Bureaucratic Politics and China’s Anti-Monopoly Law

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Introduction

Few areas of Chinese law can rival the attention that the Anti-Monopoly Law (AML) has drawn at home and abroad since its enactment on August 1, 2008.1 In China, the AML has long been heralded as the economic constitution.2 Academics and the Chinese public have high expecta-

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tions that the AML will help remove regional trade barriers and stimulate the reform of state-owned firms (SOEs). 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. As China is an essential part of the global market, the enforcement of the AML has begun to affect 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 by Chinese policymakers to a changing economic and foreign policy environment. Such a view appears to stem from the notion that the AML enforcement outcome is a result of reasoned debates among a cohesive group of Chinese policymakers who have the single, unifying goal of maximizing national interest. For instance, scholars and practitioners observe that China’s entry into the World Trade Organization (WTO) in 2001 suddenly revived and accelerated the effort to draft the AML 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 firms. This legislative background, coupled with the ambiguity of the objectives in the AML’s 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


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


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.

For sure, 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 the conventional analysis had predicted. Since the AML’s enactment in 2008, Chinese enforcement agencies have not only applied the AML to large multinational companies, but have also frequently applied it to private domestic firms and SOEs. Moreover, some enforcement agencies have vowed to focus their enforcement efforts in a number of areas that are dominated by large state-owned monopolies, such as those within the oil, banking, and telecommunication industries. This 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 failure to closely study the operation of the Chinese government bureaucracy and the incentives of the government actors involved. As Douglas North once stated: “institutions are the rules of the game in a society or, more formally, are the humanly devised constraints that shape human interaction.” 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 policy-making processes. Notably, while some scholars have recently started to adopt an institutional design perspective to study AML enforcement, they have yet to situate institutional dynamics in a broader political and economic context.

9. See, e.g., Nathan Bush & Yue Bo, Disentangling Industrial Policy and Competition Policy in China, ANTITRUST SOURCE, 2–4 (Feb. 2011) (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. INDUS. ORG. 109, 111–12 (2012) (noting the growing sentiments of economic patriotism and the rising concern that foreign firms’ dominance in China was among the driving factors behind the adoption of the AML and the prohibition decision of Coca-Cola/Huiyuan).

10. See, e.g., Zheng, supra note 5, at 671–720; see also Fei & Leonard, supra note 5, at 60–64.

11. See infra Part III on NDRC’s recent antitrust investigations involving various economic actors.


14. See generally Angela Huyue Zhang, The Enforcement of China’s Anti-Monopoly Law: An Institutional Design Perspective, 56 ANTITRUST BULL. 631 (2011); Yong Huang &
In a departure from previous analyses, this Article is the first attempt to conduct an in-depth investigation of Chinese bureaucratic politics 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 expert on Chinese political economy.15 Contrary to the conventional notion that Chinese policymakers have a single, unifying goal to maximize national interests, the Article finds that Chinese antitrust enforcement outcomes largely result from a struggle among government agencies which decide antitrust issues in terms of the personal consequence for their stature and power. The claim here is not that Chinese AML is free of protectionism and discrimination—far from it, as will be elaborated upon 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.

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, however, 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 studies on incomplete contracting and moral hazard, which have been applied to study the design of incentives of government bureaucracy.16 The second strand is political

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15. See YASHENG HUANG, INFLATION AND INVESTMENT CONTROL IN CHINA [xix](1996) (Although Huang’s argument is based on his observation of the political control of China’s monetary policy, it also applies strikingly well in this context).

scientists’ rich description and deep analysis of China’s bureaucratic structure and policymaking process.\textsuperscript{17} This is combined with a third strand of literature exploring Chinese economic institutions, such as studies on economic decentralization and fragmentation.\textsuperscript{18} 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 information gathered from extensive interviews with officials from various government departments and organizations, judges, and lawyers who have been closely involved in Chinese antitrust practice.\textsuperscript{19}

The Article proceeds as follows. Part I begins by posing the fundamental question as to why the political decision-making process matters in the Chinese context. Part II studies the bureaucratic structure and policymaking process by exploring a peculiar phenomenon in Chinese antitrust enforcement: the coordination between Chinese enforcement agencies and 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 III 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 than 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 IV examines the local enforcement agencies’ enforcement records, their incentive structures, and the constraints they face during enforcement.

I. Why Bureaucratic Politics Matter

In his seminal paper “The Nature of the Firm,” Ronald Coase posed


\textsuperscript{18} See generally Gabriella Montinola, Federalism, Chinese Style: the Political Basis for Economic Success in China, 48 World Politics 50 (1995); see also Yasheng Huang, Selling China: Foreign Direct Investment During the Reform Era 260–307(2003); see also Chenggang Xu, The Fundamental Institutions of China’s Reforms and Development, 49 J. Econ. Literature 1076, 1076 (2011).

\textsuperscript{19} As those individuals who agreed to be interviewed wish to remain anonymous, the Article will only identify the interviewees with very general terms of institutional affiliation.
the fundamental question of why firms exist. In an ideal world where economic actors can effortlessly transact with each other, firms are not needed in the first place as every activity could be organized using market transactions. In the practical context, firms exist because transacting in the market is costly; thus, a hierarchical structure, like a firm, arises to overcome these market failures and creates efficiency by reducing transaction costs. Meanwhile, the boundaries of the firm are determined by the point where internal organization is more efficient than external contracting.

Coase’s finding that firms operate as hierarchies illuminates the governance structure that China’s Communist Party (CCP) adopted to operate the Chinese economy during the early years of its rule. 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 no need for antitrust law. Thus, antitrust law only became necessary when China opened its economy and embarked on market reform. However, 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. This shows that one cannot possibly sever political determinants from the study of the AML; they constitute 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 to regulation—the contract is very incomplete. There are contingencies that are inevitably unforeseen by the law, and the law does not spell out the rules and procedures to be followed in every conceivable circumstance in precise detail. This is especially true for antitrust law, which is fundamentally tasked with assessing 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

20. Ronald H. Coase, The Nature of the Firm, 4 ECONOMICA 386, 390 (1937) (hereinafter The Nature of the Firm). According to Coase, his interest in the nature of the firm stemmed from his observation of the communist system: “Lenin had said that the economic system in Russia would be run as one big factory. However, many economists in the West maintained that this was an impossibility. And yet there were factories in the West and some of them were extremely large. How could the views expressed by economists on the role of the pricing system and the impossibility of successful central economic planning be reconciled with the existence of management and of these apparently planned societies, that is, firms operating within our own economy?” See RONALD H. COASE, ESSAYS ON ECONOMICS AND ECONOMISTS 7 (1994).
22. See id. at 395.
23. See Montinola et al., supra note 18, at 52.
antitrust law based on the form of conduct rather than on economic effects. The responsibility of assessing behaviour thus falls on the shoulders of law enforcers, including administrative agencies and the judiciary, both of which 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 gained from a successful prosecution, discounted by the probability of successful prosecution. 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. 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. Independent judiciaries provide democratic countries with the ultimate safeguard on legal interpretation and enforcement by government agencies. In China, however, the CCP maintains residual control of the law; that is, the CCP makes the final determination on how to interpret and enforce the law.

B. The Lack of Judicial Oversight

Since the AML went into effect, no defendant has appealed any administrative decision made by the enforcement agencies. China’s Administrative Litigation Law of 1989, which allows citizens to bring lawsuits against government agencies, proved to be a false hope for the establishment of rule of law in China. Haibo He, a Tsinghua law professor who

25. Owen et al., supra note 5, at 124.
27. See id. (“Discounting is required in order to reflect the fact that a case is less worthwhile if . . . there is a smaller chance of the agency’s winning it.”).
28. See Montinola et al., supra note 18, 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.
30. Based on publicly available information, there has not been a case in which a defendant appealed an administrative decision by Chinese antitrust agencies as of the end of 2013. This is confirmed by an interview with a judge at the Supreme People’s Court (Jan. 3, 2014).
has closely followed the developments of Chinese administrative law over the past decade, concluded that the institution of administrative litigation fails to achieve constitutional governance in China and only impacts social change on a severely limited level. Based on the national statistical data produced by the Supreme People’s Court, he found a puzzling phenomenon in Chinese administrative litigation: from 1987 to 2010 the rate of plaintiff withdrawal never fell below 30%, and in some years it exceeded 50%. Among those withdrawn cases, over 50% of them (over 90% from 2003 to 2010) were initiated by plaintiffs without any action by the defendants 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, and among those cases, 92.8% were withdrawn by the plaintiffs without any action to revoke or modify by the defendants; the plaintiffs won the administrative suits in only 7.8% of those cases.

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 these businesses back. First, businesses could face a serious backlash when they deal with the enforcement agencies in the future. Since each of the enforcement agencies is nested within ministries that operate like a large conglomerate, businesses fear retaliation not only from those bureaus responsible for antitrust enforcement, but also from other bureaus within these powerful ministries which have regulatory control over various aspects of their businesses. Moreover, the utility of appealing administrative 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 demands. 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 because they “cooperated with the investigating authorities and actively rectified the issues once they came to light,” whereas those firms deemed less cooperative suffered hefty

more recent works (available only in Chinese), see Qihui Huang, Xingzheng Susong Yishen Shenpan Zhuangkuan Yanjiu [Research on Administrative Litigation at Courts of First Instance], 7 T SINGHUA L. J. 73 (2013); Chunhua Zhu, Xingzheng Susong Ershen Shenpan Zhuangkuan Yanjiu [Research on the Administrative Litigation at Courts of Second Instance], 7 T SINGHUA L. J. 86 (2013).

33. Id. at 261-63.
34. Id. at 263-64.
35. Id. at 263.
fines. This practice is very unusual in other jurisdictions, where immunity is normally only granted to firms that volunteer to help antitrust authorities uncover secret cartels. However, 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 and has handled more than 100 civil antitrust actions since the enactment of the AML. While plaintiffs rarely succeed in private enforcement, Chinese judges have been praised for being more adept with economic reasoning and analysis. 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 to handle civil cases, the Court has not issued guidelines on the judicial review of administrative cases. Generally speaking, judges at the Administrative Tribunal are in charge of hearing administrative cases. However, because antitrust enforcement is often highly technical and requires substantial economic analysis, there are doubts about the ability of judges to handle such cases.

38. See id.
39. 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 (promulgated by the Supreme People’s Court, Jan. 30, 2012, effective June 1, 2012) (Lawinfochina) (China).
41. Id. at 264 (noting only two cases in which plaintiffs have won).
44. Telephone interview with a judge at the Intermediate People’s Court (Jan. 17, 2014). 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 established, the Civil Tribunal can handle administrative cases.
about whether judges at the Administrative Tribunal are equipped with sufficient expertise to handle antitrust cases.45

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 all become essential to understanding the enforcement outcome of the AML.

II. 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 this task to the government.46 While the CCP has permeated every level of the Chinese government, the CCP and the government are organizationally distinct.47 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.48 Therefore, the Politburo delegates the implementation of the AML to the State Council, which in turn delegates these tasks to various ministries. Specifically, the primary enforcement responsibilities of the AML are split among three administrative agencies: MOFCOM, NDRC, and SAIC. Specifically, 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, I will examine MOFCOM’s enforcement action since it is the most active player among the three enforcement agencies and is often viewed as being at the forefront in formulating Chinese antitrust policy.

45. Telephone interview with a judge at the Supreme People’s Court (Jan. 3, 2014). 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.

46. Political scientists have long observed a principal-agent relationship between the CCP and the government. See, e.g., Susan Shirk, The Chinese Political System and the Political Strategy of Economic Reform, in BUREAUCRACY, POLITICS, AND DECISION MAKING IN POST-MAO CHINA, supra note 17, at 59, 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; however, the crucial difference between communist and democratic systems is the political accountability of principals).

47. Shirk, supra note 46, at 55.

48. Telephone interviews with a government official at a central ministry (Jan. 8, 2014). This is consistent with an observation made by Cheng Li, an expert on Chinese leadership. See Cheng Li, China’s Economic Decisionmakers, CHINA BUSINESS REV, 21 (March/Apr., 2008), available at http://www.brookings.edu~/media/research/files/articles/2008/3/03%20china%20li/03_china_li.pdf (stating that five members of the Politburo standing committee focus on non-economic issues such as institutional and legal development).
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.\footnote{Provisions of the State Council on Thresholds for Prior Notification of Concentrations of Undertakings (promulgated by the State Council, Aug. 1, 2008, effective Aug. 1, 2008) (China).} Chinese merger notification thresholds are based on the sales revenue of the transacting parties.\footnote{Id.} 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 reviewing offshore merger transactions between large multinational companies; very often those transactions have little nexus with the Chinese market.\footnote{During the first five years of its enforcement, MOFCOM has reviewed a total of 643 cases. It blocked one transaction and imposed remedies on twenty mergers. The vast majority of the twenty 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/article/ztxx/; see also MOFCOM Press Release, MOFCOM Achieved Significant Positive Developments with Antitrust Enforcement, MOFCOM Press Release (Aug. 2, 2013), http://www.mofcom.gov.cn/article/ae/ai/201308/20130800226124.shtml (last visited Nov. 3, 2014); Fei Deng & Cunzhen Huang, A Five Year Review of Merger Enforcement in China, 13 THE ANTITRUST SOURCE 1, 5–7 (2013).}

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), which has a body of competition law that is followed by many jurisdictions all over the world. But there are two features that have made the Chinese jurisdiction stand apart from all others. First, the merger notification process in China is notoriously protracted. Large multinational companies increasingly find that their merger transactions are held up by MOFCOM’s clearance decisions. For instance, in Google/Motorola, China was the last jurisdiction to clear the transaction.\footnote{See Google Wins Chinese Approval for Motorola Bid, BBC NEWS BUSINESS (May 21, 2012), http://www.bbc.com/news/business-18140940.} In fact, MOFCOM did not clear the transaction until the last day of the statutory review period.\footnote{No. 25 of 2012 Announcement Regarding the Conditional Approval of the Anti-Monopoly Review of Google’s Acquisition of Motorola, MOFCOM (May 19, 2012), http://fldj.mofcom.gov.cn/article/ztxx/201205/20120508134324.shtml (last visited Nov. 3, 2014).} In some cases where merging parties had not reached a desirable outcome with MOFCOM, the agency required or encouraged the parties to withdraw their filings and re-file.\footnote{Deng & Huang, supra note 51, at 5.} Thus, in some cases, MOFCOM’s review time significantly exceeds the statutory
review period.\textsuperscript{55} Additionally, it has been observed that, unlike other large merger jurisdictions—particularly the United States and the EU—where merger review is nowadays primarily economics-based, MOFCOM often incorporates non-competition factors (particularly industrial policies) into its analyses.\textsuperscript{56} As such, there is often suspicion among the international business community that MOFCOM applies the AML to protect domestic industries from foreign competition.\textsuperscript{57}

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.\textsuperscript{58} 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 with 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.\textsuperscript{59} The consulting process is rather opaque and MOFCOM does not discuss the information it obtains from these government agencies with the disputing parties.\textsuperscript{60} In fact, the more government departments are involved in the consulting process, the more unpredictable it becomes; sometimes the delays are not within MOFCOM’s control.\textsuperscript{61} Moreover, because MOFCOM’s final decisions are influenced by opinions and comments from other government agencies such as NDRC and MIIT, their decisions sometimes appear inconsistent with economic-based principles and international standards.\textsuperscript{62}

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 deeper into the Chinese bureaucratic structure and political decision-making process.

\textsuperscript{55} Id. (This phenomenon has been observed in a number of conditional approval cases including Western Digital/Hitachi, Glencore/Xstrata, Marubeni/Gavilon, and MediaTeck/MStar).

\textsuperscript{56} D. Daniel Sokol, Merger Control Under China’s Anti-Monopoly Law, 10 N.Y.U. J.L. & Bus. 1, 14–16 (2013).


\textsuperscript{58} Huang & Li, supra note 14, at 9.

\textsuperscript{59} Id. at 20.

\textsuperscript{60} Deng & Huang, supra note 51, at 10.

\textsuperscript{61} Telephone interviews with a government official at a central ministry (Jan. 7, 2014).

\textsuperscript{62} Id.
A. Management by Exception

China is a vast country. On the official organizational chart (see Figure 1 below), the Chinese bureaucracy is divided into a central government and local governments. 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. The management of such a huge bureaucracy is not an easy task.

Figure 1: Official Organization of Chinese Bureaucracy

Using a principal-agent model, Huang examines Chinese bureaucratic structure by dividing it into two levels. (See Figure 2 below). The first level, the “control level,” consists of the Politburo and the State Council, which sit at the top of China’s political hierarchy. The Politburo is the supreme decision-making body for all major strategic matters in the country; the State Council is responsible for transforming the Politburo’s strategic decisions into concrete policies. The second level, the “controlled level,” is comprised of ministerial and provincial agencies.

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63. Zhonghua Renming Gong He Guo Xingzheng Quhua Tongji Biao [The Statistics of Administrative Divisions] (as of Dec. 31, 2011), Ministry of Civ. Affairs of the People’s Republic of China, http://qhs.mca.gov.cn/article/zlzx/qhtj/201203/20120300282479.shtml (last visited Oct. 16, 2014) (Note that Taiwan, Hong Kong, and Macau are not included as provincial units in Figure 1).


65. Id. at 66.

66. Id.

67. Id. at 66–67.
The logic behind such division is two-fold: first, the agencies at the control level appoint the leaders of the agencies that make up the controlled level; second, the divergence of preferences is sharpest between these two levels. 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. 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 appoint only the top level officials at the controlled 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 develops an informational advantage over the principal, the agent can vary the quality and quantity of

68. Id. at 68.
69. Id. at 67.
70. Id.
71. Id.
72. Id. at 67–68.
74. Id. at 236–37.
75. See id. at 233–39 (discussing the political process of decision-making and how this framework can be fit into a principal agent context); see also LIEBERTHAL & OksenberG, supra note 6, at 30.
its efforts, particularly those that are unobservable by the principal.\textsuperscript{76} 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”;\textsuperscript{77} at each bureaucratic level, agency representatives make decisions by a rule of consensus.\textsuperscript{78} If the representatives at one level all agree, the decision is automatically ratified at the higher level.\textsuperscript{79} Otherwise, the decision will be referred to authorities at a higher level who will either step in to make the decision, or allow the matter to be dropped until consensus can be reached.\textsuperscript{80}

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 either by function (e.g., education, culture, finance) or by economic sector (e.g., agriculture, telecommunication, transportation).\textsuperscript{81} This complex structure gives virtual (i.e. nonelectoral) representation to the economic groups and interests that the CCP leadership depends on for political support.\textsuperscript{82} This structure also provides some checks and balances among the agencies; each of the agencies has a particular mission and is expected to pursue it with zeal.\textsuperscript{83} 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.\textsuperscript{84} Accordingly, delegation by consensus is deemed more efficient because it relieves the top CCP leadership of the trouble of constant intervention in the policy process.\textsuperscript{85} When consensus cannot be reached, the issue will be pushed to the top so that the superior can exploit the information advantage it obtains through different subordinate agencies.\textsuperscript{86}

One direct consequence of “management by exception” is that power becomes fragmented when it comes to policymaking and implementation.\textsuperscript{87} The existence of massive, parallel, and interdependent bureaucra-

\textsuperscript{76} Dixit, supra note 16, at 86–88.
\textsuperscript{77} Shirk, supra note 17, at 116 n. 1 (noting that “delegation by consensus” is “identical to what management specialists call ‘management by exception’”); see also Lieberthal & Oksenberg, supra note 6, at 23–24 (discussing how consensus building is integral to political process in the Chinese system of government).
\textsuperscript{78} Shirk, supra note 17, at 116–17.
\textsuperscript{79} Id. at 116.
\textsuperscript{80} Id.
\textsuperscript{81} Id. at 93.
\textsuperscript{82} Id. at 99.
\textsuperscript{83} Lieberthal & Oksenberg, supra note 6, at 29.
\textsuperscript{84} Id. See also Shirk, supra note 17, at 98–99.
\textsuperscript{85} Shirk, supra note 17, at 117.
\textsuperscript{86} See id. at 116–17.
\textsuperscript{87} See Lieberthal & Oksenberg, supra note 6, at 22; see also Kenneth Lieberthal, Introduction: The “Fragmented Authoritarianism” Model and Its Limitations, in Bureaucracy, Politics, and Decision-Making in Post-Mao China, supra note 17, at 9, 12.
cies 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 processes in China.\footnote{88} 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 their jurisdictions.\footnote{89} Within the energy sector, for instance, they found that a single ministry or province usually lacks sufficient clout to launch or sustain a big project or major new policy.\footnote{90} Such fragmentation of authority thus demands elaborate efforts of consensus building at each stage of the decision-making process.\footnote{91}

David Lampton’s studies on bargaining in Chinese politics shed similar light in this respect.\footnote{92} He finds that bargaining among bureaucracies with similar political resources and bureaucratic ranks is so frequent and ubiquitous that policymaking becomes protracted and inefficient.\footnote{93} As he notes: “Americans 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.”\footnote{94} Susan Shirk also observes that because each participant at the bargaining table has veto power, policies that emerge from this system tend to be incremental rather than radical.\footnote{95} Moreover, if there are more participants involved in the decision-making process, policy consensus becomes more elusive.\footnote{96}

B. Consensus Building in Merger Enforcement

Due to the lack of judicial oversight, the Chinese government has effectively monopolized the whole antitrust 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 which was responsible for orchestrating the activities of the three enforcement agencies.\footnote{97} The AMC was first headed by Qishan Wang, the then-vice premier in charge of

\footnote{88. See generally Lieberthal & Oksenberg, supra note 6, at 22–31. For more recent works on fragmented authoritarianism, see Mertha, supra note 17, at 995–96.}
\footnote{89. Mertha, supra note 17, at 996.}
\footnote{90. See Lieberthal & Oksenberg, supra note 6, at 23.}
\footnote{91. Id. at 22–23.}
\footnote{92. See David M. Lampton, A Plum for a Peach: Bargaining, Interest and Bureaucratic Politics in China, in Bureaucracy, Politics, and Decision-Making in Post-Mao China, supra note 17, at 33, 34–35.}
\footnote{93. Id. at 34–35, 57.}
\footnote{94. Id. at 35.}
\footnote{95. Shirk, supra note 17, at 127.}
\footnote{96. See id. (“The larger and less stable the set of participants, the more elusive is policy consensus.”).}
\footnote{97. The AML, supra note 1, art. 9.}
the economic bureaucratic system. The heads of NDRC, SAIC, and MOFCOM, as well as a deputy secretary-general of the State Council, serve as deputy directors. The AMC also consists of fourteen commissioners, including the incumbent deputy heads of various ministries and institutions under the State Council. As a consulting and coordinating organization, the AMC does not undertake any specific enforcement activity; rather, it operates only through meetings. In practice, the commissioners rarely hold formal meetings to discuss antitrust issues and the day-to-day work is assigned to MOFCOM. Despite the inactivity of the AMC, it has officially bestowed authority upon various ministries and organizations to engage in antitrust affairs. Its structure of authority implies that no single ministry has the clout to unilaterally 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 is in effect a consensus-building process within the Chinese bureaucracy—similar to economic policy- and decision-making in China.

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

99. Id.
100. See id. 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.
102. See Hao, supra note 14, at 23 (“[E]xcept for its issuance of the Guidelines on the Definition of the Relevant Market in 2009, the AMC itself has remained mostly invisible to the public.”).
103. The AMC has set up a secretariat office within MOFCOM.
104. Telephone interviews with government officials at central ministries (Jan. 7–8, 2014).
(meaning “countersign”) procedure in China. The huiqian procedure has long been practiced among ministerial agencies, despite the absence of formal rules or procedures. Moreover, the State Council Working Procedure Rules explicitly state that the decision-making process used by each ministry and organization underneath the State Council must be democratic and scientific. In addition, the State Council Working Procedure Rules specify that, if the State Council needs to be notified of important matters, it will require prior extensive research and consulting, including sufficient cooperation with other relevant government departments. In practice, government agencies that 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. Consistent with prior studies conducted 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. 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.

Because 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 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 in merger review, the staff at MOFCOM has neither the capacity nor the sufficient expertise on various industry sectors to conduct merger review. As MOFCOM cannot solely rely on information provided by the merging parties, the “huiqian” procedure thus becomes part of an important market investigation process. In 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.

105. Id.

106. Id.


108. Id. at art. 23.

109. Telephone interviews with government officials at a central ministry (Jan. 7–8, 2014).

110. Id.

111. Id.

112. Telephone interview with a government official at a central ministry (Jan. 7, 2014).

113. Id.
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 that has its self-interests harmed will fight fiercely against the decision. This is not necessarily the optimal outcome for the nation as a whole; to maximize national interest, the self-interests of some government actors may need to be sacrificed when the overall social benefits outweigh the costs.

Although MOFCOM has an interest in consulting other government departments, it does not necessarily incorporate all of their opinions. As each government agency is presumed to represent its own particular interests, there are often 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.\textsuperscript{114} Therefore, in many circumstances compromise is a necessity because it is usually not possible to please everyone. In fact, while some government agencies have complained that MOFCOM has “delegated” too much work to the agencies by consulting them too frequently, they have also complained that the opinions they provided during consultation have not all been adopted by MOFCOM.\textsuperscript{115} However, because the “huiqian” procedure is a repeated game, an agency that refuses to compromise with other agencies faces potential retaliation when it wants to propose a decision or policy the next time.\textsuperscript{116} Therefore, anticipating that they will need MOFCOM’s cooperation in the future, government agencies tend to seek compromise with MOFCOM.\textsuperscript{117} 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 depend on the relative power of the factional networks which those government agencies represent vis-a-vis MOFCOM.\textsuperscript{118}

III. 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 is primarily responsible for non-price-related behaviour.\textsuperscript{119} Currently, NDRC and

\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
SAIC have about 15 and 8 people, respectively, in Beijing who are responsible for antitrust enforcement. While staff capacity at the central ministries is low, these agencies have thousands of staff members at the local level who have authority to enforce the AML. In the first three years of the AML’s enforcement, both agencies seemed engaged in capacity building and drafting implementing guidelines. The few cases that they have disclosed were initiated by local bureaus involving small domestic private companies, where the amount of the fine was so small that it hardly attracted any attention from the public or legal community. 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 was only catching the flies but not the tigers.

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. This was the first antitrust investigation of Chinese SOEs and marked a turning point in Chinese antitrust enforcement. Since then, Chinese antitrust enforcement has seemingly taken a great leap forward. So far, NDRC has investigated a number of high profile cases and has imposed remedies and hefty fines on a variety of influential economic actors. These include private domestic pharmaceutical companies; large multinational companies, including manufacturers of LCD panels and milk powder companies; SOEs owned by local governments.

120. Telephone interviews with a government official at a central ministry (Jan. 6, 2014).
121. Id. Notably, NDRC added 150 staff members to the local enforcement units in 2011.
122. The decisions disclosed by NDRC are available on its website: http://jjs.ndrc.gov.cn; the decisions disclosed by SAIC are available on its website: http://www.saic.gov.cn/zwgk/gggs/jzzf/ [hereinafter SAIC’s decisions].
127. See Milk Powder Decision, supra note 37. Contrary to most media reports, not all the milk powder companies investigated are foreign companies. In fact, Biostime Inc. (Guangzhou), the company that received the largest fine, is a Chinese company. See Matters in relation to the Administrative Punishment Decision Received by a Subsidiary of the Group And Resumption of Trading, BAOSTIME INT’L HOLDING LTD. (Aug. 7, 2013), http://www.hkexnews.hk/listedco/listconews/sehk/2013/0807/LTN20130807015.pdf.
including the premium white liquor companies Maotai and Wuliangye; and gold retailers in Shanghai. Very recently, NDRC has also begun to investigate American technology firms such as Qualcomm and InterDigital. These investigations have attracted heightened attention, as both companies rely heavily on the Chinese market to license standard-essential patents (SEPs) to domestic firms, and because these investigations appear to have been initiated by complaints from domestic firms.

When compared to the actions of NDRC, the actions of SAIC seem to be more cautious and conservative. As of October 31, 2014, SAIC has publicly disclosed only sixteen cases on its website, all of which were investigated by local offices and involved small, local companies and insignificant fines and remedies. It wasn’t until 2013 that SAIC announced that it had launched an investigation against Tetra Pak, a large Swedish packing firm, for conducting tying activity in China. The antitrust bureau at NDRC in Beijing has a larger staff than its counterpart at SAIC, but this fact alone seems insufficient to account for the divergent patterns of enforcement. Since the responsibility for antitrust enforcement is split between NDRC and SAIC, both agencies have an interest in competing against each other for antitrust policy 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 their responsibilities based on whether a behaviour is price-
related? The answers to these questions lie in the incentive structure for 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 an endless struggle for policy control among various levels of Chinese government agencies. This is because administrative intervention in the market creates valuable resources for Chinese government officials, who can then appropriate those resources 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 in secret, abundant literature on Chinese politics identifies intraparty factions as the key to understanding political power in China.

Due to the lack of an institutionalized mechanism for succession and of clear indicators of power, Chinese leaders face constant threats to their power. In order to gain support, these leaders form factions in which a loose group of lower officials have an incentive to support senior officials in any potential challenges. Senior officials acquire their factions as they cultivate professional relationships 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 through which appointments, economic goods, and policy power are channelled. As Lucian Pye elucidated: The prime basis for factions among cadres is the search for career security and the protection of power.

In China, all factions are formed with a single ultimate goal—power. However, not all factions are created in the same fashion, and each is endowed with different resources and memberships. Government officials working at central ministries are often called central technocrats.

135. See generally LIEBERTHAL & Oksenberg, supra note 6 at 22–31; see also Lampton, supra note 92, at 57 (discussing how decisions are also made very slowly, and each level of the government focuses on tailoring the decision to fit its own interest).

136. SHIRR, supra note 17, at 142.


138. See Shih, supra note 17, at 4.

139. Id.

140. Id. See also Nathan, supra note 137, at 43.

141. See id.

142. Id.

143. See Pye, supra note 137, at 6.

144. Huang, supra note 137, at 412.

145. Shih, supra note 17, at 4.
Compared with generalists such as governors at the provincial government levels, 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. Most central technocrats spend their whole career within the same organization and rise vertically within it, absorbing and serving its particular ideology; 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 the resources available to agencies controlled by faction members. As Victor Shih, who closely studies the politics of Chinese monetary policy, stated, the more control an agency has over an important policy area, the more likely it will be that that agency can capitalize on such power to accumulate administrative merits ("zhengji"), thus paving the way for the faction leaders to rise to the top level of the CCP hierarchy.

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 main competitive arena. As each of them is nested within ministries that operate like large conglomerates, they all have divergent responsibilities and missions. In particular, NDRC is an agency mainly in charge of macroeconomic management and industrial planning, as elaborated upon in detail below. MOFCOM is primarily responsible for formulating and implementing both inbound and outbound policies of trade and investment. 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 crowning achievements. Not surprisingly, MOFCOM is generally seen as more liberal and pro-market than other agencies, such as NDRC, with respect to economic affairs. As one MOFCOM official says: “If we don’t advocate for free

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146. See id. at 5.
147. Id. at 9–10.
148. Id. at 5.
149. Shirk, supra note 17, at 100.
150. See Sun, supra note 17, at 4–5.
151. Id. at 5.
152. See id. at 54.
markets, how could we promote trade—which is our main business?"\(^{156}\)
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.\(^{157}\) As each of these three agencies had the incentive to maximize its own bureaucratic interests, their divergent missions shaped their enforcement agendas during the implementation of the AML. For central technocrats working at these ministries, antitrust enforcement is simply another way of 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, NDRC in reality stands out as the far more powerful and interventionist ministry due to its rich historical and political background. The predecessor of NDRC was the State Planning Commission (SPC). Founded in 1952, the SPC played a crucial role when the Chinese economy was still centrally planned.\(^{158}\) Also known as the little State Council, the SPC was in charge of the organization of both production and distribution of major commodities, as well as the construction of significant projects.\(^{159}\) It focused primarily on macroeconomic management and on achieving balance amongst the three key segments in the economy: finance, material supplies, and labor.\(^{160}\) The SPC went through several restructurings and reorganizations over the years.\(^{161}\) The biggest restructuring took place in 2003, two years after China joined the WTO.\(^{162}\) 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 in order to implement the SPC’s economic plans.\(^{163}\) The State Council also removed “planning” from the SPC’s name and replaced it with “reform and development,” in order to be seen more compatible with China’s goal of building a market economy.

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156. Telephone interview with a government official at a central ministry (Jan. 7, 2014).
158. LIEBERTHAL & OKSENBERG, supra note 6, at 64.
159. Id.
160. Id.
163. See LIEBERTHAL & OKSENBERG, supra note 6, at 72.
Despite this name change, NDRC continued to rely on direct government intervention to solve most economic problems;\textsuperscript{164} this is not surprising, since promoting government intervention is directly related to NDRC’s own bureaucratic interests.\textsuperscript{165} 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.\textsuperscript{166} The Price Bureau 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.\textsuperscript{167} The Price Supervision and Anti-monopoly Bureau is in charge of preventing price instability, controlling inflation, and enforcing antitrust laws. Currently, the Price Supervision and Anti-Monopoly Bureau is composed of 46 people; one-third are in charge of antitrust enforcement, while the rest are responsible for price supervision.\textsuperscript{168}

Since the 1980s, NDRC—including its price control departments—saw a significant decrease in its power.\textsuperscript{169} Prices of commodities were increasingly 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, since the financial crisis in 2008, NDRC has clawed its way back to dominance due in large part to Hu Jingtao-Wen Jiabao’s government focusing more on redistribution and welfare at the expense of further market reform.\textsuperscript{170} They note that NDRC took advantage of economic conditions during the crisis and won strong support from the top Chinese leaders to take charge of a series of important government interventionist measures, including the battle against inflation.\textsuperscript{171}

\textsuperscript{164}. See id. See also Roberts, supra note 162.
\textsuperscript{165}. Barry Naughton, Since the National People’s Congress: Personnel and Programs of Economic Reform Begin to Emerge, 41 CHINA LEADERSHIP MONITOR 1, 2 (June 2013), available at http://www.hoover.org/sites/default/files/uploads/documents/CLM41BN.pdf.
\textsuperscript{168}. Telephone interviews with government officials at a central ministry (Jan. 6, 2013).
\textsuperscript{170}. Barry Naughton, Inflation, Welfare and the Political Business Cycle, 35 CHINA LEADERSHIP MONITOR 1, 7 (2011), available at http://media.hoover.org/sites/default/files/documents/CLM35BN.pdf. 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. See Telephone interview with a government official at a central ministry (Jan. 14, 2014).
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. For the CCP leadership, inflation is not purely an economic matter; it is also a highly sensitive political matter that has been associated repeatedly with political failures and turmoil in recent Chinese history.\textsuperscript{172} Therefore, when inflation became out of control in 2010, Chinese policymakers elevated the fight against inflation to the highest priority.\textsuperscript{173} This provided NDRC with a golden opportunity to step back into the policymaking limelight. From December 2010, NDRC closely monitored the daily prices of primary food products and pressured merchants not to increase prices.\textsuperscript{174}

In 2011, NDRC started a massive campaign to mobilize merchants, chambers of commerce, and the public to “whip inflation now.”\textsuperscript{175} For example, in April 2011, NDRC invited a number of private chambers of commerce to meet and pressured them not to increase prices.\textsuperscript{176} As a result, 24 of 28 Federation chambers of commerce signed an undertaking to stabilize prices.\textsuperscript{177} In May 2011, the Shanghai Price Bureau, a local agency of the Price Supervision and Anti-Monopoly Bureau of NDRC, fined Unilever RMB 2 million for publicly disseminating its intention to raise prices and for violating the Price Law.\textsuperscript{178} The punishment followed NDRC’s “informal chatting” with Unilever and a number of other leading household goods manufacturers earlier that month, during which NDRC suggested that the manufacturers refrain from increasing prices.\textsuperscript{179} NDRC’s punishment was, however, ineffective, as Unilever reportedly raised prices in May 2011.\textsuperscript{180} This time, however, there was nothing that NDRC could do as Unilever unilaterally raised prices without making a public announcement.\textsuperscript{181}

\textsuperscript{172} Naughton, The Inflation Battle: Juggling Three Swords Leadership, supra note 171, at 1–2 (associating inflation events with political turmoil such as unrest at Tiananmen Square in 1989).

\textsuperscript{173} Naughton, Inflation, Welfare and the Political Business Cycle, supra note 170, at 2.

\textsuperscript{174} Id. at 3.

\textsuperscript{175} Id.

\textsuperscript{176} Id. at 4.

\textsuperscript{177} Id.

\textsuperscript{178} Lian He Li Hua Sanbu Zhangjia Xingxi Raoluan Shichang Zhixu Shoudao Yanli Chufa [Unilever Received Harsh Penalty for Disseminating Price Increase Information and Disrupting Market Order], NDRC PRESS RELEASE (May 6, 2011), http://www.sdpc.gov.cn/lzggg/zhd/201105/t20110506_410568.html (last visited Nov. 4, 2014).


\textsuperscript{181} Id.
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 appearing as though NDRC is undermining market forces. Two recent, high-profile cases illustrate this point. Both cases concerned minimum resale price maintenance (RPM) conduct by wholesale manufacturers. The first case involved Maotai and Wuliangye, two premium Chinese liquor companies that had imposed price restraints on their distributors and penalized those selling liquor at a discount (the white liquor case). The second case involved a number of high-end infant formula powder manufacturers that had allegedly fixed the downstream retail prices of their products and had adopted various measures to prevent discounting by retailers (the milk powder case). Notably, white liquor and milk powder are two products that have been closely monitored by NDRC. In 2008, NDRC invoked Article 30 of the Price Law, authorizing the government to temporarily intervene in certain pricing decisions in the case of emergent inflationary pressures; 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. In 2011, on separate occasions, NDRC invited manufacturers of infant formula milk powder and premium white liquor for “informal chatting” and pressured them to refrain from increasing prices; however, these companies con-
continued to raise prices despite repeated warnings from NDRC.188

The complaints about their RPM practices therefore provided NDRC with the perfect opportunity to rein in the white liquor and infant formula powder 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 eleven percent.189 Other milk powder manufacturers quickly followed suit.190 In the end, Wyeth and two other infant formula manufacturers were rewarded with total immunity for proactive cooperation with NDRC, while the other three manufacturers received a fine totaling RMB 668 million.191 From an antitrust law perspective, however, it is unusual that these milk powder manufacturers would agree to lower their prices as part of the proposed remedies for a RPM case. Such an “unusual” remedy is, however, perfectly consistent with our hypothesis that NDRC’s main goal for the investigation was to control prices; these manufacturers simply gave NDRC what it wanted.192

Indeed, almost all of the major cases brought in the last three years by NDRC have involved basic daily consumption goods that have been subject to price monitoring, including pharmaceutical products, dairy products, liquor, broadband access, and consumer electronics.193 The only exception is NDRC’s recent investigation into a cartel involving Shanghai gold retailers.194 But a closer look at that case reveals that it too was 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 to buy gold.195 Gold hoarding signals price instability and the fragility of the Chinese economy.196 NDRC’s antitrust investigation into col-
exclusive pricing among gold retailers thus served the function of “cooling down” gold hoarding behavior. In fact, NDRC has not shied away from making it 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 the department would continue to prioritize its enforcement efforts against price-related monopolies in six major industries: aviation, household chemicals, automobiles, telecoms, pharmaceuticals, and home appliances.197

In addition to price control, NDRC has another important mission: formulating industrial policy and coordinating industry planning.198 It allocates this responsibility to the Industry Coordination Bureau, a sister bureau of the Price Supervision and Anti-monopoly Bureau and the Price Bureau. The same deputy director, Zucai Hu, simultaneously oversees these three bureaus.199 (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 investigations include current antitrust probes into American technology firms such as Qualcomm and InterDigital.200 In both cases, Chinese manufacturers rely heavily on SEPs provided by the American firms, and thus an NDRC antitrust investigation can provide these Chinese manufacturers with more bargaining power during negotiations for the license of SEPs.201

Figure 3: Lines of Authority at NDRC

198. Main Functions of the NDRC, supra note 119.
199. See id.
201. See id.; see also InterDigital News, supra note 130.
IV. 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.\textsuperscript{202} NDRC and SAIC can delegate their enforcement responsibilities to their corresponding local authorities—the Development Reform Commission (DRC) and Administration for Industry and Commerce (AIC), respectively—and thus, in theory, each agency has thousands of staff members to carry out antitrust enforcement functions.\textsuperscript{203} Based on the decisions disclosed by NDRC and SAIC, local antitrust agencies initiated and enforced the vast majority of cases. For instance, as of October 31, 2014, SAIC has publicly announced sixteen decisions, all of which were initiated and investigated by local AIC agencies with SAIC providing professional support.\textsuperscript{204} Considering SAIC’s vast network of enforcement staff at the local level, this record is hardly impressive. In fact, authorities from only eleven provinces brought those sixteen cases, meaning that almost two-thirds of the provinces have not brought a single antitrust case in the past five years.\textsuperscript{205}

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), NDRC in Beijing in fact took the lead behind the scenes.\textsuperscript{206} For instance, NDRC first initiated the white liquor case, and only subsequently was enforcement authority delegated to local DRC authorities.\textsuperscript{207} Critics also note that the fines imposed on Maotai and Wuliangye were too lenient as these two firms were only fined 1% of annual sales in 2012.\textsuperscript{208} 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.\textsuperscript{209} Shanghai DRC had long been aware of the collusive practices among these large gold retailers,\textsuperscript{210} but until that point it had only tried to persuade them to cease such practices

\textsuperscript{202} While MOFCOM also has corresponding bureaus at the provincial level, those provincial bureaus are not in charge of merger review.

\textsuperscript{203} Telephone interview with a government official at a central ministry (Jan. 6, 2014). 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.

\textsuperscript{204} See SAIC’s decisions, supra note 122.

\textsuperscript{205} See id.

\textsuperscript{206} Telephone interview with a government official at a central ministry (Jan. 6, 2014).

\textsuperscript{207} Id.


\textsuperscript{209} Telephone interview with an antitrust lawyer involved in this case (Dec. 8, 2014).

\textsuperscript{210} Id.
without resorting to any legal action.\textsuperscript{211} These gold retailers had not been investigated for AML violations until a tipoff to NDRC in Beijing.\textsuperscript{212} So how do we explain the apparent lack of interest in prosecuting antitrust cases demonstrated by local AIC and DRC authorities? Again, the answer lies in the incentive structure of local enforcement agencies and the constraints these agencies face in the CCP-hierarchy.

A. Decentralized Regional Autonomy

The Chinese bureaucratic system is unitary. Local governments derive their authority from the central government.\textsuperscript{213} 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.\textsuperscript{214} Therefore, the provincial antitrust bureau simultaneously serves two principals—the provincial government and the ministry in Beijing.\textsuperscript{215} However, within the CCP hierarchy, ministries and provincial governments are of the same bureaucratic rank.\textsuperscript{216} Bureaucratic rank remains particularly important in China because agencies at the same rank cannot issue binding orders to each other.\textsuperscript{217} A question then arises: when there is a conflict between the provincial government and the ministry, whose preference takes priority? For the system to operate smoothly, the Chinese government specifies that the primary line of leadership is administrative leadership, and 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; thus, the provincial governments have the primary line of leadership over those agencies.\textsuperscript{218} Meanwhile, the central ministries issue guidelines, instructions and non-binding directives to the provincial bureaus.\textsuperscript{219} In the case of DRC and AIC authorities, the provincial governments have the primary line of control because they control local authorities’ personnel appointments and budget.\textsuperscript{220} Therefore, the provincial governments’ preference takes priority over that of NDRC and SAIC.

When does the provincial governments’ preferences diverge from that of NDRC and SAIC? The answer again has to do with the bureaucratic incentive structure. Since central ministries are organized by function or
by sector, they have their own often well-defined spheres of responsibility.221 In comparison, provincial governments have all-encompassing responsibilities because their organizational structures mimic the organization of the central government.222 Huang notes that the division between provincial bureaucrats and ministerial bureaucrats corresponds roughly to multi-task bureaucrats and single-task bureaucrats.223 When an agent needs to perform multiple tasks, it becomes more costly to monitor the agent and evaluate his performance directly.224 To align the interest of the principal and the agent, it is therefore more efficient to give the agent a high-powered incentive rather than rely on direct monitoring.

This theoretical prediction thus makes it easy to understand the logic behind the mechanisms that the central government applies to control provincial governments. First, the central government controls the career paths of provincial leaders using the nomenklatura cadre management system.225 Second, the central government awards high-powered incentives to the provincial governments by expanding their financial autonomy and sharing the economic surplus with them.226 Known as fiscal decentralization, the scheme has been regarded as the cornerstone of the CCP leaders’ political strategy to build support for economic reform.227 These coexisting features of highly centralized personnel control and highly decentralized regional autonomy have led economist Chenggang Xu to characterize China as a “regionally decentralized authoritarian regime.”228

But decentralization is a double-edged sword. While it provides regional governments with 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.229 Soon after fiscal decentralization was introduced in 1980, local protectionism began to emerge.230 As regional governments competed fiercely for economic growth within their own jurisdictions, decentralization increased the incentives as well as the range of political means through which local governments could erect trade barriers and ban imports.231

The consequences of local protectionism are severe. First, it artificially carves up a large single Chinese market into smaller segments, reducing the size of the market as well as the quality of market demand.232

221. Huang, supra note 64, at 66–67.
222. Id. at 67–68.
223. Id. at 68.
224. See id.
225. Id. at 69–74 (Noting 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).
226. SHIRK, supra note 17, at 149; see also Xu, supra note 18, at 1098–107.
228. Id.
229. See id. at 1129.
230. SHIRK, supra note 17, at 186
231. See Montinola et al., supra note 18, at 65.
232. HUANG, supra note 18, at 313.
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.\footnote{233} 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.\footnote{234} At the same time, despite the lack of competitiveness of these regional firms, monopolies can still 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 on purchasing and marketing industrial products—a piece of regulation that has often been deemed the first competition law in China.\footnote{235} Since then, the central government has repeatedly intervened and issued decrees to curb regional protectionism.\footnote{236} But the effects of these measures to police the common market are ambiguous, and economists are still intensely debating whether regional economic fragmentation has worsened during the reform.\footnote{237} In fact, the AML has devoted a chapter on “administrative monopoly” which is specifically designed to tackle issues of local protectionism.\footnote{238} Unfortunately, actual enforcement against “administrative monopolies” is very weak.\footnote{239} In late 2013, twelve 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.\footnote{240} The fact that the removal of regional blockades remains a high priority for the central government testifies to the persistence and severity of the problem of local protectionism.

\footnote{233. Id. at 271–72.}
\footnote{234. See World Bank Report 2030, supra note 3, at 112.}
\footnote{236. Xu, supra note 18, at 1134.}
\footnote{237. Id. at 1134–35.}
\footnote{238. The AML, supra note 1, ch. V.}
\footnote{239. See generally Xu Shiyang & Zhang Baisha, Judicial and Administrative Remedies against Administrative Monopoly: Cases and Analysis, in CHINA’S ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS, supra note 5, at 271.}
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 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 is also not true, as all of the sixteen 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 upon by other government agencies, such as those in charge of product quality, intellectual property, and food safety. Some local AIC officials are therefore concerned about their careers and the continuing existence of their departments. Antitrust enforcement thus provides AIC officials with a new form of policy control and accordingly is deemed an exciting new venture. Notably, in some jurisdictions administrative fining is an important source of revenue for local governments who set a fining target and then evaluate the salaries and bonuses of AIC officials with regards to whether they have achieved that fining target. Odd compensation schemes like this turn local officials into high-powered incentive agents and gives them perverse incentives to aggressively fine companies until they meet the target, and then postpone enforcement once the target is fulfilled.

Another reason that regional monopolies escape local enforcement is 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. Vertical integration means that each provincial AIC exercises administrative leadership over all AIC offices within its respective region and controls their personnel and budgets. 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

241. Interview with a government official at a central ministry (Jan. 6, 2014).
242. Id.
243. Id.
244. Id.
245. Id.
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 leadership to lower regional governments.248 It should also 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.249

Conclusion and Implications

Judge Posner once famously said that “antitrust deals with what are at root economic phenomena.”250 This succinct statement captures 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.251 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. The 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.

Although the CCP clearly has a monopoly on governmental power in China, including law enforcement, authority below the very peak of the political system is fragmented and disjointed.252 When the CCP leadership delegates authority to various agencies with overlapping functions and competing missions and objectives, power becomes fragmented among

251. It should be noted that it is quite common for antitrust law to have aspirations other 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 2010 O.J. (C 130/1) 100 (explicitly incorporating the single market objective into the vertical guidelines and discussing potentially negative effects of vertical restraints); see also Joined Cases 56 & 58/64, Consten & Grundig v. Commission, 1996 E.C.R. 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).
252. LIEBERTHAL & OKSENBERG, supra note 6, at 8.
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. Conventional analysis of the AML therefore puts the cart before the horse in arguing that Chinese policymakers have the single objective of maximizing national interests in adopting and implementing the AML. This wrongly assumes that policy enforcement is determined by economic objectives. But protectionism is not the cause of the politicized enforcement—rather, it is its outcome. As illustrated by 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 that 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 central technocrats employed at these agencies, their 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 a different ministry, 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 fulfill 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, which have preferences that take 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 called upon not only 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 that illustrates how bureaucratic politics matter for antitrust enforcement. Without effective judicial supervision, Chinese enforcement agencies have essentially monopolized the administrative enforcement of the AML and turned it into an elusive politi-
cal process. This also suggests that any proposal to reform AML enforcement that fails to address the fundamental problems with the underpinning institutions (e.g., lack of judicial independence) is likely to only 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 hinges 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 in turn 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 does not bode well for further market reform in China. The enforcement of the AML is therefore another example of the predicament that the Chinese leadership faces in governing and reforming the country.