

# Preface: My anti-monopoly law research path

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I published two collections of essays in 1990 and 2010, *Competition Law Research* and *Wang Xiaoye on the Antitrust Law*, respectively, each of which was selected from academic papers that I had published at different times. After the publication of the 2010 collection of essays, Mr Edward Elgar encouraged me to select some papers on the Anti-Monopoly Law (AML) to translate into English for publication into a book. I gladly accepted his very kind proposal. Therefore I selected 14 essays that were originally published in Chinese and translated them into English and 10 essays that were originally published in English, and compiled them to present this book to readers. As the preface to this book, I will talk about my academic career, publications, and academic point of view, as well as some of my experiences and feelings in the process of China Anti-Monopoly Law legislation and enforcement. As I pointed out in the preface of *Wang Xiaoye on the Antitrust Law*, my publications

not only record my academic career and reflect my viewpoint on competition law, they also record the difficult process of enacting China's Antimonopoly Law and reflect the different standpoints on significant theoretical issues, such as the market economy, market competition, and competition order, and the controversies and conflicts of various perspectives during the wave of China's economic reforms.

This is also my objective and wish in publishing this book in English.

## 1. STARTING DOWN THE ANTI-MONOPOLY LAW RESEARCH PATH

### 1.1 University Study at 30

I was born in Zhangjiakou city in Hebei province and grew up in a county in the Autonomous Region of Inner Mongolia. In 1966, as I was about to graduate from high school, China began the Cultural Revolution.

One of its consequences was that every university, high school, and primary school in China was closed for the revolution. Under such circumstances, us high school graduates, referred to as ‘老三届’,<sup>1</sup> naturally lost the opportunity to go on to further study at university.

During the Cultural Revolution, I lived and worked in the countryside for three years and later worked at factories and government agencies. In February 1978, I was lucky enough to be in the first batch of students to attend university after the reinstatement of university entrance examinations.<sup>2</sup> By the time I began at the Faculty of Political Education at Inner Mongolia Normal University, I was already 30 years old and mother to two children. In the second half of 1981, on the eve of my graduation from university, after more than two months of intensive study, I, an outsider to the legal profession, passed four legal professional examinations in legal theory, civil law, private international law, and public international law with honours and was admitted to Renmin University as a Master's student.<sup>3</sup> The excitement I felt was indescribable.

At Renmin University Faculty of Law, my research interests were private international law and international economic law, and my supervisor was the leading Chinese academic in the field at that time, Professor Liu Ding. In December 1984, I successfully defended my Master's dissertation, ‘The Applicability of International Contract Law’. As a graduate student graduating at the beginning of China's economic reforms, there were many employment opportunities and I chose to be at the Institute of Law, Chinese Academy of Social Sciences (CASS). CASS is China's highest academic research institution. I worked at the Institute of Law and my research fields were private international law and foreign economic law. As you can see from my experience above, had I not studied abroad in Germany, my whole life's academic research might not have been related to anti-monopoly law at all.

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<sup>1</sup> ‘老三届 [*lao san jie*] refers to middle and high school students who graduated during the Cultural Revolution, in particular those of 1966, 1967, and 1968. A majority of these graduates were sent by the government to rural areas to undergo ‘re-education’.

<sup>2</sup> In December 1977, China conducted the first nationwide university entrance examination since the 1966 Cultural Revolution. About 5.76 million people participated in the examination, and the admission ratio was 29:1.

<sup>3</sup> In March 1978, Renmin University admitted 58 Master's students, including 13 students in the Faculty of Law.

## **1.2 Studying in Germany Led Me to the Anti-Monopoly Law Research Path**

In 1988, as I was about to turn 40 years old, with the help of Professor Frank Münzel of the Max Planck Institute for Comparative Private Law in Hamburg, I was fortunate enough to have the opportunity to study in Germany and pursue a doctorate. Even more fortunate was that, upon Professor Frank Münzel's recommendation, Professor Ernst-Joachim Mestmäcker agreed to be my doctoral thesis supervisor.

Professor Mestmäcker is the leading authority on antitrust law in Germany and Europe and was then the Director of the Max Planck Institute for Comparative Private Law. He has held many positions, including President of the University of Bielefeld, Chairman of the First German Monopolies Commission, Vice-President of the Max Planck Society, and Competition Policy and Economic Policy Advisor to the European Commission. The results of his research have had a significant influence on the development of German, European, and international antitrust law.<sup>4</sup> As I had to write my doctoral thesis in the field of anti-monopoly law, my academic career took a sharp turn as I went from researching private international law to researching a field of law that was foreign to Chinese people at the time. Consequently the issues with which I was concerned also changed from civil relationships involving foreigners to market competition and competition order, and in this case, I also paid close attention to China's economic and political reforms.

In January 1993, I successfully passed the oral examination for the doctorate degree at the Law Faculty of the University of Hamburg. The topic of the oral examination was 'European Community Anti-Dumping Law and its Impact on China's Imports'.<sup>5</sup> That May, my doctoral thesis, 'Monopoly and Competition in the Chinese Economy – A Comparative Analysis of US and German Merger Control', was published in Volume 35 of the Max Planck Institute for Foreign and Private International Law Research Series published by J.C.B Mohr. The reason I chose to conduct a comparative analysis of US and German merger control for my doctoral thesis was to find a solution for China to regulate business monopoly and

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<sup>4</sup> For instance, Immenga and Mestmäcker (eds.), *Wettbewerbsrecht GWB, Kommentar zum Deutschen Kartellrecht*, 5. Auflage 2013, C.H. Beck; and *Wettbewerbsrecht EU, Kommentar zum Europäischen Kartellrecht*, 5. Auflage 2012, C.H. Beck.

<sup>5</sup> I published papers on this topic in Chinese and German; see the list of main publications.

administrative monopoly. Professor Mestmäcker gave me very high marks on the thesis:

The author has provided a very accurate description and analysis of the legal and economic issues closely related to market competition and, on this basis, put forward a legislative proposal for China's merger control. The proposal fully takes into account the US and German experiences and China's unique system, particularly the way that businesses merge and how markets are defined.

The grade he gave the thesis was magna cum laude.

Going to study in Germany in 1988 was a key step in my life. It gave me the opportunity to travel abroad and observe the world, and understand the legal systems of developed market economies. It also allowed me to pioneer the study and research of anti-monopoly law in Chinese legal academic circles.

After I returned to Beijing in August 1994, I received invitations from many universities to join their faculty. However, what they valued was my experience studying abroad, rather than the specialization I had learnt – anti-monopoly law. Even at the Institute of Law there were many scholars who did not understand the importance of my specialization. To this day I remember clearly that, at the time, there were leaders at the Institute of Law who had warned me that researching anti-monopoly law was incompatible with China's national conditions. There were people who tried to convince me to change my research direction. There were even people who advised me to live in the countryside for at least half a year to see whether China needed an anti-monopoly law. But I was determined to continue my research field and firmly embarked on the path to research China's Anti-Monopoly Law.

Fortunately, China officially began the drafting work for the Anti-Monopoly Law in 1994, which was the year I returned to China from Germany. Upon my return to China I was invited to participate in the legislative drafting team. This gave me the opportunity to dedicate my talent and expertise to the cause and drafting of the Anti-Monopoly Law.

## 2. PARTICIPATING IN THE DRAFTING OF THE ANTI-MONOPOLY LAW

It is generally recognized that the drafting of the Anti-Monopoly Law began in 1994, as the Anti-Monopoly Law was included on the legislative

agenda of the Standing Committee of the Eighth National People's Congress (NPC). The drafting of the Anti-Monopoly Law was officially launched.<sup>6</sup>

The drafting of the Anti-Monopoly Law can be divided into three stages. The relevant state ministries prepared the draft law in the first stage; the Legislative Affairs Office of the State Council, on behalf of the State Council, reviewed the draft law in the second stage; and in the third stage, the Standing Committee of the NPC, on behalf of the country's highest lawmaking body, reviewed and passed the draft law submitted to it by the State Council. I was fortunate to have participated in all three stages of the drafting of the Anti-Monopoly Law and had the opportunity to understand the conflicts and differences between the various perspectives on the Anti-Monopoly Law. I personally felt that the anti-monopoly legislation in China was an ideological emancipation for my country. The promulgation of the Anti-Monopoly Law is a milestone in China's economic reform process.

## **2.1 State Ministries Draft the Anti-Monopoly Law**

Pursuant to the arrangements made by the State Council, in May 1994 the State Economic and Trade Commission (SETC) and the State Administration for Industry and Commerce (SAIC) jointly established the 'Anti-Monopoly Law Drafting Group'. The Deputy Director of the Regulation Department of the SETC, Zhang Delin, and the Director of the Regulation and Policy Department of the SAIC, Wang Xuezheng, were in charge. In August 1994, after I returned from studying abroad, I received an invitation from Deputy Director Zhang Delin to join the drafting of the Anti-Monopoly Law.

The Anti-Monopoly Law Drafting Group finished the first draft of the Anti-Monopoly Law (Draft Outline) in July 1997 and the second draft in November 1998. As anti-monopoly law is part of the legal system for market economies, the drafting of the Anti-Monopoly Law was, to a certain extent, a process of transplantation and learning from foreign laws. In addition to the direct participation of scholars like me who had studied abroad and accepted ideas about free competition and researched

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<sup>6</sup> To be exact, the drafting of the AML began in 1987. In 1988 the Anti-Monopoly Law Drafting Group of the Bureau of Legislative Affairs of the State Council drafted the 'Anti-Monopoly and Anti-Unfair Competition Bill'. However, in September 1993 the Law Against Unfair Competition of the People's Republic of China was adopted, indicating that anti-monopoly legislation had been unsuccessful.

anti-monopoly law, in the drafting of the Anti-Monopoly Law the Anti-Monopoly Law Drafting Group also used the 'go outside' and 'come inside' method. On the one hand, the government officials who participated in the drafting process visited countries and regions with developed competition laws and policies such as Europe, the United States, Australia, and Japan to learn about their experiences with enacting and enforcing anti-monopoly law. On the other hand, the Anti-Monopoly Law Drafting Group consulted with foreign experts and government officials in preparing the draft. In November 1998 and December 1999, the Anti-Monopoly Law Drafting Group held two international seminars and invited competition law experts and government officials from the OECD to listen to their comments and suggestions on the draft Anti-Monopoly Law. These foreign experts and government officials were very enthusiastic about the drafting of the Anti-Monopoly Law and actively participated in the discussions and made many valuable comments and suggestions. Some experts, such as the former Chairman of the Australia Competition and Consumer Commission, Professor Allan Fels, still pay close attention to the implementation and development of the Anti-Monopoly Law and maintain close ties with Chinese academics and government officials.

In June 2000, the Anti-Monopoly Law Drafting Group distributed the Anti-Monopoly Law (Consultation Draft) to the relevant government departments for comments for the first time. At the end of 2001, after China acceded to the World Trade Organization, the pace of drafting significantly quickened. The structure and content of the Anti-Monopoly Law (Consultation Draft), dated 25 July 2002, are the prototype for the current Anti-Monopoly Law.

Since the beginning of the drafting process for the Anti-Monopoly Law, there have been two distinguishing characteristics. First, the influence of German law has been relatively strong. For example, some provisions in the draft Anti-Monopoly Law that came from German law included the concept of abuse of dominance and the finding market dominance, and the 2002 draft even had provisions relating to the application for exemption for monopoly agreements.<sup>7</sup> Secondly, there has been an emphasis on administrative monopolies. From the very outset,

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<sup>7</sup> For the German influence on the AML, see Joint Submission of the American Bar Association's Sections of Antitrust Law, Intellectual Property Law and International Law on the Proposed Anti-Monopoly Law of the People's Republic of China, 19 May 2005, p. 3, available at: [http://www.americanbar.org/groups/antitrust\\_law/resources/comments\\_reports\\_amicus\\_briefs/2005\\_comments.html](http://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs/2005_comments.html).

the Anti-Monopoly Law has attached importance to and been directed against administrative monopolies.<sup>8</sup> This was a result of China's national conditions as administrative monopolies are the biggest barriers to the development of a market economy in China. It was also due to the strong urging of Chinese scholars, including myself. Perhaps due to the influence of German law and EC law, I have always attached great importance to the monopoly issues of state-owned enterprises, including public enterprises and administrative monopolies. I was the first in China to publish academic papers on this matter, for example 'The Regulation of the Market Behaviour of Public Enterprises Requires Anti-Monopoly Law', 'The Legal Regulation of Administrative Restrictions on Competition', and 'State-Owned Enterprises under EC Competition Law'.<sup>9</sup> Without a doubt, had academics not appealed for it, there would not have been a deep understanding by the government officials participating in the drafting of the Anti-Monopoly Law of the harm of administrative monopolies and the Anti-Monopoly Law would not have prohibited administrative monopolies.

In mid 2003, after the NPC and the Chinese People's Political Consultative Conference were held, the State Council underwent large-scale institutional reform. The Ministry of Foreign Trade and Economic Cooperation and the SETC were eliminated and the Ministry of Commerce (MOFCOM) was added. The Anti-Monopoly Law then became one of the MOFCOM's most important legislative tasks. The MOFCOM took this task very seriously. In October 2003, I attended a large-scale symposium hosted by the Law Department of the MOFCOM to discuss the draft Anti-Monopoly Law, and many foreign lawyers were also invited to participate. I also attended a symposium on anti-monopoly law hosted by the then Minister of MOFCOM, Mr Bo Xilai. In March 2004, the MOFCOM submitted the Anti-Monopoly Law (Draft) to the State Council, accompanied by comments on the draft from the SAIC. In addition to commenting on various provisions in the draft Anti-Monopoly Law, the SAIC also proposed that it be the enforcement authority for the Anti-Monopoly Law.

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<sup>8</sup> On 6 August 2001, someone from the SETC revealed that the term 'administrative monopoly', which had been the subject of widespread concern, had been included in the draft AML: [http://www.china.com.cn/zhuanti2005/txt/2002-08/07/content\\_5184917.htm](http://www.china.com.cn/zhuanti2005/txt/2002-08/07/content_5184917.htm).

<sup>9</sup> See the list of main publications.

## **2.2 Review of the Draft Anti-Monopoly Law by the Legislative Affairs Office of the State Council**

According to China's legislative system, laws that are drafted by ministries cannot be directly submitted to the NPC or the Standing Committee of the NPC for deliberation. The draft must first be considered by the Legislative Affairs Office (LAO) of the State Council. The LAO is a working body that assists the Premier Minister with handling legislative affairs. The Department of Industry, Communications, and Commerce of the LAO was responsible for drafting the Anti-Monopoly Law.

In the second half of 2004, the LAO began to consider the Anti-Monopoly Law (Draft) submitted to it by the MOFCOM. It formed an Expert Advisory Group and asked me to recommend 10 legal and economic experts to participate in the discussion of the draft Anti-Monopoly Law. Officials from the Law Department of the MOFCOM and the Legal Affairs Department of the SAIC also participated in the discussions. The LAO also consulted extensively with the broader community, including various ministries under the State Council, some local governments, and a few big businesses such as Microsoft, Intel, and other multinational companies. Further, the LAO invited leaders of monopoly enterprises in industries such as telecommunications, electricity, post, and railways to participate in the discussions. Some of them argued that they should be exempt from the Anti-Monopoly Law, but this opinion was not adopted. Moreover, the LAO invited Chinese civil law and commercial law scholars to participate in the discussions. At that time, generally these experts did not support the Anti-Monopoly Law because the Contract Law had recently been promulgated. It had introduced the principle of freedom of contract into China, and these experts believed that the Anti-Monopoly Law might undermine that principle. I remember that, at an Anti-Monopoly Law discussion forum that was held by LAO, they collectively left the discussion and essentially did not return to participate in the Anti-Monopoly Law discussions again.

During the Anti-Monopoly Law drafting process, the LAO attached great importance to the reaction and views of the international community. At the beginning of 2005, the LAO asked me to recommend some foreign experts to solicit their views on the Anti-Monopoly Law. The recommended experts came from Germany, the United States, Japan, South Korea (Japan and South Korea being countries with similar cultural backgrounds to China), and Russia (taking into account the transformation of China's economic system). On 24 and 25 May 2005, the LAO held a foreign experts seminar on the draft Anti-Monopoly Law and provided the foreign experts with an English translation of the

Consultation Draft of the Anti-Monopoly Law. The experts were very serious in their work and many people provided line-by-line comments. I also personally received comments from Professor Jürgen Basedow, Director of the Max Planck Institute for Comparative Private Law, Bernard J. Philips, Head of the Competition Division at the OECD, and George Metaxas of the International Bar Association.

International exchange during the review of the draft Anti-Monopoly Law by the LAO definitely impacted the Anti-Monopoly Law. The discussion on the essential facilities doctrine left me with the deepest impression. The Anti-Monopoly Law (Consultation Draft) dated 8 April 2005 provided that:

If a business operator cannot access a network or other essential facility in the possession of a dominant business operator, it is impossible for the business operator to compete. The dominant business operator must not deny other business operators access, at a reasonable price, to its network or other essential facility. However, such obligation does not apply where the dominant business operator can prove that, due to technical, security or other reasons, it is impossible or unreasonable to grant access to the network or other essential facility.

This provision was added to the draft Anti-Monopoly Law due to my efforts. The essential facility doctrine originates from a 1912 decision of the United States Supreme Court.<sup>10</sup> There are similar provisions in Germany's Act Against Restraints of Competition (Article 19.4.4) amended in 1998 for the sixth time. During the international seminar held by the LAO on 23 and 24 May 2005, American experts raised strong objections to this provision. Their reason was that the introduction of the essential facilities doctrine by the Anti-Monopoly Law would prevent investment and innovation and harm competition and consumers. Ultimately, this provision was eliminated from the Anti-Monopoly Law.<sup>11</sup>

Foreign experts were also very concerned about the provisions in the draft Anti-Monopoly Law regarding intellectual property. Article 56 in the Anti-Monopoly Law (Consultation Draft) dated 8 April 2005 stipulated that: 'This law does not apply to the proper exercise of rights in accordance with the Patent Law, Trademark Law, and Copyright Law.

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<sup>10</sup> United States v. Terminal R. R. Ass's, 224 U.S. 383 (1912).

<sup>11</sup> See Joint Submission of the American Bar Association's Sections of Antitrust Law, Intellectual Property Law and International Law on the Proposed Anti-Monopoly Law of the People's Republic of China, 19 May 2005, 4(c) of executive summary, available at: [http://www.americanbar.org/groups/antitrust\\_law/resources/comments\\_reports\\_amicus\\_briefs/2005\\_comments.html](http://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs/2005_comments.html).

However, the abuse of intellectual property rights is prohibited by this law and shall be governed by this law.<sup>7</sup> I remember that I had discussed this provision with at least two American experts and they had hoped that I would suggest to the legislative bodies that this provision be eliminated from the draft. They were concerned because the competitive advantage that multinational companies have in the Chinese market in large part stems from their intellectual property, and the draft Anti-Monopoly Law did not clearly stipulate what conduct amounted to an abuse of intellectual property rights. Under such circumstances, the proper exercise of intellectual property rights by multinational companies might be viewed as an abuse of intellectual property rights.<sup>12</sup> I can understand their concerns. However, for the two reasons stated below, I persisted in my belief that the Anti-Monopoly Law should prohibit the abuse of intellectual property rights to restrict competition. First, there have already been cases of abuse of intellectual property rights to restrict competition in European and US antitrust practice, for example the European Court of Justice's *Magill*<sup>13</sup> case in 1996 and *IMS*<sup>14</sup> case in 2004 and the German Federal Supreme Court's *Spundfass*<sup>15</sup> case in 2004. These cases demonstrate that the abuse of intellectual property rights to restrict competition is not fictitious and that this provision is reasonable. Secondly, even if this provision is included in the Anti-Monopoly Law, this does not mean that the anti-monopoly enforcement agencies will immediately handle such cases. However, if the Anti-Monopoly Law does not prohibit the abuse of intellectual property rights to restrict competition in principle, the anti-monopoly enforcement agencies will have no legal basis upon which to handle such cases. This will have long-term and serious adverse effects on the Anti-Monopoly Law.

During the review of the draft Anti-Monopoly Law by the LAO, the incident that caused widespread concern and heated debate was the deletion of the provision regarding the 'abuse of administrative power to eliminate or restrict competition' from the Anti-Monopoly Law (Consultation Draft) dated November 2005. At that time I was a Fulbright scholar in the United States. When I received this news I was very shocked and disappointed, and I deeply felt that the process of drafting the Anti-Monopoly Law was difficult and tortuous. The prohibition on administrative monopolies was subsequently reinstated into the draft of the

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<sup>12</sup> *Idem*, p. 34.

<sup>13</sup> Cases C-241/91P&242/91P, 1995 E.C.R.I 743 (C.J.).

<sup>14</sup> *IMS Health v. NDC Health*, ECJ, Judgment of 29 April 2004, Case C-418/01.

<sup>15</sup> BGH, Urt. v. 13.7.2004 – KZR 40/02, GRUR 2004, 966 – *Spundfass*.

Anti-Monopoly Law that the State Council submitted to the NPC. This caused many mixed emotions. The back-and-forth on the issue of regulating administrative monopolies demonstrated that, on the one hand, it was a controversial issue among government officials, and, on the other hand, even if it was controversial, the idea of fighting administrative monopolies was the mainstream view among Chinese businesses, academics, and government ministries.

### **2.3 Review of the Draft Anti-Monopoly Law by the Standing Committee of the NPC**

In June 2006, the LAO submitted a draft of the Anti-Monopoly Law to the Standing Committee of the NPC. As an expert, I indirectly participated in the deliberation of the Anti-Monopoly Law (Draft) organized by the Legal Affairs Commission of the Standing Committee of the NPC. The main responsibilities of the Legal Affairs Commission with respect to the Anti-Monopoly Law were to review the Anti-Monopoly Law (Draft) for the Standing Committee, research the draft submitted by the State Council, solicit opinions, provide relevant information, and propose revisions. The Legislative Affairs Commission has a heavy workload in lawmaking, but they were very serious about their Anti-Monopoly Law legislative work. From June to August 2007, I was a visiting scholar in Germany and during this period the Standing Committee had its second and third readings of the Anti-Monopoly Law (Draft). I often received emails from the Legislative Affairs Commission and provided advice on some theoretical and practical issues of the Anti-Monopoly Law, for example the decisive factors in defining a relevant market, commitments, the relationship between commitments and leniency, the legal consequences of commitments, and the relationship between the punishment of industry associations and the punishment of the enterprises which breach the law. Through these emails, I understood that the Anti-Monopoly legislation had entered its most important stage.

The draft Anti-Monopoly Law that the LAO of the State Council submitted to the Standing Committee was deliberated three times before the Standing Committee of the Tenth NPC. This process is referred to as the 'three readings'. During this period, the 160 or so members of the Standing Committee can express their views on the draft law. For example, Articles 11, 16, and 46(3) of the Anti-Monopoly Law were added to the Law during this period. In June 2007, the China branch of the World Instant Noodles Association had held a number of price coordination meetings and organized and planned the magnitude, steps, and timing of the price increases of instant noodles, and the leading

businesses had transmitted information about the price increases through the magazine *Chinese Flour Products*. At that time, the members of the Standing Committee were deliberating the Anti-Monopoly Law (Draft) and they became aware of the possibility that industry associations could manipulate the market price through industry rules. Therefore there was a unanimous request for the Anti-Monopoly Law to clearly prohibit industry associations from engaging in conduct that restricts competition. The Standing Committee also deleted some important provisions from the Anti-Monopoly Law (Draft) during the three readings. For example, Article 44 of the Anti-Monopoly Law (Draft) provided that:

With respect to monopoly conduct, the relevant ministry or regulatory authority shall investigate such conduct in accordance with the relevant laws and regulations. The relevant ministry or regulatory authority shall notify the Anti-Monopoly Commission of the results of such investigation. The anti-monopoly enforcement authority may investigate any monopoly conduct that is not investigated by the relevant ministry or regulatory authority. The anti-monopoly enforcement authority shall solicit the views of the relevant ministry or regulatory authority.

This provision would have generally applied to regulated industries. If a case involved a regulated industry and the industry-specific law related to competition, then the industry regulator would have jurisdiction over the case. The members of the Standing Committee believed that this provision was not suitable because it greatly restricted the jurisdiction of the Anti-Monopoly Law and harmed its effectiveness and authority. Therefore they proposed that the provision be removed.

Apart from the revisions discussed above, it was during the three readings that the provisions with the most Chinese characteristics were added to the Anti-Monopoly Law by the Standing Committee.<sup>16</sup> These provisions are Articles 4, 5, 7, and 31. I opposed these provisions and had emailed the officials at the Legislative Affairs Commission to express my opinion. I believe that the content of these provisions, such as 'strengthen and perfect macroeconomic control' and 'business operators can lawfully implement concentrations, expand business scope', are not incorrect per se, but that they should not be included in the Anti-Monopoly Law. The Anti-Monopoly Law is not a macroeconomic control law or an industrial policy law, but a law that embodies national competition policy.

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<sup>16</sup> See a report on the central government's webpage: 'Second review of the draft Anti-Monopoly Law adds six provisions to promote order and fairness', available at [http://www.gov.cn/jrzg/2007-06/26/content\\_661765.htm](http://www.gov.cn/jrzg/2007-06/26/content_661765.htm).

I pointed out that the Anti-Monopoly Law should apply equally to state-owned enterprises, and that national lifeline industries and industries where monopolies are granted by law should not be granted special protection under the Anti-Monopoly Law. I suggested that general provisions be added to the chapter on monopoly conduct and that the provision, ‘other monopoly agreements as determined by the State council anti-monopoly enforcement authorities’, be deleted, as the transparency of that provision is quite low. I also suggested that the provision, ‘protect the legitimate interests of foreign trade and foreign economic cooperation’, be deleted from Article 15 of the draft Anti-Monopoly Law, which provides for the exemption of certain exporting cartels from the Anti-Monopoly Law, pointing out that the implementation of this provision would not be effective because China’s export businesses are already facing antitrust litigation in the United States. I also think that, due to China’s vast market, the presumption of dominance as provided for in the Anti-Monopoly Law (one enterprise accounting for half the market share, two businesses accounting for two-thirds of the market share, and three businesses accounting for three-quarters of the market share) may be too loose in practice and not conducive to maintaining market competition.

To this day, I remain convinced of these views. I think that the reason that the legislators did not adopt some of my suggestions or views was not because the suggestions or views were incorrect, but because the legislative process is, to a certain extent, an exercise of compromise and coordination of different views. Some members of the Standing Committee thought that the Anti-Monopoly Law should reflect the characteristics of the primary stages of economic and social development of socialism in China and that national competition policy should be compatible with the socialist market economy. Therefore, they believed that, due to China’s current stage of economic development, the Anti-Monopoly Law should prevent the overconcentration of enterprises to form monopolies and be conducive to domestic enterprises growing bigger and stronger through lawful mergers, developing economies of scale, increasing the degree of industrial concentration, and strengthening competitiveness. Of course, from the perspective of some national economic policies, these views are correct. I talked to the leaders of the Legislative Affairs Commission about these different views and they cautioned that I should not be too ‘bookish’ because the legislative process for the Anti-Monopoly Law would be even longer if it did not have these provisions with Chinese characteristics. Indeed, as the Anti-Monopoly Law is a reflection of China’s economic reforms, it is impossible not to reflect reform-related issues. The Anti-Monopoly Law cannot be a simple replica of the antitrust law in the United States or the competition law in the European

Union; it must have some Chinese elements and be compatible with the current situation in China.

## **2.4 Delivering Lectures to the Standing Committee of the NPC**

During the Anti-Monopoly Law legislative process, I was honoured to deliver two law lectures to the Standing Committee. In China, it is a great honour for a scholar to deliver a lecture to the Political Bureau of the Central Committee of the Communist Party of China, or the Standing Committee of the NPC. It is the greatest award that the nation can bestow on a scholar.

The first lecture was delivered on 29 June 2002 and it was the 27th law lecture for the Standing Committee of the Ninth NPC. The topic of the lecture was 'Anti-Monopoly Law' and it was hosted by Chairman Li Peng.<sup>17</sup> In the lecture I discussed the role of anti-monopoly law in a market economy, provided an overview of the anti-monopoly laws of countries around the world, discussed the main tasks of anti-monopoly law, and suggested that an anti-monopoly law be enacted in China as soon as possible. Chairman Li Peng wrote about the lecture in his diaries:

15:00, the 28th meeting of the Standing Committee of the NPC was closed. After the meeting, the 27th law lecture was held. It was delivered by Professor Wang Xiaoye from the Chinese Academy of Social Sciences, her topic is on anti-monopoly law. I think that her opinion of 'Western anti-monopoly law and its role in promoting competition and increasing business efficiency' was a little too high.<sup>18</sup>

Li Peng's 'Diary in the time at National People's Congress' records the 30 law lectures that were held during his time as Chairman of the Standing Committee of the Eighth NPC from June 1998 to December 2002. However, of the 30 law lectures that were recorded, he expressed a slightly different view on my lecture only. On the one hand, this shows that he had reservations about the anti-monopoly laws of Western countries. On the other hand, it demonstrates that he had listened attentively to my lecture and thus put forward a different view.

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<sup>17</sup> See National People's Congress Training Centre Series, *Law Lectures for the Standing Committee of the Ninth National People's Congress*, China Democracy and Legal System Publishing House (中国民主法制出版社), 2003, pp. 589–607.

<sup>18</sup> See Li Peng, *Legislating and Supervising: Li Peng's National People's Congress Diary*, Xinhua Publishing House and China Democracy and Legal System Publishing House (新华出版社、中国民主法制出版社), 2006, p. 63.

The second lecture was delivered on 27 October 2005. It was the 17th law lecture for the Standing Committee of the Tenth NPC. The topic was 'Anti-Monopoly Law is a Basic Law to Protect Order in a Market Economy' and it was hosted by Chairman Wu Bangguo.<sup>19</sup> As both lectures were intended to disseminate basic information about anti-monopoly law to the members of the Standing Committee, the content of the lectures was similar. However, as the drafting of the Anti-Monopoly Law had entered a new stage in 2005, all sectors of the community were very concerned about the formulation of the Anti-Monopoly Law. In that lecture I placed particular emphasis on several issues that should be focused on during the formulation of the Anti-Monopoly Law. For example, the Anti-Monopoly Law should be particularly concerned with administrative monopolies because administrative monopolies impede the establishment of a unified, open, competitive, and orderly market in China, and this means that society's resources are unable to be rationally and efficiently allocated. I emphasized that, as anti-monopoly law is a market competition regulation, it should be of general application and that, except in exceptional cases, it should apply to so-called 'natural monopolies' or 'state monopoly' industries. I also emphasized that anti-monopoly law should regulate the abuse of intellectual property rights to restrict competition because abuse of intellectual property rights can also distort competition and impede business innovation. With respect to the possibility that there may be multiple government authorities enforcing the Anti-Monopoly Law, I emphasized that anti-monopoly enforcement should have a unified and efficient authority with a high degree of independence. To increase the knowledge of the members of the Standing Committee on the importance of the Anti-Monopoly Law, I emphasized that the enactment of the Anti-Monopoly Law will indicate that China has already fully established an economic system that uses the market mechanism to allocate resources and that this law will help to urge the international community to recognize China's market economy status.

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<sup>19</sup> See National People's Congress Training Centre Series, *Special Topic Lectures for the Standing Committee of the Tenth National People's Congress*, China Democracy and Legal System Publishing House (中国民主法制出版社), 2008, pp. 307–322.

### 3. MAIN ACADEMIC VIEWS

I have published extensively and the issues I have researched are quite broad, but my academic thinking and views are quite focused, distinctive, and outspoken. Below are a few points that I have constantly discussed and stressed throughout the formulation and implementation of the Anti-Monopoly Law.

#### **3.1 Anti-Monopoly Law is a Basic Law for the Establishment of China's Market Economy**

To promote the Anti-Monopoly Law, we must first explain why China needs to establish an anti-monopoly law. On this question, I generally talk about the differences between the two types of resource allocation systems, that is, the planned economy and the market economy. The production operations and activities of enterprises in a planned economy rely on state planning whereas enterprises determine their own activities in a market economy. Because the independent business operations of enterprises rely on market prices for coordination, laws protecting the price mechanism and free market competition are crucial to the market economy. This means that the market economy is a competitive economy and it must be linked to competition. However, the experience of market economies has shown that the market itself does not have a mechanism for free and fair competition. On the contrary, to reduce the pressure of competition and avoid competitive risks, enterprises in competition with each other will seek means to achieve monopoly positions to restrict competition. Therefore, to establish a socialist market economy and harness the basic function of the market mechanism to allocate resources, the nation must establish a law that protects undistorted competition and formulate and implement an anti-monopoly law. Therefore, anti-monopoly law reflects the rules of the market economy itself; therefore it is an inherent and intrinsic requirement of the market economy. The enactment and implementation of anti-monopoly law in market economies strongly indicate that a market economy is not a *laissez-faire* economy but an orderly economic system.

To clearly show that anti-monopoly law is a basic law of the socialist market economy, I have stressed very often that the basic principles of the market economy are not, as some Chinese civil scholars have said, only the protection of ownership rights and freedom of contract, but they must also include a principle of free competition. It must also be emphasized that while market players should enjoy these fundamental rights, these three principles are not absolute. People are often interested

in the type of freedom of contract, ownership rights protection, and free competition that should be provided by the state. When talking about the specific issue of free competition, people are interested in what is considered to be protecting free competition. I have discussed these views in many of my essays, such as 'Anti-Monopoly Law in a Socialist Market Economy' and 'Anti-Monopoly Law and Economic Reform in China'.

In the five years of implementation of the Anti-Monopoly Law, it is inevitable that some problems exist with its effectiveness. For example, there is widespread concern that the National Reform and Development Commission's investigation into China Telecom and China Unicom, which began in 2011, will result in very little. My view is that transplanting a law is not simply moving or accepting an object but is a complex and lengthy process. It is the interaction and blending of a combination of political, economic, legal, cultural, social, and psychological factors.<sup>20</sup> Given the various problems in China's current system, the enforcement of the Anti-Monopoly Law is bound to face various challenges. Taking into account the fact that international competition comprises not only economic competition but also system competition, including competition of legal systems, and that the competition that anti-monopoly law protects is able to bring consumers the lowest prices, the best quality, and the biggest material improvement, I strongly believe that the enforcement of the Anti-Monopoly Law will make for a better tomorrow.

### **3.2 Anti-Monopoly Law Should Regulate Mergers and Acquisitions**

The Anti-Monopoly Law legislative process spanned several decades. An important reason was that some scholars, especially economists, were against anti-monopoly law. For example, in 1989 the China Enterprise Evaluation Centre published its evaluation of China's 100 largest Chinese industrial enterprises and nine largest industries as of 1987 and came to the conclusion that: 'The scale of Chinese enterprises is too small and it is not possible to realize economies of scale. It is not wise to advance an anti-monopoly law at this stage.'<sup>21</sup> In September 2009, which was more than one year after the Anti-Monopoly Law came into effect, I was invited to deliver a lecture on the Anti-Monopoly Law to all provincial-level and ministerial-level leaders. Several senior government officials

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<sup>20</sup> See David Gerber, *Global Competition: Law, Markets and Globalisation*, Oxford University Press, 2010, p. 337.

<sup>21</sup> See *Management World* (管理世界), 1989, Issue No. 2, p. 103.

debated that the Anti-Monopoly Law was enacted too early. Their implication was that because the Anti-Monopoly Law regulates mergers and acquisitions, this is not conducive to Chinese businesses becoming bigger and stronger.

I say very often that promoting business alliances and the development of business groups is essential because it can help promote economies of scale and enable businesses to achieve complementary advantages in terms of technology, capital, resources, and personnel. However, because the market economy uses the market mechanism and competition mechanism to allocate resources, to maintain the competitiveness of the market, when the government is promoting business alliances or consolidation it must be careful to prevent businesses from becoming too big. In particular, I stress that the establishment of a head office by the government in certain industries is not conducive to fully realizing the potential of the market mechanism. The bundling of government and business is not conducive to improving the competitiveness of Chinese businesses.<sup>22</sup>

### **3.3 Anti-Monopoly Law Must Prohibit Administrative Monopolies**

The issue of whether anti-monopoly law should prohibit administrative monopolies was rather controversial during the Anti-Monopoly Law legislative process. The traditional tasks of anti-monopoly law are to prevent market power and prohibit the abuse of market dominance conduct. Therefore many Chinese scholars think that anti-monopoly law should not regulate administrative monopoly because administrative monopoly is government action, the resolution of which should be left to administrative law.<sup>23</sup>

In my view, whether it is anti-monopoly law or administrative law that regulates administrative monopolies, this is but a question of form. The

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<sup>22</sup> The doctoral thesis I published in 1993 and my book, *Anti-Monopoly Issues in Mergers and Acquisitions*, published in 1996, are important references on this topic. Some of my representative articles include 'The Framework of China's Anti-Monopoly Law', 'Merger Control in the Federal Republic of Germany', 'Merger Control in the United States and its New Developments', 'Effective Competition – China's Competition Policy and the Model Anti-Monopoly Law', and 'Comment on Concentrations of Undertakings Under the Anti-Monopoly Law of the People's Republic of China', see the list of main publications.

<sup>23</sup> See, for example, Xue Kepeng, 'Administrative Monopoly Should Not Be Adjusted by Anti-Monopoly Law', *Journal of Shanxi Normal University for Philosophy and Social Science Edition* (山西师范大学报社科版), 2001, Issue No.

substantive question is whether China should combat and prohibit administrative monopolies. I think that China is transitioning from a planned economy to a market economy. And in actual economic life, restrictions on competition generally do not come from businesses but from the government. Therefore, the Anti-Monopoly Law should proceed from the realities in China, and we should also be against government abuse of administrative power to restrict competition. I do admit that regulating administrative monopolies is a daunting task because it controls government action. I also do not deny that resolving the problem of prohibiting the abuse of administrative power to restrict competition is not just a matter of enacting an anti-monopoly law. It requires the deepening of economic reform and embarking on political system reform. However, anti-monopoly law has provisions that prohibit government departments from abusing their power to restrict competition. This helps to improve the awareness of government departments and their staff of anti-monopoly law and is conducive to clarifying the debate between legal and illegal conduct, which can help to decrease administrative monopolies. Without rules, there are no standards; without legal provisions prohibiting administrative monopolies, China will not have a legal weapon against administrative monopoly.<sup>24</sup>

### **3.4 Anti-Monopoly Law Should Apply to Monopoly Industries**

During the Anti-Monopoly Law legislative process, industries such as telecommunications, electricity, post, and railways strongly requested exemption from anti-monopoly law on the basis that they are so-called 'natural monopolies'. I remember that the draft Anti-Monopoly Law 2000 still had provisions that exempted these industries. Later on, due to the strong protest of scholars who participated in the legislative process, the draft Anti-Monopoly Law removed the provisions that explicitly exempted these industries. However, the draft submitted by the State Council to the Standing Committee in June 2006 provided that, regarding the monopoly conduct regulated by the Anti-Monopoly Law: 'relevant

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pp. 27–32; Yang Shibing and Xu Yanyan, 'Questioning the Regulation on Administrative Monopoly in Anti-Monopoly Law', *West Anhui University News* (《皖西学院学报》), 2002, Issue No. 3.

<sup>24</sup> My articles, 'The Legal Regulation of Administrative Restrictions on Competition', 'Government Behaviour in Anti-Monopoly Law', and 'Reflections on the Problem of Administrative Monopoly', were set out for this idea; see the list of main publications.

laws and regulations should be investigated and handled by the relevant government department or regulatory authority according to those laws'.<sup>25</sup>

On many occasions I have stated that jurisdiction over the competition-restricting conduct of regulated industries should be given to the anti-monopoly enforcement authority. There are two main reasons. First, domestic and international experience has shown that, in a disagreement between a regulated business and its competitors or consumers, regulatory authorities are always biased towards the regulated business. In China, regulated businesses are mostly state-owned monopolies and the phenomenon of regulators using their administrative power to shelter incumbent monopolists is not uncommon. Secondly, industries that are important to the national economy and people's livelihood, such as telecommunications, electricity, post, railway, oil, banking, insurance, and securities, have established competent authorities or regulatory authorities. If these authorities each applied sectoral regulation to deal with restriction of competition cases, not only is each authority acting on its own, thus lowering the efficiency of anti-monopoly law enforcement, but it will also be impossible to establish a unified market competition order in China.<sup>26</sup>

I am very pleased that these views have been recognized by the legislative bodies. As one can imagine, if the Anti-Monopoly Law were as per the draft that the State Council submitted to the Standing Committee, the enforcement of the Anti-Monopoly Law would not have involved big state-owned enterprises and there would have not been an investigation into China Telecom and China Unicom, two large state-owned enterprises in the broadband Internet market, for alleged monopoly conduct.<sup>27</sup>

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<sup>25</sup> Fortunately, this provision of the draft Anti-Monopoly Law was removed by the Standing Committee during its three readings. If that provision were in force, the anti-monopoly enforcement authorities would not have jurisdiction over the competition-restricting conduct of regulated industries.

<sup>26</sup> I have authored many works on these views, for example, 'Regulation of Abuse of Dominance by Public Enterprises', 'Market Access of the Non-Public Economy and Anti-Monopoly Law', 'Legal Proposals for the Reform of Monopoly Industries', and 'The Relationship Between Anti-Monopoly Enforcement Agencies and Industry Regulators'; see the list of main publications.

<sup>27</sup> See the video 'NDRC Investigates the Broadband Monopoly Problem of China Telecom and China Unicom', 12:28, 9 November 2011, 'News 30' (新闻 30分), available at: <http://www.sina.com.cn>.

### **3.5 China Should Establish a Unified, Independent and Powerful Anti-Monopoly Enforcement Authority**

One of the issues that could not be avoided during the Anti-Monopoly Law legislative process was which kind of authority should enforce the Anti-Monopoly Law. Prior to the promulgation of the Anti-Monopoly Law, there were already three authorities that enforced laws and regulations relating to anti-monopoly law in China, that is, the National Development and Reform Commission (NDRC), the SAIC, and the MOFCOM.<sup>28</sup> Therefore the issue of which authority was to have the power to enforce the Anti-Monopoly Law was a very sensitive one. To avoid offending the government departments, some scholars were very secretive on this topic. Some government officials, acting in their department's self-interest, insisted that their department should have the enforcement power. Some government officials even publicly stated that having three enforcement authorities was better than having one.

I stressed that the Anti-Monopoly Law should have a unified, independent, and powerful enforcement authority. This authority should be a ministerial-level body directly under the State Council. There are three reasons for this. First, it is due to the nature of anti-monopoly law. Anti-monopoly law generally regulates competition-restricting conduct that has a strong impact on market competition, including government departments abusing power to restrict competition. If the anti-monopoly enforcement agency does not have sufficient authority and independence, its ruling will very easily be influenced by other government departments and changes in government industrial policy. Secondly, having three pillars of administrative enforcement will not only result in a waste of enforcement resources, but there will also be unavoidable conflicts between them. In particular, even though the enforcement responsibilities of the NDRC and the SAIC are separately to investigate price-related and non-price-related cases, if there is a case that relates to both price and

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<sup>28</sup> The NDRC enforces the Price Law, which was promulgated in 1997. Article 14 of the Price Law prohibits business operators from 'colluding to manipulate the market price'. The SAIC is the enforcement authority for the Law Against Unfair Competition, which was promulgated in 1993. This law prohibits a lot of competition-restricting conduct, including government departments abusing administrative power to restrict competition. In 2006, six agencies, including the MOFCOM, published the 'Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors', which includes provisions for anti-monopoly review. Therefore the MOFCOM is also an anti-monopoly enforcement agency.

non-price-related matters, the division of enforcement powers between these two authorities cannot be very clear. This point can be illustrated by the instances of non-coordination of the activities of the three enforcement authorities after the promulgation of the Anti-Monopoly Law. Thirdly, even though Article 9 of the Anti-Monopoly Law provides that the State Council will establish an Anti-Monopoly Commission that is responsible for leading, organizing, and coordinating the work of the Anti-Monopoly Law, as the members of the Anti-Monopoly Commission are mostly leaders of ministries that implement national industrial policy and many members do not have sufficient knowledge of competition policy, it will be very hard for this Commission to become an authority that promotes national competition policy. Therefore, to this day, I believe that, to improve the prospects of anti-monopoly law enforcement in China, we should merge the three anti-monopoly enforcement authorities into one authority and form an independent and powerful ministerial-level authority that is directly under the State Council.<sup>29</sup>

#### 4. MY CONTRIBUTIONS AND ACADEMIC ACTIVITIES

As a Chinese scholar in the field of anti-monopoly law, my main mission is, through my research and academic activities, to promote the formulation and implementation of the Anti-Monopoly Law in China, increase society's awareness of competition, and enhance China's competition culture.

##### 4.1 My Publications

Since I went to Germany in 1988, my main research efforts have been focused on competition law, and in particular anti-monopoly law. In this field, I have published 18 books so far, among them seven sole authored, one co-authored, and 10 edited. I have published more than 230 articles in Chinese, English, and German.<sup>30</sup>

Some of these books and papers have been awarded prizes, for example the book *Anti-Monopoly Issues in Mergers and Acquisitions* was awarded the second prize in the Qian Duansheng Legal Research

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<sup>29</sup> My representative works in this regard include 'Some Issues Surrounding the Anti-Monopoly Enforcement Authority in China', 'Problems of Multiple Anti-Monopoly Enforcement Agencies', and 'Comment on the Anti-Monopoly Law of the People's Republic of China'; see the list of main publications.

<sup>30</sup> See the list of main publications.

Achievement Award in 2008;<sup>31</sup> the book *EU Competition Law* was awarded the second prize in the Chinese Academy of Social Sciences Outstanding Achievement Award in 2004; the textbook *Competition Law* was awarded the first prize in the Ministry of Justice National Legal Achievements Award in 2009; and the article ‘Legal Issues Related to the Abuse of Intellectual Property Rights to Restrict Competition’ was awarded the first prize in the Qian Duansheng Legal Research Achievement Award in 2012. Here I would like to stress that these awards should be deemed not only as social recognition for my contribution, but also as the social recognition for the importance of anti-monopoly law in Chinese legal systems.

My second collection of essays, titled *Wang Xiaoye on the Antitrust Law*, garnered high acclaim from academics. Professor Wang Xianlin pointed out that

This book is the product of hard work and wisdom. It is a classic and epitomizes research in the field of Chinese anti-monopoly law in the first 10 years of this new century. It is also the record and evidence of the continual maturation of the Anti-Monopoly Law. Not only does it represent the author’s individual research achievements, it also represents the level of China’s anti-monopoly law research.<sup>32</sup>

Professor Wang Jian noted that the book is

a comprehensive and in-depth study of the theory and practice of anti-monopoly law. It is an outstanding representative work of the past 10 years of research on China’s anti-monopoly law. This book details the major theoretical issues and various debates during the Anti-Monopoly Law legislative process. It also pays close attention to the problems associated with the implementation of the Anti-Monopoly Law. This work also reflects a scholar’s academic integrity, moral conscience, and sense of social responsibility.<sup>33</sup>

My research has also attracted some good international reviews. When I was applying to be a Fulbright Scholar in 2005, Professor John O. Haley of the Washington University in St Louis recommended, ‘Dr Wang is without question the leading scholar on the subject in China today and a

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<sup>31</sup> The ‘Qian Duansheng Legal Research Achievement Award’ is one of the most prestigious awards in the Chinese legal community.

<sup>32</sup> See Wang Xianlin, ‘The Perfect Combination of Local Awareness and International Perspective – A Review of “Wang Xiaoye on Antitrust Law”’, *China Social Science News* (《中国社会科学报》), 5 August 2010.

<sup>33</sup> See Wang Jian, ‘A Classic of Anti-Monopoly Research – Reading “Wang Xiaoye on Antitrust Law”’, *Legal Daily* (《法制日报》), 4 August 2010.

moving force behind efforts to enact a strong Chinese competition law.' Professor Josef Drexl in Germany said:

Professor Wang is the leading academic expert in competition law in the People's Republic of China. She is advising the Chinese government both in the preparation of a Chinese competition law act and on work of the WTO on the interaction between trade and competition policy. Her affiliation to the Chinese Academy of Social Sciences as a senior research fellow and to the Chinese National Association for Economic Law as a vice-president underlines her status as one of the top legal experts in China. Professor Wang has published extensively in the field of competition law. Her German doctoral thesis of 1993, which was supervised by one of the leading German competition law scholars after World War II, Ernst-Joachim Mestmäcker, is probably one of the first publications ever that looked at the problems of monopolies and competition in China.

He said also, 'Professor Wang is the academic driving force behind the adoption of a Chinese competition law. She can be considered a true expert on foreign, especially European, competition law.'

#### **4.2 My Academic Activities-Related Anti-Monopoly Law**

Along with the legislation and enforcement of China's Anti-Monopoly Law, I have been invited to participate in many domestic and foreign social and academic groups. In China, I established the Competition Law Centre of the Institute of International Law, CASS, and have been elected Vice-President of the Chinese Society of Economic Law. During the MOFCOM's activities regarding the new round of multilateral trade negotiations in the Doha Development Agenda, I was appointed to be the Head of the Trade and Competition Issues Negotiation Expert Advisory Group in China. During the Anti-Monopoly Law legislative process, I served as a consultant to the State Council (2004–2006) and NPC (2006–2007). After the Anti-Monopoly Law came into effect, I was appointed as a member of the Expert Advisory Group to the Anti-Monopoly Commission of the State Council, which was formed in 2010.

Internationally, in 2003 I was invited to participate in the Academic Society for Competition Law founded by Professor Josef Drexl in Munich, and served as member on the Executive Board.<sup>34</sup> In 2005 I was invited to participate in the Asian Competition Forum founded by Professor Mark Williams, and served as member on Executive Board.<sup>35</sup>

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<sup>34</sup> See <http://www.ascola.org>.

<sup>35</sup> See <http://www.asiancompetitionforum.org>.

In 2007 I was selected to be a member of the International Advisory Committee of the CUTS Centre for Competition, Investment, and Economic Regulation,<sup>36</sup> and in 2010 selected as an International Advisor to the American Antitrust Institute and listed as one of the Top Female Antitrust Economics and Law Professors by the 'Antitrust & Competition Policy Blog'.<sup>37</sup>

Due to my contribution to and direct participation in the Anti-Monopoly Law legislation, in addition to over 200 lectures to various domestic institutions, I have received also many invitations from international forums. I have been to more than 20 countries in Asia, Europe, North America, South America, and Australasia. I have been to Harvard University, Washington University in St Louis, New York University, Columbia University, Seoul National University, University of Tokyo, Waseda University, Kobe University, University of Melbourne, University of Nottingham, University of Glasgow, and many others. I have also been to the Max Planck Institute, the US Department of Justice, the American Bar Association, the International Bar Association, Chatham House, the Korea Fair Trade Commission, the Japan Fair Trade Commission, the Vietnamese Economic Research Institute, and many other government authorities and internationally renowned organizations. I have given more than 100 lectures on Chinese economic law and competition law, in English and German, and have had many unforgettable experiences.

The most memorable of these lectures was at the seminar on 23 May 2006 at Harvard University. The East Asian Legal Studies Program at Harvard Law School and Chicago-Kent College of Law had jointly organized the roundtable discussion. I was the keynote speaker, the host was Professor William Alford, Vice-Dean of Harvard Law School, and the three other participants at the roundtable were Professor David Gerber and Professor Sungjoon Cho from Chicago-Kent Law School, and Professor Gary Jefferson from Brandeis University. As the audience had asked so many questions, and the discussion was so enthusiastic, this seminar went overtime and lasted three and a half hours. After the discussion Professor Alford excitedly told me that, in terms of knowledge, language, or manner of my lecture and discussion, I was one of the best Chinese scholars that he had received at Harvard Law School to

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<sup>36</sup> See [http://www.cuts-ccier.org/Advisors\\_Index.htm](http://www.cuts-ccier.org/Advisors_Index.htm).

<sup>37</sup> See [http://lawprofessors.typepad.com/antitrustprof\\_blog/2010/05/best-of-the-best-top-female-antitrust-economics-and-law-professors.html](http://lawprofessors.typepad.com/antitrustprof_blog/2010/05/best-of-the-best-top-female-antitrust-economics-and-law-professors.html).

date. Professor Gerber happily told me that, due to my experience at Harvard and the success of the lecture and discussion, I could aim for the world!

Another conference that was particularly unforgettable for me was 'Unleashing the Tiger? Competition Law in China and Hong Kong', held by Melbourne Law School on 3 October 2008. Two days before the start of this conference, the Australian Competition and Consumer Commission (ACCC) approved the US\$120 billion proposed merger between BHP Billiton and Rio Tinto. ACCC Chairman Graeme Samuel said in a statement: 'While significant concerns were raised by interested parties in Australia and overseas, the ACCC found that the proposed acquisition would not be likely to substantially lessen competition in any relevant market.'<sup>38</sup> As China is a major customer of these two companies, this merger would have adverse effects on Chinese enterprises that import iron ore. At the conference I flatly opposed the ACCC approval of the proposed merger. Afterwards, I reiterated my view in an interview with the Australian Broadcasting Company. The overseas Chinese newspaper *Sing Tao Daily* and English media such as Reuters also reported on my views. My basic view was that, from the perspective of maintaining competition in the global iron ore market, there was a serious problem with the ACCC's approval of the proposed merger. As the proposed merger should be notified to the Chinese anti-monopoly enforcement authority, I stated that the Chinese anti-monopoly enforcement authority should refuse to approve this merger, even though the Australian government had given it the green light.

## 5. ACKNOWLEDGEMENTS

In addition to my hard work, the opportunities, circumstances, and generous support of many mentors and friends have been important reasons why I have been able to accomplish my academic achievements today. Therefore, at the end of this preface, I would like to express my sincere gratitude to some people.

My academic career began when China embarked on economic reforms in 1978. Together with thousands upon thousands of high school graduates during the time of Cultural Revolution, I must first thank the

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<sup>38</sup> Australian Competition and Consumer Commission Media Release, 'ACCC Not to Oppose BHP Billiton's Proposed Acquisition of Rio Tinto', 1 October 2008, available at: <http://www.accc.gov.au/media-release/accc-not-to-oppose-bhp-billtons-proposed-acquisition-of-rio-tinto>.

chief architect of China's economic reform and opening up policy, Deng Xiaoping. Not only did Deng Xiaoping lead China out of the Cultural Revolution lasting as long as 10 years, which had resulted in deep and broad political and economic crisis; through the opening of doors to schools again, he led China also out of the deep and broad educational crisis caused by the Cultural Revolution. I personally benefited greatly from China's economic reform and opening up policies. Not only did I have the opportunity to attend university after 12 years of academic abandonment, but in 1988 I was also fortunate to have the opportunity to study abroad in Germany. With the formulation and implementation of the Anti-Monopoly Law, I had opportunities to participate in many international competition law symposiums. In a word, had it not been for Deng Xiaoping's implementation of economic reform and opening up, I, along with thousands upon thousands of high school graduates at that worse time, would not be where we are today.

Looking back on where I started my academic career, I am extremely grateful to two Professors at the Max Planck Institute for Comparative Private Law in Hamburg, Ernst-Joachim Mestmäcker and Frank Münzel. Professor Mestmäcker was my doctoral supervisor and he had a major impact on the direction of my lifetime academic research. Professor Münzel is one of the few 'China hands' in Germany. He has dedicated most of his life to German-Sino legal exchange. With his help, in 1988 I received funding from the German institution, Gesellschaft 'Internationale Studentenfreunde' e.V., which gave me the opportunity to study for a doctorate in Germany.

Many of my research papers were completed in the libraries of the Max Planck Institute. I particularly have to thank three Directors of the Max Planck Institute. They are Professor Josef Drexler, Director of the Institute for Intellectual Property and Competition Law; Professor Jürgen Basedow, Director of the Institute for Private Law; and Professor Bernd Baron von Maydell, former Director of the Institute for Social Law. These three Directors extended many invitations to me to go to Germany to conduct research and strongly supported and enthusiastically helped with my work. I have always believed that had these three Directors not provided great support, the Max Planck Institute would not have provided me with the facilities, and in particular the libraries, to conduct my research, and I could not have accomplished the academic achievements I have today.

I must thank former Chairman of the ACCC, Professor Allan Fels. I met Allan in 1998. At that time, he was an expert for the OECD and participated in discussions during the Anti-Monopoly Law legislative process. I am particularly moved that Allan has always been passionately

concerned with the development of the Anti-Monopoly Law and has enthusiastically offered suggestions on its effective implementation. At his suggestion and with the support of the Australia and New Zealand School of Government, Allan, Jessica Su, and I established the China Competition Research Centre and began publishing the *China Competition Bulletin* from August 2010.<sup>39</sup> Allan has also strongly supported the publication of this collection of essays and he enthusiastically agreed to author the foreword for this book.

I must thank also Professor David Gerber of the Chicago-Kent College of Law. I met David in 1999 at an International Cartel Conference held by the German Bundeskartellamt, and in 2005 I chose David to be my collaborator on the Fulbright programme. I cannot forget the 10 months that I spent in Chicago. During this time he helped me greatly with my antitrust law research and English. We met nearly every Wednesday afternoon to discuss the antitrust laws of China and the United States. He helped me hold a seminar at Harvard Law School on Chinese anti-monopoly law in May 2006. As documented in writing of the friendship between us, I was honoured to author the preambles to the Chinese translation of his two books, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (2001) and *Global Competition: Law, Markets, and Globalization* (2010).

Having engaged in anti-monopoly law research for over 20 years, I have met countless mentors and friends. Among them I must mention Caron Beaton-Wells and Deborah Healy in Australia; Rainer Adam, Ulf Böge, Adolf Dietz, Ulrich Immenga, Hanns Ullrich, Dieter Wolf, and Daniel Zimmer in Germany; Mark Williams in Hong Kong; Enrico Camilleri in Italy; Toshifumi Hienuki, Hiroshi Iyori, Mitsuo Matsushita, Toshiaki Takigawa, and Kazuhiro Tsuchida in Japan; Ohseung Kwon in Korea; Ariel Ezrachi and Mark Furse in the UK; and Stuart Chemtob, Yee-Wah Chin, Eleanor Fox, John Haley, Steve Harris, and William Kovacic in the US. In addition, I would like to thank Adrian Emch, David Stallibrass, and Ninette Dodoo, who are all very active in the Chinese anti-monopoly law field. I am very grateful to those mentioned above for their help with and support for my research in many ways, giving their time, energy, and even funding. In relation to funding, I am particularly grateful to the Friedrich Naumann Foundation, which has continued to support my academic research and international symposiums for over a decade.

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<sup>39</sup> See <http://www.anzsog.edu.au/research/publications/the-china-competition-bulletin>.

The foundation and soil of my anti-monopoly research is in China. Looking back on my academic career, I am grateful to all of my colleagues, and students, who have supported and encouraged my research in China. In particular, I would like to thank Professor Wang Jiafu of the Institute of Law, CASS. It was Professor Wang who accepted me into the Institute of Law to work and supported my study abroad in Germany. I must also express my gratitude to some Chinese Professors, in particular Fang Xiaomin, Huang Yong, Shi Jianzhong, Wang Jian, Wang Xianlin, Xu Shiyong, and Zheng Pengcheng. They are my peers and made great efforts to promote competition culture in China. I also thank my large number of postdoctorate and doctorate students, especially Han Wei, Su Hua, and Zhu Zhongliang. They have devoted a lot of time and effort to my research. I also thank Wendy Ng of the University of Melbourne. In 2012 she visited and lived in Beijing for over half a year to study the Anti-Monopoly Law for her PhD and has also worked hard for my research work. I am in particular grateful to her for her contribution to this English-language book.

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We conducted extensive consultations with our advisers and recognize that you are regarded as a leading scholar and renowned internationally in every country in the world for your contribution to the study of competition law in China. You will, I am sure, be aware that developments in Chinese competition law attract significant interest and we believe that your work will be essential reading for many scholars throughout the world keen to understand the Chinese legal system.

Without a doubt, without Edward's kind invitation and tremendous encouragement, I would not have considered publishing this collection of essays in English. I would also like to thank the Chinese National Social Science Foundation for its generous financial support and the Social Sciences Academic Press (China) for the effort to publish this book.

I regard this book as a summary of my 25 years of anti-monopoly law research, but also new beginnings and motivations! I know very well that

learning is like a boundless sea and I cannot stop on the road of my academic research. I still have a long way to walk and there is still much work to be done!

Xiaoye Wang  
Beijing, February 2013