

BID RIGGING, A FAINTLY DISCERNIBLE ENUMERATION UNDER ARTICLE 13 OF THE ANTI-MONOPOLY LAW IN CHINA

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Article 13 of China’s Anti-Monopoly Law (AML) adopted an enumeration methodology to prohibit horizontal agreements, but the items enumerated do not include bid rigging. However, through case analysis, it is found that the National Development and Reform Commission of the P.R.C. penalized business operators that participated in bid rigging, an enumeration known as “fixing or changing the price of commodities,” according to article 13.1(1). Such practice is inappropriate as article 13.1(1) should be regarded as “specific price fixing,” as defined in this Note, which does not cover bid rigging. This penalization neglected the uniqueness of bid rigging as well. In contrast, article 13.1(6), a fallback provision, provides an appropriate legal basis for the AML to regulate bid rigging. Nevertheless, the fallback provision has limited publicity and could not exhibit the guiding function of the AML. Since bid rigging is one of the most serious types of anti-competition agreement, article 13 should be perfected to regulate bid rigging.

I. ISSUES AND QUESTIONS RAISED.....	245
II. BID RIGGING: DEFINITION, FORMS, AND HARM.....	246
III. THE REMOVAL OF BID RIGGING FROM THE DRAFT AML.....	250
IV. BID RIGGING CASES FINED FOR VIOLATING AML ARTICLE 13.1(1).....	253
A. <i>Japanese Automobiles Part Cases</i>	253
B. <i>International RORO Shipping Cases</i>	255
V. REFLECTIONS ON INCORPORATING BID RIGGING INTO AML ARTICLE 13.1(1).....	258
VI. SUGGESTIONS.....	262

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I. ISSUES AND QUESTIONS RAISED

Article 13 of the China Anti-Monopoly Law (AML) prohibits competing business operators from making any monopoly agreements.² Article 13.1 enumerates five types of prohibited horizontal agreements.³ However, a major type of horizontal agreements is missing from the enumerations—bid rigging. Following the five types of prohibited horizontal agreements is an enumeration that serves as a fallback provision. According to the fallback provision, non-enumerated agreements as determined by the AML enforcement agencies are also prohibited.⁴ However, none of the AML enforcement agencies has so far exercised the fallback provision, or other means, to define bid rigging as a type of prohibited monopoly agreement. Therefore, bid rigging is not explicitly covered by article 13 of the AML.

However, through theoretical analysis, many Chinese academics agree that bid rigging is a horizontal monopoly agreement that should be prohibited by the AML, China's Anti-Unfair Competition Law article 27, Criminal Law article 223, and Bidding Law.⁵ In this context, Chinese academics have conducted theoretical

² Zhonghua Renmin Gongheguo Fanlongduanfa (中华人民共和国反垄断法) [Anti-Monopoly Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), *translated in* Lawinfochina, <http://www.lawinfochina.com/display.aspx?lib=law&id=0&CGid=96789> [<http://perma.cc/A4S9-J78S>] [hereinafter AML].

³ Enumerations under AML article 13.1:

- (1) Fixing or changing the price of commodities;
- (2) Restricting the production quantity or sales volume of commodities;
- (3) Dividing the sales market or the raw material supply market;
- (4) Restricting the purchase of new technology or new facilities or the development of new technology or new products;
- (5) Jointly boycotting transactions; or
- (6) Other monopoly agreements as determined by the Anti-Monopoly Law Enforcement Agency under the State Council.

Id. art. 13.

⁴ *Id.*

⁵ Zhonghua Renmin Gongheguo Fanbuzhengdangjingzhengfa (中华人民共和国反不正当竞争法) [Anti-Unfair Competition Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 2, 1993, effective Dec. 1, 1993), <http://www.lawinfochina.com/Display.aspx?lib=law&CGid=6359> [<http://perma.cc/3NCJ-28A7>]; Zhonghua Renmin Gongheguo Xingfa (1997 Xiuding) (中华人民共和国刑法(1997修订)) [Criminal Law of the People's Republic of China (1997 Revision)] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 1, 1997, effective Dec. 25,

research related to the coordination of the AML and other laws in regulating bid rigging or perfecting the AML in bid rigging regulations.⁶ These studies adopted a theoretical, rather than practical, approach as the AML bid-rigging case decisions were not published until the cases involving Japanese automobiles and International RORO shipping were published in recent years. These cases provided a new foundation for the study of bid rigging regulation by the AML. Although bid rigging is not explicitly covered by article 13 of the AML, case analysis reveals that law enforcement agencies “borrowed” one of the article’s enumerations, the provisions on fixing or changing the price of commodities (i.e., article 13.1(1)), to penalize bid riggers. Based on these decisions, this Note addresses 1) the appropriateness of penalizing bid riggers using article 13.1(1); 2) the appropriateness of the article 13.1(6) fallback provision as an alternative; and 3) whether bid rigging should be added to article 13 as one of its enumerations.

II. BID RIGGING: DEFINITION, FORMS, AND HARM

From time to time, both public institutions and private enterprises need to purchase goods and services from the market for their operations. The market is often filled with many suppliers of

1999), [http://www.lawinfochina.com/display.aspx?id=354&lib=law&SearchKeyword=criminal%20law&SearchCKeyword=\[http://perma.cc/JK29-XSQQ\]](http://www.lawinfochina.com/display.aspx?id=354&lib=law&SearchKeyword=criminal%20law&SearchCKeyword=[http://perma.cc/JK29-XSQQ]); Zhonghua Renmin Gongheguo Toubiao Zhaobiaofa (中华人民共和国招标投标法) [Bidding Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 30, 1999, effective Jan. 1, 2000), [http://www.lawinfochina.com/display.aspx?id=1014&lib=law&SearchKeyword=The%20Bidding%20Law&SearchCKeyword=\[http://perma.cc/CR34-7F9C\]](http://www.lawinfochina.com/display.aspx?id=1014&lib=law&SearchKeyword=The%20Bidding%20Law&SearchCKeyword=[http://perma.cc/CR34-7F9C]).

⁶ See Song Huihang (宋会行), Chuantong Zhaotoubiao de Fanlongduanfa Guizhi (串通招标投标的反垄断法规制) [Regulation of Bid Rigging by the Anti-Monopoly Law] (May 2014) (Master’s degree thesis, Kunming University of Science and Technology) (on file with author) (discussing theoretical research related to bid rigging); Jiang Senmiao & Song Huihang (姜森淼 & 宋会行), Lun Chuantong Zhaotoubiao Fanlongduanfa Guizhi de Wanshan (论串通投标反垄法规制的完善) [To Improve the Regulation of Bid Rigging by the Anti-Monopoly Law], 2 JINGJI SHIYE (经济视野) [ECON. VISION] 463, 463–464 (2013) (discussing research related to AML); Wu Jinwei (武晋伟), Chuantong Zhaotoubiao Falv Wenti Yanjiu (串通招标投标法律问题研究) [Research on the Legal Issues of Bid-Rigging] (Apr. 2006) (Ph.D. thesis, Central South University) (on file with author) (discussing research related to bid rigging); Luo Linlin (罗琳琳), Zhengfu Caigouzhong Chuantong Toubiao Falv Guizhi Yanjiu (政府采购中串通投标法规制研究) [Study on the Legal Regulation Relating to Bid-Rigging in Government Procurement] (May 2013) (Master’s degree thesis, Zhengzhou University) (on file with author) (discussing research related to bid rigging).

these goods and services. The price of goods and services varies among suppliers. Instead of reaching out to each supplier separately to ask for product information and quotes, the buyer may invite suppliers to bid on a procurement contract. The bidding process is hidden and competitive in nature. All interested suppliers could submit their quotes to the buyer within a certain period of time. After receiving all of the quotes, the buyer will assign the contract to the winner. During the bidding process, each bidder works independently and is not supposed to know who else is participating, not to mention the quotes of its competitors. Bidders tend to lower their quote as much as possible to increase the chance of being selected by the buyer. This process brings economic efficiency to the buyer, as the buyer can obtain supplies at the lowest cost.

Bidders understand the rules of the game well. They know that even if they win the contract, part of the profit is dissipated during the competition process and goes to the buyer's pocket. Therefore, bidders have a motive for colluding and engaging in horizontal bid rigging, or simply bid rigging, to avoid the dissipation of profit.⁷ According to the Organisation for Economic Co-operation and Development (OECD), bid rigging occurs when "businesses, that would otherwise be expected to compete, secretly conspire to raise prices or lower the quality of goods or services for purchasers who wish to acquire products or services through a bidding process."⁸ Bid rigging exists in four major forms: cover bidding, bid suppression, bid rotation, and market allocation.⁹

Cover Bidding: Colluding bidders first select a winning bidder among themselves. The rest submit quotes slightly higher, or even unreasonably higher, than that of the predetermined winning bidder. Alternatively, those predetermined losing bidders will deliberately include unacceptable terms in their bid to avoid being chosen by the buyer. By doing so, bidders can create the appearance

⁷ Specifically, bid rigging can be classified into horizontal bid rigging and vertical bid rigging. The former is bid rigging formed between bidders, while the latter is formed between the buyer and bidders. As this Note only concerns horizontal bid rigging, the term "bid rigging" is used interchangeably with "horizontal bid rigging."

⁸ ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT [OECD], GUIDELINES FOR FIGHTING BID RIGGING IN PUBLIC PROCUREMENT 1–2 (2009), <http://www.oecd.org/competition/cartels/42851044.pdf> [<http://perma.cc/J8UN-XY4N>].

⁹ *Id.*

of competition and “cover” their intent to lead the buyer to choose their predetermined winning bidder.¹⁰

Bid Suppression: Colluding bidders first select a winning bidder among themselves. Then, one or more of the predetermined losing bidders will inhibit themselves from participating in the bid, or withdraw their previously submitted bids. By doing so, the predetermined losing bidders will have no chance to be selected by the buyer.¹¹

Bid Rotation: Colluding bidders agree to take turns being the predetermined winner over a series of bids. The ways in which bid-rotation agreements are implemented can vary.¹²

Market Allocation: Colluding bidders determine who the winning bidder will be based on geographic areas or buyers.¹³ For example, imagine two colluding bidders, X and Y, in a market. They made a market allocation agreement in which X is the predetermined winner in the south while Y is the winner in the north. Whenever there is a buyer from the south inviting bidders to bid, Y will help X win by submitting a cover-bid or suppressing himself from bidding.

When forming one of the above bid rigging agreements, colluding bid riggers often make a subcontract arrangement.¹⁴ Under the arrangement, once the predetermined winning bidder successfully obtains the contract from the buyer, the winner will subcontract the project to helpful (i.e., colluding) losing bidders. This explains why some firms are willing to play the role of predetermined losing bidders in the first place—all the colluding bidders could share the profit from the procurement contract under a subcontract agreement.

Bid-rigging is considered one of the most severe type of anti-competitive agreements. In 1998, the OECD first introduced the term “hardcore cartel.” In simple terms, it refers to agreements formed between competitors involving any one of the following behaviors:

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Preventing and Detecting Bid Rigging, Price Fixing, and Market Allocation in Post-disaster Rebuilding projects: An Antitrust Primer for Agents and Procurement Officials*, U.S. DEP'T OF JUSTICE (Jun. 25, 2015), <https://www.justice.gov/atr/preventing-and-detecting-bid-rigging-price-fixing-and-market-allocation-post-disaster-rebuilding> [http://perma.cc/C6EZ-HX3S].

price fixing, market allocation, output restriction, and bid rigging.¹⁵ According to the OECD, a hardcore cartel represents the “most egregious violations of competition law.”¹⁶ As bid rigging is one of the most serious anti-competitive behaviors, many countries impose stringent regulations. In the United States, section 1 of the Sherman Antitrust Act prohibits agreements in restraint of trade. Section 1 is a general provision with enumerated examples of prohibited agreements. Bid rigging falls under section 1 and is considered as a *per se* violation of the Sherman Act.¹⁷ In the European Union, article 101 of the Treaty on the Functioning of the European Union (TFEU) has a general rule that prohibits anti-competitive agreements. Some examples of prohibited agreements are provided in the article. Any agreements that violate the general rule, even those not listed as an example, are covered by the article. From case decisions, it is clear that bid rigging violates the general rule and is regulated by the article in the European Union.¹⁸ In the United Kingdom, bid rigging is considered as a Cartel Offence under the Enterprise Act 2002, of which section 188(5) defines “Bid rigging arrangements.”¹⁹ In Canada, bid rigging is considered as a specific offence in relation to competition under the Competition Act section 47(2). In Hong Kong, bid rigging is interpreted as “serious anti-competitive conduct” under Competition Ordinance section 2. In addition to the above, bid rigging implicates criminal penalties in United States, United Kingdom, and Canada.²⁰ Overall, bid rigging is considered serious anti-competitive behavior internationally. Many countries’ competition laws have either adopted a general provision that covers and regulates bid rigging, enumerated bid rigging as an example of prohibited agreements, or dedicated a separate section to regulate bid

¹⁵ OECD, RECOMMENDATION OF THE COUNCIL CONCERNING EFFECTIVE ACTION AGAINST HARD CORE CARTELS [C(98)35/FINAL] 3 (1998).

¹⁶ *Id.* at 2.

¹⁷ U.S. DEP’T OF JUSTICE, *supra* note 14.

¹⁸ Press Release, European Comm’n, Antitrust: Commission Fines Suppliers of Optical Disc Drives €116 Million for Cartel, (Oct. 21, 2015), http://europa.eu/rapid/press-release_IP-15-5885_en.pdf [<http://perma.cc/T6AA-EW26>].

¹⁹ Enterprise Act, 2002, c. 40, § 188(5) (U.K.), <http://www.legislation.gov.uk/ukpga/2002/40/part/6> [<http://perma.cc/6A3W-M4Z5>].

²⁰ U.S. DEP’T OF JUSTICE, *supra* note 14; Enterprise Act, 2002, c. 40 (U.K.), <http://www.legislation.gov.uk/ukpga/2002/40/part/6> [<http://perma.cc/6A3W-M4Z5>]; Competition Act, R.S.C. 1985, c. C-34, art. 47(2) (Can.), <http://laws-lois.justice.gc.ca/PDF/C-34.pdf> [<https://perma.cc/W9R7-KNRG>].

rigging. Moreover, some nations have taken stringent measures to combat it.

III. THE REMOVAL OF BID RIGGING FROM THE DRAFT AML

Chinese lawmakers have been aware of the seriousness of bid rigging. On June 24, 2006, during the 22nd Session of the Tenth National People's Congress Standing Committee, the State Council of the People's Republic of China submitted the Draft Anti-Monopoly Law (Draft) to the NPC Standing Committee for its first deliberation.²¹ At that time, under the Draft, bid rigging was not only included, but also entitled to stricter regulations than other horizontal monopoly agreements.²²

Firstly, article 7 of the Draft, like article 13 of the AML that was eventually implemented in 2008, enumerated horizontal agreements that were prohibited.²³ Although the wording adopted in the two articles are slightly different, the content of the five prohibited agreements enumerated is the same. Also, both articles include a fallback provision. The major difference between Draft article 7 and AML article 13 is that the latter includes a simple definition of monopoly agreement. In the Draft, a similar definition could be found separately in article 3.2.

Secondly, the Draft contains article 9, separate from article 7, to prohibit bid rigging.²⁴ Draft article 9 prohibits business operators from bid rigging, as well as eliminating or restraining competition

²¹ Under the Law on Legislation of the P.R.C., a bill that has been put on the agenda of the Standing Committee session shall in general be deliberated three times in the current session of the Standing Committee before being voted on. See *Zhonghua Renmin Gongheguo Lifafa* (中华人民共和国立法法) [Law on Legislation] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 2000, effective July 1, 2000), art. 27 <http://www.lawinfochina.com/display.aspx?id=386&lib=law&SearchKeyword=law%20on%20legislation&SearchCKeyword=> [<https://perma.cc/347G-FF26>] (reflecting the first deliberation).

²² Anti-Monopoly Law of the People's Republic of China (draft) (June 2006 version for the submission to the 22th Session of the Tenth National Standing Comm. Nat'l People's Cong.) *translated in* FANLONGDUAN LIFA REDIAN WENTI (反垄断立法热点问题) [HOT SPOTS OF CHINESE ANTIMONOPOLY LEGISLATION] App'x 2 (Wang Xiaoye (王晓晔) ed., 2007). [hereinafter Draft (P.R.C.)].

²³ Draft (P.R.C.), *supra* note 22, art. 7.

²⁴ Draft (P.R.C.), *supra* note 22, art. 9.

during the bidding process. In other words, it prohibits horizontal bid rigging, rather than vertical bid rigging.

Thirdly, article 10 of the Draft states that “efficient” agreements could be exempted from the prohibition.²⁵ Any agreements that satisfy the exemption criteria listed in Draft article 10 are not subject to Draft article 7, meaning that they are not considered horizontal monopoly agreements. Article 15 of the AML corresponds to article 10 of the Draft.²⁶ Any agreements that satisfy the exemption criteria listed in the AML article 15 are not subject to AML article 13, meaning that they are not considered horizontal monopoly agreements. Although the wordings adopted in the two articles are slightly different, the contents of the exemption criteria are more or less the same as those under Draft article 7. In the Draft, the article 10 exemption is applicable to agreements enumerated in article 7, but not bid rigging regulated by article 9. Therefore, some academics viewed such structuring as a way for legislators to reveal that bid rigging is illegal *per se*.²⁷

During the legislation process, Professor Shi Jianzhong criticized that dedicating a separate and independent article to regulate bid rigging is a waste of legislative resources. Instead, given the fact that bid rigging is a kind of horizontal monopoly agreement, bid rigging could have been integrated into article 7 of the Draft as another enumerated example of prohibited agreements.²⁸ Some countries set up a separate provision to regulate bid rigging because bid rigging is a typical area where a mixed monopoly agreement is likely to be formed. That is, it is possible that horizontal and vertical bid rigging are mixed into one agreement and appear at the same time.²⁹ Therefore, some countries consider it necessary to distinguish bid rigging from horizontal agreement or vertical agreement provisions.

²⁵ Draft (P.R.C.), *supra* note 22, art. 10.

²⁶ Draft (P.R.C.), *supra* note 22, art. 15.

²⁷ FANLONGDUAN LIFA REDIAN WENTI (反垄断立法热点问题) [HOT SPOTS OF CHINESE ANTIMONOPOLY LEGISLATION] App'x 2 (Wang Xiaoye (王晓晔) ed., 2007).

²⁸ Shi Jianzhong (时建中), Shiping Woguo Fanlongduanfa Cao'an Youguan Longduanxieyi de Guiding (试评我国反垄断法草案有关垄断协议的规定) [Comments on the Monopoly Agreement Regulations in the Draft Antimonopoly Law], 16 ZHONGGUO GONGSHANG GUANLI YANJIU (中国工商管理研究) [STUDY ON CHINA ADMIN. FOR INDUS. AND COMMERCE] 32, 33 (2007).

²⁹ *Id.*

After the first deliberation of the Draft, the NPC Legal Committee submitted the Second Reading Draft, Third Reading Draft, and Proposed Draft for Vote to the NPC Standing Committee for its deliberation on June 24, August 24, and August 29, 2007, respectively. On August 30, 2007, the NPC Standing Committee passed the current AML. Throughout the year, in each of the three submissions of the amended draft to the Standing Committee, the Legal Committee made a report and illustrated the major amendments.³⁰ However, the Legal Committee did not mention and explain the amendments made to the Draft article 9 in the three reports. Moreover, the government did not publish the text of the Second Reading Draft, Third Reading Draft, or the Proposed Draft for Vote. Therefore, it is not known when and what amendments were made to the Draft article 9, not to mention the reasons for the amendments. All we know is that article 9 was removed after the first deliberation in the legislative process, as there was no separate provision to prohibit bid rigging in the AML since. Additionally, bid rigging was not added to the enumerations of horizontal monopoly agreements in the AML article 13. It is unlikely that the legislators “forgot” to add bid rigging to article 13 of the AML after removing article 9 from the Draft. One reason that this author could think of to explain the absence of bid rigging in the AML article 13 is that law makers believed that bid rigging was already regulated under article 27 of the Criminal Law as well as the Bidding Law.

³⁰ HU KANGSHENG (胡康生), NAT'L PEOPLE'S CONG. LAW COMM., GUANYU ZHONGHUA RENMIN GONGHEGUO FANLONGDUANFA (CAO'AN) XIUGAI QINGKUANG DE HUIBAO (关于《中华人民共和国反垄断法(草案)》修改情况的汇报) [Report on the Amendment of the Antitrust Law of the People's Republic of China (Draft)] (2007), http://www.npc.gov.cn/npc/zt/2007-06/24/content_1382614.htm [<https://perma.cc/MRV5-PEEC>]; JIANG QIANGUI (蒋黔贵), NAT'L PEOPLE'S CONG. LAW COMM., GUANYU ZHONGHUA RENMIN GONGHEGUO FANLONGDUANFA (CAO'AN ERCI SHENYIGAO) SHENYI JIEGUO DE BAOGAO (关于《中华人民共和国反垄断法(草案二次审议稿)》审议结果的报告) [Report on the Result of Deliberation of the Antitrust Law of the People's Republic of China (Second Reading Draft)] (2007), http://www.npc.gov.cn/wxzl/gongbao/2007-10/09/content_5374669.htm [<https://perma.cc/E4P9-G5PJ>]; YANG JINGYU (杨景宇), NAT'L PEOPLE'S CONG. LAW COMM., GUANYU ZHONGHUA RENMIN GONGHEGUO FANLONGDUANFA (CAO'AN SANCI SHENYIGAO) XIUGAI YIJIAN DE BAOGAO (关于《中华人民共和国反垄断法(草案三次审议稿)》修改意见的报告) [Report on Opinions on Amending the Antitrust Law of the People's Republic of China (Third Reading Draft)] (2007), http://www.npc.gov.cn/wxzl/gongbao/2007-10/09/content_5374668.htm [<https://perma.cc/BQ29-YXQR>].

IV. BID RIGGING CASES FINED FOR VIOLATING AML ARTICLE 13.1(1)

Article 13 of the AML does not enumerate bid rigging as a prohibited monopoly agreement. At the same time, as mentioned above, there are other laws to regulate such anti-competitive conduct. In reality, some bid riggers are penalized based on the violation of one of the article 13 enumerations: *Fixing or changing the price of commodities (i.e. article 13.1(1))*. Below are two recent cases to illustrate its application.

A. Japanese Automobiles Part Cases

On August 15, 2014, the National Development and Reform Commission of the P.R.C. (NDRC) imposed decisions for administrative penalties or exemption of administrative penalties to twelve Japanese automobile parts enterprises.³¹ On August 20, the NDRC published a press release on its webpage and disclosed the cases and decisions.³² On September 18, the NDRC published twelve written decisions online.³³ By analyzing the written decisions, it can be found that eight out of the twelve cases were “bid rigging” cases.³⁴

³¹ The parties in the twelve cases were: Hitachi Automotive Systems Ltd., Denso Corporation, Aisin Industry Co.,Ltd., Mitsubishi Electric Corporation, Mitsuba Corporation, Yazaki Corporation, Furukawa Electric Co.,Ltd., Sumitomo Electric Industries, Ltd., Nachi-Fujikoshi Corporation., NSK Ltd., NTN Corporation, and JTEKT Corporation.

³² Press Release, NDRC Policy Research Office (发改委政策研究室), Riben Shierjia Qiye Shishi Qiche Lingbujian He Zhoucheng Jiage Longduan Bei Guojia Fazhangaigewei Fakuan 12.35 Yiyuan (日本十二家企业实施汽车零部件和轴承价格垄断被国家发展改革委罚款 12.35 亿元) [Twelve Japanese Companies Implemented Price Agreement on Automobile Warts and Were Fined 1.2 Billion Yuan by the NDRC], http://zys.ndrc.gov.cn/xwfb/201408/t20140820_622755.html [<http://perma.cc/9PN6-HBVZ>] (last visited Mar. 1, 2017).

³³ NDRC, Mianchu Xingzheng Chufa Juedingshu Fagaiban Jiajian Chufa Dierhao (免除行政处罚决定书发改办价监处罚[2014] 2号) [Decision on Exemption of Administrative Penalty [2014] No. 2], http://www.sdpc.gov.cn/fzgggz/jgjdyfld/fjgld/201409/t20140918_626086.html [<http://perma.cc/H9NP-8QDH>]; NDRC, Mianchu Xingzheng Chufa Juedingshu Fagaiban Jiajian Chufa (行政处罚决定书发改办价监处罚[2014]3-13号) [Decision for Administrative Penalty [2014] No. 3-13], http://www.sdpc.gov.cn/gzdt/201409/t20140918_626088.html [<http://perma.cc/5LSA-5G9B>].

³⁴ NDRC, Mianchu Xingzheng Chufa Juedingshu Fagaiban Jiajian Chufa Dierhao (免除行政处罚决定书发改办价监处罚[2014] 2号) [Decision on Exemption of Administrative Penalty [2014] No. 2]; NDRC, Mianchu Xingzheng Chufa Juedingshu Fagaiban Jiajian Chufa (行政处罚决定书发改办价监处罚[2014] 3-9号) [Decision for Administrative Penalty [2014] No. 3-9], http://www.sdpc.gov.cn/gzdt/201409/t20140918_626088.html [<http://perma.cc/LDE2-Q437>].

The eight parties in the cases were: Hitachi Automotive Systems Ltd., Denso Corporation, Aisin Industry Co., Ltd., Mitsubishi Electric Corporation, Mitsuba Corporation, Yazaki Corporation, Furukawa Electric Co., Ltd., and Sumitomo Electric Industries, Ltd. According to the written decisions, between the second half of 2000 and early 2010, the eight competing companies repeatedly reached and implemented agreements on the submission of quotes for various automobiles part purchase orders offered by different car manufactures.

A reporter interviewed an NDRC Anti-Monopoly Bureau official for the eight cases.³⁵ The official pointed out that car manufacturers sent Letters of Inquiry to a number of suppliers in order to select automobiles part suppliers for a new car model development. During the selection process, car manufacturers considered multiple factors, such as the prices, technical specifications, and production capacities of the suppliers. As there was minimal difference between the eight companies in terms of the non-price factors, the quotes they submitted became the decisive factor for the car manufacturers to select their suppliers. After receiving the Letters of Inquiry, the eight companies allocated the purchase orders among themselves internally and secretly. The predetermined winning company submitted the lowest quote to the car manufacturers, while the remaining companies submitted higher quotes. Such practice is exactly the cover bidding approach explained in Part II of this Note. In addition, an industry insider pointed out that the practice that Japanese automobiles part companies took turns to win the bid by cover bidding, and this seemed to have become an “industry norm.”³⁶

Although the NDRC did not mention the word “bid rigging,” or any related terms, in either the press release or the eight written decisions, there is no doubt that the eight cases were bid rigging as shown by both the written decisions and the above-mentioned interview. However, since the AML does not expressly prohibit bid

³⁵ Zhou Rui (周锐), *Riqi Longduan Liangzongzui: Chuantong Toubiao Xieshang Zhangjia* (日企垄断“两宗罪”: 串通投标 协商涨价) [*Two Crimes of Japanese Enterprises: Bid Rigging (and) Price Raising*], ZHONGGUO XINWENWANG [CHINANEWS] (Aug. 20, 2014), <http://www.chinanews.com/gn/2014/08-20/6510727.shtml> [<http://perma.cc/P968-CN4A>].

³⁶ Wang Xing (王星), *Rixi Cheqi Hengxianglongduan Xianyi* (日系车企横向垄断嫌疑) [*Japanese Automobile Related Companies Suspected of Horizontal Monopoly*], ZHONGGUO JINGYINGBAO [CHINESE BUS. JOURNAL] (Aug. 18, 2014), http://news.cb.com.cn/html/economy_9_19487_1.html [<http://perma.cc/LJR2-6EEY>].

rigging from competition operators, as stated in the written decisions, the NDRC eventually classified the agreements involved in these cases as ones fixing or changing the prices of automobile parts, which violated the first enumeration of AML article 13.1, "fixing or changing the price of commodities." As the eight companies had violated article 13, they were fined by the NDRC according to article 46.1 of the AML. In total, the NDRC imposed a fine of 831 million Chinese yuan to the eight companies.³⁷

B. International RORO Shipping Cases

RORO cargo refers to wheeled cargo, such as automobiles, construction machinery, and trucks. RORO (cargo) shipping is different from ordinary shipping. Ordinarily, only the parts of automobiles could be loaded onto vessels. The parts would be assembled upon arrival. In contrast, RORO shipping allows the wheeled cargo to roll on and off vessels. Therefore, the RORO ship used in the business is also known as the "roll-on/roll-off" ship.³⁸ The cost of an RORO ship is very high, as it must be built in a huge size to carry more vehicles. At the same time, the use of RORO ships is unilateral. Hence, although the cost barrier to enter into the business is high, the homogeneous nature of the service promotes price competition in the RORO shipping industry. According to a business insider in China, when there is excessive competition, the competing practitioners will increase their profits by forming price alliances and allocating the market.³⁹

On December 28, 2015, the NDRC imposed decisions of administrative penalty and exemption of administrative penalty towards eight international RORO shipping companies. On December 28, the NDRC made a press release on its webpage and

³⁷ NDRC, *supra* note 34.

³⁸ Liu Nan (刘楠), *Bajia Guoji Haiyun Qiye Shishi Jiagelongduan Beifakuan 4 Yiyuan* (八家国际海运企业实施价格垄断被罚款 4 亿元) [*Eight International Shipping Companies were Fined 400 Million Yuan for Implementing Price Monopoly*], YANGGUANG WANG [CHINA NAT'L RADIO] (Dec. 28, 2015), http://finance.cnr.cn/jjgd/20151228/t20151228_520945765.shtml [<http://perma.cc/3QD9-GB2Z>].

³⁹ Liu Yichen (刘祎辰), *Bajia Guoji Haiyun Qiye Jiage Longduan Fagaiwei Kaichu 4.07 Yi Fadan* (8 家国际海运企业价格垄断发改委开出 4.07 亿罚单) [*NDRC Imposed Fine of 407 Million on Eight International Shipping Companies for Price Monopoly*], YANGGUANG WANG [CHINA NAT'L RADIO] (Dec. 28, 2015), http://china.cnr.cn/NewsFeeds/20151228/t20151228_520954892.shtml [<http://perma.cc/2QDS-9V27>].

disclosed the cases and decisions.⁴⁰ On December 31, the NDRC published the eight written decisions online.⁴¹ The parties in the eight cases were NYK Line, Kawasaki Kisen Kaisha, Ltd., Mitsui O.S.K. Lines, Ltd., EUKOR Car Carriers Inc., Wallenius Wilhelmsen Logistics, Compania Sud Americana De Vapores S.A., Eastern Car Liner, Ltd., and Compania Chilena De Navegacion Interoceanica S.A.

According to the written decisions, between 2008 and September 2012, the eight companies repeatedly reached and implemented agreements on the submission of quotes for RORO shipping service (between China and other countries) requested by different RORO cargo suppliers (i.e., the buyer of RORO shipping services). In order to reduce price competition, the parties first made agreements to set the minimum value of quotes that they could submit to buyers. Then, the parties determined who the winning bidder would be based upon assigned shipping routes or buyers. By doing so, the eight companies manipulated RORO shipping prices and reduced competition. From the above, it is clear that bid rigging existed via the presence of cover bidding and market allocation, among other forms. Although both the Japanese automobile part cases and RORO shipping cases are bid rigging cases, there is a significant difference between the press releases. In the automobile cases, the NDRC did not mention any terms related to bid rigging. In contrast, the NDRC highlighted that the RORO shipping cases were instances of bid rigging in the title of the press release.⁴²

However, similar to the automobile cases, the NDRC did not include the term “bid rigging” in the body of the written decisions of

⁴⁰ Press Release, NDRC Policy Research Office (发改委政策研究室), *Bajia Gunzhuang Huowu Guojihaiyun Qiye Chuantong Toubiao Hangwei Beichufa 4.07 Yiyuan* (八家滚装货物国际海运企业串通投标行为被处罚4.07亿元) [Eight International RORO Shipping Companies Were Fined 407 Million Yuan for Bid Rigging], http://zys.ndrc.gov.cn/xwfb/201512/t20151228_768888.html [<http://perma.cc/YQZ2-3MAH>] (last visited Sept. 1, 2016).

⁴¹ NDRC, *Mianchu Xingzheng Chufa Juedingshu* [2015] 1 Hao (免除行政处罚决定书 [2015]1 号) [Decision on Exemption of Administrative Penalty [2015] No. 1]; NDRC, *Mianchu Xingzheng Chufa Juedingshu* [2015] 2-8 hao (免除行政处罚决定书[2015] 2-8 号) [Decision on Exemption of Administrative Penalty [2015] No. 2-8], <http://www.ndrc.gov.cn/zwfwzx/xzcf> [<https://perma.cc/8GBL-RHFD>].

⁴² Press Release, NDRC Policy Research Office (发改委政策研究室), *Bajia Gunzhuang Huowu Guojihaiyun Qiye Chuantong Toubiao Hangwei Beichufa 4.07 Yiyuan* (八家滚装货物国际海运企业串通投标行为被处罚4.07亿元) [Eight International RORO Shipping Companies were Fined 407 Million Yuan for Bid Rigging], http://zys.ndrc.gov.cn/xwfb/201512/t20151228_768888.html [<http://perma.cc/YQZ2-3MAH>] (last visited Sept. 1, 2016).

the RORO shipping cases. One explanation might be that bid rigging was not enumerated in AML article 13. Eventually, the NDRC summarized the RORO shipping companies' conduct as "forming and implementing price quotation agreement" and "allocation of shipping routes and customers." The NDRC decided that the parties had violated the first enumeration, "fixing or changing the price of commodities," and the third enumeration, "dividing the sales market or the raw material supply market," under article 13.1 of the AML.

One possible explanation for the decision is that regardless of the facts, the NDRC views bid rigging as a combination of price fixing and market allocation. There was a contract dispute case in China in 2009 and 2010. In the judgment, the court held that "bid rigging, in fact, is the existence of market allocation and price fixing in a combined form."⁴³ However, as anti-monopoly enforcement agencies are not bound by that court decision, they do not need to adopt this definition of bid rigging. For example, in the Japanese automobile cases, the NDRC did not consider there was a violation of the "dividing the sales market or the raw material supply market" enumeration; the NDRC instead applied article 13.1. For example, as analyzed, this case involved at least two forms of bid rigging, namely cover bidding and market allocation. However, it is not certain whether the NDRC used article 13.1(1) and article 13.1(3) to represent cover bidding and market allocation separately, or whether it used them both to represent market allocation.⁴⁴ In any event, as a result of violating the AML article 13, the eight RORO shipping companies were fined 407.44 million Chinese yuan in total.⁴⁵

⁴³ Zhou Shunlong (周舜隆), *Suzhou Juxing Qingzhijiancai Youxiangongsi Su Nantong Feilun Qingzhijiancai Youxiangongsi Hezuohetongan* (苏州巨星轻质建材有限公司诉南通飞轮轻质建材有限公司合作合同案) [*Suzhou Superstar Lightweight Building Materials Co., Ltd v Nantong Feilun Lightweight Building Materials Co., Ltd. Cooperation Agreement Case*], ZHONGYUAN YANJIUSHI [RESEARCH OFFICE OF THE INTERMEDIATE PEOPLE'S COURT OF NANTONG CITY IN JIANGSU PROVINCE] (Apr. 22, 2013), <http://www.ntfy.gov.cn/contents/563/1550.html> [<http://perma.cc/DL6S-RZE7>].

⁴⁴ In this sentence, the term "market allocation" refers to market allocation as a form of bid rigging, instead of market allocation under a hardcore cartel.

⁴⁵ NDRC, *supra* note 41.

V. REFLECTIONS ON INCORPORATING BID RIGGING INTO AML ARTICLE 13.1(1)

Bid rigging is faintly discernible in article 13 of the AML. While bid rigging is not enumerated under the article, the case analyses from Part IV finds that the Anti-monopoly Authority has penalized business operators that participated in bid rigging under article 13.1(1), an enumeration known as “fixing or changing the price of commodities.” This begs the question of whether bid rigging should be added to article 13 as an enumeration of a prohibited form of horizontal agreement. To answer this question, we need to first determine whether it is appropriate to use article 13.1(1) to penalize bid riggers, and whether the fallback provision under article 13 is a better alternative to regulate bid rigging.

Both China’s Criminal Law and Bidding Law have provisions prohibiting bid rigging. Regulating bid rigging under the competition law system may raise problems, such as jurisdictional overlap and conflict of laws. However, as presented in Part II of this Note, bid rigging is essentially a competition issue, and this view is internationally recognized. In addition, case analysis reveals that bid rigging is considered as a violation of the AML in China. Therefore, the discussions of whether bid rigging should be regulated by the competition law system or incorporated into the AML are lagging behind reality. The fact that China has AUCL article 27 under its competition law system to regulate bid rigging does not eliminate the need to enumerate bid rigging under the AML article 13. As illustrated by the above two cases, the NDRC selected to penalize bid riggers based on AML article 13, rather than AUCL article 27. In short, the two cases demonstrated that, in practice, bid rigging is regulated under China’s competition law system and primarily by AML article 13.

More specifically, the law enforcement agency penalized bid riggers according to the “fixing or changing the price of commodities” enumeration under article 13.1. As bid rigging could fix or change commodity prices, the question is whether the current practice is an appropriate approach to regulate bid rigging.

The definition of price fixing can be general or specific. For the purposes of illustration, this Note will use the terms “general price fixing” and “specific price fixing,” respectively. In its specific sense, price fixing refers only to agreements made between competing

business operators to charge consumers a specific price for a good or service. For example, in 2014, there were cases in China where car dealers made and implemented agreements to fix the prices of vehicle sales and maintenance services. These car dealers were penalized according to the “fixing or changing the price of commodities” enumeration.⁴⁶

In contrast, there is also a general definition of price fixing. In a fact sheet about the Commerce Act of New Zealand, the Commerce Commission explained that

Price fixing includes agreements between competitors to charge customers a specific price for a good or service. But it can also include agreements that ultimately affect the price a customer pays for a good or service. For example, agreeing to rig bids, dividing markets by customer or area, or restricting output.⁴⁷

In the United States, bid rigging was held as “a price fixing-agreement of the simplest kind.”⁴⁸ The descriptions above support the existence of a general definition of “price fixing agreement” that includes bid rigging. In the two China cases, bid rigging conduct was defined as a violation of AML article 13.1(1). In other words, in daily practice, the law enforcement agency interprets the “fixing or changing the price of commodities” enumeration in a broad sense to encompass bid rigging. In spite of this practice, article 13.1(1) should not continue to be used to regulate bid rigging for two reasons.

First, merely applying the price fixing enumeration to regulate bid rigging ignores the uniqueness of bid rigging. Bid rigging

⁴⁶ See Chen Weiwei & Zhaochao (陈炜伟 & 赵超), *Kelaisile Shishi Jiagelongduan Beichu Fakuan 3168 Wan Yuan* (克莱斯勒实施价格垄断被处罚款 3168 万元) [*Chrysler Was Fined 3,168 Million Yuan for Implementing Price Monopoly*], XINHUA WANG [XINHUA], (Sept. 11, 2014), http://news.xinhuanet.com/fortune/2014-09/11/c_1112443669.htm [<https://perma.cc/7CSR-E92G>] (discussing the penalty as a result of monopoly); Zhou Rui (周锐), *Yiqi-dazhong Xiaoshougongsi Shishi Longduan Zaofa 2.48 Yi* (一汽-大众销售公司实施垄断遭罚 2.48 亿) [*FAW-Volkswagen Was Fined 248 Million for Implementing Monopoly*], ZHONGGUO XINWENWANG [CHINANEWS] (Sept. 11, 2014), <http://www.chinanews.com/gn/2014/09-11/6582195.shtml> [<http://perma.cc/S63R-B9FJ>] (discussing the penalty as a result of price monopoly).

⁴⁷ NEW ZEALAND COMMERCE COMMISSION [NZCC], PRICE FIXING AND CARTELS FACT SHEET 2 (2011), <http://www.comcom.govt.nz/dmsdocument/202> [<http://perma.cc/7MXJ-MGHW>].

⁴⁸ *United States v. Bensinger Co.*, 430 F.2d 584, 1970 (8th Cir. 1970).

conduct is nuanced. For example, as introduced in Part II of this Note, bid rigging can exist in different forms, such as cover bidding, bid suppression, bid rotation, and market allocation.⁴⁹ In the Japanese automobile parts cases, the NDRC did not mention the term “bid rigging” in either the written decisions or the press release.

For purposes of comparison, a similar case exists in the United States. In 2015, NGK Insulators Ltd. (hereinafter NGK), an automobile parts supplier, was fined 65.3 million USD. NGK pleaded guilty to conspiring with others to fix prices and rig bids for ceramic substrates for automotive catalytic converters supplied to automobile manufacturers from at least July 2000 until February 2010. NGK’s conduct violated section 1 of the Sherman Act. Section 1 is a general provision with no enumerated examples of prohibited agreements. Yet, the U.S. Department of Justice press release clearly states that NGK Insulators was “charged with price fixing and bid rigging in violation of the Sherman Act” and fined “for its role in a conspiracy to fix prices and rig bids.”⁵⁰ The press release described NGK’s conduct as “agreeing to rig bids for, and to fix, stabilize, and maintain the prices.”⁵¹

Thus, U.S. judicial bodies did not describe bid rigging as a conspiracy case or avoid mentioning the term “bid rigging.” They highlighted the conduct of the defendants as “price fixing and bid rigging.” This suggests that the United States has acknowledged the uniqueness of bid rigging and distinguished bid rigging from a price fixing agreement.

Second, interpreting article 13.1(1) as general price fixing is wrong, in principle. By analyzing the structure of article 13, it is clear that the “fixing or changing the price of commodities” enumeration means price fixing in a specific sense. As explained above, general price fixing includes market allocation and output restriction. The two monopoly agreements discussed above correspond to the second and third enumerations under article 13 (i.e., article 13.1(2) & 13.1(3)). If the price fixing enumeration was

⁴⁹ OECD, *supra* note 8, at 2.

⁵⁰ Press Release, U.S. Dep’t of Justice, NGK Insulators Ltd. to Pay \$63.3 Million for Fixing Prices on Auto Parts, Sept. 3, 2015, <https://www.justice.gov/opa/pr/ngk-insulators-ltd-pay-653-million-fixing-prices-auto-parts> [<http://perma.cc/B7SX-TR9X>].

⁵¹ Information for United States v. NGK Insulators. Ltd., No. 15-cr-20550 (E.D. Mich. Sept. 3, 2015), <https://www.justice.gov/opa/file/767241/download> [<http://perma.cc/LP8E-GGNH>].

interpreted in a general sense, then market allocation and output restriction would not have been enumerated in the first place. Accordingly, the two cases of anti-competitive conduct would instead have been covered by article 13.1(1). In other words, interpreting article 13.1(1) as a general price fixing provision would make purposeless the specific agreements enumerated in the article. Therefore, article 13.1(1) should be interpreted as an instance of specific price fixing that does not include bid rigging. If one keeps this conclusion in mind when analyzing the two bid rigging cases in China, one is led to realize that the NDRC expanded its jurisdiction by interpreting article 13.1(1) as a general price fixing provision. Through such expansion, the NDRC could apply article 13.1(1) to regulate horizontal agreements that are not enumerated, such as bid rigging, as long as they ultimately have a price fixing effect. Given the broad definition of general price fixing, the law enforcement agency can now regulate most, if not all, kinds of horizontal agreements using article 13.1(1).

Given the fact that there is a fallback provision under article 13, it is unnecessary for the NDRC to expand the interpretation of price fixing to include bid rigging as a prohibited agreement. According to AML article 13.1(6), in addition to the five specific agreements enumerated, other horizontal agreements as determined by the Anti-monopoly Law Enforcement Agency under the State Council are also prohibited. The fallback provision was established to deal with the complexities that the AML would encounter in practice.⁵² The NDRC, one of the three anti-monopoly law enforcement agencies in China, is responsible for price-related anti-monopoly practices. Thus, the NDRC has the authority to determine if non-enumerated conduct constitutes an example of a prohibited horizontal agreement.⁵³ Therefore, the NDRC could have directly

⁵² LEGISLATIVE AFFAIRS COMM'N., ZHONGHUA RENMIN GONGHEGUO FANLONGDUANFA: TIAOWEN SHUOMING, LIFA LIYOU JI XIANGGUAN GUIDING (中华人民共和国反垄断法: 条文说明、立法理由及相关规定) [People's Republic of China Anti-Monopoly Law: Provision Explanations, Reasons of Legislation and Relevant Regulations] (2007).

⁵³ The three anti-monopoly law enforcement agencies in China are the Ministry of Commerce, the State Administration for Industry and Commerce, and the National Development and Reform Commission of the People's Republic of China. Wang Xian Lin (王先林), *Lixiang Yu Xianshi Zhong de Zhongguo Fanlongduanfa—Xiezai Fanlongduanfa Shishi Wunian Zhiji* (理想与现实中的中国反垄断法——写在《反垄断法》实施五年之际) [*The Anti-Monopoly Law in Ideality and Reality—Written at the 5th Anniversary of the Anti-Monopoly Law*], 4 JIAODA FAXUE [SJTU L. REV.] 16, 21–23 (2013).

applied the fallback provision to the Japanese automobiles part cases and International RORO shipping cases and defined bid rigging as a prohibited horizontal agreement.

However, it is not certain what the implications will be if a specific horizontal agreement is determined as a violation of article 13 through the fallback provision in a future case.⁵⁴ It is highly questionable whether such decisions would be binding, given that China is a civil law country. Therefore, direct application of the fallback provision to cases as an approach to determine bid rigging as a horizontal agreement is not ideal. Nevertheless, under the AML, it seems that the fallback provision is the only existing and justifiable provision to incorporate bid rigging into the law for the sake of regulation.

VI. SUGGESTIONS

In early 2014, Sun Hongzhi, the Deputy Director of the State Administration for Industry and Commerce of the People's Republic of China (hereinafter SAIC), pointed out that the agency “needs to impose stringent punishments to cases that involve monopoly agreements that disrupt market competition orders severely and have huge impact to the economy.”⁵⁵ In the same year, the State Council issued the Opinions of the State Council on Promoting Fair Market Competition and Maintaining the Normal Market Order in which it stated that “strict regulation shall be applied.”⁵⁶ In early 2015, the SAIC Director, Zhang Mao, said that the agency was further

⁵⁴ Tang Jinwei (唐晋伟), *Shixi Woguo Fanlongduanfa Guizhi Longduanxieyi de Lifamoshi - Yi Di 13 Tiao He Di 14 Tiao Zhong de Douditiaokuan Wei Kaocha Duixiang* (试析我国《反垄断法》规制垄断协议的立法模式-以第13条和第14条中的兜底条款为考察对象) [*Comment on the Steps Taken to Regulate Monopoly Agreements in the Anti-Monopoly Law—A Study of the Fallback Provision under Article 13 and Article 14*], 16 XINGZHENGFA XUE YANJIU [ADMIN. L. REV.] 78, 81 (2008).

⁵⁵ Zhang Xiaosong (张晓松), *Yaochachu Gaolongduan He Buzhengdangjingzheng de “Dalaohu”* (要查处搞垄断和不正当竞争的“大老虎”) [*Must Penalize “Big Tigers” That Engage in Monopoly and Anti-Competition*], ZHONGHUA GONGSHANGSHIBAO [CHINA BUS. TIMES] 1, 2 (2014).

⁵⁶ Guowuyuan Guanyu Cujin Shichang Gongping Jingzheng Weihi Shichang Zhengchang Chixu de Ruogan Yijian (国务院关于促进市场公平竞争维护市场正常秩序的若干意见) [Opinions of the State Council on Promoting Fair Market Competition and Maintaining the Normal Market Order] (promulgated by the St. Council, June 4, 2014, effective June 4, 2014), <http://www.lawinfochina.com/display.aspx?id=17407&lib=law> [<https://perma.cc/R6YG-X5GZ>].

strengthening the anti-monopoly law enforcement.⁵⁷ From these developments, it is clear that the Chinese government has the intention to strengthen the fight against severe anti-competitive behaviors.

As explained in Part II of this Note, the OECD introduced the term “hardcore cartel” to describe the most egregious violations of competition law. It exists in four forms: price fixing, market allocation, output restriction, and bid rigging. A hardcore cartel is generally regarded as illegal *per se* because the implementation of a hardcore cartel will inevitably cause severe harm to market competition and consumer interests. In other words, hardcore cartels are viewed as an unreasonable restriction to market competition under all circumstances, so it is not applicable to the Rule of Reason.⁵⁸ The first three enumerations under article 13.1 correspond to price fixing, market allocation, and output restriction—the three forms of hardcore cartel, respectively. In fact, in early 2008, Philip H. Warren, the Chief of the San Francisco Office of the U.S. Justice Department’s Antitrust Division, noticed the absence of a bid rigging enumeration and suggested that it should be incorporated into AML article 13.⁵⁹

Since bid rigging is one of the most serious anti-competitive behaviors, the AML should ensure that business operators foresee the legal consequences of bid rigging, to achieve a deterrent effect. Early in the submission of the Draft for its first deliberation, Cao Kangtai, the Director of the Legislative affairs Office of the State Council highlighted that one of the rationales adopted when the State Council drafted the AML was to set clear and precise regulations such that undertakings could understand the law easily and cultivate a habit to

⁵⁷ Xing Zheng (邢郑), *Gongshangzongju Juzhang Zhangmao: Jiaqiang Fanlongduan Gongliandiao cha 47 Jian Anjian* (工商总局局长张茅: 加强反垄断共立案调查 47 件案件) [SAIC Director Zhang Mao: Strengthening Enforcement of Anti-Monopoly Law, 47 Cases under Investigation], RENMIN WANG [PEOPLE’S DAILY ONLINE] (Mar. 9, 2015), <http://finance.people.com.cn/n/2015/0309/c1004-26661326.html> [http://perma.cc/2C6T-Y8QJ].

⁵⁸ Wang Xiaoye (王晓晔), *ZHONGHUA RENMIN GONGHEGUO FANLONGDUANFA XIANGJIE* (中华人民共和国反垄断法详解) [DETAILED EXPLANATION OF THE CHINA ANTI-MONOPOLY LAW] (2008).

⁵⁹ Philip H. Warren (菲利普·沃伦), *Guanyu Zhongguo Fanlongduanfa Fankateer Tiaokuande Ji dianyijian* (关于中国反垄断法反卡特尔条款的机点意见) [A Few Suggestions on the Anti-Cartel Provisions in China’s Anti-Monopoly Law], 15 *GONGSHANG HANGZHENG GUANLI* [BIWEEKLY OF ADMIN. FOR INDUS. AND COMMERCE] 30, 30 (2008).

follow the law autonomously.⁶⁰ In other words, the design of the AML emphasizes on not only a restraint function, but also a guiding function.⁶¹

However, in terms of the regulation of bid rigging, the extant law has failed to achieve a guiding function because its predictability is low in light of the absence of bid rigging as an enumeration under article 13 of the AML. In general, laws should be written with reasonable clarity.⁶² One way to gauge legal certainty is a citizen's ability to organize behavior in such a way that does not break the law.⁶³ Bid rigging may not be an uncommon term in the business world. However, as bid rigging was not enumerated, it is impossible for one, simply by reading the AML, to be able to project that bid rigging is categorized as price fixing under article 13. Moreover, business operators should not be expected to anticipate that bid rigging is categorized as price fixing under article 13 because, as discussed before, it is principally wrong to interpret the price fixing enumeration in a board sense.

In sum, it is hard for business operators to learn that bid rigging is prohibited by the AML. The current dilemma is that the law enforcement agency intends to regulate bid rigging under AML article 13, but article 13 as it exists does not provide a clear legal basis to do so. Although the agency could use the fallback provision to regulate bid rigging, this does not exhibit the guiding function that the AML meant to have because the publicity of individual cases is very limited. In addition, it would be too demanding to expect business operators to go through cases and learn by themselves that bid rigging is identified as a violation of the AML article 13 through the fallback provision. Therefore, to prevent business operators from committing a bid rigging offence inadvertently and to enhance the

⁶⁰ Cao Kangtai (曹康泰), *Guanyu Zhonghua Renmin Gongheguo Fanlongduanfa (Cao'an) de Shuoming (关于《中华人民共和国反垄断法(草案)》的说明)* [Interpretation of the Antitrust Law of the People's Republic of China (draft) at the 22nd Session of Tenth National People's Congress Standing Committee] (June 24, 2006), http://www.npc.gov.cn/npc/zt/2006-06/24/content_1382613.htm [http://perma.cc/2N6H-AWWE].

⁶¹ Zou Shengwen, Sun Yubo & Zhang Zongtang (邹声文, 孙玉波 & 张宗堂), *Fanlongduanlifa Gngzhong Qidai Shime (反垄断立法公众期待什么)* [What Does the Public Expect from Anti-Monopoly Law Legislation], 13 *ZHONGGUO XIANGZHENQIYE* 31, 31 (2006).

⁶² LON L. FULLER, *THE MORALITY OF THE LAW* (rev. ed. 1977).

⁶³ A.T.H. Smith, *Judicial Law Making in the Criminal Law*, 100 *LAW Q. REV.* 72, 72 (1984).

deterrent effect of the AML, bid rigging should be enumerated under article 13.

The above conclusion should not be expanded to all other non-enumerated monopoly agreements. It is unnecessary to list all the non-enumerated horizontal agreements under article 13. The fallback provision exists for a good reason. It gives more flexibility to the AML and enables law enforcement agencies to identify and regulate new forms of agreements over time. At the same time, amending the AML is costly. It is impossible to amend the law itself periodically to update the enumerations under article 13. However, from the perspective of efficiency, there is greater benefit from incorporating bid rigging into the article compared to other forms. As the harm caused by bid rigging, a form of a hardcore cartel, is higher, the return to society for preventing a bid rigging violation would be higher. Taking the two China cases for example, a total fine of 1.2 billion Chinese yuan was imposed but might have been avoided with the enumeration of bid rigging under article 13. Therefore, bid rigging should be distinguished from other non-enumerated agreements and treated differently. In short, there is an urgent need to add bid rigging to article 13 as an independent enumeration.

Bid rigging cannot be added to article 13 without the amendment of the AML. However, the AML has not been amended since it came into effect in 2008, and it is not known when it would be amended in the future, despite the growing trend of strengthening AML enforcement against serious anti-competitive behaviors, including bid rigging, in China in recent years. Therefore, as an alternative to execute the fallback provision, this Note suggests that, in the short run, the NDRC issue *provisions* as a timely and less costly solution to incorporate the regulation of bid rigging into the AML.⁶⁴ This approach is preferred to applying the fallback provision for two reasons. First, provisions have greater publicity than the written opinions of cases, so it could better fulfil the AML's guiding function. Provisions will be more well-known, easily accessible, and understandable to business operators. Second, China is not a common law country. Law enforcement agencies' case decisions have no binding effect. The NDRC's application of the fallback

⁶⁴ "Provisions" are administrative rules in China. Guizhang Zhiding Chengxu Tiaoli (规章制度制定程序条例) [Regulations on Procedures for the Formulation of Rules] (promulgated by the St. Council, Nov. 16, 2001, effective Jan. 1, 2002), <http://en.pkulaw.cn/display.aspx?cgid=38100&lib=law> [<http://perma.cc/XEU7-MY8X>].

provision and decision that bid rigging is a violation of article 13.1(1) in a particular case may not be applicable to future cases. However, there will undoubtedly be more consistent decisions if provisions are available for law enforcement agencies to follow. All in all, provisions can reduce the chance of a business operator committing an offence inadvertently due to the lack of legal certainty in the regulation of bid rigging under the AML.

In sum, law enforcement agencies should immediately stop using the “fixing or changing the price of commodities” enumeration under article 13.1 to regulate bid rigging. In the short run, the agencies could regulate big rigging using the fallback provision. This is a feasible approach but does not sufficiently exhibit the guiding function of the law. Therefore, the NDRC could consider issuing provisions to incorporate the regulation of bid rigging into the AML. Then, it will be clearer to business operators that bid rigging is identified as a horizontal agreement that is prohibited by the law. In the long run, when there is a chance to amend the AML, bid rigging should be enumerated under AML article 13.1.