<sup>17</sup> Horton, *Confucianism and Antitrust*, *supra* note 1, at 213. See also Geoffrey Kok Heng See, *Harmonious Society and Chinese CSR: Is There Really a Link?* 89 J. BUS. ETHICS 1, 2 (2009) (discussing the CCP’s recognition that it must deal with social and economic issues as an interwoven “national priority”); Harmonious Society, The 17th National Congress of the Communist Party of China (Sept. 30, 2007, 9:14 AM), *available at* <http://english.peopledaily.com.cn/90002/921691/92211/6274973.html>, at 1-2 (discussing how economic growth in China must be balanced by tackling serious social and economic dislocations).

<sup>18</sup> Doc. No. 9, *supra* note 10. “Document No. 9, as it [is] known, called for eradicating seven subversive strains of thinking. Beginning with ‘Western constitutional democracy.’ The list included press freedom, civic participation, ‘universal values’ of human rights, and what it described as ‘nihilist’ interpretations of the Party’s history. The ‘seven taboos’ were delivered to university professors and social media celebrities, who were warned not to cross the line.” EVAN OSNOS, *AGE OF AMBITION: CHASING FORTUNE, TRUTH, AND FAITH IN THE NEW CHINA* 365-66 (2014).

<sup>19</sup> *Id.* at 365.

<sup>20</sup> *Id.* at 319.

<sup>21</sup> For example, CCP Document No. 9 additionally excoriates Western efforts at “promoting Neoliberalism, [and] attempting to change China’s basic economic system.” Doc. No. 9, *supra* note 10. See also Beina Xu & Eleanor Albert, *The Chinese Communist Party* (Nov. 17, 2014) *available at* <http://www.cfr.org/china/chinese-communist-party/p29443>; Chris Buckley, *China Takes Aim at Western Ideas*, N.Y. TIMES, Aug. 19, 2013; Noah Feldman, *CCP’s Plan for Pro-Democracy Voices: Repression*, JAPAN TIMES, Aug. 27, 2013; Andrew McKillop, *China’s 7 Perils Are All Western*, MKT. ORACLE, Aug. 20, 2013 (discussing Document No. 9’s criticisms of the doctrines of “free markets” and “neo-liberalism”); Stanley Lubman, *Document No. 9: The Party Attacks Western Democratic Ideals*, WALL ST. J., Aug. 27, 2013.

<sup>22</sup> Doc. No. 9, *supra* note 10, at pt 4. The CCP’s Document No. 9 adds:

about how we should use Western standards to achieve so-called ‘thorough reform.’”<sup>23</sup> The harsh rhetoric currently coming from China indicates that “[a]fter a lull in xenophobia, anti-Western invective [in China] is back.”<sup>24</sup>

China’s determination to chart its own antitrust course without following or adhering to western ideologies has resulted in four major trends during the first eight years of AML enforcement. First, China aspires to protect and buttress its socialist market economy by safeguarding what it perceives to be “fair market competition” and the “consumer and public interests” of China’s citizens.<sup>25</sup> Second, China is determined to protect at all costs its own perceived long-term security and economic interests. Third, China is focused on protecting its indigenous businesses and entrepreneurs, including its diverse multitude of small and medium-sized businesses. And, fourth, China is demonstrating a strong propensity to focus on potential barriers to entry and the use of exclusionary practices by dominant firms.

China’s AML enforcement activities have drawn harsh and scathing criticism from Western governmental and business interests—especially those in the United States.<sup>26</sup> Major themes of such criticisms are that China “is relying on non-competition factors” in its antitrust analyses and enforcement actions, especially in the context of international mergers and acquisitions, and the protection of Intellectual Property (IP) rights; and that China is discriminating against foreign businesses and countries through uneven enforcement of its AML laws.<sup>27</sup> “According to Lester Ross, Vice Chairman of the American Chamber of Commerce in China, this is a strategy by the Chinese government to help its domestic companies catch up in industries in which they are

---

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

<sup>23</sup> Doc. No. 9, *supra* note 10. The Document continues: “Essentially they oppose the general and specific policies emanating from the road taken at the Third Plenum of the Eleventh Party Congress and they oppose socialism with Chinese characteristics.”

<sup>24</sup> Andrew Jacobs, *The War of Words in China*, N.Y. TIMES, Aug. 2, 2014. *See also* Murong Xuecan, *The New Face of China’s Propaganda*, N.Y. TIMES, Dec. 22, 2013; Orville Schell, *Comrade Xi’s Choice*, WALL ST. J., Oct. 4, 2014, at C1. (“The party’s strenuous denunciation of such ‘hostile forces’ is instructive. It suggests that our own assumptions over the past few decades—that open markets would somehow lead inevitably to open societies and redirect China from what President Bill Clinton once called ‘the wrong side of history’—were pipe dreams.”).

<sup>25</sup> AML, *supra* note 11, at Ch. I. Art. 1.

<sup>26</sup> *See, e.g.*, Velk, Gong & Zuckerbrot, *supra* note 8, at 9 (“In 2014, many American and other foreign companies claimed that they were singled out in antitrust investigations that discriminated against non-Chinese corporations”).

<sup>27</sup> *See, e.g.*, Maureen K. Ohlhausen, Commissioner, Federal Trade Commission, Second Annual GCR Live Conference, *Antitrust Enforcement in China-What’s Next?* (Sept. 16, 2014), at 3-4 (“a growing chorus is claiming that the Chinese are using the AML to promote industrial policy[and] the AML may be used to protect and promote domestic industry”); U.S. Chamber of Commerce, *Competing Interests in China’s Competition Law Enforcement*, Sept. 9, 2014, at ii (“China’s remedies often appear designed to advance industrial policy and boost national champions, AMEAs rely insufficiently on sound economic analysis, intellectual property rights have been curtailed in the name of competition law, and AML enforcement suffers from procedural and due process shortcomings. These patterns in AML enforcement give rise to growing concern about the quality and fairness of enforcement, and they raise legitimate questions about China’s commitment to the global antitrust commons.”).

lagging.”<sup>28</sup>

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

To understand China’s AML and its recent enforcement efforts, it is “necessary and crucial not only to carefully examine the words of the AML, but to read them in the context and light of Chinese history, culture, and traditions.”<sup>29</sup> First and foremost, we must recognize that China may be “the only civilization the world has known upon which Western thought exercised little or no influence until modern times.”<sup>30</sup> “China’s historical culture was largely independent of Western influences and its responses to its peoples’ economic needs are often peculiar to China and sharply differentiated from other countries.”<sup>31</sup>

Second, it is important to keep in mind that China’s political system does not share “the same values of the Western legal traditions.”<sup>32</sup> China is not in any sense “a western-style democracy,”<sup>33</sup> and, “in reality, the country still is without rule of law.”<sup>34</sup> Furthermore, the leaders of the Chinese Communist Party (CCP), including its President Xi Jinping, are not interested in “bring[ing] about a change of allegiance by bringing Western political systems to China.”<sup>35</sup> Indeed, one of the CCP’s conspicuous slogans is “[a] strong Communist Party means happiness to the Chinese people.”<sup>36</sup> CCP Document No. 9 warns Chinese leaders that one of the goals of the West “is to obscure the essential differences between the West’s value system and the value system we advocate, ultimately using the West’s value systems to supplant the core values of Socialism.”<sup>37</sup>

A key concern of the CCP is “to maintain social stability, which ensures the CCP stays in power.”<sup>38</sup> As an authoritarian single-party regime, the CCP believes it must “reinforce [its]

---

<sup>28</sup> Velk, Gong & Zuckerbrot, *supra* note 8, at 9. *See also* *China Targeting Foreign Companies, American Chamber Says*, BLOOMBERG NEWS, Sept. 2, 2014, available at <http://www.bloomberg.com/news/2014-09092/u-s-companies-say-china-subjectively-enforcing-laws.html>.

<sup>29</sup> Horton & Huang, *supra* note 1, at 95, 98; *see also* Wentong Zheng, *Transplanting Antitrust in China: Economic Transition, Market Structure, and State Control*, 32 U. PA. J. INT’L. 643, 720 (2010) (“the mold of Western antitrust laws takes place under local conditions that are not entirely compatible with Western antitrust models; despite having a Western-style antitrust law, China has not developed and likely will not develop Western-style antitrust jurisprudence in the near future due to these local conditions”).

<sup>30</sup> NORMAN KOTKER & CHARLES PATRICK FITZGERALD, *THE HORIZON HISTORY OF CHINA* 10 (Norman Kotker, ed., 1969); *See also* Horton, *Confucianism and Antitrust*, *supra* note 1, at 197.

<sup>31</sup> Horton, *Confucianism and Antitrust*, *supra* note 1, at 197 (citing KOTKER & FITZGERALD, *supra* note 30, at 11).

<sup>32</sup> Ignazio Castelluci, *Rule of Law With Chinese Characteristics*, 13 ANN. SURV. INT’L L. & COMP. L. 35, 64 (2007). *See also* Horton & Huang, *supra* note 29, at 98.

<sup>33</sup> *See* Horton, *Confucianism & Antitrust*, *supra* note 1, at 197.

<sup>34</sup> Velk, Gong & Zuckerbrot, *supra* note 8, at 8. The authors add: “China does not have an independent judiciary that acts as a check on executive power . . . Constitutionally prescribed limits on the sovereign power of the Communist party are mere rhetorical devices.”

<sup>35</sup> Doc. No. 9, *supra* note 10, at 3.

<sup>36</sup> Xuecan, *supra* note 24.

<sup>37</sup> Doc. No. 9, *supra* note 10, at 3.

<sup>38</sup> *Monthly Analysis of U.S.–China Trade Data, Report by the U.S.–China Economic and Security Review Commission*, Nov. 4, 2014, at 5. The USCC Report further characterizes the CCP as “remain[ing] above the law.” *Id.* *See also* The Right Honourable Brian Mulroacy, *The Growth of a Giant*, 60(1) ANTITRUST BULL. 14, 16 (2015) (arguing that in China there is no “serious consideration of whether China should be open to options beyond a single-party control vehicle or, indeed, whether more clarity needs to be brought to such fundamental issues as whether the party is (according to most current interpretations) above the law or subject to it”).

management of all types and levels of propaganda on the cultural front, perfect and carry out related administrative systems, and allow absolutely no opportunity or outlets for incorrect thinking or viewpoints to spread.”<sup>39</sup> In simple terms, China’s AML and the authorities that interpret and enforce it ultimately are beholden to the CCP and its “Chinese dream of the great rejuvenation of the Chinese nation” through the continuing development and implementation of “socialism with Chinese characteristics.”<sup>40</sup> Therefore, China’s AML enforcement activities ultimately are not directed towards carrying out or reinforcing western neoclassical economic ideologies, but towards helping “to perfect a Socialist rule of law system with Chinese characteristics.”<sup>41</sup>

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

In Article 1 of Chapter 1, China’s AML sets out its broad goals of “preventing and prohibiting monopolistic conduct, safeguarding fair market competition, improving the efficiency of economic operation, protecting the consumer and public interests, and promoting the healthy development of the socialist market economy.”<sup>42</sup> Article 4 adds that “[t]he State shall formulate and implement competition rules compatible with the socialist market economy, perfect macroeconomic supervision, and develop a united, open, competitive and orderly market system.”<sup>43</sup>

From the outset, China’s AML is ambiguous, and includes both industrial and competition policies.<sup>44</sup> As noted by distinguished Chinese Anti-Monopoly Law Professor Xiaoye Wang, “[b]ecause consumer interests and the public interest may not be parallel, it may still be difficult for the anti-monopoly authority to make a choice.”<sup>45</sup> What is not ambiguous, however, is the CCP’s determination that the public interest “is a critical part of the law,”<sup>46</sup> and that China’s AML is seen as part of the State’s control over an orderly market system designed to promote the healthy development of China’s socialist market economy, and “the universal good of the Chinese people.”<sup>47</sup>

As China moves forward into its ninth year of AML enforcement, it is becoming clear that China has not accepted western competition policy as a normative organizing principle.<sup>48</sup> Current

---

<sup>39</sup> Doc. No. 9, *supra* note 10, at p. 7. See also *Monthly Analysis*, *supra* note 38, at 5 (“The government is well aware of the need to maintain the public’s trust in the system”).

<sup>40</sup> Doc. No. 9, *supra* note 10, at 2. Indeed, the CPC has gone so far as to pronounce that Chinese television should be dedicated to promoting “socialist core values.” OSNOS, *supra* note 18, at 320.

<sup>41</sup> See *President Xi’s Plenum Speech Emphasizes the Law*, CHINESE MEDIA DIG., Nov. 10, 2014, at 2.

<sup>42</sup> AML Ch. 1, Art. 1. See note 11.

<sup>43</sup> AML Ch. I, Art. 4. See also Susan Beth Farmer, *The Impact of China’s Antitrust Law and Other Competition Policies on U.S. Companies*, 23 LOY. CONS. L. REV. 34, 42-43, 45 (2010) (discussing how “AML Articles 1 and 4 diverge from the traditional model of antitrust analysis that is based solely on competition principles”).

<sup>44</sup> See e.g., XIAOYE WANG, *THE EVOLUTION OF CHINA’S ANTI-MONOPOLY LAW* 313, 322-23 (2014).

<sup>45</sup> *Id.* at 323.

<sup>46</sup> *Id.* at 322.

<sup>47</sup> *Id.* at 323.

<sup>48</sup> *Impact of China’s Antitrust Law and Other Competition Policies on U.S. Companies: Hearing Before the Subcomm. On Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. 7 (July 13, 2010) (testimony of Shankar A. Singham); see also Maureen K. Ohlhausen, *Illuminating the Story of China’s Anti-*

United States Federal Trade Commissioner Maureen K. Ohlhausen believes that in spite of the rhetoric about China wanting to move “away from a planned economy and toward a market system,” there is still a strong “continuing impulse to factor in effects on Chinese industry and employment rather than focusing simply on efficiency and consumer welfare, as well as ongoing support for more direct government intervention in the market.”<sup>49</sup> Such interests are seen as important in “building a harmonious socialist society,” and in promoting “the prosperity of the nation, and the vitality and happiness of the Chinese people.”<sup>50</sup>

All this points to China’s emerging intent to be “guided by social, moral, and ethical considerations” in interpreting and enforcing its AML.<sup>51</sup> A key objective includes “preserving and protecting China’s traditional cultural and historical values,”<sup>52</sup> including Chinese Confucianism.<sup>53</sup> China is determined to regulate competitive behavior it deems to be ethically and socially irresponsible.<sup>54</sup> China is therefore focused on maintaining fair and orderly competition, which “assumes a harmonious business relationship between competitors, as well as suppliers, customers, and partners.”<sup>55</sup> We should not therefore be surprised to see an emphasis on encouraging fair competition, preventing unfair competition practices, and protecting the legal rights and interests of business operators, as well as Chinese consumers.<sup>56</sup> Recent Chinese administrative rulings and guidelines, as well as court decisions, point in this direction.<sup>57</sup>

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

China’s AML expressly sets forth China’s strong interest in protecting and enhancing China’s national and economic security.<sup>58</sup> Article 31 of the AML requires mergers or acquisitions

---

*Monopoly Law*, ANTITRUST SOURCE 1, 4 (Oct. 2013) available at [www.antitrustsource.com](http://www.antitrustsource.com) (observing that during a July 31-August 1, 2013, celebration of the fifth anniversary of China’s AML, Chinese “antitrust officials were more mixed in their endorsement of free-market competition, with several officials emphasizing the need for maintaining regular market order”).

<sup>49</sup> Ohlhausen, *supra* note 27, at 8. See also Farmer, *supra* note 43, at 45 (discussing how the AML allows consideration of effects on “social public interests and economic development”).

<sup>50</sup> WANG, *supra* note 44, at 21 (quoting CCP’s Central Committee’s October 11, 2006, *Decisions Regarding Several Major Issues With Building a Harmonious Society*).

<sup>51</sup> Horton, *Confucianism and Antitrust*, *supra* note 1, at 196.

<sup>52</sup> *Id.* at 199.

<sup>53</sup> *Id.* at 205; see also JACQUES, *supra* note 8, at 565 (“The [Chinese] state remains as pivotal in society and sacrosanct as it was in imperial times. Confucius, its great architect, is in the process of experiencing a revival and his precepts still, in important measure, inform the way China thinks and behaves. Although there are important differences between the Confucian and Communist eras, there are also strong similarities”).

<sup>54</sup> See, e.g., Horton, *Confucianism and Antitrust*, *supra* note 1, at 209; William E. Shafer, Kyoko Fukukawa & Grace Meina Lee, *Values and the Perceived Importance of Ethics and Social Responsibility: The U.S. Versus China*, 70 J. BUS. ETHICS 265, 268 (2007) (discussing how many Chinese fear that “the transition to a market-based economy has been characterized by behavior that is less than ethical and socially irresponsible”); SPENCE, *supra* note 14, at 699 (1990) (discussing China’s longstanding fear of decadent Western influences, including “spiritual pollution”).

<sup>55</sup> Horton, *Confucianism and Antitrust*, *supra* note 1, at 214. See also Lei Wang & Heikki Juslin, *The Impact of Chinese Culture on Corporate Social Responsibility: The Harmony Approach*, 88 J. BUS. ETHICS 433, 443-44 (2009).

<sup>56</sup> See, e.g., Horton, *Confucianism and Antitrust*, *supra* note 1, at 217.

<sup>57</sup> See, e.g., Horton, *Antitrust or Industrial Protectionism?*, *supra* note 1, at 119-123.

<sup>58</sup> See, e.g., Farmer, *supra* note 43, at 36-37 (“In another departure from American antitrust policy, the Chinese antitrust law explicitly incorporates additional, non-competition factors into the analysis. The agency guidelines and

involving foreign companies or investors “which implicate national security” to “go through national security reviews according to relevant laws and regulations.”<sup>59</sup> AML Article 27 additionally requires China’s competition authorities to review “the effect of [a] concentration on national economic development,” as well as “[o]ther factors affecting market competition as determined by the AMEA [Anti-Monopoly Enforcement Authorities].”<sup>60</sup>

AML Articles 27 and 31 mesh with Article 1’s broad goals of “promoting the healthy development of the socialist market economy” and AML Article 4’s admonition that “[T]he State shall formulate and implement competition rules compatible with the socialist market economy, perfect macroeconomic supervision and control, and develop a united, open, competitive and orderly market system.”<sup>61</sup> Together, these articles provide strong incentives to China’s AML authorities to regulate business conduct that “would not only impede competition but also harm Chinese national security [and economic interests].”<sup>62</sup>

These AML provisions further reflect long-standing Chinese concerns and internal debates “regarding the perceived national security issues arising from foreign acquisitions of domestic [Chinese] companies, with particular concern focused on ‘strategic and sensitive’ industries and Chinese national champions.”<sup>63</sup> It is difficult for Westerners to fully appreciate China’s intense security concerns based on the horrific and “long history of destructive imperialism in China, which has led to ‘social disruption and psychological demoralization,’ and, at times, threatened China’s ‘entire way of life.’”<sup>64</sup> But such concerns remain powerful throughout China today. As recently noted by the U.S.–China Economic and Security Review Commission in its November 2014 Report to Congress: “Published Chinese views on China-Japan security relations encompass a mix of suspicion, alarm, and concern—especially on the issues of Japan’s increasing robust

---

language of the available decisions employ mainstream analytic concepts, but also may import non-economic factors such as ‘national economic development’ and ‘national security’ in mergers involving foreign investors”).

<sup>59</sup> AML Ch. IV, Art. 31.

<sup>60</sup> AML Ch. IV, Art. 27. *See also* Ohlhausen, *Illuminating*, *supra* note 48, at 6 (discussing how AML Article 27 expressly allows for consideration of broad factors that are inconsistent “with market competition analysis . . . [including] the effect of the proposed deal on the development of the national economy, and any other factors determined by the State Council Anti-Monopoly Enforcement Authority”).

<sup>61</sup> AML Ch. I, Art. 4.

<sup>62</sup> WANG, *supra* note 44, at 320.

<sup>63</sup> HARRIS ET. AL., *supra* note 3, at 134 (quoting NDRC, Special Review Mechanism Needs to be Established for Mergers and Acquisitions Involving Foreign Parties, Dec. 27, 2006). *See also* MARK FURSE, *ANTITRUST LAW IN CHINA, KOREA AND VIETNAM* 107 (2009). In all fairness, it must be noted that in the United States and Canada, serious concerns about China using investments in western companies and technology for military and strategic purposes have led to increasing careful monitoring and review in both countries of Chinese investments and acquisitions. *See, e.g.*, Nicholas Raffin & Eric Wiebe, *A Timeline of the East-West Relationship: Past, Present, and Future Acquisitions* 60(1) *ANTITRUST BULL.* 19 (2015). Indeed, the Committee on Foreign Investment in the United States (CFIUS) “applied mitigation measures to sixteen cases from 2008 to 2010.” *Id.* at 28.

<sup>64</sup> Horton, *Confucianism and Antitrust*, *supra* note 5, at 199-200 (citing FAIRBANK & GOLDMAN, *supra* note 8, at 189). As described by Fairbank and Goldman, “[t]oday’s historians are more likely to stress the social disruption and psychological demoralization caused by foreign imperialism. In these dimensions the long-term foreign invasion[s] of China proved to be a disaster so comprehensive and appalling that we are still incapable of fully describing it.” *Id.* *See also* RANA MITTER, *FORGOTTEN ALLY: CHINA’S WORLD WAR II–1937-1945* (2013) (describing in detail the horrors of Japanese atrocities in WWII); MICHAEL BURLEIGH, *MORAL COMBAT: GOOD AND EVIL IN WWII* 14-21 (2011) (describing Japan’s horrific invasion of China and the barbaric slaughter and torture of Chinese civilians and soldiers); IRIS CHANG, *THE RAPE OF NANKING: THE FORGOTTEN HOLOCAUST OF WORLD WAR II* (1997) (describing the horrors of Japan’s invasion of China during World War II).

defense and security establishment, the development of the U.S.–Japan alliance, and perceived lack of Japanese atonement over its wartime past.”<sup>65</sup>

Alarming, China has increasingly begun leveraging its economic successes into a major military build-up. For example, the U.S.–China Economic Security Review Commission (USCC) Report adds: “China is engaged in a sustained and substantial military buildup that is shifting the balance of power in the region, and is using its growing military advantages to support its drive for a dominant sphere of influence in East Asia.”<sup>66</sup> The Association of Southeast Asian Nations (ASEAN) has raised particular concerns over China’s naval build-up, which has “served to crystallize the doubts and fears about China’s long-term intentions.”<sup>67</sup>

Some commentators have sought to argue that China’s intense focus on protecting its own economic security partially could be a result of “the national security hurdles encountered by Chinese companies overseas.”<sup>68</sup> Indeed, China appears to have modelled its AML security provisions on United States’ regulations that were used to block foreign purchases in the United States based “on purported national security grounds.”<sup>69</sup> In any event, it seems likely that security concerns on both sides will increasingly impact economic relations between China and the West.<sup>70</sup>

A potential complicating factor in attempting to predict how boldly China will apply security concerns in its interpretation and enforcement of its AML is that the term “national security” conceivably could be defined broadly and “used to promote domestic [Chinese] economic protectionism.”<sup>71</sup> Indeed, MOFCOM’s 2011 implementing regulations broadly cover military or military-related enterprises surrounding a key or sensitive military infrastructure or unit otherwise related to the military, and national security-related enterprises regarding important agricultural and energy products and resources, as well as important infrastructure, transportation,

---

<sup>65</sup> USCC 2014 Report to Congress, *Competing Interests*, *supra* note 27, at 21.

<sup>66</sup> *Id.* at 22.

<sup>67</sup> JACQUES, *supra* note 8, at 591. Jacques adds: “It would seem that the Chinese government made little or no attempt to inform, let alone consult, its ASEAN partners about the new naval deployments.” *Id.*

<sup>68</sup> HARRIS, ET. AL., *supra* note 3, at 134.

<sup>69</sup> *Id.* Indeed, AML Article 31 “was formulated after CNOOC’s proposed acquisition of Unocal in 2005 in the United States, which failed in the face of heavy opposition on national security and other grounds.” *Id.* at 134, n. 36. See also Michael Petrusie, *Recent Development: Oil and the National Security: CNOOC’s Failed Bid to Purchase UNOCAL*, 84 N. CAR. L. REV. 1373 (2006). Professor Xiaoye Wang perceptively adds that China’s AML security provision “is not unlike the United States’ Exon-Florio merger review of certain foreign investments involving national security.” WANG, *supra* note 44, at 320-21, citing 50 U.S.C.A §2170. See also Moritz Lorentz, *The New Chinese Competition Act*, 29 EUR. COMPETITION L. REV. 257, 261 (2008); Nathan Bush & Zhou Zhaofeng, *Chinese Antitrust- Act II, Scene I*, 8(1) THE ANTITRUST SOURCE 1, 9 (2008); Raffin & Wiebe, *supra* note 63, at 35-37 (discussing increasing American and Canadian hostility to Chinese investments that could confer strategic military advantages).

<sup>70</sup> See, e.g., CAPITOL FORUM, May 12, 2015, *China’s Anti-Monopoly Law: An Interview with Professor Tom Horton of USD Law* (on file with author).

<sup>71</sup> *Competition Policy in China, Report by the U.S.-China Business Council*, Sept. 2014, at 13. See also Hannah C. L. Ho, *China’s Security Review System for Foreign Investment: Where Do We Stand?*, MONDAQ (April 7, 2014) (discussing the possibility of overbroad interpretations of sensitive or key competitive areas); Christine Kahler, *Foreign M & A in China Face Security Review*, CHINA BUS. REV. (April 1, 2011) (observing that “the security review will analyze the M & A deal’s effects on national security, China’s economy, social stability, and the R & D capabilities of key national security technologies. Transactions found to have ‘significant effects on national security’ will be terminated or approved conditionally”).

technology and major equipment manufacturing.<sup>72</sup> Potential factors to be considered include the influence of potential transactions over China's national defense, the stable running of China's economy, China's basic social life and order, and research and development of key national security technologies.<sup>73</sup> The potential practical breadth of these national security concerns is enormous, and highlights China's obsession with protecting its national security interests against foreign investments. Therefore, it is likely that national security concerns will play a crucial role in China's AML review of the activities of foreign companies and investors in China in the coming years.

Furthermore, as discussed above, China's AML specifically identifies the protecting of "the public interest and the impact on the Chinese national economy" as key goals and objectives.<sup>74</sup> Once again, such considerations in the context of industrial conduct and transactions, including mergers and acquisitions, "is a very broad concept."<sup>75</sup> Combined with the "insufficient independence" for antitrust enforcement authorities in China,<sup>76</sup> such broad economic policy goals for antitrust create potential vulnerabilities for "officials at MOFCOM, NDRC, and SAIC, [who] are part of larger organizations whose functions include the formulation and implementation of macroeconomic and other policies."<sup>77</sup>

There should be little doubt that broad macroeconomic concerns are given priority over competition concerns in China today. For example, in 2014, China's "Party leaders placed their highest priority on maintaining public support through rapid economic growth and job creation."<sup>78</sup> As a result, some commentators argue that "[d]uring the course of 2014, foreign companies investing in China faced increased regulatory burdens and barriers to business dealings that do not similarly encumber China's highly favored 'national champions.'"<sup>79</sup> Throughout 2014, "China used [its] AML to investigate foreign firms in sectors designated by the government as 'strategic and emerging,' including automobiles and information technology."<sup>80</sup> Such developments reveal a continuing intention to heavily factor in perceived effects on Chinese industry and employment.

China's President Xi Jinping announced at China's 2013 Third Plenum that reforms were

---

<sup>72</sup> MOFCOM Regulation on Implementing the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, of September 1, 2011. *See also* McDermott, Will & Emery, *China Formalises National Security Review System for M & A Transactions by Foreign Firms*, available at <http://www.nationalreview.com/article/china-formalises-national-security-review-system-ma-transactions-foreign-investors>. *See also* JANE M. ZIMMERMAN, CHINA LAW DESKBOOK: A LEGAL GUIDE FOR FOREIGN INVESTED BUSINESSES 930, n. 114 (3d ed. 2010).

<sup>73</sup> *Id.*

<sup>74</sup> Gregory K. Leonard & Yizhe Zhang, *Considering the Unique Aspects of the Merger Review Process in China*, ANTITRUST SOURCE, 1 (2014). *See also* AML, Ch. I, Arts. 1 & 4.

<sup>75</sup> Xiaoye Wang & Adrian Emch, *Five Years of Implementation of China's Anti-Monopoly Law-Achievements and Challenges*, 2013 J. ANTITRUST ENF. 1, 23 (2013).

<sup>76</sup> *Id.* at 21-22.

<sup>77</sup> *Id.* at 22.

<sup>78</sup> U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION 2014 REPORT TO CONGRESS, *supra* note 38, at 33.

<sup>79</sup> *Id.* at 34. Furthermore, "[f]or the first time, in 2014, foreign direct investment (FDI) from China into the United States exceeded FDI from the United States to China." *Id.*

<sup>80</sup> Castelluci, *supra* note 32, at 60. The European Union Chamber of Commerce has emphasized similar concerns. *See* Michael Martina, *EU Lobby Piles in on Foreign Criticism of China's Antitrust Enforcement*, REUTERS, Sept. 9, 2014.

important, but the state would continue to play a key role in the economy.<sup>81</sup> Such pronouncements are more than rhetoric. CCP Document No. 9 confirms that such speeches are designed to “unif[y] the thought of the entire Party, the entire country, and the people enormously.”<sup>82</sup> Combined with the CCP’s promises to “accelerate[e] economic transformation as the main thread, and increas[e] the quality and efficiency of the economy at its core,”<sup>83</sup> it is likely that protecting and enhancing China’s perceived long-term security and economic interests will play a key role in China’s future interpretation and enforcement of its AML.<sup>84</sup> As observed by AML scholar Wendy Ng, “[w]here an important or sensitive Chinese industry is involved, it appears that MOFCOM might be more concerned about the potential negative effects of the transaction on the industry and national economic development more generally.”<sup>85</sup>

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

Although China’s economy is plagued today by the continuing existence of State-Owned Enterprises (SOEs),<sup>86</sup> China has a strong backbone of small and medium-size businesses, sometimes referred to as “a fast-growing thicket of bamboo capitalism.”<sup>87</sup> This “astonishing force” of private entrepreneurs is a crucial contributor to economic innovation and growth in China.<sup>88</sup> Not surprisingly, “China continues to show a keen interest in protecting the long-term health and economic opportunities of [these] smaller competitors.”<sup>89</sup> Encouraging small businesses and

---

<sup>81</sup> *China’s Third Plenum: Xi Jinping Consolidates Power*, TELEGRAPH, Nov. 12, 2013, available at <http://www.telegraph.co.uk/news/worldnews/asia/china/1044176/Chinas-Third-Plenum>. (“The free market, [the conference statement] said, would be given a ‘decisive role in allocating resources,’ but the Communist party will continue to shape the economic landscape”).

<sup>82</sup> Doc. No. 9, *supra* note 10, at 2.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 46. Brookings Institution scholar Arthur Kroeber adds that “[t]he respective roles of state and market need to be clarified, but the state role will remain very large.” Arthur Kroeber, *After the NPC: Xi Jinping’s Roadmap for China* (Brookings Instit.), March 11, 2014, available at <http://www.brookings.edu/research/opinions/2014/03/11-after-npc-xi-jinping-roadmap-for-china-kroeber>. Moreover, the IMF observed in a 2014 report on China that its economic reform blueprint “has not been followed up with details on the specific reforms or timetables.” *Id.*

<sup>85</sup> Wendy Ng, *Policy Objectives of Public Enforcement of the Anti-Monopoly Law: The First Five Years*, in CHINA’S ANTI-MONOPOLY LAW, *supra* note 1, at 35, 44. Interestingly, “the involvement of a well-known Chinese brand appears to be an [additional potential] important factor in MOFCOM’s decision-making.” *Id.* at 45. See also Wang & Emch, *supra* note 75, at 22 (“An important weakness of the three antitrust authorities is that they are inserted within larger ministries or commissions under the State Council. In other words, their level in the Chinese hierarchy is not high enough for enforcing the AML in an entirely independent and ‘neutral’ manner”).

<sup>86</sup> A wealth of excellent scholarship discussing economic issues relating to China’s SOEs is available. See, e.g., Thomas Brook, *China’s Anti-Monopoly Law: History, Application, and Enforcement*, 16 APPEAL 31, 38 (2011) (“SOEs have retained significant if not strengthened control of many industries despite attempts by the Chinese government to introduce competition”). A fuller discussion of China’s SOEs and ongoing reform efforts by China is beyond the scope of this paper.

<sup>87</sup> Wesley Harris, *China Energy: A Crossroads Historiography*, 37 T. MARSHALL L. REV. 255, 259 (2012), quoting *China’s Economy: Bamboo Capitalism*, ECONOMIST (Mar. 10, 2011), available at <http://www.economist.com/node/18332610>.

<sup>88</sup> *Id.* at 258-59. See also JACQUES, *supra* note 8, at 621 (arguing that “a major reason why the Chinese economy has been so dynamic is the intense competition between the various provinces and their firms”).

<sup>89</sup> Horton, *Confucianism and Antitrust*, *supra* note 1, at 225. See also Horton & Huang, *supra* note 1, at 101 (discussing China’s interest in “protecting the long-term health and stability of smaller competitors, as part of its interest in an orderly market and ‘industry self-discipline’”).

entrepreneurs is viewed as a key part of China's efforts to promote "the healthy development of the socialist market economy."<sup>90</sup>

China sees the protection of small and medium-size competitors and producers in a competitive market as beneficial in several key ways.<sup>91</sup> First, their continuing presence "allows local producers to participate in an evolving and innovative market, thereby increasing the possibility of capturing technological expansions."<sup>92</sup> They also help fuel China's economic growth and promote its long-term economic stability.<sup>93</sup>

China's AML unapologetically sets forth China's interest in protecting its small businesses' competitive opportunities. For example, AML Article 15 (3) sets forth the express objective of "improving operational efficiency and enhancing the competitiveness of small and medium-sized enterprises."<sup>94</sup> AML Articles 1 and 4 bolster and buttress this clear objective by seeking to "safeguard[ ] fair market competition" and by "develop[ing] a united, open, competitive and orderly market system."<sup>95</sup> Similarly, Article 6 forbids dominant undertakings from abusing their market positions "to eliminate or restrict competition."<sup>96</sup> Such provisions have led some scholars to raise the "worrisome possibility" that "the drafters intended the AML as a tool to promote [China's] domestic economy."<sup>97</sup>

In interpreting and carrying out these mandates, China's AML regulators unapologetically have sought to limit activities or transactions that could have an adverse impact on domestic small and medium-size businesses. For example, at a May 2014 Conference in Beijing co-sponsored by the ABA Section of Antitrust Law and the Expert Advisory Committee of the Anti-Monopoly Commission of the State Council of the People's Republic of China (PRC), Shang Ming, the Director General of MOFCOM's Anti-Monopoly Bureau, admitted that "MOFCOM seeks comments from industrial regulators in its merger review practices and will continue to do so."<sup>98</sup> Director Ming further stated that "MOFCOM will continue to balance competition policies and

---

<sup>90</sup> See, e.g., FAIRBANK & GOLDMAN, *supra* note 8, at 408. Former Chinese Premier Deng Xiaoping, for example, saw government encouragement of small and medium-size businesses as part of a program of economic reforms called "Socialism with Chinese characteristics." *Id.*

<sup>91</sup> See Jared A. Berry, *Anti-Monopoly Law in China: A Socialist Market Economy Wrestles with Its Antitrust Regime*, 2 INT'L L. & MGMT. REV. 129, 144 (2005).

<sup>92</sup> *Id.*

<sup>93</sup> See *id.*

<sup>94</sup> AML Ch. II, Art. 15 (3).

<sup>95</sup> AML Ch. II, Arts. 1 & 4.

<sup>96</sup> AML Ch. I, Art. 6. See also AML Ch. IV, Arts. 27-28. Article 27 states that the effect of economic concentrations on "consumers and other undertakings" must be considered in "the review of concentrations." Other undertakings can be interpreted to include both competitors and customers. Article 28 adds that "where a concentration of undertakings results in or may result in the effect of eliminating or restricting competition, the AMEA shall make a decision to prohibit the concentration." This stern and mandatory language suggests a strong interest in protecting small and medium-sized competitors.

<sup>97</sup> Oliver Q. C. Zhong, *Dawn of a New Constitutional Era or Opportunity Wasted? An Intellectual Reappraisal of China's Anti-Monopoly Law*, 24 COL. J. ASIAN L. 87, 106 (2010); see also *Competition Policy and Enforcement in China*, U.S.-China Bus. Council (Sept. 2014), at 12 ("Many questions remain unanswered about the objectives of China's competition regime. Among them: Will China use the AML to protect domestic industry rather than promote fair competition?").

<sup>98</sup> Client Memorandum from Davis Polk Law Firm 2 (June 5, 2014) (on file with author).

industrial policies in its merger review.”<sup>99</sup>

An early well-known example of MOFCOM’s interest in protecting small and medium-size Chinese businesses is MOFCOM’s 2009 decision to block Coca-Cola’s proposed acquisition of Huiyan, a Chinese juice producer.<sup>100</sup> In its Public Announcement, MOFCOM indicated that it looked at several important factors under AML Art. 27, including “[t]he effect of the concentration on the development of the national economy.”<sup>101</sup> MOFCOM concluded that “[t]he transaction would have an adverse impact on domestic small-and medium-sized enterprises in the fruit juice market and impair their ability to compete and innovate, negatively affecting the sound development of the Chinese juice industry.”<sup>102</sup>

More recent MOFCOM decisions have shown a continuing concern for protecting and enhancing competitive opportunities for Chinese firms. For example, in conditionally approving Merck’s acquisition of AZ Electronic Materials on April 30, 2014, MOFCOM imposed licensing and behavioral remedies due to its concern that competitors could face unfair bundling and cross-subsidization competition that could “result in the marginalization or exit of competitors from the market.”<sup>103</sup> Similarly, on June 17, 2004, MOFCOM prohibited the formation of the proposed P3 Network shipping alliance between Maersk, Mediterranean Shipping, and CMA GGM in part because the network could “suppress competitors’ room for development, increase the parties’ bargaining power vis-a-vis ports, and harm the interest of cargo owners.”<sup>104</sup> More recently, MOFCOM played a potentially decisive role in catalyzing American and Japanese semiconductor and display industry giants Applied Materials and Tokyo Electron to abandon their proposed merger. MOFCOM believed that the proposed merger would have “a severe impact on the interests of Chinese chip manufacturing customers.”<sup>105</sup>

Watching MOFCOM’s increasingly aggressive enforcement efforts unfold, it seems fair to

---

<sup>99</sup> *Id.* at 3. The Director added that “[i]ndustrial regulators know their respective industries well and their comments often include information on industrial development trends, which helps MOFCOM identify competition problems and solve competition concerns.” *Id.* at 2-3.

<sup>100</sup> Coca-Cola/Huiyan, MOFCOM Publ. Ann. No. 22, March 18, 2009.

<sup>101</sup> *Id.* at 2(5).

<sup>102</sup> Wang and Emch, *supra* note 75, at 9. In section 4(3) of its Public Announcement, MOFCOM explained:  
The concentration would squeeze out small and medium-sized juice producers in China, and restrain local producers from participating in competition in the juice beverage market and their ability for proprietary innovation, which would have a negative effect over effective competition in the Chinese juice beverage market, and would prove adverse to the sustained sound development of the juice beverage market in China.

MOFCOM Publ. Ann. 22, *supra* note 100, at 4(3).

<sup>103</sup> CHINA COMPETITION BULL. (32nd ed. 2014), at 3 (citing <http://fldj.mofcom.gov.cn/article/ztxx/201404/20140400569060.shtml>).

<sup>104</sup> CHINA COMPETITION BULL. (32nd ed. 2014), at 4 (citing <http://fldgj.mofcom.gov.cn/article/ztxx/201406/20140600628586.html>). Interestingly, both the United States and European authorities had previously determined “that the alliance would not result in unreasonable increases in transportation costs through a reduction in competition.” *Id.* at 5. Unlike MOFCOM, “both took into account the parties’ argument that the alliance would result in operational efficiencies and benefit consumers.” *Id.*

<sup>105</sup> See CHINA COMPETITION BULL. 4 (36th ed. 2015) (citing <http://www.mofcom.gov.cn/article/ae/ail201504/2015040095517.html>); Interview with Tom Horton, Professor of Law at Univ. of S.D., *supra* note 70, at 3-6 (discussing the various strategic considerations of the proposed deal from the perspectives of the United States, Japan, and China).

predict that China will continue focusing, at least in the near term, on protecting its diverse multitude of small and medium-sized businesses, as well as national champions and core Chinese competitors in strategic businesses.<sup>106</sup>

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

“[H]aving co-opted Western capitalism and mirrored many of its surface features, China today poses an unprecedented and profound challenge to Western capitalism that scholars and policymakers have only begun to grasp.”<sup>107</sup> As previously discussed, divergent views about antitrust enforcement and different regulatory focuses “may arise from the unique and economic-specific national policies each country’s antitrust laws are designed to promote.”<sup>108</sup> Consequently, “culturally embedded” competition laws, despite similarities in wordings, “may mean different things in different societies.”<sup>109</sup> We should not therefore be surprised that Chinese Anti-Monopoly Law regulators are taking “into account specific social and economic circumstances in China, rather than uncritically importing the legislative models used in the U.S. and the E.U.”<sup>110</sup>

The Chinese do not appear to be buying into the current extreme American judicial tolerance and even encouragement of concentrated industries<sup>111</sup> and predatory conduct, as allegedly “important element[s] in the free market system.”<sup>112</sup> Instead, the Chinese are showing an increased interest in controlling and arresting the growth of monopolies and dominant firms. China’s current interest parallels an ongoing trend in China towards economic decentralization.<sup>113</sup> As previously discussed, many of China’s industries, “are characterized by small-scale firms and

---

<sup>106</sup> See Lawrence S. Liu, *All About Fair Trade? - Competitors Law in Taiwan and East Asian Economic Development*, 57 ANTITRUST BULL. 259, 298 (2012) (arguing that China “resorts to serious industrial policy to foster national champions in strategic sectors.”); see also Berry, *supra* note 91, at 152 (predicting that China’s AML enforcement “will likely reflect the CCP’s historically protectionist tendencies.”); Deborah Healey, *Anti-Monopoly Law and Mergers in China: An Early Report Card on Procedural and Substantive Issues*, 3 TSINGHUA CHINA L. REV. 17, 26 (2010) (arguing that China’s “policy of promoting mergers and acquisitions to form large companies which will be internationally competitive, thereby creating national champions, is inconsistent with competition law principles”).

<sup>107</sup> Marshall W. Meyer, *Is it Capitalism?*, 7 MGMT. & ORG. REV. 5, 8 (2010).

<sup>108</sup> Farmer, *supra* note 43, at 41.

<sup>109</sup> Liu, *supra* note 106, at 269.

<sup>110</sup> Dr. Yijun Tian, *The Impacts of the Chinese Anti-Monopoly Law on IP Commercialization in China & General Strategies for Technology-Driven Companies and Future Regulators*, 2010 DUKE L. & TECH. REV. 004, ¶ 55 (2010).

<sup>111</sup> See, e.g., Sam Peltzman, *Industrial Concentration Under the Rule of Reason*, 57 J. L. & ECON. S101 (2014) (finding that concentration for American manufacturing has increased since 1982, due largely to the relaxation of antitrust merger standards); Horton, *Confucianism and Antitrust*, *supra* note 1, at 224 (discussing the trend of growing economic consolidation in the United States); WALTER A. ADAMS & JAMES W. BROCK, *THE BIGNESS COMPLEX: INDUSTRY, LABOR, AND GOVERNMENT IN THE AMERICAN ECONOMY* (2d ed. 2004); TED NACE, *GANGS OF AMERICA: THE RISE OF CORPORATE POWER AND THE DISABLING OF DEMOCRACY* 100 (2005) (discussing the rapidly accelerating trend to concentration); KENNETH M. DAVIDSON, *MEGA MERGERS: CORPORATE AMERICA’S BILLION-DOLLAR TAKEOVERS* (2003).

<sup>112</sup> RUDOLPH J. R. PERITZ, *COMPETITION POLICY IN AMERICA: 1888-1992: HISTORY, RHETORIC, LAW* 239 (1996) (quoting RICHARD A. POSNER, *ANTITRUST LAW* 28 (2d ed. 2001)). See also *Verizon Commc’ns, Inv. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407 (2004); Thomas J. Horton, *Unraveling the Chicago/Harvard Antitrust Double Helix. Applying Evolutionary Theory to Guard Competitors and Revive Antitrust Jury Trials*, 41 U. BAL. L. REV. 615, 616 (2012).

<sup>113</sup> See, e.g., Zheng, *supra* note 29, at 656; Yingyi Qian & Chenggang Xu, *Why China’s Economic Reforms Differ: The M-Form Hierarchy and Entry/Expansion of the Non-State Sector*, 1 ECON. TRANSITION 135, 145-47 (1993).

low market concentration ratios.”<sup>114</sup> Throughout “China’s bustling cities, vast numbers of small businesses exist alongside the towers of industrial and corporate giants.”<sup>115</sup>

Chapter III of China’s AML covers “Abuse of Dominant Market Position.”<sup>116</sup> Recent Chinese AML investigations show an emphasis on enforcing Chapter III. The focus seems to be on lowering potential barriers to entry for Chinese firms and controlling the use of potential exclusionary practices by dominant firms.<sup>117</sup>

In several recent merger investigations, MOFCOM has found that proposed transactions were likely to lead to heightened barriers to entry and the suppression of possible growth and development by competitors. As an example in imposing various conditions on Merck’s acquisition of AZ Electronic Materials, MOFCOM observed “that there were high barriers to entry,” including Merck’s holding more than 3,500 patents in the liquid crystals display market.<sup>118</sup> MOFCOM expressed similar concerns about high barriers to entry in its second decision unconditionally blocking a proposed merger. MOFCOM announced that the transaction would “increase the already high barriers to entry, [and] suppress competitors’ room for development” in blocking the proposed P3 Network Shipping Alliance among Maersk, Mediterranean Shipping, and CMA CGM.<sup>119</sup> Special attention also has been paid in recent months to bundling, and the licensing of intellectual property and technology.

Expansively pressing for the fair, reasonable, and non-discriminatory (FRAND) licensing of intellectual property rights (IPR) is perhaps the single area where the Chinese have been the most aggressive against foreign companies. Although AML Article 55 initially exempts from its ambit the use of IPR, it immediately adds: “however, this Law is applicable to conducts of undertakings that abuse their intellectual property rights to eliminate or restrict competition.”<sup>120</sup> China’s AML enforcement authorities have interpreted and applied Article 55 aggressively and expansively, especially in the context of requiring FRAND licensing of IPR in conditional merger and acquisition approvals.

---

<sup>114</sup> Zheng, *supra* note 29, at 710. Zheng adds that “[o]fficial statistics indicate that market concentration ratios in China have been unusually low when compared to both developed and developing countries.” *Id.*; see Horton, *Confucianism and Antitrust*, *supra* note 1, at 224-26.

<sup>115</sup> *Id.* at 224.

<sup>116</sup> AML Ch. III.

<sup>117</sup> AML Article 17 defines a “dominant market position” as one that “enables the undertakings to control the price or quantity of products or other trading conditions in the relevant market or to impede or affect the entry of other undertakings into the relevant market.” Articles 18 and 19 set forth a number of factors that can be employed in determining whether undertakings have a dominant market position, including market share, financial and technical status, and the “difficulty for other undertakings to enter the relevant market.” AML Ch. III, Art. 18. A single undertaking with a 50% share of a relevant market is presumed under Article 19 to have a dominant market position.

<sup>118</sup> *MOFCOM Conditionally Approves Merck’s Acquisition of AZ Electronic Materials*, CHINA COMPETITION BULL. 3 (32nd ed. 2014). Additional barriers to entry included photoresist suppliers having to go through a technical certification process that lasts two to three years. *Id.*

<sup>119</sup> *MOFCOM Prohibits the Formation of the P3 Network Shipping Alliance Among Maersk, Mediterranean Shipping, and CMA CGM*, CHINA COMPETITION BULL. 4 (32nd ed. 2014). MOFCOM has consistently voiced concerns about transactions potentially increasing barriers to entry since 2009. See, e.g., MOFCOM Announcement [2009] No. 77 Regarding Conditional Approval of Pfizer’s Acquisition of Wyeth, Sept. 29, 2009, at 4 (3) (iii) (discussing the high barriers to entry in imposing conditions on Pfizer’s acquisition of Wyeth).

<sup>120</sup> AML Ch. VII, Art. 55.

Considered together with MOFCOM's aggressive use of IPR licensing requirements in its conditional approval of mergers,<sup>121</sup> it appears that China increasingly will use its AML to help its indigenous companies gain favorable access to IPR held by foreign companies. This aggressive posture likely reflects China's recognition that "the country's innovators still have a way to go before they can meet the Communist Party's expectations."<sup>122</sup> While "China has strengthened its commitment to R & D to support the government's drive towards innovation, [t]he reality is that China remains heavily reliant on foreign IP."<sup>123</sup> Even though China has surpassed the United States and Japan in filing patents, "many of them [have] little value; they [have] been filed to meet political targets or attract funding."<sup>124</sup> Consequently, "[a]ccess to technology and development of domestic, 'indigenous' technology are key factors in China's development strategy."<sup>125</sup> Such developments lend strong credence to increasing foreign concerns that China will use its AML to promote its domestic research and development needs.

## II. CONCLUSION

"[H]aving co-opted Western capitalism and mirrored many of its surface features, China today poses an unprecedented and profound challenge to Western capitalism that scholars and policymakers have only begun to grasp."<sup>126</sup> We should not be surprised that China's Anti-Monopoly Law regulators are taking "into account specific social and economic circumstances in China, rather than uncritically importing the legislative models used in the U.S. and the E.U."<sup>127</sup> Nor should we be surprised that in charting its own course, China does not wish to be "the tail of someone else's dog."<sup>128</sup>

Unfortunately, notwithstanding China's vigorous protestations and denials, a review of China's AML enforcement activities since 2008 lends strong credence to the allegations that the primary targets of major AML enforcement initiatives have been foreign companies. Chinese officials and their CCP-controlled press have been unapologetic in simultaneously issuing warnings that foreign companies need "to get used to tougher scrutiny,"<sup>129</sup> and "must strictly

---

<sup>121</sup> See, e.g., *MOFCOM Conditionally Approves Merck's Acquisition of AZ Electronic Materials*, CHINA COMPETITION BULL. 3 (32nd ed. 2014) (discussing MOFCOM's requirements that Merck "offer LCD patent licenses on a non-exclusive, non-transferable, fair, reasonable, and non-discriminatory basis").

<sup>122</sup> Bruce Einhorn, *China's Government Admits Chinese Patents Are Pretty Bad*, BLOOMBERG BUSINESSWEEK, June 23, 2014. See also Christina Larson, *A Peek Into the 'Black Box' of Where China's Hefty R & D Budget Goes*, BLOOMBERG BUSINESSWEEK, Oct. 1, 2014, (discussing the massive graft and corruption in China's research fields).

<sup>123</sup> Dr. Zhan Hao, *SAIC Moves Closer to Antitrust Rules for IP*, CHINA LAW VISION, July 10, 2014, available at <http://www.chinalawvision.com/2014/07/articles/competitionantitrust-law-of-the/saic-mov>.

<sup>124</sup> OSNOS, *supra* note 18, at 320. Similarly, while China is producing more scientific papers than anywhere but the United States, they are not even ranked in the top ten in terms of quality. *Id.* Osnos argues that academic fraud is still rampant in China. *Id.*

<sup>125</sup> Adrian Emch & Liyang Hou, *Antitrust Regulation of IPRs – China's First Proposal*, COMPETITION POLICY INTERNATIONAL, ASIA COLUMN 1, 10 (August 1, 2014).

<sup>126</sup> Meyer, *supra* note 107, at 8.

<sup>127</sup> Tian, *supra* note 110, at ¶ 55.

<sup>128</sup> FAIRBANK & GOLDMAN, *supra* note 8, at 322.

<sup>129</sup> See Neil Gough, Chris Buckley & Nick Wingfield, *China's Energetic Enforcement of Antitrust Rules Alarms Foreign Firms*, N.Y. TIMES, Aug. 10, 2014, available at [http://www.nytimes.com/2014/08/11/business/international/china8217s-energetic-enforcement-of-antitrust-rules-alarms-foreign-firms.html?\\_r=0](http://www.nytimes.com/2014/08/11/business/international/china8217s-energetic-enforcement-of-antitrust-rules-alarms-foreign-firms.html?_r=0).

comply with Chinese rules and laws and fulfill their social obligations.”<sup>130</sup>

China’s unwillingness to give more serious consideration to the escalating allegations and criticisms of its AML enforcement activities is cause for grave concern. Given the rising rhetoric and concerns on both sides, it seems that we may be headed for a dangerous clash sparked by two very different antitrust regulatory systems.<sup>131</sup>

China’s current course indicates that China will aggressively pursue AML enforcement with the goal of creating “fair market competition” and protecting the “consumer and public interests” of China’s citizens. China is likely to continue using its AML to protect its long-term security and economic interest, and to protect the competitive opportunities for its small and medium-sized businesses. In so doing, China is likely to continue aggressively seeking to break down perceived barriers to entry and to block exclusionary practices by firms with perceived dominant market positions.

Like it or not, the United States and other Western countries and businesses are going to have to accept that China views itself as different, and that its view of its “socialist market economy” is vastly different from our view of free markets.<sup>132</sup> We need to come to grips with the reality that Chinese antitrust in the next decade is unlikely to mimic our post-Chicago antitrust system, and its grounding in supposedly neutral and scientific neoclassical economic models.

Rather than wasting time criticizing China and trying to lure it into following current American models, we should humbly ask ourselves whether we might learn from the Chinese and their Confucian traditions and values. China should be lauded for seeking to pursue an aggressive antitrust policy that takes into account Confucian norms of ethics, morals, and fairness, and seeks to inspire increased corporate social responsibility.<sup>133</sup> In areas such as resale price maintenance, monopoly leveraging, and unfair predatory conduct by dominant firms, China ironically may be moving towards a potential leadership position in the global antitrust competition law arena, as the founder and historical leader of antitrust, the United States, struggles to overcome forty years of largely misguided neoclassical economics and regain its economic soul.

On the other hand, the Chinese and their AML enforcers are going to need to pay more attention going forward to their own Confucian traditions and values, as well.<sup>134</sup> Ongoing business

---

<sup>130</sup> China Competition Research Ctr., *CHINA COMPETITION BULLETIN, MOFCOM and the EU Chamber of Commerce Comment on the Recent AML Investigations into Foreign Businesses* 7 (33rd ed. 2014).

<sup>131</sup> See, e.g., Arthur Kroeber & Donald Clark, *Is a Trade War with China Looming? A ChinaFile Conversation*, CHINAFILE (Sept. 12, 2014), available at <http://www.chinafile.com/conversation/trade-war-china-looming>. See also Velk, Gong & Zuckerbrot, *supra* note 8, at 10 (describing the current trading relationship between China and the United States as “combative”).

<sup>132</sup> See, e.g., JACQUES, *supra* note 8, at 563 (stating that “[t]he desire to measure China primarily, sometimes even exclusively, in terms of Western yardsticks, while understandable, is flawed. At best it expresses a relatively innocent narrow-mindedness; at worst it reflects an overweening Western hubris, a belief that the Western experience is universal in all matters of importance. This can easily become an excuse for not bothering to understand or respect the wisdom and specificities of other cultures, histories, and traditions”).

<sup>133</sup> See Horton, *Confucianism and Antitrust*, *supra* note 1, at 228.

<sup>134</sup> In the words of Chinese Academy of Social Sciences Professor Zhou Hanhua: “Chinese society must share the values of a ‘market economy governed by law,’ including freedom, equality, fairness, and trust.” *Chinese Scholars Debate Rule of Law and Economy*, CHINESE MEDIA DIG., Nov. 10, 2014, at 3.

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

As always, the future is uncertain. But the stakes could not be higher. Whether we like it or not, China's and our economies are inextricably linked and positively correlated.<sup>135</sup> Both China and the West must continue their ongoing dialogues, and seek to continue building strong economic, cultural, and political bridges.<sup>136</sup> After all, much more than future international antitrust enforcement is at stake.

---

<sup>135</sup> See, e.g., Jingling Liu & Zhixiao Zheng, *The Economic Link Between China and North America*, 60(1) ANTITRUST BULL. 40, 44 (2015) (discussing studies and research showing “a moderate and positive [economic] correlation between China and North America”).

<sup>136</sup> See, e.g., Danjie Peng, Yi Tzu Tsao & Nicholas Glaudemans, *Agents of Change*, 60(1) ANTITRUST BULL. 46 (2015) (“Improved Sino-Western cooperation requires better communication between China and the West. China should not be dismissive of Western work habits and skills, and the West should not display hostility toward China’s advancing economic and political importance”).