

# *Fordham International Law Journal*

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*Volume 41, Issue 2*

*Article 5*

REGINA A. LOUGHRAN MEMORIAL ISSUE

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## The Role of Media in Antitrust: Evidence from China

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## ARTICLE

### THE ROLE OF MEDIA IN ANTITRUST: EVIDENCE FROM CHINA

*Angela Huyue Zhang\**

#### ABSTRACT

*This Article examines the media, a neglected but important institution that plays a role in influencing Chinese antitrust enforcement. Drawing from the methodology used in communication studies, the Article conducted a content analysis of 1,394 news reports on six high-profile Chinese antitrust investigations from 2008 to 2015. The findings demonstrate that in reporting antitrust investigations, Chinese media tends to be biased against firms under investigation. Instead of providing a balanced and objective account of the story, the media was an effective conduit for amplifying the populist concern, and aided and abetted the regulator in advancing its enforcement. The Article argues that such an outcome is driven by at least three factors: the regulator's strategic leakage of information to state-controlled media, the rarity of public dissents of agency decisions, and the populist pressures for lower prices and nationalism.*

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### *I. INTRODUCTION*

China is the second-largest economy in the world. However, it was not until 2007 that it passed the Anti-Monopoly Law (“AML”), its first modern antitrust legislation. Since the AML went into effect in 2008, antitrust investigations have made constant headlines in China. In 2009, Coca-Cola’s bid for Huiyuan, a domestic juice manufacturer, generated a fierce debate among the Chinese public about whether a famous domestic brand should be swallowed by a large foreign multinational.<sup>1</sup> The deal was ultimately blocked by the Ministry of Commerce (“MOFCOM”), causing a stir in the business and legal communities.<sup>2</sup> In 2011, the National Development and Reform Commission (the “NDRC”) made a surprise announcement of its investigation into China Telecom and China Unicom on the China Central Television (“CCTV”).<sup>3</sup> This unusual move led to a public row among several state-controlled media outlets and ignited a heated debate about antitrust regulation of state-owned enterprises

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1. *See infra* Section VI.B.

2. David Barboza, *China Blocks Coke Bid for Juice Maker*, *NEW YORK TIMES* (Mar. 18, 2009), <http://www.nytimes.com/2009/03/19/business/worldbusiness/19coke.html> [https://perm a.cc/Z8QG-ATRG] (archived on Jan. 3, 2018).

3. *See infra* Section IV.A.

(“SOEs”).<sup>4</sup> In less than two months, China Telecom and China Unicom relented and offered remedies and requested that the investigation be suspended.<sup>5</sup> Two years later, the NDRC applied the same tactic by publicly announcing its investigation into nine infant formula manufacturers on the CCTV.<sup>6</sup> Before the agency formally imposed any legal sanction, infant formula producers had already started announcing significant price reductions of their products.<sup>7</sup> These episodes suggest that the media may play a role in influencing antitrust enforcement in China. What are the mechanisms through which the media can potentially influence public enforcement of the AML? Is there a bias in the media’s coverage of antitrust investigations in China? What are the factors driving the supply and demand of media content?

Chinese antitrust enforcement presents an excellent setting for examining the role of the media in law enforcement. First, Chinese antitrust cases are often very visible—this is due not only to the prominence of the targets involved, but also to the fact that many of the cases involve daily consumer products or services. The media has an interest in covering these cases, as they directly concern consumer prices and relate to the welfare of the general public. Second, China only started to enforce its AML eight years ago, so the media has not yet established a long track record of imposing reputational penalties on firms subject to antitrust investigations. Otherwise, firms would not commit such violations in the first place or would quickly yield to the agency’s demands to avoid negative publicity. As such, the early years of the enforcement of the AML provide us with a unique opportunity to observe a transient stage when the authority of the antitrust enforcement agency has not been well-established. Third, China lacks the western-style of legal governance, with an independent court providing effective checks on administrative abuse.<sup>8</sup> Despite hectic enforcement by Chinese antitrust agencies and mounting complaints lodged by foreign businesses with their chambers of commerce, there have thus far been few challenges to

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4. *Id.*

5. *Id.*

6. *See infra* Section IV.B.

7. *Id.*

8. Angela Huyue Zhang, *Bureaucratic Politics and China’s Anti-Monopoly Law*, 47 CORNELL INT’L L. J. 671, 677-80 (2014).

public antitrust enforcement.<sup>9</sup> As a consequence, the power to enforce the law is monopolized by the government, which leaves much room for other non-competition factors to influence its enforcement agenda and outcomes.

Using media content analysis,<sup>10</sup> I conducted a close examination of 1,394 news reports on six Chinese high-profile antitrust investigations from 2008 to 2015. I have several major findings. First, in two cases, Chinese antitrust regulators strategically leaked information about their investigations to the CCTV. Such leaking helped the agency obtain the first mover advantage to shape the editorial slant and leverage the public opinion to push forward its investigation. Although on one occasion, two powerful SOEs launched a media campaign to defend themselves, there was no countervailing effort from other private domestic or foreign firms. Second, due to the lack of judicial checks on agency discretion, there is little market demand for expert criticisms of agency decisions. As such, domestic antitrust experts are disincentivized to voice dissent,

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9. Indeed, foreign multinational companies have voiced mounting complaints against Chinese antitrust authorities for deficiencies in transparency and due process. In a survey conducted by the US-China Business Council in 2014, over eighty six percent of the surveyed companies indicated that they were “somewhat” or “very” concerned about the AML enforcement, citing issues such as discrimination, lack of due process and regulatory transparency, and use of noncompetition factors as major concerns. The reports released by the Chambers of Commerce in both the United States and Europe also contained scathing criticisms of China’s hectic antitrust enforcement in recent years. *See* US-China Business Council, *USCBC 2014 CHINA BUSINESS ENVIRONMENT SURVEY RESULTS: GROWTH CONTINUES AMIDST RISING*, 20 (2014), <https://www.uschina.org/reports/uscbc-2014-china-business-environment-survey-results> [<https://perma.cc/37ZY-KDB3>] (last visited Jan. 3, 2018); US CHAMBER OF COMM., *COMPETING INTERESTS IN CHINA’S COMPETITION LAW ENFORCEMENT: CHINA’S ANTI-MONOPOLY LAW APPLICATION AND THE ROLE OF INDUSTRIAL POLICY*, 77-78 (2014), [https://www.uschamber.com/sites/default/files/aml\\_final\\_090814\\_final\\_locked.pdf](https://www.uschamber.com/sites/default/files/aml_final_090814_final_locked.pdf) [<https://perma.cc/A9TH-NDX8>] (last visited Jan. 3, 2018) (The US Chamber of Commerce accused the Chinese government of using the AML to advance industrial policy goals at the expense of free competition, curtailing intellectual property protection of foreign firms, and enforcing the AML without an adequate due process safeguard.); *see also* European Chamber of Commerce, *European Chamber Releases Statement On China AML-Related Investigations* (August 13, 2014), <http://www.european-chamber.com.cn/en/press-releases/2132/european-chamber-releases-statement-on-china-aml-related-investigations> [<https://perma.cc/6WZR-LEXT>] (last visited Jan. 3, 2018) (“It [The Commerce] had received numerous alarming anecdotal accounts from a number of sectors that administrative intimidation tactics are being used to impel companies to accept punishments and remedies without full hearings. Practices such as informing companies not to challenge the investigations, bring lawyers to the hearings or involve their respective governments or chambers of commerce are contrary to best practices.”).

10. KIMBERLY A. NEUENDORF, *THE CONTENT ANALYSIS GUIDEBOOK* (2d ed. 2017).

which dampens the frequency of public criticism of antitrust intervention. Third, the Chinese media as a whole shows little interest in understanding the legal merits of antitrust cases and the media coverage caters to the populist demands for lower prices and nationalist concerns. Thus, the Chinese media lacks the incentive to expose criticisms over regulatory intervention and the editorial slant tends to spin in the direction that is damaging to the company under investigation. The media becomes a conduit for amplifying the populist concern, aiding and abetting the regulator in advancing its enforcement.

This Article contributes to several strands of literature. First, in a series of papers, Dyck, Zingales, and their coauthors conducted the seminal work of exploring the role of media in corporate governance.<sup>11</sup> Using evidence from Russia, another country beset by weak legal institutions, they found that foreign media coverage could be strategically employed to discipline corporate governance violations of firms.<sup>12</sup> This Article examines the role of the media in another area of law enforcement and another jurisdiction. In contrast to Dyck's findings that domestic media did not have an impact on corporate governance in Russia, this Article identifies some preliminary evidence suggesting that domestic media in China can be a powerful influence upon enforcement outcomes in Chinese antitrust law.

Second, this Article contributes to the study of the relationship between competition and truth in the news market. As with any other product on the market, the quantity and the quality of the information produced by the media depends on both supply and demand. Thus far, economic literature has found that competition is effective in eliminating media bias from the supply side, but the evidence of the media bias driven by consumer demand is inconclusive.<sup>13</sup> Mullainathan and Shleifer argued that competition does not enhance accuracy, as long as consumers would rather read less accurate news

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11. ALEXANDER DYCK & LUIGI ZINGALES, *The Bubble and the Media*, in CORPORATE GOVERNANCE AND CAPITAL FLOWS IN A GLOBAL ECONOMY (Peter K. Cornelius & Bruce Kogut eds., 2002); Alexander Dyck et al., *The Corporate Governance Role of the Media: Evidence from Russia*, 63 J. FIN. 1093 (2008); Alexander Dyck et al., *Who Blows the Whistle on Corporate Fraud*, 65 J. FIN. 2213 (2010).

12. Dyck et al., *supra* note 11.

13. See Matthew Gentzkow & Jesse M. Shapiro, *Competition and Truth in the Market for News*, 22 J. ECON. PERSPECTIVE 133, 114-15 (2008) (giving a comprehensive review of the literature).

than have their personal beliefs challenged.<sup>14</sup> Gentzkow and Shapiro reached the opposite conclusion in their paper, but their conclusion was drawn upon a different assumption that readers' confirmatory preferences are driven by a desire for accuracy.<sup>15</sup> The media bias identified in this Article seems to confirm the insights of Mullainathan and Shleifer. As illustrated in the studies of cases involving resale price maintenance ("RPM") practices, the competition among commercialized media outlets in China did not improve accuracy in reporting; rather, it appears to worsen the biases in many instances.

Third, this Article also relates to a strand of literature on empirical studies on media bias in China. Until now, most empirical studies of media bias have been staged in settings with strong democratic characteristics, and empirical studies on the role of the media in authoritarian regimes remain a nascent field. One study finds that the surge of commercial newspapers in China can reduce readers' exposure to highly biased newspapers but does not diminish the political bias within the same newspapers.<sup>16</sup> Another recent study identifies evidence suggesting that commercialization allows Chinese newspapers to attenuate political influences and cater better to the preferences of consumers.<sup>17</sup> In a departure from these studies, this research explores media bias in covering corporate misconduct, a topic that is generally deemed non-sensitive and is not subject to tight political control. This Article thus attempts to fill in a gap in the literature in understanding how Chinese media uncovers non-politically sensitive commercial news.

Fourth, the Article contributes to the study of the media's role in the Chinese legal system. Liebman pioneered the study in examining the dual role that the media has played in influencing judicial decisions: on the one hand, extensive media coverage of a case can

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14. See generally Sendhill Mullainathan & Andrei Shleifer, *The Market for News*, 95 *AM. ECON. REV.* 1031 (2005).

15. See generally Matthew Gentzkow & Jesse M. Shapiro, *Media Bias and Reputation*, 114 *J. POL. ECON.* 280 (2006).

16. Bei Qin *et al.*, *Media Bias in Autocracies: Evidence from China* (Sept. 2014), <http://www-bcf.usc.edu/~yanhuiwu/MediaBias1.pdf> [<https://perma.cc/2BM8-AVX4>] (last visited Jan. 3, 2018).

17. Joseph D. Piotroski *et al.*, *Political Bias of Corporate News in China: Role of Commercialization and Conglomeration Reforms*, (May 2016) (unpublished research paper, Stanford University Graduate School of Business), <http://ssrn.com/abstract=2674780> [<https://perma.cc/GW3D-MZR9>] (last visited Jan. 3, 2018).

pressure courts to act more carefully and fairly, but on the contrary, it could also encourage more political intervention in the courtroom, predetermine the outcomes of cases, and strengthen the Chinese Communist Party (the Party)'s control over the court.<sup>18</sup> This Article focuses on a different aspect of the legal system and examines how media coverage influences public enforcement of administrative law. As illustrated by the case studies below, rather than injecting more checks and balances into the legal system, extensive media coverage of an antitrust investigation could exacerbate the biases against investigated firms. This is consistent with the findings by Stockman and Gallagher in their study of labor law related disputes in China, where the authors found that the media content hewed closely to the Party line.<sup>19</sup>

Finally, this Article contributes to the institutionally-oriented research on antitrust law. Antitrust law made significant strides in the 20<sup>th</sup> century by incorporating more economic insights into its analysis. While the criteria in legal analysis have become more objective, the power to enforce the law lies with the institutional actors. In an ideal setting, antitrust regulators should set their enforcement agenda independently, enforce the law non-discriminatorily, and observe due process requirements, whereas an independent judiciary should provide an effective check on administrative discretion and agency abuse.<sup>20</sup> China's experience with antitrust enforcement reveals the potential risks in adopting an antitrust law without such institutional safeguards. The effects of the media in influencing antitrust investigation is another example of how extralegal factors could affect the enforcement outcomes of the AML in China.

The Article is organized as follows. Part II sets the stage by introducing the institutional background of the Chinese newspaper industry and the mechanisms through which the media can influence public enforcement of the AML. Part III describes the methodology and data used in analyzing the cases. Part IV uses two high-profile antitrust investigations to illustrate how the NDRC strategically manipulated the supply of media content and successfully mobilized

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18. BENJAMIN L. LIEBMAN, *Changing Media, Changing Courts*, in CHANGING MEDIA, CHANGING CHINA 151 (Susan L. Shirk ed., 2011).

19. Daniela Stockmann & Mary E. Gallagher, *Remote Control: How the Media Sustain Authoritarian Rule in China*, 44 COMP. POL. STUD. 1, 23 (2011).

20. William E. Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 BROOK. J. INT'L L. 403, 409-13(1997).



public sentiment to push forward its investigations. Part V analyzes the disincentives among Chinese antitrust lawyers and academics to voice criticisms over antitrust intervention. In particular, it performs a content study of the incident involving the dismissal of Zhang Xinzhu, a renowned antitrust expert, from a government advisory committee. Part VI turns to the demand side bias and analyzes how populist concerns could drive media coverage of antitrust investigations. It studies the editorial slant in three RPM investigations and a merger review involving Coca-Cola's attempted acquisition of a well-known domestic brand. Part VII concludes.

## II. INSTITUTIONAL BACKGROUND

The Chinese media was once called “the mouth and tongue” of the party.<sup>21</sup> Liebman observes that the industry is subject to regulation by a complicated “web of formal and informal regulation.”<sup>22</sup> In 2016, Reporters Without Borders ranked China 176<sup>th</sup> out of 180 countries in its index of press freedom.<sup>23</sup> The Freedom House called China “one of the world’s most restrictive media environments” and gave it a press freedom score of 87 out of 100 (with 100 being the worst) in 2016.<sup>24</sup> Meanwhile, China also has one of the world’s most dynamic media markets, and its advertising expenditure ranked only after the United States in 2015.<sup>25</sup>

Chinese media went through significant transformations in several rounds of reform. The first reform carried out in the 1990s led to the commercialization of many newspapers that focus on reporting financial and economic news.<sup>26</sup> Unlike party newspapers, which are still tightly controlled by the local communist party organization and propaganda departments, many commercial newspapers have become

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21. Benjamin L. Liebman, *Watchdog or Demagogue? The Media in the Chinese System*, 105 COLUM. L. REV. 1, 15 (2005); SUSAN L. SHIRK, CHINA: FRAGILE SUPERPOWER 85 (2007).

22. Liebman, *supra* note 21, at 41.

23. REPORTERS WITHOUT BORDERS, 2016 WORLD PRESS FREEDOM INDEX, <https://rsf.org/en/ranking> [<https://perma.cc/VGB9-MA38>] (last visited Nov. 1, 2017).

24. FREEDOM HOUSE, FREEDOM OF THE PRESS 2016, FREEDOMHOUSE.ORG, <https://freedomhouse.org/report/freedom-press/2016/china> [<https://perma.cc/VVT3-QZQ8>] (last visited Jan. 4, 2018).

25. STATISTA, ADVERTISING EXPENDITURE IN THE WORLD’S LARGEST AD MARKETS IN 2015 (IN BILLION U.S. DOLLARS), STATISTA.COM, <http://www.statista.com/statistics/273736/advertising-expenditure-in-the-worlds-largest-ad-markets/> [<https://perma.cc/9FWL-HL B2>] (last visited Jan 4., 2018).

26. Piotroski et al., *supra* note 17.

self-sufficient and no longer rely on financial support from the government.<sup>27</sup> The other large-scale reforms involved the conglomeration of selected newspapers into newly created media groups.<sup>28</sup> Although commercialized newspapers are still subject to political control by the Chinese government, they are financially driven and compete for audiences by appealing to their tastes and demands.<sup>29</sup>

Generally speaking, Chinese newspapers are divided into three categories: official newspapers, semi-official newspapers, and commercialized newspapers.<sup>30</sup> Official newspapers receive indirect subsidies through subscription by government units.<sup>31</sup> In contrast, semiofficial and commercialized newspapers are completely financed through advertising, with the latter partially privatized, while the former is not.<sup>32</sup> All newspapers continue to be registered under state organization and are subject to close state scrutiny.<sup>33</sup> Editors and journalists generally perceive the official papers as experts on the position of the government while unofficial papers voice public opinion.<sup>34</sup> Nonofficial media thus have more credibility, and this in turn improves their ability to influence public opinion.<sup>35</sup> At the same time, the commercialization of the media and the emergence of the internet has revolutionized the way that the Chinese Communist Party leadership and the citizens interact during the public policy making process.<sup>36</sup> As the internet becomes an important platform for Chinese citizens to voice grievances and participate in public affairs, the Chinese government is learning to be more responsive and adaptive in the digital environment.<sup>37</sup>

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27. *Id.*

28. *Id.* at 3.

29. *Id.*

30. DANIELA STOCKMANN, MEDIA COMMERCIALIZATION AND AUTHORITARIAN RULE IN CHINA 67-68 (2013).

31. See DANIELA STOCKMANN, *What Kind of Information Does the Public Demand? Getting the News during the 2005 Anti-Japanese Protests*, in CHANGING MEDIA, CHANGING CHINA 179 (Susan L. Shirk ed., 2011).

32. *Id.*

33. Stockmann & Gallagher, *supra* note 19, at 6.

34. STOCKMANN, *supra* note 31, at 180.

35. *Id.* at 181-82.

36. See generally Xiao Qiang, *The Rise of Online Public Opinion and Its Political Impact*, in CHANGING MEDIA, CHANGING CHINA, 203 (Susan L. Shirk ed., 2011).

37. *Id.* at 222-23.

There are several mechanisms through which the media can influence Chinese antitrust enforcement. First, economists have argued that profit-maximizing media can help overcome the rational ignorance problem of voters.<sup>38</sup> By collecting, verifying, and summarizing relevant facts, the media mitigates the collective action problem associated with gathering information for a dispersed group.<sup>39</sup> Many Chinese SOEs hold entrenched and vested interests in concentrated industry sectors in China.<sup>40</sup> Meanwhile, these SOEs also enjoy superior bureaucratic and political status, and they have more convenient channels through which to lobby, making it more difficult and costly for antitrust agencies to bring actions against them.<sup>41</sup> However, the media can help inform the public about antitrust policy, empowering the policy entrepreneurs to mobilize public sentiment in order to challenge such concentrated interests.<sup>42</sup> As illustrated in Part IV regarding the NDRC's media campaign, news coverage of Chinese antitrust enforcement was driven not only by the intrinsic appeal of each piece of news, but also by the efforts exerted by the regulator.

Second, if a Chinese state-controlled media strongly endorses an antitrust intervention, this sends a political signal that the administrative intervention has gained endorsement from higher levels of the government. It also causes speculation that the Chinese government is tightening its regulation of an industry, with antitrust intervention being one of its tools to achieve its policy objectives, as illustrated in the Infant Formula Case elaborated in Section IV.B. below. Thus, if a firm vigorously defends itself, it might not only be viewed as defying the antitrust agency, but might also provoke the Chinese government for thwarting its policy objectives. This fear of provocation, coupled with the weak legal institutions and the lack of judicial oversight over agency action, exerts pressures on firms to conform to the antitrust agency's demand.

Third, Chinese media not only plays the role as a party mouthpiece but is also an information gatherer and watchdog for the Party.<sup>43</sup> Political scientists have long identified the function of the

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38. Alexander Dyck et al., *Media versus Special Interest*, 56 J. L. ECON. 521 (2013).

39. *Id.*

40. Angela Huyue Zhang, *Taming the Chinese Leviathan, Is Antitrust Regulation A False Hope*, 51 STAN. J. INT'L L. 195, 207-11 (2015).

41. *Id.*

42. See Dyck et al, *supra* note 38.

43. YUEZHI ZHAO, *MEDIA, MARKET AND DEMOCRACY IN CHINA: BETWEEN THE PARTY LINE AND THE BOTTOM LINE* (1998).

Chinese media as a bottom-up information transmission system, which helps the party leaders gather intelligence and monitor the performance of lower-level government officials.<sup>44</sup> Moreover, as the actions of the Chinese antitrust agencies are seldom tested in court, popular support is an important means through which Chinese enforcement agencies can obtain legitimacy for their actions. The endorsement from the public helps the agency gain political credit from within the bureaucracy. It also helps the agency overcome the political opposition that it faces when tackling large SOEs, as illustrated in the China Telecom Case in Section IV.A. below.

Fourth, consumer product firms operating in China are sensitive to the negative publicity brought by antitrust investigations. As suggested by Dyck and Zingales, the effectiveness of the media depends on two essential characteristics of the institutional environment. First, public shaming works when society as a whole takes a negative view of the conduct exposed by the press.<sup>45</sup> Second, the magnitude of the penalty depends on the frequency and importance of business' interactions with the consumers, the capital market, and the government.<sup>46</sup> The Chinese market has long been plagued by concerns about poor quality and counterfeits. A good reputation is therefore expensive to establish in China. An antitrust investigation of a firm could tarnish the brand image that these firms have worked hard to cultivate, leaving consumers with the impression that they have been "ripped off." Thus, Chinese consumer product firms will most likely suffer as a result of the negative publicity after the exposure of their involvement in an antitrust investigation. Ironically, the less market power that a firm has, the more that it fears the damage to its reputation because consumers can easily turn to other brands as substitutes. This is particularly the case for companies involved in RPM investigation. The vast majority of these cases that the NDRC has investigated so far involve consumer product firms operating in highly competitive markets. These companies are therefore the most vulnerable to negative publicity brought by media coverage of their cases, as illustrated in Section VI.A. below.

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44. *Id.*

45. DYCK et al., *supra* note 11, at 1101.

46. *Id.* at 1102.

*III. METHODOLOGY*

In order to examine the role of the media and its effects on antitrust enforcement, I collected all the investigations that were conducted by the Chinese antitrust agencies from the inception of the AML to the end of 2015.<sup>47</sup> I include only closed cases and those in which there were public disclosures of the NDRC's investigations, as sometimes the agency did not make any disclosure of its investigation or decision.<sup>48</sup> I then used WiseNews to search for the relevant news reports covering these cases between the first public disclosure of the case and the date before the agency released its decision.<sup>49</sup> WiseNews collects news reports from a wide range of general interest Chinese newspapers published in mainland China.<sup>50</sup> Within the relevant search period, I found six that attracted over 100 media reports on WiseNews. These include the Coca-Cola/Huiyuan Case, the China Telecom/China Unicom, the White Liquor Case, the Infant Formula Case, the Auto Part Case, and the Qualcomm case. A summary of each of these cases is provided in Annex I. Among these six cases, one is a merger case, two are abuse of dominance cases, and three involve RPM. With the exception of the Coca-Cola/Huiyuan Case, all five other cases were investigated by the NDRC. As Qualcomm is not a consumer product firm and does not directly interact with end consumers, I expected that the firm would be less sensitive to media coverage. Thus, in the Qualcomm case, I did not study the whole period of the media coverage, but rather the pertinent period involving the dismissal of Zhang Xinzhu, an eminent antitrust expert from a government advisory committee.

I then performed content analysis of the relevant news articles in the sample.<sup>51</sup> I included only those articles that focus on discussing

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47. I rely on the information disclosed on the websites of the three main Chinese antitrust enforcement agencies to collect the information about the investigations. It should be noted, however, sometimes the Chinese agencies did not publicize some of their investigations so there is no public record of these cases.

48. Angela Huyue Zhang, *Strategic Public Shaming: Evidence from Chinese Antitrust*, CHINA QUARTERLY (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2943268](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2943268) [<https://perma.cc/W9PW-4S45>] (last visited Jan. 4, 2018).

49. For all these searches, I limited my search on news articles published by media outlets in mainland China.

50. WiseNews' database is <http://wiseneews.wisers.net/wiseneews/index.do?> [<https://perma.cc/E7FL-PAN8>] (last visited Jan. 4, 2018).

51. In the Qualcomm case, as the inquiry is about dismissal of Zhang Xinzhu, I focus on the media coverage between the first public disclosure of the dismissal of Zhang to the date before the release of the Qualcomm decision.

the investigations, excluding those that made only passing reference to these cases. A summary statistics of the number of relevant articles and the number of media outlets of these four cases are presented in Table 1 below.

TABLE 1: NUMBER OF ARTICLES AND MEDIA OUTLETS IN WISENEWS

Case	Articles (N)	Media Outlets (N)	Search Window
Coca-Cola	272	158	Sep. 3, 2008 to March 17, 2009
China Telecom/China Unicom	202	75	9 Nov. 2011 to 1 Dec. 2011
White Liquor	101	48	Jan. 15, 2013 to Feb. 18, 2013
Infant Formula	502	91	June 27, 2013 to August 6, 2013
Auto Part	257	74	July 26, 2014 to August 12, 2014
Qualcomm (the Zhang Xinzhu incident)	60	44	August 12, 2014 to Feb. 9, 2015
Total	1394	n/a	n/a

I read through each article, which allowed me to reconstruct the details of how the NDRC strategically leaked the existence of its investigation to state-controlled media, how the public reacted to such disclosure, how the media covered the investigation, whether it interviewed any industry or legal experts, and how the experts commented on the case, as well as the subsequent responses from the investigated firms, the regulator, and other media outlets. I used a mixture of inductive and deductive coding, beginning with themes that I expected to be reported based on my previous reading of the news coverage on these antitrust investigations, but I also added new codes as they emerged from the media analysis. I then documented the major theme of each article, how the news was framed, the origin

and the institutional affiliations of the sources cited in the article, how the sources commented on the investigation, and the general tone of the article.

#### *IV. THE NDRC'S MEDIA CAMPAIGN*

China currently has three main antitrust enforcement agencies. The NDRC and the State Administration for Industry and Commerce (“SAIC”) are jointly responsible for the enforcement against anticompetitive conducts, whereas MOFCOM is responsible for merger control. In recent years, the NDRC has emerged as a more powerful regulator and its hectic enforcement actions have dwarfed SAIC. As of the end of 2016, the antitrust bureau within the NDRC, formally titled the Anti-Monopoly and Price Supervision Bureau, had launched investigations against many prominent targets, including national state-owned giants such as China Telecom and China Unicom, local state-owned champions such as Maotai and Wuliangye, and leading multinational companies in a wide range of industries ranging from infant formula to auto manufacturers to chip makers. At the same time, the SAIC’s enforcement activities did not attract much public attention, with the exception of its investigations into Microsoft and Tetra Pack.

Notably, the NDRC is the only one among the three enforcement agencies that has been seen to actively and consciously utilize a media strategy during antitrust enforcement actions. During the tenure of Xu Kunlin, the NDRC officials appeared twice on Dialogue, a CCTV talk show, to publicize their enforcement activities. On August 25, 2013, Xu appeared on Dialogue to discuss his agency’s experience in investigating three high-profile cases including the Infant Formula, the Gold Retailer, and White Liquor Cases.<sup>52</sup> The audience in the show all appeared to be officials from the antitrust unit.<sup>53</sup> An executive from Wyeth, an infant formula producer investigated in 2013, also appeared on the show to publicly announce its determination to reduce prices in conformity with the NDRC’s request.<sup>54</sup> Wyeth’s proactive cooperation ultimately won it full

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52. CCTV, *Fanlongduan Shifou Neng Hanwei Women De Liyi [Could Antitrust Defend Our Interest]*, Duihua [Dialogue] (August 25, 2013), <http://tv.cntv.cn/video/C10316/723a17154d2940bbb913ed2c38901064> [<https://perma.cc/H4UH-J933>] (last visited Jan. 4, 2018).

53. *Id.*

54. *Id.*

immunity from fines.<sup>55</sup> On February 15, 2015, Xu and his team appeared on the Dialogue show again, highlighting the challenges that the NDRC received in response to the Qualcomm investigation.<sup>56</sup> Xu first tried to rebut the challenges from foreign media sources, arguing that it had not discriminated against foreign multinational companies during its antitrust enforcement.<sup>57</sup> He also firmly denied the allegations of due process violations during antitrust investigations.<sup>58</sup> TV appearances such as these not only serve to raise public awareness of the AML, but also help the NDRC establish its legal authority and legitimacy. In addition to TV interviews, Xu also accepted many interviews with various newspapers and magazines. For instance, in June 2015, Xu Kunlin accepted an interview with a magazine in which he discussed the negotiation with Qualcomm at length.<sup>59</sup>

During the second Dialogue show, Xu admitted that the NDRC had kept a low profile during many cases that it had investigated out of concern of “double penalty.”<sup>60</sup> He explained that many firms requested that the NDRC not publicize their cases for fear of the reputational sanctions on these firms.<sup>61</sup> However, in three cases, the NDRC acted as a whistle blower by strategically leaking information to the state media. In both the China Telecom/China Unicom Case and the Infant Formula Case, the agency announced its investigations on the CCTV.<sup>62</sup> Additionally, in a case involving a number of gold retailers, the NDRC first leaked its investigation to *People’s Daily*.<sup>63</sup> As illustrated in the case studies below, such strategic leakage helps the agency gain the first mover advantage in framing the media

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55. Ye Bihua, *Fagaiwei Shiyi Huishi Mianzao Zhongfa: Shouxian Jiangjia Shuaixian Rencuo [NDRC Explained Why Wyeth Got Exemptions From Penalties: Wyeth Was The First One To Reduce Price]*, XINLANG CAIJING [SINA FIN.] (August 8, 2013), <http://finance.sina.com.cn/chanjing/gsnews/20130808/022816379184.shtml> [<https://perma.cc/Z6PA-93XP>] (last visited Jan. 4, 2018).

56. CCTV, *Fanlongduan Zhenxiang [The Truth of Antitrust]* (Feb. 15, 2015), <http://jingji.cntv.cn/2015/02/16/VIDE1424029494651330.shtml> [<https://perma.cc/7JY2-VVML>] (last visited Jan. 4, 2018).

57. *Id.*

58. *Id.*

59. Xinhua Net, *Guojia Fagaiwei Jiagesi Sizhang Xu Kunlin: Qingli Zhongda Fang Londuan An [Kunlin Xu from the Price Bureau of NDRC: The Experiences of High Profile Antitrust Investigation]* (June 20, 2015), <http://finance.sina.com.cn/china/20150620/213322484073.shtml> [<https://perma.cc/MMD7-BS4R>] (last visited Jan. 4, 2018).

60. CCTV, *supra* note 56.

61. *Id.*

62. Zhang, *supra* note 48.

63. *Id.*



discussions about the cases and shaping the tones for subsequent outlets. Firms under investigation can also launch a countervailing media campaign, which occurred in the China Telecom/China Unicom case. However, even if these two SOEs could use other state-controlled media to defend their conduct, this did not seem to change the negative perception held by the public against these two SOEs. Meanwhile, in the Infant Formula Case, the investigated firms all avoided the media and none of them made any attempt to defend themselves.

#### *A. China Telecom/China Unicom*

On November 9, 2011, *30 Minutes News*, a CCTV program, began by referring to a recent report prepared by the National Telecommunication Expert Committee (Expert Report).<sup>64</sup> The Expert Report noted that China's internet speed ranks 71<sup>st</sup> in the world, less than one-tenth of the average speed of the OECD countries, while costing two or three times more.<sup>65</sup> Then, Li Qing, a deputy director general at the antitrust unit of the NDRC emerged, announcing that her agency had been investigating two large telecommunication firms—China Telecom and China Unicom—for antitrust violations (the China Telecom and China Unicom case).<sup>66</sup> Ms. Li claimed that these two SOEs had a dominant market position and that they together held over two-thirds of the market shares in the internet access market.<sup>67</sup> According to her, these two SOEs had conducted price discrimination against rival companies—if these facts were to be ultimately proven true, these two firms could be subject to a fine of 1-10% of the fiscal revenue, potentially up to RMB 8 billion for these two SOEs.<sup>68</sup> In addition to the antitrust allegations, Ms. Li asserted that these two SOEs had not achieved full integration, thus increasing the cost of internet access for internet service providers.<sup>69</sup> The CCTV program also quoted some estimates from the Expert Report, stating

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64. See CCTV, *Fagaiwei Zheng Diao cha Zhongguo Dianxin He Zhongguo Liantong Shexian Longduan* [*The NDRC Is Investigating the Broadband Monopoly Issues of China Telecom and China Unicom*], XINLANG CAIJING [SINA FIN.] (Nov. 9, 2011), <http://finance.sina.com.cn/g/20111109/121510782543.shtml> [<https://perma.cc/PR8R-J7VD>] (last visited Jan. 4, 2018).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

that the internet access price will decrease 27% to 38% in five years if the relevant market becomes truly competitive, saving RMB ten billion to RMB fifteen billion for Chinese consumers.<sup>70</sup> Ms. Li did not explain how the internet speed is related to the price discrimination conduct at issue, but her announcement left the impression that the abusive behavior of these two SOEs had led to the high internet prices and low internet speed for Chinese consumers.

The NDRC's announcement on the CCTV caught both SOEs by surprise. Both companies immediately released clarification statements to their investors in response to the NDRC's announcement.<sup>71</sup> In their statements, both SOEs alleged that they had been operating in accordance with the law and were actively cooperating with the NDRC's investigations.<sup>72</sup> As later revealed in a Xinhua report, the NDRC had, in fact, started to investigate China Telecom and China Unicom seven months ago.<sup>73</sup> By June 2011, the NDRC had reached a preliminary conclusion that these two SOEs had abused their monopolies in the relevant market, and the two SOEs subsequently submitted their feedback reports.<sup>74</sup> But the investigation was kept strictly confidential during that time, and employees needed to sign their testimonies after interviews with the NDRC.<sup>75</sup> According to the Xinhua News, the NDRC held a meeting with the Legal Department of the State Council, the Supreme People's Court, and the Ministry of Industry and Information Technology ("MIIT") on October 17, 2011.<sup>76</sup> During the meeting, the NDRC's proposal was met with significant opposition from these departments due to concern over the controversy, and they urged the NDRC to not reach its conclusion hastily before gathering solid evidence.<sup>77</sup> During the

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70. *Id.*

71. *Zhongguo Lianhe Wangluo Tongxin Gufen Youxian Gongsi Chengqing Gonggao* [Public Clarification Notice of China Unicom], CNINFO.COM.CN (Nov. 9, 2011), <http://www.cninfo.com.cn/finalpage/2011-11-10/60183823.PDF> [<https://perma.cc/PKW2-R3TL>] (last visited Jan. 4, 2018); *Zhongguo Dianxin Gufen Youxian Gongsi Gaogong* [Public Notice of China Telecom], HKEXNEWS.HK (Nov. 9, 2011), <http://www.chinatelecom-h.com/tc/regulatory/announcements/a111109.pdf> [<https://perma.cc/ZJF6-R7T2>] (last visited Jan. 17, 2018).

72. *Id.*

73. Dahua Liu, *Weiguan Fanlongduan Shou An* [Examining The First Big Antitrust Case], XINHUA (Nov. 11, 2011), <http://tech.sina.com.cn/t/2011-11-11/19476309150.shtml> [<https://perma.cc/XS23-9VZH>] (last visited Jan. 4, 2018).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

meeting, the NDRC promised that it would solicit further feedback from the State-Owned Asset Supervision and Administration Commission (“SASAC”) and the MIIT before submitting its report to the State Council.<sup>78</sup>

Thus, the NDRC’s announcement on the CCTV not only sent a shock to the SOEs, but also to the SASAC, the MIIT, and other government departments that were involved and consulted during the investigation. According to the Xinhua News, the surprise announcement on the CCTV was a deliberate tactic adopted by the NDRC in response to the arrogant attitude displayed by these two SOEs.<sup>79</sup> Interviews with the NDRC officials corroborate the news report. Insiders note that the NDRC faced significant opposition not only from the SOEs, but also the other bureaucratic departments, including the SASAC, which was concerned about the potential loss of state assets, and the MIIT, which was concerned that the NDRC was encroaching on its turf.<sup>80</sup> By leaking the news to the CCTV, the NDRC hoped that public opinion against these two SOEs would in turn exert pressure on these two firms, making it more difficult for other bureaucratic departments to intervene in the matter.<sup>81</sup>

The NDRC’s announcement on the CCTV caused a sensation in the Chinese media. In WiseNews, I identified fifty-eight news articles from fifty-one media outlets covering the investigation the day after the NDRC’s announcement. As the CCTV was the first to report this investigation, almost all news articles (with only one exception) relied heavily on the information disclosed by the CCTV and extensively quoted the remarks by Li. Among these reports, eighty-five percent quoted experts expressing enthusiastic support for the NDRC’s actions. For instance, Wang Xiaoye, a prominent antitrust expert in China, said that she was very pleased to see that the NDRC initiated this investigation.<sup>82</sup> Hailing the case as the first antitrust investigation of Chinese SOEs, Professor Wang said that the case set a milestone in

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78. *Id.*

79. *Id.*

80. Zhang, *supra* note 40, at 218-20.

81. Interview with a NDRC official in Beijing (June 2016).

82. Xiaofang Ma & Liqing Guo, *Liantong Dianxin Yiwai Zao Diaocha, Fanlongduan Shou Han Yangqi* [China Telecom and China Unicom Were Subject to a Surprise Investigation, the First Attack on State-Owned Enterprises under the Antimonopoly Law], *DIYI CAIJING RIBAO* [CHINA BUSINESS NEWS] (Nov. 10, 2011), <http://finance.qq.com/a/20111110/000224.htm> [https://perma.cc/P2CR-AZ7M] (last visited Jan. 4, 2018).

Chinese antitrust enforcement.<sup>83</sup> Only five reports quoted industry experts who expressed doubts or confusion over the NDRC's investigation.<sup>84</sup> For instance, Yangcheng Evening News, a newspaper based in Guangzhou, interviewed several telecom experts who said that they were confused by the NDRC's investigation.<sup>85</sup> They said that the prices of broadband access had not increased significantly in recent years, and that broadband access in small Chinese cities is not very expensive. Thus, telecom should not constitute major antitrust concerns.<sup>86</sup>

With almost all news outlets relying heavily on the NDRC and the CCTV as sources, and the vast majority of experts endorsing the investigation, the editorial slant is unsurprisingly very skewed against the SOEs. Among the fifty-eight news reports released on the day after the NDRC's announcement, sixty seven percent carry a negative tone against the telecom firms, either by presenting one-sided allegations from the NDRC or by firmly endorsing the government's action as a major breakthrough in antitrust enforcement. Public opinion was also overwhelming negative towards the SOEs. A survey conducted by Sina Weibo, the Chinese Twitter, on the day of the NDRC's announcement shows that ninety-six percent of the participants believed that these two SOEs held dominant positions in the broadband market and that eighty-seven percent of the participants were dissatisfied with their performance.<sup>87</sup> Another survey conducted by China Comment reveals that ninety four percent of the 6,400 participants who participated in an online survey on the day after the NDRC's announcement believed that these two SOEs

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83. *Id.*

84. The news outlets that quoted negative comments from experts include SOUTHERN DAILY, DAILY SUNSHINE, YANGCHENG EVENING NEWS, SHANTOU DAILY, and SHANTOU METRO NEWS, all of which are based in Guangdong province.

85. Jing Xu, *Liantong Dianxing Shouzaofanlongduan Diaocha, Yenei Hu Bujie Yewai Jiaokou Zan* [China Telecom and China Unicom Were Subject to Antitrust Investigation, Telecom Experts Expressed Doubts While the Public Applauded], YANGCHENG WANGBAO [YANGCHENG EVENING NEWS] (Nov. 10, 2011), <http://news.sohu.com/20111110/n325205104.shtml> [https://perma.cc/W69C-4R4R] (last visited Jan. 4, 2018).

86. *Id.*

87. Yuat Yue, *Fagaiwei Zhi Dianxin Liantong Shexian Longduan, Ying Weiguan, Gejie Fanying Buyi* [NDRC Alleged China Telecom and China Unicom Were Monopolies, Mixed Feedback from Different Sides], RENMING WANG [RENMING NET], (Nov. 9, 2011), <http://politics.people.com.cn/GB/16191006.html> [https://perma.cc/9975-BKNB] (last visited Jan. 4, 2018).

had committed antitrust violations.<sup>88</sup> The results indicating public opinion are not surprising. The Chinese public have long loathed large Chinese SOEs, who are often considered villains that are causing all sorts of problems in the Chinese economy.<sup>89</sup> On the other hand, the overwhelming public support for the NDRC's actions also reveals the presence of confirmation bias among the Chinese public. Even without any solid evidence, the Chinese public is eager to take a mere announcement by an antitrust agency of its investigation into the SOEs as evidence of the firms' antitrust violations.

Two days after the NDRC's announcement of its investigation into China Telecom and China Unicom, the Xinhua News published a lengthy report, calling the NDRC's investigation a fight among deities that was irrelevant for Chinese consumers.<sup>90</sup> A lawyer from a consumer association was quoted in the report, condemning the NDRC's surprise announcement on the CCTV as an inappropriate move that "lack[ed] careful consideration."<sup>91</sup> He asserted that since the case had not been resolved, such an announcement was unfair to the investigated firms and could result in adverse social consequences.<sup>92</sup> As Xinhua is also a leading official newspaper owned by the central government, the criticisms quoted in the Xinhua report sent a strong signal of the dissonance within the bureaucracy over the NDRC's action. The Xinhua report also quoted other skepticisms expressed by many telecom industry experts over the antitrust investigation. For instance, Wu Songning, the editor in chief from People's Post and Telecommunication News ("PPTN") clarified that the case actually involved the internet service provider ("ISP") access market, rather than the broadband market as announced by the NDRC.<sup>93</sup> He observed that the competition in the ISP market is very fierce, with over 700 ISP competing in the same market.<sup>94</sup> Notably, PPTN is owned by the MIIT, a telecom regulator that was concerned that the NDRC's investigation was encroaching on its turf. The

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88. Editorial, *Fanlongduan Shou An [The First Antitrust Case]*, CHINA COMMENT (Nov. 11, 2011), [http://news.hangzhou.com.cn/jjxw/content/2011-11/11/content\\_3954157\\_2.htm](http://news.hangzhou.com.cn/jjxw/content/2011-11/11/content_3954157_2.htm) [https://perma.cc/7M94-ZRDX] (last visited Jan. 17, 2018).

89. See generally SHENG HONG & ZHAO NING, CHINA'S STATE-OWNED ENTERPRISES: NATURE, PERFORMANCE AND REFORM (2012).

90. Liu, *supra* note 73.

91. See *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

Xinhua report also hinted that many telecom experts were reluctant to comment on the antitrust investigation, suggesting the sensitive nature of the matter.<sup>95</sup>

On November 11, 2011, the PPTN released an editorial on its front page entitled “Confusing Facts, Misleading Public,” directly rebutting the CCTV’s report.<sup>96</sup> It began by noting that the NDRC’s surprised announcement distressed employees working at these two SOEs and caused the stock prices of these two SOEs to tumble.<sup>97</sup> It then outlined four misleading facts presented in the CCTV program. First, the CCTV program misled the public, as the case in fact concerned the ISP access market, a much smaller market than the broadband market, which was the market initially reported to be involved.<sup>98</sup> Second, the CCTV program also misled the public into believing that China Telecom and China Unicom held dominant positions in the ISP market, but this is factually wrong, as the market is highly competitive with many other players.<sup>99</sup> Third, these two SOEs did not conduct any price discrimination—they charged different prices to different firms on the basis of product differentiations, rather than price discrimination.<sup>100</sup> Finally, the CCTV’s mention of China’s slow broadband speed as compared with that of the OECD is irrelevant to the current antitrust investigation.<sup>101</sup> Additionally, the editorial argued that it was unfair to compare the internet speed in China with those in advanced countries—a fairer comparison would be to measure China against developing countries such as India and Russia.<sup>102</sup> The editorial also severely criticized the lack of professional standards in the CCTV coverage, which caused severe reputational and financial harm to these two SOEs.<sup>103</sup> On the same day, Telecommunication Industry News, another newspaper

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95. *Id.*

96. Xiaoya & Yangyang, *Huanxiao Shiting, Wudao Gongzhong: Bo Yangshi Dui Dianxing Liantong Shexian Jiage Longduan de Baodao* [Confusing and Misleading the Public: Rebutting CCTV’s Coverage over the alleged Price Monopoly of China Telecom and China Unicom], RENMIN YOU DIAN BAO [PEOPLE’S POST AND TELECOMMUNICATION NEWS] (Nov. 11, 2011), <http://www.aisixiang.com/data/46369.html> [<https://perma.cc/4AWN-D68Z>] (last visited Jan. 4, 2018).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

owned by the MIIT, also published an editorial criticizing the CCTV report on the investigation.<sup>104</sup> It argued that even if these two SOEs held a dominant position in the ISP access market, dominance in itself did not constitute a violation of the AML.<sup>105</sup>

The skepticism portrayed in the Xinhua News and the fierce rebuttal launched by the two MIIT newspapers ignited another round of debate over this case in state-controlled media. On November 11, 2011, the Economic Information Daily, an influential business-oriented newspaper owned by the Xinhua News, published an investigative report that severely condemned the conduct of China Telecom and defended the NDRC's action.<sup>106</sup> The author asserted that China Telecom had abused its dominant position and suggested that the abusive conduct by China Telecom had resulted in broadband prices for Chinese enterprises that were more than four times as much as those in the United States.<sup>107</sup> According to the report, China Telecom conducted price discrimination in selling bandwidth to different ISPs and charged those larger ISPs much higher fees than the smaller ISPs.<sup>108</sup> However, China Telecom soon realized that its differential pricing scheme led to arbitrage opportunities, as small ISPs packaged their bandwidth and resold it to large ones.<sup>109</sup> After detecting this, China Telecom issued a notice to its subsidiaries in August 2010 prohibiting resale by small ISPs.<sup>110</sup> This action resulted in the blackout of internet access for many large ISPs, who relied on the cheaper bandwidth sold by small ISPs.<sup>111</sup> One of the companies that suffered a significant loss is China Railcom, a subsidiary of China Mobile, one of the three major state-owned telecom firms.<sup>112</sup>

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104. *Gongxin Bu Xiashu Liangjia Meiti Bo Dianxin Liantong Shexian Longduan Baodao* [Two Newspapers Owned by MIIT Rebutted the Media Coverage over the Antitrust Violation of China Telecom and China Unicom], XINJIN BAO [BEIJING NEWS], (Nov. 12, 2011), <http://www.chinanews.com/it/2011/11-12/3455659.shtml> [https://perma.cc/EVM2-T9NF] (last visited Jan. 4, 2018).

105. *Id.*

106. Editorial, *Zhongguo Dianxin Weihe Zaoyu Fanlongduan Diaocha* [Why Was China Telecom Subject to Antitrust Investigation], JINGJI CANKAO BAO [ECON. INFORMATION DAILY], (last updated Nov. 11, 2011), <http://finance.sina.com.cn/roll/20111111/070310796649.shtml> [https://perma.cc/69QP-EYMC] (last visited Jan. 4, 2018).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

On November 14, 2011, People's Daily published an editorial that asserted that the case was not a fight between commercial deities, but rather an investigation that concerned the interests of millions of Chinese consumers.<sup>113</sup> It reiterated the message sent in the CCTV that if the market competition became effective, the prices for internet access would increase 27-38% for consumers, saving ten billion or fifteen billion yuan for Chinese consumers.<sup>114</sup> Moreover, the non-integration of these two SOEs not only affected the speed of the Internet, but also the cost of internet access.<sup>115</sup> This editorial seems to be a direct rebuttal of the earlier Xinhua editorial which cast doubt upon the NDRC's action. On November 15, 2011, the CCTV produced another TV program in response to the attack from the SOEs, inviting a number of telecom and legal experts to comment on the case.<sup>116</sup> Gao Hongbing, a telecom expert, was quoted as stating that these two telecom firms' antitrust violations were solidly proven.<sup>117</sup> He rebutted the allegation that the investigation is unrelated to consumer interests, noting that the failure of these two telecom firms to fully integrate directly harms the interests of tens of millions of consumers.<sup>118</sup> On November 21, 2011, the People's Daily published another editorial, entitled "Applauding the NDRC's Actions," firmly endorsing the NDRC's intervention.<sup>119</sup> The editorial approvingly declared that the NDRC's action not only appealed to the popular demand of the Chinese people, but also set a milestone in Chinese antitrust enforcement.<sup>120</sup>

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113. Chenchen, *Lanlongduan Diaocha Bushi Shenxian Zhan [Antitrust Investigation Is Not A Fight Among Deities]*, RENMIN RIBAO [PEOPLE'S DAILY] (Nov. 14, 2011), [http://tech.ifeng.com/telecom/special/fanlongduan/content-1/detail\\_2011\\_11/14/10634305\\_0.shtml](http://tech.ifeng.com/telecom/special/fanlongduan/content-1/detail_2011_11/14/10634305_0.shtml) [https://perma.cc/44M8-JBWH] (last visited Jan. 17, 2015).

114. *Id.*

115. *Id.*

116. Ma Xiaofang, *Fanlongduan Xulun Zhan Di'er Chang: Yanshi Wang Quanmian Fanji [The Second Antitrust Media Fight : The Combat of the CCTV]*, DIYI CAIJING RIBAO, [CHINA BUSINESS NEWS] (Nov. 22, 2011), <http://www.c114.net/news/16/a656077.html> [https://perma.cc/9DMV-ZXDN] (archived on Jan. 4, 2018).

117. *Id.*

118. *Id.*

119. Xiaoyan, *Renmin Ribao Wei Fagaiwei Jiaohao, Kending Diaocha Dianxin Liantong [Renmin Ribao Cheered for NDRC, Approving Its Investigation of China Telecom and China Unicom]*, RENMIN RIBAO [PEOPLE'S DAILY] (Nov. 21, 2011), <http://news.qq.com/a/20111121/000110.htm> [https://perma.cc/HU7J-3ER3] (archived on Jan. 4, 2018).

120. *Id.*



On December 2, 2011, the PPTN published another editorial, again attacking the CCTV's report about the comparison of the broadband access price with other countries.<sup>121</sup> However, on the same day, both China Telecom and China Unicom formally requested the suspension of from the NDRC's investigation.<sup>122</sup> Both issued statements on their remedial proposal, promising to rectify their discriminatory conduct, to increase integration with other network, and to increase internet speed while lowering the cost for internet access in China.<sup>123</sup> The NDRC responded the next day, acknowledging the receipt of such a suspension request. However, there was no further disclosure regarding the matter and no fine was imposed on these two firms. It thus appeared that the dispute was resolved within the internal bureaucracy. Moreover, the countervailing efforts by the two SOEs did not seem to change public opinion. According to the polling results by Global Times, as of November 18, 2011, over 80% of the online participants believed that the conduct of China Telecom and China Unicom had constituted antitrust violation; seventy percent were not satisfied with their broadband services; and thirty percent believed that the antitrust investigation would help them address the problems that they met during broadband access.<sup>124</sup>

The China Telecom/China Unicom case demonstrates the powerful feedback loop among the regulator, the Chinese media, and the Party. The NDRC's strategic leakage of its investigation over the CCTV created nationwide common knowledge about the case. The stimulated responses to these reports mobilized public sentiments. Such sentiments were then expressed through various online and print

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121. Zhou Ling, *Liang Gongsì Zhong Rencuo, Dianxin Liantong Shenqing Zhongzhi Fanlongduan Diaocha* [Two Companies Finally Admitted Guilt, China Telecom and China Unicom Applied to Suspension of Antitrust Investigation], *DONGFANG ZAobao ORIENTAL MORNING POST* (Dec. 3, 2013), <http://finance.jrj.com.cn/2011/12/03080211715510.shtml> [https://perma.cc/RNU5-V89L] (archived on Jan. 4, 2018).

122. *Id.*

123. Liu Yuying, *Zhongguo Dianxin He Zhongguo Liantong Shenqing Zhongduan Fanlongduan Diaocha* [China Telecom and China Unicom Applied for Suspension of Antitrust Investigation], *CHINA NEWS.COM*, (Dec. 2, 2011), <http://www.chinanews.com/it/2011/12-02/3505203.shtml> [https://perma.cc/7FD4-4EFJ] (archived on Jan. 4, 2018).

124. Nie Lubing, *Bacheng Shoufang Wangyou Renwei Dianxin Liantong Longduan, Huyu Diaocha Shiyou Hangye* [Over 80% of Those Who Participated Online Believed China Telecom and China Unicom Had Committed Antitrust Violation, Calling for Antitrust Investigation of the Oil Industry], *HUANGQIU SHIBAO* [GLOBAL TIMES] (Nov. 11, 2011), <http://china.huanqiu.com/roll/2011-11/2164617.html> [https://perma.cc/47TJ-KNZG] (archived on Jan. 4, 2018).

media, which were then communicated back to the Party leaders. As Shirk points out, the Party leaders, whose paramount priority is to maintain social stability, pays close attention to the media and the public opinion as reflected in those news reports.<sup>125</sup> The endorsement from the public thus helps the NDRC remove the political obstacles when tackling cases, making it more difficult for opponents to challenge its actions.

Despite the overwhelming public endorsement, it was never clear whether the NDRC had a legitimate basis to bring such a case and whether it benefited consumers, as the NDRC had claimed. As the case was suspended and no public information was revealed, there is very little the public could learn about this case. One commentator lamented in a Southern Metropolis Newspaper article, questioning whether the NDRC would have brought such a case had it not been a turf war among several state-owned telecom SOEs.<sup>126</sup>

### *B. The Infant Formula Case*

Two years later, the NDRC applied the same tactic again in a RPM case involving nine infant formula producers. On July 1, 2013, the CCTV announced that it received confirmation from the NDRC that it was investigating Biostime and a few other manufacturers of infant formula.<sup>127</sup> This is the earliest media confirmation of the NDRC's investigation, suggesting that the NDRC first leaked the news to the CCTV. The CCTV News quoted a report published on Biostime's website, noting that Biostime is the largest player in the premium infant formula in China 2011, holding over forty-four percent of market shares.<sup>128</sup> Also, its infant formula business grew rapidly and increased more than sixty one percent than the previous year, with its infant formula business now accounting for eighty

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125. SUSAN SHIRK, *Changing Media, Changing Foreign Policy*, in CHANGING MEDIA, CHANGING CHINA 239 (Susan L. Shirk ed., 2011).

126. Ruan Ziwen, *Dianxin Fanlongduan Diaocha Yinggai Huigui Falv Benyi [Antitrust Investigation of China Telecom Should Return to the Meaning of Law]*, NANFANG DUSHI BAO [SOUTHERN METROPOLIS] (Nov. 14, 2011), <http://tech.sina.com.cn/t/2011-11-14/07326315104.shtml> [https://perma.cc/HQ4U-UZB6] (last visited Jan. 4, 2018).

127. CCTV, *Fazhan Gaigewei Dui Heshengyuan Deng Rufen Qiye Fanlongduan Diaocha [NDRC Launched Antitrust Investigation Into Biostime and Other Milk Powder Companies]*, CHINA NETWORK TELEVISION (July 1, 2013), <http://tv.cntv.cn/vodplay/015c07df1972448e915602c6c74c20b2/860010-1102010100> [https://perma.cc/Q9DF-2CLC] (last visited Jan. 4, 2018).

128. *Id.*

percent of its overall revenue in 2012.<sup>129</sup> The TV report also mentions that Biostime had disclosed the NDRC's investigation a few days earlier, causing a significant blow to its stock prices.<sup>130</sup> One the same day, China Broadcast Net, a newspaper owned by the CCTV, published an article on its website confirming the same facts.<sup>131</sup> The article also reports the phenomenon of an abnormal price increase in the infant formula market in recent years, with prices of foreign infant formula milk powders increasing by fifty percent from 2008 to 2013.<sup>132</sup> It states that the prices of infant formula powder in China are the most expensive in the world and that many Chinese consumers traveled abroad to purchase milk powder.<sup>133</sup> It further suggests that the NDRC's investigation is intended to quell this abnormal trend.<sup>134</sup> The day after the CCTV's announcement, People's Daily disclosed the names of five more companies who were also involved, claiming that it had obtained confirmation from the NDRC.<sup>135</sup> This disclosure suggests that the NDRC leaked the information to People's Daily and subjected the other five firms to a different level of publicity than Biostime.

The leakage to the CCTV and People's Daily caused a stir in China. In WiseNews, I identified a total of eighty-three news articles covering this case on July 2, 2013 (the day after the CCTV's announcement) and July 3, 2013 (the day after People's Daily's announcement). Forty-seven percent of these news reports discussed the phenomenon of excessive pricing in the high-end infant formula and all of these reports carry a negative tone against the businesses. For example, on July 2, 2013, China Business News, one of the most popular financial newspapers in China, published a detailed report

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129. *Id.*

130. *Id.*

131. Feng Ya, *Fagaiwei Jiage Jiandu Jiancha Yu Fanlongduan Ju Dui Heshengyuan Jinxing Fanlongduan Diaocha* [NDRC Launched Antitrust Investigation Into Biostime], FINANCE.CNR.CN (July 1, 2013), [http://finance.cnr.cn/gundong/201307/t20130701\\_512939729.shtml](http://finance.cnr.cn/gundong/201307/t20130701_512939729.shtml) [<https://perma.cc/9DZ6-NQD2>] (last visited Jan. 4, 2018).

132. *Id.*

133. *Id.*

134. *Id.*

135. Zhu Jianhong, *Fagaiwei Fanlongduan Ju Zhengzai Diaocha Duoqia Naifen Qiye Shexian Jiage Longdong* [NDRC Is Launching An Antitrust Investigation Into Milk Powder Companies Suspected of Price Monopolies], PEOPLE'S DAILY, (July 2, 2013), <http://finance.people.com.cn/n/2013/0703/c1004-22056243.html> [<https://perma.cc/5MAK-2838>] (last visited Jan. 17, 2018) (noting that MeadJohnson, Abbott, Danone, Dumex, FrieslandCampina and Wyeth were also investigated).

about how Biostime maintained an elaborate and strict price control system in the supply chain network to maintain its high prices.<sup>136</sup> On July 3, 2013, China Business News published another story with a dramatized title “Cost RMB 100 but Sold at RMB 800, Some Infant Formula Producers Are to Be Subject to High Fines.”<sup>137</sup> The article noted that ever since the milk scandal that took place in China in 2008, Chinese consumers had lost confidence in domestically produced infant formula products.<sup>138</sup> As Chinese consumers switched to foreign infant formula products, the foreign producers started to exploitatively increase the prices, causing Chinese consumers to pay three or even four times the prices than foreign consumers.<sup>139</sup> The report quoted Wang Dingmian, a dairy expert who noted that some infant formula producers such as Nestle charged RMB 400 per can, and Biostime charged RMB 500 and sometimes even RMB 800.<sup>140</sup> Wang called on the NDRC to impose hefty fines on these infant formula producers.<sup>141</sup> He claimed that many of the foreign producers reaped billions of yuan from the Chinese market in the past few years, and thus the fine must exceed RMB one billion for it to effectively deter such conduct.<sup>142</sup>

Meanwhile, the CCTV, People’s Daily, and Xinhua News, the three most powerful media outlets directly controlled by the central government, all expressed strong support for the NDRC’s action while condemning the misconduct of these infant formula manufacturers. On July 3, 2013, the CCTV produced a TV program that provided extensive coverage of the case.<sup>143</sup> The TV show started by highlighting the phenomenon of abnormal price increases of

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136. Zhang Zhiwei, *Heshengyuan Bei Fagaiwei Diaocha, Gaojia Yankong Moushi Shoukao [Biostime Was Investigated for Antitrust Violations, High Resale Price Maintenance Was Subject to Challenge]* (July 2, 2013), <http://www.yicai.com/news/2825221.html> [https://perma.cc/AHW6-YM7W] (last visited Jan. 4, 2018).

137. He Tianjiao & Sun Xu, *Chenben Yibai Yuan Maidao Babai Yuan She Jiage Caozhong Naiqi Huo Zao Jue Fakuan [Cost RMB100 but Sold at RMB800, Some Infant Formula Producers Are to Be Subject to High Fines]* (July 3, 2013), <http://www.yicai.com/news/2828433.html> [https://perma.cc/V6G4-FVBC] (last visited Jan. 4, 2018).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. CCTV, *Fanlongduan Liqi: Yao Gaoju Bie Qingfang [Attention To Anti-Monopoly and Do Not Easily Let Go]*, CNTV.CN (July 3, 2013), <http://tv.cntv.cn/video/VSET100156269129/bf4ecb08d1fa47829daa6bc5d74760dd> [https://perma.cc/UJD5-A7YA] (last visited Jan. 4, 2018).

foreign milk powder since 2008.<sup>144</sup> It then interviewed three experts, one of whom was a CCTV commentator, while the other two were leading experts on Chinese antitrust law.<sup>145</sup> Both law professors only provided conclusive comments, noting that these firms tried to fix the resale prices of distributors and that this harmed consumers.<sup>146</sup> Neither of them hinted that RPM could potentially be exempted under the AML, nor did they discuss whether these manufacturers could qualify for these exemptions.<sup>147</sup> The CCTV commentator concluded that consumers placed unusually high trust in foreign milk powders due to quality concerns over domestic products, so they had no choice but to choose foreign products despite their excessive prices.<sup>148</sup>

On the same day, People's Daily published an editorial applauding the NDRC's investigation without discussing any details of the case.<sup>149</sup> The next day, an editorial entitled "Milk Powder Manufacturers Faced Antitrust Investigation, Ending the Feasts of their Oligopolies in China" appeared at The Economic Information Daily, a business-oriented newspaper owned by the Xinhua News.<sup>150</sup> The article provides no analysis of the actual case, but simply condemns the excessively high prices of foreign milk powder manufactures. The bias against these businesses is revealed in the following conclusion reached in the article: "Although the final results of the investigation have not been released, it could be almost certain that the manufacturers involved have intentionally reduced intra-brand and inter-brand competition, in order to reinforce its monopoly position in China, to ensure the lowest input and to reap abnormal profits."<sup>151</sup>

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144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. Jia Zhuang, *Renmin Ribao Renmin Shiping: Pochan "Yanglongduan" Youdai Guochan Hao Naifen [Opinions: Nine Domestic Milk Powder May Defeat the Monopolies of Foreign Milk Powder Companies]*, PEOPLE'S DAILY (July 3, 2013), <http://opinion.people.com.cn/n/2013/0703/c1003-22054806.html> [https://perma.cc/ZR5N-VNXF] (archived on Jan. 4, 2018).

150. Jingji Cankao Bao, *Yang Naifen Mianlin Fanlongduan Diaocha Zhongjie Naifen Guatou De Zhongguo Shengyan [Milk Powder Manufacturers Faced Antitrust Investigation, Ending the Feasts of their Oligopolies in China]*, XINHUA (July 4, 2013), <http://finance.sina.com.cn/review/jcgc/20130704/152416017348.shtml> [https://perma.cc/4UVN-UHXX] (last visited Jan. 15, 2018).

151. *Id.* The Economic Information Daily also published another news report describing the reactions of the Chinese public to the NDRC's investigations. Jingji Cankao Bao,

By strategically leaking information to the state media, the NDRC helped the news channel gain the first mover advantage in reporting the case. Then the CCTV's negative coverage of Biostimes set the tone for subsequent news outlets. The endorsement from the other two main politically-controlled newspapers further reinforced the bias. Notably, none of the infant formula producers launched a countervailing media campaign to defend themselves. The lack of response might have been due to the pressures that they faced from the NDRC, who had reiterated that firms that proactively cooperated with the agency would be rewarded with reduced fines—implying that those that defended themselves would be subject to higher sanctions.<sup>152</sup> Unlike China Telecom and China Unicom, foreign infant formula producers may have lacked the political clout to influence any newspapers. These producers may also believe that any defense will be futile given the public's resentment towards high prices. Indeed, as illustrated in the China Telecom/China Unicom case, even if the SOEs had been able to launch a fierce combat in other state-controlled media, this would not have changed the public opinion over the NDRC's investigation. To avoid prompting retaliation from the regulator and potentially provoking more anger from Chinese consumers, a safer approach would have been to admit guilt quickly and reduce prices to appease consumers.

#### V. THE RARITY OF DISSENTS IN CHINA

In addition to winning a public endorsement, another important factor that contributed to the NDRC's successful media campaign is the support that it received from Chinese antitrust experts. Antitrust is one of the fastest developing areas of practice in China. The severe

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*Yangnaifen Fanlongduan Diaocha Youzhu Hangye Huigui Lixing [Antitrust Investigation Into Foreign Milk Powder Companies Would Help The Industry Regain Its Rationality]*, NEWS.XINHUANET.COM (July 4, 2013), [http://dz.jjckb.cn/www/pages/webpage2009/html/2013-07/04/content\\_76687.htm?div=-1](http://dz.jjckb.cn/www/pages/webpage2009/html/2013-07/04/content_76687.htm?div=-1) [<https://perma.cc/272T-WPXP>] (last visited Jan. 17, 2018) (quoting the comments from the Chinese netizens, the report notes that the misconduct of these foreign milk powder manufacturers should have been investigated a long time ago, and that this investigation provides an opportunity for domestic manufacturers to compete with foreign brands so domestic producers should treasure this opportunity).

152. Michael Martina, *Tough Talking China-Pricing Regulator Sought Concession from Foreign Firms*, REUTERS (August 22, 2013), <http://www.reuters.com/article/us-china-antitrust-idUSBRE97K05020130822> [<https://perma.cc/Q7ML-AN7Q>] (archived on Jan. 4, 2018); Tom Mitchell, *China Antitrust Ruling Blunts Foreign Criticisms*, FINANCIAL TIMES (August 21, 2014), <http://www.ft.com/cms/s/0/61d3f8aa-28ff-11e4-9d5d-00144feabdc0.html#slide0> [<https://perma.cc/29FD-K6CH>] (archived on Jan. 4, 2018).

sanctions that could be imposed under the AML incentivizes businesses to spend resources to defend their cases. However, the lack of procedural safeguards and judicial oversight of agency actions makes the antitrust bar less effective in constraining the actions of the administrative authorities. Because firms very often would rather choose to acquiesce rather than directly challenge the agency's actions in court, there is little market demand to challenge agency decisions in court. Private law firms, therefore, could not gain much by taking an aggressive, adversarial approach in defending their clients. Indeed, they would risk burning their bridge with the government if they take an antagonistic approach in dealing with the government.

Moreover, for lawyers working in the antitrust field, it is vital to develop a good relationship with the Chinese regulators. Due to the opacity of the regulatory process and the great discretion that antitrust agencies possess, lawyers who have established good personal relationships with the case handlers will enjoy a competitive advantage in obtaining valuable information regarding the status of the reviews and investigations, as well as understanding the individual preferences of the officials involved. The more information that the lawyers can obtain from the regulators, the more informed and well-played that their reactions to the regulators' offers can be. Chinese antitrust lawyers thus play the critical role of what sociologist Ronald Burt called the information brokers.<sup>153</sup> Their positions in the social network become important forms of social capital that are assets in their own right.

Furthermore, Chinese antitrust lawyers and law firms are repeat players who have the opportunity to establish their reputations in antitrust practice.<sup>154</sup> Because interaction with the government is a routine part of their daily business, this incentivizes lawyers to achieve a reputation for cooperation. Cooperative lawyers can cultivate a better relationship with the agencies, which will also enhance their credibility in front of the regulator. For instance, in cartel investigations, the NDRC often requests that the suspected firms self-investigate and self-report any cartel conduct.<sup>155</sup> If the firm

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153. RONALD S. BURT, *BROKERAGE & CLOSURE: AN INTRODUCTION TO SOCIAL CAPITAL* 4 (2005).

154. Ronald J. Gilson & Robert H. Mnookin, *Disputing through Agents: Cooperation and Conflict between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 513 (1994).

155. Interview with a Chinese antitrust lawyer, in London, Eng. (April 12, 2016).

proposes that it will engage a “cooperative” law firm to do this, it signals the credibility<sup>156</sup> of the self-report prepared by its lawyers.<sup>157</sup> This advantage, in turn, helps the lawyer attract more clients. The more representations that lawyers accumulate, the more experienced that they become, and therefore the more popular they become.

As Gilson and Mnookin point out, law firms “provide a larger repository of reputational capital,” and, therefore, defection by any single lawyer in a single case will jeopardize the entire firm’s reputation with the government agency.<sup>158</sup> Indeed, the larger and more established that the firm’s antitrust practice is, the more reputational capital that it will have at stake, and thus the more reluctant that it will be to forfeit such a reputation by representing a client that wants to challenge the agency’s decision.<sup>159</sup> In the worst situation, a non-cooperative Chinese lawyer may even face a boycott from the regulator.<sup>160</sup> This action is fatal to lawyers, as being unable to represent the client in front of the regulator will render the lawyer worthless to the client. Moreover, because each of the three antitrust agencies is housed within large central ministries that have various policy controls, the law firms would anticipate repeated dealings with these agencies on various fronts. Therefore, few law firms with an established antitrust practice would dare to jeopardize their relationship with the central antitrust authority by bringing a suit against it.

Chinese academics face the same dilemma as lawyers. While Chinese enforcers have been subject to fierce criticisms in foreign media, surprisingly these agencies face little opposition in China. Criticisms of government are a highly delicate issue, and academic freedom is limited in China.<sup>161</sup> Moreover, as businesses cannot bring

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156. Douglas W. Diamond, *Financial Intermediation and Delegated Monitoring*, 51 REV. ECON. STUD. 293 (1984).

157. *Id.*

158. Gilson & Mnookin, *supra* note 154, at 530.

159. *Id.* at 525; see also Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615 (1981).

160. Michael Martina & Matthew Miller, ‘Mr. Confession’ and His Boss Drive China’s Antitrust Crusade, REUTERS (Sept. 15, 2014), <http://uk.reuters.com/article/us-china-antitrust-ndrc-insight-idUSKBN0HA27X20140915> (recalling a ‘two warning system’ where lawyers running afoul of vague protocol or who are persistent in defense of their clients are threatened with being banned from meetings with the regulator, a way of suppressing client advocacy).

161. Gary King et al., *How Censorship in China Allows Government Criticism but Silences Collective Expression*, 107 AM. POL. SCI. REV. 326 (2013); see also *Hearing on “Is*



the agencies to court, there is little market demand for academic criticisms of agency decisions in China. Indeed, Chinese antitrust scholars are not only assessed by their scholarly works but more importantly, by their connection with and proximity to the antitrust regulators. Similar to Chinese lawyers, an important asset of a Chinese legal academic is the collection of privileged sources of information to which he or she has access. Scholars who are favored by the regulators are invited to advise on large and important antitrust cases, which gives them valuable insights into the regulatory practice. The leading scholars are invited to sit on the Expert Advisory Committee of the Anti-Monopoly Commission (“AMC”), a prestigious position that also provides them with insights into the inner workings of the antitrust regulators. Thus, the last thing that antitrust experts want is to develop a reputation for criticizing the regulators, or they will find it difficult to maintain their connections with the regulators and may face retaliation in the future, as demonstrated by the Zhang Xinzhu incident below.

#### *A. Public Criticisms of RPM Decisions*

RPM investigations have constituted one of the NDRC’s most important enforcement priorities in recent years. From 2008 to 2015, the NDRC brought four large RPM cases in industries involving white liquor, infant formula, eye glasses, and auto parts. However, RPM cases are also very controversial from a legal standpoint, and economists have identified many procompetitive reasons why firms would choose to conduct such practices.<sup>162</sup> Even if a firm has been found to have committed RPM practice, it is far from clear that such conduct is anticompetitive or would harm the interests of consumers. In 2007, the United States Supreme Court abandoned the century-old precedent in the *Dr. Miles* resale price maintenance agreement case and endorsed a more lenient rule of reason approach in investigating RPM.<sup>163</sup> Despite such controversy over RPM practices, criticisms of the NDRC’s investigations into RPM cases were scant.

In the WiseNews database, I found no criticisms of the agency’s investigation in the White Liquor Case. I was able to identify four

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*Academic Freedom Threatened by China’s Influence on American Universities*”, H. Comm. on Foreign Affairs, 113 Cong. 13- 22 (2014) (statement of Perry Link).

162. MASSIMO MOTTA, *COMPETITION POLICY: THEORY AND PRACTICE* 306-47 (2004).

163. *See generally* *PSKS, Inc. v. Leegin Creative Leather Prods.*, 551 U.S. 877 (2007).

editorials that expressed skepticism about the NDRC's legal position in the Infant Formula Case, but they represent a mere one percent of all the news reports that I found on WiseNews.

The first editorial, published in the Beijing News on July 3, 2013, was contributed by a columnist who analyzed the legal merits of the NDRC's investigation.<sup>164</sup> The article discussed the recent precedents involving resale price maintenance and highlighted the decision delivered by the Shanghai Intermediate Court involving Johnson & Johnson's resale price maintenance practice.<sup>165</sup> In that case, the Shanghai court applied a rule of reason analysis similar to the one applied by the United States Supreme Court in *Leegin*.<sup>166</sup> After finding that the plaintiff failed to satisfy its burden of proof, the court dismissed its action.<sup>167</sup> The author suggested that the NDRC's analysis of the Infant Formula Case should adopt a similar rule of reason analysis and take into account those competition factors applied in the Johnson & Johnson case.<sup>168</sup> Only two days later, the same columnist contributed another editorial in Beijing News.<sup>169</sup> He alleged that the NDRC was adopting a *per se* illegal approach in analyzing resale price maintenance cases.<sup>170</sup> He noted that the NDRC had taken a highly controversial position which was blatantly inconsistent with the Shanghai court's judgment in Johnson & Johnson case.<sup>171</sup> He further explained that dairy companies chose not to defend themselves because the NDRC possessed significant discretion under the AML in determining legal sanctions, and that these companies therefore offered significant price reductions in order to appease the regulator in the hope of a lower fine.<sup>172</sup> Finally, the author noted that in the absence of clear guidelines from the Supreme

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164. Shen Bing, *Naifen XianXianjia Xiaoshou Ruhe Panding Zhongxiang Longduan [Milk Powder Resale Price Maintenance How to Determine Vertical Antitrust Violation]* (July 3, 2013), [http://epaper.bjnews.com.cn/html/2013-07/03/content\\_444790.htm?div=-1](http://epaper.bjnews.com.cn/html/2013-07/03/content_444790.htm?div=-1) [<https://perma.cc/XLD4-XEHA>] (last visited Jan. 4, 2018).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. Shen Bing, *Zao Fanlongduan Diaocha, Naiqi Yinghe Furuan Jiangjia [Why Dairy Companies Subject to Investigation Relented and Reduced Prices]* (July 5, 2013), [http://epaper.bjnews.com.cn/html/2013-07/05/content\\_445280.htm?div=-1](http://epaper.bjnews.com.cn/html/2013-07/05/content_445280.htm?div=-1) [<https://perma.cc/XE5P-J5W4>] (last visited Jan. 4, 2018).

170. *Id.*

171. *Id.*

172. *Id.*

People's Court on how to interpret the relevant provision under the AML, no company would dare to challenge the NDRC's cases in court.<sup>173</sup>

The second editorial, published by Beijing Times, was contributed by Mei Xinyu, a researcher from the MOFCOM on July 10, 2013.<sup>174</sup> Mei used a skeptical tone and suggested that the NDRC's legal basis is probably wrong.<sup>175</sup> Mei first argued that the NDRC's case rested on dubious grounds—vertical agreements should not be illegal per se, and there are many procompetitive justifications for such actions.<sup>176</sup> Moreover, the cause for the high prices of infant formula powder in China lies not in an antitrust problem, but rather in the low rate of breastfeeding, the irrational quest for foreign milk powder, and the excessive layers of sales channels.<sup>177</sup> Criticism from MOFCOM is not surprising. Even though both MOFCOM and the NDRC are central ministries, they have different bureaucratic interests—the former endorses the open market and reform, whereas the latter favors industrial policy and direct intervention in the market.<sup>178</sup>

The third editorial, published in the Economic Observer on July 25, 2017, was contributed by a journalist.<sup>179</sup> The author argued that an RPM conduct by a firm that lacks significant market power is unlikely to cause any anticompetitive harm.<sup>180</sup> She noted that Chinese infant formula market was highly fragmented, with the largest producer, MeadJohnson, holding a mere 12.3% of the shares in the market.<sup>181</sup> Moreover, the public's call for price reduction through regulatory intervention could not resolve the long-term issue of the

173. *Id.*

174. See Mei Xinyu, *Mei Xinyu: Lengyan Kan Yangnaifen Fanlongduan Yangnaifen Gaojia Rengnan Genchu* [Mei Xinyu: Keep An Reasonable View On Anti-Monopoly Against Foreign Milk Powder Companies; The Root For Their High Price Would Not Be Eliminated Because Of Anti-Monopoly Invesigations], CS.COM.CN (July 10, 2013), [http://www.cs.com.cn/xwzx/ms/201307/t20130710\\_4058832.html](http://www.cs.com.cn/xwzx/ms/201307/t20130710_4058832.html) [https://perma.cc/XQ9Z-V7EA] (last visited Jan. 4, 2018).

175. *Id.*

176. *Id.*

177. *Id.*

178. See Zhang, *supra* note 8, at 693.

179. Xue Ying, *Lahui Zoushen De Dazhong* [Pulling Back the Absented Minded Public], JINGJI GUANCHA WANG [ECONOMIC OBSERVER] (July 25, 2013), <http://www.eeo.com.cn/2013/0725/247199.shtml> [https://perma.cc/U9GL-XEC5] (archived on Jan. 4, 2018).

180. *Id.*

181. *Id.*

mistrust that Chinese consumers placed in domestic infant formula.<sup>182</sup> The editorial also warned of the unintended consequences that might follow as a result of the NDRC's pressures on these producers to reduce prices.<sup>183</sup> In the end, the author called for more professionalism in the enforcement of the AML.<sup>184</sup>

The fourth editorial, published in Beijing News on August 1, 2013, was contributed by You Yunting, a lawyer based in Shanghai.<sup>185</sup> In this editorial, You expressed skepticism that the NDRC's actions could rein in high prices for infant formula in China.<sup>186</sup> He noted that the NDRC possessed significant discretion in setting the fines. Thus, the infant formula producers offered price reductions for fear of higher sanctions.<sup>187</sup> However, such price reductions are only temporary, and it is unrealistic to hope that an antitrust investigation can rein in prices, as the ultimate pricing power still lies with the producers.<sup>188</sup> Moreover, You believed that the cause of high prices of infant formula in China had less to do with resale price maintenance, but rather with the mistrust that Chinese consumers placed on domestic infant formula products.<sup>189</sup> Besides, there is an academic controversy regarding the anti-competitiveness of the resale price maintenance practices itself.<sup>190</sup> As a legal specialist, You's critical comments on the NDRC's investigation would strike many as bold. However, he is not a specialist in antitrust law, though his practice encompasses a wide range of corporate and litigation matters. Thus, he had much less to lose, even if his comments did upset those working inside the NDRC.

The above-mentioned articles were published in commercialized media outlets, but none of them generated much fanfare in the press, nor were they reproduced in any other news outlets. Moreover, none of the articles were contributed by a well-established antitrust academic or lawyer. Even though several leading Chinese antitrust

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182. *Id.*

183. *Id.*

184. *Id.*

185. You Yunting, *Fanglonduanfa Nanjie Yinger Naifen Gaojia Wenti [The Anti-Monopoly Law Cannot Solve the Problem of the High Prices of Infant Formula]* (August 1, 2014), [http://epaper.bjnews.com.cn/html/2013-08/01/content\\_454281.htm?div=-1](http://epaper.bjnews.com.cn/html/2013-08/01/content_454281.htm?div=-1) [https://perma.cc/L5WD-M57U] (last visited Jan. 4, 2018).

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

experts were interviewed and commented on the case, none of them voiced any doubts about the NDRC's investigation.

Similarly, I found only one critical editorial on the Auto Part Case in WiseNews and the author, Liu Zichuan was a columnist.<sup>191</sup> In this editorial entitled "Antitrust: The Government Should Played the Role As A Nightwatchman," Liu advocated for four things: first, a pattern of high prices in itself should not constitute an antitrust violation; second, resale price maintenance conduct has many pro-competitive justifications and is unlikely to trigger antitrust concerns in a competitive market; third, the power of the regulator should also be checked; and fourth, the priority for Chinese antitrust enforcement should be administrative abuse, rather than market abuse, as the market also has a self-correcting function.<sup>192</sup> Despite being a generalist, Liu seems to possess a clear understanding of the relevant literature in Chinese antitrust. It is not entirely clear whether there were ghostwriters behind him that contributed to the editorial, but it expressed the legitimate concern about the NDRC's enforcement in resale price maintenance cases. Unfortunately, similar to those in the Infant Formula Case, the editorial attracted little attention and generated no response from any other media outlets. The critical voices were too dim to be heard.

### *B. The Controversy in A Telecom Case*

In contrast to the scant criticisms in RPM cases, criticisms abounded in the China Telecom and China Unicom Case. In my WiseNews sample, over twelve percent of the news articles (25 out of 202) quoted experts who criticized the NDRC's investigation, compared with thirty seven percent (76 out of 202) who quoted experts who expressed endorsement. Almost all those experts who provided critical comments are experts in the telecom industry; no antitrust scholar cast any doubt, with the only exception of Zhang Xinzhu.<sup>193</sup> Zhang is a preeminent Chinese scholar from the Academy

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191. Liu Zichuan, *Fanlongduan: Zhengfu Geying Banyan Shouyeren [Antitrust: The Government Should Played the Role As A Nightwatchman]* (August 11, 2014), <http://www.eeo.com.cn/2014/0811/264813.shtml> [<https://perma.cc/ES96-JQFA>] (last visited Jan. 4, 2018).

192. *Id.*

193. Dong Dong et al., *Zhang Xinzhu: Chong Muqian De Xinxi Kan Lilun Shang Wufa Rendeng Longduan [Not Sufficient to Conclude Antitrust Violation Based on Existing*

of Social Science, and received his doctoral degree from the Toulouse School of Economics, under the supervision of Jean-Jacques Laffont.<sup>194</sup> Unlike most antitrust scholars, Zhang is an expert in both telecommunication regulation and antitrust regulation. Long before he advised on antitrust matters, he had served as an advisor for Chinese telecom firms and the telecom regulator MIIT.<sup>195</sup> Zhang also served on the Expert Advisory Committee to the AMC.<sup>196</sup> The Committee comprises of twenty one experts in law, economics, and various industry sectors.<sup>197</sup>

Two days after the NDRC's announcement of its investigation into China Telecom and China Unicom, the Oriental Morning Post interviewed Zhang, who provided very critical comments on the NDRC's antitrust investigation.<sup>198</sup> Zhang asserted that the internet retail access market has already been liberalized, so the competition was very fierce, and the differential pricing reflected a market outcome.<sup>199</sup> He pointed out that there was insufficient evidence to conclude that these two SOEs had committed antitrust violations.<sup>200</sup> He criticized the NDRC for inappropriately assuming the role of a telecom regulator, as the matter should have been handled jointly by both the antitrust and the telecom regulators.<sup>201</sup> He suggested that a wiser solution for the NDRC would be to promote institutional restructuring.<sup>202</sup> Zhang also expressed worry over the absence of the participation of economists during the enforcement of the AML in the

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*Evidence*] (Nov. 11, 2011), <http://finance.sina.com.cn/review/jcgc/20111111/070510796575.shtml> [https://perma.cc/WPN6-LQVC] (last visited Jan. 4, 2018).

194. Yingyi Qian, *Lafeng Dui Jingjixue He Jingjixue Jiaoyu De Gongxian* [Laffont's Contribution to the Economics Discipline and the Economic Education], CAIXIN WANG [CAIXIN NET] (Oct. 14, 2016), <http://opinion.caixin.com/2016-10-14/100997008.html> [https://perma.cc/P5YN-7EN2] (last visited Jan. 4, 2018).

195. Shengyi & Tan Jieyu, *Zhang Xinzhu Qiren: Cen Canary Qicao Fanlongduan Fa Pipin Dianxin Fanlongduan An* [Zhang Xinzhu Who Drafted the AML Criticized the Telecom Antitrust Case], RENMIN WANG [PEOPLE'S NET] (August 14, 2014), <http://finance.sina.com.cn/china/20140814/174220014032.shtml> [https://perma.cc/G27Y-Q7TQ] (last visited Jan. 4, 2018).

196. *Id.*

197. Guo Liqin, *Shenxian Gaotong Xuanwo De Zhang Xinzhu* [Zhang Xinzhu Who Is in Deep Trouble], DIYI CAIJIN RIBAO [CHINA BUSINESS NEWS] (Oct. 13, 2014), <http://www.yicai.com/news/4027003.html> [https://perma.cc/9MA3-QYWW] (archived on Jan. 4, 2018).

198. Dong Dong et al., *supra* note 193.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

past three years, arguing that economists should have played a prominent role in enforcing antitrust law.<sup>203</sup> He criticized the NDRC's overzealous attempt to regulate while ignoring the proper rules or standards in antitrust enforcement.<sup>204</sup> Lastly, Zhang condemned the agency's tactic of using public opinion against these telecom SOEs and failing to make full disclosure of the case.<sup>205</sup>

After the two SOEs requested the suspension of the NDRC's investigation, Zhang contributed another editorial to the *Oriental Morning Post*.<sup>206</sup> Zhang first observed that the NDRC's proactive disclosure of the case on the CCTV was a skillful move to leverage the public's resentment against those state monopolies, and the NDRC successfully achieved its objective in mobilizing public sentiment.<sup>207</sup> However, as he pointed out, such a strategic move is problematic from the perspective of antitrust law enforcement.<sup>208</sup> Zhang argued that antitrust enforcement should not be interfered with by public opinion, but rather be grounded in law and facts.<sup>209</sup> Zhang acknowledged that room for improvement remains in the regulation of the telecom industry. However, he also condemned the NDRC's practice, stating that no other antitrust enforcement agency in the world would use the media to influence the antitrust enforcement outcome.<sup>210</sup> Zhang argued that antitrust enforcers should rationally consider requests from rivals, as the spirit of the antitrust law is to protect competition, rather than competitors.<sup>211</sup> He noted that while the interest groups involved in this case remain a mystery, rival state-owned telecom firms seemed to have played a role in pushing the NDRC into investigating these two SOEs.<sup>212</sup> He warned antitrust

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203. *Id.*

204. *Id.*

205. *Id.*

206. Xinzhu Zhang, *Dianxin Fanlongduan An Fansi: Changquan Gaige Shi Nan Yi Yuyue Hong Gou* [Reflections on China Telecom Antitrust Case: The Reform of Property Rights is the Impossible Chasm], *XINLANG CAIJING* [SINA FIN.] (Dec. 13, 2011), <http://finance.sina.com.cn/chanjing/sdbd/20111213/073810981972.shtml> [https://perma.cc/H7WQ-LENM] (last visited Jan. 4, 2018) (arguing that the NDRC's allegation that the two telecom firms conducted price discrimination without reasonable justification lacks legal and economic support).

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

regulators that they should be vigilant about the strategic use of the antitrust law to harm rivals.<sup>213</sup>

Zhang then moved on to analyze the legal merits of this case. He first clarified that the AML only prohibits abuse of dominant position, and the possession of a monopoly position is not illegal per se.<sup>214</sup> He then noted that it was not even clear whether these two telecom SOEs held a dominant position in the relevant market in the first place.<sup>215</sup> Even if they did, as Zhang argued, the regulators would still need to satisfy a high burden of proof in proving the abusive conduct of these two firms.<sup>216</sup> Zhang advocated a rule of reason approach in analyzing the alleged price discrimination by these two SOEs.<sup>217</sup> Moreover, he outlined a number of reasons for defending the pricing practices of these two telecom firms, arguing that the existing evidence gathered by the NDRC was insufficient to prove the alleged abusive conduct of these two SOEs.<sup>218</sup> Last but not least, he proposed that the fundamental solution for reforming Chinese telecom industry lies in property reform.<sup>219</sup> He argued that without such market reforms, there would not be effective competition in the telecom industry, and he warned against the scenario in which an antitrust regulator would become a de facto price regulator of the telecom industry.<sup>220</sup> He also criticized the remedies requested by the NDRC in regulating the interconnection prices charged by these two SOEs, stating that it would be an undesirable form of price regulation that would lack a basis under the AML.<sup>221</sup>

Among the experts who have served on the Expert Advisory Committee to AMC, Zhang is the only antitrust expert who dared to challenge the NDRC's position publicly thus far. However, his outspoken comments also spell impending trouble for himself.

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213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*



*C. The Dismissal of An Antitrust Expert*

On August 12, 2014, news broke that Zhang Xinzhu had been sacked from the Expert Advisory Committee to the AMC after allegedly accepting a large sum for defending Qualcomm.<sup>222</sup> The news caused a stir in the Chinese media. It also surprised Zhang, who told news reporter that he was not aware of this until he learned it from the newspaper.<sup>223</sup> Zhang claimed that he had been dismissed from the Committee for “speaking for foreign businesses.”<sup>224</sup> He recalled that the chair of the Committee, Zhang Qiong, had asked him to conduct a self-assessment of his consulting practice for Qualcomm a few months earlier.<sup>225</sup> Zhang Qiong reprimanded Zhang Xinzhu for speaking for foreign firms and opposing the government’s position.<sup>226</sup> Zhang analogized his situation as a criminal defense lawyer: “It’s like I am defending a criminal facing death sentence. Every case should have two sides, they couldn’t deprive my rights to speak.”<sup>227</sup> Zhang claimed that the trigger for this case was not Qualcomm.<sup>228</sup> As a vocal critic of the NDRC in the China Telecom and China Unicom Case, Zhang explained that his comments created many obstacles for the agency.<sup>229</sup> As he confessed with the newspaper: “Currently, China’s administrative law enforcement is extremely dangerous, with

222. Neil Gough & Chris Buckley, *Adviser to Government in Chinese Investigation of Qualcomm Is Ousted*, N.Y. TIMES (Aug. 13, 2014), <http://www.nytimes.com/2014/08/14/business/international/antitrust-adviser-to-beijing-ousted-in-inquiry-over-payments.html>.

223. Shi Dongdong, *Zhang Xinzhu Huiying Bei Guowuyuan Fanlongduan Weiyuanhui Zhuanjia Zu Jieping: Wo Bang Waiqi Shuohua Le* [*Zhang Xinzhu Responded to the Dismissal by the Expert Advisory Committee to the Anti-Monopoly Commission of the State Council: I Spoke for Foreign Firms*], PENGPAI [THE PAPER] (Aug. 12, 2014), [http://www.thepaper.cn/newsDetail\\_forward\\_1261301](http://www.thepaper.cn/newsDetail_forward_1261301) [<https://perma.cc/EK58-PUXK>] (archived on Jan. 4, 2018).

224. *Id.*

225. Li Wei, *Fanlongduan Fanduizhe: Xiagan Zhuanjia Zhang Xinzhu* [*Antitrust Opponent: The Jobless Expert Zhang Xinzhu*], CAIJING YAN [CAIJING EYE] (Aug. 15, 2014), <http://finance.qq.com/zt2014/focus/fld.html> [<https://perma.cc/JU3W-9KYX>] (last visited Jan. 4, 2018).

226. *Id.*

227. Han Zhe, *Fanlongduan Yaorang Zhengfan Fang Dou Shuohua* [*Both Voices Should Be Heard In The Anti-Monopoly Investigations*], CHINADAILY.COM.CN (Aug. 14, 2014), [http://www.chinadaily.com.cn/hqj/xfly/2014-08-14/content\\_12193072.html](http://www.chinadaily.com.cn/hqj/xfly/2014-08-14/content_12193072.html) [<https://perma.cc/737A-PSPZ>] (archived on Jan. 4, 2018).

228. Shi Dongdong, *Zhang Xinzhu Huiying Bei Jieping: Wobang Waiqi Shuohua Le Haimei Shoudao Tongzhi* [*Zhang Xinzhu Responded to Dismissal: I Spoke for Foreign Firms and Haven’t Received Notice*], ZI MAO QU YOUBAO [FTZ POST] (Aug. 12, 2014), <http://finance.sina.com.cn/china/20140812/220919989721.shtml> [<https://perma.cc/MHX4-E5PN>] (archived on Jan. 4, 2018).

229. *Id.*

investigative powers and law enforcement powers bound together.”<sup>230</sup> Zhang was pessimistic about the future of China’s antitrust enforcement, as he lamented: “From the viewpoint of administrative enforcement of the law, China’s anti-monopoly law is at a dead end. The judiciary is the only hope.”<sup>231</sup>

On August 13, 2014, there was widespread speculation on Chinese media that Zhang Xinzhu had accepted six million in compensation for speaking for Qualcomm, although it was not clear whether the figure was in US dollars or RMB.<sup>232</sup> For instance, the 21<sup>st</sup> Century Business Herald, a popular business newspaper in China, published an article entitled “Zhang Xinzhu Responded to the Allegation of Accepting 6 Million Bribery from Qualcomm: Bullshit.”<sup>233</sup> The use of “bribery” suggested that Zhang’s consulting for Qualcomm was illegal. Zhang strongly denied this allegation, but the figure was widely quoted by major newspapers. On WiseNews, I found that almost all of the news articles published the next day mentioned Zhang’s compensation of six million. On August 13, 2014, Xinhua News published an editorial entitled “Those Experts Who Fished in Troubled Water, Living on Our Country While Leaking Secrets to Others Are Not Tolerated.”<sup>234</sup> The editorial carried a very harsh tone, condemning the fact that Zhang used his title as a member of the Expert Advisory Committee to back foreign firms.<sup>235</sup> The editorial also suggests that even though Zhang is a very knowledgeable expert, his behavior should be condemned as unethical.<sup>236</sup> It noted that some multi-national companies tried to use all sorts of tactics to defend themselves and delay the investigations into them.<sup>237</sup> Moreover, those government experts who worked for foreign firms violated the disciplinary rules and such conduct should be penalized.<sup>238</sup> As Xinhua is regarded as a Party mouthpiece, this

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230. *Id.*

231. Gough & Buckley, *supra* note 222.

232. Zhang Xinzhu Huiying Shouhui Gaotong 600 Wan: Chedan [Zhang Xinzhu Responded to The Allegation of Accepting 600 Million Bribery from Qualcomm: Bullshit], 21 SHIJI JINGJI BAO [21<sup>ST</sup> CENTURY BUESINSS HERALD] (August 13, 2014), <http://finance.sina.com.cn/china/20140813/214720002508.shtml> [https://perma.cc/M3W9-LP83] (archived on Jan. 4, 2018).

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

editorial signaled that the Chinese leadership had set the tone for the incident. The editorial was highly influential. In the WiseNews database, I found ten news articles published on the same date that directly copied the editorial from Xinhua.

On the same day, the CCTV produced another TV program reporting the case.<sup>239</sup> The discussion revolved around the conflict of interest issue in this case and interviewed Ren Yuling, a consultant for the State Council.<sup>240</sup> Mr. Ren was concerned about the Zhang Xinzhu incident, noting that it was not purely a commercial matter and that it might have also affected the national interest.<sup>241</sup> As Zhang might leak information to foreign firms, Ren hinted that there could be corruption.<sup>242</sup> Mr. Ren then called for more laws to be promulgated to address such problems.<sup>243</sup> Meanwhile, several newspapers hinted that Zhang could be subject to legal sanctions. On August 14, 2014, Global Times released an editorial, noting that it was not clear whether Zhang Xinzhu possessed state secrets when serving on the Expert Advisory Committee and thus his consulting service to Qualcomm may amount to the selling of state secrets.<sup>244</sup> Yangtze News also speculated that Zhang might have had the capacity to obtain state secrets.<sup>245</sup> The article pointed to Article 111 of the Criminal Law, which states that the sale of state secrets could be subject to a jail sentence of up to imprisonment for life.<sup>246</sup>

On August 14, 2014, Qualcomm representatives denied direct compensation for Zhang Xinzhu, clarifying that Qualcomm instead hired Global Economics, an economic consultancy where Zhang

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239. CCTV, *Guowuyuan Zhuanjia Bei Jieping: Huoying Shou Gaotong Haochu Fei* [State Council Expert Was Dismissed: Maybe Due to the Benefits Received from Qualcomm], Zhongguo Xinwen Wang [China News Net] (Aug. 13, 2014), <http://www.chinanews.com/gn/2014/08-13/6488450.shtml> [https://perma.cc/XPY4-FVTK] (archived on Jan. 4, 2018).

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. Shan Renping, *Guowuyuan Fanlongduan Zhuanjia Anzhu Waiqi Taibugai* [State Council Antitrust Expert Shouldn't Have Secretly Assisted Foreign Firms], HUANGQIU SHIBAO [GLOBAL TIMES], (Aug. 14, 2014), <http://opinion.huanqiu.com/shanrenping/2014-08/5105235.html> [https://perma.cc/VQ45-AMBS] (archived on Jan. 4, 2018).

245. Yang Yuze, *Zhang Xinzhu Shijian de Lunli He Falv* [The Ethics and Law in The Zhang Xinzhu Incident's] (August 15, 2014), <http://opinion.people.com.cn/n/2014/0815/c1003-25471636.html> [https://perma.cc/YUW5-CSDD] (last visited Jan. 4, 2018).

246. *Id.*

served as an expert.<sup>247</sup> Qualcomm also noted that the engagement of economic experts was standard practice during antitrust investigations.<sup>248</sup> Zhang refused to provide further comments during an interview with a newspaper, alleging that the current media environment was very hostile.<sup>249</sup> On September 11, 2014, Xu Kunlin, the former director general of the antitrust unit at the NDRC made a detailed explanation of the dismissal of Zhang Xinzhu during a press conference.<sup>250</sup> Xu explained the dismissal had to do with a research report that Qualcomm submitted to the NDRC, in which Zhang was one of the three contributors.<sup>251</sup> The NDRC claimed that Zhang Xinzhu was supposed to receive USD 1.4 million from Qualcomm for his advisory service, and until the time that he was sacked, he had received USD 77,000.<sup>252</sup>

In WiseNews, I identified sixty news articles discussing the dismissal of Zhang Xinzhu from the date of the first public disclosure of his dismissal to the day before the NDRC released its decision in Qualcomm. Among these articles, ninety-three percent noted that Zhang Xinzhu had accepted high compensation from Qualcomm for defending the firm and forty-six percent mentioned that he accepted six million from Qualcomm; some articles reported that that figure was in dollars, but others were ambiguous. Forty-seven percent expressly condemned and criticized Zhang's conduct. Public opinion was also hostile toward Zhang Xinzhu. A poll on Sina shows that eighty percent of those surveyed believed that Zhang Xinzhu had some illicit dealings with Qualcomm.<sup>253</sup> Only two editorials that I identified in WiseNews defended Zhang Xinzhu. The first article was

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247. Jimmo Zang, *Gaotong Fourean Yu Zhang Xinzhu You Zhijie Caiwu Lianxi* [Qualcomm Denied Direct Financial Dealings with Zhang Xinzhu], TENGXUN KEJI [TENANT TECHNOLOGY] (Aug. 14, 2014), <http://tech.qq.com/a/20140814/080401.htm> [https://perma.cc/BWU2-L42P] (last visited Jan. 4, 2018).

248. *Id.*

249. Gough & Buckley, *supra* note 222.

250. Li Xiaoyu, *Guowuyuan Fanlongduan Weiyuanhui Jieping Zhuanjia Zhang Xinzhu Ye Shouping Gaotong Gongsi* [The Expert Advisory Committee of the Antimonopoly Bureau Dismissed Zhang Xinzhu Who Was Also Employed by Qualcomm], ZHONGGUO XINWEN WANG [CHINA NEWS NET] (Sept. 11, 2011), <http://www.chinanews.com/gn/2014/09-11/6583116.shtml> [https://perma.cc/S692-QD53] (archived on Jan. 4, 2018).

251. *Id.*

252. *Id.*

253. Xinlang Caijing [Sina Finance], *Ni Ruhe Kandai Fanlongduan Zhuanjia Bei Jieping* [How Do You View the Dismissal of Antitrust Experts?], XINLANG DIAOCHA [SINA INVESTIGATION] (Aug. 15, 2014), <http://survey.finance.sina.com.cn/result/100992.html> [https://perma.cc/3BUG-89JF] (last visited Jan. 17, 2018).

published by Legal Evening News on August 15, 2014.<sup>254</sup> The article mentioned that the media coverage had been highly biased—it was widely reported that Zhang accepted six million from Qualcomm, even before it verified the currency in which the money was paid.<sup>255</sup> The editorial also argued that the AMC is not a law enforcement agency, nor a working commission, such as the SASAC.<sup>256</sup> It clarified that the main function of the Expert Advisory Committee is to provide advice to antitrust policy-making and enforcement, and it lacked the power to influence decision-making directly.<sup>257</sup> The editorial also noted that members of the Expert Advisory Committee should have the freedom to conduct consulting work as long as they were not advising the AMC.<sup>258</sup> Even if Zhang had accepted financial benefits from advising an investigated firm, the main focus should be whether the reasoning and the analysis performed by the expert made sense.<sup>259</sup> However, such defense of Zhang was not well-received. In WiseNews, I found no article that made an effort to understand the substantive arguments proposed by Zhang. Rather, the focus was on how much money that he had received from Qualcomm and whether he should be dismissed for violating the disciplinary rules of the Expert Advisory Committee.

The second editorial was published by the Securities Times on August 18, 2014.<sup>260</sup> It first argued that lobbying is different from rent seeking; the former is legal, while the latter is not.<sup>261</sup> It noted that one characteristic of the NDRC's enforcement is that it would give generous leniency to those companies that readily admitted their guilt and imposed higher sanctions on those that tried to defend themselves.<sup>262</sup> This method deterred firms from challenging the

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254. Miao Yinzhi & Ren Xiaolan, *Lunzheng Fanlongduan Zhuanjia Dei Jiangli* [Discussing Antitrust Experts Should Make Sense], FAZHI WANBAO [LEGAL EVENING NEWS] (August 15, 2014), <http://money.163.com/14/0815/14/A3MOD9BO00253B0H.html> [https://perma.cc/XNX7-VLLG] (archived on Jan. 4, 2018).

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. Xu Shengliang, *Youshui Zhengfu, Zhege Keyi You* [Lobbying the Government, This Can Happen], ZHENGQUAN SHIBAO [SECURITIES TIMES] (Aug. 18, 2014), <http://m.cgbchina.com.cn/exchangeNewDetail.gsp?newsId=6215521> [https://perma.cc/4UB6-HZVT] (archived on Jan. 4, 2018).

261. *Id.*

262. *Id.*

NDRC in court and it had worked perfectly well thus far.<sup>263</sup> Thus, the NDRC wanted to deter Qualcomm from suing the agency even before it formally released its decision, and the Zhang Xinzhu incident was a deliberate act of hitting the mountain to scare the tiger (meaning “showing of strength as a warning”) to deter Qualcomm from challenging its case in court.<sup>264</sup> The editorial argued that firms subject to an antitrust investigation should have the freedom to engage experts to lobby the government, as long as such lobbying is made public.<sup>265</sup> The author lamented that some foreign firms become corrupt after they start operating in China, many of which would not resort to rent seeking if such lobbying were effective.<sup>266</sup>

Despite the doubts expressed in these two editorials, no other reports in the WiseNews sample defended Zhang Xinzhu. For instance, China Business News interviewed several leading Chinese antitrust experts in early October 2014.<sup>267</sup> The interviewees unanimously believed that Zhang had violated the conflict of interest rules while serving as a member of the Expert Advisory Committee.<sup>268</sup> One antitrust expert was quoted as follows: “The figure (of Qualcomm’s compensation for Zhang) is too big, it is difficult for me to imagine such an amount. Is there something wrong here? If he was not a member of the Expert Advisory Committee, would he be able to receive such a high sum?”<sup>269</sup> Another expert recalled that he accepted an advisory project with a multinational firm in 2004 but only asked for RMB 50,000.<sup>270</sup> Many believed that Zhang Xinzhu received such high compensation because of his affiliation with the Expert Advisory Committee.<sup>271</sup> According to the news, Qualcomm had tried to engage several experts who served on the Expert Advisory Committee, but Zhang Xinzhu was the only one who accepted the job.

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263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. Guo Liqin, *Shenxian Gaotong Xuanwo De Zhang Xinzhu [Zhang Xinzhu Who Is in Deep Trouble]*, *DIYI CAIJIN RIBAO [CHINA BUSINESS NEWS]* (Oct. 13, 2014), <http://www.yicai.com/news/4027003.html> [<https://perma.cc/KH9D-8FKM>] (archived on Jan. 4, 2018).

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

*VI. THE POPULIST DEMAND*

Critical comments over the NDRC's actions were rare, but their existence also demonstrates that public criticism of administrative enforcement is not a taboo subject or politically sensitive news subject to censorship. After all, the Chinese media is the mouth and ears for the Party, and abuse of administrative discretion of low-level officials are frequently exposed under the spotlight in the Chinese media. Then how do we explain the rarity of such critical comments? As explained in the previous section, the strategic leakage of information from regulators to media outlets, and the self-censorship by Chinese antitrust experts, distorts the supply of media coverage over Chinese antitrust. However, the problem is not just the manipulation of supply, but a more fundamental one—the consumer demand also creates disincentives for media to expose negative news about antitrust interventions.

Abundant literature by economists and political scientists show that readers find a news report more credible and memorable when its story is consistent with their beliefs.<sup>272</sup> Economists have also found that newspapers have incentives to slant their news in the same direction, as media spinning will make their news reports more credible and memorable to readers.<sup>273</sup> Indeed, the loosening of state control over the Chinese media has enhanced its ability to respond to consumer demand. Commercialized media in China, therefore, has the incentive to appeal to or even create popular opinion.<sup>274</sup> Topics that stimulate popular sentiments will tend to attract an audience. As illustrated in the examples below, the Chinese public loathes high prices and applauds the antitrust regulator's vow to reduce prices for consumers. As such, the media is more concerned about the effects of the antitrust investigation on consumer prices, rather than its legitimacy. Nationalist sentiments can also be easily stirred up when a famous domestic brand is being acquired by a large multinational firm. The media's focus is not on whether the foreign acquisition

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272. See generally Russell J. Dalton *et al.*, *Partisan Cues and the Media: Information Flows in the 1992 Presidential Election*, 92 *AM. POL. SCI. REV.* 111 (1998); Robert Erikson, *The Influence of Newspaper Endorsements in the Presidential Elections: The Case of 1964*, 20 *AM. J. POL. SCI.* 207 (1964); Edward L. Glaeser *et al.*, *Strategic Extremism: Why Republicans and Democrats Divide on Religious Values*, 120 *QUARTERLY J. ECON.* 1283 (2005).

273. See Sendhil Mullainathan & Andrei Shleifer, *Media Bias*, HARVARD INSTITUTE OF ECONOMIC RESEARCH DISCUSSION PAPER (2002), <http://www.nber.org/papers/w9295.pdf> [<https://perma.cc/P2K2-GUEU>] (last visited Jan. 4, 2018).

274. Liebman, *supra* note 21, at 8.

violates the AML, but rather whether the transaction should be blocked because of its threat to domestic industries.

#### *A. Price Regulator in RPM Cases*

To gauge how the media “adjudicates” a RPM case before the NDRC makes its decision, I focus my study on the three RPM cases in which there were prior public disclosures of the investigations before the agency released its decisions. Using the WiseNews database, I searched for relevant news articles<sup>275</sup> on each of the cases during the period between the first public disclosure of the investigation<sup>276</sup> and the day before the NDRC’s decision.<sup>277</sup>

Two major themes emerge from a review of the coverage in the Infant Formula Case and the Auto Part Case. One is the condemnation of excessive pricing. Many reports discussed the abnormal profits reaped by the firms involved, the unusually high prices of these consumer products, or the comparison of the prices of products in China and elsewhere. The other theme centers around the price reduction voluntarily offered by the companies under investigation. Just two days after the NDRC’s announcement, Wyeth announced a price reduction for its milk powder and others quickly followed.<sup>278</sup> Similarly, some manufacturers proactively offered to reduce the prices of their auto parts in response to the NDRC’s probe into the auto industry.<sup>279</sup> Most news articles focused on various topics

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275. For the Infant Formula Case, I conducted my search using the key words “milk powder and NDRC”; for the White Liquor Case, I conducted my search using the key words “Maotai or Wuliangye and NDRC”; for the Auto Part Case, I conducted my search using the key words “Auto and NDRC.” For all these searches, I used the WiseNews database and limited my search on news articles published by media outlets in mainland China.

276. In each of these three cases, it were the companies that first disclosed the investigation.

277. In both the White Liquor Case and the Infant Formula Case, the decisions were made on all companies under investigation at the same time. However, because the Auto Part Case was investigated by different local authorities of the NDRC, the decisions were imposed by different authorities on different dates. For the purpose of this study, I used the date of the first the NDRC decision released by Hubei Price Bureau on BMW dealers as the decision date.

278. Southern Daily, *Huishi Naifen Zuigao Jiangjia Ercheng Yangnaifen Fanlongduan Diaocha Xiaoying Chuxian [The Price of Wyeth Has Been Reduced By 20% at Most; The Antitrust Investigation on Foreign Milk Powder Companies Has Begun to Work]*, XINLANG CAIJING [SINA FIN.] (July 4, 2013), <http://finance.chinanews.com/cj/2013/07-04/5001321.shtml> [<https://perma.cc/Y938-3K2N>] (last visited Jan. 4, 2018).

279. Tom Mitchell, *China Antitrust Ruling Blunts Foreign Criticisms*, FINANCIAL TIMES (August 21, 2014), at <http://www.ft.com/cms/s/0/61d3f8aa-28ff-11e4-9d5d-00144feabdc0.html#slide0> [<https://perma.cc/H6PX-N6UZ>] (archived on Jan. 4, 2018).



revolving around price reductions, such as the magnitude of the price reductions, whether they actually took place, whether such price reductions were only short-lived, whether they would benefit consumers in the long term, and whether such price reductions would benefit or harm domestic manufacturers. Noticeably, very few media reports tried to understand the legal basis for the NDRC's intervention, i.e., the legal merits of the case. Fewer mentioned that there were actually grounds for an exemption for resale price maintenance practices under the AML.<sup>280</sup> Rarely did news articles cast doubt as to the legitimacy of the NDRC's legal intervention. In comparison, the White Liquor Case attracted much less publicity, and there were far fewer reports that condemned Maotai's or Wuliangye's pricing. As neither company offered to reduce prices in this case, there was also no mention of price reductions in this case.

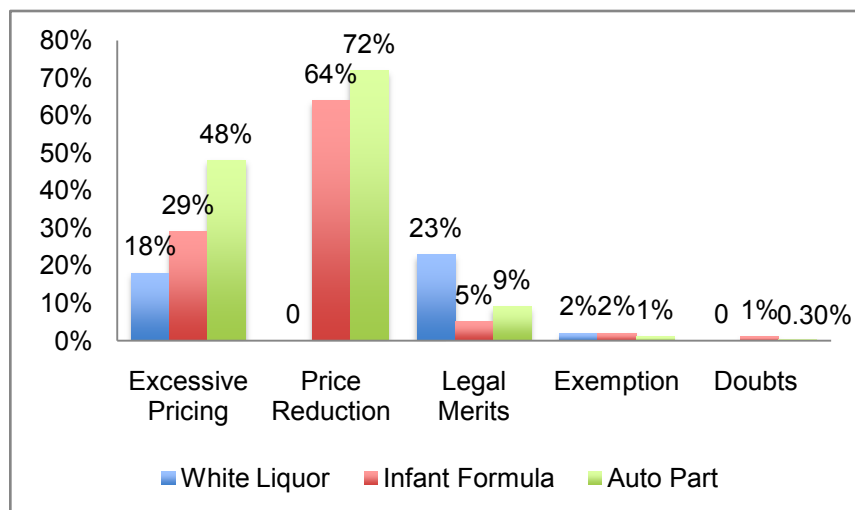
I analyze the content of each article by coding it as covering each of the following five issues: excessive pricing of the products or abnormal profits by the manufacturers ("Excessive Pricing"), price reduction offered by the manufacturers ("Price Reduction"), legal basis for the NDRC's intervention ("Legal Merits"), grounds of exemption for manufacturers under the AML ("Exemption"), and doubts about the NDRC's legal basis ("Doubts"). An article will be coded as "1" if it has devoted at least one sentence<sup>281</sup> to discussing the underlying topic. Otherwise, it is coded as "0". A particular article could receive multiple codes if, for example, it focused on multiple topics. Figure 1 presents the percentages of the reports that covered a particular topic among all the news reports on each case.

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280. Art. 15, AML.

281. Sometimes an article only mentions a few words that are relevant to the topic but they are only tangential to the discussion. In these circumstances, the article will be coded as 0.

FIGURE 1: TOPICS OF DISCUSSION IN THE NEWS COVERAGE OF THE THREE MAJOR RPM CASES



Indeed, rather than injecting more transparency into the investigation, many commercialized media sources in these cases acted as cheerleaders for the regulator, aided and abetted the antitrust regulator to monitor prices, and coerced firms to reduce prices, all without clear evidence that the firm had committed an antitrust violation in the first place. A few examples will illustrate this. On July 11, 2013, Beijing Morning Post reported the price reductions offered by the infant formula producers.<sup>282</sup> The journalist inspected the prices of the infant formula products made by the several firms subject to the NDRC's investigation and was disappointed to find no reduction in retail prices on the shelves.<sup>283</sup> Several supermarkets explained that it would take a couple of days for them to adjust the prices.<sup>284</sup> On July 13, 2013, another journalist inspected several supermarkets to monitor the price reductions of the infant formula products.<sup>285</sup> She found that

282. Xiao Dan, *Yan Naifen Jiangjia Beizhi Bu Jieke, Touhuan Gainian Bian Cuxiao* [Foreign Infant Formula Price Reduction Was Not Sufficient, Trying to Do Promotion Instead], BEIJING CHENBAO [BEIJING MORNING POST] (July 11, 2013), <http://www.chinanews.com/sh/2013/07-11/5029985.shtml> [https://perma.cc/GA62-2HHB] (archived on Jan. 4, 2018).

283. *Id.*

284. *Id.*

285. Wang Fenglin, *Yan Naifen Jiangjia Chengyi Bugou, Linshou Duan Da Guimo Jiangjia Chichi Wei Xian* [Foreign Milk Powders Did Not Show Sincerity in Reducing Prices,

the prices for several brands had decreased—noting, for instance, Wyeth had offered 11%-20% reduction for certain infant formula products.<sup>286</sup> However, consumers were still not satisfied, noting that the prices for the stage 1 and stage 2 infant formula products had remained the same.<sup>287</sup> In another news report published by National Business Daily, a reporter found that Wyeth even attempted to increase the prices by introducing new infant formula products that were closely similar to the previous product.<sup>288</sup>

Such a hostile media environment exerted pressure on firms to reduce prices to appease the disgruntled consumers. However, voluntary price reduction also generated great fanfare in the media and sent a signal to the public that these firms had indeed committed an antitrust violation by overcharging consumers. The public's attention to the scale and scope of the price reduction overshadowed the fundamental question about the legitimacy of the regulator's intervention in the first place.

### *B. Nationalism and Merger Control*

In China, foreign acquisition of domestic assets can easily become an emotionally charged hot button issue. As Susan Shirk once commented: “Nationalist themes struck a chord in a country seeking to revive itself as a major power after over a century of humiliating weakness vis-à-vis foreign powers.”<sup>289</sup> The Chinese government is ambivalent toward the nationalist slant in the Chinese media.<sup>290</sup> On the one hand, nationalism appeared to be an effective way to foster popular identification with the Chinese government.<sup>291</sup> On the other hand, the government is concerned that the Chinese public might topple its power if they perceive the government as weak for not

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*Massive Discounts of Retail Prices Haven't Appeared*], JINRI ZAobao [TODAY MORNING POST] (July 13, 2013), <http://finance.huanqiu.com/industry/2013-07/4127805.html> [<https://perma.cc/ZNS3-CL5S>] (archived on Jan. 4, 2018).

286. *Id.*

287. *Id.*

288. Guo Mengyi & Wang Xia, *Huishi Beizhi Xin Peifang Zhanghui Yuanjia Huoying Zhong Pingpai Gengfeng*, MEIJING [NBD.COM] (July 31, 2013), <http://www.nbd.com.cn/articles/2013-07-31/762556.html> [<https://perma.cc/9RV9-AZTE>] (last visited Jan. 4, 2018).

289. See Susan L. Shirk, *Changing Media, Changing Foreign Policy in China*, 8 JAPANESE J. POL. SC. 43, 45 (2007).

290. *Id.*, at 242.

291. *Id.*

standing up to the foreign powers.<sup>292</sup> As illustrated in the Coca-Cola/Huiyuan case below, widespread nationalist sentiments could exert pressure on the antitrust regulator to take a tough stand in reviewing an acquisition from a foreign buyer.

On September 3, 2008, Huiyuan, a famous Chinese juice manufacturer, announced that it was selling its shares to Coca-Cola for twenty billion HKD (approximately 2.5 billion USD).<sup>293</sup> This was the largest acquisition of a Chinese firm and the news caused a sensation overnight. According to an online survey by Sina Net, as of September 4, 2008, over 100,000 online participants took the survey, of whom eighty-two percent opposed the transaction, and of whom eighty-three percent believed that the transaction would destroy a leading domestic company.<sup>294</sup> This results of the online survey were widely quoted by the Chinese media. In the WiseNews database, I identified 655 pieces of relevant news articles from the date of Coca-Cola's announcement to the day before MOFCOM's prohibition decision, among which 150 quoted the survey results.

A number of news articles expressed doubts about the acquisition. For instance, on September 9, 2008, Economy Information Daily, a business-oriented newspaper owned by Xinhua Newspaper, published an editorial warning regulators of the foreign acquisitions of domestic brands.<sup>295</sup> It noted that over seventy percent of the traditional Chinese brands have disappeared after the flooding of foreign brands and those brands produced by joint ventures.<sup>296</sup> It also highlighted several examples where Chinese brands disappeared after acquisitions by foreign firms.<sup>297</sup> It called on the regulator to strengthen its regulation and to tighten control over the foreign

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292. *Id.*

293. Alison Leung & Fion Li, *Coca-Cola To Buy Huiyuan in Largest China Takeover*, REUTERS (Sep. 3, 2008), <http://www.reuters.com/article/us-coca-cola-huiyuan-idUSHKG15315720080903> [<https://perma.cc/SGR9-PKL8>] (archived on Jan. 4, 2018).

294. Wenhua Li & Junchu Zhu, *Kekou Kele Yu Tun Huiyuan Guozhi Zhongguo Wannming Bachen Bu Zantong [Coca-Cola Wanted to Swallow Huiyuan Juice, 80% Netizens Disagreed]*, RENMING WAN [PEOPLE'S NET] (Sep. 8, 2008), [http://finance.ifeng.com/news/industry/200809/0908\\_2202\\_770288.shtml](http://finance.ifeng.com/news/industry/200809/0908_2202_770288.shtml) [<https://perma.cc/F387-593Q>] (last visited Jan. 17, 2018).

295. Zhang Kuixing, *Jingfang Waizi Bingou Xingcheng Longduan Weiji Wo Jingji Anquan [Beware Foreign Acquisition Became Monopolies Harm Our Economic Security]*, JINGJI CANKAO BAO [ECONOMIC INFORMATION DAILY] (Sep. 9, 2008), [http://finance.ce.cn/macro/gdxw/200809/09/t20080909\\_13602625.shtml](http://finance.ce.cn/macro/gdxw/200809/09/t20080909_13602625.shtml) [<https://perma.cc/HE96-XKCV>] (archived on Jan. 4, 2018).

296. *Id.*

297. *Id.*

acquisitions of domestic brands.<sup>298</sup> On September 8, 2008, the People's Net, a website owned by People's Daily, published a long article summarizing the public's reactions to the merger.<sup>299</sup> It noted that the results of the Sina survey suggested that an overwhelming percentage of Chinese citizens strongly opposed the transaction.<sup>300</sup> It then highlighted examples of the foreign acquisitions of famous domestic brands.<sup>301</sup> It should be noted, however, that those news articles that vehemently opposed the transaction only account for a small minority. Many others are neutral, or even supportive of the transaction. For example, Zhu Xingli, the chairman of the Huiyuan Juice Company, tried to placate nationalistic sentiments, stating that the sale is a purely commercial act, rather than anything symbolic.<sup>302</sup> He said that companies should be raised like sons but sold like pigs, and this statement was widely quoted by Chinese newspapers.<sup>303</sup>

On September 9, 2008, Beijing Youth Daily published an editorial entitled "Probably Difficult for Coke to Swallow Huiyuan," highlighting the two challenges for Coca-Cola.<sup>304</sup> The first challenge was the national sentiments that were expressed through online surveys and the news coverage.<sup>305</sup> The second challenge was the recent scandal involving Sun Jingyi, a MOFCOM official in charge of approving foreign acquisitions of domestic assets.<sup>306</sup> On September 25, 2008, Southern Weekend published a lengthy and detailed report of the corruption case involving Sun, who abused his administrative power when conducting merger reviews.<sup>307</sup> According to the report,

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298. *Id.*

299. Li & Zhu, *supra* note 294.

300. *Id.*

301. *Id.*

302. Quan Jing, *Huiyuan Zhu Xinli: Qiye Yinggai Dan Er Yan Dan Zhu Mai* [Enterprises Should Be Raised Like Sons and Sold Like Pigs], XINLANG CAIJING [SINA FINANCE] (Sep. 6, 2008), <http://finance.sina.com.cn/g/20080906/22195279943.shtml> [https://perma.cc/G4YP-NR8X] (last visited Jan. 4, 2018).

303. *Id.*

304. Lu Ning, *Kekou Kele Kong Nantun Huiyuan Guozhi* [Probably Difficult for Coca-Cola to Swallow Huiyuan Juice], BEIJING QINGNIAN BAO [BEIJING YOUTH DAILY] (Sep. 9, 2008), <http://stock.sohu.com/20080909/n259458535.shtml> [https://perma.cc/3MK6-J8GZ] (archived on Jan. 4, 2018).

305. *Id.*

306. *Id.*

307. Su Yongtong et al., *Yige Shangwubu Guanyuan He Lvshimen De Yingmi Jiaoyi* [A Secret Deal between A MOFCOM Official and Lawyers], NANFANG ZHOUMO [SOUTHERN WEEKEND] (Sep. 25, 2008), <http://www.infzm.com/content/17636/1> [https://perma.cc/D9FC-NZRJ] (last visited Jan. 4, 2018).

Sun colluded with his friends who worked at law firms and accepted bribes in exchange for the approvals of foreign acquisitions of domestic assets.<sup>308</sup> MOFCOM officials denied that they were influenced by any factors other than competition. However, it was widely speculated among experts in China that the excessive media coverage over this transaction contributed to MOFCOM's prohibition.<sup>309</sup> As admitted by Lin Zheyang, a spokesperson from the Foreign Investment Bureau of MOFCOM, in January 2009, the potential interference of the widespread media coverage of this case was one of the challenges posed to MOFCOM in dealing with its merger review.<sup>310</sup>

During this period, no news report discussed the legal merits of the case. The focus of the debate in the media is about whether nationalism should prevail in a merger transaction, not whether the transaction should be blocked under Chinese antitrust law. The biased media coverage also partly reflects the limited public awareness of the rule of law in China. As the general public lacks a sophisticated knowledge in antitrust law, they may judge MOFCOM's performance based on their understanding of fairness and justice. As such, MOFCOM may be condemned as passive and incompetent had it approved the transaction. Following the scandal of Sun Jingyi, the public may even call for a probe into the MOFCOM officials for their failure to block the deal.

## VII. CONCLUSION

Understanding the role of media is crucial to understanding the forces that have shaped the outcome in Chinese antitrust law. Through the extensive analysis of the media coverage of six high profile cases brought by the NDRC during 2008 to 2015, this Article

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308. *Id.*

309. Jing Cuodao, *Qing Hefang Yanjiu Yuan Yu Ma Guanyuan Lvshi Jiedu Shang Wubu Foujue Huiyuan Shougou An* [Researcher Qing Hefang and Lawyer Ma Guanyuan Interpret MOFCOM's Prohibition of Huiyuan Acquisition], FENGHUANG WANG CAIJING [PHOENIX NET FINANCE] (March 19, 2009), <http://finance.ifeng.com/hk/gs/20090319/460127.shtml> [<https://perma.cc/7ZZK-PRCN>] (last visited Jan. 4, 2018).

310. Liu Yinghua, *Shui Juji Le Kekou Kele Shougou Huiyuan* [Who Kills Coca-Cola's Acquisition of Huiyuan], BEIJING CHENBAO [BEIJING MORNING POST] (March 20, 2009), <http://finance.sina.com.cn/chanjing/b/20090320/08356002388.shtml> [<https://perma.cc/C6QU-4S5N>] (last visited Jan. 17, 2018) (The other two factors that she considered include MOFCOM needs to conduct a review of the consequences of the acquisition on the industry, MOFCOM needs to conduct a review of the health of the overall industry).

illustrates the complex relationship that exists between the Chinese antitrust regulators, the media, and the Party during antitrust enforcement. Chinese antitrust regulators are policy entrepreneurs who are adept at using the media to mobilize public sentiments to push forward difficult cases. They strategically leak information to the state media in an attempt to manipulate the supply of information to the public and then leverage the public endorsement to win political support. Meanwhile, Chinese antitrust lawyers and academics have a vested interest in promoting antitrust enforcement and those who voice dissent face retaliation from the government. This dampens public criticism over agency decisions. However, the problem of the media's bias is not just driven by these supply factors, but also demand side bias. In response to the populist demand to reduce consumer prices and nationalistic concerns, the media lacks the incentive to publicize criticism of regulatory interventions. As such, consumer demand converges with the regulatory demand for intervention in these industries. This suggests that even if the judicial oversight over administrative discretion is strengthened in China, and the Chinese antitrust experts are incentivized to voice dissents, the disincentives of the media to diffuse negative news about the regulatory intervention will probably persist.

## Annex I

Decision Year	Case Name	Description
2009	Coca-Cola/ Huiyuan	In March 2009, MOFCOM announced that it had blocked Coca-Cola's proposed acquisition of Huiyuan, a Chinese juice manufacturer primarily on the ground that Coca-Cola could have the ability to leverage its dominant position in the carbonated soft drink market to the juice market. <sup>311</sup>
2011	China Telecom/ China Unicom	In November 2011, NDRC announced its investigation into China Telecom and China Unicom, alleging that they had conducted price discrimination by charging their rival ISPs much higher prices than those small ISPs not competing with them. A few weeks later, both SOEs proposed a number of rectifications and requested suspension of the investigation. The NDRC acknowledged the receipt of the proposal and no fine was imposed. <sup>312</sup>
2013	White Liquor Case	The Guizhou Price Bureau held that Kweichow Moutai had conducted RPM in violation of Art. 14 of the AML. Kweichow

311. MOFCOM, *Zhonghua Renming Gongheguo Shangwubu Gongbao [The Public Announcement of MOFCOM of the People's Republic of China]*, No 22, 2009, <http://fldj.mofcom.gov.cn/article/ztxx/200903/20090306108494.shtml> [https://perma.cc/6QFJ-MZDN] (last visited Jan. 17, 2018).

312. No official decision was released in this case. For details of this case please see Xiaoye Wang, *The China Telecom and China Unicom Case and the Future of Chinese Antitrust*, in *CHINA'S ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS* 467, 469 (Adrian Emch & David Stallibrass eds., 2013).



		Moutai was fined RMB 247 million, or 1 percent of the “related” sales revenue in the previous year. The Sichuan Development and Reform Commission similarly fined Wuliangye RMB 202 million, or one percent of the “related” sales revenue in the previous year. <sup>313</sup>
2013	Infant Formula Case	The nine milk powder companies were accused of fixing resale prices for distributors and retailers in violation of Article 14 of the AML. NDRC fined six of these producers a total of RMB 668.7 million, ranging from three percent to six percent of prior year’s revenue. <sup>314</sup>
2014-2015	Auto Part Cases	The Hubei Price Bureau announced that FAW-Volkswagen had conducted RPM with its dealerships. The Bureau fined FAW-Volkswagen RMB 248.58 million. It also fined eight Audi dealerships RMB twenty nine million.

313. *Wuliangye Gongsì Shìshì Jiàgè Longduàn Bèi Chufa 2.02 Yìyuán* [*Wuliangye Conducted Price Monopoly and Was Fined RMB202 Million*], SICHUAN DEV. AND REFORM COMM’N (Feb. 22, 2013), <http://www.scdrc.gov.cn/dir25/159074.htm> [https://perma.cc/QM3V-3P2C] (last visited Jan. 4, 2018) (China); Guizhousheng Wujia Ju [Guizhou Provincial Price Bureau], *Guizhou Wujia Ju Guanyu Maotai Fanlongduan de Chufa Gonggao* [*Guizhou Price Bureau’s Announcement Regarding the Maotai Case Antitrust Punishment*], WANGYI CAIJING [NETEASE FIN.] (Feb. 22, 2013), <http://money.163.com/13/0222/16/8OB5900800252G50.html> [https://perma.cc/MR2R-LVBB] (last visited Jan. 4, 2018).

314. *Heshengyuan Deng Rufen Shengchan Qiye Weifan Fanlongduan Fa Xianzhi Jingzheng Xingwei Gongbei Chufa 6.6873 Yìyuán* [*Biostime and Other Milk Powder Companies Were Fined RMB 668.73 Million for Anti-Competitive Conduct and the Violation of the AML*], NAT’L DEV. AND REFORM COMM’N (Aug. 12, 2013), [http://www.ndrc.gov.cn/xwzx/xwfb/201308/t20130807\\_552991.html](http://www.ndrc.gov.cn/xwzx/xwfb/201308/t20130807_552991.html) (China).

The Shanghai Price Bureau announced that Chrysler had conducted RPM with its dealers and fined Chrysler RMB 31.68 million.

The Jiangsu Price Bureau announced that Mercedes-Benz had conducted RPM with its dealers and fined the company RMB 350 million.

The Hubei Price Bureau announced that four BMW dealerships had been involved in RPM practices. The bureau fined the dealerships a collective total of RMB 1.63 million.

Guangdong DRC announced that Dongfeng-Nissan had conducted RPM practices and

		<p>fined Dongfeng-Nissan RMB 123 million. It also fined seventeen dealerships a total of RMB nineteen million.<sup>315</sup></p>
2015	Qualcomm	<p>The NDRC found that Qualcomm abused its dominant market position in the licensing of standard essential patents concerning wireless telecommunication and baseband chip technologies. It imposed a number of behavioral remedies on Qualcomm and a fine of RMB 6,088 million, or eight percent of its sales revenue in 2013.<sup>316</sup></p>

315. From 2014 to 2015, various local authorities of NDRC investigated a number of premium auto manufacturers and their dealers for alleged RPM practices. See Yiqi Dazhong Jiage Longduan Beifa 2.4 Yi [FAW-Volkswagan Was Fined RMB 240 Million for Antitrust Violation], Yangcheng Wanbao (Sep. 12, 2014), <http://finance.sina.com.cn/chanjing/gsnews/20140912/140920277963.shtml> [https://perma.cc/FDS5-VH52] (last visited Jan. 4, 2018); Shanghaishi Wujia ju Shanghai Price Bureau], *Shanghai Shi Wujiaju Xingzheng Chufa Jueding Shu (Kelaisile Zhongguo Qiche Xiaoshou Youxian Gongsi) [Decision Regarding The Penalty of Chrysler]*, SHANGHAI MUN. DEV. AND REFORM COMM'N (Aug. 18, 2014), <http://www.shdrc.gov.cn/fzgggz/jgggl/jghzcfjds/24064.htm> [https://perma.cc/5N8Q-DHQY] (last visited Jan. 4, 2018); Li Jianping, *Hubei Sijia Baoma Qiche Xiaoshou Shang Shexian Jiage Longduan Beifa 162wan [Four Dealers of BMW In Hubei Were Fined RMB1.62 Million For Price Monopolies]*, PHOENIX NEW MEDIA (Aug. 13, 2014), [http://news.ifeng.com/a/20140813/41565291\\_0.shtml](http://news.ifeng.com/a/20140813/41565291_0.shtml); Jiangsu Sheng Wujia ju [Jiangsu Price Bureau], *Jiangsusheng Wujiaju Dui Benchi Gongsi Jiage Longduan An Zuochu Xingzheng Chufa [Jiangsu Price Bureau Made Decisions Regarding The Penalty of Mercedes-Benz For Price Monopolies]*, CHINA JIANGSU NETWORK (April 23, 2015), <http://jsnews2.jschina.com.cn/system/2015/05/21/024806045.shtml> [https://perma.cc/92XB-B2ZH] (archived on Jan. 4, 2018); *Guangdong Fagaiwei Dui Dongfeng Richan Kaichu 1.2 yiyuan Longduan Fadan [Dongfeng-Nissan Was Fined 120 Million by Guangdong NDRC for Anti-Competitive Practices]*, NAT'L DEV. AND REFORM COMM'N (Sept. 10, 2015), [http://fgs.ndrc.gov.cn/xtjl/201509/t20150925\\_752485.html](http://fgs.ndrc.gov.cn/xtjl/201509/t20150925_752485.html) [https://perma.cc/8RFW-5U5Y] (last visited Jan. 17, 2018) (China).

316. *Zhonghua Renmin Gongheguo Guojia Fazhan He Gaiga Weiyuanhui Xingzheng Chufa Juedingshu [NDRC's Decision Regarding the Penalty of The Violation of the AML]*, NAT'L DEV. AND REFORM COMM'N (Feb. 9, 2015), [http://www.ndrc.gov.cn/gzdt/201503/t20150302\\_666209.html](http://www.ndrc.gov.cn/gzdt/201503/t20150302_666209.html) [https://perma.cc/4TWM-LUMD] (last visited Jan. 4, 2018) (China).