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CHINA'S MERGER REVIEW: THE REVIEW AGENCY IS IN BALANCE WITH MAJOR STAKEHOLDERS¹

Huizhen Chen

ABSTRACT

China's relatively new merger review system continues trending toward those of the United States and the European Union. However, its merger review will never entirely converge with the Western model from either a competition policy or review methodology perspective. Such divergence from the West, this article claims, is rooted in the decision-making mechanism of China's merger reviews. Traditionally, China's decision-making mechanism has been viewed as a singular review-agency domination like that of the West. In fact, however, China's merger reviews have issued remedies reflecting policies generated by major stakeholders as well as the review agency. These co-decision-makers have balancing relationships that forge an agency-stakeholder, rather than sole agency domination. Today, China's State Administration for Market Regulation (SAMR), established in 2018, follows a path set by the earlier China's Ministry of Commerce (MOFCOM). This article provides valuable insight into how the new active type of agency-stakeholder domination in China's merger reviews balances both economic and non-economic (political) policies to protect markets and consumers, as well as to be ready to react to the rise of protectionism globally.

INTRODUCTION

Since China has become one of the largest jurisdictions of merger reviews in the world,² it is beneficial to all potential participants to comprehensively understand its merger review. The critical position of China in the global economy today ensures that its merger reviews can significantly intervene in the business of many multinational companies. Therefore, to understand the characteristics of China's merger reviews has both academic and practical value.

One striking difference with the West in China's merger reviews is that China heavily relies on behavioral rather than structural remedies. From the perspective of economics, structural remedies are more efficient to restore competition to pre-merger levels without significant administrative costs. China's preference for behavioral remedies thus has usually been considered as evidence of Chinese government intervention in the merger reviews and an adoption of the government's noneconomic or even political policies such as protection of domestic competitors.³ In Part I, this article first briefly introduces the traditional understanding of China's merger reviews and their remedies, especially from the perspective of comparison with the United States (US) and the European Union (EU).

In actual fact, however, the non-economic policies in China's merger reviews simply reveal that China's merger review agency is not the only policy source. Although non-economic policies are usually political policies representing the state interest, scholars have failed to recognize the fact of multiple decision-makers inside China's merger reviews. This contrasts with the singular review-agency domination in the US and the EU. In Part II, the article explains

¹ Fund Program: The 2022 Research Start-up Fund for New Entry Scholars at the Capital University of Economics and Business (China) (XRZ2022013).

² See Andrew L. Foster, *Navigating the Unique Features of China's Competition Landscape*, 31 ANTITRUST 79 (Spring 2017).

³ See Fei Deng & Cunzhen Huang, *A Ten-Year Review of Merger Enforcement in China*, 18 ANTITRUST SOURCE 1, 9 (2018).

the Western singular review-agency domination.

Having had insufficient review officials, China's merger review agency could never be as active as the Western counterparts.⁴ With the significant increase of caseload in the past decade, China's review agency has had to assign its review authority to other parties in order to complete its reviews on time. Analyzing policy sources and remedy beneficiaries, Part III reveals that major stakeholders may also at times generate non-economic policies in China's merger reviews. These major stakeholders, such as merger parties or third-party acquirers, actually became co-decision-makers with China's Ministry of Commerce (MOFCOM) in the merger reviews. Therefore, the Chinese decision-making mechanism represents a unique agency-stakeholder domination.

For instance, the 2014 Corun/Toyota China/PEVE/Sinogy/Toyota Tsusho (Toyota) and 2009 Panasonic/Sanyo (Panasonic) cases illustrate that the major stakeholder in both, Corun, was, in fact, a second decision-maker. These cases involved the global nickel-metal hybrid (NiMH) vehicle batteries market. Both of MOFCOM's decisions defined the product market differently from the West and were therefore assumed to be subject to consistent political policy. The truth is that, since MOFCOM could not fully analyze the market independently, MOFCOM completed the merger reviews based on Corun's understanding of the product market. This understanding, in fact, even went against China's relevant industrial policies, and instead favored the stakeholder Corun. So Corun was an actual decision maker in both cases. These cases refute the traditional assumption that MOFCOM alone dominated merger reviews. By contrast, the remedies in both cases illustrate that MOFCOM shared its review authority with Corun in the decision-making mechanism.

MOFCOM's hold-separate remedies in the 2011 Seagate/Samsung (Seagate) and the 2012 Western Digital/Viviti (Western Digital) cases also illustrate MOFCOM's distinction from its Western counterparts in its balancing with the merger parties. Compared to the West's use of hold-separate remedies only to support primary structural remedies,⁵ MOFCOM's hold-separate remedies tend to be temporary structural remedies in a behavioral remedy format. In both cases, MOFCOM gave up structural remedies because it could not further divide the product market and had to accept Seagate's product market analysis. MOFCOM relied on non-neutral analysis from the merger parties again because of its insufficient review capacity. Thus, MOFCOM's remedies contained both behavioral and structural remedy characteristics. Therefore, in both groups of cases MOFCOM shared its review authority with major stakeholders, such as merger parties or third party acquirers, which represents a unique agency-stakeholder domination.

The merger reviews of MOFCOM's successor, China's State Administration for Market Regulation (SAMR) continue to represent China's agency-stakeholder domination. In 2018, in a government effort to unify its competition law enforcement jurisdiction, SAMR officially replaced MOFCOM to become the new merger review agency. Since then, SAMR has systematically reformed China's merger review from multiple levels to efficiently protect markets and consumers. Because the merger review officials working for MOFCOM all

⁴ See Fei Deng, *Roundtable on Antitrust Developments in China Ten Years On*, 18 ANTITRUST SOURCE 1, 2 (2018) [hereinafter Roundtable].

⁵ See Eric Emch, Thomas D. Jeitschko & Arthur Zhou, *What Past Agency Actions Say About Complexity in Merger Remedies, with an Application to Generic Drug Divestitures*, 27 COMPETITION: J. ANTI., UCL & PRIVACY SEC. CAL. L. ASSOC. 87, 91 (2018).

transferred to SAMR,⁶ SAMR has largely maintained MOFCOM's agency-stakeholder domination, and major stakeholders may still influence merger reviews far beyond their limited role in the West as "information sources."

China's decision-making mechanism of merger reviews, however, has faced new challenges since the establishment of SAMR. Accompanied by the rise of protectionism, the trade war between the US and China threatens the supply of essential upstream products to China in critical industries. Part IV thus reveals that as with MOFCOM, SAMR's merger reviews continue to have stakeholders with equivalent weight to the review agency. Nevertheless, the active agency role is stronger under SAMR, as major stakeholders cannot affect the decision-making mechanism to issue merger review remedies that would damage state interests or industrial policies as they could in the agency-stakeholder domination during MOFCOM's time.

Thus, SAMR demonstrates in the 2020 ZF/Wabco (ZF) case a new active type of balancing relationship between decision-makers. Merger parties ZF and Wabco are manufacturers of commercial vehicle components. In its decision, SAMR pays abnormal attention to Shaanxi Fast, a leading Chinese competitor of the AMT system. In the ZF case, Shaanxi Fast appears to have nonetheless significantly influenced the decision-making mechanism, as a third-party competitor to ZF. The remedies moreover primarily benefit Shaanxi Fast, implying major stakeholders still play important roles in SAMR's decision-making mechanism. This shows how SAMR actively intervenes in business operations of merger parties, demonstrating this unique type of agency-stakeholder domination.

In sum, unlike the West's singular review-agency domination with clear policy preferences, China's merger review designs remedy structure to reflect the competition policies of the agency and the decision-makers simultaneously. Therefore, one fundamental characteristic of China's merger reviews, different from those of the West, is that China and major stakeholders are balanced in the agency-stakeholder domination, indicating equivalent weight among competition policies.

I. CHARACTERISTICS OF CHINA'S MERGER REVIEWS

The characteristics of China's merger reviews can be clearly seen by comparison with the US and the EU. The traditional approach to the features of China's merger reviews is to focus on laws, procedures, and practices. This approach usually reaches a split recognition of China's merger reviews: on the one hand, its review methods significantly converge towards the West; on the other hand, its review remedies stick to behavioral instead of structural ones. Traditionally, China's over-application of behavioral remedies has been considered as over-emphasizing political policies in the merger reviews. However, this interpretation, in fact, ignores deeper distinctions from the West in the decision-making mechanism.

A. CHINA'S MERGER REVIEW PRACTICES CONVERGE TOWARDS THE WEST

Compared to their counterparts in the US and the EU, China's merger reviews are known for their unique characteristics. Both the former MOFCOM and the current SAMR often issue different remedies from those of their Western counterparts.⁷ Generally, both the US and the EU prefer issuing structural remedies to diminish significant anti-competitive effects of

⁶ See Deng & Huang, *supra* note 2, at 18; see also Roundtable, *supra* note 3.

⁷ See Deng & Huang, *supra* note 2, at 9.

mergers.⁸ By contrast, China primarily depends on behavioral remedies.⁹ The context of a decision would show only a blunt conclusion without explanation of relevant markets and competition effects.¹⁰

With the growing demand for detailed analyses, the context of China's merger reviews has become gradually enlarged, containing six sections: case-filing and review procedure, general case information, relevant markets, competitive analysis, discussion with additional restrictive conditions, and final remedy orders.¹¹ The addition of relevant markets and competitive analysis sections demonstrates how China's merger review agency is enhancing efficiency analysis by applying a law and economics approach.

China's merger review agency has adopted a law and economics approach similar to its Western counterparts. From the perspective of methodologies, MOFCOM absorbed the Chicago School theory of economics: it transitioned from unilateral counting on market structures by primarily monitoring the combined market shares and concentration levels after mergers, to considering efficiency defenses when analyzing potential anti-competitive effects.¹² Generally, China's merger reviews have developed analytical capacities, regulation transparency, and decision predictability.

In practice, China's merger review agency hires legal and economics experts to enhance its analytical capacity. To provide further credence to its merger reviews, China has established

⁸ See Makan Delrahim, Assistant Attorney General, U.S. Dept. of Justice, Keynote Address at American Bar Association's Antitrust Fall Forum, U.S. Dept. of Justice (Nov. 16, 2017), <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar> [<https://perma.cc/6Q3X-N4CV>] [hereinafter Delrahim 11.16.2017]; see also Emch, Jeitschko & Zhou, *supra* note 4, at 88; see also Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, 2008 O.J. (C 267) 1, ¶15 (EC), [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC1022\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC1022(01)&from=EN) [<https://perma.cc/RC6M-8G6D>].

⁹ See Deng & Huang, *supra* note 2, at 9.

¹⁰ For example, in the 2009 Pfizer/Wyeth case, MOFCOM only emphasized the governing law without any further in-depth argument on how to determine the relevant markets or market powers of merger parties. See Zhonghua Renmin Gongheguo Shangwubu Gonggao 2009 Di 77 Hao Guanyu Futiaojian Pizhun Huirui Gongsu Shougou Huishi Gongsu Fanlongduan Shencha Jueding De Gonggao [Notice [2009] No. 77 of MOFCOM of the P.R.C.] (中华人民共和国商务部公告[2009]第77号

关于附条件批准辉瑞公司收购惠氏公司反垄断审查决定的公告) [Announcement No.77 [2009] of the Ministry of Commerce-Announcement on Decisions from Anti-monopoly Review of the Concentration of Undertakings on Conditional Approval of Proposed Merger between Pfizer and Wyeth] (issued by MOFCOM, Sep. 29, 2009, effective the same day), <http://fldj.mofcom.gov.cn/article/ztxx/200909/20090906541443.shtml> [<https://perma.cc/7KGM-FNDX>] (China).

¹¹ Use the 2017 Becton Dickinson/Bard case as an example. All later decisions issued by MOFCOM have similar structures. See Shangwubu Gonggao 2017 Di 92 Hao Guanyu Fujia Xianzhixing Tiaojian Pizhun Beikedun Dijincen Gongsu Yu Meiguo Bade Gongsu Hebing'an Jingyingzhe Jizhong Fanlongduan Shencha Jueding De Gonggao (商务部公告2017年第92号 关于附加限制性条件批准贝克顿-迪金森公司与美国巴德公司合并案经营者集中反垄断审查决定的公告) [Ministry of Commerce—Announcement on Decision from Anti-Monopoly Review of the merger of Undertakings on Conditional Approval of Proposed Merger between Becton, Dickinson and Company and C. R. Bard, Inc.] (issued by MOFCOM, Dec. 27, 2017, effective the same day), <http://fldj.mofcom.gov.cn/article/ztxx/201712/20171202691390.shtml> [<https://perma.cc/UA8S-HG6Y>] (China).

¹² See Fei Deng & Yizhe Zhang, *Interview with Shang Ming, Director General of the Anti-Monopoly Bureau Under the Ministry of Commerce of the People's Republic of China*, 13 ANTITRUST SOURCE 1, 2 (2014).

a consultant team consisting of legal, technological, and economics experts to analyze post-merger competitive effects of merger reviews.¹³ These experts are not permanent merger review officials, but outside consultants working primarily in their respective fields.¹⁴ Their main tasks are to draft reports on competition regulations and related guidelines, assess market competition, provide advice in high-profile cases, and present introductory information on domestic and international hot topics in competition law.¹⁵

Thus, most distinctions of review techniques from the West are only temporary flaws reflecting China's insufficient review capacity. China, as a developing country, frequently reforms competition law practices to meet the needs of the rapidly developing economy.¹⁶ Many substantive and procedural differences in merger review practices have been revised in the later reform of merger review regulations.¹⁷ Competition policies in merger reviews can generally be divided into two categories: economic and non-economic (political).¹⁸ All economic policies derive from the purpose of either promoting market efficiency or consumer welfare. Non-economic (political) policies, on the other hand, cover all the other policies not included in economic policies.¹⁹ Thus, the scope of competition policies may be infinite, depending on the identity of potential competition policy sources and economic development in their jurisdictions.²⁰ For economic policies, utility can objectively be measured by law and

¹³ According to the news article online, the first expert consulting group was established in December 2011. The group directly worked for the Antitrust Committee of the State Council. There were 21 experts, including scholars and professors from Shanghai Jiaotong University, Tianjin University of Finance and Economics, Renmin University of China, Peking University, China University of Political Science and Law, and other famous universities. There were also some experts from the Chinese Academy of Social Sciences and related government ministries and commissions. Most of the experts were legal experts, and others were economists and technical experts. See Shi Dongdong (是冬冬), Zhang Xinzhu Huiying Bei Guowuyuan Fanlongduan Weiyuanhui Zhuanjiazu Jiepin: Wo Bang Waiqi Shuohua Le (张昕竹回应被国务院反垄断委员会专家组解聘：我帮外企说话了) [stating Mr. Zhang Xinzhu's response to be fired by the Anti-Monopoly Committee of the State Council: "I spoke for foreign companies"], PAPER (澎湃) (Aug. 12, 2014), [<https://perma.cc/H3XD-RRYJ>] (China).https://www.thepaper.cn/newsDetail_forward_1261301 [<https://perma.cc/H3XD-RRYJ>] (China).

¹⁴ See *id.*

¹⁵ *Id.* The process of experts' consultation and its actual influences on review still remains opaque.

¹⁶ See Roundtable, *supra* note 3, at 12.

¹⁷ For instance, MOFCOM initially did not adopt the rules of crown jewels in its structural remedies. Yet, in just a few years, MOFCOM adopted this type of alternative divestiture commitments in practice and officially published guidelines on them. These static differences in merger review methods may overemphasize the actual gap that exists between China and the West. See Ye Jun (叶军), Jingyingzhe Jizhong Fanlongduan Shencha Zhi Huangguan Baoshi Guize Yanjiu (经营者集中反垄断审查之皇冠宝石规则研究) [Study on the Rules of Crown Jewels in Merger Reviews], 28 ZHONGWAI FAXUE (中外法学) [Peking Univ. L. J.], No. 4, 1057 (2016) (China).

¹⁸ See Dina I. Waked, *Antitrust Goals in Developing Countries: Policy Alternatives and Normative Choices*, 38 SEATTLE UNIV. L. REV. 945, 951 (2015).

¹⁹ For instance, in Williamson's welfare trade-off model, no surplus triangle or rectangle can positively correspond to political policy.

²⁰ See D. Daniel Sokol, *Tensions Between Antitrust and Industrial Policy*, 22 GEO. MASON L. REV. 1247, 1248 (2015).

economics theories.²¹ For instance, the concept of promoting consumer welfare can be expressed graphically as maximizing consumer surplus. Market efficiency can be described as maximizing the total of both consumer and producer surplus, or as the difference of production cost compared to the allocative benefits.²² In economic graphs, such surpluses or benefits appear as surplus triangles (such as consumer surplus) and rectangles (such as producer benefit). Therefore, economic policies can lead different review agencies to similar conclusions when market structures are identical.

By contrast, non-economic (political) policies do not correspond to economic models. No surplus triangle or rectangle can positively correspond to political policy because political policies usually cannot be deconstructed into a price-quantity two-dimensional graph. In fact, the consequential effects of non-economic policies may be beyond the scope of measurement. For instance, one competition policy which cannot be quantified in the EU's competition law is the integration of a common European market.²³ Apparently, the analytical method of such a policy is flexible without any objective guidance.²⁴ Therefore, arguments relating to political policies are usually presented in a descriptive rather than mathematical format to analyze the potentially adverse effects on competition.

Since merger review agencies prepare remedies to achieve certain goals, both economic and non-economic (political), the remedies inevitably reflect the competition policies adopted in merger reviews. Thus, just as competition policies can be categorized into economic and non-economic (political) policies, there are two basic types of remedies when the review agencies conditionally clear transactions. Structural remedies are to fully divest a company's related assets or business departments to an unrelated third-party.²⁵ Behavioral remedies act something like injunctions, restricting merger parties from certain business activities or requiring them to take certain action to preserve competition.²⁶

The classification of remedies in merger reviews is consistent with the types of competition policies. For instance, the US and the EU generally consider structural remedies as the most efficient remedies.²⁷ In practice, the West recognizes the adverse effects of

²¹ There are some debates over whether these competition policies can be measured from the perspective of economics theories. For instance, the concept of "allocative efficiency" or "total surplus" may not truly reflect all aspects of "consumer welfare" in the moral philosophy sense.

²² See Daniel J. Gifford & Robert T. Kudrle, *Rhetoric and Reality in the Merger Standards of the United States, Canada, and the European Union*, 72 ANTITRUST L.J. 423, 427-28 (2005).

²³ See Sokol, *supra* note 19, at 1256.

²⁴ See Marcin Szczepański, *EU competition policy: Key to a fair single market*, 2 EUR. PARLIAMENTARY RES. SERV., Oct. 2019, at 30, n. 63, [https://www.europarl.europa.eu/RegData/etudes/IDAN/2019/642209/EPRS_IDA\(2019\)642209_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2019/642209/EPRS_IDA(2019)642209_EN.pdf) [<https://perma.cc/MW2N-GXNG>].

²⁵ See Emch, Jeitschko & Zhou, *supra* note 4.

²⁶ The typical behavioral remedies include "compulsory licensing, line-of-business restrictions, prohibitions on product integration, disclosure of the application programming interfaces ('APIs'), and limitations on contractual terms with customers." See Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Indus.*, 68 U. CHI. L. REV. 1, 6 (2001); see also Per Hellström, Frank Maier-Rigaud & Friedrich Wenzel Bulst, *Remedies in European Antitrust Law*, 76 ANTITRUST L. J. 43, 47 (2009).

²⁷ See Jillian Bray, *Firmly Grasping the Knife: An Investigation of the Asymmetric Application of Chinese Antitrust Law as a Protectionist Tool*, 24 CARDOZO J. INT'L & COMP. L. 351, 378 (2016) (claiming the FTC and DOJ issued more decisions with structural remedies and the outcomes of structural remedies are more efficient in maintaining the competition); see also Greg Olsen, *Revised EU Merger Remedy Guidance*, 23 ANTITRUST, Summer 2009, at 80, 82 (stating the Notice of EC shows a clear preference for divestiture remedy over other forms of remedy).

administrative intervention in the regime of commerce.²⁸ It also confirms the long-range damage of the over-application of behavioral remedies to consumers and competition.²⁹ The Western fundamental business philosophy is that a businessman knows the market better than any official.³⁰ Thus, the best remedies for the West are those that do not distort market competition by merger review officials. Structural remedies only require divesting particular businesses or assets to avoid direct regulation of merger parties or the need to appoint a monitoring trustee.³¹ Thus, structural remedies are generally most appropriate for promoting economic policies in merger reviews.

B. CHINA'S UNIQUE RELIANCE ON BEHAVIORAL REMEDIES

China's behavioral remedies, unlike Western behavioral remedies, do not generally support primary structural remedies, but are instead independent. China's merger review agency, in fact, has multiple types of behavioral remedies.³² MOFCOM and its successor, SAMR, have never considered that only structural remedies could reduce mergers' potential anticompetitive effects. On the contrary, China's practices strongly indicate that China considers restrictions on business operations to be equally as effective as permanent divestitures.

For instance, China's hold-separate remedies are unique among all three jurisdictions.³³ By "hold-separate" it is meant that, after a merger, the merger review agency requires the merger parties to operate temporarily as independent entities. However, China's hold-separate remedies usually last for a few years; their effects are similar to divesting certain assets or business packages instead of just transitional regulations during the period of divestiture.³⁴

Behavioral remedies offer China's merger review agency an opportunity to continually regulate the business operations of combined companies for years after the merger. According to China's Anti-Monopoly Law,³⁵ China never hesitated to adopt an expansive scope of political policies,³⁶ and political policies are not inferior to economic ones in China's merger reviews.³⁷ Westerners have believed that China's principal reliance on behavioral remedies

²⁸ See Ken Heyer, *Optimal Remedies for Anticompetitive Mergers*, 26 ANTITRUST, Spring 2012, at 26.

²⁹ *Id.*

³⁰ See Harlan M. Blake & William K. Jones, *Toward A Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422 (1965).

³¹ See Emch, Jeitschko & Zhou, *supra* note 4, at 88; see also Cunzhen Huang & Fei Deng, *Convergence with Chinese Characteristics? A Cross-Jurisdictional Comparative Study of Recent Merger Enforcement in China*, 31 ANTITRUST, Spring 2017, at 44, 48.

³² In practice, China often requires merger parties to serve customers fairly; not restrict customers' selection of other suppliers; terminate certain strategic corporation agreements with other main competitors; maintain the service and production capacities at a certain level; prevent further merger or acquisition of main competitors; establish an information firewall; restrict anticompetitive conduct such as false advertising, bundling, and tying; and make FRAND commitments on the Standard Essential Patents (SEPs).

³³ The Western hold-separate remedies are intended to support the success of the divestitures and usually last for less than half a year. MOFCOM, by contrast, adopted its own type of long-term order in many horizontal mergers.

³⁴ See Deng & Huang, *supra* note 2, at 12-13.

³⁵ See Fanlongduan Fa (反垄断法) [Anti-Monopoly Law], ch. 1, art. 1 (2007) (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) (China) [hereinafter Anti-Monopoly Law].

³⁶ See Yane Svetiev & Lei Wang, *Competition Law Enforcement in China: Between Technocracy and Industrial Policy*, L. & CONTEMP. PROBS., no. 4, 2016, at 187, 191.

³⁷ *Id.*

proves that the Chinese government intends to use its merger reviews as a vehicle for industrial policies promoted by the Chinese Communist Party.³⁸

Since China has not issued thorough guidelines on merger reviews, traditional literature on the subject tends to use an "outside-in" approach to analyze the competition policies adopted in MOFCOM's merger reviews. By outside-in, the author means interpreting policy preferences from the external beneficiaries of the remedies. But this approach ignores the fact that a remedy provision may contain multiple remedy beneficiaries. Some beneficiaries only receive benefits passively or collaterally from merger remedies.

In sum, the author believes that competition policy sources, rather than remedy beneficiaries, determine the competition policy represented in a remedy.³⁹ A decision-maker in a merger review must be a beneficiary, either direct or indirect. A beneficiary, however, may not always be a decision-maker. In other words, although the Chinese government may be an external beneficiary of behavioral remedies, it is at least problematic to consider China's merger review agency as the sole competition policy source in MOFCOM's (or SAMR's) merger reviews. There may be other sources and other beneficiaries.

II. SINGULAR REVIEW- AGENCY DOMINATIONS: US AND EU

Investigation into the decision-making mechanism of merger reviews reveals the true identity of the competition policy sources. The "decision-making mechanism" is a system indicating how an agency reviews mergers. Generally, the decision-making mechanism demonstrates the flexible interactions among decision-makers on a case-by-case basis.⁴⁰ The policy preferences of decision-makers influence the determinations of remedies. Thus, like two sides of a coin, the competition policy sources in merger reviews are also the decision-makers in the decision-making mechanism.

The decision-making mechanism of China's merger reviews is different from that of the West. Both the US and the EU have literally hundreds of officials with legal and economic backgrounds working for their merger review agencies, while MOFCOM usually had only around thirty officials. Considering the significant increase in China's merger review caseload in recent years, the improvement in administrative efficiency of China's merger review agency cannot fully explain why China's merger reviews still operate functionally. The author asserts that China's merger review agency consistently shares its merger review authority with stakeholders, thus forging a different type of decision-making mechanism compared to its Western counterparts.

In the US and the EU, the merger review agencies themselves are the sole decision-makers dominating their decision-making mechanisms. A merger review agency has legitimate authority to review mergers in order to reduce their potential anti-competitive effects. Thus,

³⁸ The fundamental technique of structural remedies is as simple as selling a well-segregated subsidiary, product line, or asset to a suitable third-party sustaining divested business activity competitively. Therefore, structural remedies often have limited room for political consideration. For the West, the fewer applications of structural remedies imply that China's remedies were subject to political factors.

³⁹ For instance, a simple remedy like a divestiture, from the state perspective, may represent an economic policy. By contrast, for a competitor, the remedy may demonstrate political considerations.

⁴⁰ Every interested party has an incentive to influence the decision-making mechanism. Some parties would acquire enough power to dominate the decision-making mechanism when to determine the analytical approaches and remedy structures, becoming decision-makers in the process. The rest would simply become information sources for merger reviews.

the most common decision-maker is the merger review agency.⁴¹ By contrast, all stakeholders of Western merger reviews, such as merger parties, downstream or upstream manufacturers, and competitors, function only as market information sources. Thus, the US and the EU demonstrate review-agency domination in their decision-making mechanisms.

There are several reasons for the US and the EU's singular review-agency domination paradigm. First, the sheer size of these agencies ensures their capacity to dominate reviews. In the Federal Trade Commission (FTC) and the European Commission (EC), there are hundreds of legal and economics professionals conducting independent research on merger review remedies and supervising their implementation. These review officials have published detailed merger review guidelines with comprehensive summaries of applicable review methods and principles.⁴² Further, the officials have established a comprehensive information collection and verification system. They amass market data from previous review practices needed to maintain independent merger reviews. These highly efficient professionals ensure that the singular dominance of merger review agencies runs smoothly in both jurisdictions.

Moreover, the US and the EU intentionally enhance their review agency's domination in their merger reviews. Both jurisdictions will select the most appropriate agency for a merger review. In the US, for example, where the FTC and the Department of Justice (DOJ) share review authority over mergers, cases will be assigned on a case-by-case basis, depending on which agency has more expertise with the industry involved.⁴³ The EU similarly authorizes the EC to review mergers that are likely to have no significant inter-state effects.⁴⁴ Accordingly, this agency-selection process allows Western merger review agencies to enhance the review-agency domination in both jurisdictions.

The consistent competition policy preferences in Western merger reviews confirm this singular review agency domination. A merger review agency is generally the only party in the decision-making mechanism with a consistent policy preference, namely to diminish the potential anti-competitive effects of mergers or to protect domestic industries to ensure economic development. The consideration of economic policies, such as market efficiency and consumer welfare, require the agency to maintain neutrality since those economic policies benefit society in general, not only a specific privileged group. Meanwhile, although the agencies may occasionally promote political policies to ensure economic development, such promotion will usually favor a specific industry instead of an individual company. Over time, such protections repeatedly apply without consideration of the identities of the merger parties. Therefore, a merger review agency generally maintains stable policy preferences, while merger parties may change from case to case.

⁴¹ The potential decision-makers include a merger review agency and some major stakeholders. Contrasting to major stakeholders, such as a merger party or competitor, only the merger review agency consistently qualified as a decision-maker in the decision-making mechanism.

⁴² See U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* (2010), <http://www.ftc.gov/os/2010/08/100819hmg.pdf> [<https://perma.cc/3ZGJ-W9YY>]; see also Off. J. of the Eur. Union, *Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings*, 5 (Feb. 5, 2004), [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205\(02\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205(02)&from=EN).

⁴³ See Fed. Trade Comm'n, *Premerger Notification and the Merger Review Process*, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/premerger-notification-merger-review> [<https://perma.cc/XD9J-S7K5>] (last visited Feb. 12, 2020).

⁴⁴ The EC assumes responsibility for the case from member states when the Commission can more efficiently perform the review.

By contrast, major stakeholders may have flexible policy preferences, based on the current market situation and their relationship to the review agency.⁴⁵ For instance, a multinational company may file a pre-merger notification, then, as a merger party, raise arguments or defense about the efficiency policy at stake. However, when the same company becomes a competitor with other merger parties in another case, it may argue that protecting the competitor promotes consumer welfare. Thus, even when the same stakeholders are involved in different proposed mergers, their policy preferences may vary according to their different positions in the merger.

In sum, Western merger reviews present only their merger review agencies as singular decision-makers that create consistent policy preferences. The interests of major stakeholders are subject to the dominating influence of merger review agencies. Large companies thus have an incentive to lobby the supervising agencies to receive non-economic advantages in market competition. With enhanced information collection and economic analysis systems, the Western merger review agencies can resist major shareholders' influences by verifying the documents and arguments they offer. If the prospective stakeholder's non-economic considerations conflict with the agency's policy preference, the agency will refuse to intervene in the transaction. Thus, the role of major stakeholders in the Western jurisdictions is only that of information source and not decision-maker in a merger review.

III. MOFCOM AND AGENCY- STAKEHOLDER DOMINATION

China's decision-making mechanisms contain distinctive features, like a home-made quilt, precisely because of inadequacies in the merger review agency. China lacks significant analytical capacity by comparison with the two other major merger review jurisdictions. Such inadequacy in merger reviews can be attributed to a simple fact: MOFCOM's merger review staff stabilized at just around 30 officials.⁴⁶ Although the efficiency of MOFCOM's merger reviews has increased by more than 85 percent over the past ten years,⁴⁷ MOFCOM's workload has increased about five times since the agency started to review mergers.⁴⁸ The rate of efficiency increase is thus far disproportionate to the overwhelmingly increased workload. In order to complete the reviews on time, MOFCOM had to share its review authority with other parties. The result, in contrast with the West, was that stakeholders in MOFCOM's merger reviews actually became co-decision-makers, thus creating a multiparty decision-making mechanism.

A. MOFCOM SHARED ITS REVIEW AUTHORITIES WITH MAJOR STAKEHOLDERS

There is only limited scholarship on China's competition policies and the decision-making mechanism inside their mergers. These scholars are aware that China's merger reviews often involve noneconomic (political) policies, and that China's merger review agency is not always

⁴⁵ For instance, the competitors to merger parties may raise concerns about maintaining the market structure to promote competition. If, in another merger, the competitors become merger parties they will adopt the efficiency defense argument for the success of the merger.

⁴⁶ Deng & Huang, *supra* note 2, at 1; see also Angela Huyue Zhang, *Taming the Chinese Leviathan: Is Antitrust Regulation a False Hope?*, 51 STAN. J. INT'L L. 195, 215 (2015).

⁴⁷ See Interview with Wu Zhenguo, Director General of China's State Administration for Market Regulation (SAMR), 18 ANTITRUST SOURCE 1, 5 (2018).

⁴⁸ See Deng & Huang, *supra* note 2, at 1; see also D. Daniel Sokol, *Merger Control Under China's Anti-Monopoly Law*, 10 N.Y.U. J.L. & BUS. 1, 33 (2013).

the only decision maker in merger reviews because of China's administrative structure.⁴⁹ However, most of the literature concerns only the visible interagency relationships inside the Chinese government.⁵⁰ In other words, noneconomic (political) policies are believed to be generated by the state alone. In the current literature, no one has yet analyzed whether major stakeholders, such as merger parties or principal third-party competitors, have become decision makers in China's merger reviews. Competition policies in China's merger reviews may reflect not just state interests, but the private interests of major stakeholders as well.

MOFCOM's merger review agency, in fact, has demonstrated great reliance on market information offered by major stakeholders to complete its reviews. MOFCOM even required merger parties to recommend essential information such as market definition, and to determine whether any competition issue might exist.⁵¹ In fact, merger parties were occasionally required to consider the potential impact of their proposed merger on the local Chinese industry or China's national economy with a stringent burden of proof, tasks beyond their traditional duty as mere information sources.⁵² Moreover, MOFCOM often consulted with trade associations, major competitors, customers and suppliers, and sometimes even independent third-party economics experts.⁵³ These major stakeholders carried significantly more weight in MOFCOM's merger reviews than do their counterparts in the West, and they are much more political.⁵⁴ MOFCOM's merger reviews thus presented agency-stakeholder domination in the decision-making mechanism.

To delve into MOFCOM's agency-stakeholder domination, this Part will study a group of decisions with identical markets or stakeholders involved in more than one decision. Since the agency-stakeholder domination contains multiple decision makers, MOFCOM's review remedies in response benefited many parties. Thus, a single decision might not identify the true decision makers since one case cannot control all effective variables when analyzing the beneficiaries of the remedies. However, a group of decisions involving identical markets or stakeholders can offset some variables in the analysis. The distinctive features of MOFCOM's decision-making mechanism are thus better demonstrated in the following group of decisions involving some identical markets or stakeholders.

B. DOMESTIC STAKEHOLDER AS DECISION-MAKER: *TOYOTA* AND *PANASONIC*

Both the *Toyota* case and the *Panasonic* case demonstrate an identical understanding of the product market, indicating that the same decision maker, the major stakeholder, likely determined both final orders. In fact, the common understanding of the product market proved

⁴⁹ See Yuni Yan Sobel, *Domestic-to-Domestic Transactions—A Gap in China's Merger Control Regime?*, 13 ANTITRUST SOURCE 1, 9 (2014).

⁵⁰ MOFCOM often consults with other Chinese agencies, and usually shares its merger review authority with other administrative agencies. For instance, a merger involving State-owned Enterprises required approval from the State Owned Assets Supervision and Administration Commission, and the National Development and Reform Commission. These agencies worked alongside MOFCOM in merger reviews instead of being mere information sources of concerned markets. See Angela Huyue Zhang, *Bureaucratic Politics and China's Anti-Monopoly Law*, 47 CORNELL INT'L L.J. 671, 675 (2014); see also Gregory K. Leonard & Yizhe Zhang, *Considering the Unique Aspects of the Merger Review Process in China*, 14 ANTITRUST SOURCE 1 (2014); Sokol, *supra* note 47, at 29-30; Svetiev & Wang, *supra* note 35, at 199-203.

⁵¹ See Peter Wang, Yizhe Zhang & Sébastien Evrard, *China Merger Review: a New Gauntlet for Global M&A*, THE M&A LAW, 2011, at 1.

⁵² See Leonard & Zhang, *supra* note 49, at 2.

⁵³ *Id.* at 1; see also Foster, *supra* note 1, at 81; see also Svetiev & Wang, *supra* note 35, at 209.

⁵⁴ See Sokol, *supra* note 47, at 20; see also Svetiev & Wang, *supra* note 35, at 207.

identical to that of the major stakeholder, Corun, and the remedies all directly or indirectly benefited Corun. Additionally, the political policy common to the above cases was to promote the development of NiMH vehicle batteries in order to benefit the domestic hybrid vehicle market. This policy is, in fact, against China's national industrial policy in the auto industry. In sum, Corun, a major stakeholder in both cases, was clearly the actual decision maker influencing the remedy determination of China's national review agency, MOFCOM.

In the *Toyota* case, MOFCOM issued behavioral remedies, including one "defensive" one to the merger party, Corun. Toyota China, Primearth EV Energy (PEVE), Changshu Sinogy, and Toyota Tsusho joined to establish a domestic joint venture called Corun PEVE in Jiangsu Province, China, to produce the NiMH vehicle battery system. Corun PEVE adopted PEVE's related technologies to produce battery modules of NiMH vehicle batteries primarily supplying Sinogy Toyota. Ultimately, MOFCOM ordered the joint venture to distribute its products to third parties following the principle of "Fair, Reasonable, and Non-Discriminatory" (FRAND). The joint venture was to go on sale within three years after production to correspond to market demand.⁵⁵

In the *Panasonic* case, MOFCOM issued structural rather than behavioral remedies to diminish potential anticompetitive effects, but the internal decision maker was still the common major stakeholder, Corun, although here Corun was a third-party purchaser of the divested package. Both Sanyo and Panasonic are international companies with a wide range of electronic components and device businesses, including batteries and industrial products. MOFCOM ordered Sanyo to divest its rechargeable coin shape lithium battery business in Tottori, Japan. Additionally, MOFCOM required the merger parties to divest either Panasonic's or Sanyo's civil use NiMH battery business. Finally, MOFCOM required Panasonic to divest its NiMH vehicle battery business in Kanagawa, Japan, and reduce Panasonic's shares from the then current 40% to 19.5% in PEVE.⁵⁶ This divestiture was purchased by Corun.

Both of the above mergers clearly involved the NiMH vehicle battery industry. In *Toyota*, a joint venture was formed: Corun PEVE, Corun and PEVE being both manufacturers of NiMH batteries. Similarly, in *Panasonic*, Panasonic and Sanyo overlapped in NiMH battery production, especially vehicle batteries. Furthermore, Toyota and Panasonic were the owners

⁵⁵ See Shangwubu Gonggao 2014 Nian Di 49 Hao Guanyu Fujia Xianzhixing Tiaojian Pizhun Keliyuan Fengtian Zhongguo PEVE Xinzhongyuan Fengtian Tongshang Ni Sheli Heying Qiye An Jingyingzhe Jizhong Fanlongduan Shencha Jueding De Gonggao (商务部公告2014年第49号—关于附加限制性条件批准科力远、丰田中国、PEVE、新中源、丰田通商拟设立合营企业案经营者集中反垄断审查决定的公告) [Announcement No. 49 [2014] of the Ministry of Commerce—Announcement on the Decision from Anti-Monopoly Review of the Concentration of Undertakings on Conditional Approval of the Establishment of Joint Venture by Hunan Corun New Energy Co., Ltd., Toyota (China) Co., Ltd., Primearth EV Energy Co., Ltd., Changshu Sinogy Venture Capital Co. Ltd., and Toyota Tsusho Corp.] (issued by MOFCOM, Jul. 2, 2014, effective the same day), <http://fdj.mofcom.gov.cn/article/ztxx/201407/20140700648291.shtml> [<https://perma.cc/57NB-LQXF>] (China) [hereinafter *Toyota Case*].

⁵⁶ See Zhonghua Renmin Gongheguo Shangwubu Gonggao 2009 Nian Di 82 Hao Guanyu Futiaojian Pizhun Songxia Gongsi Shougou Sanyang Gongsi Fanlongduan Shencha Jueding De Gonggao (中华人民共和国商务部[2009年]第82号公告关于附条件批准松下公司收购三洋公司反垄断审查决定的公告) [Announcement No. 82 [2009] of the Ministry of Commerce]—Announcement on the Decision from Anti-Monopoly Review of the Concentration of Undertakings on Conditional Approval of Sanyo Electric Co., Ltd. by Panasonic Co., Ltd.] (issued by MOFCOM, Oct. 30, 2009, effective the same day), <http://fdj.mofcom.gov.cn/article/ztxx/200910/20091006593175.shtml> [<https://perma.cc/K7DM-PD8R>] (China) [hereinafter *Panasonic Case*].

of PEVE. Toyota was the world's leading hybrid vehicle manufacturer and the downstream purchaser of NiMH batteries.⁵⁷ The two transactions, therefore, contain both horizontal and vertical merger effects regarding NiMH batteries.

From the consistently narrow scope of the product market, both merger reviews were subject to the same noneconomic (political) policy. In both cases, MOFCOM claimed to define NiMH batteries as an independent product market.⁵⁸ However, in the FTC's *Panasonic/Sanyo* case, the FTC concluded that the Li-ion hybrid vehicle (HEV) batteries were a superior alternative to NiMH batteries, so the product market should also include Li-ion batteries.⁵⁹ Many companies were already supplying Li-ion HEV batteries to vehicle manufacturers.⁶⁰ Since the geographic market for NiMH batteries is global, the product market scope should be the same in both China and the US if MOFCOM had been considering only economic policies. The consistently narrow range of the product market in these two cases further implies that both of MOFCOM's decisions were subject to an identical noneconomic (political) policy.

MOFCOM's additional structural remedies in the *Panasonic* case appear to reflect a political policy representing state interest. In *Panasonic*, the FTC only ordered Sanyo to divest one portable HEV NiMH battery manufacturing plant in Takasaki, Japan,⁶¹ because the FTC considered that the merger did not raise competitive concerns in the HEV battery market.⁶² Whereas MOFCOM added a second structural remedy divesting a Panasonic HEV plant in Chigasaki, Kanagawa, Japan.⁶³ The additional divestiture indeed weakened the productivity of the newly merged company, contributing to the false impression of China's review-agency domination to promote state political policies. It appeared that the remedies were promoting Chinese industrial policy by blocking foreign development, but in fact, the stakeholder, Corun, was a third-party acquirer of Panasonic's Chigasaki plant.⁶⁴ So, the remedy primarily benefited the stakeholder, Corun, rather than the Chinese government.

The policies represented by MOFCOM's remedies in these two cases actually conflicted with China's state interest in the new energy automobile industry. Under Chinese policy, the

⁵⁷ Toyota itself owns 80.5% of the PEVE's shares. Panasonic, another leading batteries manufacturer, owns 19.5% of shares.

⁵⁸ See *Toyota Case*, *supra* note 54 (contending that the relevant product market was only NiMH batteries. MOFCOM conceded theoretically that the NiMH batteries could be further divided into vehicle batteries and ordinary batteries, or into hybrid electric vehicles (HEV) and battery electric vehicles (BEV). However, in practice, MOFCOM considered NiMH batteries mainly used in HEV).

⁵⁹ See Press Release, Fed. Trade Comm'n, FTC Order Sets Conditions for Panasonic's Acquisition of Sanyo (Nov. 24, 2009), <https://www.ftc.gov/news-events/press-releases/2009/11/ftc-order-sets-conditions-panasonics-acquisition-sanyo> [<https://perma.cc/39YP-F9XS>] [hereinafter *FTC's Panasonic Case*].

⁶⁰ *Id.*

⁶¹ See Press Releases, Fed. Trade Comm'n, FTC Approves Final Consent Order in Matter of Panasonic Corporation/Sanyo Electric Co., Ltd.; FTC Approves Final Consent Order in Matter of Service Corporation International and Palm Mortuary, Inc. (Jan. 8, 2010), <https://www.ftc.gov/news-events/press-releases/2010/01/ftc-approves-final-consent-order-matter-panasonic> [<https://perma.cc/H5DP-T9YA>].

⁶² See *FTC's Panasonic Case*, *supra* note 58.

⁶³ See *Panasonic Case*, *supra* note 55.

⁶⁴ See Jingji Guan Cha Wang (经济观察网) [Economic Observe Web], Shangwubu Chushou Fanlongduan Shiya Fengtian Hundong Fengbi Gongyinglian (商务部出手反垄断 施压丰田混动封闭供应链) [MOFCOM Raised Anti-Monopoly Concerns to Pressure Toyota to Open Its Supply Chain for HEV], EEO (July 11, 2014), <http://www.eo.com.cn/2014/0711/263211.shtml> [<https://perma.cc/X4V7-U5UG>] (China) [hereinafter 07/11/2014 News].

battery industry had focused on improving energy density, and the Chinese auto industry was actually promoting the application of Li-ion batteries.⁶⁵ In fact, the future of the auto industry in China was never in hybrid vehicles, the intended recipient of the batteries in both cases, but rather in electric vehicles.⁶⁶ However, MOFCOM had defined the geographic market to contain only NiMH batteries. This scope excluded the Li-ion battery market, effectively diminishing its potential anti-competitive effects. This "abnormally concentrated" market structure forced MOFCOM to issue remedies, that consequently benefited the domestic NiMH battery industry. The policies represented by MOFCOM's remedies in both *Toyota* and *Panasonic*, are thus at odds with China's industrial policies regarding the application of Li-ion batteries to vehicles.

The fact that its remedies were opposed to Chinese state interests shows that MOFCOM (the State) was not single-handedly controlling the decision-making mechanism in either case. If MOFCOM had been actively putting aside economic policies and promoting political ones, the policies would not have so conflicted with China's state interests. Therefore, we must conclude that MOFCOM, as a governmental agency, was not the sole decision-maker in these cases.

Nor did MOFCOM interfere with Toyota's business operations, as evidenced by the behavioral remedies in *Toyota*. Toyota, in fact, as the principal purchaser of the NiMH HEV batteries being manufactured by Corun PEVE, held 50% ownership in the joint venture.⁶⁷ MOFCOM ordered Corun PEVE to supply the batteries subject to the "Fair, Reasonable, and Non-Discriminatory" (FRAND) commitment. Although the commitment appeared to lower the product prices it could charge, Toyota would not suffer economic loss since Toyota is both a major shareholder of Corun PEVE and a major purchaser of its products. Besides, MOFCOM only required the joint venture to launch production within three years if the market had sufficient demand. MOFCOM could not harm Toyota by only ordering an earlier supply to downstream manufacturers, including Toyota Sinogy. These remedies contain only general requirements with no apparent burden on the merger parties. These remedies show that, in both *Toyota* and *Panasonic*, MOFCOM did not intend to limit foreign companies' business operations since both cases were subject to the identical industrial, noneconomic policy.

On the contrary, the common stakeholder in both cases, Corun, was the primary remedy

⁶⁵ See Dianchi Zhongguo Wang (电池中国网) [China Battery Enterprise Alliance], Hundongche De Dianchi Youshenme Qubie (混合动力电池有什么区别?) [What is the Difference Between HEV Batteries?], CBEA (Nov. 29, 2018), <http://www.cbea.com/xnyqc/201811/554331.html> [<https://perma.cc/3RVL-RZEN>] (China).

⁶⁶ See Qiche Chanye Touzi Guanli Guiding Zhengqiu Yijian Gao (《汽车产业投资管理规定》) [Provisions on the Administration of Investments in the Automotive Industry], <https://www.ndrc.gov.cn/xxgk/zcfb/fzggwl/201812/W020190905495164515512.pdf> [<https://perma.cc/CF4J-9ACH>] (China); see also Qiongyan Caijing (穹眼财经) [Qiongyan Finance and Economics], Zhongguo Qiche Chanye Zhengce Fengxiang Yibian PHEV Mianlin Bei Ti (中国汽车产业政策风向已变, PHEV面临被"踢") [China's Auto Industry Policy has Changed, and PHEV has been "kicked off"] (May 31, 2018), <https://www.d1ev.com/news/shichang/69413> [<https://perma.cc/9FDR-PCSF>] (China); see also Dianchi Zhongguo Wang (电池中国网) [China Battery Enterprise Alliance], Lidaixin Zhongguo Diandong Qiche Chanye Zhengce Shuli (李岱昕: 中国电动汽车产业政策梳理) [Ms. Li Daixin: China's Electric Vehicle Industry Policy Review], CBEA (Nov. 3, 2014), <http://www.cbea.com/ztxnyqcjdxw/201411/16545.html> [<https://perma.cc/2SDG-X3BR>] (China).

⁶⁷ See *Toyota Case*, *supra* note 54 (The share ratios of Corun, Toyota China, PEVE, Sinogy, and Toyota Tsusho are 40%, 5%, 41%, 10%, and 4%. Toyota itself owns 80.5% of the PEVE's shares).

beneficiary in the Panasonic case. As a major stakeholder in both cases, Corun had the potential to be a de facto decision maker if it also became the remedy beneficiary in both cases. Corun was the third-party beneficiary of the remedy in both cases. Corun directly benefited by the structural remedy in *Panasonic*.

The major stakeholder, Corun, as a merger party in the *Toyota* case, also explains the remedies in this case involving FRAND commitments. In the long run, Corun received significant indirect benefits from Toyota's FRAND obligations. As one of Corun's directors explained when MOFCOM required Corun PEVE to sell batteries to third parties on FRAND terms, Corun's stake returns, as well as the sale of Corun's battery pole pieces, increased.⁶⁹ Otherwise, Corun PEVE would have likely become a mere supply factory for Toyota, allowing Toyota to control all business orders and revenues. Corun apparently had the incentive to lobby MOFCOM to issue a remedy involving FRAND obligations in order to promote a favorable political policy for Corun.

To acknowledge Corun as a decision maker further explains the behavioral remedy in *Toyota* of ordering the joint venture to start operation within three years. Mass production of high-quality batteries requires a large amount of cooperation between Toyota and Corun. For Corun, this remedy could be leveraged to indirectly force Toyota to share its know-how and related technology with Corun. MOFCOM's remedy regarding the opening of a Corun PEVE factory further advanced Corun's competitiveness with its domestic competitors, such as Chunlan and BYD.

The fact that Corun shared its vision of the market with MOFCOM in MOFCOM's merger reviews indicates Corun was the policy source leading to this distinctive product market. According to China's news sources, Corun had considered that the product market should exclude Lithium-ion batteries.⁷⁰ The chairperson of the board of Corun had directed the company to develop the HEV battery industry for years before both mergers.⁷¹ In addition, although China had not been subsidizing the HEV industry since 2013, Corun still bet that the relevant national industry strategy would refocus on hybrid power.⁷² For Corun, the scope of a limited product market would stimulate MOFCOM to issue remedies indirectly favoring Corun's future development plan. Considering the fact that Corun was the only major stakeholder appearing in both cases, Corun not only benefited from, but also generated the noneconomic, political remedies in both cases. MOFCOM, thus, did not work as a sole decision maker dominating policy consideration in these merger reviews, but rather shared its decision making with Corun.

⁶⁸ See 07/11/2014 News, *supra* note 63.

⁶⁹ *Id.*

⁷⁰ See Zhongguo Chuneng Wang Xinwen Zhongxin (中国储能网新闻中心) [ESCN News Center], Keliyuan Jiannan De Nieqing Dianchi Meng (科力远：艰难的镍氢“电池梦”) [Corun: a stressful dream of nickel-metal hydride battery], ESCN (Nov. 11, 2013), <http://www.escn.com.cn/news/show-85137.html> [<https://perma.cc/NT87-VR2Z>] (China)(Corun confirmed that, within two decades, the market would still belong to NiMH HEV batteries).

⁷¹ *Id.*

⁷² See Zhongguo Qiche Bao (中国汽车报) [China Automotive News], Jili Bu Jiepan Yiwei Lizhi Yuangong Daochu Keliyuan Jukui Neimu (吉利不接盘?一位离职员工道出科力远巨亏内幕) [Geely Will Not Bet On? A Former Employee Says Stories Behind Corun's Huge Deficit], Cheyun (Apr. 12, 2017), <http://www.cheyun.com/content/15770> [<https://perma.cc/WRJ8-Q6W3>] (China).

C. FOREIGN STAKEHOLDER AS DECISION-MAKER: *SEAGATE* AND *WESTERN DIGITAL*

The 2011 cases, *Seagate* and *Samsung (Seagate)*, and the 2012 cases, *Western Digital* and *Viviti (Western Digital)*, demonstrate that foreign stakeholders can also dominate political policies in MOFCOM's merger reviews.⁷³ In the previous two cases, although the major stakeholder, Corun, was a leading Chinese domestic company in the HEV battery market, agency stakeholder domination in MOFCOM's decision-making mechanism was not limited to domestic companies. The *Seagate* and *Western Digital* cases illustrate that MOFCOM could in fact share its review authority with foreign stakeholders. The identical review contents indicate that MOFCOM reviewed both of these mergers simultaneously.⁷⁴ Here, the merger party, Seagate, significantly influenced MOFCOM's understanding of the Hard-Drive Disk (HDD) product market. Also, the behavioral remedies in both decisions primarily benefited the merger parties, reflecting political policies generated from the major stakeholder instead of from MOFCOM.

From MOFCOM's perspective, the HDD market was a highly concentrated oligopoly, requiring further remedies to reduce its anticompetitive effects. Before the merger, there were only five HDD manufacturers in the world: Seagate, Western Digital, Hitachi (Viviti), Toshiba, and Samsung. In 2011-2012, Seagate merged with the HDD business of Samsung. At almost the same time, Western Digital acquired Viviti's HDD and Solid-State Drives business. MOFCOM determined that the premerger Herfindahl-Hirschman Index (HHI) was 2454; whereas the postmerger HHI grew to 4158, due in large part to the postmerger HHI increase in *Seagate* of 660, and in *Western Digital* of 1044.⁷⁵ Because of the significant growth of concentration level after the mergers, MOFCOM prepared remedies to reduce the potentially anticompetitive effects of the mergers.

MOFCOM's hold separate remedies, in fact, present structural remedy characteristics.⁷⁶

⁷³ See Shangwubu Gonggao 2011 Nian Di 90 Hao Guanyu Futiaojian Pizhun Cijie Keji Gongsu Shougou Sanxing Dianzi Youxian Gongsu Yingpan Qudongqi Yewu Fanlongduan Shencha Jueding De Gonggao (商务部公告2011年第90号

关于附条件批准希捷科技公司收购三星电子有限公司硬盘驱动器业务反垄断审查决定的公告)

[Announcement No. 90 [2011] of the Ministry of Commerce- Announcement on the Decision from Anti-Monopoly Review of the Concentration of Undertakings on Conditional Approval in the Acquisition of the Hard Disk Drive Business of Samsung Electronics Co., Ltd. by Seagate Technology Plc.] (issued by MOFCOM, Dec. 12, 2011, effective the same day), <http://fldj.mofcom.gov.cn/article/ztxx/201112/20111207874274.shtml> [<https://perma.cc/DQQ3-7R6Z>] (China) [hereinafter *Seagate Case*]. See also Shangwubu Gonggao 2012 Nian Di 9 Hao Guanyu Fujia Xianzhixing Tiaojian Pizhun Xibu Shuju Shougou Rili Cunchu Jingyingzhe Jizhong Fanlongduan Shencha Jueding De Gonggao (商务部公告2012年第9号

关于附加限制性条件批准西部数据收购日立存储经营者集中反垄断审查决定的公告) [Announcement No. 9 [2011] of the Ministry of Commerce] - Announcement on the Decision from Anti-Monopoly Review of the Concentration of Undertakings on Conditional Approval of Viviti Technologies Ltd. by Western Digital Corp.] (issued by MOFCOM, Mar. 2, 2012, effective the same day), <http://fldj.mofcom.gov.cn/article/ztxx/201203/20120307993758.shtml> [<https://perma.cc/CJX6-LXKE>] (China). [hereinafter *Western Digital Case*].

⁷⁴ See *Seagate Case*, *supra* note 72; see also *Western Digital Case*, *supra* note 72.

⁷⁵ See *Seagate Case*, *supra* note 72; see also *Western Digital Case*, *supra* note 72 (stating that in 2010, the global market shares of these five manufacturers were about 33%, 29%, 18%, 10%, and 10%, respectively).

⁷⁶ See Shaoping Chen, *Merger Control Under China's Anti-Monopoly Law*, 13 CHI.-KENT J. INT'L & COMPAR. L. 177, 198-99 (2013); see also Foster, *supra* note 1 at 81; see also Jim O'Connell, *Rabbit, Revisited-Antitrust Enforcement in China*, ANTITRUST, Spring 2014, at 6, 7.

In both cases, MOFCOM required Seagate, Western Digital, Viviti, and Samsung to manufacture HDDs still using their old brand names after the merger. In addition, they were to set up firewalls of essential competitive information in order to maintain independent production, pricing, and sales. MOFCOM's hold separate remedies forced the merger parties to make independent business judgments for a time even after the merger. Thus, the only significant difference between MOFCOM's hold separate remedies and structural remedies was the limited duration of the remedy effects. Compared to the permanent effects of structural remedies, MOFCOM's hold separate remedies only temporarily intervened in the parties' business operations in the HDD market.

MOFCOM's hold separate remedies are notably distinguishable from the ones of the West. The US and the EU occasionally prepare temporary hold separate remedies *before* divestitures to third parties. These temporary hold separate remedies support primary structural remedies premerger when the merger parties need a period of time to locate a proper acquirer or to transfer a divested asset. By contrast, MOFCOM's hold separate remedies require merger parties to maintain separate assets or business operations for a few years *after* the mergers, instead of a few months before divestiture.⁷⁷

Seagate further pointed out that "the distinction of HDDs on the basis of the end-use (for example, Desktops, Mobile PCs, and tablets) [was] increasingly blurred" because HDDs that are sold for different end-uses are now technically the same.⁷⁸ MOFCOM's understanding of the product market was similar to that of Seagate.

MOFCOM's extensive product market determination of HDDs ultimately benefited Seagate. Generally, the permanent divestiture of certain businesses or assets will significantly decrease their portfolio value.⁷⁹ Seagate was thus intentionally unifying the different HDDs into one market to avoid divestiture. Seagate therefore refused the demand for substitutability in order to define one large HDD market. Usually, a potential third-party purchaser is a minor competitor who understands the industry under concern. If mergers develop into various sub-markets, review agencies can easily reduce the anti-competitive effects of certain sub-markets, while maintaining the efficiency of mergers in other sub-markets. By contrast, if MOFCOM had taken Seagate's position in this case, MOFCOM could not have divested such a large package containing Samsung's all HDD business, especially considering the fact that two other main competitors were also required to get clearance of their mergers simultaneously. Therefore, beyond the supplier's view of the technical similarities between HDD products with different end-users, Seagate's understanding of the product market reflects its interest in preventing the review agency from issuing a structural remedy. The potential divested packages might become too large to find a qualified purchaser to restore the competition level.⁸⁰

Insufficient market information was the fundamental reason for MOFCOM's issuance of hold-separate remedies. In these merger reviews, MOFCOM, unlike its Western counterparts, often lacked sufficient market information to sub-divide a product market any further. MOFCOM did not have adequate resources to analyze the product market independently, so it

⁷⁷ See Foster, *supra* note 1 at 81.

⁷⁸ The EC published a 126 page Commission Decision. It contains much first-hand information, including not only the EC's analyses, but also arguments and defenses of the merger parties. See Commission Decision 139/2004, art. 8(declaring a concentration to be compatible with the internal market and the functioning of the EEA Agreement)

⁷⁹ Merger parties always try to avoid the permanent effects of such harsh remedies. In a highly concentrated oligopoly, such divestiture will inevitably enhance the competitor's market power in certain sub-markets.

⁸⁰ See HUANG & DENG, *supra* note 30, at 44.

would rely on documents that merger parties submitted without fully understanding their reliability or possible bias.

However, although it remained passive in certain circumstances, MOFCOM still tried to reduce the anti-competitive effects of mergers by framing selective behavioral remedies. Although behavioral remedies usually require costly supervision *ex-post*, the permanent effects of improper structural remedies on the markets and consumers often outweigh the temporary supervision costs. These temporary behavioral hold-separate remedies gave MOFCOM authority to regulate, modify, or withdraw inappropriate remedies even after the reviews rather than allowing its remedies to cause permanent defects.

In sum, MOFCOM was the policy source of the economic policies in those cases, while Seagate was the source of the non-economic policies. MOFCOM's merger reviews, demonstrating an agency-stakeholder domination instead of a singular review-agency domination, here stemmed from MOFCOM's lack of adequate resources to verify information independently. In both sets of cases, the major stakeholders and decision-makers, such as Corun and Seagate, indirectly influenced MOFCOM's merger reviews instead of directly tossing their preferred remedies into the contests.

Additionally, the shared equivalent weight of economic and non-economic (political) policies in MOFCOM's remedies reveals that MOFCOM and the major stakeholders remained balanced in an agency-stakeholder domination. A single remedy generally favors only one policy source, and the importance of the remedy reflects its priority among decision-makers. However, in both sets of decisions above, a single MOFCOM remedy represented MOFCOM's economic policy plus stakeholders' political policies simultaneously. There was no apparent competition policy preference in any of these cases. Thus, the equivalent weight of MOFCOM's economic policies and the stakeholders' political policies reflect the balancing relationships among decision-makers in agency-stakeholder domination.

IV. SAMR'S DECISION- MAKING MECHANISM

China's decision-making mechanism of merger reviews demonstrates new characteristics because SAMR replaced MOFCOM to become the new review agency. Using new technology, SAMR now develops laws, procedures, and practices for merger reviews with dramatic speed.⁸¹ Compared to MOFCOM, SAMR more frequently invites independent consultants to complete empirical studies. Meanwhile, the current trade war between the US and China has also significantly influenced SAMR's merger review remedies in response to fluctuating policy in the US. By July 2020, SAMR had completed ten merger reviews.⁸² SAMR shows protectionism in frequently ordering merger parties to continue supplying essential

⁸¹ For instance, SAMR has recently updated Guidelines on Declaration of Mergers Between Undertakings and formulated Interim Provisions on Examination of Concentration of Business Operators. *See* Guanyu Jingyingzhe Jizhong Shenbao de Zhidao Yijian (关于经营集中申报的指导意见) [Guiding Opinions of the State Administration for Market Regulation on the Declaration of Mergers Between Undertakings] (promulgated by State Administration for Market Regulation, Sept. 29, 2018, eff. Sept. 29, 2018), http://gkml.samr.gov.cn/nsjg/fldj/201907/t20190726_305197.html [<https://perma.cc/ZVU5-ZFFZ>] (China); *see also* Jingyingzhe Jizhong Shencha Zanxing Guiding Zhengqiu Yijian Gao (经营者集中审查暂行规定 (征求意见稿) [Interim Provisions on Merger Rev. Between Undertakings (a draft for the invitation of recommendation)] (promulgated by State Administration for Market Regulation, Jan. 7, 2020), http://www.moj.gov.cn/news/content/2020-01/07/zlk_3239243.html [<https://perma.cc/X7PL-PD73>] (China).

⁸² *See* Notice and Announcement, State Administration for Market Regulation, Conditionally Approved/Prohibited Mergers, <http://www.samr.gov.cn/fldj/tzgg/fjzpz/> [<https://perma.cc/H8WM-BAGX>] (China).

products on fair terms to China. These facts strongly indicate that SAMR, more than MOFCOM, actively seeks to apply both economic and political (non-economic) policies, reflecting the Chinese government. Meanwhile, because the merger review officials working for MOFCOM all transferred to SAMR,⁸³ SAMR has largely maintained MOFCOM's decision-making mechanism, and major stakeholders may still influence merger reviews far beyond their limited role in the West as "information source." However, combined with the fact that SAMR has been enhancing its domination in the merger reviews, China's merger reviews thus present a new type of agency-stakeholder relationship in the SAMR era.

A. SAMR BEGINS TO DOMINATE ITS MERGER REVIEWS

In its first two years, SAMR has significantly increased agency dominance of merger reviews from two perspectives: enhancing information collection and analytical capacity. With the greater technological capacity for collecting information and analyzing it, the merger review agency is better able to screen and restrict major stakeholders from too much influencing of SAMR's merger reviews. Furthermore, as long as tension continues between the US and China, SAMR is compelled to protect the interests of domestic companies and industries. Therefore, SAMR has already become a more powerful agency to represent Chinese government interests than MOFCOM was in China's merger reviews.

A. SAMR CONSIDERS ECONOMIC POLICIES MORE FREQUENTLY

Since its 2018 inception, SAMR has greatly enhanced the agency's ability to collect marketing information. Compared to MOFCOM, SAMR uses more sophisticated tools for collecting information. For example, SAMR may send questionnaires (2019 II-VI/Finisar case, 2019 Novelis/Aleris case);⁸⁴ invite independent experts (2019 Garden/DSM case, 2020

⁸³ See DENG & HUANG, *supra* note 2, at 18.

⁸⁴ See Shichang Jianguan Zongju Guanyu Fujian Xianzhixing Tiaojian Pizhun Gaoyi Gufen Youxian Gongsi Shougou Feinisa Gufen Youxian Gongsi Guquan'an Fanlongduan Shencha Jueding De Gonggao, (市场监管总局关于附加限制性条件批准高意股份有限公司收购菲尼萨股份有限公司股权案反垄断审查决定的公告) [Announcement of the State Administration for Market Supervision on the Anti-Monopoly review Decision on Approving the Case of Gaoyi Co., Ltd's Acquisition of Equity in Finisar Co., LTd. With Additional Restrictive Conditions](Release date Sept. 23, 2019, eff. Sept. 23, 2019), (http://www.samr.gov.cn/fldj/tzgg/ftjgz/201909/t20190920_306948.html [<https://perma.cc/6RPU-8VSL>] (China) [hereinafter II-VI Case]; see also Shichang Jianguan Zongju Guanyu Fujian Xianzhixing Tiaojian Pizhun Nuobeilisi Gongsi Shougou Aili Gongsi Guquan'an Fanlongduan Shencha Jueding De Gonggao (市场监管总局关于附加限制性条件批准诺贝尔斯公司收购爱励公司股权案反垄断审查决定的公告) [Announcement of the State Administration for Market Regulation on the Anti-Monopoly review Decision on Approving Novelis' Acquisition of Aleris Equity with Additional Restrictive Conditions] (Release time: 2019-12-20 16:07, effective the same day), http://www.samr.gov.cn/fldj/tzgg/ftjgz/201912/t20191220_309365.html [<https://perma.cc/5D6S-5LYM>] (China) [hereinafter Novelis Case].

Danaher/GE Biopharma case);⁸⁵ complete field research (*Novelis*); or hold one or even a series of symposiums (*Novelis* and *Garden*). Thus, SAMR promotes its dominance while actually collecting market information.

With its more detailed market information, SAMR can understand the relevant market more precisely than MOFCOM ever did. For example, in the 2018 *Essilor* and *Luxottica* (*Essilor*) case, Essilor and Luxottica were competing in the Chinese optical lens, frames, and sunglasses market. SAMR used a survey on the brand recognition of Essilor and Luxottica from both retailer and consumer perspectives.⁸⁶ By analyzing consumer habits and alternative brands in sixty thousand Chinese retail stores, SAMR learned that the Chinese glasses retail market is highly fragmented, which means that geographic markets should be divided at the city level. In the past, MOFCOM, at most, divided the geographic market at either the global or the domestic level. Therefore, SAMR's more detailed knowledge of a geographic market enabled the merger agency to better comprehend market structure than did MOFCOM.

Further, SAMR has developed its analytical capacity to predict the potential effects of mergers. China's merger reviews now analyze concentration levels to determine whether the mergers are likely to cause anti-competitive effects. Based on its imprecise understanding of market structure, MOFCOM's merger reviews often roughly calculated the concentration ratio and the HHI in attempting to anticipate the potential effects of mergers. By contrast, SAMR's merger reviews are adopting advanced techniques to anticipate market response and price alterations. Such improvement is effective from many perspectives, as a study of SAMR's decisions to date show. For instance, SAMR invites third-party consultancies to do economics analyses (*Essilor, II-VI, Danaher, 2020 Nvidia/Mellanox, ZF*), accounting for 50% of SAMR's

⁸⁵ See Shichang Jianguan Zongju Guanyu Fujian Xianzhixing Tiaojian Pizhun Zhejiang Huayuan Shengwu Gaoke Gufen Youxian Gongsi Yu Huangjia Disiman Youxian Gongsi Xinshe Heying'an Fanlongduan Shencha Jueding De Gonggao (市场监管总局关于附加限制性条件批准浙江花园生物高科股份有限公司与皇家帝斯曼有限公司新设合营企业案反垄断审查决定的公告) [Announcement of the State Administration for Market Regulation on the Decision to Approve the Antimonopoly Review of the New Joint Venture Between Zhejiang Garden Biotech Co., Ltd. and Royal DSM Co., Ltd. with Additional Restrictive Conditions] (Release date Oct. 18, 2019, eff. Oct. 18, 2019), http://www.samr.gov.cn/fldj/tzgg/ftjzp/201910/t20191018_307455.html [<https://perma.cc/85X3-XSAY>] (China); see also Shichang Jianguan Zongju Guanyu Fujian Xianzhixing Tiaojian Pizhun Danahe Gongsi Shougou Tongyong Dianqi Yiliao Shengming Kexue Shengwu Zhiyao Yewu'an Fanlongduan Shencha Jueding De Gonggao (市场监管总局关于附加限制性条件批准丹纳赫公司收购通用电气医疗生命科学生物制药业务案反垄断审查决定的公告) [Announcement of the State Administration for Market Regulation on the Anti-monopoly Review Decision on Approving Danaher's Acquisition of General Electric's Medical Life Sciences Biopharmaceutical Business with Additional Restrictive Conditions] (Release date Feb. 28, 2020, eff. Feb. 28, 2020), http://www.samr.gov.cn/fldj/tzgg/ftjzp/202002/t20200228_312297.html [<https://perma.cc/H3U7-CK6P>] (China) [hereinafter *Danaher Case*].

⁸⁶ See Shichang Jianguan Zongju Guanyu Fujian Xianzhixing Tiaojian Pizhun Yishilu Guoji Yu Luxuntika Jituan Hebing'an Fanlongduan Shencha Jueding De Gonggao (市场监管总局关于附加限制性条件批准依视路国际与陆逊梯卡集团合并案反垄断审查决定的公告) [Announcement of the State Administration of Market Supervision on the Decision to Approve the Anti-monopoly Review of the Merger of Essilor International and Luxottica Group with Additional Restrictive Conditions] (Release date Jul. 25, 2018, eff. Jul. 25, 2018), http://www.samr.gov.cn/fldj/tzgg/ftjzp/202003/t20200309_312682.html [<https://perma.cc/E5BR-6C78>] (China).

merger reviews.⁸⁷

The *ZF* case is an excellent example of economics analysis improvement.⁸⁸ In *ZF*, SAMR completed a quantitative analysis of whether the merger parties can benefit from supply reduction through an independent consultancy. According to SAMR's merger review, there is a real risk that the merger parties might block essential input of the AMT controller in China since the merger parties only need to sacrifice 15%-20% supply to earn extra benefits; however, such proportion must be increased to 25%-30% in the global market. Thus, it was important for SAMR to further evaluate the domestic markets' effects even if the agency had defined the geographic market as global. Because the merger parties had a vertical relationship in upstream AMT controller and downstream AMT markets, SAMR adopted behavioral remedies, especially "defensive" ones, reflecting economic policies.

B. CIRCUMSTANCES REQUIRE SAMR TO CONSIDER POLITICAL POLICIES MORE CONSISTENTLY

SAMR's new domination may also firmly promote political policies instead of exclusively economic ones. Despite its significantly improved merger review capacities, SAMR has issued structural remedies in only two cases so far, the *Novelis* case and the *Danaher* case.⁸⁹ One reason for SAMR's frequent promotion of political policies in its merger reviews is the trade war between the US and China. Evidence of this is seen in the fact that the review periods of SAMR's merger reviews have fluctuated in direct correlation with the severity of the tension between the two countries. At times of heightened global tension, SAMR intentionally strengthens protection of its domestic key industries and domestic customers.

SAMR's merger reviews often take six to eighteen months. From the perspective of merger parties, SAMR's merger reviews may take even longer.⁹⁰ The time needed for the following merger parties to get clearance is listed in chronological order as follows: 428 days (*Essilor*), 291 days (*KLA-Tencor*), 392 days (*Cargotec*), 268 days (*II-VI*), 414 days (*Novelis*), 554 days (*Garden*), 305 days (*Danaher*), 244 days (*Infineon*), 358 days (*Nvidia*), and 263 days

⁸⁷ *Id.*; see also *II-VI Case*, *supra* note 83; see also *Danaher Case*, *supra* note 84; see also *Novelis Case*, *supra* note 83; see also Shichang Jianguan Zongju Guanyu Fujian Xianzhixing Tiaojian Pizhun Caiifu Gufen Gongsi Shougou Weibo Konggu Gongsi Guquan'an Fanlongduan Shencha Jueding De Gonggao (市场监管总局关于附加限制性条件批准采埃孚股份公司收购威伯科控股公司股权案反垄断审查决定的公告) [Announcement of the State Administration for Market Regulation on the Anti-Monopoly Review Decision on Approving ZF's Acquisition of Equity in WABCO Holding company with Additional Restrictive Conditions] (Release date May 15, 2020), http://www.samr.gov.cn/fldj/tzgg/ftjpz/202005/t20200515_315255.html [<https://perma.cc/5DZ5-2ZU3>] (China) [hereinafter *ZF Case*].

⁸⁸ See *ZF Case*, *supra* note 86.

⁸⁹ See also *Novelis Case*, *supra* note 83; see also *Danaher Case*, *supra* note 84.

⁹⁰ China's merger reviews are known for delays. Similar to MOFCOM, SAMR usually needs a few days to a month to initiate Phase I reviews. If SAMR requires an extended review period, merger parties must withdraw and refile the notifications. The days of SAMR required to review in chronological order are: 318 days (*Essilor*), 230 days (*KLA-Tencor*), 348 days (*Cargotec*), 209 days (*II-VI*), 400 days (*Novelis*), 346 days (*Garden*), 237 days (*Danaher*), 182 days (*Infineon*), 242 days (*Nvidia*), and 172 days (*ZF*).

(ZF).⁹¹

SAMR's delays are clearly related to the tension at the time of this writing between the US and China. When the Trump Administration approved additional tariffs on Chinese products in March 2018, the average time to review a merger was 384 days (*KLA-Tencor, Cargotec, II-VI, Novelis, Garden*). In January 2020, after the US and China signed the Economic and Trade Agreement,⁹² the average time for clearance was 296 days (*Danaher, Infineon, Nvidia, ZF*). The variance of review periods demonstrates vital political considerations in SAMR's merger reviews.

B. SAMR'S MERGER REVIEWS HAVE COMPETITION POLICIES WITH EQUIVALENT WEIGHT

In its dominance as decisionmaker, SAMR promotes both economic and political policies equally. As SAMR begins to take control of the decision-making mechanism, the agency is deliberately avoiding favoring of political policies. In other words, SAMR limits the application of political policies to only those minimally necessary to protect economic security rather than primarily pursuing business interests of Chinese companies. Thus, SAMR consistently presents economic and non-economic (political) policies with equivalent weight. In particular, the frequent application of "defensive" behavioral remedies is a convincing example of competition policy equivalency because the remedies reflect both economic and political considerations simultaneously without apparent policy preference.

⁹¹ See Shichang Jianguan Zongju Guanyu Fujian Xianzhixing Tiaojian Pizhun Ketian Gongsì Shougou Aobao Keji Youxian Gongsì Guquan'an Fanlongduan Shencha Jueding De Gonggao (市场监管总局关于附加限制性条件批准科天公司收购奥宝科技有限公司股权案反垄断审查决定的公告) [Announcement of the State Administration for Market Regulation — Announcement on the Decision from Anti-Monopoly Review of the Concentration of Undertakings on Conditional Approval of Orbotech Ltd. by KLA-Tencor Corp.] (issued by SAMR, Feb. 13, 2019, eff. Feb. 13, 2019), http://gkml.samr.gov.cn/nsjg/xwxc/201902/t20190220_290940.html [<https://perma.cc/VLT6-X7P7>] (China) [hereinafter KLA-Tencor Case]; see also Shichang Jianguan Zongju Guanyu Fujian Xianzhixing Tiaojian Pizhun Kagekete Jituan Shougou Derisi Jituan Bufen Yewu'an Fanlongduan Shencha Jueding De Gonggao (市场监管总局关于附加限制性条件批准卡哥特科集团收购德瑞斯集团部分业务案反垄断审查决定的公告) [Announcement of the State Administration for Market Regulation — Announcement on the Decision from Anti-Monopoly Review of the Concentration of Undertakings on Conditional Approval of TTS Group by Cargotec Oyj] (issued by SAMR, Jul. 12, 2019, eff. Jul. 12, 2019), http://www.samr.gov.cn/fldj/tzgg/ftjz/201907/t20190712_303428.html [<https://perma.cc/D7E5-D7QB>] (China) [hereinafter Cargotec Case]; see also Shichang Jianguan Zongju Guanyu Fujian Xianzhixing Tiaojian Pizhun Yingfeiling Keji Gongsì Shougou Saipulasi Bandaoti Gongsì Guquan'an Fanlongduan Shencha Jueding De Gonggao (市场监管总局关于附加限制性条件批准英飞凌科技公司收购赛普拉斯半导体公司股权案反垄断审查决定的公告) [Announcement of the State Administration for Market Regulation — Announcement on the Decision from Anti-Monopoly Review of the Concentration of Undertakings on Conditional Approval of Cypress Semiconductor Corp. by Infineon Technologies AG] (issued by SAMR, Apr. 8, 2020, eff. Apr. 8, 2020), http://www.samr.gov.cn/fldj/tzgg/ftjz/202004/t20200408_313950.html [<https://perma.cc/KHD6-FDCN>] (China) [hereinafter Infineon Case].

⁹² See Economic And Trade Agreement Between The Government Of The People's Republic Of China And The Government Of The United States Of America, Jan. 15, 2020, <http://wjb.mof.gov.cn/gongzuodongtai/202001/W020200116100509153339.pdf> [<https://perma.cc/VF8H-QGLD>] (China).

"Defensive" behavioral remedies are widely adopted in China's merger reviews.⁹³ Compared to active behavioral remedies such as mandatory licensing of patents or trade secrets, defensive remedies never actually require merger parties to change their traditional business operations. The most common "defensive" behavioral remedy of SAMR's merger reviews is the commitment to supply essential input to key industries to China after a merger. SAMR has issued this type of behavioral remedy in six cases, counting for two-thirds of the cases since the trade war with the US.

The commitment to supply essential inputs generally involves key industries for Chinese economic security. The 2019 KLA-Tencor/Orbotech case, for example, affected the Chinese semiconductor industry where SAMR required both parties to continue providing semiconductor process control equipment and services to Chinese customers.⁹⁴ The Cargotec case affected international transportation as SAMR required Cargotec to supply hatch covers, roll-on equipment for merchant ships, and cargo lifters, and to avoid maliciously delaying the supply.⁹⁵ The II-VI case, where SAMR ordered II-VI and Finisar to supply their wavelength selective switch, had significant influence on Chinese optical communication device manufacturing.⁹⁶ The Infineon case, involving the Chinese automobile manufacturing industry, required Infineon and Cypress to continue supplying vehicle level insulated gate bipolar transistor, vehicle level micro control unit, and vehicle level NOR flash memory to the Chinese market.⁹⁷ The Nvidia case impacted Chinese supercomputing and artificial intelligence markets because it required Nvidia to continue supplying to Chinese industry its GPU accelerator and Mellanox's high-speed network interconnect products and services.⁹⁸ Finally, the ZF case influenced domestic product transportation as SAMR ordered ZF and Wabco to continue providing to Chinese industry AMT-controllers.⁹⁹ These cases are all related to essential industries in which China lacks independent supply capacity.

Unlike the more active role of stakeholders in the decision-making mechanism under MOFCOM, SAMR actually issues "defensive behavioral" remedies to restrain major stakeholders from overinfluencing the decision-making mechanism. Although SAMR starts a merger review controlling the decision-making mechanism, major stakeholders, perhaps accustomed to a more active role, still try to lobby the agency or even share its merger review authority. As seen in Part II, during MOFCOM's time, major stakeholders, such as competitors or downstream manufacturers, at times co-decided the merger reviews. Though SAMR has

⁹³ There have been multiple types of "defensive" behavioral remedies since MOFCOM's time. Those remedies have mainly targeted unreasonable commercial terms in practice, such as bundling or tying or refusing to deal with China.

⁹⁴ See KLA-Tencor Case, *supra* note 90.

⁹⁵ See Cargotec Case, *supra* note 90.

⁹⁶ See II-VI Case, *supra* note 83.

⁹⁷ See Infineon Case, *supra* note 90.

⁹⁸ See Shichang Jianguan Zongju Guanyu Fujian Xianzhixing Tiaojian Pizhun Yingweida Gongsì Shougou Mailuosi Keji Youxian Gongsì Guquan'an Fanlongduan Shencha Jueding De Gonggao (市场监管总局关于附加限制性条件批准英伟达公司收购迈络思科技有限公司股权案反垄断审查决定的公告) [Announcement of the State Administration for Market Regulation—Announcement on the Decision from Anti-Monopoly Review of the Concentration of Undertakings on Conditional Approval of Mellanox Technologies, Ltd. by NVIDIA Corp.] (issued by SAMR, Apr. 16, 2020, eff. Apr. 16, 2020.), http://www.samr.gov.cn/fldj/tzgg/ftjgz/202004/t20200416_314327.html [<https://perma.cc/KUX9-3P6Y>] (China).

⁹⁹ See ZF Case, *supra* note 86.

started to dominate the decision-making mechanism of merger reviews, it is problematic to consider SAMR as completely dominating it. For instance, SAMR still lacks review officials to establish reliable information collection channels or detailed merger review guidelines. Thus, through official complaints or personal connections to the agency, major stakeholders may continue to partially influence SAMR's merger reviews. In *ZF*, Shaanxi Fast, a domestic competitor to *ZF* and a customer of Wabco, may be the most recent example.

In *ZF*, SAMR determined that the merger would harm both global and domestic AMT markets, and so issued "defensive" behavioral remedies. The merger parties, *ZF* and Wabco, are both world leaders in manufacturing large commercial vehicle components. *ZF* and Wabco have a vertical relationship in AMT-controller and AMT markets. SAMR further defined the geographic market as global because China imports most of its large commercial vehicle components without an apparent barrier to entry. However, SAMR balanced the effects on both global and domestic markets in reviewing this merger. Ultimately, SAMR ordered *ZF* and Wabco to continue providing the AMT controller and its components to existing Chinese customers. Additionally, SAMR stipulated that the merger parties must continue supplying Chinese customers and help them to develop AMT controllers under the FRAND commitments.¹⁰⁰

The West, on the other hand, did not consider the merger between *ZF* and Wabco as harming global vehicle transmission system competition. In fact, the EC unconditionally cleared the transaction,¹⁰¹ while the DOJ required both parties to divest Wabco's North American steering components and related assets and businesses.¹⁰² The West reasoned that the merger would not otherwise harm competition because there are alternative manufacturers available at both levels of the transmission system market.¹⁰³ Since SAMR also contended that the relevant companies were competing in a global market, different jurisdictions should have similar understandings about market structure if only considering economic policies.

SAMR's decision in *ZF* indicates that the merger review protected the interests of domestic AMT manufacturers. The *ZF* case was reviewed from the perspective of AMT manufacturers. For instance, SAMR argued that downstream AMT manufacturers are usually challenged to find an alternative supply from Wabco because of user viscosity. Downstream manufacturers need four to five years to design and test an AMT in cooperation with an AMT controller manufacturer. They must sign a four to five year supply agreement for the customized AMT controllers until the AMT controller is off the market. Therefore, SAMR issued behavioral remedies to continue the supply because AMT manufacturers have difficulty switching to other suppliers in a short time.¹⁰⁴

Shaanxi Fast, a domestic competitor to *ZF* and a customer of Wabco, may have influenced the decision-making mechanism as a third-party. Shaanxi Fast was not only the leading

¹⁰⁰ *Id.*

¹⁰¹ See Press Corner, Eur. Comm'n, Mergers: Commission approves *ZF*'s acquisition of Wabco (Jan. 23, 2020), https://ec.europa.eu/commission/presscorner/detail/en/IP_20_112 [<https://perma.cc/7D8S-MBW8>] [hereinafter EC's *ZF* Case].

¹⁰² See News, U.S. Dept. of Justice, Justice Department Requires *ZF* and WABCO to Divest WABCO's Steering Components Business to Proceed With Merger (Jan. 23, 2020), <https://www.justice.gov/opa/pr/justice-department-requires-zf-and-wabco-divest-wabcos-steering-components-business-proceed> [<https://perma.cc/6FWJ-5HQV>].

¹⁰³ See EC's *ZF* Case, *supra* note 100.

¹⁰⁴ See *ZF* Case, *supra* note 86.

competitor of ZF in China, but also had strategic cooperation with Wabco. In China, few manufacturers have a developing strategy for designing the AMT controller and producing AMT. Wabco thus entered into a long-term supply contract for its OptiDrive system with Shaanxi Fast in 2011.¹⁰⁵ Shaanxi Fast had also signed an agreement with Wabco to develop AMT technologies collaboratively in 2016.¹⁰⁶ The development of Shaanxi Fast depended on Wabco's continuous supply of the AMT controller and the success of the technical cooperation.

As the primary user of the AMT controller, Shaanxi Fast may be the only party directly benefiting from SAMR's behavioral remedies in the ZF case. There is another fact demonstrating Shaanxi Fast most likely intervened in SAMR's merger review: China's merger reviews generally consider the effect of a merger on domestic industries and companies, but rarely analyze the effect on an individual company. In this case, however, SAMR evaluated the influence of a merger on Shaanxi Fast.¹⁰⁷

¹⁰⁵ See WABCO Announces Major Agreement for Advanced Transmission Automation Technology with Shaanxi Fast Gear Company, China's Largest Manufacturer of Heavy Duty Transmissions, YAHOO NEWS (Apr. 19, 2011), <https://www.yahoo.com/news/WABCO-Announces-Major-iw-2611276351.html> [<https://perma.cc/9PX9-EVL6>].

¹⁰⁶ See Shaanxi Fast Auto Drive Group Company Business Report FY ended Dec. 2016, MARKLINES, AUTOMOTIVE INDUSTRY PORTAL, https://www.marklines.com/en/top500/cf/s500_171_hl2016 [<https://perma.cc/T7Z3-R6KF>].

¹⁰⁷ See ZF Case, *supra* note 86.

BANGLADESH-BHUTAN PTA: LESS IS MORE?

*Md. Rizwanul Islam**

ABSTRACT

While in the General Agreement on Tariffs and Trade (GATT) years, generally developed economies pursued preferential trade agreements (PTAs), and the states of the global South were also pursuing PTAs between and among each other. The recently concluded Bangladesh-Bhutan Preferential Trade Agreement (BBPTA) is an addition to this list. This article argues that the seemingly narrow scope of the BBPTA is somewhat deceptive. This is so because it covers products which are actually traded between the parties, and they create a substantial margin of preference. Thus, though the relatively liberal and simple rules of origin of the BBPTA is a cause of comfort for competitors from third parties, for some products they may witness reduced market share. Having said this, due to the opening of their sensitive industries, the two state parties would seem to have committed to market liberalisation. Thus, arguably the less coverage of the PTA could mean more for their trade relationship.

INTRODUCTION

The Bangladesh-Bhutan Preferential Trade Agreement signed on 6 December 2020, is one more addition to the mushrooming trend of PTAs.¹ Even PTAs between states of the global South are consistently on the rise.² Historically, Bhutan and Bangladesh have strong diplomatic ties. Bhutan was the first country to recognize Bangladesh on 6 December 1971, even ten days before Pakistan formally surrendered to the joint forces of Bangladeshi liberation fighters and the Indian army on 16 December 1971.³ Thus, the signing date of the PTA is no coincidence, but has a historical symbolism. While Bangladesh is a party to several multi-state PTAs, this is Bangladesh's first ever bilateral PTA.

Relying on the official documents of the Ministry of Commerce of the Government of Bangladesh and other sources, this article discusses the background of signing the Treaty and critically analyzes its text. It demonstrates that the actual trade creation through the BBPTA may be more than what appears on its face. However, because of the very liberal rules of origin, the Treaty is unlikely to cause any significant trade diversion. On the other hand, due to the high applied tariff in the two state parties, the economic welfare reducing trade diversion for some products may be a risk. This article also demonstrates that apart from tariff preference, the BBPTA hardly creates any value for either of the state parties, as the rights created by the BBPTA do not go beyond anything that they were already entitled to under the Agreement on South Asian Free Trade Area (SAFTA).⁴ Having said that, because of its nominal substantive rules and simple preferential rules of origin, the Treaty may enhance economic welfare, albeit limitedly. The BBPTA would not appear to pose any significant administrative challenges for

* PhD, Macquarie University; LL.M. (Intellectual Property & Information Technology Law), National University of Singapore; LL.B. (Honours), University of Dhaka; Professor at Department of Law and a member, Center for Peace Studies, North South University; <rizwanuli@u.nus.edu>. The writer would like to thank Sajid Hossain and Md. Azizul Hakim for their able research assistance.

¹ As of June 5, 2021, as per the WTO Secretariat Website, there were 350 various forms of preferential trade agreements notified to the WTO. See *WTO Regional Trade Agreements Database* <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx> (last visited June 5, 2021). Throughout the article the term PTA has been used to convey the same meaning as RTA connotes in the WTO parlance. The choice is based on the reality that not all RTAs involve states located within the same region.

² *Id.* As of 5 June 2021, 62 PTA are under the Enabling Clause, WTO RTA database.

³ Diplomatic Correspondent, *Bhutan Was First to Recognise Bangladesh*, Dhaka, The Daily Star, (March 8, 2015), <https://www.thedailystar.net/bhutan-was-first-to-recognise-bangladesh-54336>, (last visited May 23, 2021).

⁴ Agreement on South Asian Free Trade Area (SAFTA), Jan. 6, 2004, [international source].

traders of either state parties or for the multilateral trading system.

I. BACKGROUND OF AND MOTIVATIONS FOR NEGOTIATING BBPTA

While PTAs would be driven by economic motives, it is well-established in the literature that their economic motive maybe intermingled with strategic objectives.⁵ Given that states are monolithic political actors representing the interest groups, this is hardly surprising. In the case of the BBPTA, this seems to be the case too. Traditionally, the bilateral relationship between the two countries has been quite robust. The formal diplomatic relationship between the two countries was established on 12 May 1973 and Bangladesh was the second state with whom Bhutan set up formal diplomatic ties.⁶ In 1979, Bangladesh was also the second state to exchange diplomatic representation with Bhutan at the ambassadorial level.⁷ They also had trade arrangements in place for more than four decades. The two state parties started to trade under a bilateral agreement which was signed in 1980, which ultimately took effect in 1988 when India allowed them transit rights necessary for moving products to and from landlocked Bhutan.⁸ Bangladesh and Bhutan renewed that agreement in 2003 and 2009.⁹ The state parties have been using “Burimari (Bangladesh)—Changrabandha (India)—Jaigaon (India)—Phuentsholing (Bhutan) as the transit route for [their] bilateral trade.”¹⁰ During the visit of the Bhutanese Prime Minister to Bangladesh from 12 to 15 April, 2019, the exchange of duty free market access for the goods of two states in each other’s market was officially discussed.¹¹ Following this, the first official meeting for the negotiations of the BBPTA took place in Thimphu from 21 to 23 August, 2019.¹² They subsequently negotiated the BBPTA on 16 June, 2020 via video conferencing.¹³ At this meeting, the parties finalized the draft version of the text of the BBPTA and the rules of origin.¹⁴

Interestingly, from the standpoint of Bangladesh, the import of a major Bhutanese product seems to have been a factor propelling it to agree to the BBPTA. The import of boulder stone, which is used as an input for mega building projects, played a role in negotiating the BBPTA.¹⁵

⁵ Md. Rizwanul Islam, *Hark! Are PTAs Swallowing up the WTO and Global Economic Welfare? A Legal and Political Economy Critique of PTAs*, 12 SING. Y.B. INT’L L. & CONTRIB. 133, 135 (2008); M. Rafiqul Islam, *The Australian Policy and Practice of Preferential Bilateral Trade: A Benign or Malign Alternative to the WTO Multilateral Free Trading System?*, 2(2) J. INT’L TRADE L. & POL’Y 43, 57 (2003).

⁶ See Ministry of Foreign Affairs: Royal Government of Bhutan, *Bilateral Relations: Bangladesh*, https://www.mfa.gov.bt/?page_id=8824 (last visited May 14, 2021).

⁷ Peter Macalister-Smith, *Bhutan*, MAX PLANCK ENCYCLOPEDIA OF INT’L L. (2008).

⁸ U. N. Conference on Trade and Development, *Who Is Benefiting from Trade Liberalization in Bhutan: A Gender Perspective*, 12 (2011).

⁹ *Id.*

¹⁰ *Id.*

¹¹ Ministry of Commerce of the Government of Bangladesh, Memo No: 26.00.0000.141.38.003.19-37, *Summary for the Meeting of the Cabinet, Subject: Approval of the Draft of Bangladesh-Bhutan Trade Agreement* (in Bengali) 6 September 2020, (on file with the author) [Summary for the Cabinet Meeting]; Ministry of Commerce of the Government of Bangladesh, *Minutes of the Meeting for Expansion of Bilateral Trade between Bangladesh and Bhutan and the Bilateral Preferential Trade Agreement with Other States*, November 6, 2019 (on file with the author) ¶ 2 [Minutes of the Meeting of November 6, 2019].

¹² *Summary for the Meeting of the Cabinet, supra* note 11.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*; Ministry of Commerce, Government of Bangladesh, *Subject: Approval of the Proposal/Counter Proposal (Policy Option) Execution of Preferential Trade Agreement between Bangladesh and Bhutan on the Meeting to be Held on 10-11 March 2020*, February 9, 2020, (on file with the author) ¶ 9; Minutes of the Meeting of November 6, 2019; Ministry of Commerce of the Government of Bangladesh, *supra* note 11, ¶ 4. This seems to be a trend of the recent decades where the global value chain is often integrated across states.

It was also a consideration that the loss of import revenue may be offset by the benefit of duty-free export of Bangladeshi products to the Bhutanese market.¹⁶ In terms of the strategic and broader motivation of Bangladesh, it has so far signed few a PTAs, which are: South Asian Preferential Trade Arrangement, SAFTA, Asia Pacific Trade Agreement, Trade Preferential System among Member States of Organisation of Islamic Cooperation (TPS-OIC), a PTA among Developing-8 Member States¹⁷ and no bilateral PTA at all. Bangladeshi trade officials seem to have a conviction that Bangladesh needs to sign more PTAs, and a PTA with a relatively smaller player like Bhutan would be low-hanging fruit.¹⁸ There seems to be an expectation that the loss of revenue would also be compensated for the domestic fiscal measures such as value-added tax or income tax on investing companies.¹⁹ Such a position may be attributable to either the comparatively smaller size of the Bhutanese economy or a relatively limited experience and bargaining power of Bhutanese officials, or both. Bangladeshi trade policymakers are also bracing for the loss of preference in the market of some key export destinations when the state officially graduates to the status of a developing country.²⁰ PTAs and free trade agreements (FTAs) are being thought of as an option to offset the loss of preference in foreign markets.²¹ While this should materialize in practice, to achieve greater economic welfare gain, Bangladesh would need to sign PTAs with those states with which it has a greater trade potential. Indeed, Bhutan is neither among the major exporting nor importing state for Bangladesh.²² Market size aside, many of Bangladesh's major trade partners are advanced economies, namely the U.S. and EU, and they tend to sign PTAs covering many non-trade issues. And to what extent the negotiating experience with Bhutan would be replicable to advanced economies remains doubtful. Thus, it is difficult to see Bangladesh being able to sign PTAs with those economies in the near future without undertaking significant legal and policy overhaul.

From the viewpoint of Bhutan, Bangladesh would appear to be an important trading partner. And in terms of market size and trade volume, Bangladesh is important to Bhutan as the former happens to be the second largest export destination and the eighth largest import source for the latter.²³ The PTA could have a broader strategic motivation too. Bhutan has been an observer of the WTO for more than two decades.²⁴ Thus, it is possible that this PTA with a relatively modest target of trade liberalisation could offer them an opportunity for their trade negotiators to gain the experience of negotiating trade deals, as some scholars have suggested that PTAs may serve as a laboratory of trade liberalisation.²⁵ While in the case of power

¹⁶ *Id.*

¹⁷ It is a kind of sub-group of Organisation of Islamic Cooperation (OIC) member states.

¹⁸ Chairperson of Nat'l Tariff Comm'n of Bangladesh as stated in Minutes of the Meeting of 6 November 2019, *supra* note 11, ¶ 5.

¹⁹ Syful Islam, *Commerce Ministry Makes Fresh Move to Allay FTA Fear*, The Financial Express (Feb. 27, 2021), <https://thefinancialexpress.com.bd/trade/commerce-ministry-makes-fresh-move-to-allay-fta-fear-161439329>.

²⁰ *Bangladesh Signs Preferential Trade Agreement with Bhutan*, The Dhaka Tribune (Dec. 6, 2020), <https://www.dhakatribune.com/bangladesh/2020/12/06/bangladesh-signs-preferential-trade-agreement-with-bhutan>.

²¹ *Id.*

²² World Trade Org. Trade Pol'y Rev. Body, *Bangladesh – Trade Policy Review: Report by the Secretariat*, WTO Doc. 130-31, WT/TPR/S/385, (February 6, 2019).

²³ *Bilateral Relations.: Bangladesh*, *supra* note 6.

²⁴ The working party for the accession of Bhutan to the WTO had been established on October 6, 1999; *see* World Trade Org., *Bhutan: Accession*, https://www.wto.org/english/thewto_e/acc_e/a1_bhoutan_e.htm (last visited May 5, 2021).

²⁵ *See* Michael Ewing-Chow, *Southeast Asia and Free Trade Agreements: WTO Plus or Bust?*, 8 S.Y.B. Int'l L. 193, 198 (2004), <http://www.asianlii.org/sg/journals/SGYrBkIntLaw/2004/12.pdf>; *compare* Islam, *supra* note 5, at 144.

asymmetries between the parties to a bilateral PTA, the possibility for a mutually beneficial deal may be somewhat reduced²⁶ in the case of parties like Bangladesh and Bhutan, both of which are relatively small players in the global arena, making the possibility of a lopsided deal occurring less likely.

II. THE SCOPE OF TARIFF LIBERALISATION

In theory, the text of the BBPTA aspires to progressively liberalize tariff and para-tariff on the bilateral trade between the parties.²⁷ However, the text provides for neither any modality nor even any schedule for negotiations for the progressive reduction of tariffs. Thus, the lack of conviction of the state parties in this regard is palpable. As the parties have termed the treaty as a preferential trade agreement, as opposed to a free trade agreement, it appears that the possibility of further tariff reduction is not a priority for them. The lack of a commitment to any drastic reduction in tariff across the board is also evident from the aspiration in the preamble that the parties aim for “progressive reduction and elimination of barrier to bilateral trade through a *bilateral preferential trading arrangement*.”²⁸

The BBPTA follows a positive list approach, i.e., only products listed in the text are eligible for preferential treatment. The scope of the tariff reduction is in addition to the goods listed in Annex C (listing eighteen Bhutanese products) and Annex D (listing ninety Bangladeshi products), which were enjoying duty free entry in their respective partner markets even before the BBPTA came into force.²⁹ This was done on the basis of a mutual understanding without the framework of a written agreement since 2010.³⁰ While Bangladesh granted those eighteen products from Bhutan not only waiver from import duty but also waiver from supplementary duty as well as regulatory duty, the Bhutanese waiver to Bangladeshi products was limited to import duty, and they are still subject to the payment of sale or excise duty in Bhutan.³¹ There may be several reasons for the significant disparity in the number of products enjoying special access under the arrangement since 2010. It could be due to the balance of trade being in favour of Bhutan; it might have agreed to offer concessions on a longer list of products. Another explanation could be Bhutan having a more limited export basket than Bangladesh, so a fewer list of products enjoying special concession would have been significantly beneficial to Bhutan. Another explanation could be that some of the imports from Bangladesh to the Bhutanese market were to be used as inputs in producing other finished products. Thus, any lowering of the import tariff of primary or secondary products would have been helpful for the Bhutanese industry.

Considering that the average applied tariff rate of Bangladesh is considerably high—around 14.8%—and even higher for agricultural products—around 18.1%—a zero tariff would also appear to confer Bhutanese producers a significant edge in the Bangladeshi market over producers

²⁶ Md. Rizwanul Islam, *Economic Integration in South Asia: Charting a Legal Roadmap* 103-07 (Martinus Nijhoff Publishers (2012)).

²⁷ *Preferential Trade Agreement between the Royal Government of Bhutan and the People’s Republic of Bangladesh*, Bangl.-Bhutan, Dec. 6, 2020, Article IV:2 (on file with the author).

²⁸ *Id.*, emphasis added.

²⁹ *Id.* at art. VI.

³⁰ *Summary for the Meeting of the Cabinet, Subject: Approval of the Draft of Bangladesh-Bhutan Trade Agreement*, *supra* note 11 (it would seem to be a clear violation of Bangladesh’s legal obligation under Article I of the GATT. Neither from the WTO RTA database nor its searchable documents online can be gleaned that there was any notification regarding this arrangement, let alone any waiver from the WTO regarding this apparent breach of the MFN obligation).

³¹ *Minutes of the Meeting for Expansion of Bilateral Trade between Bangladesh and Bhutan and the Bilateral Preferential Trade Agreement with Other States*, *supra* note 11, ¶ 1.

from third parties.³² And as the bound tariff rate is even higher, the producers of Bhutan can rely on the preferential margin without being encumbered by the concern of a future tariff hike taking advantage of the water between the bound and applied tariff rate. Based on the recent practice, it may be assumed that the prospect of increasing applied tariff to the bound level may not be too high. Although B has only bound around 19% of all tariff lines, and the average gap between applied and bound (Most Favoured Nations (MFN)) rates is exorbitantly high, in recent years, the authorities have not used this water.³³

As Bangladesh, even under its PTAs, does not waive supplementary duty or regulatory duty,³⁴ the market access benefit for these Bhutanese products seems to be of particular significance. The National Board of Revenue of Bangladesh (NBR) has not objected to this special provision for imports from Bhutan but has suggested that in the future PTAs' exports to Bangladesh do not enjoy any exemption duties other than customs duties.³⁵ What particular consideration may have been at play here is not clear, but it could be guessed that solid bilateral political commitments may have played a decisive role.

Products featuring in the eligible list of Annex A (exports from Bhutan to Bangladesh) are both agricultural and industrial goods such as milk, natural honey, wheat, jams, mineral water, quartzite, cement clinkers, Portland cement, soap, particle board of wood, wooden furniture, etc. Products featuring in the eligible list of Annex B (exports from Bangladesh to Bhutan) are also agricultural and industrial products such as pineapple juice, guava juice, orange juice, green tea, particle board, men's jackets, garments of babies, etc. Some of these products are major export items for the two parties. In particular, for Bangladesh, textile and tea are among its major export items, and for Bhutan, wood, juice, cement, etc. are major export items.³⁶ Thus, the low coverage of the tariff lines may actually mask its bilateral trade potential in the context of the two state parties, if not in the global trade, as neither is a significant player globally.

Although the list of products may seem too short, in terms of trade potential, they would seem to be significant. Many of these products feature in the respective sensitive list of products which are not eligible for any form of tariff preference under the SAFTA. To explain it further, products such as ginger (HS Code 0910.11), milk (HS Code 0401.20), homogenised preparations of jams, fruit jellies, marmalades (HS Code 2007.10), mineral waters and aerated waters (HS Code 2201.10), cement clinkers (HS Code 2523.10), Portland cement (HS Code 2523.29), soap (HS Code 3401.11), wooden furniture of a kind used in offices (HS Code 9403.30), wooden furniture of a kind used in the bedroom (HS Code 9403.5), etc. feature in the revised sensitive list of Bangladesh for LDC contracting parties of SAFTA (i.e.

³² *Trade Policy Review: Report by the Secretariat, Bangladesh*, *supra* note 22, at 45.

³³ *See id.* at 44-45.

³⁴ Nat'l Bd. of Rev., Bangladesh, Memo No: 08.01.0000.055.24.003.20.6, *The Submission of the Opinion of National Board of Revenue of Bangladesh on "Rules of Determination of Origin of Goods for Bhutan-Bangladesh Preferential Trade Agreement" (BB-PTA) along with the Draft Text on "Bhutan-Bangladesh Preferential Trade Agreement"* 3 (August 17, 2020) (in Bengali) (on file with the author).

³⁵ *Id.*

³⁶ World Trade Org., Bhutan Tariff Profile (2020), https://www.wto.org/english/res_e/statis_e/daily_update_e/tariff_profiles/BT_E.pdf (last visited May 16, 2021); *Trade Policy Review*, *supra* note 22, *passim*.

Afghanistan, Bhutan, and Nepal).³⁷ Thus, under the SAFTA regime, Bhutanese producers would not have received any preferential benefit for these products in the Bangladeshi market. On the Bhutanese side, products such as green tea (HS code 0902.10), pineapple juice (HS code 2009.49), orange juice (HS Code 2009.19), textile products such as men's or boys' suits, ensembles, jackets, blazers, trousers (HS Code 6203.39, 6203.49) and baby garments and clothing accessories (6209.90), etc. feature in its SAFTA sensitive list of products.³⁸ While sometimes a positive list of tariff coverage may be misleading in that the products may not have actual trade potential between the state parties,³⁹ a negative list would normally mean some sort of domestic sensitivity or opposition to the opening to foreign producers. In other words, as they feature in the sensitive list of the two state parties within their SAFTA commitment, it would appear that there is a sizeable domestic industry who seek protection from imports. Hence, these products have featured in their respective SAFTA sensitive list. Thus, they are not subject to the SAFTA liberalisation commitment. Under the SAFTA, the sensitive list was to disappear within 10 years of the entry into force of the Agreement, i.e. 2016, and all products were to enjoy market access by paying duty ranging from none to five per cent.⁴⁰

However, the goal has remained elusive. Hence, in the near future, traders from both state parties will appear to trade under the BBPTA rather than under the SAFTA.⁴¹

III. SIMPLE RULES OF ORIGIN UNLIKELY TO RESULT ANY SIGNIFICANT TRADE DIVERSION?

Only products that satisfy the rules of origin as contained in Appendix I of the BBPTA would qualify for the preferential tariff.⁴² The rules of origin of the BBPTA are relatively simple. Of course, products wholly produced or obtained within the territory of one of the parties to the PTA would be eligible to be treated as an originating product eligible for the tariff preference under the BBPTA.⁴³ Of course, only a few products such as mineral products, live animals, plants, and fishing products can fall under this category. In the contemporary economy of complex value chain, few products would be produced in the territory of one state. Thus, the rules on products which consist of inputs of multiple states are very important.

For products not wholly produced in either of the state parties, the BBPTA adopts the change of tariff heading (CTH) rule, i.e., when a final product belongs to a tariff line, which is

³⁷ *Revised Sensitive List (Phase-II) of Bangladesh for LDCs Under SAFTA*, Bangladesh Trade Portal, [https://www.bangladeshtradeportal.gov.bd/kcfinder/upload/files/Bangladesh%20Revised%20Sensitive%20List%20\(Phase-II\)%20for%20LDCs_HS%202012.pdf](https://www.bangladeshtradeportal.gov.bd/kcfinder/upload/files/Bangladesh%20Revised%20Sensitive%20List%20(Phase-II)%20for%20LDCs_HS%202012.pdf) (last visited May 18, 2021). It is important to note that although the Maldives graduated to the status of a developing country, it is entitled to the benefits of LDCs under the SAFTA and subsequent treaty arrangements by virtue of Article 12, which states "Notwithstanding the potential or actual graduation of [the] Maldives from the status of a Least Developed Country, it shall be accorded in this Agreement and in any subsequent contractual undertakings thereof treatment no less favourable than that provided for the Least Developed Contracting States."

³⁸ Dep't of Com., Gov't of Sri Lanka, Final Sensitive List at 6-digit as per HS 2007 (REV): Bhutan, http://www.doc.gov.lk/images/pdf/our_services/safta/bhutan_revised_sensitive_list_2_hs_2007.pdf (last visited May 18, 2021). Noticeably, unlike Bangladesh, Bhutan maintains an identical list of tariff preference for both LDCs and non-LDCs.

³⁹ This was precisely the case within the framework of the South Asian Preferential Trade Agreement, as a few of the products with actual trade potential between SAARC member states were included into the positive list of products eligible for preferential market access; see Islam, *supra* note 26, at 139.

⁴⁰ SAFTA, *supra* note 4, at art. 7.

⁴¹ For more on this, see below the discussion in part 6 of this article (Trade Liberalisation With The SAARC Framework and BBPTA).

⁴² BBPTA, *supra* note 27, art. VIII.

⁴³ *Id.* at app. I, r. 6.

different from those of all non-originating material from third party states, it would qualify for preferential treatment.⁴⁴ Alternatively, to qualify under the rules of origin of the BBPTA, total value of the non-originating materials must not be higher than 70%, and the last processing must take place in the territory of the contracting parties.⁴⁵ Irrespective of any value addition or change of tariff heading, any process to ensure the preservation of products, or any routine process such as washing, painting, change of packaging, affixing of marks on products, simple mixing, or assembly of products, etc., would be disregarded for conferring the status of originating products.⁴⁶

Despite some degree of convergence in some major sectors of the economy such as chemicals and footwear, the complexity of rules of origin in PTAs continues to pose problems, particularly in agricultural products, textiles, iron, steel, and machinery.⁴⁷ This appears to be a nonissue in the BBPTA. There are no product-specific rules of origin, and the general rules apply for all products otherwise eligible for preferential treatment. Thus, it would seem that the rules of origin of the BBPTA fulfil all the hallmarks of the textbook for an ideal set of rules of origin: simplicity, transparency, and applicability across the products.⁴⁸ The quite liberal rules of origin should be helping producers of the two countries to enjoy preferential market access easily. Again, this simple set of rules of origin would not seem to cause any significant trade or investment diversion.⁴⁹

However, some of the positive impact of the simple rules of origin may be undermined by the substantial gap between the MFN applied tariff and preference margin under the BBPTA. Therefore, the possibility of some trade diversion would seem to exist due to the fact that the gap between preferential tariff under the BBPTA and the applied MFN tariff for some products is way too high. For example, the MFN applied rate for milk (HS Code 0401.20), or natural honey (HS Code 0409.00), is 25%,⁵⁰ and clearly the preference margin here would be too high and may strain the access of some third-party producers of some products in the Bangladeshi market. The same appears to be true in the case of Bhutan where the applied tariff rate seems to be too high. To take but one example, the tariff for other textile materials (HS Code 6203.39) is 30%, which should give Bangladeshi producers a significant edge over producers from third parties who would have to pay the MFN tariff. Thus, here too the prospect of some trade diversion looms large.⁵¹ This would appear to be further exacerbated by the abolition of regulatory and supplementary duty for the Bhutanese products which would be covered by the BBPTA.⁵²

IV. OTHER BASIC PROVISIONS

⁴⁴ *Id.* at r. 7(2)(a).

⁴⁵ *Id.* at r. 7(2)(b)

⁴⁶ *Id.* at r. 8

⁴⁷ Hasegawa Jitsuya, *Standardization of Complex and Diversified Preferential Rules of Origin*, 55 J. WORLD TRADE 545, 546 (2021).

⁴⁸ Paul Brenton, *Preferential Rules of Origin*, PREFERENTIAL TRADE AGREEMENT POLICIES FOR DEV.: A HANDBOOK 161, 164 (Jean-Pierre Chauffour & Jean-Christophe Maur eds., The World Bank, 2011).

⁴⁹ See Patricia Augier, Michael Gasiorek, & Charles Lai Tong, *The Impact of Rules of Origin on Trade Flows*, 20 ECON. POL'Y, 567, 567-624 (2005) (for an analysis of how complex rules of origin can impact trade and investment.)

⁵⁰ BANGLADESH NATIONAL BOARD OF REVENUE, *Tariff Schedule*, <https://nbr.gov.bd/taxtype/tariff-schedule/eng> (last visited June 4, 2021).

⁵¹ Department of Revenue and Customs, Ministry of Finance, Royal Government of Bhutan, *Bhutan Trade Classification and Tariff Schedule* (6th ed., 2017).

⁵² See National Board of Revenue, *supra* note 34 and accompanying text.

The BBPTA's main value is in the preferential market access for the products of the parties covered by it. Beyond this, the other rules of the BBPTA are quite basic in their scope. The BBPTA contains a standard national treatment obligation,⁵³ general and security exceptions,⁵⁴ and prohibitions of quotas⁵⁵ modelled after the GATT. The national treatment obligation's scope is not limited to the products that are subject to the tariff reduction scheme. This reading is based on the following words in Article 5 of the text of the Treaty in which they agree to provide "*each other's products imported into their territory, treatment no less favourable than that accorded to like domestic products.*"⁵⁶ Products imported into their territory should, in their ordinary meaning, connote all products from each other's territory, not just those mentioned in the respective Annexes of the BBPTA. As Bhutan is yet to be a WTO party, this may appear to confer an advantage on the trade between the two parties. However, as the two states are already parties to the SAFTA, Bhutan was already entitled to the national treatment protection as afforded by Article 5 of the SAFTA.

There is no commitment whatsoever to eliminate antidumping or countervailing duties in the trade between the two state parties.⁵⁷ There is also no commitment on accepting price undertaking or any other special concession. As only Bangladesh is a WTO member, even the GATT or provisions of the Anti-dumping Agreement would not seem to limit the scope for adopting antidumping or countervailing measures. However, as Bangladesh is yet to conduct any antidumping or countervailing measures for the foreseeable future, this may not create any practical challenge for the bilateral trade. This feature too is in line with the SAFTA. Moreover, there is also no specific commitment on curbing the use of antidumping or countervailing duties in the trade between parties, beyond a simple hortatory commitment that the parties would consider the special situation of LDCs in adopting antidumping or countervailing measures.⁵⁸

The BBPTA does not provide any detailed provision on dispute settlement mechanism. The text of the BBPTA provides that any disputes relating to it would be resolved through mutual consultation.⁵⁹ This is in keeping with the trend in Asian FTAs or PTAs where there is an overwhelming emphasis on diplomacy over dispute settlement as a mechanism for settlement of disputes.⁶⁰ To oversee the implementation of the BBPTA, the parties have agreed to set up a Joint Trade Committee (JTC), consisting of bureaucrats at the Additional Secretary or Joint Secretary level.⁶¹ The BBPTA provides that the JTC would sit for a meeting at least once annually.⁶²

V. LACK OF COVERAGE OF SERVICES

The limited ambition of the BBPTA would again be evident from the non-inclusion of trade in services from its scope. Globally, trade in services has grown and so has the number of PTAs with coverage on trade in services, which would be evident from the fact that as of mid-July

⁵³ BBPTA, *supra* note 27, art. V.

⁵⁴ *See id.*, art. VII.

⁵⁵ *See id.*, art. IX.

⁵⁶ General Agreement on Tariffs and Trade, art. 5, Oct. 30, 1947. Emphasis added.

⁵⁷ BBPTA, *supra* note 27, art. XIV.

⁵⁸ SAFTA, *supra* note 4, art. XI.

⁵⁹ BBPTA, *supra* note 27, art. XVIII.

⁶⁰ Michael Ewing-Chow, Alex WS Goh, & Akshay Kolshe Patil, *Are Asian WTO Members Using the WTO DSU 'Effectively'?* 16 J. INT'L ECON. L. 669–705 (2013).

⁶¹ BBPTA, *supra* note 27, at Article XVII:1.

⁶² *Id.*

2021, there are 181 PTAs notified to the WTO.⁶³ As scholarly works have shown that South Asian states probably have a greater prospect of trade integration in services than in goods,⁶⁴ the omission of services would probably reduce the potential of the BBPTA. Even the official statement of the parties would connote that they envisage the need for expanding bilateral trade in services. For example, with its acute shortage of skilled medical practitioners, Bhutan expressed the intention to employ medical practitioners from Bangladesh in its public hospitals; the two parties have signed a memorandum of understanding in this regard.⁶⁵

Thus, it seems that the parties did not want to commit to any binding commitment of trade in services; rather, they wanted to conduct this on a voluntary basis. However, the stance of the parties would be somewhat at odds with the position of the LDCs in the WTO where they advocate for preferential access from the developed world to their services market, particularly under mode 4.⁶⁶ On the overall South Asian front, members of the South Asian Association for Regional Cooperation (SAARC) signed the SATIS in 2010, and technically, the SATIS has been in force since 2012.⁶⁷ However, negotiations on schedules of commitments of the parties have not been concluded yet.⁶⁸ Thus, SATIS remains, for now, nothing but a piece of aspiration of the SAARC member states. Hence, it is where the BBPTA seems to have missed an opportunity for some trade creation.

VI. TRADE LIBERALISATION WITH THE SAARC FRAMEWORK AND BBPTA

The BBPTA is, in some ways, a fitting vindication of the “spaghetti bowl syndrome” that Professor Bhagwati has famously coined.⁶⁹ As both state parties are also parties to the SAFTA, this PTA could be perceived as a testament to their lack of conviction on the progress of the SAFTA. For many outstanding political issues, the SAFTA is yet to achieve its true potential.⁷⁰ It may be mentioned that both of these states are also members of the Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC), which is also working on a PTA, but since the tariff regime under this is yet to be functional, they are beyond the scope of this paper. There are quite a few functional PTAs between SAFTA parties already (such as between India and Nepal, India and Bhutan, India and Afghanistan, Pakistan and Sri Lanka, etc.).

The above trend of parties to a regional trade agreement signing bilateral PTAs with their regional PTA partners does not seem to be present among members of the Association of Southeast Asian Nations, European Union, or Mercosur. In many cases, either because of more

⁶³ WORLD TRADE ORGANIZATION, REGIONAL TRADE AGREEMENTS DATABASE (The number would be 188, if we add the seven accessions also notified under the WTO). See generally Martin Roy, Juan Merchetti and Hoe Lim, *Services Liberalization in the New Generation of Preferential Trade Agreements: How Much further Than the GATS?*, 6 WORLD TRADE REVIEW 155-19, 2 (2009) (for an overview of services trade liberalization commitment under various PTAs).

⁶⁴ See RUPA CHANDA, INTEGRATING SERVICES IN SOUTH ASIA: TRADE, INVESTMENT AND MOBILITY 40 (Oxford University Press 2011).

⁶⁵ Joint Statement on the State Visit of H.E. Dr. Lotay Tshering, Prime Minister, Royal Government of Bhutan, to the People’s Republic of Bangladesh, Bangl.-Bhutan, ¶ 16, Apr. 12-15, 2019 (on file with the author).

⁶⁶ See Claudia Manrique Carpio & Jaime Comas Mir, *The Least-Developed Countries Services Waiver: Any Alternative Under the GATS?*, 6(1) GOETTINGEN J. INT’L L. 115, 121 (2014).

⁶⁷ *Trade Policy Review*, supra note 22, at 33.

⁶⁸ *Trade Policy Review*, supra note 22, at 33.

⁶⁹ See JAGDISH BHAGWATI, TERMITES IN THE TRADING SYSTEM: HOW PREFERENTIAL AGREEMENTS UNDERMINE FREE TRADE 251 (Oxford University Press 2008).

⁷⁰ See Md. Rizwanul Islam, *A Diagnosis of the Crawling Trade Liberalisation under the Auspices of the South Asian Association for Regional Cooperation*, 11 J. WORLD INV. & TRADE, 293-308 (2010), for an overview of the geopolitical factors posing challenges to trade expansion between SAARC member states.

liberal rules of origin or more extensive tariff liberalisation, traders of some of the SAFTA state parties do use the bilateral PTA in place rather than the SAFTA.⁷¹ Thus, the BBPTA would likely further solidify that trend. As Bangladesh has apparently decided to sign a PTA with Nepal in the near future, the SAFTA would likely become of even lesser importance and push the regional economic integration in South Asia even more on the margin.⁷² While the thorough overhaul of the SAFTA and SATIS would clearly create a much more integrated market for the whole of South Asia, the political volatility and the concomitant ebb and flow in the diplomatic relationship between member states of the SAARC would appear to imply that such progress is far off. As already pointed out, the SAFTA is yet to achieve its tariff reduction targets originally envisaged, and any further form of regional market integration under its auspices does not seem to be on the horizon.

VII. BBPTA'S COMPLIANCE WITH THE WTO RULES

There is a substantial body of literature on the issue of compliance of the PTAs with the WTO rules.⁷³ They need not be replicated here. However, in view of Bangladesh's legal obligations as a member state of the WTO, a few observations about the potential compliance of the BBPTA with the WTO would be in order. As Bangladesh is yet to notify the PTA to the WTO or to have even made an early announcement under the Transparency Mechanism of 2006, it is not entirely sure if the BBPTA would be notified under Article XXIV of the GATT or the Enabling Clause.⁷⁴ Hence, the discussion that follows will analyse the BBPTA in light of both Article XXIV of the GATT and the Enabling Clause.

Clearly, with the very limited scope of coverage of the BBPTA in terms of the products, it would fail to comply with the internal trade liberalisation requirement of the GATT Article XXIV(8). While both WTO member states and scholars have differed on the meaning of "substantially all trade[.]" it would be ludicrous to claim that the limited product coverage of the BBPTA would meet any threshold of "substantially all". It would appear that Article XXIV only views PTAs with partial product coverage as interim agreements, which would eventually lead to a full-fledged FTA or customs union (CU) because Article XXIV(5)(c) of the GATT clearly states that "any interim agreement referred to in subparagraphs (a) and (b) shall include a plan and schedule for the formation of such a customs union or of such a free-trade area

⁷¹ Islam, *supra* note 26, at 195-201; Md. Rizwanul Islam, *Constraints of the Agreement on South Asian Free Trade Area and SAARC Agreement on Trade in Services Militating against Sub-regional Trade Proliferation in South Asia*, 7 *BYU INT'L LAW & MGMT. REV.* 1, at 3-8 (2010).

⁷² Press Release, The Off. of the Prime Minister of Bangl., Subject: Approval of the Execution of Preferential Trade Agreement between Bangladesh and Bhutan on the Meeting to be Held on 10-11 March 2020 (Feb. 23, 2020) (on file with the author) (stating that it is also necessary to sign a bilateral preferential trade agreement with Nepal and to ask the Ministry of Commerce to take action on an urgent basis. Nepal is not the only state with which Bangladesh is negotiating a PTA; it is only considering the case for bilateral PTAs with Indonesia, Malaysia, China, and so on); see Minutes of the Meeting of Nov. 6, 2019, *supra* note 11, at 7.

⁷³ See, e.g., Zakir Hafez, *Weak Discipline: GATT Article XXIV and the Emerging WTO Jurisprudence on RTAs*, 79 *N.D. L. REV.* 879-919 (2003); Md. Rizwanul Islam & Shawkat Alam, *Preferential Trade Agreements and the Scope of GATT Article XXIV, GATS Article V and the Enabling Clause: An Appraisal of GATT/WTO Jurisprudence*, 56 *NETH. INT'L L. REV.* 1-34 (2009); Gabrielle Marceau & Cornelis Reiman, *When and How is a Regional Trade Agreement Compatible with the WTO?*, 28 *LEGAL ISSUES OF ECON. INTEG.*, 297-334 (2001); ANDREW MITCHELL & N. LOCKHART, *LEGAL REQUIREMENTS FOR PTAs UNDER THE WTO in SIMON LESTER, BILATERAL AND REGIONAL TRADE AGREEMENTS: COMMENTARY AND ANALYSIS* 81-114 (Bryan Mercurio & Lorand Bartels eds., Cambridge Univ. Press 2016).

⁷⁴ See Ben Sharp, *Comparing Preferential Trade Agreement Scrutiny under GATT Article XXIV and the Enabling Clause: Lessons Learned from the Gulf Coop. Council*, 7 *Manchester J. INT'L ECON. L.* 56 (2010), for an analysis on the difference between the requirements under Article XXIV of the GATT and the Enabling Clause.

within a reasonable length of time.”⁷⁵ Thus, in order to comply with the provision of Article XXIV, a PTA needs to transform to an FTA or CU at the expiry of the interim phase.⁷⁶ Understanding on Article XXIV has clarified that only in exceptional cases the period of culmination into FTA or CU should be more than ten years. Thus, Article XXIV does not envisage the scope for an evergreen PTA with minimal internal trade coverage between its parties. Because the text of BBPTA nowhere alludes to any eventual plan to move beyond exchanging preference between the two parties, it clearly falls short of the requirement of Article XXIV(5)(c) that within a reasonable length of time it results in an FTA or CU.

Regarding the external trade requirement, such as not creating any undue trade barriers for third parties, it may be surmised that due to the limited product coverage and simple rules of origin, it would comply with the external trade requirement of GATT Article XXIV. However, of course, both Bangladesh and Bhutan, not being economically developed countries,⁷⁷ their PTA could and would probably be notified to the WTO under paragraph 2(c) of the Enabling Clause. Article 2(c) of the Enabling Clause allows developing and LDC member states to engage in mutual reduction or elimination of tariffs in accordance with criteria or conditions which may be prescribed by the *contracting parties*.⁷⁸ The precise scope of paragraph 2(c) of the Enabling Clause is yet to be clarified. However, it can be said that legally, an agreement notified under paragraph 2(c) of the Enabling Clause may serve as an exception to Article I of the GATT as long as the state notifying it to the WTO can prove that there is a genuine link between the differential treatment accorded to a PTA partner and the arrangement at issue.⁷⁹ As the Appellate Body (AB) has explained in *Brazil — Certain Measures Concerning Taxation and Charges*:

Paragraph 2(c) excepts differential and more favourable treatment accorded pursuant to “[r]egional or global arrangements entered into amongst” developing country Members from a finding of inconsistency with Article I of the GATT 1994. Paragraph 2(c) limits the kind of differential and more favourable treatment to the: (i) mutual reduction or elimination of tariffs; and (ii) mutual reduction or elimination of non-tariff measures. In case of the latter, paragraph 2(c) adds that the “mutual reduction or elimination of non-tariff measures” have to be “in accordance with criteria or conditions which may be prescribed” by the WTO Members. Paragraph 2(c) does not exclude the possibility that developing country Members that are parties to regional or global arrangements may adopt such instruments that they may deem appropriate for the mutual reduction or elimination of tariffs and non-tariff measures. However, it suffices that the instrument adopted that way, to be justified under paragraph 2(c) for the differential and more favourable treatment it accords, has a “genuine” link or a rational connection with the regional or global arrangement adopted and notified to the WTO.⁸⁰

Thus, the AB here has followed a less stringent test than the one the Panel followed in the same case, that “for any differential and more favourable treatment” to be justified under

⁷⁵ See Lorand Bartels, *Interim Agreements under Article XXIV GATT*, 8 World Trade Rev. 339-350 (2009), for a detailed overview of the law and practice on interim agreements under the GATT and WTO.

⁷⁶ Islam, *supra* note 26, at 41.

⁷⁷ PTAs involving only developed countries would need to be notified under Article XXIV of the GATT.

⁷⁸ Hafez, *supra* note 73, at 201.

⁷⁹ See *infra* note 80 and the accompanying text.

⁸⁰ Appellate Body Report, *Brazil — Certain Measures Concerning Taxation and Charges*, ¶ 5.423, WTO Docs. WT/DS472/AB/R, WT/DS497/AB/R 13, AB-2017-7, AB-2017(adopted on Jan. 11, 2019).

paragraph 2(c) of the Enabling Clause, there must exist a close and genuine link to a regional arrangement entered into amongst less developed contracting parties.”⁸¹ However, one issue would be that Bhutan is a non-WTO member state and it is uncertain whether a PTA signed by a WTO member with non-WTO member states would or would not comply with the Enabling Clause because paragraph 2(c) of the Enabling Clause refers to the arrangements among less developed *contracting parties*.⁸² Thus, a literal interpretation would indicate that a PTA that a WTO member signed with a non-WTO member state cannot be within the scope of the Enabling Clause. However, this is yet to be determined in the GATT or WTO jurisprudence, and alternative interpretation is possible.⁸³

And in any case, for the BBPTA to benefit from the Enabling Clause, it must be properly notified to the WTO under Article 2(c) of the Enabling Clause. The Appellate Body report in *Brazil — Taxation* has explained the value of this procedural requirement, where it has been observed that:

Paragraph 4(a) of the Enabling Clause envisages a degree of specificity in the notification adopted thereunder. At a minimum, a notification pursuant to paragraph 4(a) should state under which provision of the Enabling Clause the differential and more favourable treatment has been adopted. Paragraph 4(a) indicates that arrangements or measures adopted under different subparagraphs of paragraph 2 would have to be notified to the WTO so as to put other Members on notice regarding the relevant differential and more favourable treatment sought to be accorded and justified under the Enabling Clause.⁸⁴

CONCLUSION

With the burgeoning number of PTAs having increasingly deep coverage in terms of rules, the BBPTA appears to be a minority. Apart from liberalizing tariff on their trade in certain goods, the two parties seem to have done nothing through it. This, accompanied by the political statements of the policymakers on the non-economic and diplomacy centric public statements of the two parties, may connote that the BBPTA is all about symbolism. However, from the viewpoint of those who attach their hope to the multilateral trade liberalisation, the very limited scope of the BBPTA may not necessarily be unwelcome. Clearly, the very limited scope of the BBPTA would mean that it falls far short of a full-fledged FTA as GATT Article XXIV would require. That being said, its simple rules or origin and coverage of some tradable products which are protected by the relatively high MFN tariff may mean that it complies with the spirit of GATT Article XXIV, in that PTAs should reduce barriers to trade between the parties (albeit in case of the BBPTA, it clearly does not do so for substantially all trade). Article XXIV also demands that in liberalizing trade for PTA parties, it should not raise barriers for entry of third-party products to the market of PTA partners. And the BBPTA, to some extent, ensures that. But, of course, for some products, the possibility of trade diversion is a real one.

Overall, the shallow liberalisation pursued by the BBPTA may indeed be an economic welfare enhancing treaty rather than those of deep economic integration pursued by PTAs that reduce barriers for intra-PTA trade but raise barriers for third parties. This is somewhat paradoxical, that though the BBPTA does not substantially liberalize the internal trade between the two state parties, it perhaps does not pose any real strain for the WTO's multilateral trade

⁸¹ Panel Report, *Dispute Settlement Reports 2019*, ¶ 7.1117, WTO Docs. WT/DS472/R WT/DS497/R (adopted as modified by the Appellate Body Report on Jan. 11, 2019),

⁸² Islam, *supra* note 26, at 77-79.

⁸³ *Id.*

⁸⁴ WTO Appellate Body Report, *supra* note 80, at ¶ 5.363.

liberalisation route. From the standpoint of greater sub-regional economic integration in South Asia, the BBPTA would seem to be yet another stumbling block and evidence that member states do not perceive any significant breakthrough within the SAARC trade integration framework anytime soon.