Bureaucratic Politics and China’s Anti-Monopoly Law

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Abstract

This article is a first attempt to investigate Chinese bureaucratic politics in-depth in order to analyze how these dynamics affect the outcome of antitrust enforcement in China. It has two major findings. First, bureaucratic politics have a powerful impact on the allocation of economic resources in China, which in turn determines how monopolies arise in the Chinese market. Second, the bureaucratic structure and political processes of decision-making shape the incentive structures of administrative agencies, thus affecting how they regulate the economic activities of various actors in the economy. The article finds that antitrust enforcement in China is a highly pluralistic process involving officials from various central ministries and local governments with overlapping functions and divergent missions and objectives. Contrary to the conventional assertion that Chinese regulators are motivated to advance the national interest, the article finds instead that China’s antitrust enforcement outcome is largely the result of struggle among government agencies advancing policies that serve particularistic interests.
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I. INTRODUCTION

Few areas of Chinese law can rival the attention the Anti-Monopoly Law (AML) has drawn at home and abroad since its enactment on August 1, 2008. Long heralded as the economic constitution for China,1 the Chinese public and intellectuals have high expectations that the AML will help remove regional trade barriers and stimulate the reform of state-owned firms (SOEs).2 Globalization has also triggered a surge in foreign demand for understanding the AML. The extraterritorial effects of the law allow Chinese antitrust authorities to intervene in offshore merger transactions and anti-competitive behaviours conducted overseas solely on the basis of their impact on China, i.e., sales to the Chinese market.3 As China has been an essential part of the global market, the enforcement of the AML is affecting multinational companies in terms of their strategies and manner of doing business both inside and outside of China.

Existing studies typically view the adoption and implementation of the AML as a response of Chinese policymakers to a changing economic and foreign policy environment.4 Such a view appears to stem from a notion that the AML enforcement outcome is a result of reasoned debates among a cohesive group of Chinese policymakers with the single, unifying goal of maximizing national interest.5 For instance, scholars and practitioners observe that the effort to draft the AML was suddenly revived and accelerated after China’s entry into the World Trade Organization (WTO) in 2002 and that there appeared to be “a broad consensus” at the time that China needed the AML to protect against the anticompetitive practices of multinational companies.6

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5 This is similar to the rationality model some political scientists have adopted to explain Chinese politics. See KENNETH LIEBERTHAL & MICHEL ORSENBERG, POLICY MAKING IN CHINA: LEADERS, STRUCTURES, AND PROCESSES 9-14 (1988).

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firms. This legislative background, coupled with the ambiguity of the objectives of the AML as laid down in its text, has led many to believe that the Chinese government will use the AML as “an instrument of industrial policy” to benefit domestic firms and consumers at the expense of foreign companies. Moreover, given China’s current transitional stage, distorted market structure and pervasive state control, scholars and practitioners also predict that the AML will have limited application to Chinese domestic firms, particularly SOEs.

Clearly, the above literature significantly advances our understanding of the economic forces shaping antitrust policy in China. But the actual enforcement of the AML has yielded a far more complicated picture than it predicts. Since its enactment in 2008, the AML has not only been applied to large multinational companies, but has also been frequently applied to private domestic firms and SOEs. Moreover, some enforcement agencies have vowed to prioritize their enforcement efforts in a number of areas that are dominated by large state-owned monopolies, such as the oil, banking and telecommunication industries. The disparity between the predictions of the existing literature and the actual enforcement pattern therefore demands an explanation.

The purpose of this Article is to provide such an explanation. It argues that the main problem with the existing literature is its omission of political determinants from its object of inquiry. As Douglas North once stated: “institutions are the rules of the game in a society or, more formally, are the humanly devised constraints that

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8 See, e.g., Nathan Bush & Yue Bo, *Disentangling Industrial Policy and Competition Policy in China*, Antitrust Source, Feb. 2011, at 4. (noting that the ambiguous text of the AML invites regulators to consider non-antitrust factors and that industrial policy is likely to prevail over antitrust policy in times of conflict); Ping Lin & Jingjing Zhao, *Merger Control Policy under China’s Anti-Monopoly Law*, 41 Rev. Ind. Organ. 109, 111-12 (2012) (noting the growing sentiments of economic patriotism and the rising concern about foreign firms’ dominance in China were among the driving factors behind the adoption of the AML and the prohibition decision of Coca-Cola/Huiyuan).

9 See, e.g., Zheng, *supra* note 4, at 671-720. See also Fei & Leonard, *supra* note 4, at 60-64.

10 See infra Part IV on NDRC’s recent antitrust investigations involving various economic actors.

As a form of human interaction, law enforcement is no exception—it operates within the constraints devised by a country’s specific political and economic institutions. But the existing literature focuses primarily on the economic conditions pertaining to the creation and enforcement of the AML, paying scant attention to China’s bureaucratic structure and policymaking processes. Notably, some scholars have recently started to adopt an institutional design perspective to study AML enforcement, but they have yet to situate institutional dynamics in a broader political economic context.

In a departure from previous analyses, this Article is the first attempt to investigate Chinese bureaucratic politics in-depth in order to analyze how these dynamics affect the outcome of antitrust enforcement in China. It has two major findings. First, bureaucratic politics have a powerful impact on the allocation of economic resources in China, which in turn determines how monopolies arise in the Chinese market. Second, the bureaucratic structure and political processes of decision-making shape the incentive structures of administrative agencies, thus affecting how they regulate the economic activities of various actors in the economy. “The direction of causality runs from politics to economics, not the other way around,” argues Yasheng Huang, a leading China expert. Contrary to the existing literature, the Article finds that Chinese antitrust policy outcome largely results from struggle among government agencies who decide antitrust issues in terms of the personal consequence for their stature and power, rather than to promote national interests. The claim here is not that Chinese AML is free of protectionism and discrimination. Far from it, as will be elaborated in detail below. The claim is that the complexity of China’s bureaucratic structure, policy process and incentives of government agencies leads to a far more heterogeneous enforcement outcome than the existing literature predicts.

12 DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 3 (2003)


14 YASHENG HUANG, INFLATION AND INVESTMENT CONTROL IN CHINA xix (1996) (Although Huang’s statement is based on his observation of the political control of China’s monetary policy, it applies strikingly well in this context too.)
One caveat must be entered here. The institutional approach proposed in this Article does not intend to provide a complete explanation of every antitrust decision made by Chinese administrative agencies. What it does seek to show is that the pattern of China’s antitrust enforcement over the past five years can best be understood by examining the bureaucratic incentives of enforcement agencies embedded in China’s unique political system.

This Article builds upon three strands of literature. The first strand is the economic theories of organizations, particularly the studies on incomplete contracting and moral hazard, which have been applied to study the design of incentives of government bureaucracy. The second strand is political scientists’ rich description and deep analysis of Chinese bureaucratic structure and policymaking process. This is combined with the third strand of literature on Chinese economic institutions, particularly studies on economic decentralization and fragmentation. Integrating incentive theory into the study of Chinese political economy is important because the incentive structure is key to understanding China’s policymaking process and its market structure today. This Article also benefits from extensive interviews with officials from various government departments and organizations, judges, and lawyers who have been closely involved in Chinese antitrust practice.

The Article proceeds as follows. Part II begins by posing the fundamental question as to why the political process of decision-making matters in the Chinese context. Part III studies the bureaucratic structure and policymaking process by exploring a peculiar phenomenon in Chinese antitrust enforcement: why do

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18 As those individuals who agreed to be interviewed wish to remain anonymous, the Article will only identify the interviewees in very general terms of institutional affiliation.
Chinese enforcement agencies need to coordinate with other government organizations during antitrust enforcement? This is particularly evident in merger control as the Anti-Monopoly Bureau of the Ministry of Commerce (MOFCOM) regularly confers with other government agencies during merger review. Part IV examines the incentive structure of central enforcement agencies and seeks answers to the following questions: why does the Price Supervision and Anti-Monopoly Bureau of National Development and Reform Commission (NDRC) appear more aggressive in antitrust enforcement compared with the Antimonopoly and Anti-Unfair Competition Enforcement Bureau at the State Administration for Industry and Commerce (SAIC)? And what has incentivized NDRC to establish an enforcement priority of tackling price-related behaviour in certain industrial sectors? Part V examines the enforcement record of local enforcement agencies, as well as their incentive structures and the constraints they face during enforcement. Conclusion and implications follow in Part VI.

II. WHY BUREAUCRATIC POLITICS MATTER

In his seminal paper “the Nature of the Firm,” Ronald Coase posed the fundamental question of why firms exist.\(^\text{19}\) In an ideal world where economic actors can effortlessly transact with each other, firms do not need to come into existence in the first place as every activity could be organized using market transactions. Firms exist because transacting in the market is costly, and thus a hierarchical structure like a firm arises to overcome these market failures and to create efficiency by reducing transaction costs.

Coase’s finding that firms operate as hierarchies illuminates the governance structure China’s Communist Party (CCP) adopted to operate the Chinese economy during the early years of its ruling. Modelled after the Soviet Union, the whole Chinese economy was turned into a gigantic firm in the 1950s and all economic activities were decided by command and control. As there was no market, there was no competition and of course there was no need for antitrust law. Thus antitrust law only became necessary when China opened its economy and embarked on market reform. But this change was only possible after the Chinese leadership successfully overcame ideological obstacles by shifting from a dogmatic emphasis on Marxism-Leninism to a pragmatic, market-oriented approach.\(^\text{20}\) This shows that one cannot possibly server political determinants from the study of the AML. Indeed, they constituted the conditions of its very existence.

A. Law as An Incomplete Contract

If we view law as a contract, according to which a legislature specifies the terms upon which business undertakings will be subject

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20 See Montinola et al., *supra* note 17, at 52.
to regulation, the contract is a very incomplete one. Inevitably there are contingencies that were not foreseen in the law, and the law does not spell out the rules and procedures to be followed in every conceivable circumstance in precise detail.\textsuperscript{21} This is especially true for antitrust law, whose fundamental task is to assess the economic effects of the behaviours in question. Black letter law is ill suited for such a task as it runs the risk of making antitrust law based on the form of conduct rather than on its economic effects. As such, the responsibility of assessing behaviour falls on the shoulders of law enforcers, including administrative agencies and the judiciary, who enjoy wide discretion in assessing economic effects.

Unlike the United States, Chinese antitrust enforcement relies primarily on administrative enforcement rather than private litigation. In a democratic society the utility of administrative agencies’ law enforcement activity can be modelled as the expected public benefit, if prosecuted successfully, discounted by the probability of successful prosecution.\textsuperscript{22} Here discounting is required as the judiciary provides an effective check on the arbitrariness of the agencies’ enforcement. But in a country like China where judicial power is often usurped by political power, judicial oversight is severely limited. In the past three decades, China has taken an unusual path by undergoing breathtaking economic transformation with little political reform.\textsuperscript{23} Despite remarkable market liberalization, China remains a country ruled by a single party—the CCP. The CCP maintains supreme authority over every apparatus of the country, including the military, legislature, executive and judiciary. In a democratic country an independent judiciary provides the ultimate safeguard on legal interpretation and enforcement by government agencies. But in China, it is the CCP that has residual control of the law; that is, it has the ultimate say in how to interpret and enforce the law.

\textbf{B. The Lack of Judicial Oversight}

Since the AML went into effect, no defendant has appealed any administrative decision made by the enforcement agencies.\textsuperscript{24} China’s


\textsuperscript{23} See Montinola et al., supra note 17, at 52. (Although China has achieved little progress in democratization, it is noteworthy that it has made great strides in other ways, including political decentralization, shifts in ideology and the opening of its economy.)

\textsuperscript{24} Based on the publicly available information and interviews with judges, we don’t know of a case in which a defendant appealed an administrative decision by Chinese antitrust agencies. However, we don’t preclude the possibility that some defendants appealed but subsequently withdrew their claims.
Administrative Litigation Law of 1989, which allows citizens to bring lawsuits against government agencies, has proven to be a false hope for the establishment of rule of law in China. Haibo He, a Tsinghua law professor who has been closely following the developments of Chinese administrative law over the past decade, came to the conclusion that the institution of administrative litigation fails to be a means for achieving constitutional governance in China and that its impact on social change is severely limited. Based on the national statistical data by the Supreme People’s Court, he found a puzzling phenomenon in Chinese administrative litigation: from 1987 to 2010 the rate of withdrawal by plaintiffs never fell below 30% and in some years it has exceed 50%. Among those withdrawn cases, above 50% of them (above 90% from 2005 to 2010) were initiated on the plaintiff’s own without the defendants taking any action to revoke or modify the challenged administrative act. Thus the plaintiff gained no benefits in those withdrawn cases. For instance, in 2010, 44.5% of the cases accepted by Chinese administrative courts were withdrawn, among which 92.8% were withdrawn by the plaintiffs without any action to revoke or modify by the defendants; in only 7.8% cases the plaintiffs won the administrative suits.

Indeed, suing the government is both risky and costly for any business in China, whether it is domestic or foreign owned. At least three things have been holding them back. First, businesses could face a serious backlash when they deal with the enforcement agencies in the future. Since each of the enforcement agencies are nested within ministries that operate like a large conglomerate, businesses fear retaliation not only from those bureaus responsible for antitrust enforcement, but also other bureaus within these powerful ministries who have regulatory control over various aspects of their businesses. Moreover, the utility of appealing administrative


27 Id., at 261-63.

28 Id., at 263-64.

29 Id., at 263.

30 Interviews with Chinese antitrust lawyers. See also Lester Ross & Kenneth Zhou, Administrative and Civil Litigation under the Anti-Monopoly Law, in CHINA’S ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS, supra note 4, at 325-29.
decisions is further undermined by the fact that the likelihood of winning such a case is miniscule, given the predicament of Chinese administrative litigation. To make matters worse, enforcement agencies such as NDRC often artificially create a race among firms under investigation by applying generous leniency or complete immunity to those who readily admit their guilt and satisfy the agency’s demand. In a recent case involving alleged minimum resale price maintenance (RPM) conduct by premium infant formula milk manufacturers, NDRC offered 100% immunity to Wyeth, Beingmate, and Meiji for their “active cooperation” and “quick rectification,” whereas those firms deemed less cooperative suffered hefty fines.\textsuperscript{31} Such granting of immunity is very unusual in other jurisdictions since immunity is normally only granted to firms that volunteer to help antitrust authorities uncover secretive cartels. But NDRC was investigating RPM conduct and none of the affected manufacturers were whistleblowers. This peculiar fining practice can therefore lead to a prisoner’s dilemma for firms under investigation. If each firm anticipates that other firms will race to admit their guilt in order to receive a lower fine, then none of them will have the incentive to challenge the government’s action. The high risks and costs at stake thus explain the reluctance of businesses to appeal an administrative antitrust decision.

At the same time, the Chinese judiciary has been actively engaged in drafting guidelines for private enforcement\textsuperscript{32} and has handled more than 100 civil antitrust actions since the enactment of the AML.\textsuperscript{33} While plaintiffs rarely succeed in private enforcement,\textsuperscript{34} Chinese judges have been praised for being more adept with economic reasoning and analysis.\textsuperscript{35} Unfortunately it appears that their enthusiasm and dedication are limited to civil cases. While the Supreme People’s Court has designated the Intellectual Property Tribunals at the Intermediate Court as the court of first instance to handle civil cases,\textsuperscript{36} no guidelines have been issued on the judicial

\textsuperscript{31} NDRC Press Release, \textit{Biostime and Other Milk Powder Manufacturers Company Were Fined RMB668.73 Million for Their Anti-Competitive Behaviour Violating the AML}, http://www.sdpc.gov.cn/xwfb/t20130807_552991.htm

\textsuperscript{32} Provisions of the Supreme People’s Court on Several Issues Concerning the Application of Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conduct, [2012] Fa Shi No 5, May 3, 2012.


\textsuperscript{34} \textit{Id.}, at 264 (noting only two cases in which the plaintiffs have won).


\textsuperscript{36} Notice by the Supreme People’s Court on In-depth Studying and Implementing the Anti-Monopoly Law of the People’s Republic of China, [2008] Fa Fa No. 23, July 28, 2008.
review of administrative cases. Generally speaking, judges at the Administrative Tribunal are in charge of hearing administrative cases.\textsuperscript{37} However, because antitrust enforcement is often highly technical and requires substantial economic analysis, there are doubts of whether those judges at the Administrative Tribunal are equipped with sufficient expertise to handle antitrust cases.\textsuperscript{38}

Given the predicament of administrative litigation in China, administrative agencies have effectively monopolized public enforcement in China. When law enforcement essentially becomes a political process, the study of bureaucratic structure, the political process of decision-making and the incentives of the government actors involved becomes essential to understanding the enforcement outcome of the AML.

III. BUREAUCRATIC STRUCTURE AND POLICY PROCESS

Although the CCP maintains supreme control of all strategic policymaking in China, it cannot administer the country on its own. Rather, it needs to delegate the task to the government.\textsuperscript{39} Note that although the CCP has permeated every level of the Chinese government, they are organizationally distinct.\textsuperscript{40} In particular, the Politburo, which sits at the apex of the CCP political hierarchy, lacks the time, interest and expertise to manage and coordinate all economic affairs in China—not to mention antitrust policy and implementation.\textsuperscript{41} Therefore, the Politburo delegates the implementation of the AML to the State Council, who in turn

\textsuperscript{37} Interview with a judge at the Intermediate People’s Court. According to the interviewee, in normal circumstances the Administrative Tribunal handles administrative cases. However, in some remote places where the Administrative Tribunal has not been set up, the Civil Tribunal can handle administrative cases.

\textsuperscript{38} Interview with a judge at the Supreme People’s Court. According to the interviewee, it hasn’t been decided whether the judges in the Intellectual Property Tribunal (one of the Civil Tribunals at the Intermediate Court) or the Administrative Tribunal will handle administrative cases.

\textsuperscript{39} Political scientists have long observed the principal-agent relationship between the CCP and the government. See, e.g., Susan Shirk, \textit{the Chinese Political System and the Political Strategy of Economic Reform}, in \textit{BUREAUCRACY, POLITICS AND DECISION MAKING IN POST-MAO CHINA} 59, \textit{supra} note 17, at 61-62. (Shirk notes that the relationship between the CCP and the government is analogous to the relationship between the ruling party and the government bureaucracy in a democratic system. But the crucial difference between communist and democratic systems is the political accountability of principals.)

\textsuperscript{40} SHIRK, \textit{supra} note 16, at 55.

\textsuperscript{41} Interviews with government officials at central ministries. This is consistent with the observation by Cheng Li, an expert on Chinese leadership. See Cheng Li, \textit{China’s Economic Decisionmakers}, \textit{CHINA BUSINESS REV}, March/Apr., 2008, http://www.brookings.edu/~/media/research/files/articles/2008/3/03%20china%20li.pdf
delegates these tasks to various ministries. Specifically, the primary enforcement responsibilities of the AML are split among three administrative agencies—namely, MOFCOM, NDRC and SAIC. In particular, MOFCOM is primarily responsible for merger control, a pre-emptive form of antitrust intervention; NDRC and SAIC are responsible for ex post antitrust enforcement. Inevitably, as authority to enforce the AML has been delegated to specific enforcement agencies, much of the critical activity in the shaping and implementation of the antitrust policies takes place at the bureaucratic level. To begin, we will examine MOFCOM’s enforcement action since it is the most active player among the three enforcement agencies and has often been viewed as being at the forefront in formulating Chinese antitrust policy.

Similar to most jurisdictions in the world, merger review is mandatory and suspensory in China. As long as a transaction meets the notification thresholds in China, parties to the transaction have the obligation to notify MOFCOM; the deal cannot be closed until MOFCOM clears the transaction. Chinese merger notification thresholds are based on the sales revenue of the transacting parties. These thresholds, however, are poor proxies of the competitive effects of a transaction as the sales revenue of transacting parties says little about the impact of their transaction on the Chinese market. Not surprisingly, since the AML went into effect, MOFCOM has spent most of its efforts in reviewing offshore merger transactions between large multinational companies; very often those transactions have little nexus with the Chinese market.

It should be noted China is hardly the only jurisdiction that has been beset with this problem. The Chinese merger review system is modelled after that of the European Union (EU), whose competition law has been widely followed by many jurisdictions all over the world. But two features have made the Chinese jurisdiction stand apart from all others. First, the merger notification process in China is notoriously protracted. Large multinational companies

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43 During the first five years of its enforcement, MOFCOM has reviewed a total of 643 cases. It blocked one transaction and imposed remedies on 20 mergers. The vast majority of the 20 conditional approval cases involve foreign-to-foreign transactions. For those transactions that have been unconditionally cleared, there is little public disclosure except for the names of the transacting parties of those cases. An initial analysis of those cases shows that almost half of the unconditional clearance cases involve foreign-to-foreign transactions. See MOFCOM’s published decisions, available at http://fldj.mofcom.gov.cn/. See also MOFCOM Press Release, MOFCOM Achieved Significant Positive Developments with Antitrust Enforcement, Aug. 2, 2013, http://www.mofcom.gov.cn/article/ae/ai/201308/20130800226124.shtml; Fei Deng and Cunzhen Huang, A Five Year Review of Merger Enforcement in China, ANTITRUST SOURCE, Oct. 2013, at 2-4.
increasingly find that their merger transactions are held up by MOFCOM’s clearance decision. For instance, in Google/Motorola, China was the last jurisdiction to clear the transaction. In fact, MOFCOM didn’t clear the transaction until the last day of the statutory review period. In some cases where merging parties hadn’t reached a desirable outcome with MOFCOM, the agency required or encouraged the parties to withdraw their filings and refile. Thus in some cases MOFCOM’s review time significantly exceeds statutory review period. Second, unlike other large merger jurisdictions (particularly the United States and the EU) where merger review is nowadays primarily economics-based, it has often been observed that MOFCOM incorporates non-competition factors (particularly industrial policies) into its analyses. As such, there is often suspicion among the international business community that MOFCOM applies the AML to protect domestic industries from foreign competition.

To be fair, MOFCOM is understaffed compared to other merger review antitrust agencies in large jurisdictions. The Anti-Monopoly Bureau, responsible for reviewing hundreds of cases each year, is staffed with only 35 people. This fact alone, however, does not fully account for the delays. It is widely known among experienced practitioners that MOFCOM regularly confers with other government departments and organizations during merger review, particularly those bureaus at NDRC and the Ministry of Industry and Information Technology (MIIT) that are in charge of industrial policies, as well as local governments in certain cases. The consulting process is rather opaque and MOFCOM does not communicate the information it obtains from these government agencies. In fact, the more government departments are involved in the consulting process, the more unpredictable it becomes; sometimes the delay is not really within MOFCOM’s control. Moreover, because opinions and comments from other government agencies such as NDRC and MIIT

45 Deng & Huang, supra note 43, at 5.
46 Id. (This phenomenon has been observed in a number of conditional approval cases including Western Digital/Hitachi, Glencore/Xstrata, Marubeni/Gavilon, MediaTeck/MStar.)
49 Huang & Li, supra note 13, at 9.
50 Sokol, supra note 47, at 10.
51 Deng & Huang, supra note 43, at 10.
52 Interviews with government officials at central ministries.
have played a role in MOFCOM’s final decisions, they thus sometimes appear inconsistent with economic-based principles and international standards.\textsuperscript{53}

But if our inquiry were to stop here, it would neglect the more interesting and important questions: Why does MOFCOM need to confer with other government agencies? Isn’t it in the interest of MOFCOM to consolidate its enforcement power and to make all merger decisions on its own? To understand MOFCOM’s rather unusual practice of consulting other government agencies, we need to delve deeply into the Chinese bureaucratic structure and political decision-making process.

\section*{A. Management by Exception}

China is a vast country. On the official organizational chart, the Chinese bureaucracy is divided into a central government and local governments. (See Figure 1 below) The central government consists of the State Council and various ministries and organizations. The local government consists of four levels, including 31 provincial-level units (including 22 provinces, 4 municipalities and 5 autonomous regions), 332 cities, 2,853 counties and 40,466 townships.\textsuperscript{54} The management of such a huge bureaucracy is not an easy task.

\textbf{Figure 1: Official Organization of Chinese Bureaucracy}

\textsuperscript{53} Id.

\textsuperscript{54} Ministry of Civil Affairs, \textit{The Statistics of Chinese Administrative Districts} as of 2011, March 12, 2012, \texttt{http://qhs.mca.gov.cn/article/zlxq/hj/201203/20120300282479.shtml} (Note Taiwan is not included as a province in Figure 1).
Using a principal-agent model, Huang examines Chinese bureaucratic structure by dividing it into two levels.\textsuperscript{55} (See Figure 2 below) The first level, defined as the control level, consists of the Politburo and State Council, who sit at the top of China’s political hierarchy.\textsuperscript{56} The Politburo is the supreme-decision making body that decides all major strategic matters in the country; the State Council is responsible for transforming those strategic decisions into concrete policies.\textsuperscript{57} The second level, defined as the controlled level, comprises ministerial and provincial agencies.\textsuperscript{58}

Figure 2: A Principal-Agent Perspective on Chinese Bureaucracy

The logic behind such division is two-fold: first, the agencies at the control level control the appointments of the leadership of the agencies at the controlled level; second, the preference divergence is sharpest between these two levels.\textsuperscript{59} Each of the ministries has well-defined functions and each of the provinces has its own territorial interest. Thus they often pursue their own interests at the expense of the interest of the whole system.\textsuperscript{60} Moreover, each of the ministries and provinces has relative autonomy in managing its own affairs, including the control of its own personnel. Since 1984, the CCP has applied the one-rank-down nomenklatura system, thus allowing the control level to only appoint the top level officials at the controlled

\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} Id., at 67.
\textsuperscript{60} Id.
level—ministers and provincial heads. Therefore, the appointments to all but the top-level positions are controlled from within the controlled level.

This principal-agent perspective not only elucidates the logic behind the highly complex institutional design of China’s bureaucracy, but also illuminates the nation’s political process of decision-making. When the agent acquires specialized information and thus has information advantage over the principal, the agent can vary the quality and quantity of those of its efforts that are largely unobservable to the principal. Therefore, agency problems can arise when the control level (the Politburo and the State Council) delegates authority to the controlled level (the ministries and provincial governments). So how does the former induce the latter to reveal its information?

Political scientists have long observed that the Chinese government bureaucracy makes economic policy according to the decision rule of “management by exception”. At each government bureaucratic level, agency representatives make decisions by a rule of consensus. If they all agree, the decision is automatically ratified by the higher level. Otherwise the decision will be referred to authorities at a higher lever who will either step in to make the decision or allow the matter to be dropped until consensus can be reached.

This method of decision-making has been applied to alleviate the problem of information asymmetry for the CCP leadership. To begin, Chinese ministries are organized by either function (e.g., education, culture, finance) or economic sector (e.g., agriculture, telecommunication, transportation). This complex structure gives virtual (i.e. nonelectoral) representation to all those economic groups and interests on whom the CCP leadership depends for political support. It also provides some checks and balances among the agencies. As each of them has particular missions, they are expected to pursue them with zeal. Therefore, when ministries and provincial leaders are called together to discuss a policy proposal, they are expected to represent and articulate the views of their units. Accordingly, delegation by consensus is deemed more efficient as it

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62 DIXIT, supra note 15, at 87-88.
63 SHIRK, supra note 16, at 116-17. See also LIEBERTHAL & OKSENBERG, supra note 5, at 23-24.
64 Id., at 116.
65 Id.
66 Id.
67 Id., at 99.
68 LIEBERTHAL & OKSENBERG, supra note 5, at 29.
69 Id. See also SHIRK, supra note 16, at 98-99.
relieves the top CCP leadership of the trouble of constant intervention in the policy process. When consensus couldn’t be reached, the issue will be pushed to the top and the superior can exploit the information advantage it obtains through different subordinate agencies.

One direct consequence of “management by exception” is that power becomes fragmented when it comes to policymaking and implementation. The existence of massive, parallel and interdependent bureaucracies and territorial administrations with overlapping jurisdictions further complicates this process. Kenneth Lieberthal and Michel Oksenberg, two leading experts on Chinese politics, propose a “fragmented authoritarianism” model to examine the political process in China. By closely studying Chinese economic policymaking, they found that policy made at the center is increasingly malleable to the political interests of the various ministries and provinces charged with enforcing that policy. Within the energy sector, for instance, they found that a single ministry or province usually lacks sufficient clout by itself to launch or sustain a big project or major new policy. Such fragmentation of authority thus demands elaborate efforts of consensus building at each stage of decision-making.

David Lampton’s studies on bargaining in Chinese politics shed similar light in this respect. He finds that bargaining among bureaucracies with similar political resources and bureaucratic ranks is so frequent and ubiquitous that policymaking becomes protracted and inefficient. As he notes: “American sometimes see themselves as uniquely hamstrung by a ‘checks and balances system’, the Chinese decision system often is hamstrung by a complex bargaining process and the need to build a consensus.” Susan Shirk also observes that because each participant at the bargaining table has veto power, policies emerging from this system tend to be incremental rather than radical. Moreover, the more participants that are involved in the decision-making process, the more elusive is policy consensus.

70 SHIRK, supra note 16, at 117.
71 See generally LIEBERTHAL & OKSENBERG, supra note 5. For more recent works on fragmented authoritarianism, see Mertha, supra note 16.
72 Id., at 22-31.
73 Id., at 22.
75 Id., at 35.
76 SHIRK, supra note 16, at 127.
77 Id.
B. Consensus Building in Merger Enforcement

Due to the lack of judicial oversight, the Chinese government has effectively monopolized the whole enforcement process. This turns antitrust enforcement into a political process involving a large number of government actors, as reflected in the personnel composition of the Anti-Monopoly Commission (AMC). In 2008, the State Council established the AMC as a consulting and coordinating organization to orchestrate the activities of the three enforcement agencies.\(^78\) It was first headed by Qishan Wang, the then vice premium in charge of the economic bureaucratic system. The heads of at NDRC, SAIC and MOFCOM and a deputy secretary-general of the State Council serve as deputy directors. It also consists of fourteen commissioners including the incumbent deputy heads of fourteen ministries and institutions under the State Council.\(^79\) As a consulting and coordinating organization, the AMC does not undertake any specific enforcement activity but operates only through meetings.\(^80\) In practice the commissioners rarely formally meet to discuss antitrust issues,\(^81\) and the day-to-day work has been assigned to MOFCOM.\(^82\) Despite the inactivity of the AMC, it has officially established the authority of various ministries and organizations in antitrust affairs. Its structure of authority implies that no single ministry has the clout in itself to make an important antitrust policy or decision. Rather, it will have to obtain the active cooperation of other bureaucratic units who are themselves nested in distinct chains of authority. The composition of the AMC therefore suggests that enforcement of the AML, similar to economic policy-and decision-making in China, is in effect a consensus-building process within the Chinese bureaucracy.

MOFCOM’s consulting practice provides a good opportunity for us to investigate the decision-making process. Based on our interview with government officials working at central ministries, we find that government officials do not view MOFCOM’s consulting practice “unusual” at all—in fact, they believe this is the standard procedure

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\(^78\) The AML, art. 9.

\(^79\) These include: NDRC, SAIC, MOFCOM, State-Owned Assets Supervision and Administration Commission, the Ministry of Industry and Information Technology, the Ministry of Transportation, the Ministry of Finance, the Ministry of Supervision, the State Intellectual Property Office, the China Banking Regulatory Commission, the China Security Regulatory Commission, and the China Insurance Regulatory Commission, the State Electricity Regulatory Commission and the Legislative Affairs Office of the State Council. See General Office of the State Council, Notice of the Main Responsibilities and Members of the Anti-Monopoly Commission of the State Council, Guo Ban Fa [2008] No. 104.


\(^81\) Qian, supra note 13, at 21-27.

\(^82\) The AMC has set up a secretariat office within MOFCOM, but the office will soon be separated as an arm’s length directorate. See Huang & Li, supra note 13, at 6.
for economic policy and decision-making for central ministries.\textsuperscript{83} They note that within the Chinese government bureaucracy, it is a customary practice for one agency in charge of economic policy- or decision-making to solicit comments and opinions from other government agencies, widely known as the “huiqian” (meaning “countersign”) procedure in China.\textsuperscript{84} Indeed, the huiqian procedure has long been practiced among ministerial agencies, despite the absence of formal rules and procedures.\textsuperscript{85} Moreover, the State Council Working Procedure Rules explicitly require that the decision-making process by each ministry and organization underneath the State Council be democratic and scientific.\textsuperscript{86} In addition, the State Council Working Procedure Rules specify that if important matters need to be notified to the State Council, it will require prior extensive research and consulting, including sufficient cooperation with other relevant government departments.\textsuperscript{87} In practice, government agencies who have been consulted will have a say in the policymaking process and thus the “huiqian” procedure is an important consensus-building mechanism among various government actors.\textsuperscript{88} Consistent with prior studies by political scientists on delegation by consensus, interviewees confirm that policy proposals or administrative decisions that have been through the “huiqian” procedure will normally be ratified by the State Council.\textsuperscript{89} On the other hand, if the agencies are unable to reach a consensus on a matter, the decision will be pushed up to the State Council.\textsuperscript{90}

Since large merger transactions often have an impact on the competitive structure of domestic industries, a merger review will inevitably involve the functions of other government departments such as those responsible for industrial policy or those in charge of overseeing certain economic industry sectors. Accordingly, even if the “huiqian” procedure constrains MOFCOM’s discretion to some extent, it also mitigates the risk that a decision will be problematic—that it will negatively impact the interests of the other government agencies at play. The “huiqian” procedure also helps MOFCOM gain insight into the industry sectors in which the mergers take place. With limited experience with merger review, the staff at MOFCOM has neither the capacity nor sufficient expertise on various industry sectors to conduct merger review.\textsuperscript{91} As it cannot solely rely on information provided by the merging parties, the “huiqian” procedure thus becomes part of an important market investigation process. In

\textsuperscript{83} Interviews with government officials at central ministries.

\textsuperscript{84} Id.

\textsuperscript{85} Id.


\textsuperscript{87} Id., art. 23.

\textsuperscript{88} Interviews with government officials at central ministries.

\textsuperscript{89} Id.

\textsuperscript{90} Id.

\textsuperscript{91} Id.
fact, if MOFCOM makes an important merger decision without properly consulting relevant government departments, the legitimacy of its decision could be challenged internally within the government bureaucracy.92

Since the delegation by consensus mechanism maintains some checks and balances among different government agencies, can it nonetheless serve as a close substitute for the democratic system of decision-making and thus produce outcomes that will maximize national interest? The answer is probably not. As each government agency is carefully evaluating the costs and benefits of proposed decisions in terms of its own interest, they are unlikely to reach a consensus unless the decision is a Pareto improvement (i.e. it benefits at least one party and harms no one). Otherwise the agency whose interest is harmed will fight fiercely against the decision. But this is not necessarily the optimal outcome for the nation as a whole. To maximize the national interest some government actors’ interests may need to be sacrificed when the overall social benefits outweigh the costs.

Indeed, although MOFCOM has an interest in consulting other government departments, it does not necessarily incorporate all their opinions. As each government agency is presumed to represent its own particular interests, there are inevitably conflicts among various agencies. When conflict arises, it is then left to a “bargaining” process in which MOFCOM and other government agencies hammer out a workable solution that is deemed satisfactory to everyone.95 Therefore, in many circumstances compromise needs to be reached as it is not possible to please everyone. In fact, while some government agencies have complained that MOFCOM has “delegated” too much work to them (consulted them too much), they have also complained that the opinions they provided during consultation have not all been adopted by MOFCOM.94 However, as the “huiqian” procedure is a repeated game, an agency that refuses to compromise with other agencies faces potential retaliation next time it wants to propose a decision or policy.95 Therefore, anticipating that they will need MOFCOM’s cooperation in the future, government agencies tend to seek compromise with MOFCOM. As to how much other agencies voice their opinions, how hard these agencies press their opinions, and how much MOFCOM ultimately incorporates their opinions into a final decision depends on the relative power of the factional networks those government agencies represent vis-a-vis MOFCOM.96

92 Id.
93 Id.
94 Id.
95 Id.
96 Id.
IV. THE MOTIVES AND BEHAVIOR OF CENTRAL ENFORCEMENT AGENCIES

Within the realm of antitrust enforcement, NDRC is primarily responsible for price-related anti-competitive behaviour and SAIC for non-price-related behaviour. Currently NDRC and SAIC have respectively about 15 and 8 people in Beijing who are responsible for antitrust enforcement.\(^\text{97}\) While their staff capacity at the central ministries is low, they have thousands of staff members at the local level who have authority to enforce the AML.\(^\text{98}\) In the first three years of its enforcement, both agencies seem engaged in capacity building and drafting implementing guidelines. The few cases they have disclosed were initiated by local bureaus involving small domestic private companies, with the amount of fine so small that hardly any attention from the public or the legal community was attracted.\(^\text{99}\) As the public had high hopes that the AML would be applied to tackle the monopolistic behaviour of Chinese SOEs, complaints began to mount that the Chinese AML only catches the flies but not the tigers.\(^\text{100}\)

On November 9, 2011, NDRC announced on Chinese television that it had been investigating two large telecommunication firms—China Telecom and China Unicom—for allegedly conducting price discrimination against rival companies.\(^\text{101}\) This was the first antitrust investigation of Chinese SOEs and marked a turning point in Chinese antitrust enforcement. Since then, Chinese antitrust enforcement has seemed to take a great leap forward. So far NDRC has investigated a number of high profile cases and imposed remedies and hefty fines on a variety of influential economic actors. These include private domestic pharmaceutical companies,\(^\text{102}\) large multinational companies including manufacturers of LCD panels\(^\text{103}\) and milk powder companies, SOEs owned by local governments including

\(^{97}\) Interviews with government officials at central ministries.

\(^{98}\) Id. Notably, NDRC added 150 staff members to the local enforcement units in 2011.

\(^{99}\) The decisions disclosed by NDRC are available on its website: \url{http://jjs.ndrc.gov.cn}; the decisions disclosed by SAIC are available on its website: \url{http://www.saic.gov.cn/zwgk/gggs/jzzf/}.

\(^{100}\) Jiadi Lao, The Anti-Price Monopoly Provision Had Been Alleged to Only Catch the Flies but Not the Tigers, EVENING NEWS, Jan. 5, 2011,\url{http://www.antimonopolylaw.org/article/default.asp?id=2623}

\(^{101}\) CCTV, NDRC Is Investigating the Broadband Monopoly Issues of China Telecom and China Unicom, Nov. 9, 2011,\url{http://finance.sina.com.cn/g/20111109/121510782543.shtml}

\(^{102}\) NDRC Announcement, Two Pharmaceutical Companies Have Been Severely Punished for Monopoly of the Active Pharmaceutical Ingredients of Compound Reserpine, Nov. 15, 2011,\url{http://jjs.ndrc.gov.cn/fjgld/t20120306_465386.htm}


\(^{104}\) NDRC Press Release, supra note 31. Contrary to most media reports, not all the milk powder companies investigated are foreign companies. In
the premium white liquor companies Maotai and Wuliangye, and gold retailers in Shanghai. Very recently NDRC has also started to investigate American technology firms including Qualcomm and Interdigital. This has attracted heightened attention as both companies rely heavily on the Chinese market for their licensing of standard-essential patents (SEPs) to domestic firms and because the cases appear to be initiated upon complaints from domestic firms.

Compared with NDRC, moves by SAIC seem to be more cautious and less bold. So far the agency has publicly disclosed 13 cases on its website, all of which were investigated by local offices, involving small local domestic companies and insignificant fines and remedies. It wasn’t until 2013 that SAIC announced that it had initiated a case against TetraPack, a large Swedish packing firm, for conducting tying activity in China. Certainly, the antitrust bureau at NDRC in Beijing has more staff than its counterpart at SAIC, but this fact alone doesn’t seem sufficient to account for the divergent patterns of enforcement. As the responsibility for antitrust enforcement is split between NDRC and SAIC, both agencies have an interest in competing with each other for antitrust policy.

fact, Biostime Inc.(Guangzhou), the company that received the largest fine, is a Chinese company. See Announcement by Baostime International Holding Limited, Matters in relation to the Administrative Punishment Decision Received by A Subsidiary of the Group And Resumption of Trading, Aug. 7, 2013.


106 NDRC Press Release, Shanghai Golden Jewelry Association and A Number of Gold Retailers Were Fined for Implementing Price Monopoly, http://js.ndrc.gov.cn/gzdt/20130813_553441.htm. All five gold retailers investigated by NDRC were initially controlled by the State Asset Supervision and Administration Commission (SASAC) of Huangpu District in Shanghai. In 2002 the majority control of two gold retailers Lao Miao Huang Jing and Ya Yi Huang Jing was transferred to Fosun, a large private domestic firm. But Shanghai SASAC maintains majority control of the other three gold retailers including Lao Feng Xiang, Cheng Huang Zha Bao and Tian Bao Long Feng. One may be puzzled by the fact that the Shanghai government still retains control in competitive businesses like gold retailing. But this is also perfectly consistent with Yasheng Huang’s acute observation of state-led capitalism in Shanghai. See YASHENG HUANG, CAPITALISM WITH CHINESE CHARACTERISTICS: ENTREPRENEURSHIP AND THE STATE 175-232(2008).


108 SAIC’s decisions have been disclosed on its website: http://www.saic.gov.cn/zwgk/gggs/jzzf/

109 Kathrin Hille, China’s Watchdog Shows They Have Teeth, FINANCIAL TIMES, July 5, 2013, http://www.ft.com/cms/s/0/2310d35e-e56c-11e2-ad1a-00144feabde0.html#axzz2rKpL2M91
control.  But why does NDRC appear more aggressive than SAIC in bringing antitrust cases?  What has motivated NDRC to bring those cases?  More fundamentally, why did NDRC and SAIC divide up their responsibilities based on whether a behaviour is price-related or not?  The answers to these questions lie in the incentive structure of government officials working at central ministries.

A. The Utility Function of Central Technocrats

Political scientists have long observed that power fragmentation in policy-making leads to endless struggle for policy control among Chinese government agencies at various levels.  This is because administrative intervention in the market creates valuable resources for Chinese government officials, who can then appropriate its value in the form of bribes (corruption) or political support (patronage).  Such opportunities for patronage therefore create fertile soil for factions to be formed.  Although factions are officially prohibited within the CCP and can be organized only secretly, abundant literature in Chinese politics identifies intraparty factions as key to understanding political power in China.

Due to the lack of an institutionalized succession mechanism and clear indicators of power, Chinese leaders face constant threats to their power.  In order to gain support, factions are formed in which a loose group of lower officials have an incentive to support senior officials in times of challenge.  Senior officials acquire their factions as they cultivate personal relations with junior colleagues during the course of their careers.  In return for their support, senior officials reward lower officials with security or advancement.  Over time, these loose networks of mutual obligation and exchange become conduits whereby appointments, economic goods, and policy power are channelled.  As elucidated

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110 Zhang, supra note 13, at 640-45.
111 See generally Lieberthal & Oksenberg, supra note 5; see also Lampton, supra note 74.
112 Shirk, supra note 16, at 142.
115 Id.
116 Id. See also Nathan, supra note 113, at 43.
117 Id.
118 Id.
by Lucian Pye: “The prime basis for factions among cadres is the search for career security and the protection of power.”\textsuperscript{119}

In China all factions are formed with a single ultimate goal—power.\textsuperscript{120} However, not all factions are created in the same fashion and each is endowed with different resources and membership.\textsuperscript{121} Government officials working at central ministries are often called central technocrats. Compared with generalists such as governors at provincial governments who are in charge of a wide range of matters, central technocrats have narrower experience in the regime and their expertise is highly specialized. Generally speaking, central technocrats have a clear preference toward central control as it grants them more policy discretion.\textsuperscript{122} Most central technocrats spend their whole career within the same organization and rise vertically within it, absorbing and serving its particular ideology.\textsuperscript{123} Their career paths thus affect their incentive structures and political preferences. For those forward-looking central technocrats, their main utility function is to maximize their power through promoting members of their factions and enlarging resources available to agencies controlled by faction members.\textsuperscript{124} As depicted by Victor Shih, who closely studies the politics of Chinese monetary policy, the more control an agency has over an important policy area, the more likely it can capitalize on such power to accumulate administrative merits (“zhengji”), thus paving the way for the faction leaders’ rise to the top level of the CCP hierarchy.\textsuperscript{125}

The above study on power fragmentation and factional politics illuminates the incentive structures of the three central antitrust enforcement agencies. While each of the three agencies clearly has an interest in competing for antitrust policy control, antitrust is not their own competitive arena. As each of them is nested within ministries working like large conglomerates, they have divergent responsibilities and missions. In particular, NDRC is an agency mainly in charge of macroeconomic management and industrial planning, as elaborated in detail below.\textsuperscript{126} MOFCOM is primarily responsible for formulating and implementing both inbound and outbound policies of trade and investment.\textsuperscript{127} It played a key role in representing China in trade deal negotiations with foreign countries—the accession into the WTO is deemed one of its glorious achievements. Not surprisingly, MOFCOM is generally seen as

\textsuperscript{119} PYE, supra note 113, at 7-8.
\textsuperscript{120} HUANG, supra note 113, at 412.
\textsuperscript{121} SHIH, supra note 16, at 4.
\textsuperscript{122} Id., at 5.
\textsuperscript{123} SHIRK, supra note 16, at 100.
\textsuperscript{124} SHIH, supra note 16, at 5.
\textsuperscript{125} Id., at 54.
\textsuperscript{126} NDRC, Main Functions of NDRC, http://en.ndrc.gov.cn/mfndrc/
more liberal and pro-market than other agencies, such as NDRC, in economic affairs. As one MOFCOM official says: “If we don’t advocate for free markets, how could we promote trade—which is our main business?” Compared with MOFCOM and NDRC, SAIC is smaller in size and has a narrower mandate, with tasks including the administration of enterprise registration, the regulation of unfair competition behaviour and consumer protection. As each of these three agencies had the incentive to maximize its own bureaucratic interests, their divergent missions shaped their enforcement agenda during the implementation of the AML. Indeed, for central technocrats working at these ministries, antitrust enforcement is simply another means to fulfilling their original mission—the ultimate goal being to gain more policy control within the scope of their designated responsibilities. To illustrate this, let’s examine NDRC’s behaviour following the enactment of the AML.

B. The Mission of NDRC

While the three central enforcement agencies enjoy the same ministerial rank, in reality NDRC stands out as a far more powerful and interventionist ministry due to its historical and political background. The predecessor of NDRC was the State Planning Commission (SPC). Founded in 1952, the SPC played a crucial role during those days when the Chinese economy was centrally planned. Also known as the little State Council, the SPC was in charge of the organization of production and distribution of major commodities, as well as the construction of significant projects. It focused primarily on macro-economic management and on achieving balance among the three key segments in the economy: finance, material supplies, and labour. It went through several restructurings and reorganizations over the years. The biggest restructuring took place in 2003, a year after China joined the WTO. The SPC merged with part of the State Economic and Trade Commission, another supra-ministerial organization that was primarily responsible for coordinating various government agencies for the implementation of the SPC’s economic plans. To be viewed as more compatible with China’s goal of building a market economy, the State Council also removed “planning” from the SPC’s name and replaced it with “reform and development.”

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129 Interview with a MOFCOM official.
131 LIEBERTHAL & OKSENBERG, supra note 5, at 64.
132 Id.
133 Id.
134 Id., at 72.
Despite this name change, NDRC continued to rely on direct government intervention to solve most economic problems. This is not surprising since promoting government intervention is directly related to its own bureaucratic interests. In particular, the responsibilities of price control fall on the shoulders of two departments within NDRC—the Price Bureau and the Price Supervision and Anti-monopoly Bureau. The former is in charge of regulating the price of certain basic commodities in a number of sectors including natural gas, diesel, electricity, some medicines and basic telecom rates. And the latter is in charge of preventing price instability and of controlling inflation, as well as antitrust enforcement. Currently the Price Supervision and Anti-Monopoly Bureau has about 46 people, about 1/3 of whom are in charge of antitrust enforcement while the rest are responsible for price supervision.

Since the 1980s, NDRC (including its price control departments) has seen its power shrink significantly. This is due to the fact that more and more prices of commodities were liberalized and the power of the state to mandate prices was significantly weakened after China’s entry into the WTO. But experts have observed that NDRC has clawed its way back to dominance since the financial crisis on account of the Hu Jingtao-Wen Jiabao government focusing more on redistribution and welfare (domains of government intervention) at the expense of further market reform. They note that NDRC took advantage of economic conditions during the crisis and won strong support from the top Chinese leadership to take charge of a series of important government interventionist measures, including the battle against inflation.

Given China’s significant economic liberalization, one may wonder why the government continues to resort to direct price control rather than monetary policy to control inflation. But for the CCP leadership inflation is not purely an economic matter, it is also a highly sensitive

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137 Interviews with government officials at central ministries.


139 Barry Naughton, *Inflation, Welfare and the Political Business Cycle*, CHINA LEADERSHIP MONITOR No. 35 (2011). This is also confirmed by interviews with government officials at central ministries. Interviewees note, however, that NDRC’s power may be weakened again under the current Chinese leadership who now advocate for further deepening of market reform.

140 *Id. See also* Barry Naughton, *The Inflation Battle: Juggling Three Swords*, CHINA LEADERSHIP MONITOR No. 25 (2008), at 6-9.
political matter that has repeatedly been associated with political failures and turmoil in recent Chinese history. Therefore, when inflation got out of control in 2010, Chinese policymakers elevated the fight against inflation to the highest priority. This provided NDRC with a golden opportunity to step back into the policymaking limelight. From December 2010, NDRC had been closely monitoring the daily prices of primary food products and pressured merchants not to increase prices. In 2011, NDRC started a massive campaign to urge everyone to pitch in to “whip inflation.” In 2011, NDRC invited a number of private chambers of commerce to meet and pressured them not to increase prices. As a result, 24 of 28 Federation chambers of commerce signed an undertaking to stabilize prices. In March 2011, the Shanghai Price Bureau (a local agency of the Price Supervision and Anti-Monopoly Bureau of NDRC) fined Unilever RMB2 million for disseminating price increase news and violating the Price Law. This punishment followed NDRC’s “informal chatting” with Unilever and a number of other leading household goods manufacturers earlier that month, during which it was suggested that they not increase prices. NDRC’s punishment wasn’t effective, as reportedly Unilever raised prices in May 2011. But there was nothing NDRC could do this time as Unilever unilaterally raised prices without public announcement.

C. Using the AML as A New Tool for Policy Control

In recent years, NDRC has started to appreciate the AML as a powerful tool for fulfilling its original mission of “price control” without being seen as in contradiction with the market. Two recent high-profile cases illustrate this point. Both cases concerned minimum resale price maintenance (RPM) conduct by wholesale manufacturers. The first one involved Maotai and Wuliangye, two

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141 Naughton, The Inflation Battle: Juggling Three Swords Leadership, supra note 140, at 1-2. (associating inflation events with political turmoil such as the unrest at Tiananmen Square in 1989).
142 Id.
143 Id., at 3-4.
144 Id., at 4.
145 Id.
146 Id.
150 Id.
premium Chinese liquor companies who had imposed price restraints on their distributors and penalized those who sold the liquor at a discount (white liquor case).\footnote{See announcements by Guizhou Price Bureau and Sichuan DRC, supra note 105.} The second case involved a number of high-end infant formula powder manufacturers who allegedly fixed the downstream retail prices of their products and adopted various measures to prevent discounting by retailers (milk powder case).\footnote{See NDRC’s announcement, supra note 31.} Notably, white liquor and milk powder are two products that had been closely monitored by NDRC.\footnote{NDRC publishes periodic reports monitoring the prices of white liquor, see, e.g., NDRC, White Liquor Prices in 36 Large and Medium-Size Cities in January 2008, \url{http://www.ndrc.gov.cn/jgjc/jmxf/t20080202_189832.htm}; see infra footnotes 155 and 156 on NDRC’s monitoring of the prices of milk powder.} In 2008, NDRC invoked Article 30 of the Price Law, which authorizes the government to temporarily intervene in certain pricing decisions in the case of emergent inflationary pressures.\footnote{The Price Law, art. 30. See also NDRC, The Provisional Measures by NDRC regarding the Exercise of Temporary Price Intervention of Certain Important Products and Services, Jan. 15, 2008, \url{http://www.gov.cn/flfg/2008-01/16/content_860257.htm}.} In particular, milk powder was one of the commodities subject to NDRC’s temporary price control and NDRC sent an emergency notice to all local provincial authorities to ensure compliance with its measures.\footnote{NDRC Forbids the Significant Price Increases of Milk Powder, MACAU DAILY, Sep. 20, 2008, \url{http://xwzx.ndrc.gov.cn/ntfy/jwmt/t20080924_237986.htm}.} In 2011, on separate occasions NDRC invited manufacturers of infant formula milk powder and premium white liquor for “informal chatting” and pressured them not to increase prices.\footnote{Maotai and Other White Liquor Companies Increase Price Again, NDRC Asks for Informal Chatting Requesting the Stabilization of Prices, GUANGZHOU DAILY, Sep. 23, 2011, \url{http://news.xinhuanet.com/fortune/2011-09/23/c_122075707.htm}; Media Claims NDRC Informally Chatted with Six Foreign Milk Powder Manufacturers, SOUTHERN CHINA WEEKEND, May 27, 2011, \url{http://www.infzm.com/content/59015}.} But these companies continued to raise prices despite repeated warnings from NDRC.\footnote{Cannot Control Retailers, 53 Degree Feitian Maotai Increases Prices by RMB200, CHINA MANAGEMENT NET, Sep. 26, 2011, \url{http://jingji.cntv.cn/special/maotai/}; Wyeth and Other Foreign Milk Powder Companies Increase Prices, Experts Suggest the Gross Margin Reaches 60%, ORIENTAL DAILY, July 6, 2011, \url{http://finance.sina.com.cn/focus/ynfzj_2011/}.}

The complaints about their RPM practices therefore provided NDRC the perfect opportunity to rein in their prices. A few days after NDRC’s announcement of its investigation into the infant milk powder industry, Wyeth announced that it would cooperate with NDRC’s investigation, rectify its behavior immediately and lower its...
wholesale prices by an average of 11%.\textsuperscript{158} Other companies followed suit quickly.\textsuperscript{159} In the end, Wyeth and two other infant formula manufacturers were rewarded with 100% immunity for proactive cooperation with NDRC, whereas the other three manufacturers received a fine totaling RMB668 million.\textsuperscript{160} From an antitrust law standpoint, however, it is very odd that these milk powder manufacturers would commit to lower prices as part of the proposed remedies for a RPM case. But such an “unusual” form of remedy is perfectly consistent with our hypothesis that the main goal of NDRC’s investigation was to control prices; what these manufacturers did was simply to give NDRC what it wanted.\textsuperscript{161}

Indeed, almost all the large cases NDRC has brought (or actively cooperated with local authorities to bring) in the last three years have involved basic daily consumption goods that have been subject to its price monitoring, including pharmaceutical products, dairy products, liquor, broadband access and consumer electronics.\textsuperscript{162} The only exception is its recent investigation into a cartel involving Shanghai gold retailers.\textsuperscript{163} But a closer look at that case reveals that it was also consistent with NDRC’s mission to maintain price stability. In April 2013, a steep decline in gold prices led to a frenzy among Chinese consumers who rushed in to buy gold.\textsuperscript{164} Gold hoarding sends a very bad sign of price instability and the fragility of the Chinese economy.\textsuperscript{165} Therefore, NDRC’s antitrust investigation into collusive pricing among gold retailers served the function of “cooling down” the fanatical gold hoarding behavior. In fact, NDRC has not shied from making clear that its antitrust enforcement priority is to maintain the price stability of basic commodities. In November 2013, Lu Yanchun, the deputy director general of the Price Supervision and Anti-Monopoly Bureau, announced that its department would continue to prioritize its enforcement efforts against price-related monopolies in six major industries including aviation, household

\textsuperscript{158} \textit{NDRC Explains Why Wyeth Received Immunity Because It Was The First One to Admit Guilt and to Lower Price}, 21\textsuperscript{st} CENTURY ECONOMIC REPORT, August 8, 2013, http://finance.sina.com.cn/chanjing/gsnews/20130808/022816379184.shtml
\textsuperscript{159} Id.
\textsuperscript{160} See NDRC’s announcement, supra note 31.
\textsuperscript{162} See infra Part IV.
\textsuperscript{163} See supra note 106.
chemicals, automobiles, telecoms, pharmaceuticals and home appliances.\textsuperscript{166}

It should be noted that in addition to price control, NDRC has another important mission: formulating industrial policy and coordinating industry planning. This responsibility is allocated to the industry coordination bureau, a sister bureau of the Price Supervision and Anti-monopoly Bureau and the Price Bureau, as the same deputy director Zucai Hu simultaneously oversees these three bureaus.\textsuperscript{167} (See Figure 3 below) Not surprisingly, NDRC recently initiated a number of high-profile investigations that have far reaching implications for the competitive structure of domestic industries. These include its current antitrust probes into American technology firms such as Qualcomm and Interdigital. In both cases, Chinese manufacturers rely heavily on standard-essential patents (SEPs) provided by the American firms, and thus antitrust investigation can provide them with more bargaining power during negotiations for the license of SEPs.\textsuperscript{168}

\textbf{Figure 3: Lines of Authority at NDRC}

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\begin{enumerate}
\item\textsuperscript{166} \textit{China Will Closely Monitor Prices in Six Major Industries}, XINHUA NET, Nov. 24, 2013, \url{http://news.xinhuanet.com/fortune/2013-11/24/c_118270369.htm}
\item\textsuperscript{167} NDRC, \textit{Main Responsibilities of Zucai Hu}, \url{http://huzucai.ndrc.gov.cn/zggz/default.htm}
\item\textsuperscript{168} See supra note 107. See also \textit{Qualcomm Faces Prospect of Record Antitrust Fine in China}, REUTERS, Jan. 28, 2014, \url{http://www.reuters.com/article/2014/01/29/us-qualcomm-china-idUSBREA0S06020140129}
\end{enumerate}
V. THE MOTIVES AND BEHAVIOR OF LOCAL ENFORCEMENT AGENCIES

Unlike MOFCOM, both NDRC and SAIC have massive networks of corresponding bureaus at various levels of the regional governments.169 NDRC and SAIC can delegate their enforcement responsibilities to local authorities (hereinafter DRCs and AICs respectively) and thus in theory each agency has thousands of staff members to carry out antitrust enforcement functions.170 Based on the decisions disclosed by NDRC and SAIC, the vast majority of cases were initiated and enforced by local antitrust agencies. For instance, SAIC has publicly announced 13 decisions, all of which were initiated and investigated by local AIC agencies, with SAIC providing professional support.171 The SAIC network has in fact handled more cases than those it has disclosed, as local authorities face pressures from local governments and thus deliberately hold back disclosure of certain cases, particularly those involving local SOEs.172 Although all the cases disclosed by SAIC were brought by local agencies, this enforcement record is hardly impressive. In fact, the 13 cases were brought by AIC authorities from 9 provinces, meaning that more than two-thirds of the provinces have not brought a single antitrust case in the past five years.

The enforcement pattern of local DRC authorities sheds similar light on the predicament of local enforcement. While local DRC authorities seem to have brought a number of high-profile cases (e.g. the gold retailer case and the white liquor case), in fact NDRC in Beijing took the lead behind the scenes.173 For instance, the white liquor case was first initiated by NDRC in Beijing; only subsequently was enforcement authority delegated to local DRC authorities.174 Critics also notice that the fines imposed on Maotai and Wuliangye were too lenient—in fact these two local SOEs were only subject to the lowest possible level of penalty.175 Similarly, although the decision to fine large gold retailers in Shanghai was made by Shanghai DRC, NDRC in Beijing was actively involved during the investigation.176 In fact, Shanghai DRC had long been aware of the

169 While MOFCOM also has corresponding bureaus at the provincial level, those provincial bureaus are not in charge of merger review.
170 Interview with a government official at a central ministry. Note that some of the local corresponding offices of NDRC are called price bureaus. But for simplicity we refer to all local authorities of NDRC as DRCs.
171 See supra note 108.
172 Interview with a government official at a central ministry.
173 Id.
174 Id.
176 Interview with an antitrust lawyer involved in this case.
collusive practices among these large gold retailers. But until that point it had tried to persuade them to cease such practices without resorting to any legal action. It wasn’t until a tipoff to NDRC in Beijing that these gold retailers were investigated for AML violations. So how do we explain the apparent lack of interest local AIC and DRC authorities have in prosecuting antitrust cases? Again the answer lies in the incentive structure of local enforcement agencies and the constraints they face in the CCP-hierarchy.

### A. Decentralized Regional Autonomy

The Chinese bureaucratic system is unitary. The authority of local governments derives from the central government. For instance, each of the central ministries in Beijing has a corresponding bureau at the provincial level, but the provincial bureau is also a component of the provincial government. Therefore the provincial antitrust bureau simultaneously serves two principals, the provincial government and the ministry in Beijing. On the other hand, within the CCP hierarchy, ministries and provincial governments are of the same bureaucratic rank. Bureaucratic rank is particularly important in China as agencies at the same rank cannot issue binding orders to each other. A question then arises: when there is a conflict between these two principals, whose preference takes priority? In order for the system to operate smoothly, the Chinese government specifies the primary line of leadership as administrative leadership, whereas the secondary line of leadership is professional leadership. With the exception of a few vertically integrated ministries, the provincial governments control the appointment of personnel and the budget of most of the provincial bureaus and thus it has the primary line of leadership over those agencies. Meanwhile, the central ministries issue guidelines, instructions and non-binding directives to the provincial bureaus. In the case of DRC and AIC authorities, the provincial governments have the primary line of control as they control local authorities’ personnel appointment and budget. Therefore, the preference of the provincial government takes priority over that of NDRC and SAIC.

And when does the preference of the provincial governments diverge from that of NDRC and SAIC? This again has to do with the bureaucratic incentive structure. As central ministries are organized by function or by sector, they have their own often well-defined spheres of responsibility. In comparison, provincial governments have all-encompassing responsibilities since their organizational

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177 Id.
178 Id.
179 Id.
180 LIEBERTHAL, supra note 61, at 236.
181 HUANG, supra note 17, at 60.
182 See LIEBERTHAL & OKSENBERG, supra note 5, at 149.
183 Interview with an AIC official.
structures mimic the organization of the central government. Huang notes that the division between provincial bureaucrats and ministerial bureaucrats corresponds roughly to multi-task bureaucrats and single-task bureaucrats. When an agent needs to perform multiple tasks, it becomes more costly to monitor the agent and evaluate its performance directly. To align the interest of the principal and the agent, it is therefore more efficient to give the agent high-powered incentive rather than direct monitoring.

This theoretical prediction thus makes it easy to understand the logic behind the mechanisms the central government applies to control provincial governments. First, the central government controls the career paths of provincial leaders using the nonmenkatura cadre management system. Second, the central government awards high power incentives to the provincial governments by expanding their financial autonomy and sharing with them the economic surplus. Known as fiscal decentralization, the scheme has been regarded as the cornerstone of the CCP leaders’ political strategy to build support for economic reform. Indeed, these unique features of coexisting highly centralized personnel control and highly decentralized regional autonomy have led economist Chenggang Xu to characterize China as a “regionally decentralized authoritarian regime.”

But decentralization is a double-edged sword. While it provides regional governments with the incentives to focus on tasks that are more directly observable and measurable (e.g. GDP growth and foreign direct investment), it also induces moral hazard—for example, ignoring those tasks that are less-measurable and less-observable. Soon after fiscal decentralization was introduced in 1980, local protectionism began to emerge. As regional governments competed fiercely for economic growth within their own jurisdictions, decentralization increased the incentives as well as the range of political means for local governments to erect trade barriers and ban imports.

The consequences of local protectionism are severe. First, it artificially carves up a large single Chinese market into smaller

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184 Huang, supra note 55, at 67.
185 Id.
186 Id., at 69-74. Huang notes a number of indirect mechanisms that aim at aligning the preferences of provincial leaders with those of the central government, such as cross-posting, appointment, rotation and promotion.
187 SHIRK, supra note 16, at 149. See also Xu, supra note 17, at 1098-07.
188 Id.
189 Xu, supra note 17, at 1078.
190 Id., at 1129.
191 SHIRK, supra note 16, at 186.
192 See Montinola et al., supra note 17, at 65.
segments and reduces the size of the market as well as the quality of market demand.\textsuperscript{193} Second, it alters the industry structure of the Chinese economy. For both political and economic reasons, regional governments have incentives to impose a variety of formal and informal constraints on firms to prevent them from expanding outside of their own territories.\textsuperscript{194} This results in a paradoxical phenomenon. When Chinese industries are assessed on a national level, the concentration is very low because firms tend to be small and uncompetitive compared with their foreign counterparts.\textsuperscript{195} At the same time, despite the lack of competitiveness of these regional firms, monopolies can arise as regional governments erect trade barriers to prevent imports into their jurisdictions.

Over the past three decades, the central government has exerted significant effort to police the common market. In 1980, the State Council issued a regulation prohibiting regional blockades in purchasing and marketing industrial products—a piece of regulation that has often been deemed the first competition law in China.\textsuperscript{196} Since then, the central government has repeatedly intervened and issued decrees to curb regional protectionism.\textsuperscript{197} But the effects of these measures to police the common market are ambiguous and economists are still debating intensely whether regional economic fragmentation has worsened during the reform.\textsuperscript{198} In fact, the AML has devoted a chapter on “administrative monopoly” specifically designed to tackle issues of local protectionism. But the actual enforcement against “administrative monopolies” is very weak.\textsuperscript{199} In late 2013, 12 central ministries, including MOFCOM, the Legal Affairs Office of the State Council, NDRC, and the Ministry of Finance and State Administration of Taxation, jointly released a notice on overhauling regional blockade rules for industries across the country.\textsuperscript{200} The fact that the removal of regional blockade remains a high priority for the central government testifies to the persistence and severity of the problem of local protectionism.

\textbf{B. The Predicament of Local Enforcement}

When provincial governments engaged in a race to the bottom by erecting trade barriers and banning imports from other regions, they

\begin{itemize}
  \item \textsuperscript{193} HUANG, supra note 17, at 313.
  \item \textsuperscript{194} \textit{Id.}, at 271-72.
  \item \textsuperscript{195} See World Bank Report 2030, supra note 2, at 112.
  \item \textsuperscript{197} Xu, supra note 17, at 1134
  \item \textsuperscript{198} \textit{Id.}, at 1134-35.
  \item \textsuperscript{199} See Xu Shiyiing & Zhang Baisha, Judicial and Administrative Remedies against Administrative Monopoly: Cases and Analysis, in CHINA’S ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS 271, supra note 4, at 274-85.
\end{itemize}
created market conditions conducive to the rise of monopolies at the local level. This explains local enforcement agencies’ lack of interest in tackling regional monopolies, as these monopolies are deemed local champions and are important contributors to the local GDP. On the other hand, if it is local protectionism that has contributed to the lax local enforcement, one should expect local authorities to have no interest in bringing any antitrust cases at all. But that isn’t true either because all of the 13 cases announced by SAIC were initiated by local authorities. The answer to this puzzle again has to do with the bureaucratic incentive structures of AICs. Over the years, AICs have seen their power encroached by other government agencies, such as those in charge of product quality, intellectual property and food safety.²⁰¹ Some local AIC officials are therefore concerned about their careers and the continuing existence of their departments.²⁰² Antitrust enforcement thus provides AIC officials with a new form of policy control and accordingly is deemed an exciting new venture.²⁰³ Notably, in some jurisdictions administrative fining is an important source of revenue for local governments; indeed, the salaries and bonuses of AIC officials are evaluated with regard to whether they have fulfilled the fining target set by local governments.²⁰⁴ Such an odd compensation scheme turns local officials into high-powered incentive agents and gives them perverse incentives to aggressively fine companies before meeting the target but then to postpone their enforcement once the target is fulfilled.²⁰⁵

Another reason has to do with the bureaucratic structure of AICs. Concerned about rampant food and pharmaceutical safety issues, the central government requested in 1998 that a number of government departments in charge of product quality (including provincial AICs) consolidate their offices within their respective provincial regions and become vertically integrated.²⁰⁶ Vertical integration means that each provincial AIC exercises administrative leadership over all AIC offices within its respective region and controls their personnel and budgets.²⁰⁷ Therefore, provincial AICs have primary leadership over those agencies, and thus their preferences take priority over those of lower-level regional governments. Not surprisingly, some provincial AIC offices have incentives to encourage AIC offices to tackle small local monopolies arising at the lower regional level (i.e., the city, county or township level). However, in 2011 the State Council removed the requirement for vertical integration of AIC offices at the provincial level, and thus some provinces again delegated primary

²⁰¹ Interview with a government official at a central ministry.
²⁰² Id.
²⁰³ Id.
²⁰⁴ Id.
²⁰⁵ Id.
²⁰⁶ Interview with an AIC official. For detailed analysis of this structural change, see Andrew C. Mertha, *China’s “Soft” Centralization: Shifting Tiao/Kuai Authority Relations*, 184 CHINA Q. 791 (2005).
leadership to lower regional governments. It should be noted that there is no vertical integration with provincial DRCs; each level of the regional government has administrative leadership over the DRC office in its respective region.

VI. CONCLUSION AND IMPLICATIONS

Judge Posner once famously said that “antitrust deals with what are at root economic phenomena.” This succinct statement spells out the underlying logic of antitrust, which allows governments to intervene when the market fails. But when the AML is asked to deal with rampant protectionism by local governments and to tackle the monopolistic behaviour of SOEs, it then deals with what are not at root market failures, but rather government failures. The idiosyncrasies of China’s antitrust law are found not only in its intentions, but also in its enforcement process. Upon opening the black box of the political decision-making process, we find that antitrust enforcement in China is in fact a highly pluralistic process involving officials from various central government ministries and local government agencies. Their incentive structure and the formal and tacit rules of the Chinese bureaucracy shape the enforcement outcome of the AML. Posner’s statement therefore demands a modification when applied to the Chinese context: there antitrust law deals with what are at root not economic phenomena, but rather political phenomena.

Contrary to some of the existing literature, Chinese agencies are not aiming to maximize national interests, but rather to pursue their own particularistic interests. Therefore, protectionism is not the cause of the politicized enforcement but rather its outcome. Although the CCP clearly has a monopoly on governmental power in China that includes law enforcement, authority below the very peak of the political system is fragmented and disjointed. When the CCP

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209 RICHARD A. POSNER, ANTITRUST LAW 1 (2nd ed. 2001).
210 It should be noted that it is quite common for antitrust law to have other aspirations than economic efficiency and that China is not unique in this regard. EU competition law, for instance, has been tasked with the overriding political goal of creating a single market, which does not necessarily coincide with the objective of maximizing economic efficiency. See Commission Notice on Guidelines on Vertical Restraints OJ 2010 C 130/1, ¶ 100 (explicitly incorporating the single market objective into the vertical guidelines). Another example is Consten & Grundig v. Commission, 56 and 58/64, [1996] ECR 299. See also VALENTINE KORAH, AN INTRODUCTORY GUIDE TO EC COMPETITION LAW AND PRACTICE 66-68 (9th ed., 2007) (criticizing the European Commission’s mechanical application of the single market goal without properly taking into account the economic effects.)
211 LIEBERTHAL & OKSENBERG, supra note 5, at 8.
leadership delegates authority to various agencies with overlapping functions and competing missions and objectives, power becomes fragmented among various government actors. The endless struggle among these government actors for control of policy therefore accounts for the heterogeneity of China’s seemingly paradoxical antitrust enforcement outcome. As illustrated in consensus building in merger enforcement, the incorporation of industrial policy into merger decisions is in fact the result of a protracted process that involves intense negotiation and bargaining between MOFCOM and the other government agencies who have a say in AML enforcement.

For the most part, China’s antitrust enforcement is a centralized process promoted by MOFCOM, NDRC and SAIC in Beijing. For these central technocrats, the main objective is to maximize their departments’ policy control, which is directly tied to their factional interests and hence their career prospects. As each Chinese enforcement agency is nested within different ministries, their divergent responsibilities and political missions shape their enforcement priorities, as amply demonstrated in the case of NDRC’s attempt to use the AML as a tool to maintain price stability and fulfil industrial policy goals. At the same time, the central government’s attempt to use the AML as a tool to police the internal common market seems unlikely to be successful. While local enforcement agencies clearly desire to increase their antitrust policy control, they are faced with the constraints imposed by local governments, whose preference takes priority over that of the central ministries. Accordingly, unless central ministries intervene, the reliance on local enforcement is unlikely to be effective in tackling local monopolies, particularly those that are supported by strong political ties with local governments.

Although this Article is limited to China, its findings have implications for the general study of antitrust law in transitional economies. Antitrust law was first built upon a market economy where the government was only called upon to intervene when the market was imperfect. But as antitrust law globalizes and proliferates in other parts of the world, including transitional economies such as China, the functions of the law have changed. The AML was not only called upon to correct market imperfections, but also institutional imperfections such as economic fragmentation and entrenched state-owned monopolies—outcomes of deliberate political choices made by the Chinese leadership. Moreover, as antitrust law was initially enforced in democratic countries with strong judicial oversight of government actions, antitrust scholars have often neglected the complex bureaucratic process itself as an important determinant of antitrust policy outcomes. China is an excellent example illustrating how bureaucratic politics matter for antitrust enforcement. Indeed, without effective judicial supervision, Chinese enforcement agencies have essentially monopolized the administrative enforcement of the AML and turned it into an elusive political process. This also suggests that without addressing the fundamental problems with the underpinning institutions (e.g. lack of
judicial independence), any proposal to reform AML enforcement is only likely to generate cosmetic results.

The findings in this Article also have general implications for the study of other areas of Chinese law. China is a vast country, and the enforcement of its laws often relies upon a large decentralized network of administrative agencies. Examination of the bureaucratic structure of administrative enforcement, the policy processes, and the incentives and constraints faced by enforcement agencies within the CCP-dominated hierarchy is therefore essential to understanding the law enforcement outcome.

Over the past three decades, China has proven to the world that it is able to carry out successful economic transformations without political reform. But the liberalization of the economy has produced pressure for political reform. Without effective judicial oversight, arbitrary enforcement of the AML is bound to do more harm than good in regulating the Chinese economy. This bodes ill for further market reform in China. The enforcement of the AML is therefore another example of the predicament the Chinese leadership faces in governing and reforming the country.