China, Google, and the Intersection of Competition and Intellectual Property

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I. Introduction

Since Deng Xiaopeng's rise to power in 1978, the People's Republic of China has been on a journey towards economic liberalization. While that road has been rocky at times—State

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¹ See H. Stephen Harris, Jr., The Making of an Antitrust Law: The Pending Anti-Monopoly Law of the People's Republic of China, 7 CHI. J. INT'L L. 169, 172-73 (2006) (citing Deng, a promoter of pragmatic economics who was initially denounced as a "capitalist roader" for sparking the initial move away from the command economy of the

Owned Enterprises (SOE) and Administrative Monopolies still represent major barriers to competition²—China has reached several noteworthy milestones.³ With reform toward a market-oriented economy, China has embraced, albeit tentatively, the need for more "formalized and institutionalized competition law."⁴ In 2007, China took yet another historic step towards achieving its ideal "socialist market economy"⁵ with the passage of the Anti-Monopoly Law (AML), the first comprehensive competition law in the country's history.⁶

Considering that the United States Supreme Court once heralded antitrust law, specifically the Sherman Antitrust Act, as "the Magna Carta of free enterprise," one might have predicted the AML's passage to meet much aggrandizement in the western world. However, the initial reaction to the AML was decidedly skeptical, with much of the commentary focusing on the law's perceived shortcomings. Criticism was especially strong in the

Mao regime).

- ³ See generally Wentong Zheng, Transplanting Antitrust in China: Economic Transition, Market Structure, and State Control, 32 U. Pa. J. Int'l L. 643, 652-71 (2010) (chronicling liberalization from 1978 up to the passage of the Anti-Monopoly Law in the areas of price control, economic decentralization, market concentration, market entry restrictions, state owned enterprises, and general regulations).
- ⁴ See Salil K. Mehra & Meng Yanbei, Against Antitrust Functionalism: Reconsidering China's Antimonopoly Law, 49 VA. J. INT'L L. 379, 389 (2009).
- ⁵ See XIANFA, art. 15 (1993) (China), available at http://english.people.com.cn/constitution/constitution.html (enshrining in the Constitution the idea that "[t]he state has put into practice a socialist market economy[]"); see also Harris, supra note 1, at 185 (defining a socialist market economy as one "using market competition to enhance the efficient allocation of resources while restricting, or at least transitioning gradually towards, private ownership of property").
- 6 $\it See$ H. Stephen Harris Jr. et al., Anti-Monopoly Law and Practice in China 1 (2011).
- ⁷ See United States v. Topco Assoc., Inc., 405 U.S. 596, 610 (1972) ("[Antitrust laws] are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to protection of our fundamental personal freedoms.").
- ⁸ See generally Huo, supra note 2, at 32-33 ("Since the largest developing country in the world can now claim to have a systematic antitrust law, the law's passage is a historic moment in China's legal history.").
- ⁹ See id. at 32-33 ("[The AML has] aroused suspicion and even criticism... mainly from within China's legal and business communities, and stems from a view that the law's final draft is merely a compromise to appease China's powerful vested interest,

² See Zhengxin Huo, A Tiger Without Teeth: The Antitrust Law of the People's Republic of China, 10 ASIAN-PAC. L. & POL'Y J. 32, 32-33 (2008) ("Administrative monopolies are arguably the greatest hindrance to fair competition in China today.").

United States, where concerns that the AML would be used as a protectionist tool overshadowed any praise of the law as a move towards freer competition within Chinese markets. 10 The United States generally harbors a cynical view of China, especially in regard to economic issues, with fifty-nine percent of Americans viewing China as an economic threat rather than as an opportunity. 11 During a hearing of the House Subcommittee on Courts and Competition Policy, Representative Hank Johnson encapsulated the skepticism that prevails in the United States by emphasizing the concern within the business community that the AML will be enforced in a "discriminatory manner," which would further weaken the ability of American businesses to compete in China. 12

Although the AML is still in its infancy, its early application has done little to quell the international community's worries. ¹³ The Chineses Ministry of Commerce's (MOFCOM) most recent decision, regarding Google Inc.'s acquisition of Motorola Mobility Inc., shows a Chinese merger authority that is increasingly willing to flex its regulatory muscles. ¹⁴ Chinese officials approved the merger on the express condition that Google continue to license its

especially the huge state-owned enterprises."); see also Zheng, supra note 3, at 651 ("[D]espite having a Western-style antitrust law, China has not developed and likely will not develop Western-style antitrust jurisprudence in the near future due to [local conditions]."); Harris, supra note 1, at 171 (noting the concern that the AML's enforcement provisions may only be used against foreign companies, which would inevitably, if not consciously, benefit domestic firms). But see Mehra & Yanbei, supra note 4, at 383 ("[T]he AML has the potential to spark a 'competition culture'—an appreciation of the value of promoting and safeguarding competition—that could positively impact central government competitive restraints as well.").

- ¹⁰ See, e.g., Mehra & Yanbei, supra note 4, at 380-86.
- 11 See GERMAN MARSHALL FUND OF THE UNITED STATES, TRANSATLANTIC TRENDS: KEY FINDINGS 13 (2012) (finding that, among the nationalities surveyed, Americans were the second most threatened by China's economic rise).
- ¹² Impact of China's Antitrust Law and Other Competition Policies on U.S. Companies: Hearing Before the Subcomm. on Courts and Competition of the H. Comm. on the Judiciary, 111th Cong. 1 (2010) (statement of Rep. Hank Johnson, Chairman, H. Comm. on the Judiciary).
- ¹³ See generally HARRIS ET AL., supra note 6, at 126 (noting that all of the conditional approvals have involved transactions between foreign companies and the only denial involved a foreign company's attempted acquisition of a Chinese company).
- ¹⁴ See John Letzing & Paul Mozur, China Clears Google to Buy Motorola Mobility, WALL St. J. (May 20, 2012), http://online.wsj.com/article/SB100014240527 02303360504577414280414923956.html.

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Android mobile-device software freely for five years.¹⁵ The compulsory licensing conditions placed on the merger prompted claims that China was infringing on Google's intellectual property rights.¹⁶ China's decision was the latest chapter in a long and complicated history of tension between Beijing and Google.¹⁷

This note will argue that the Google/Motorola case is best understood within the context of China's views on the appropriate balance between the free exercise of intellectual property rights and competition concerns, rather than on some notion of inherent biases within the merger review process. The note will be divided into four parts: First, an overview of the AML with an emphasis on legislative history and the merger review process; second, a breif discussion of the Google/Motorola transaction, focusing in particular on Google's desire to leverage its acquisition of Motorola's extensive patent portfolio by entering the mobile handset market; third, an exploration of the Google/Motorola case through the intersection of antitrust and intellectual property law including consideration of the validity of claims that the AML merger review process is being manipulated to benefit Chinese companies and a demonstration of why any current tendencies favoring domestic firms are not cause for alarm; finally, recommendations for how the United States, multinational firms, and other international actors can maximize efficiency and reach the most positive outcomes in future multinational mergers subject to Chinese regulatory approval.

¹⁵ See id.

¹⁶ See id.

¹⁷ See SIVA VAIDHYANATHAN, THE GOOGLIZATION OF EVERYTHING (AND WHY WE SHOULD WORRY) 115-19 (2011) (documenting the history of conflict between Google and China including: a breach in Google's security by Chinese hackers seeking access to the accounts of Chinese dissidents; China's decision to censor Google searches conducted within China; and Google's decision, in March 2010, to leave China and abandon its Mandarin-language search service). Further complicating issues for Google are industry groups' efforts to persuade the United States and the European Union to bring antitrust actions against Google in connection with its expanding smartphone business. See David Saleh Rauf & Elizabeth Wasserman, Mobil: The New Frontier in Claims Against Google, POLITICO, Oct. 22, 2012, http://www.politico.com/news/stories/1012/82706.html.

II. China's Anti-Monopoly Law

A. Legislative History and Basic Principles

The first draft of the AML was, at least in part, the byproduct of China's ascension to the World Trade Organization (WTO) on November 11, 2002. 18 Responding to unease in the international community that China would have difficulty complying with "the WTO's requirements of transparency and non-discrimination," 19 the National People's Congress (NPC) Standing Committee announced that it would draft an antitrust law. 20 Despite initial support for further economic liberalization as a show of good faith to the WTO, the legislative process stalled many times over the next decade as internal forces stoked fears that social unrest, job losses, and political backlash would accompany the law's passage. 21 However, external pressures coupled with domestic forces bent on reform prevailed. 22 The Tenth NPC passed the AML on August 30, 2007, and the law went into effect on August 1, 2008. 23

The objectives and overarching principles of the law are stated plainly in the first article: "This law is enacted for the purposes of preventing and prohibiting Monopolistic Conduct, protecting fair market competition, promoting efficiency of economic operation, safeguarding the interests of consumers and the public interests, and promoting the healthy development of the socialist market economy." The broad goals of the AML are consistent with

¹⁸ See Harris, supra note 1, at 176.

¹⁹ *Id.* at 176-77.

 $^{^{20}}$ See id.

²¹ See id. at 177.

²² See id. ("Other factors, such as a massive influx of foreign investment; the concomitant internationalization of Chinese markets; and the rapidly growing participation of Chinese entities, both state-owned and private, in the market have combined to increase support of, and a broad recognition of the need for, a comprehensive, strongly enforced competition law.").

Huo, supra note 2, at 32.

²⁴ Fanlongduan Fa [Anti-Monopoly Law] ch. 1., art. 1 (promulgated by the Standing Comm. of the Nat'l People's Cong, Aug. 20, 2007, effective Aug. 1, 2008) 2007 Standing Comm. Nat'l People's Cong. Gaz. 517 (China) [hereinafter AML]. An unofficial English translation is available through the American Bar Association. Nathan Bush, *The PRC Antimonopoly Law: Unanswered Questions and Challenges Ahead*, The Antitrust Source, Oct. 2007, *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Oct07_Bush10_18f.authcheckdam.pdf.

western antitrust ideals insofar as they ensure consumer welfare by promoting efficiency and market competition.²⁵ The AML addresses the three hallmarks of classic antitrust law—monopoly agreements, abuse of dominance, and merger review²⁶—all of which are similarly addressed by the law's western counterparts in the United States²⁷ and the European Union.²⁸ Although the core of the AML is rooted in traditional antitrust law, the economic history and local conditions in China made unique provisions to address the vestiges of the country's socialist past a necessity.²⁹

B. Mechanics of Merger Review

Of particular interest to this note are the provisions of the AML outlining the merger review process.³⁰ The AML merger review provisions address the transactions covered, the threshold requirements for submission, the review procedure, the substantive standard of review, and the possible outcomes.³¹ The AML grants review authority to the Anti-Monopoly Enforcement Authority,³²

²⁵ See RICHARD A. POSNER, ANTITRUST LAW viii-ix (2d ed. 2001).

²⁶ See AML, supra note 24, ch. 1, art. 3 ("Monopolistic Conduct [is the] (1) conclusion of monopoly agreements by undertakings; (2) abuse of dominant market positions by undertakings; (3) concentrations of undertakings that have or are likely to have the effect of eliminating or restricting competition."); see also Zheng, supra note 3, at 647-48.

²⁷ See Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (2006); see also Clayton Act, 15 U.S.C. §§ 12-27 (2006).

²⁸ See Consolidated Versions of the Treaty Establishing the European Union and the Treaty Establishing the European Community arts. 81, 82, Dec. 29, 2006, 2006 O.J. (C 321) [hereinafter EU Treaty].

²⁹ See Zheng, supra note 3, at 651. Specifically, there are provisions explicitly addressing administrative monopolies, as well as SOES. See AML, supra note 24, ch. 5, art. 37 (appearing to exempt SOEs from the provisions of the AML). Although the provisions regarding administrative monopolies and SOEs will play an important role in establishing the credibility and enforceability of the AML, they are beyond the scope of this note. See Harris, supra note 1, at 172 (articulating concern over the degree to which the AML will apply to effectively address issues concerning administrative monopolies given that the provisions regulating their conduct were at one point in the drafting process completely omitted); see also Bruce M. Owen et al., Antitrust Law in China: The Problem of Incentive Compatibility, 1 J. COMPETITION L. & ECON. 123, 133 (2005) (predicting that the legal system in China will be incapable of protecting private rights with the desired effect).

³⁰ See AML, supra note 24, ch. 4.

³¹ See id.

³² See id. art. 21.

which is located within MOFCOM.³³

The AML merger review provisions apply to concentrations, which are defined as "(1) a merger of undertakings; (2) an acquisition by an undertaking of the control of other undertakings through acquiring equity or assets; [or] (3) an undertaking, by contracts or other means, acquiring control of other undertakings or the capability to exercise decisive influence on other undertakings."³⁴ The Notification Threshold Regulation established the thresholds for mandatory submission of transactions for regulatory approval:

[T]he combined worldwide turnover of all undertakings involved in the last fiscal year exceeds [US \$1.47 billion], *and* the China-wide turnover of each of at least two undertakings exceeds [US \$58.8 million]; *or* the combined China-wide turnover of all undertakings involved in the last fiscal year exceeds [US \$294 million], *and* the China-wide turnover of each of at least two undertakings exceeds [US \$58.8 million].³⁵

The threshold regulations allow for decision-making based on objectively quantifiable data,³⁶ which is a marked improvement from earlier drafts that focused on the less objective market share criteria.³⁷ Although the notification thresholds are lower than many observers would have liked, the thresholds "find a balance between underreporting of transactions important to China and overburdening both parties and MOFCOM reviewers."³⁸

In addition to mandatory notification review, MOFCOM may launch investigations where the transaction would not otherwise meet the mandatory thresholds if "facts and evidence gathered pursuant to prescribed procedures indicate that such concentration

³³ See HARRIS ET AL., supra note 6, at 125.

³⁴ See AML, supra note 24, art. 20.

³⁵ HARRIS ET AL., *supra* note 6, at 139 (emphasis in original) (noting that the Regulation of Notification Thresholds was adopted by the State Council on August 1, 2008, the day the AML became effective, providing some evidence of the importance China places on its merger review process).

³⁶ See International Competition Network, Recommended Practices for Merger Notification Procedures, available at http://www.internationalcompetition network.org/uploads/library/doc588.pdf. ("Notification thresholds should be based exclusively on objectively quantifiable criteria. Examples of objectively quantifiable criteria are assets and sales [e.g. turnover].").

³⁷ See HARRIS ET AL., supra note 6, at 140.

³⁸ *Id*.

has or may have the effect of restricting or eliminating competition." Such discretion has incited concern that uncertainty regarding which transactions will be subjected to regulatory approval will raise transaction costs. Turthermore, multinational businesses protested that discretionary review could be used to protect favored domestic companies from competition, at the expense of foreign competitors, specifically where MOFCOM is subjected to pressure by "domestic competitors, industry associations, or other government ministries" with an interest in the outcome. Although the AML has only a brief enforcement history, such concerns appear to be unfounded given that MOFCOM has yet to use its discretionary authority to review any transaction not falling under the mandatory notification thresholds.

Merger review is the most-developed mechanism of the AML, consisting of several procedural requirements.⁴³ If a transaction meets the mandatory thresholds or is subject to discretionary review, the parties must submit a detailed filing to MOFCOM before closing the deal.⁴⁴ Notice of further review must be provided, but MOFCOM is not required to publicize such decisions and has not done so in practice.⁴⁵ If any competition concerns arise, the parties are permitted to submit additional filings.⁴⁶ Perhaps the most important consideration to note is that the parties are prohibited from closing the transaction and implementing the merger until the end of the review period, which can be as long as 120 days.⁴⁷ Where the procedural standards of merger review are more or less plainly stated, the substantive standard of review is much more ambiguous and will be defined by later interpretation.⁴⁸ The standard in the AML gives little

 $^{^{39}}$ *Id.* at 142 (quoting the Notification Thresholds Regulation, art. 4) (internal quotation marks omitted).

⁴⁰ See id.

⁴¹ See id.

⁴² See HARRIS ET AL., supra note 6, at 142.

⁴³ See id. at 145.

⁴⁴ See AML, supra note 24, arts. 21, 23.

⁴⁵ See HARRIS ET AL., supra note 6, at 150.

⁴⁶ See id. ("[P]arties must 'submit their defense within the specified time limit with facts, reasons, and evidences."").

⁴⁷ See id.

⁴⁸ See id. at 156 ("MOFCOM's merger decisions so far have tended to be more

guidance; MOFCOM will prohibit any merger or acquisition that "has or may have the effect of eliminating or restricting competition."

However, the AML does provide some guidance for parties subject to review.⁵⁰ Article 27 makes clear that MOFCOM will consider the following factors in reviewing transactions with potential effects on competition: (1) the market share of the parties in the "Relevant Market"; (2) "the degree of concentration in the relevant market";⁵¹ (3) the effect of the transaction on "market access and technological progress";⁵² (4) the effect of the transaction on "consumers and other relevant undertakings";⁵³ (5) the effect of the transaction on the Chinese economy; and (6) "other factors" the reviewing authority finds relevant.⁵⁴ addition to guidance within the AML, the few published decisions provide useful insights into the AML's application, which are particularly applicable to the Google/Motorola decision.⁵⁵ For instance, MOFCOM stringently examines "potential future barriers to entry."56 Also, it appears MOFCOM will show special concern for the effect of the concentration on smaller competitors, which will often be domestic or regional firms.⁵⁷ Another early takeaway is that Chinese regulators show particular interest where the combination involves two or more well established brands.⁵⁸

conclusory than analytical.").

- ⁵⁰ See id. art. 27.
- ⁵¹ *Id.* art. 27(1)-(2).
- ⁵² *Id.* art. 27(3).
- 53 Id. art 27(4).
- ⁵⁴ AML, *supra* note 24, art. 27(5)-(6).
- 55 See HARRIS ET AL., supra note 6, at 163.
- ⁵⁶ See id. at 159-60, 163 (citing the *Coca-Cola-Huiyuan* decision where MOFCOM prohibited the acquisition of a Chinese juice company in part because of concerns that the acquisition would raise barriers to entry in the juice beverage market).
- 57 See id. at 159-61, 163 (citing the decisions in Coca-Cola-Huiyuan as evidence that where a transaction may prevent local manufacturers from competing, the concentration may be denied, and Pfizer-Wyeth where the merger was approved with conditions because without the conditions Pfizer might have been able to leverage its size and market control to restrict future development of competitors).
- ⁵⁸ See id. at 159-60, 163 (citing Coca-Cola-Huiyuan because of the strict scrutiny applied by MOFCOM, where the global beverage giant, Coca-Cola, who already owned the Minute Maid brand, sought to acquire Huiyuan, a popular juice manufacturer in China).

⁴⁹ AML, *supra* note 24, art. 28.

Finally, criticism from "domestic trade associations, competitors, customers, or suppliers," when focused on a transaction involving a foreign company, will likely cause "increased scrutiny and delay and possibly significant conditions on approval."⁵⁹

The AML's merger review affords three potential outcomes: approval, 60 approval with conditions, 61 or denial. 62 Article 29 establishes the conditional approval option: "If the Anti-Monopoly Law Enforcement Authority. . . does not prohibit the concentration of undertakings, it may decide to impose restrictive conditions to reduce the adverse effects the concentration may have on competition." Considering that the brief provision above is the only guidance regarding conditional approvals, MOFCOM may exercise broad discretion in deciding when conditions are appropriate and what conditions may be applied. 64 Insights into MOFCOM's reasoning and decision making process are limited, but the AML does provide for some modicum of transparency with regard to conditional approvals by requiring the publication of decisions to "prohibit concentration of undertakings or to impose restrictive conditions on the concentration."65

III. Google's Acquisition of Motorola

On August 25, 2011, Google entered into an agreement to purchase Motorola Mobility, 66 a transaction ultimately worth

⁵⁹ See id. at 159-61, 163 (citing the decisions in *GM-Delphi*, where GM's acquisition of an automotive parts manufacturer, Delphi, was approved with conditions, and *Coca-Cola-Huiyuan*, where the acquisition of a major Chinese brand by an American company was prohibited).

⁶⁰ See AML, supra note 24, art. 25, 26.

⁶¹ See id. art. 29. The Google/Motorola case deals with a conditional approval; therefore, it is useful to sketch out the details of the mechanism for such approvals. See MINISTRY OF COMMERCE, ANNOUNCEMENT NO. 25, 2012 OF THE MINISTRY OF COMMERCE—ANNOUNCEMENT OF APPROVAL WITH ADDITIONAL RESTRICTIVE CONDITIONS OF THE ACQUISITION OF MOTOROLA MOBILITY BY GOOGLE (2012) [hereinafter MOFCOM DECISION] (English translation), available at http://english.mofcom.gov.cn/aarticle/policyrelease/domesticpolicy/201206/2012060819 9125.html.

⁶² See id. art. 28.

⁶³ See AML, supra note 24, art. 29.

⁶⁴ See HARRIS ET AL., supra note 6, at 167-68.

⁶⁵ See AML, supra note 24, art. 30.

⁶⁶ DEPARTMENT OF JUSTICE, STATEMENT OF THE DEPARTMENT OF JUSTICE'S ANTITRUST DIVISION ON ITS DECISION TO CLOSE ITS INVESTIGATIONS OF GOOGLE INC.'S

\$12.5 billion.⁶⁷ Google's motivation to pursue the deal was the acquisition of 17,000 issued patents and 6,800 patent applications, including hundreds relating to wireless devices.⁶⁸ The transaction was submitted for merger approval to regulators in the United States, the European Union, and China, as well as several other states.⁶⁹

A. Department of Justice Decision⁷⁰

The U.S. merger authorities, the Department of Justice's Antitrust Division and the Federal Trade Commission, approved the merger on February 13, 2012. The Antitrust Division approved the merger without conditions. However, it did voice concerns that Google might abuse its newly acquired intellectual property, resulting in harm to future innovation and consumer welfare. The specific issues addressed by the United States focused on "Standard Essential Patents." These concerns arose from the fact that the wireless device industry requires "seamless interoperability" with "wireless communications technologies while providing audio, video and computer functionalities." Firms in the industry use standard setting organizations (SSO) "to develop technical standards that establish precise specification for essential components of the technology." The SSOs improve compatibility among devices and, therefore, provide consumers

Acquisition of Motorola Mobility Holdings Inc. and the Acquisition of Certain Patents by Apple Inc., Microsoft Corp. and Research in Motion LTD. 2 (2012) [hereinafter DOJ Statement], *available at* http://www.justice.gov/atr/public/press_releases/2012/280190.htm.

- 67 See Letzing & Mozur, supra note 14.
- 68 See DOJ STATEMENT, supra note 66, at 2.
- 69 See Letzing & Mozur, supra note 14.

- ⁷¹ See DOJ STATEMENT, supra note 66, at 1.
- ⁷² See id.
- ⁷³ See id.
- ⁷⁴ See id. at 3 (internal quotation marks omitted).
- ⁷⁵ *Id*.
- ⁷⁶ *Id*.

This Note focuses on the decision by MOFCOM and its impact on the global climate for international intellectual property acquisitions. However, given that MOFCOM released limited information concerning the reasoning behind its decision, it is useful to examine the U.S. Department of Justice Antitrust Division's reasoning as a supplement to the Chinese decision on the same facts.

with greater options in the marketplace.⁷⁷ More often than not, the technology adopted by a SSO will be the intellectual property of one of the industry participants.⁷⁸ Patents that are included in the standard eventually become "essential to the implementation of that standard, thus the term 'Standard Essential Patent."⁷⁹ The establishment of Standard Essential Patents prompts other market participants to rely on the technology, making it expensive to abandon the standard.⁸⁰

Although, generally, SSOs benefit consumers by promoting competition, they can also have anticompetitive effects if subjected to abuse.⁸¹ When the patent is embraced in a SSO and induces investments by other market participants, the technology increases in value.82 The patent holder is then positioned to extract payments higher than the original value of the licensed technology by exploiting other market participants' reliance on the technology as a standard, with the ultimate effect of retarding innovation and harming consumer choice.83 While the Antitrust Division determined that the acquisition by Google was not likely to spawn any anticompetitive effects, the Division did express concern that Google did not unequivocally commit to exercising its intellectual property rights in a "fair, reasonable and nondiscriminatory" manner. 84 For instance, there was trepidation that Google could limit access to the wireless Standard Essential Patents acquired from Motorola or charge unreasonable licensing fees that make licensees choose between abandoning the technology and paying the increased fee. 85

Such concerns were amplified by the fact that, as of 2011, Google's Android mobile device operating platform controlled forty-six percent of the U.S. market.⁸⁶ The Android software was

⁷⁷ DOJ STATEMENT, supra note 66, at 3.

⁷⁸ See id.

⁷⁹ *Id*.

⁸⁰ See id.

⁸¹ See id.

⁸² See id.

⁸³ DOJ STATEMENT, supra note 66, at 3.

⁸⁴ *Id*.

⁸⁵ See id.

⁸⁶ See id. at 2 ("Google's Android accounted for approximately 46 percent of the U.S. smartphone operating system platform subscribers and Apple's iOS was used by about 30 percent of subscribers. RIM and Microsoft accounted for approximately 15

developed using a freely available open source model, "which allows programmers outside the company to view the product's underlying code and make modifications." In circumstances analogous to the Standard Essential Patent context, companies who commit their software to open sourcing may entice others to make "complementary investments." Therefore, were a company to curtail the availability of its technology after open sourcing it, market participants who have invested in reliance on the availability of the technology can be harmed and competition restricted. There is fear that if Google were to restrict the availability of Android by providing the software only to Motorola, for instance, it could exploit the market position held by Android and the manufacturing capabilities of Motorola to impede competition in the smartphone market. 90

B. Ministry of Commerce Decision

On September 30, 2011, MOFCOM received the Google/Motorola merger for review. The initial review raised concerns that the agreement may "eliminate or restrict competition" in the market for smartphone mobile operating systems, which prompted further review pursuant to Article 26. 20 On March 20, 2012, MOFCOM extended its review with the consent of Google pursuant to Article 26(1). Upon further review, MOFCOM determined that Google's acquisition would have "competition-eliminating or restricting effects." The transaction was approved with the following restrictions, which were imposed in an effort to eliminate, or mitigate, any future anticompetitive effect:

- (I) Google will continue its current commercial practice of providing a free and open Android platform.
- (II) Google shall treat all original equipment manufacturers [in a

percent and 6 percent of the share of smartphone subscribers, respectively.").

⁸⁷ Letzing & Mozur, supra note 14.

⁸⁸ See DOJ STATEMENT, supra note 66, at 3.

⁸⁹ See id.

⁹⁰ See id.

⁹¹ See Mofcom Decision, supra note 61.

⁹² See id.

⁹³ See id.

⁹⁴ *Id*.

non-discriminatory manner] in terms of the Android platform . . . This obligation does not apply to Google providing, licensing or distributing of any products or services relating to the Android platform (including but not limited to applications running on the Android platform).

(III) After this transaction, Google shall continue to fulfill the FRAND (fair, responsible, and non-discriminatory terms) obligations of Motorola Mobility regarding the latter's patents. 95

Restrictions (I) and (II), compelling licensure of the Android operating platform, will be effective for five years, and require Google to report to MOFCOM every six months to ensure its compliance. ⁹⁶

Given the similar issues articulated by the Antitrust Division and MOFCOM, the divergent results were a surprise. 97 Although the MOFCOM statement is largely conclusory, providing minimal insight into the Ministry's reasoning, the conditions imposed lead to the inference that MOFCOM shared the Antitrust Division's concerns that a decision by Google to limit the availability of Android by charging licensing fees or providing Motorola with preferential treatment could restrain competition in the mobile handset market. 98 However, instead of taking the wait-and-see approach adopted by U.S. antitrust officials, MOFCOM acted assertively to cut off any potential threat to competition.⁹⁹ The condition compelling Google to freely license its Android software prompted renewed criticism that China was using the AML to disadvantage foreign competitors. 100 In fact, initial reports indicated that the compulsory licensing requirement was specifically "aimed at helping domestic competitors such as ZTE Corp. and Huawei Technologies Co., which offer smartphones that

⁹⁵ *Id*.

⁹⁶ See Mofcom Decision, supra note 61.

⁹⁷ See generally Letzing & Mozur, supra note 14 (reporting that the United States and European Union expressed concerns similar to that of the Chinese authorities, but when the MOFCOM decision was announced, months after the United States and European Union decisions, Chinese regulators treated the transaction in a much harsher manner).

⁹⁸ Compare MOFCOM DECISION, supra note 61, with DOJ STATEMENT, supra note 66, at 3.

⁹⁹ Compare MOFCOM DECISION, supra note 61, with DOJ STATEMENT, supra note 66, at 3.

¹⁰⁰ See Letzing & Mozur, supra note 14.

use Android and are increasingly competing" with foreign-made, Android-based smartphones. ¹⁰¹ By requiring Google to freely license Android, Google will be prevented from restricting access, which might impair the burgeoning domestic manufacturers. ¹⁰² The fact that "[t]he Chinese government has been seeking to spur local innovation within the technology sector to wean itself off of a reliance on costly foreign technology" did nothing to alleviate concerns that the merger review process was disproportionately affecting foreign companies, while exempting Chinese counterparts altogether. ¹⁰³

Anxiety over the Google-Motorola decision appears to follow the familiar chorus line of critics predicting abuse of the merger review process upon the passage of the AML. Despite MOFCOM's official position that "all mergers whose size reach a certain threshold should be notified," critics argue that the structure of the AML and the local conditions in China will preclude equal application in merger review. Given the structural issues and lack of enforcement against domestic companies, it is not unreasonable to explain the Google/Motorola case as a high-profile example of Beijing manipulating the merger review process to protect its homegrown industries at the expense of encroaching foreign competitors. However, as will be discussed in the next Part, the Google/Motorola case is more fully

¹⁰¹ *Id*.

¹⁰² See id.

¹⁰³ See id.

¹⁰⁴ See Zheng, supra note 3, at 709 ("[A] disproportionately high percentage of foreign companies involved in cases notified to MOFCOM and in cases for which MOFCOM published its merger review decisions has led to suspicions or charges that MOFCOM discriminated against foreign companies in its merger review process."); see also HARRIS ET AL., supra note 6, at 126 (noting that the vast majority of conditional approvals involved a foreign company, and the only denial involved a foreign acquisition of a company with firm roots in China); Huo, supra note 2, at 32-33 (commenting that the AML is a compromise to appease vested interest in the business community and government, and, therefore, it will fail to apply equally to domestic firms, SOEs, and administrative monopolies).

¹⁰⁵ See Zheng, supra note 3, at 709.

¹⁰⁶ See generally Michael Jacobs & Xinzhu Zhang, China, in INTELLECTUAL PROPERTY, COMPETITION LAW AND ECONOMICS IN ASIA 149, 149-52 (R. Ian McEwin ed., 2011) (noting that it is in China's national interest to pursue compulsory licensing policies that benefit domestic consumers and competitors above foreign holders of powerful intellectual property rights).

explained within the context of the two states' divergent approaches to the intersection between competition law and intellectual property rights. Part IV argues that China has adopted a compulsory licensing policy that is inconsistent with that of the United States, due in no small part to its economic and political history, and that this policy informed the decision in the Google/Motorola case, rather than any inherent bias within the AML or perverse protectionist tendencies in MOFCOM. 108

IV. China's Compulsory Licensensing Policy within the Context of the Anti-Monopoly Law's Merger Review

A. The Intersection of Intellectual Property Rights and Competition Law

Innovation drives long-term economic growth. ¹⁰⁹ Investment in research and development is the key to fostering domestic innovation. ¹¹⁰ Generally, the strength of intellectual property rights correlates with returns from domestic research and development. ¹¹¹ If rights are weak, the state can expect diminished returns from research and development investments. ¹¹² Therefore, states have an interest in protecting intellectual property rights in order to encourage businesses to invest in

¹⁰⁷ See generally id. at 127-38, 149-52 (explaining that all states seek to maximize their interests through antitrust policy, so while the approaches of different states may lead to inconsistent results, it does not necessarily follow that either state is a bad actor seeking to maliciously harm other states).

¹⁰⁸ See infra Parts IV, V.

¹⁰⁹ See R. Ian McEwin, Editor's Introduction, in Intellectual Property, Competition Law and Economics in Asia, supra note 107, at 3; see also Michael A. Carrier, Unraveling the Patent-Antitrust Paradox, 150 U. Pa. L. Rev. 761, 802 (2002) ("Innovation consists of 'the search for and discovery, development, improvement, adoption, and commercialization of new processes, products, and organizational structures and procedures."") (quoting Thomas M. Jorde & David J. Teece, Innovation, Cooperation, and Antitrust, in Antitrust, Innovation, and Competitiveness 47, 48 (Thomas M. Jorde & David Teece eds.)). Technological and scientific innovation accounted for at least a fifty percent increase in output in the United States between the late 1920s to the late 1960s. See id. at 814-15. Subsequently, "declines in innovation contributed to a reduction in the growth of the business-sector productivity by roughly sixty-five percent from the 1947-1973 period to the 1973-1987 period." Id. at 814.

¹¹⁰ See McEwin, supra note 109, at 3.

¹¹¹ See id. at 4.

¹¹² See id.

innovation. ¹¹³ However, intellectual property rights are limited in an attempt to strike a balance "between protecting the intellectual property holder's exclusive rights and encouraging access to unprotected information." ¹¹⁴ When the balance is properly struck, intellectual property laws will provide maximum incentive for investment in innovation, given that the investor will have confidence that she will realize the commercial value of any invention, and others in the market will be assured access to the technology behind valuable inventions upon the expiration of the patent. ¹¹⁵

In general, intellectual property law and antitrust law "share the fundamental goals of enhancing consumer welfare and promoting innovation." However, intellectual property rights, which are "designed to promote innovation," can clash with competition law, which attempts to "ensure new ideas and expression are disseminated at least cost as widely as possible." In information—based, high—technology economies, intellectual property rights occupy an increasingly important position. As the importance of intellectual property rights increases, the impact of the issues at the intersection of intellectual property and antitrust will be felt with greater magnitude. 119

Where a single intellectual property holder gains substantial market power as a result of a powerful intellectual property right, anticompetitive results can occur. ¹²⁰ In particular, rigorous protection of high-technology intellectual property can raise

See id.; see also Carrier, supra note 109, at 767-68 (noting that where inventors expend resources creating inventions, appropriation by others who did not make such investments of time and capital will deter future investments, with the ultimate effect of reducing innovation).

See Seungwoo Son, Selective Refusals to Sell Patented Goods: The Relationship Between Patent Rights and Antitrust Law, 2002 U. ILL. J. L. TECH. & POL'Y 109, 123 (2002).

¹¹⁵ See id.

¹¹⁶ Jacobs & Zhang, supra note 106, at 125.

¹¹⁷ See McEwin, supra note 109, at 4; see also Carrier, supra note 109, at 768 ("The antitrust laws... scrutinize activity that restricts competition. The rationale of the laws is that competition leads to lower prices, higher output, and more innovation, and... conduct by monopolists prevents consumers from enjoying these benefits.").

¹¹⁸ Carrier, *supra* note 109, at 762-63.

¹¹⁹ *Id*.

¹²⁰ See id.

barriers to innovation and deprive consumers of choice because the intellectual property holder will be able to drive competitors from the market by exploiting its sanctioned monopoly over the technology. The intersection of intellectual property and competition law presents a policy choice between protecting intellectual property rights, thus encouraging "optimal innovation over time (dynamic efficiency)," and promoting competition, ensuring "efficient short-term resource allocation (static or allocative efficiency)." States walk the line between dynamic and static efficiency in a myriad of ways, as informed by their current economic position and future goals. 124

How a given state walks that line is causally related to its policy regarding compulsory licensing of intellectual property. 125 Compulsory licensing, in the context of merger review, serves the purpose of remedying "the anti-competitive misuse of intellectual property by a dominant firm, which has foreclosed smaller rivals from market access." Therefore, compulsory licensing is used as a solution to static inefficiency, or the "loss incurred when an intellectual property owner appropriates rents by excluding others from the relevant market and charging a monopoly price." 127 Reducing static inefficiency naturally has the inverse effect on dynamic efficiency, in that compulsory licensing will weaken intellectual property rights, thus sparking dynamic loss through decreased investment in research and development. ¹²⁸ Again, each state will have its own answer to the compulsory licensing issue, which will depend on its own unique circumstances, including "conceptions of the value of intellectual property, the place of the dominant firm, the efficacy of the market mechanisms, and the importance of long-term incentives for economic growth." ¹²⁹

B. Irreconcilable Differences: The Chinese and American

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<sup>121</sup> See Son, supra note 114, at 190.
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¹²² See McEwin, supra note 109, at 5.

¹²³ See id. at 5.

¹²⁴ See id. at 4-6.

¹²⁵ See Jacobs & Zhang, supra note 106, at 125.

¹²⁶ Id. at 126.

¹²⁷ Id.

¹²⁸ *Id*.

¹²⁹ Id.

Approaches to Compulsory Licensing

The American and Chinese approaches to compulsory licensing are incompatible, and therefore produce inconsistent results, as seen in the Google/Motorola case. 130 Discrepancies in the compulsory licensing policies of the world's two largest economies¹³¹ have inescapable consequences for multinational businesses, and are likely to increase transaction costs and breed uncertainty for firms considering any large acquisition. 132 The divergence is the product of differing objectives and expectations of the merger review system. 133 The American approach to compulsory licensing generally tends to favor dynamic efficiency long-term innovation), even where there will be (e.g. anticompetitive effects. 134 Therefore, the United States is reluctant to compel licensing of powerful intellectual property. 135 United States will allow a firm to refuse to license powerful intellectual property even when the decision may harm competition in the short-term. 136 This decision places great faith on the power of long-term innovation incentive, reasoning "the possession and retention of monopoly power will create strong incentives over the long-term for vigorous competition, as each firm strives to become the monopolist." 137 Precisely because all firms in a given market will strive for monopoly status, few will ever achieve it. 138 The necessary corollary is that, when a firm manages to reach monopoly status, they must be able to reap the

¹³⁰ Compare MOFCOM DECISION, supra note 61, with DOJ STATEMENT, supra note 66, at 3.

Andrew Bergmann, *World's Largest Economies*, CNN, http://money.cnn.com/news/economy/world_economies_gdp/ (last visited Apr. 15, 2013).

¹³² See, e.g., Andrew Guzman, The Case for International Antitrust, 22 BERKELEY J. INT'L L. 355, 355-56 (2004) [hereinafter Guzman, The Case for International Antitrust] ("Firms must satisfy regulatory agencies in many countries, meaning they must hire legal representation in each state and meet the reporting and disclosure requirements of each jurisdiction.").

¹³³ See Jacobs & Zhang, supra note 106, at 129-30, 138-39.

¹³⁴ See id. at 133-34.

¹³⁵ See id. at 128-29.

¹³⁶ See Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP., 540 U.S. 398, 407-08 (2004).

¹³⁷ Jacobs & Zhang, supra note 106, at 129.

¹³⁸ *Id.* at 128-29.

full value of their investments.¹³⁹ In fact, as articulated by the U.S. Supreme Court, "[t]he opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth."¹⁴⁰ Therefore, in order to maximize innovation, the United States practices minimum regulatory intervention in the short-term, which precludes compulsory licensing.¹⁴¹ In turn, the United States is willing to tolerate short-term costs to consumers, such as monopoly prices and lack of competition, in order to reward innovators and encourage competitors to invest in research and development to reap similar rewards.¹⁴²

While the Supreme Court of the United States has not addressed the refusal to license intellectual property directly, its cases interpreting general refusals to deal under the Sherman Antitrust Act¹⁴³ provide insight into the policy of providing stringent protections for intellectual property rights, even at the expense of competition.¹⁴⁴ *Verizon Communications Inc.*, *v. Law Offices of Curtis V. Trinko, LLP* established, with few limitations, that the Sherman Act "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to parties with whom he will deal." Several U.S. circuit courts

¹³⁹ See Verizon Communications, 540 U.S. at 407-08 ("Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.").

¹⁴⁰ Id. at 407.

¹⁴¹ See SCM Corp. v. Xerox Corp., 645 F.2d 1195, 1206 (2d Cir. 1981), cert. denied, 102 S.Ct. 853 (1982) (noting that patent incentives would be undercut if antitrust laws proscribed the natural transition of a lawfully granted information monopoly, in the form of a patent, into an economic monopoly).

¹⁴² See Jacobs & Zhang, supra note 106, at 129-32.

¹⁴³ Sherman Antitrust Act, 15 U.S.C. §2 (2006).

¹⁴⁴ See Verizon Communications, 540 U.S. at 407-10 (describing the limited circumstances under which anti-competitive behavior in violation of § 2 of the Sherman Anti-Trust Act will be found).

¹⁴⁵ *Id.* at 408 (quoting United States v. Colgate & Co., 250 U.S. 300, 307 (1919)) (internal quotations omitted). The narrow, outer boundary exception to the freedom of refusal to deal is found in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). In *Aspen Skiing*, the Court upheld § 2 liability because the defendant terminated a voluntary, and thus presumptively profitable, course of dealing, which

have directly addressed refusals to license intellectual property. 146 Those decisions further illuminate the United States' policy against compulsory licensing.¹⁴⁷ One key takeaway from the decisions of the circuit courts is that there is no general obligation to license intellectual property to competitors. 148 What is less clear is the extent to which an intellectual property holder may discontinue licensing intellectual property to rivals once it has already undertaken the practice voluntarily. 149 In Image Technical Services, Inc. v. Eastman Kodak Co., 150 the Ninth Circuit held that "a monopolist's desires to exclude others from its [protected] work is a presumptively valid business justification for any immediate harm to consumers." 151 A showing that the firm had an ulterior motive designed to harm competition may rebut presumption. 152 Therefore, where a "monopolist [relies] upon a pretextual business justification to mask anticompetitive conduct," the presumption of a valid business justification may be rebutted. 153 The subjective standard is a steep burden for parties seeking to rebut the presumption and thus claim damages as a result of a firm's abuse of its intellectual property. 154

China rests firmly on the other end of the spectrum, raising a multitude of issues for firms acquiring powerful intellectual property and doing business in both China and the United States. China, along with other notable merger review regimes, 155 puts

showed a willingness and intention to forego short-term profits to achieve an anticompetitive end. *See Verizon Communications*, 540 U.S. at 408-10.

¹⁴⁶ See Image Technical Services, Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1218 (9th Cir. 1996); see also SCM, 645 F.2d at 1205-07.

See Image Technical, 125 F.3d at 1218; see also SCM Corp. v. Xerox Corp.,
 645 F.2d 1195, 1205-07 (2d Cir. 1981), cert denied, 102 S.Ct. 853 (1982).

¹⁴⁸ See Image Technical, 125 F.3d 1216 ("We find no reported case in which a court has imposed antitrust liability for a unilateral refusal to sell or license a patent or copyright.").

¹⁴⁹ See id. at 1218.

¹⁵⁰ *Id*.

¹⁵¹ *Id.* (quoting Data General Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1187 (1st Cir. 1994)) (internal quotation marks omitted).

¹⁵² See id. at 1219.

¹⁵³ See id.

¹⁵⁴ See id. (describing ways in which the plaintiff can satisfy the subjective standard and rebut the presumption of a valid business justification).

See Jacobs & Zhang, supra note 106, at 127-29, 134-35. This note will focus on China, given the luminary nature of the recent Google/Motorola decision and growing

greater emphasis on the short-term, ensuring static efficiency by prohibiting the anticompetitive effect attendant to the refusal to license powerful intellectual property. ¹⁵⁶ One factor contributing to the divergence is China's relative lack of experience regulating free markets. 157 As seen in the European Union, it is hard to believe that market powers will strike the right balance between promoting competition and protecting intellectual property rights where the current monopolists are former or current state-owned firms accustomed to high levels of regulation. 158 Similar fears are absent when, as in the United States, any monopolist that emerges does so "on the merits." The historical efficiency of U.S. markets gives the United States reason to trust them, and incentive to err on the side of under-regulation, while "Europe [and China have very different experiences with markets, with local protectionism, with dominant firms and with invention," leading those states to err on the side of over-regulation. 160 Instead of

impact of China's merger review mechanism, as an example of the approach taken by countries that place greater emphasis on the short-term benefits to competition. However, it is important to note that China's approach to the trade-off between static and dynamic efficiencies, which informs its compulsory licensing policy, is similar to that seen in the European Union and much of the developing world. See id. at 130; see also McEwin, supra note 109, at 4. For instance, in IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG, the European Court of Justice (ECJ) held that it is a violation of Article 82 of the European Community Treaty, prohibiting abuse of dominate position, for the holder of indispensable intellectual property to refuse to license that intellectual property when the following conditions are satisfied: (1) the firm attempting to acquire the license "intends to offer . . . new products or services not offered by the owner of the intellectual property right and for which there is potential consumer demand;" (2) "the refusal is not justified by objective considerations;" and (3) the refusal eliminates "all competition on [the relevant] market." Case C-418/01, IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG, ¶ 52, 2004 E.C.R. I-5039. Initially the IMS Health decision appeared to be a narrow exception to a general rule allowing unfettered refusal to license. See id. However, the subsequent decision in Microsoft v. Commission expanded each of the three conditions set forth in IMS Health, greatly increasing the number of transactions that could be subject to compulsory licensing as a condition of approval. See Case T-201/04 Microsoft v. Commission, ¶¶ 563, 639-41, 680, 2007 E.C.R. II-3601.

¹⁵⁶ See Jacobs & Zhang, supra note 106, at 127-29, 134-35.

¹⁵⁷ See id. at 135-36 (using Europe's more established compulsory licensing policy as an analytical analog for the policy that could be developing in China).

¹⁵⁸ See id.

¹⁵⁹ See id. at 135.

 $^{^{160}}$ Id. ("[O]ver the past century markets have worked more effectively in the United States than in Europe.").

placing their faith in the long-term benefits of incentivizing investments in innovation, China, the European Union, and other similarly situated states focus on the immediate benefits to consumers that derive from smaller rivals gaining access to technology held by firms subject to the compulsory licensing condition.¹⁶¹

Similarities with Europe aside, China has specific economic and historical factors that lead to a heavier hand in compelling licensing of powerful intellectual property as a remedy to anticompetitive transactions. Generally, states with developing or transitioning economies have limited investment in research and development; thus, the incentive to protect intellectual property rights will be nonexistent because there is little innovation to protect. Such states are often presented with an inverse incentive: failing to protect intellectual property rights will allow for the copying of others' intellectual property, which in turn will allow the local copiers to prosper. As states transition, intellectual property protection becomes increasingly important as the primary mechanism for encouraging investment and growth in domestic industries.

As is the case with many transitioning economies, a majority of the patents and copyrights in China are held by foreign entities and are developed abroad. Also, the patents and copyrights that are granted to domestic firms tend to be of lower value, while many of the patents and copyrights granted to foreign firms are generally of higher value. Typically, the overarching purpose of patent law is to incentivize investment in research and development, which is accomplished by rewarding those making

¹⁶¹ Id. at 133 ("[S]maller rivals can improve upon the relevant technology and offer consumers a greater choice of products . . . at lower prices."). This is not to suggest that there is a right or wrong answer to the issues raised by the contrast between long term and short term efficiencies; as noted by Jacobs and Zhang, the long term benefits preferred by the United States are "notoriously difficult, impossible, to measure." Id. at 128.

See Jacobs & Zhang, supra note 106, at 149.

See McEwin, supra note 109, at 4.

¹⁶⁴ See id.

¹⁶⁵ See id.

¹⁶⁶ See Jacobs & Zhang, supra note 106, at 149. In 2008, 50.28% of all inventions in China were patented to foreign firms. See id. at 150.

¹⁶⁷ See id.

such investments with the commercial advantages gained from exclusive access to the technology and the ability to charge monopoly rents. However, where foreign firms hold a majority of the high technology patent rights in a state, the commercial benefits gained from the ability to charge monopoly rents will be sucked out of the state by the foreign firms. In such situations, protecting intellectual property rights fails to effectuate the typical purpose of the patent system and instead provides all of the long-term benefits to foreign firms while leaving the state's consumers to suffer the short-term competitive detriment of monopoly rents. To

Therefore, the function of traditional patent regimes may not find salience in China. By restricting the market power of patents, which is accomplished through compulsory licensing, consumers in technology-importing states such as China benefit from patented technology without paying the additional costs of monopoly rents. Moreover, when countries like China fail to protect intellectual property rights, they suffer little by way of loss in research and development investment because foreign firms currently investing in innovation are doing so elsewhere. Due to the relative lack of investment in research and development, pursing policies such as compulsory licensing, which weaken intellectual property protection but maximize competition by ensuring efficient disbursement of ideas, are currently in China's best interest.

¹⁶⁸ See Image Technical Services, Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1218 (9th Cir. 1996) (noting that the patent system provides privileges to the patent holder to reward those who take the risk of investing large amounts of time, effort, and capital in research and development); see also Jacobs & Zhang, supra note 106, at 150 ("[T]he patent system is to provide incentives for firms to invest in R&D by permitting monopoly rents in return for disclosure to the public of the underlying technology.").

¹⁶⁹ See Jacobs & Zhang, supra note 106, at 150-51.

¹⁷⁰ See id.

¹⁷¹ See id. at 151.

¹⁷² See id.

¹⁷³ See id. at 150-51.

¹⁷⁴ See id. at 149-51.

V. Implications of Irreconcilable Compulsory Licensing Policies: Recommendations for a Path Forward

A. Is an International Antitrust Agreement the Solution?

There has been growing concern that the AML is being used by China as a tool to further its national interest and is deterring foreign firms from conducting business in China. 175 MOFCOM's decision to require mandatory licensing of Google's Android operating system as a condition of Google's acquisition of Motorola will only stoke the now familiar refrain of protectionism.¹⁷⁶ In the immediate aftermath of the decision, it appears that there is a degree of validity to the claims that the decision was influenced bv a disproportionally benefit consumers and domestic firms. especially when considering that the decision will guarantee Chinese handset makers the continued opportunity to compete.¹⁷⁷ MOFCOM's aggressiveness raises legitimate issues and calls to mind the warning that "competition rules serve . . . as the perfect non-diplomatic, undetected platform from which to advance local economic and industrial considerations under the mask of legal arguments."178 Beyond any negative consequences that befall foreign firms doing business in China, MOFCOM's tough stance on compulsory licensing will affect all acquisitions of powerful intellectual property by firms with an international reach.¹⁷⁹ Where the market for a product affected by the acquisition of powerful intellectual property is "truly international, the most aggressive competition law regime can effectively create rules of

¹⁷⁵ See supra Part II.

¹⁷⁶ MOFCOM DECISION, supra note 61.

¹⁷⁷ See Jacobs & Zhang, supra note 106, 149-51 (explaining that when countries compel licensing, they are making a choice to favor the competitive benefits that are associated with free disbursement of technology, such as greater consumer choice and lower prices, over long term incentives for intellectual property holders to invest in innovation that are associated with strong protection of intellectual property rights).

¹⁷⁸ Ariel Ezrachi, Globalization of Merger Control: A Look at Bilateral Cooperation Through the GE/Honeywell Case, 14 Fl.A. J. Int'l L. 397, 408 (2002).

¹⁷⁹ See Jacobs & Zhang, supra note 106, at 136 (explaining that when firms must submit proposed mergers to multiple national agencies for approval, the country with the toughest requirements becomes the most influential by default in any given substantive area).

worldwide application."¹⁸⁰ Therefore, multinational firms undertaking large transactions, especially U.S. firms that are accustomed to a high level of intellectual property protection, will be plagued by uncertainty and increased transaction costs so long as the incongruity between Chinese and U.S. antitrust officials persists.¹⁸¹

Harmonization of merger review regimes could help to eliminate the waste and inconsistencies inherent in the current global antitrust system. 182 Requiring firms to submit multinational merger proposals to several different global entities increases the overall cost of the transaction. 183 Firms waste resources in the initial process of identifying jurisdictions where they must file and preparing filings.¹⁸⁴ The increased transaction costs associated with duplicitous requirements lead to unnecessary waste in mergers with an international scope. 185 For instance, Google submitted its acquisition of Motorola to merger review agencies in seven different states. 186 In addition to the increased transaction costs associated with multiple filings, the ever-increasing number of jurisdictions reviewing a transaction enhances the intricacy of the process, which in turn "reduces legal and economic certainty."187 Also, as the number of jurisdictions reviewing a transaction increases, predictability decreases, subjecting firms to greater risk of inconsistent conditions that are costly, or

¹⁸⁰ Id.

¹⁸¹ See Andrew T. Guzman, Is International Antitrust Possible?, 73 N.Y.U.

L. REV. 1501, 1502-05 (1998) [hereinafter Guzman, Is International Antitrust Possible?].

¹⁸² See id. at 1505.

¹⁸³ See Guzman, The Case for International Antitrust, supra note 132, at 355-56 ("The most obvious problem is duplication of costs. Firms must satisfy regulatory agencies in many countries, meaning they must hire legal representation in each state and meet the reporting and disclosure requirements of each jurisdiction.").

See Ezrachi, supra note 178, at 404.

¹⁸⁵ See Guzman, The Case for International Antitrust, supra note 132, at 355.

¹⁸⁶ See Steven M. Davidoff, China Flexes Its Regulatory Muscle, Catching Google in Its Grip, N.Y. TIMES, May 15, 2012, http://dealbook.nytimes.com/2012/05/15/china-flexes-its-regulatory-muscle-catching-google-in-its-grip/ (noting that Google complied with merger notification procedures in the United States, the European Union, China, Canada, Israel, Russia, and Turkey).

¹⁸⁷ See Ezrachi, supra note 178, at 402-04 ("Failure to predict the outcomes of these procedures may result in financial loss for the undertakings and a weakening of their competitive ability.").

impossible, to comply with.¹⁸⁸ In addition, the extraterritoriality of antitrust law ensures inevitable temptation for national regulators to act more aggressively toward foreign firms when they believe it to be in their nations' economic interest.¹⁸⁹ As referenced previously, MOFCOM's decision in the Google/Motorola case has already raised such grumblings.¹⁹⁰ However, even when there is no bias, the perception of bias could prevent firms from pursuing what would otherwise be beneficial transactions as well as cause extraneous hostility in the international community.¹⁹¹

While harmonization is an admirable solution to such extraneous waste and would lead to greater overall welfare by way of increased predictability and lower transaction costs, the most appropriate method by which to achieve harmonization is open to debate. The most widely considered options for international harmonization of antitrust law, and more specifically merger review, are broad multinational agreements and bilateral agreements between key states. In order to avoid the disparate results seen in the Google/Motorola case, one option available to the United States is to use political and economic force to pressure China to bring its merger review regime into compliance with U.S. ideals on the value of innovation and the importance of consistently protecting intellectual property rights. For instance,

¹⁸⁸ See Guzman, The Case for International Antitrust, supra note 132, at 555-56; see also Ezrachi, supra note 178, at 402 ("The existence of different approaches to the same transaction also heightens the risk of imposing inconsistent limitations on the undertakings seeking approval and may undermine their confidence in the process.").

¹⁸⁹ See Guzman, The Case for International Antitrust, supra note 132, at 356-57.

¹⁹⁰ See Todd Bishop, Last Hurdle for Google's \$12.5В Motorola Deal: China, GEEKWIRE (Mar. 19, 2012, 7:17 AM), http://www.geekwire.com/2012/hurdle-googles-125b-motorola-deal-china.

¹⁹¹ See Guzman, The Case for International Antitrust, supra note 132, at 356-57 ("[E]ven if the process is unbiased, foreign firms subject to review—as well as their governments—may believe that an unfavorable ruling represents an attempt to penalize foreign firms.").

¹⁹² See generally Guzman, Is International Antitrust Possible?, supra note 181 at 1542-47 (arguing that there are various means through which to achieve international harmonization of antitrust law, all of which have positives and negatives associated with them).

¹⁹³ See id. at 1542-46; see also Guzman, The Case for International Antitrust, supra note 132, at 368-74.

¹⁹⁴ See generally Guzman, Is International Antitrust Possible?, supra note 181, at 1542-47 (noting that there is room for states to negotiate over substantive antitrust issues, even where the parties have different interests, so long as one party is willing to

the United States may work toward bringing China into a broad multilateral agreement, such as the Organisation for Economic Co-Operation and Development¹⁹⁵ (OECD) or the International Competition Network (ICN). 196 The OECD and ICN seek to foster compatible standards and best practices in merger review as part of an ongoing effort to increase the ease of doing business Inclusion of states such as China in a "broad multilateral agreement" would be "more successful in reducing costly distortions to international trade." However, in reality, any benefits gained, as measured in consistency of outcomes, would be marginal. 199 Working within the current framework of international antitrust agreements will necessarily only result in modest benefits. 200 Agreements under both the ICN and OECD are non-binding and, as a result, are limited to voluntary information sharing, cooperation, and harmonization of procedural rules.²⁰¹ So long as both the ICN and OECD lack the ability to govern substantive issues, there is no hope that agreements

compromise and the other party is willing to make a transfer payment for the compromise).

See Convention on the Organisation for Economic Co-operation, Dec. 14, 1960,
 U.N.T.S. 179, available at http://www.oecd.org/general/conventiononthe-organisationforeconomicco-operationanddevelopment.htm.

¹⁹⁶ *See* Memorandum on the Establishment and Operation of the International Competition Network (Oct. 25, 2001) (on file with author).

¹⁹⁷ See generally Organisation for Economic Co-Operation, Policy Roundtables: Standard for Merger Review (2009) [hereinafter Organisation for Economic Co-Operation] (on file with author) (summarizing the OECD Competition Committee's analysis of two merger review standards); International Competition Network, Recommended Practices for Merger Notification Procedures (2002) [hereinafter International Competition Network] (on file with author) (outlining the Working Group's comments to various merger procedures).

¹⁹⁸ Guzman, Is International Antitrust Possible?, supra note 181, at 1505.

¹⁹⁹ See generally id. at 1542-47 (positing that, where parties to a negotiation have divergent interests, it will be difficult to convince any one nation to abandon those interests in order to reach a meaningful agreement, and as a result the most likely outcome of negotiations are modest information sharing agreements that do not have the capability to reach consistent outcomes).

²⁰⁰ See generally Organisation for Economic Co-Operation, supra note 197 (emphasizing the non-binding nature of agreements reached by the OECD); International Competition Network, supra note 197 (emphasizing the non-binding nature of agreements reached by ICN countries).

²⁰¹ See Organisation for Economic Co-Operation, supra note 197; see also International Competition Network, supra note 197.

reached within those organizations can prove outcomedeterminative with regard to issues at the cross section of antitrust and intellectual property law. ²⁰²

Bilateral agreements are another potential avenue toward harmonization. Given the size and importance of both economies, a bilateral agreement establishing joint principles for merger review could begin to bridge the international gap in standards for dealing with compulsory licensing issues. Precedent exists for bilateral antitrust agreements; the United States has entered into bilateral agreements concerning antitrust issues with twelve nations. In fact, a basis for agreement between China and the United States, which may lay a foundation for further cooperation, already exists. However, both agreements suffer from the same shortcomings as the broad international agreements. The limited goals of the current bilateral agreements are cooperation and information sharing.

See generally Guzman, Is International Antitrust Possible?, supra note 181, at 1542-47 (noting that non-binding information sharing and cooperation agreements are unlikely to affect meaningful, substantive change that might be reached under a broad multilateral binding agreement, which would be much more difficult to reach).

²⁰³ See id. at 1505 ("Bilateral negotiations provide the most promising forum for reaching agreement because they require only two countries to agree that cooperation will increase national welfare.").

See id. at 1548; cf. id. at 1505 ("[B]ilateral or regional agreements may reduce the distortion of antitrust policy among the parties to the agreement, but they will not do so between countries that are part of the agreement and those countries that are not.").

²⁰⁵ See Antitrust Cooperation Agreements, DEPARTMENT OF JUSTICE, http://www.justice.gov/atr/public/international/int-arrangements.html (last visited Apr. 15, 2013) (providing a list of bilateral antitrust agreements to which the United States is a party).

²⁰⁶ See Guidance for Case Cooperation Between the Ministry of Commerce and the Department of Justice and Federal Trade Commission on Concentration of Undertakings (Merger) Cases, U.S.-China, Nov. 29, 2011, [hereinafter Guidance for Merger Cases], available at www.ftc.gov/os/2011/11/111129mofcom.pdf; see also Memorandum of Understanding on Antitrust and Antimonopoly Cooperation Between the United States Department of Justice and Federal Trade Commission, on the One Hand, and the People's Republic of China National Development and Reform Commission, Ministry of Commerce, and State Administration for Industry and Commerce, on the Other Hand, U.S.-China, July 27, 2011 [hereinafter Memorandum of Understanding], available at http://www.ftc.gov/os/2011/07/110726mou-english.pdf.

²⁰⁷ Compare Guidance for Merger Cases, supra note 206, and Memorandum of Understanding, supra note 206, with Organisation for Economic Co-Operation, supra note 197, and International Competition Network, supra note 197.

²⁰⁸ See Guidance for Merger Cases, supra note 206 ("[C]ase cooperation between

Both agreements explicitly state their non-binding nature by ensuring that "case cooperation does not prejudice each agency's independent decision-making with respect to its cases." Due to the non-binding nature of current bilateral antitrust agreements and their limited objectives—information sharing, cooperation, and establishing procedural best practices²¹⁰—it is unlikely that the two states will be able to reach an agreement capable of harmonizing policies regarding substantive issues of merger review. ²¹¹

Expending political capital on efforts to pressure China to adopt an approach to merger review that is compatible with current American standards would be futile. It is clear that the current system, where each state operates a separate mechanism for merger review, is "suboptimal"; however, it is doubtful that meaningful, i.e., substantive and binding, international agreement is possible. Too often, states that would be parties to an agreement face perverse incentives that make their negotiating positions wholly incompatible. Ultimately, national antitrust

the investigating agencies may help improve the efficiency of their investigations, and thereby maintain competition in their jurisdictions."); see also Memorandum of Understanding, supra note 206, at 1 ("[Both parties] desiring to enhance the effective enforcement of their competition laws and policies by creating a framework for long-term cooperation between the U.S. antitrust agencies and the PRC antimonopoly agencies.").

- ²⁰⁹ Guidance for Merger Cases, *supra* note 206; *see also* Memorandum of Understanding, *supra* note 206, at 3 ("Nothing in this Memorandum is intended to create legally binding rights or obligations.").
- 210 See Guidance for Merger Cases, supra note 206; Memorandum of Understanding, supra note 206, at 2.
- See generally Guzman, Is International Antitrust Possible?, supra note 181, at 1542-47 (noting that non-binding information sharing and cooperation agreements are unlikely to affect meaningful, substantive change that might be reached under a broad multilateral binding agreement, which would be much more difficult to reach).
- See id. at 1548 ("International agreements on antitrust policy will continue to be difficult—and may be impossible—to reach because not all countries will benefit from such agreements.").
- 213 See id. at 1504 ("[R]egulating antitrust at the national level is suboptimal, and an international approach to antitrust is likely to be welfare increasing."); Ezrachi, *supra* note 178, at 401 ("In areas dominated by domestic considerations, states may implement policies that are liable to contradict global aims.").
- 214 See Guzman, Is International Antitrust Possible?, supra note 181, at 1504 ("[T]he incentives facing individual countries make it extremely difficult—perhaps impossible—to negotiate substantive international antitrust agreements.").

officials will make choices that provide a net benefit to their state's interests, even if the necessary corollary is a net loss to another state's interests. For example, where one negotiating party is an exporting state it will favor "a relatively weak antitrust law because behavior with potentially anticompetitive effects benefit[s] the country's producers and imposes costs only on foreign consumers." When such a state negotiates with an importing state, their interests will be in direct conflict and agreement is unlikely. ²¹⁷

History bears out the difficulty of reaching international agreements governing substantive antitrust policy. To date, there are, with the extraordinary exception of the European Union, on meaningful international agreement[s] exist[ing] to govern the application of antitrust policies to cross-border activities."

Within the Chinese-American context, so long as foreign firms hold the majority of the high technology patents being exploited in China, making China a net importer of high technology, there is no incentive for China to enter into any agreement that would compel it to strengthen intellectual property rights.²²¹ Given that the majority of the benefit from the unfettered, exclusive use of such intellectual property will come back to the United States by way of domestic intellectual property holders, the United States has incentive to under-regulate powerful intellectual property.²²²

²¹⁵ See id. at 1529. "[I]ndividual countries will adopt policies that, although optimal from a national perspective, are suboptimal from a global perspective." *Id.* at 1542.

²¹⁶ *Id.* at 1529.

²¹⁷ See id.

²¹⁸ See id. at 1535-38.

²¹⁹ See EU Treaty, supra note 28, art. 82. The Treaty Establishing the European Community broadly provides: "Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States." Id. Examples of what constitutes "abuse" follow. See id.

²²⁰ See Guzman, Is International Antitrust Possible?, supra note 181, at 1535.

²²¹ See id. at 1529; Jacobs & Zhang, supra note 106, at 138, 151-53.

See generally Jacobs & Zhang, supra note 106, 127-32 (observing that the U.S. strategy to intellectual property rights favors the monopolist through its long-term outlook, thereby incentivizing research and development); Guzman, Is International Antitrust Possible?, supra note 181, at 1532 (reviewing a case analogous to the China-U.S. context, explaining that, as far as U.S. firms are concerned, "if the laws of the United States and those of another country regulate the same activity, the stricter of the

In contrast, China has the incentive to over-regulate because failing to do so, as in the context of the Google/Motorola case, may subject Chinese consumers and competitors to anticompetitive harms associated with monopoly rents and may provide Google, a U.S. firm more likely to make investments in innovation in the United States, with the benefits of intellectual property protection. ²²³

Furthermore, reaching a substantive agreement on compulsory licensing policy would cost the United States significant economic and political capital. Despite the negative effects of compulsory licensing on foreign acquirers of powerful intellectual property, which result in large part from variances in policy, such capital expenditures are needless. To persuade a state to enter an agreement that may cause net harm to its domestic interest, there must be a payment to that state to lessen the blow. As explained above, it would not serve China's national interest to curtail its use of compulsory licensing. In order to persuade China to enter such an agreement, the United States would have to make a compensatory payment to shift the incentive balance in favor of reaching an agreement. Although the payment need not take the

laws will govern").

²²³ See generally Guzman, Is International Antitrust Possible?, supra note 181, at 1532 (reviewing an analogous case); Ezrachi, supra note 178, at 407 ("A given jurisdiction will strive to shield its local markets from a negative transfer of wealth, while the jurisdiction that receives the positive transfer of wealth caused by the anticompetitive behavior of its local corporations will be reluctant to act against such behavior.").

See generally Guzman, Is International Antitrust Possible?, supra note 181, at 1542 (expounding on the difficulties involved in international antitrust negotiations, noting in particular that convincing parties to overlook the detriment to their interest that could result from joining the agreement may require substantial compensation payments).

²²⁵ See generally Jacobs & Zhang, supra note 106, at 127-30 (arguing that holders of powerful intellectual property will be harmed by compulsory licensing because they will not be able to realize the full value of the inventions where the underlying technology is widely disbursed).

²²⁶ See Guzman, Is International Antitrust Possible?, supra note 181, at 1542.
("Unlike trade policy agreements, antitrust policy agreements do not necessarily improve the welfare of all countries that participate in a cooperative regime; some may suffer a welfare loss.").

²²⁷ See supra notes 223-25 and accompanying text.

²²⁸ See Jacobs & Zhang, supra note 106, at 149-53.

²²⁹ See Guzman, Is International Antitrust Possible?, supra note 181, at 1542.

form of monetary compensation, the United States would have to compromise on another policy position valuable to China. Given the current benefits China receives from its compulsory licensing policy, the reciprocal payment necessary to induce it to enter a substantive antitrust agreement would be significant. When such a payment is added to the political capital that would be expended in the negotiation process, the cost-benefit analysis places an international agreement with China outside the interest of the United States. 232

B. In Favor of the Evolving Status Quo

If pursuing an international agreement to bridge the policy gap between the United States and China is too costly, ineffectual, and improbable, ²³³ what other options are available for states whose firms face uncertainty and costs inherent in a status quo where two major merger review regimes may, as witnessed in the Google/Motorola case, reach inconsistent results? Given China's current trajectory, as measured in terms of high technology patents granted, it is in the best interest of the United States and others who prefer greater protection of intellectual property rights to simply wait for China's compulsory licensing policy to evolve, ²³⁴ rather than expend capital trying to force China's hand, and risk souring the relationship with an emerging superpower. ²³⁵

Additionally, there is the "free rider" problem, where "some countries may choose not to contribute to the compensation package offered to those countries that lose from an agreement," but nonetheless would benefit from the change in policy. *Id.* at 1544.

- 230 See Guzman, Is International Antitrust Possible?, supra note 181, at 1545 ("Notice that transfer payments need not involve money.... [C]ountries may be able to negotiate an antitrust policy agreement if those countries that stand to lose are able to extract concessions in other areas of negotiations.").
- 231 See id. at 1544-46 ("[I]n the world of international commercial law, transaction costs are far from zero and information is less than perfect.... Because developing countries are more often net importers... and developed countries are more often net exporters... agreement is unlikely....").
- 232 See id. at 1544 ("Costs arise due to a variety of factors, including the political realities faced by negotiators (e.g., voters may be against an agreement, uncertainty with respect to the magnitude of the costs and benefits of an agreement, and concern regarding the future behavior of the other countries.").
 - 233 See supra Part V.A.
- 234 See generally McEwin, supra note 109, at 1-4 (explaining that as a state's economy transitions, intellectual property protection becomes increasingly important, even when incentivizing innovation investment comes at a price).
 - 235 See Guzman, Is International Antitrust Possible?, supra note 181, at 1548

The proportion of Chinese patents granted to foreign firms fell from 72.67% in 2002, to 50.28% in 2008.²³⁶ Given the current trend, the number of patents granted to domestic inventors, measured as a proportion of total patents granted, will continue to rise.²³⁷ In fact, as of 2010, fifty-nine percent of all patents were granted to domestic applicants.²³⁸ Granting more domestic patents is a sign of greater investment in innovation.²³⁹ Investment in innovation shifts the balance between static and dynamic efficiency.²⁴⁰ Specifically, when the proportion of high technology patents granted to domestic inventors increases, the cost of weak intellectual property rights, measured by the disincentive for innovation, gradually shifts from foreign firms to Chinese companies.²⁴¹

Eventually, it will be in China's interest to protect intellectual property rights more stringently, in part by limiting the use of compulsory licensing. ²⁴² It will no longer be in China's interest to coerce acquirers of powerful intellectual property to license patents, because Chinese holders of similar patents will also be vulnerable to such action. ²⁴³ If foreign and domestic acquirers of

(noting the difficulty in reaching an agreement where the negotiating parties have divergent interests); Guzman, *The Case for International Antitrust*, *supra* note 132, at 368-69 (explaining the costs involved in "noncooperative policymaking").

²³⁶ See Jacobs & Zhang, supra note 106, at 151.

²³⁷ See id.

²³⁸ China Grants More Patents in 2010, XINHUA NEWS ENGLISH (Jan. 13, 2011, 12:47 AM), http://news.xinhuanet.com/english2010/china/2011-01/13/c_13688 018.htm.

²³⁹ See Jacobs & Zhang, supra note 106, at 149-51 (observing that, contrary to the "so-called developing country argument," which holds that "China would benefit from ... provid[ing] relatively little protection to [intellectual property]," the "situation is changing as China becomes more economically developed.").

²⁴⁰ See id. at 150-51 (noting that where a state has little prospects for investment in research and development, its best interests are served not by protecting intellectual property rights, but by ensuring that the technology behind the intellectual property held by foreign firms is widely disbursed in order to benefit local competitors and consumers, but arguing that in China, the converse is likely true).

²⁴¹ See id. at 149-52.

²⁴² See generally id. at 149-51 (arguing that where the majority of high technology patents are being exploited by foreign firms it will be in that state's interest to compel licensing of powerful intellectual property, and, conversely, that as an economy transitions and more patents are granted to domestic firms, the state's interest shifts and compulsory licensing is no longer a viable policy).

²⁴³ See id. at 151 (observing that "the profile of patent grant is changing in China,"

powerful intellectual property may be subjected to compulsory licensing, domestic innovation will be curbed right along with foreign innovation and, as a result, domestic inventors will be unable to realize the full commercial benefits of their inventions. China will transition toward a policy that further incentivizes investment in innovation because a greater portion of that investment will be occurring domestically. Therefore, as the proportion of high technology patents granted in China increases, the dynamic gains of encouraging research and development will outweigh the short-term anticompetitive costs of allowing sanctioned monopolies over powerful intellectual property. See the company of the short-term anticompetitive costs of allowing sanctioned monopolies over powerful intellectual property.

With these considerations in the cost-benefit analysis, which informs compulsory licensing policy, a greater overall alignment of U.S. and Chinese policies at the intersection of antitrust and intellectual property law will result. As both states move closer to a point of convergence, there will be no need for an international agreement, because benefits of an agreement diminish as standards become increasingly similar. The United States should continue on its current path, using information sharing agreements to maintain a positive working relationship with the Chinese authorities, while avoiding any unnecessary tension that would accompany efforts to force China to change its merger review policies. 249

which "challenge[s]... the standard developing country argument").

²⁴⁴ See id. at 127-30.

²⁴⁵ See generally Jacobs & Zhang, supra note 106, at 127-30 (noting that the more stringently a state protects intellectual property rights, the greater incentive there will be for firms to invest in research and development, which leads to innovation).

See id. at 150-52 ("Given the trend of China's economic growth and the national strategy to develop an innovation-oriented country.... weak [intellectual property] protection and unwarranted compulsory licensing... [will suppress] independent innovation.").

²⁴⁷ See generally Guzman, Is International Antitrust Possible?, supra note 181, at 1546-47 (explaining that where two states' interests align, their antitrust policies are more likely to harmonize).

²⁴⁸ See generally Jacobs & Zhang, supra note 106, 149-51 (noting that the one factor leading to China's compulsory licensing policy is that foreign firms are disproportionately benefited by protection of intellectual property rights).

²⁴⁹ See Guzman, The Case for International Antitrust, supra note 132, at 356 (arguing that issues arising in the context of incompatible antitrust regimes are ripe to cause hostility among states).

VI. Conclusion

The enactment of the AML was an extraordinary event and an important milestone denoting greater economic liberalization and openness in China. For all of the opportunities presented by the AML, there are also many challenges facing Chinese antitrust authorities as they implement and interpret the law. Not the least of these challenges is the potential and perceived bias of the Chinese authorities, who may be tempted to use the law to benefit local industries and consumers by selectively enforcing the law against foreign firms.

The recent acquisition of Motorola Mobility by Google provides an early case study of how these issues will present themselves. By compelling Google to continue to license its Android operating software freely for five years, MOFCOM acted more aggressively than its merger review counterparts in the United States and Europe. Despite initial reports that it was motivated by a desire to ensure the continued viability of a growing domestic smartphone industry, the decision shows that the compulsory licensing policy of China is not a threat to the continued efficacy of the AML or the interests of foreign firms operating in China. As is often the case in modern antitrust regimes, Chinese officials enforce the law's provisions in a way that is most beneficial to China's national interest. Although

²⁵⁰ See Huo, supra note 2, at 32-33 ("Since the largest developing country in the world can now claim to have a systematic antitrust law, the law's passage is a historic moment in China's legal history.").

²⁵¹ See Zheng, supra note 3, at 651 ("[D]espite having a Western-style antitrust law, China has not developed and likely will not develop Western-style antitrust jurisprudence in the near future due to [] local conditions.").

²⁵² See Harris, supra note 1, at 171 (noting the concern that the AML's enforcement provisions may only be used against foreign companies, which would inevitably, if not consciously, benefit domestic firms).

²⁵³ See, e.g., DOJ STATEMENT, supra note 66, at 1.

²⁵⁴ Compare MOFCOM DECISION, supra note 61, with DOJ STATEMENT, supra note 66, at 1, and Letzing & Mozur, supra note 14 (noting that both the United States and the European Union approved the merger without conditions).

²⁵⁵ See Letzing & Mozur, supra note 14.

²⁵⁶ See generally Jacobs & Zhang, supra note 106, at 149-51 (explaining that China's compulsory licensing policy is informed by its status as an importer of high technology, but economic development may lead to a change in the compulsory licensing policy).

²⁵⁷ See generally Guzman, Is International Antitrust Possible?, supra note 181, at

MOFCOM's early willingness to apply tough restrictions on proposed mergers may cause apprehension among the international business community, especially considering the inconsistency among the United States, the European Union, and China with regard to compulsory licensing, the Google/Motorola decision is more likely to be a blip on the radar than the start of a lasting trend.

If the United States remains patient and refrains from taking an overtly aggressive stance toward Beijing, China's economy will continue to evolve and become more technologically advanced, creating greater incentive for Chinese authorities to protect intellectual property rights as a strategy to encourage domestic investment in innovation.²⁶¹ As that incentive grows, compulsory licensing will become less viable as a remedy in merger review cases, allowing for a natural convergence of American and Chinese merger review policy.²⁶²

1502-06 (explaining that states often have conflicting interests when it comes to antitrust policies and objectives, and as a result, officials will pursue policies in their nation's interest even if those policies harm consumers or firms in foreign states).

²⁵⁸ See Letzing & Mozur, supra note 14 (hypothesizing that MOFCOM's decision to apply a compulsory licensing condition to the merger was motivated by a desire to benefit domestic industry at the expense of Google and Motorola's new relationship).

²⁵⁹ See Jacobs & Zhang, supra note 106, at 128-38, 149-51.

²⁶⁰ See generally id. at 149-51 (observing that, broadly speaking, as China's proportion of high technology held by domestic firms increases, the incentives to maintain a compulsory licensing policy diminish).

²⁶¹ *See generally id.* at 150-51.

²⁶² See generally id. at 127-30, 149-51.