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Foreign Direct Investment, Trade, and China's Competition Laws

Keywords

Investment, Comparative Law, Trade Regulation, Antitrust, Corporations, Financial Law

FOREIGN DIRECT INVESTMENT, TRADE, AND CHINA'S COMPETITION LAWS^{*}

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"Whether a cat is black or white makes no difference. As long as it catches mice, it is a good cat." Deng Xiaoping

I. INTRODUCTION

The People's Republic of China, or the PRC, known more widely simply as China, holds nearly one-sixth of the world's population. It possesses one of the fastest growing economies in the world. In 2007, China experienced a growth rate of 11.4%.¹ As a result of its strong economy and growing population, China has the ability to greatly influence the global economy. It is not surprising, therefore, that the newly adopted Chinese Anti-Monopoly Law, or AML, has been the subject of much interest, discussion, and debate. The legislation, which became effective August 1, 2008, has a variety of purposes: to safeguard competition in China; to protect the Chinese economy against monopolistic conduct; to improve economic efficiency; and, perhaps most importantly from the Chinese perspective, to promote the healthy development of its "socialist market economy."²

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1. Information relating to economic growth, investment, foreign trade, population, and other economic and political factors are garnered and adapted from the CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK (2007), <https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html#Econ> [hereinafter CIA].

2. Not surprisingly, various translations and drafts of the AML exist. See Anti-Monopoly Law of China (adopted by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007), art. 1, translated in Nathan Bush, O'Melveny & Myers L.L.P., *The PRC Antimonopoly Law: Unanswered Questions and Challenges Ahead*, THE ANTITRUST SOURCE, at app. 1-14 (Oct. 2007), <http://www.abanet.org/antitrust/at-source/07/10/Oct07-Bush10-18f.pdf>; Anti-Monopoly Law of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), 2007 Order of the President No. 68, translated in 2007 China Law LEXIS 1950. The content of this article, however, refers to the AML translation provided in Nathan Bush, *The PRC Antimonopoly Law*. See also H. Stephen Harris, Jr., *Legal Implications of a Rising China: The Making of an Antitrust Law*:

Minister of the National Development and Reform Commission, Ma Kai, has underscored the contextual importance of China's transformation and transition in the development of the AML. The Minister noted on July 12, 2005, that China had essentially completed the transition to a socialist market economy from a highly centralized planned economy "after 26 years' endeavor on reform."³ Minister Ma asserted that China had successfully established the fundamental basis of an economic system in which public ownership of the economy plays the "leading role and co-exists and shares opportunities with the economy in various other ownerships."⁴ Indeed, by the end of 2004, more than fifty percent of the nearly 3,000 state-owned or state-controlled large major enterprises had turned into stock-sharing (so-called *joint stock*) companies.⁵ As an indication of the pervasiveness of market forces in the "new Chinese market," the private sector now provides "four-fifths of new job opportunities and generate[s] one-third of Chinese GDP."⁶ In this context, the drive for both foreign direct investment and foreign trade—key aspects of the Chinese economy that would rely heavily on the proper functioning of a truly competitive market—occupy unique positions of importance.

The Chinese AML was drafted within the context of three principal international concerns relating to the restrictive or monopolistic nature of competition within the Chinese market: *regional monopolies*, enjoying local or regional protection; certain *sectoral monopolies* by established Chinese firms and state-owned enterprises (SOEs), termed *administrative monopolies*; and the perception of significant *abuse of their dominant positions* by some *multinationals* operating within the Chinese market.⁷

While the legislation represents yet another significant step towards China's transition to a full market economy and away from one that is centrally planned,⁸

The Pending Anti-Monopoly Law of the People's Republic of China, 7 CHI. J. INT'L L. 169, 183-84 (2006) (providing information on the AML history and draft).

3. *China has Socialist Market Economy in Place*, PEOPLE'S DAILY ONLINE, July 13, 2005, http://english.peopledaily.com.cn/200507/13/eng20050713_195876.html.

4. *Id.*

5. *Id.*

6. *Id.*

7. See Jun Wei & Janet L. McDavid, *Antitrust Law, China's Anti-Monopoly Law*, NAT'L L. J., Oct. 15, 2007, available at http://www.hhlaw.com/files/Publication/1495de2a-b30d-44ad-822c-6ffea0cd69bf/Presentation/PublicationAttachment/145c9a50-b1eb-4083-885f-863242014c68/15Oct07_NLJ_ChinaAntiMonopoly_JWei_JMcDavid.pdf.

8. The Polish process of economic transformation is quite instructive and has provided a more general model for Eastern and Central European nations, as well as for a systemic comparison for China. Named for the Minister of Finance and Deputy Prime Minister Leszek Balcerowicz, the program in Poland was based on five philosophical *pillars of economic transformation*: (1) transformation of the monocentric system of state central planning into a functioning market economy; (2) liberalization of economic functions, especially in relation to foreign trade and foreign direct investment; (3) privatization of state-owned-enterprises (SOEs); (4) construction of an effective social safety net; and (5) mobilization of international financial assistance to support the process. In the process of economic transformation, Balcerowicz was aided by a well-prepared transition team consisting of Polish nationals and so-called "Polonia" (émigré) specialists. The leading foreign expert was Harvard Economist Jeffrey Sachs. Both Balcerowicz, who later served as President of the National Bank of Poland, and Sachs remain enigmatic and quite controversial figures even today in Poland. For

many commentators have expressed concern over the vague and inefficient mechanics of the proposed legislation.⁹ One specific concern is that China will reserve to itself the ability to review any transaction affecting its “national security,” which may provide China with unreasonable control over multi-nationals operating in the Chinese market.

This article will analyze several of the concerns raised by the new legislation. In order to accomplish this purpose, the article will first discuss the history and progression of the legislation, beginning with the circumstances that led to initial discussions on the issue which began as early as 1994. Information on the background of the legislation from a *comparative systemic viewpoint*—that is, from the standpoint of Poland, itself a “transition economy”—will be offered. The article will next review several of the most important provisions of the new law and will discuss similarities and differences between the final draft legislation and the competition laws of other nations. Finally, the article will conclude with an analysis of why the legislation may prove unworkable for China in the long run in the global business environment without significant refinement or amendment by raising several of the persistent concerns raised by its implementation.

II. CHINA IN TRANSITION – THE CONTEXT

In 1978, Chinese President Deng Xiaoping began a series of initiatives in order to transform China's economy from a traditional command-and-control economy into China's version of a “market economy,” later termed a “socialist market economy.” In fact, the Chinese Constitution itself was amended in 1988 and 1999 to incorporate the concept of a “socialist market economy,” rather than one based solely on state central planning.¹⁰ The initiatives carried out were a part

a discussion of the core transformation program from a “foreign” viewpoint, see JEFREY SACHS, *POLAND'S JUMP TO THE MARKET ECONOMY* 45-46 (1994). For a unique “insider” view of the process, see LESZEK BALCEROWICZ, *SOCIALISM, CAPITALISM, TRANSFORMATION* 273-369 (1996). Interestingly, the elements of the “Balcerowicz Plan” all have been implemented, in one form or another, in China in its transition to a socialist market economy.

9. Leszek Balcerowicz, the architect of “shock therapy” in Poland, has identified certain *derivative traits* of the command-and-control economy that were pervasive in the entire region of Central and Eastern Europe, and as well in China, and which were the object of systemic economic reform. These include:

- Administrative *price fixing* by central authorities;
- *Isolation* of domestic producers from foreign markets;
- Excessive *regulation of imports* through licenses and import quotas;
- The tendency by central planners to engage in “*import substitution*,” often accomplished through rationing, queues, lines and coupons;
- “*Soft budget constraint*” in which targets of planning are revised downward or inputs significantly increased in order to meet plan targets;
- The *lack of true commercial and financial institutions*;
- *Monopolization* of the state sector due to extreme organizational concentration, the centralization of organizational rights, and the lack of foreign competition; and perhaps most importantly,
- The *lack of any motivation mechanisms* for either line managers or workers.

See generally RICHARD J. HUNTER, JR. & LEO V. RYAN, *FROM AUTARCHY TO MARKET: POLISH ECONOMICS & POLITICS 1945-1995*, 37 (1998).

10. See XIAN FA art. 15 (1988) (P.R.C.) (amended Mar. 29, 1993); XIAN FA pmb. (1988) (P.R.C.)

of a pursuit of *Four Modernizations* in the areas of industry, agriculture, science and technology, and the military.¹¹ During this transition period, China became more and more reliant on international trade and foreign investment for its growth. Professor Mark Williams has noted:

The expansion of China's participation in international trade has been one of the most outstanding features of the country's economic development. Chinese exports rose on average 5.7 percent in the 1980s, 12.4 percent in the 1990s, and 20.3 percent between 2000 and 2003. By 2003, China's exports growth rate was seven times higher than the export growth rate recorded by the world as a whole. Foreign direct investment has also soared, and currently over a billion dollars in FDI are invested in China each week.¹²

(amended Mar. 14, 2004); XIAN FA art. 11 (amended Mar. 14, 2004) *available at* <http://english.people.com.cn/constitution/constitution.html> (last visited Nov. 13, 2008). For a definitive description of the system of central planning, *see* JÁNOS KORNAL, *THE SOCIALIST SYSTEM: THE POLITICAL ECONOMY OF COMMUNISM* (1992). As early as 1960, Polish economist and diplomat Oskar Lange had written of a "'new economic calculus' where decentralization in planning and management of the economy was both vital and necessary." Lange had argued that the Stalinist scheme was not suited to a "mechanical translation," and that prices, for example, should be fixed on the basis of a "market mechanism," linking state planning to market forces. *See* HUNTER & RYAN, *supra* note 9, at 23-24; *see also* OSKAR LANGE, *FUNKCJONOWANIE GOSPODARKI SOCJALISTYCZNEJ* [The Functioning of the Socialist Economy] (1960). For a spirited criticism of Lange, however, *see* JOHN MONTIAS, *CENTRAL PLANNING IN POLAND* 267 (1963). While Lange's criticisms were made in the context of analyzing the flaws of central planning in Poland, their application can be seen as relevant for China as it has sought to adapt its Stalinist economic model to the market.

11. *See* Robert C. Berring, *Chinese Law, Trade and the New Century*, 20 *NW. J. INT'L L. & BUS.* 425, 436 & 444 (2000) ("Call the current economy 'market socialism' if you wish, but it bears no relation to communist or socialist theory.").

12. Mark Williams, *Wal-Mart in China: Will the Regulatory System Ensnare the American Leviathan?* 39 *CONN. L. REV.* 1361, 1366 n.9 (2007) (citing Javier Silva-Ruete, Alternate Executive Dir. of IMF for the Constituency of Arg., Bol., Chile, Para., Peru, & Uru., *The Development of China's Export Performance*, Address before Conference at the Central Reserve Bank of Peru (Mar. 7, 2006), *available at* <http://www.imf.org/external/np/speeches/2006/030706.htm>). Professor Williams describes the influx of foreign capital into China and notes that "[f]oreign investment in China is generally structured via a joint venture vehicle with a local enterprise." *Id.* at 1371. In the 1990s, Chinese law required foreign owned retailers to be in the form of a joint venture and, in addition, imposed other restrictions. *Id.* at 1367. This regulation was repealed as a result of Chinese accession to the WTO. *Id.* at 1371. As a result, China now permits foreign investors to establish wholly-owned foreign enterprises, which are Chinese legal entities, possessing a separate legal personality. Many may also have limited liability. *See id.* at 1372 n.39 (citing Law on Wholly Foreign-Owned Enterprises (Adopted by the Standing Comm. Nat'l People's Cong. Apr. 12, 1986, revised Jul. 24, 2006), *available at* <http://openchina.com.es/wp-content/uploads/2007/04/wholly-foreign-owned-enterprise-law-of-the-people.pdf>). The international law firm of Jones Day reports the following information concerning the basics of foreign investment in China:

Direct foreign investment into the People's Republic of China ("PRC") is generally carried out through the establishment of a Sino-foreign joint venture (either an equity joint venture ("EJV") or a cooperative joint venture ("CJV") or a wholly foreign-owned enterprise ("WFOE") (such vehicles are collectively referred to as "foreign investment enterprises," or "FIEs"). For more passive, indirect business activities . . . foreign companies may establish representative offices in China.

With the development and growth in international trade and international investment, China recognized a need to ensure that its domestic market would be free from price fixing, monopolization, and the effects of invidious agreements between suppliers and/or competitors that restricted competition. There was also a strong perception that China needed to curtail foreign economic dominance and to transform poorly performing state-owned-enterprises (SOEs) into fully-functioning private enterprises. Attorney Stephen Harris noted: "These policies and many subsequent structural reforms have been pursued in an avowed effort to transform China's centrally planned economy, dominated by state-owned-enterprises, to a system that embodies free market characteristics but retains certain socialist attributes."¹³ An early attempt at reform was the enactment of the *Enterprise Act of 1988*. This law promised that factories would no longer be able to depend on state subsidies and state support and would face the real prospect of "bankruptcy if they failed to adapt to market competition."¹⁴ This law, seen as revolutionary in its time, was described by Zhang Yanning, Deputy Minister of the State Commission for Restructuring the Economy, as moving away from direct control of central government departments or authorities over industries toward a system in which "the state regulates the market, which in turn guides the enterprises," in large part by making managers responsible for profits and losses.¹⁵ However, the effect of

In terms of the legal form, FIEs are almost always established as limited liability companies, although joint stock companies are also permitted under PRC law. FIEs closely resemble Western-style corporations in many respects but also differ in certain fundamental areas, such as the following:

- Investors in an FIE limited liability company do not hold issued shares *per se*, but instead hold equity interest in the "registered capital" of the relevant FIE;
- Voting and decision-making authority in an FIE is generally vested in the board of directors rather than the investors;
- FIEs generally have a specified term (*e.g.*, 30 years) depending on the nature of the project, which term can be renewed under PRC law, although the conditions of any such renewal are not clearly specified in the law;
- Various matters, including the initial establishment of an FIE, transfer of a party's equity interest, increase of an FIE's registered capital, change of an FIE's business scope, and dissolution of an FIE, are subject to approval by the Chinese authorities; and
- FIEs must operate within an approved "scope of business," which tends to be relatively specific and, for manufacturing FIEs in particular, will limit sales activities to the sale of "self-manufactured" products.

Jack J.T. Huang et al., JONES DAY, *Mergers and Acquisitions in China*, July 2006, http://www.jonesday.com/pubs/pubs_detail.aspx?pubID=S3571. As Professor Berring notes, "To attract foreign investment China had to do several things. The first was change its internal culture, the second was to win the trust of the rest of the world that investing in China was a rational move." Berring, *supra* note 11, at 437.

13. Harris, *supra* note 2, at 173 (citing the Chinese Enterprise Act (1988), the Anti-Unfair Competition Law of 1993, the Company Law (1993), and the Price Law (1997)).

14. *Id.* (citing Mark E. Monfort, *Reform of the State-Owned Enterprises and the Bankruptcy Law in the People's Republic of China*, 22 OKLA. CITY U. L. REV. 1067 (1997)).

15. *China Enacts Law Giving More Power to Enterprises*, ASSOCIATED PRESS, Aug. 1, 1988

this law was problematic. Harris notes that “it [was] broadly agreed that entrenched government monopolies and local and regional protectionism have hampered any wholesale transition to market competition.”¹⁶

Perhaps reflecting this lack of real progress, China engaged in a wholesale revamping of its legal system in areas dealing with monopolistic conduct. One of the first laws enacted was the *Law Against Unfair Competition*.¹⁷ This law was

(quoted in Harris, *supra* note 2, at 173 n.15).

16. Harris, *supra* note 2, at 173. One of the reasons for this failure may have been the existence of the bureaucratic system in managing enterprises. An analogy to the Polish experience seems apt. By the time of the collapse of the Soviet system in Poland in the period 1989-1991, the *nomenklatura* or bureaucratic system in Poland had developed into a highly centralized administrative structure—not only for national economic and political organs, but also for intermediary organizations, whereby smaller enterprises operated only as a part of a huge centrally organized bureaucracy. By the 1980's, the system had virtually elapsed into a “lunatic collage of incompetence, privilege, pandering and outright corruption,” based on a principle of underqualification and a perverted practice of negative selection. See, LAWRENCE WESCHLER, *SOLIDARITY, POLAND IN THE SEASON OF ITS PASSION* 102 (1982). It appears that the Chinese system has exhibited many of these same characteristics. For a description and discussion of the Chinese bureaucratic system, see Eric Zusman & Jennifer L. Turner, *Beyond the Bureaucracy: Changing China's Policymaking Environment*, CHINA'S ENVIRONMENT AND THE CHALLENGE OF SUSTAINABLE DEVELOPMENT 121 (Kristen A. Day ed., 2005); David Li, Address at the Shorenstein Seminars on Contemporary East Asia on The Dynamics of Institutional Change in China: The Role of the Bureaucracy (Mar. 31, 1998), <http://ieas.berkeley.edu/Shorenstein/1998.03.html>; DAVID M. BACHMAN, *BUREAUCRACY, ECONOMY, AND LEADERSHIP IN CHINA* (1991). For an interesting “inside” description of the *nomenklatura* system as it operated in Central and Eastern Europe, see MILOVAN DJILAS, *THE NEW CLASS* (1957). Djilas is credited with coining the term “New Class” as a description of the political and economic bureaucracy. The term “*apparatchik*” usually referred to party members, especially in the former Soviet Union. The term most often used in China to describe the “ruling class” is *oligarchy*. See also, e.g., Richard J. Hunter & Leo V. Ryan, *Economic Transformation Through Foreign Direct Investment in Poland*, 6 J. EMERGING MKTS. 18 (2001) (providing a comprehensive “country study” of Poland). The role of the *nomenklatura* is still hotly debated in Polish society, as it will no doubt be in China. A pattern was common in transition economies throughout the region of Central and Eastern Europe that has been duplicated during the Chinese “transition.” Not surprisingly, members of the *nomenklatura* in Poland almost immediately became active in private businesses and banks—especially as the prospects for advancing their bureaucratic careers in the “new system” appeared more limited. The particular type of privatization carried out by the *nomenklatura* in the early period has sometimes derisively been referred to as “spontaneous privatization,” but was, in reality, theft of public assets and property. For a discussion of the phenomenon of “spontaneous privatization,” see HUNTER & RYAN, *supra* note 9, at 112-13. Directors and managers often used their new authority to split up or divide state companies or to spin off or divest units into limited liability companies or other new joint ventures—many under their own control or the control of their friends and associates. Skilled workers were often transferred to the new enterprises to the detriment of their former enterprises. In many nations of Central and Eastern Europe—but most especially in Poland—members of the *nomenklatura* also greatly benefited both politically and economically from popular discontent that was practically unavoidable during economic reforms started under very difficult economic and political conditions and circumstances. Members of the *nomenklatura* were seen as major “winners” in the transformation process. The issue of *winners vs. losers* in post-Communist Poland is discussed at length in Richard J. Hunter, Jr. et al., *Out of Communism to What?: The Polish Economy and Solidarity in Perspective*, 39 THE POLISH REV. 328-329, 334-335 (1994). We offer this information for comparative purposes based on our extensive study of the processes and results from the transformation throughout the region of Central and Eastern Europe.

17. Law Against Unfair Competition (promulgated by the Standing Comm. Nat'l People's Cong.,

enacted in 1993 and would be administered by the State Administration of Industry and Commerce (SAIC). The major significance of this legislation was that while it prohibited a broad range of anticompetitive acts, in practice, the law only applied to the protection of trademarks.¹⁸

The next significant piece of legislation was the *Price Law*, which became effective in 1997, and was administered by the National Development and Reform Commission (NDRC).¹⁹ Similar to the *Law Against Unfair Competition*, this legislation had a broad scope—namely, to outlaw all price fixing. Yet, in a similar fashion, the *Price Law* was applied in a more narrow fashion. In particular, the *Price Law* merely provided local authorities with the power to control prices and thus served goals other than ensuring free competition.²⁰ In addition, China enacted other laws, such as the *Protection of the Rights of Consumers Act* (1993) and *The Company Law* (1994)—but these laws too were narrowly construed.²¹ General confusion seemed to reign among the various governmental agencies as to which agency would enforce which laws,²² different remedies were provided for the same underlying actions, and perhaps most importantly, Chinese officials lacked the expertise to fully appreciate the complexities of market forces and the harmful effects that certain other seemingly minor actions might have on the creation of an otherwise competitive market.

III. CHINA AND THE WTO

China concluded negotiations with the World Trade Organization (WTO) on September 17, 2001, concerning China's terms of membership. Among the commitments undertaken by China were the following:

- China will provide non-discriminatory treatment to all WTO Members. All foreign individuals and enterprises, including those not invested or registered in China, will be accorded treatment no less favorable than that accorded to enterprises in China with respect to the right to trade.
- China will eliminate dual pricing practices as well as differences in treatment accorded to goods produced for sale in China in comparison to those produced for export.

Sept. 2, 1993, effective Dec. 1, 1993), translated in CCPIT Patent and Trademark Law Office, http://www.ccpit-patent.com.cn/references/Law_Against_Unfair_Competition_China.htm (last visited Dec. 23, 2008) (P.R.C.).

18. Harris, *supra* note 2, at 175 (citing Paul B. Birden, Jr., *Trademark Protection in China: Trends and Directions*, 18 LOY. L.A. INT'L & COMP. L. REV. 431, 447-49 (1996)). See *Law Against Unfair Competition*, art. 5(1).

19. *Price Law* (issued by President's decree, Dec. 29, 1997, adopted by the Standing Comm. Nat'l People's Cong., May 1, 1998), translated at China Development Gateway (2004), <http://en.chinagate.com.cn/english/430.htm>.

20. Again, the purpose of the law was to establish a new pricing system "compatible with the requirements of a socialist market system." Harris, *supra* note 2, at 176 n.33 (citing *China's Price Law Embodies Features of Modern Market Economy*, CHINA BUS. INFO. NETWORK, (Apr. 30, 1998)(quoting Wei Dale of the State Development Planning Commission). See *Price Law*, art. 19.

21. See Monfort, *supra* note 14, at 1095.

22. See Harris, *supra* note 2, at 175.

- [P]rice controls will not be used for purposes of affording protection to domestic industries or services providers.
- [T]he WTO Agreement will be implemented by China in an effective and uniform manner by revising its existing domestic laws and enacting new legislation fully in compliance with the WTO Agreement.
- Within three years of accession, all enterprises will have the right to import and export all types of goods and trade them throughout the customs territory with limited exceptions.
- China will not maintain or introduce any export subsidies on agricultural products.²³

As China acceded to membership in the WTO on November 11, 2002, many of China's potential trading partners were quite skeptical that China would be able to abandon practices that discriminated in its own favor, or would be able to enact comprehensive legislation aligning the Chinese legal system with *global trade rules and norms*.²⁴ After all, it was widely held that "China has traditionally been suspicious of trade with the West, and has imposed substantial limits and regulations upon foreigners within the country."²⁵ In addition, China voiced a concern that following "international norms" might result in significant job losses as a result of the almost inevitable demise of its state-owned-enterprises.²⁶ However, in balancing these concerns with the prestige and power that membership in the WTO would certainly bring to China, the overriding hope of China's accession was that membership in the WTO would act as a "catalyst for reform as investors seek a more stable, predictable destination for capital."²⁷ Professor Hoogmartens writes: "The international investor confidence resulting from WTO membership determines its attractiveness and allows the country to amass foreign capital to pay for sound domestic reforms and hence, further industrialization."²⁸

In this process, the legal system necessarily would play an important, perhaps critical, role. The World Bank had noted in 1997: "The transition from a command economy to a market-oriented economy makes legal rules matter. Direct

23. Press Release, World Trade Organization, WTO Successfully Concludes Negotiations on China's Entry (Sept. 17, 2001), available at http://www.wto.org/english/news_e/pres01_e/pr243_e.htm.

24. See generally Lindsay Wilson, note, *Investors Beware: The WTO Will Not Cure All Ills in China*, 2003 COLUM. BUS. L. REV. 1007, 1007 & 1009-14 (2003) (describing the main issues confronting the Chinese legal system). By 1980, China had joined both the IMF and the World Bank. See HAROLD K. JACOBSON & MICHEL OKSENBERG, CHINA'S PARTICIPATION IN THE IMF, THE WORLD BANK, AND GATT: TOWARD A GLOBAL ECONOMIC ORDER 75 (1990). China gained observer status in GATT in 1984—a prelude to full WTO membership.

25. Wilson, *supra* note 24, at 1007.

26. See generally Jan Hoogmartens, *Can China's Socialist Market Survive WTO Accession? Politics, Market Economy and Rule of Law*, 7 LAW & BUS. REV. AMS. 37 (2001).

27. Wilson, *supra* note 24, at 1029.

28. Hoogmartens, *supra* note 26, at 43 (citing Monica Hsiao, comment, *China and the GATT: Two Theories of Political Economy Explaining China's Desire for Membership in the GATT*, 12 UCLA PAC. BASIN L.J. 430, 431 (1994)).

government control over economic decisions is replaced by the rule of law that is necessary to protect private property and contract rights.”²⁹ As early as 1999, China had announced a Five Year People’s Court Reform Plan which sought to “improve China’s court system by improving the expertise of judges, enforcing anticorruption regulations, allowing some discovery, and improving the efficiency and enforcement of judgments.”³⁰ It may seem ironic, but “The WTO does not require a member state to have a good legal system, however, or even a fair one. Instead, it merely insists that foreigners and nationals are treated alike, for better or for worse.”³¹ Attorney Lindsay Wilson identified three major “points of interest” concerning Chinese legal institutions “(1) the lack of a cohesive legal “system;” (2) pervasive vagueness in the language of statutes and administrative rules; and (3) difficulty of enforcing judgments once they are obtained.”³²

29. The Asian Development Bank (ADB) notes: “The rule of law is generally defined as (i) general, abstract rules that are prospective, never retrospective, in their effect; (ii) rules that are known and certain; (iii) rules that are equal in that they do not discriminate based on irrelevant distinctions; and (iv) a separation between regulators and the regulated. The rule of law in the business environment is expected to guarantee transparency, predictability, and consistency.” ASIAN DEVELOPMENT BANK, PRC PRIVATE SECTOR ASSESSMENT, PEOPLE’S REPUBLIC OF CHINA 23 (2003), http://www.adb.org/Documents/Reports/PSA/PRC/PRC_PSA.pdf. During the 1980s, judges were routinely appointed from among the ranks of the Chinese Communist Party or from the military. “Only rarely did these judges have a college education, let alone any sort of legal training.” See Wilson, *supra* note 24, at 1010. In terms of reforming the “lawyer system” itself in the PRC, it is also important to note that prior to 1993, lawyers were classified as “state legal workers,” and virtually all law firms were owned or controlled by the State. Beginning in 1993, the Ministry of Justice took several measures to achieve a fundamental change. These measures included encouraging lawyers to set up private law firms. See Ma Chenguang, *Better Legal Services Sought*, CHINA DAILY, Jan. 5, 1994, at 1; encouraging more Chinese citizens to take up the legal profession. See also Chang Hong, *State Aims to Triple Number of Lawyers*, CHINA DAILY, July 22, 1993, at 3 (scheduling national bar examinations once each year instead of once every two years); *Annual Exam Set for New Lawyers*, CHINA DAILY, June 12, 1993, at 3 (granting lawyer status to those who have obtained law degrees in foreign countries, without first having to pass national bar examinations, provided that the lawyer has worked in a domestic law firm for one year—designed to accommodate the need for lawyers with certain critical “specialties” or skills); He Jun, *Lawyers to Grow in Number and Role*, CHINA DAILY, Oct. 16, 1993, at 1. An interesting parallel to Poland’s entry into the EU can be seen in China’s accession to the WTO.

30. Stephanie M. Greene, *Protecting Well-Known Marks in China: Challenges for Foreign Mark Holders*, 45 AM. BUS. L.J. 371, 382-83 (2008).

31. Wilson, *supra* note 24, at 1009.

32. *Id.* See also Greene, *supra* note 30, at 383. For a comparative view of various legal aspects of the transformation process, see Richard J. Hunter, Jr. et al., *Legal Aspects of the Transformation Process in Poland: Business Association Forms*, 40 THE POLISH REV. 387, 387-407 (1995). See also RICHARD J. HUNTER, JR. ET AL., POLAND: A TRANSITIONAL ANALYSIS (2003) (discussing the issues of foreign direct investment, international trade, taxation, and Poland’s accession to the European Union in the context of economic transition). These issues are equally central in the context of China’s continuing transition or evolution to its unique “socialist market economy.” Poland’s antimonopoly law is today a mainstay of its economic transformation. It is termed The Law on Competition and the Protection of Consumers’ Interests of 15 December 2000, and provides:

- Prohibition of concerted practices, agreements and associations between firms which may prevent, restrict or distort competition and prohibition of abuse of a dominant position;
- Preventive supervision of mergers which may create or strengthen a dominant market position.

POLISH INFORMATION AND FOREIGN INVESTMENT AGENCY, COMPETITION LAW (2006), <http://www.paiz.gov.pl/index/?id=0e139b17a92b2df7d6c3c840e51465fe> (summarizing the law and

As of September 2002, as a part of its accession to the WTO, 2,300 of China's laws and government regulations that were deemed potentially incompatible with WTO requirements were carefully reviewed and either amended or repealed.³³ China further announced that if there were a conflict between domestic law and China's obligations to the WTO, the latter would rule—as an indication that the Chinese Government was committed to the adaptation of the WTO rules-based regime.³⁴ In addition, and perhaps most importantly, in March of 2001, China's National People's Congress (NPC) Standing Committee declared that China would soon issue a draft of a comprehensive antitrust law that would deal directly with many of the perceived difficulties in assuring real competition in the Chinese market.³⁵

IV. DRAFTING THE ANTIMONOPOLY LAW

As China began to develop its unique socialist market economy, many commentators noted that it was important to create a transparent legislative regime that would apply to transactions that directly involved the acquisition of domestic companies by foreign investors (termed *onshore transactions*), as well as to foreign transactions (termed *offshore transactions*). There were several attempts in the period 2002-2005 to construct viable and workable antimonopoly legislation.³⁶ The following are the main highlights of the process:

- “In 2002, the Ministry of Foreign Trade and Economic Cooperation (‘MOFTEC’), a predecessor of MOFCOM [the Ministry of Commerce], promulgated draft rules on the notice and approval process for *concentrations* involving foreign multinationals. These rules were largely based upon... preexisting restrictions on foreign investment, and were criticized for the implication that they would be applied solely to foreign companies [and not to Chinese organizations].”³⁷
- “In March 2003, the Provisional Mergers & Acquisitions Rules were promulgated by MOFCOM and SAIC [the State Administration for Industry and Commerce].”³⁸
- In June 2003, the National Development and Reform Commission (NDRC) promulgated the so-called “Provisional Rules” in order to deal with the

explaining that it deals with antitrust, merger control, and state aid).

33. See generally, ASIAN DEVELOPMENT BANK, *supra* note 29. Among the laws that were repealed in China was the law that required foreign-owned retailers to be in the form of joint ventures. See *Amendments to Law on Chinese-Foreign Equity Joint Ventures Submitted to NPC*, PEOPLE'S DAILY ONLINE, Mar. 9, 2001, available at http://english.peopledaily.com.cn/200103/09/eng20010309_64556.html.

34. ASIAN DEVELOPMENT BANK, *supra* note 29.

35. Harris, *supra* note 2, at 176-77.

36. A chronology of the various iterations and stages of the antimonopoly law may be found in Harris, *supra* note 2, at 177-181. Harris is a distinguished and recognized expert in the field and was a participant in a major conference hosted by MOFCOM outside of Beijing in October 2003, attended by leading academics from China and practitioners from Japan, Germany, and the United States.

37. *Id.* at 176-77 (citing ECONOMIST INTELLIGENCE UNIT, *New Antitrust Rules* (Oct. 24, 2002).

38. *Id.*

expected flood of foreign direct investment prior to the final enactment of any comprehensive legislation.³⁹ These “provisional rules” were later called “Regulations on the Mergers and Acquisitions of Domestic Enterprises by Foreign Investors.”⁴⁰ The limited application of the 2003 rules concerned some foreign investors who interpreted the regulation’s “target” on foreign investors as a possible harbinger of biases that might continue to prevail in the substance or enforcement of any future legislation. These “Provisional Rules” included several more traditional antitrust provisions dealing with price fixing, monopolistic conduct, and predatory pricing. Harris notes that some saw these provisional rules as a “serious move toward the enactment of a comprehensive antitrust law. Others, however, saw the Provisional Rules as an indication that the drafting of such a law was bogged down, resulting in a few elements of the draft law being issued in the form of the Provisional Rules. Enforcement of the Provisional Rules was ultimately abandoned.”⁴¹

- In 2003, the State Council Legislative Office (LAO) undertook a thorough review of the 2002 Draft Antimonopoly Law, prepared by the former State Economic and Trade Commission (SETC).⁴² The October 2002 Draft had proscribed collusion among businesses, abuse of market dominance, and excessive concentrations. The 2002 draft had also included provisions prohibiting abuses of administrative power by governmental units through what were termed *administrative monopolies*. Interestingly, Chapter 6 of the 2002 Draft Law provided for the creation of an Anti-Monopoly Management Body of the State Council. A later draft diffused enforcement of the Draft Law among three separate agencies: MOFCOM, with responsibility for merger review and administrative (state) monopolies; SAIC, responsible for overseeing “monopoly agreements” and abuses of a dominant position; and the NDRC, responsibility for price collusion and bid-rigging.
- The February 2004 draft called for the establishment of a *single* “competent Anti-Monopoly Authority under the Ministry of Commerce.”⁴³ This provision was retained in the July 2004 draft (it was actually promulgated in March 2004) issued by MOFCOM. Concerns about abuses

39. *Id.*

40. See *Do's, Don'ts of M & As*, CHINA DAILY, May 30, 2005, available at http://www.chinadaily.com.cn/english/doc/2005-05/30/content_446763.htm. See also FRESHFIELDS BRUCKHAUS DERINGER, NEW CHINESE MERGER CONTROL RULES 1 (2003), <http://www.freshfields.com/publications/pdfs/practices/5356.pdf> (noting that the rules stipulate that mergers and acquisitions may not “result in excessive concentration and exclusion of competition and may not disturb the social or economic order or harm public interest”). The four issuing governmental bodies were the Ministry of Foreign Trade and Economic Cooperation (MOFTEC—now the Ministry of Commerce), the State Administration for Industry and Commerce (SAIC), the State Administration of Taxation, and the State Administration of Foreign Exchange.

41. Harris, *supra* note 2, at 178.

42. *Id.*

43. *Id.* at 179.

by foreign firms—including Microsoft, Kodak, and TetraPak⁴⁴—were raised in a report issued by the Fair Trade Bureau of SAIC, although allegations were vigorously denied by these firms.⁴⁵ Prior to the release of the February and March drafts, SAIC indicated in January 2004 that it supported a limitation of enforcement to private conduct, thereby *exempting* official government conduct.⁴⁶ MOFCOM proceeded to set up its own Anti-Monopoly Office in September 2004.

- MOFCOM's Anti-Monopoly Office proffered a "Submission Draft" in February 2004, which was similar to a subsequent March 2005 draft.⁴⁷ This draft dropped the reference to creation of the MOFCOM enforcement authority and instead called for the establishment of an "anti-monopolization authority under the State Council." In April 2005, the State Council released a draft law, providing for the establishment of an Anti-Monopoly Authority under the State Council⁴⁸ with broad powers to both implement and enforce the underlying law.⁴⁹
- A revision dated July 27, 2005, provided a strong basis for the eventual Anti-Monopoly Law. This draft provided for an Anti-Monopoly Authority

44. See Wang Xiaoye, *Report: Anti-Monopoly Law Vital*, CHINA DAILY, Aug. 20, 2004, at 11, available at: http://www.chinadaily.com.cn/english/doc/2004-08/22/content_367692.htm (cited in Harris, *supra* note 2, at 179 n.52).

45. See, e.g., *Kodak Denies Monopolistic Accusations*, CHINA DAILY, June 8, 2004, available at: http://www.chinadaily.com.cn/english/doc/2004-06/13/content_338954.htm (cited in Harris, *supra* note 2, at 179 n.53).

46. See Xue Zheng Wang, *Challenges/Obstacles Faced by Competition Authorities in Achieving Greater Economic Development through the Promotion of Competition*, ¶ 2, Org. Econ. Coop. Dev. [OECD] Doc. CCNM/GF/COMP/WD(2004)16 (Jan. 9, 2004), available at: <http://www.oecd.org/dataoecd/18/51/23727203.pdf> (cited in Harris, *supra* note 2, at 180 n.54) (asserting that "[a]ntitrust law is supposed to be against private anticompetitive conduct and is not supposed to be applied to markets that are controlled or regulated by the government"). The SAIC submission was to an OECD Global Competition Forum.

47. Harris, *supra* note 2, at 180.

48. Beijing Official Website International, Political System and State Structure, <http://www.ebeijing.gov.cn/BeijingInfo/BJInfoTips/BeijingHistory/t951208.htm> (last visited Nov. 15, 2008) ("The State Council, the Central People's Government, is the highest state administrative body. The State Council carries out the laws enacted and decisions adopted by the NPC and its Standing Committee. The State Council is responsible to the NPC and its Standing Committee, and reports to them on its work. The State Council exercises the following functions and powers: in accordance with the Constitution and statutes, formulates administrative measures, enacts administrative regulations, promulgates decisions and orders; exercises unified leadership over the work of the ministries and commissions and the work of other organizations under its jurisdiction; exercises unified leadership over the work of local state administrative bodies at different levels throughout the country; draws up and implements national economic and social development plans, and the state budget; directs and administers economic work, urban and rural development, and work in education, science, culture, public health, physical culture and family planning; directs and administers civil affairs, public security, judicial administration and supervision, as well as national defense construction; manages foreign affairs and concludes treaties and agreements with foreign states; and in accordance with the law, appoints, removes and trains administrative officers, appraises their work, and rewards or penalizes them. The State Council is composed of the premier, vice-premiers, state councillors, the heads of the various ministries and commissions, the auditor-general and the secretary-general.").

49. Harris, *supra* note 2, at 180-81.

under the State Council, as did the later drafts of September 14, 2005, September 30, 2005, and of November 2005.⁵⁰

The Draft Anti-Monopoly Law of 2005 was the culmination of the previous efforts which began in 2002. Article 1 of the Draft is important because it sets forth the general parameters and objectives of antimonopoly policy in China.⁵¹

This law is enacted for the purposes of prohibiting monopolistic conduct, protecting and promoting market competition, safeguarding the legitimate rights and interests of consumers and public interests, and ensuring the healthy development of the socialist market economy.

Article 3 of the 2005 Draft defined monopolistic conduct as follows:

“Monopolistic conduct’ is defined in this law as the following activities which eliminate or restrict competition or are likely to have the effects to eliminate or restrict competition:

- (i) actions among undertakings to come to agreements, decisions, or other consensus that eliminate or restrict competition (termed “Monopoly Agreements”);
- (ii) abuse of dominant market positions by undertakings;
- (iii) concentration of undertakings that are likely to have the effects of eliminating or restricting competition.”⁵²

This article will not extrapolate on the 2005 Draft and the other “intermediate steps” noted above. Suffice to note that the drafting of the final legislation in 2006 provoked a great amount of both internal and external debate, including the solicitation of views and commentary from several international experts and international organizations such as the OECD, the World Bank, the United Nations Conference on Trade and Development [UNCTAD], the Asia-Pacific Economic Cooperation, and nations such as the United States, Japan, Australia and South Korea, as well as the European Union.⁵³ In early June 2006, the State Council

50. *Id.* at 182.

51. *Id.* at 183-84 (asserting that the 2002 Draft had prohibited the existence of “monopoly status,” seemingly condemning the *status* of having achieved dominance in the market, even through *lawful* competition or conduct). The April 8, 2005 Draft and all subsequent drafts have clearly prohibited “monopolistic conduct” rather than monopoly itself—placing Chinese law in line with the prevailing world viewpoint regarding monopolistic conduct. *See, e.g.*, Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C 340) 82, available at http://www.okm.gov.hu/doc/upload/200509/hatalyos_alapszerzodes_en.pdf (prohibiting *abuse* of a dominant position, not the possession or status of a dominant position within the European Union).

52. Harris, *supra* note 2, at 184.

53. *Id.* at 175-76. An important International Seminar on Anti-Monopoly Legislation was held in Beijing in May 2005, hosted by the LAO. The *Financial Times* recently reported that “China and India are implementing regimes based on the European Union model, covering anti-competitive agreements, abuses of dominance, and merger control—with the potential effect on M&A causing concern among multinational companies.” Sundeep Tucker & Patti Waldmeir, *Asian Antitrust Laws Threaten Deals*, FIN. TIMES, Jul. 27, 2008, available at http://us.ft.com/ftgateway/superpage.ft?news_id=fto072720081742322031. However, the authors note that “[l]awyers and business executives believe China and India’s thresholds for merger filings are too low, and are likely to ensnare global deals that

approved in principle the 2005 Draft.⁵⁴ China's National Party Congress finally adopted the new Anti-Monopoly Law on August 31, 2007, effective August 1, 2008.⁵⁵

V. CHINA'S NEW ANTI-MONOPOLY LAW (AML)⁵⁶

The AML seeks to address issues centering on competition in a comprehensive manner, not just those relating to monopolization. Thus, the legislation covers price fixing, conspiracies, mergers, and the abuse of intellectual property rights, as well as providing a definition of the "market" and penalties for substantive violations of the law. Article 1, which tracks the 2005 Draft version very closely, lays out the broad purposes of the AML:

This law is enacted for the purposes of preventing and prohibiting Monopolistic Conduct, protecting fair market competition, promoting efficiency of economic operation, safeguarding the interests of consumers and the public interests, and promoting the healthy development of the socialist market economy.⁵⁷

Article 4 is also expositive of the general framework for the creation of the AML:

The State shall formulate and implement competition rules suitable for the socialist market economy to improve control of the macro-economy and to strengthen a unified, open, competitive, and orderly market system.⁵⁸

There are four major aspects of the AML that will be reviewed in detail: sections dealing with the scope of review, sections dealing with the creation and duties of the Anti-Monopoly Commission, sections dealing with prohibited conduct, and sections dealing with legal liabilities and penalties.

A. Scope of Review

Chapter 1, Article 2 discusses the scope of review. The AML is applicable to monopolistic conduct⁵⁹ in economic activity *within* the territory of the People's Republic of China (PRC). The AML is also "applicable to monopolistic conduct *outside* the territory of the People's Republic of China that have eliminative or

will have little effect on competition locally. They also fear enforcement agencies in each country will lack the resources and expertise to deal quickly with complex merger cases." *Id.*

54. Hu Yuanyuan, *China Okays Draft Anti-Monopoly Law*, CHINA DAILY, Jun. 8, 2006, available at http://www.chinadaily.com.cn/china/2006-06/08/content_611238.htm.

55. *China Legislature Passes Anti-Monopoly Law*, THE CHINA POST, Aug. 31, 2007, available at <http://www.chinapost.com.tw/business/asia/2007/08/31/120617/China%2Dlegislature.htm>.

56. AML, *translated in Bush*, *supra* note 2, at app.

57. *Id.* art. 1.

58. *Id.* art. 4.

59. *Id.* art. 3. "Monopolistic Conduct," as defined in Article 3, includes:

- (1) conclusion of monopoly agreements by undertakings;
- (2) abuse of dominant market positions by undertakings;
- (3) concentrations of undertakings that have or are likely to have the effect of eliminating or restricting competition.

restrictive effects on competition in the domestic market of the People's Republic of China."⁶⁰

It is important to note that Article 7 specifically addresses questions relating to activities of state-owned-enterprises or industries that are controlled by the state that are deemed "critical to the wellbeing of the national economy and national security, as well as industries in which exclusive operation and exclusive sales are the norm of business in accordance with the law..."⁶¹

B. Creation of the Anti-Monopoly Commission

Chapter 1, Article 9 calls for the State Council to establish an Anti-Monopoly Commission which will be responsible for "organizing, coordinating, and guiding" the administrative activities associated with prohibited conduct.⁶² Specifically, the Anti-Monopoly Commission is charged with carrying out the following responsibilities or duties:

- (1) to research and formulate competition policies;
- (2) to organize investigations, access the overall market competition conditions, and publish assessment reports;
- (3) to formulate and promulgate anti-monopoly guidelines;
- (4) to coordinate the anti-monopoly administrative enforcement work; and
- (5) to undertake other duties as designated by the State Council.⁶³

Article 9, however, does not establish whether an existing agency such as MOFCAM or SAIC will be designated as the Commission or whether a wholly new Commission will be created. Interestingly, the creation of the Anti-Monopoly Commission may not completely alleviate concerns over the lack of expertise or biases of judges who will hear disputes. However, as noted by Subrata Bhattacharjee of the American Bar Association's Antitrust Section, "since the enforcement of antitrust law is a relatively new phenomenon [for China], judges may not have the requisite level of knowledge to produce decisions that conform to international practice and reflect micro-economic analysis, an observation admittedly common to many jurisdictions."⁶⁴ In addition, "in the context of

60. Harris, *supra* note 2, at 186.

61. AML, art. 7, translated in Bush, *supra* note 2, at app. See, e.g., Robin Gerofsky Kaptzan & Michael Jacobs, Blake Dawson Waldron, *The New Chinese Anti-Monopoly Law and Foreign Business in China*, available at: http://www.abanet.org/intlaw/committees/business_regulation/antitrust/China'sAntiMonopolyPowerPoint.ppt (last visited Dec. 23, 2008) (listing that the SOEs operating in *strategic sectors* of the Chinese economy are "petroleum, natural gas, telecoms, electricity, coal, civil aviation, waterway transport, and national defense"); see, e.g., Zhengjun Zhang & Zhaoxi Li, Enterprise Research Institute & Development Research Center of the State Council China, *Policy Challenges of Corporate Governance Reform of SOEs in China* (May 15-16, 2006), available at: <http://www.oecd.org/dataoecd/60/35/37340418.pdf> (discussing current issues concerning Chinese SOEs).

62. AML, art. 9, translated in Bush, *supra* note 2, at app. 2.

63. *Id.*

64. Subrata Bhattacharjee, *The Merger Review Process under the New PRC Anti-Monopoly Law: Selected Issues*, 2008 A.B.A. SEC. ANTITRUST 9 (presentation at the New Chinese Anti-Monopoly Law Teleseminar, Jan. 23, 2008). See also Youngjin Jung & Qian Hao, *The New Economic Constitution in China: A Third Way for Competition Regime?*, 24 NW. J. INT'L L. & BUS. 107, 164 (noting that before

China's current legal system, it has been suggested that the Chinese judiciary lacks independence."⁶⁵ Mr. Bhattacharjee continues:

The current structure of China's court system and the process for selecting and promoting judges allows local governments to influence decisions regarding personnel, as well as financial and material resources. Accordingly, even if a party exercises its right to judicial review, some would argue that it is unlikely that a court will come to a different decision from the one made by the Authority, which may result in interpretations that are not based on economic principles.⁶⁶

C. Prohibited Conduct

Articles 13 through 37 describe the types of conduct that are proscribed by the AML. The following types of conduct are generally prohibited.

1. Vertical and Horizontal Agreements:

The first type of conduct that is prohibited under the AML is the creation of *horizontal agreements*—agreements between competing companies, which are termed Monopoly Agreements among undertakings with competing relationships—that restrain trade; or *vertical agreements*—agreements between a manufacturer or a distributor within the same marketing chain, which are termed Monopoly Agreements with their counter-parties.⁶⁷

Article 13 prohibits the following *horizontal* Monopoly Agreements that concern:

- (1) fixing or changing the price of commodities;
- (2) limiting the outputs or sales volume of commodities;

the adoption of the so-called *Judge's Law* in 1995, "no uniform credentials were required of judges, and formal legal training was also not a prerequisite"); *see also* Judge's Law (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 28, 1995, effective July 1, 1995), *translated in* <http://www.accci.com.au/judges-law.htm> (2002).

65. Bhattacharjee, *supra* note 64, at 9.

66. *Id.* Attorneys H. Stephen Harris, Jr. and Rodney J. Ganske note:

In countries transitioning to market-based economies, especially where there is no history of competition enforcement, it is often best not to rely on existing courts for competition enforcement. A manageable number of specialized competition judges could be trained within a reasonable time following enactment and prior to the August 1, 2008 effective date of the Anti-Monopoly Law, participating perhaps in appropriate portions of the training to be provided to the staff of the Anti-Monopoly Enforcement Authority. The need for such a specialized court would seem most important in cases involving allegations of violations through single-firm conduct, i.e., abuses of dominance under Chapter III, as such cases require sophisticated understanding of definitions of product and geographic markets and an understanding of alleged effects on competition, unlike more straightforward cases involving horizontal collusion such as bid-rigging or market division.

H. Stephen Harris, Jr. & Rodney J. Ganske, Alston & Bird LLP, American Bar Association Section of Antitrust Law 56th Annual Antitrust Spring Meeting, *The Monopolization and IP Abuse Provisions of China's Antimonopoly Law* 19 (Mar. 26-28, 2008), available at: <http://www.abanet.org/antitrust/at-committees/at-ic/pdf/spring/08/03-28-08-Harris-Ganske.pdf>.

67. Harris, *supra* note 2, at 189-90.

- (3) allocating the sales markets or the raw material purchasing markets;
- (4) restricting the purchase of new technology or new equipment or restricting the development of new products;
- (5) jointly boycotting transactions; or
- (6) other Monopoly Agreements determined by the AML Enforcement Authority under the State Council.⁶⁸

Article 14 prohibits the following *vertical* agreements that:

- (1) fix the resale price of commodities sold to third parties;
- (2) limit the minimum resale price of commodities sold to third parties; or
- (3) other Monopoly Agreements determined by the AML Enforcement Authority under the State Council.⁶⁹

However, Article 15 contains significant exceptions to what otherwise might be considered as “*per se*” violations of the AML under both Article 13 and Article 15. These include activities conducted:⁷⁰

- (1) for the purpose of improving technology, researching and developing new products;
- (2) for the purpose of improving the product quality, reducing costs, enhancing efficiency, unifying specifications and standards of products, or implementing division of labor based on specialization;
- (3) for the purpose of improving operational efficiency of small and medium-sized undertakings and enhancing their competitiveness;
- (4) for the purpose of achieving public interests, but not limited to, energy saving, environmental protection, and disaster relief;
- (5) for the purpose of alleviating serious decreases in sales volume or distinctive production surpluses due to economic depression;
- (6) for the purposes of safeguarding legitimate interests in foreign trade and foreign economic cooperation;
- (7) other circumstances as stipulated by laws and by the State Council.⁷¹

68. AML, art. 13, *translated in* Bush, *supra* note 2, at app. *See id.* art. 10 (creating the Anti-Monopoly Law Enforcement Authority under the State Council to perform the function of anti-monopoly enforcement. The AML specifically permits the delegation of this authority to the “corresponding agencies of the People’s Governments at levels of province, autonomous region and municipality directly under the central government responsibilities....”).

69. *Id.* art. 14.

70. *Id.* art. 15. *See also* United States v. Topco Associates, Inc., 405 U.S. 596, 607-08, 615-19 (1972) (discussing a comparative review of *per se* violations under United States antitrust law, “[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act.”). Traditional examples of *per se* violations include horizontal price fixing and horizontal division of markets.

71. *See* Standard Oil Co. v. United States, 221 U.S. 1 (1911) (explaining the view of the United States concerning the application of the reasonableness test and applying a rule or reason test in recognition that there is a range of economic effects that may result from different types of restraints in different market structures.). The reasonableness test under the Chinese AML differs from the United States’ reasonableness test in that the United States does not balance the anticompetitive effects of an agreement against its social or political benefits. It simply inquires whether the agreement promotes or suppresses competition. *See* Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 695 (1978) (expressing that “[T]he statutory policy [of the Sherman Act] precludes inquiry into the question of whether competition is good or bad.”). The United States Supreme Court noted: “The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes

Interestingly, if clauses 1-5 are offered as reasons for the non-applicability of the provisions of Articles 13 and 14, the “relevant undertakings”⁷² must also prove that the agreement so concluded will not materially restrict competition in the Relevant Market⁷³ and that the agreement can allow consumers to share the benefits generated therefrom.”⁷⁴

In addition, also reflecting a “reasonableness” standard, Article 27 contains the “factors [that] shall be taken into consideration in the review of concentrations by undertakings”:

- (1) the market shares of undertakings participating in the concentration in the Relevant Market and their ability to control... the market;
- (2) the degree of concentration in the Relevant Market;
- (3) the effect that the concentration of undertakings may have on market access and technological progress;
- (4) the effect that the concentration of undertakings may have on consumers and other relevant undertakings;
- (5) the effect that the concentration of undertakings may have on the development of the national economy;
- (6) other factors affecting the market competition that the AML Enforcement Authority under the State Council deems shall be taken into consideration.⁷⁵

competition or whether it is such as may suppress or even destroy competition.” *Id.* at 691 (citing *Bd. of Trade of City of Chicago v. United States*, 246 U.S. 231, 246 (1918), quoted in *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 n.15 (1977)). The United States Supreme Court continued in its discussion of the considerations contained in a rule of reason analysis. “In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. In either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.” *Id.* at 692.

72. As used in the AML, “undertakings” refers to natural persons, legal persons, and other organizations that are engaged in manufacturing or otherwise dealing with commodities, or providing services. AML, art. 12, *translated in Bush, supra* note 2, at app. 3.

73. As used in the AML, “Relevant Market” generally means the “scope of commodities and the scope of territory within which the undertakings compete with each other during a specific period of time with respect to specific commodities or services (collectively ‘commodities’).” *Id.*

74. *Id.* art. 15(7).

75. *Id.* art. 27.

2. Abuse of Power by Dominant Market Holders

A second type of prohibited conduct, stemming from the “abuse of power” by “dominant market holders,”⁷⁶ is considered in Chapter 3, Article 17. These activities include:

- (1) selling commodities at unfair high prices or buying commodities at unfair low prices;
- (2) selling commodities at prices below cost without any justification;⁷⁷
- (3) refusing to transact with counter-parties with respect to a transaction without any justification;
- (4) restricting, without any justification, their counter-parties to transact with such undertakings exclusively or to transact with other parties designated by such undertakings exclusively;
- (5) engaging in tie-in sales of commodities or imposing other unreasonable conditions with respect to transactions without any justifications;
- (6) applying differential treatments to counter-parties to transactions who have the same qualifications with respect to transaction price and other transaction terms, without any justification;
- (7) other activities that are deemed by the AML Enforcement Authority of the State Council as abusing dominant market positions.⁷⁸

As with other prohibited conduct, this type of conduct is subject to the “reasonableness” standard, meaning that the conduct may be proved justified or legitimate. However, undertakings may be *presumed* to have a Dominant Market Position if they satisfy any of the following conditions:

- (1) the market share of one undertaking in the Relevant Market accounts for 1/2;

76. The determination that an undertaking has a Dominant Market Position is based on the following factors as found in Article 18:

- (1) The market share of the undertaking in the Relevant Market, and the competition conditions in the Relevant market;
- (2) the ability of the undertaking to control the sales market or the raw material purchasing market;
- (3) the financial resources and the technical capacities of the undertaking;
- (4) the extent to which other undertakings depend on the subject undertaking with respect to relevant transactions;
- (5) the level of difficult for the undertakings to enter the Relevant Market;
- (6) other factors relating to its determination whether the subject matter has a Dominant Market Position.

77. The problem of dumping is an especially vexing one for China. Dumping requires a comparison of “the price of export with the home-market price to see if the former is lower than the latter so that there is a ‘margin of dumping.’” JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 335 (2nd ed. 1997). Jackson continues:

Almost by definition, given that such an economy is not based on pricing principles, the nominal price of goods may bear little relation to prices that would be set by enterprises in a market/price oriented economy. The prices may be set by a state planning commission, and may vary according to end user. Furthermore, the prices may bear little relation to the cost of an enterprise, or ‘profitability.’

Id.

78. AML, art. 17, *translated in* Bush, *supra* note 2, at app, 5.

- (2) the joint market share of two undertakings in the Relevant Market accounts for 2/3; or
- (3) the joint market of three undertakings in the Relevant Market accounts for 3/4.⁷⁹

In the case of circumstances set forth in clauses 2 and 3 above, if any of such undertakings has a market share of less than 1/10, it shall not be presumed to have a Dominant Market Position. Further, if an undertaking which is presumed to have a Dominant Market Position presents evidence showing otherwise, it shall not be deemed to have a Dominant Market Position. Attorneys Harris and Ganske write that although Article 27 contains the factors noted above for determining “market dominance,” the AML does not fully define how product and geographic markets will be identified. Further, the inadequacy of this definition has been described as “unique and troubling” by some scholars.⁸⁰

3. Certain Concentrations with and without Notification or Approval

There are three concentrations contemplated by Chapter 4, Article 20:

- (1) a merger of undertakings;
- (2) an acquisition by an undertaking of the control of other undertakings through acquiring equity or assets;
- (3) an undertaking, by contracts or other means, acquiring control of other undertakings or the capability to exercise decisive influence on other undertakings.⁸¹

Article 21 stipulates that if a concentration described above meets the thresholds for notification as stipulated by the State Council, the relevant undertakings shall file a notification with the Anti-monopoly Law Enforcement Authority under the State Council in advance. Without filing such a notification, the undertakings will be prohibited from implementing the concentration. In such a case, the undertakings are required to file a variety of documents and other materials.⁸²

79. *Id.* art. 19.

80. See generally Harris & Ganske, *supra* note 66 at 2. The authors report that “[u]nder U.S. antitrust law, market share is the ‘usual starting point’ for assessing the existence of market power.” *Id.* at 10-11. See also A.B.A. ANTITRUST SECTION, I ANTITRUST LAW DEVELOPMENTS 66 (6th ed. 2007). Low market shares “virtually preclude a finding of market power, whereas a high market share indicates the possibility that market power exists.” *Id.* Indeed, proof of a “dominant market share” has been held to be a requirement for the establishment of market power. See *Flegel v. Christian Hosp.*, 4 F.3d 682, 689 (8th Cir. 1993). However, a high market share alone is *not* proof of market power. An economic analysis of other “competitive factors” may be able to demonstrate the absence of the requisite market power despite a high market share, particularly when barriers to market entry are low. In sum, unlike the application of China’s market share percentages, U.S. antitrust law does not establish presumptions of market power based *solely* on market share. *Id.* See, e.g., *Ball Mem’l Hosp. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1336 (7th Cir. 1986). See generally A.B.A. ANTITRUST SECTION, MARKET POWER HANDBOOK: COMPETITIOIN LAW AND ECONOMIC FOUNDATIONS (2005).

81. AML, art. 20, *translated in* Bush, *supra* note 2, at app. 6.

82. Included are the following documentation items: the notification, including the name, address, and business scope of the participating undertakings, the proposed date for implementing the concentration, and other matters stipulated by the AML Enforcement Authority under the State Council; a statement explaining the impact of the concentration upon the competitive conditions (i.e.,

Article 27 lays out the factors that should be taken into account in the review of the proposed concentration by the AML Enforcement Authority under the State Council. These include:

- (1) the market shares of the participating undertakings in the Relevant Market and their ability to control the market;
- (2) the degree of concentration in the Relevant Market;
- (3) the effect that the concentration may have on market access and technological progress;
- (4) the effect that the concentration may have on consumers and other relevant undertakings;
- (5) the effect that the concentration may have on the development of the national economy;
- (6) other factors affect competition that the AML Enforcement Authority under the State Council deems shall be taken into consideration.⁸³

In reviewing these considerations, the AML Enforcement Authority under the State Council shall prohibit a proposed concentration “if such [a] concentration has or may have the effect of eliminating or restricting competition.”⁸⁴ However, the authorities may instead decide not to prohibit a concentration “if the undertaking can prove that the positive effects of such concentration on the competition obviously outweigh its negative effects or that the concentration is *in the public interest*.”⁸⁵ In the alternate, if the AML Enforcement Authority under the State Council does not prohibit the concentration, it may instead decide to impose restrictive conditions in order “to reduce the adverse effects that the concentration may have on competition.”⁸⁶ In either case, the AML Enforcement Authority under the State Council shall publicize, in a timely manner, its decision to prohibit the concentration or to impose any restrictive conditions.⁸⁷

A second category of prohibited conduct under Chapter 4 is the merging or acquiring of companies under certain circumstances *without notification or approval*, found in Article 22. Undertakings are not required to file any notification with the AML Enforcement Authority under the State Council if their concentration meets *any* of the following conditions:

- (1) one undertaking participating in the concentration owns more than 50% of the voting shares or assets of each of the other participating undertakings;

competition) of the Relevant Market; the concentration agreement; audited financial and accounting reports of the undertakings participating in the proposed concentration in the preceding fiscal year; and other documents and materials under the AML Enforcement Authority under the State Council. *Id.* art. 23.

83. *Id.* art. 27.

84. *Id.* art. 28.

85. *Id.* (emphasis added).

86. *Id.* art. 29.

87. *Id.* art. 30. Articles 24-26 deal with issues concerning the required filing of supplementary documents (Art. 24), a preliminary review and notification requirements (Art. 25), the completion of the review (Art. 26), and the circumstances that involve an extension of time (Art. 26, para. 2 (1)-(3)).

- (2) more than 50% of the voting shares or assets of every undertaking participating in the concentration are owned by a single undertaking that does not participate in the concentration.⁸⁸

Four specific problems may be identified concerning Article 22. First, acquiring *control* of a company is considered a concentration, but the term *control* is never fully defined.⁸⁹ Bhattacharjee cited Harris and Yang, and notes somewhat wryly that “experience in other jurisdictions reveals that creative lawyers and businesspersons can structure transactions in a manner to avoid being caught by the merger rules.”⁹⁰ Second, no specific timeline has been established concerning the time period during which a company must notify Chinese authorities; instead, Article 21 uses the term “in advance.” Third, as with other provisions, Article 28 permits parties to attempt to persuade the AML Enforcement Authority that the positive effects of a concentration outweigh (overweigh) any negative effects; but the AML provides no real guidelines on this point, unless the provisions established under Article 15 are applicable under this article as well. Fourth, thresholds for concentrations requiring notifications are not set, perhaps reflecting the earlier criticisms of notification requirements generated in earlier drafts and in the current mergers and acquisitions rules.⁹¹ Article 22 describes only two situations, noted as “exemptions,” from the notification requirements, and these exemptions do not reference traditional exemption thresholds, such as concentrations not exceeding certain defined market shares or market values. On this specific topic, Bhattacharjee noted:

The AML is silent on the nature of merger notification thresholds. Ordinarily, this would not be a concern, given the tendency in many jurisdictions to leave such details (which may change over time) to regulation. However, the AML is silent with respect to the basis for notification. Earlier drafts of the AML included notification thresholds based on assets, turnover and market share, but the current AML does not define the notification threshold in any way.⁹²

In addition, and perhaps most importantly, Article 31 requires approval that is *separate* from the normal merger approval for concentrations between a foreign investor and a domestic company which “concerns national security.” This provision is highly controversial and problematic, both because it fails to define

88. *Id.* art. 22.

89. See Bhattacharjee, *supra* note 64, at 8 (noting that examples might include defining “control” as control at the board of directors level through the holding of voting interest or the possession of contractual power to designate a portion of the board—as is the case in the United States and Canada). The author also raises the possibility that control might include exercising “decisive influence” over an undertaking—as is the case in the European Union. The issue of control raises the question of the continued existence of the “Golden Share” in China, which perpetuates majority Chinese control of foreign investment. The existence of the “Golden Share” is problematic in light of China’s membership in the WTO.

90. H. Stephen Harris & Kathy Lijun Yang, *China: Latest Developments in Anti-Monopoly Law Legislation*, 19 ANTITRUST 89, 92 (2005) (cited in Bhattacharjee, *supra* note 64, at 7 n.28).

91. See Harris, *supra* note 2, at 211 (describing the criticism of the prior legislative thresholds).

92. Bhattacharjee, *supra* note 64, at 8.

“national security,” and because it is not standard policy for a sovereign to frame its antitrust laws to this extent and in this manner.⁹³ Many commentators have voiced concern that the vagueness of this provision will allow China to reject or approve a transaction for political rather than legal or economic reasons,⁹⁴ reflecting the increasing concern that China has voiced about alleged foreign domination in important sectors of its domestic market. In defense of the Chinese position, however, it should be noted that in 2002, Kodak dominated almost 50% of the photographic film market in China; Nestle held about 40% of the instant coffee market; Procter and Gamble had a 30% share of the hair care market; Hewlett-Packard held 25% of the commercial internet-service market; and Epson held a 30% share of the computer-printer market.⁹⁵

4. Abuse of Intellectual Property Rights

The fourth type of prohibited conduct is the abuse of intellectual property rights (IPRs).⁹⁶ Specifically, Article 55 of the AML states:

This law shall not apply to Undertakings' conducts that are exercising their intellectual property rights in accordance with the provisions of laws and administrative regulations relating to intellectual property rights. However, this law shall apply to Undertakings' conducts that

93. For a full discussion of the issues surrounding an assertion of “national security,” see *id.* at 9-10. See also *id.* at 10 n.41 (providing “negative media attention” and citing Jamil Anderlini, *Investors Fear China Monopolies Law*, FIN. TIMES, Aug. 30, 2007); *China Approves Anti-Monopoly Law that Bans Discrimination Fears*, INSIDE US-CHINA TRADE, (Sept. 5, 2007).

94. See Zhuoyao Hui, *Chinese Anti-Monopoly Law: A Pretext for Local Protection or an Aspiration to Comply with the International Norm?* ILL. BUS. L.J. (2007), available at http://iblsjournal.typepad.com/illinois_business_law_soc/2007/11/chinese-anti-mo.html (noting that Chinese AML is based upon the European Community (EC) anti-competition law, Japanese AML, and U.S. Antitrust Law, and stating that none of these countries' competition laws include some “abstract aspirational goals that might give the Chinese government grounds for invalidating a foreign enterprise's business conduct”).

95. See MARK WILLIAMS, *COMPETITION POLICY AND LAW IN CHINA, HONG KONG AND TAIWAN* 198 (2005).

96. For a general discussion of key IPR issues in international business, see Richard J. Hunter, Jr., *A Primer on Key International Intellectual Property (IPR) Issues*, 5 EUR. J. ECON., FIN. & ADMIN. SCI. 103 (2006). The International Chamber of Commerce has identified general issues and “tensions” between intellectual property rights and antitrust and three “distinct ways in which anti-competitive practices may prove to be anticompetitive:

- (i) A dominant position resulting from ownership of IP property may be abused by its owner.
- (ii) A licensor may impose restrictive licensing terms on his licensee which secure inappropriate reward for his intellectual property.
- (iii) If a patent Office grants patents of low quality, and if the law is generally uncertain, competitors of patentees may choose to respect them rather than to ignore or challenge them.”

INTERNATIONAL CHAMBER OF COMMERCE, *CURRENT AND EMERGING INTELLECTUAL PROPERTY ISSUES FOR BUSINESS* 65 (9th ed. 2008), available at [http://www.iccwbo.org/uploadedFiles/ICC/policy/intellectual_property/pages/IP_Roadmap-2005\(1\).pdf](http://www.iccwbo.org/uploadedFiles/ICC/policy/intellectual_property/pages/IP_Roadmap-2005(1).pdf).

eliminate or restrict competition by abusing their intellectual property rights.⁹⁷

Revamping of Chinese law in the area of IPR protection was seen as critical to the prospects for the long-range development of the Chinese economy, as "Rampant piracy of intellectual property in China has undermined foreign confidence in the Chinese market's ability to absorb foreign technology and copyrighted material without cannibalizing it."⁹⁸ Lee and Mansfield reported that China's weak IP protection has "a significant negative impact on the location of U.S. FDI."⁹⁹ As a result of the world-wide importance placed on IP protection, this provision perhaps may be the most controversial of all because of its vagueness and because China has historically offered limited, if any, protection to intellectual property holders. Jianyang Yu, a partner in a Chinese law firm, reported on the early period of China's transition from a socialist to a market economy. Yu noted that despite major changes in the IPR regime in China, "problems continue[ed] to exist in the protection of intellectual property. There are defects in intellectual property laws and in the coordination among the courts and government agencies, and there is much to be done to enforce the intellectual property laws effectively."¹⁰⁰ "According to Maria Lin, an attorney with Morgan

97. AML, art. 55, *translated in* Bush, *supra* note 2, at app. 14.

98. Jonathan C. Spierer, *Intellectual Property in China: Prospectus for New Market Entrants*, HARV. ASIA Q., 46 (Summer 1999) (cited in Yahong Li, *Pushing for Greater Protection: The Trend Toward Greater Protection of Intellectual Property in the Chinese Software Industry and the Implications for the Rule of Law in China*, 23 U. PA. J. INT'L ECON. L. 637, 640 n.14 (2002)).

99. Reported in Yahong Li, *supra* note 98, at 641 n.16. It is also quite ironic, but as Alford points out, "[t]he most significant rationale for intellectual property law lies with the welfare of the Chinese people themselves. They are now, and seem likely in the foreseeable future to continue to be, the greatest victims of the infringement of intellectual property that is rampant throughout the vast nation." William P. Alford, *Making The World Safe for What? Intellectual Property Rights, Human Rights, Property Law and American Foreign Policy in the Post-European Cold War World*, 29 N.Y.U. J. INT'L L. & POL. 135, 136 (1997). See also Robert Bird & Daniel R. Cahoy, *The Impact of Compulsory Licensing on Foreign Direct Investment: A Collective Bargaining Approach*, 45 AM. BUS. L.J. 283 (2008).

100. For a description of the early efforts (1992-1994) at reforming the Chinese IPR regime, see Jianyang Yu, *People's Republic of China: Protection of Intellectual Property in the P.R.C.: Progress, Problems, and Proposals*, 13 UCLA PAC. BASIN L.J. 140 (1994). Yu counted among the various changes an amended Patent Law and Trademark Law; China's joining four international conventions on intellectual property; strengthening or making available criminal sanctions on infringement of intellectual property; and China's courts and administrative authorities aggressively attempting to enforce its IPR law in practice. *Id.* at 161. Among the international conventions mentioned by Yu include the Berne Convention for the Protection of Literary and Artistic Works, effective on October 15, 1992; the Universal Copyright Convention, effective on October 30, 1992; the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, effective on April 30, 1993; and on September 25, 1992, China issued the International Copyright Treaties Implementation Rules ("Rules"), which became effective on September 30, 1992. These rules were formulated in order to implement the various international conventions which China had joined—most especially the Berne Convention. Key provisions of the 1992 "Rules" include:

- protecting unpublished foreign works under the copyright laws;
- protecting foreign works of applied art for a term of twenty-five years;
- protecting foreign computer programs as literary works without requiring their registration;
- protecting foreign works that are created by compiling non-protectable materials, but which

& Finnegan, 'While China has many laws to protect intellectual property,... enforcement of such laws has been problematic as the court system is still in the process of reform, and relevant administrative bureaus have problems delegating authority.'"¹⁰¹

Concern over the lack of protection of IPRs was voiced by the International Bar Association in 1995, which noted:

[T]he borderline between fair exercise of IP rights and the abuse of IP rights is not well defined under any jurisdiction. An attempt to draw a dividing line through legislation is commendable but should leave no illusions as to the urgent need for future clarification through case-law or administrative practice.... Therefore, timely guidance on the concept of restrictions of competition "beyond the laws and administrative regulations on intellectual property rights," under this provision would be appreciated, especially as intellectual property laws are typically silent on competition-related questions.¹⁰²

Attorneys Harris and Ganske report that the vagueness of the AML concerning issues relating to the abuse of IPRs has caused many to question

possess originality;

- eliminating certain limitations imposed by the Copyright Law on the copyright owner's rights to comply with the Berne Convention; and
- protecting foreign works which, at the moment when the various international conventions came into force in China, have not yet fallen into the public domain in the country of origin after the expiration of the term of protection.

Id. at 143. Yu also identifies a problem with the legal system itself. China officially operates on the basis of the "civil law" system in which judicial decisions do not enjoy *stare decisis* status, "[h]ence there are notable disparities among court decisions and no clear judicial tests to determine whether infringements have occurred." *Id.* at 158. Yet, as Professor Berring notes, "[t]he existing Chinese legislative opus is a patchwork drawn from both the civil and common law traditions. Each year it grows more complete and its implementation improves. Huge problems remain in predictability and enforcement but the commercial structure grows more stable." Berring, *supra* note 11, at 439 (citing STANLEY B. LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* 383-432 (1999)). The situation may have been exacerbated by China "reclaiming" Hong Kong on July 1, 1997. Hong Kong had generally adopted the Common Law system, based on precedent and the rule of *stare decisis*. Hong Kong has held an advantage in that its common law tradition has allowed it to maintain its status as a part of a global legal system, with membership in a number of international treaties and organizations. Thus, at least as it relates to commercial transactions involving Hong Kong and China, there exists the paradigm of "one nation, two systems." See Berry Fong-Chung Hsu, *Legislative Control of Hong Kong Financial Markets: Some Aspects of Banking and Securities Regulations*, 28 *LAW & POL'Y INT'L BUS.* 649, 651-52 (1997). Interestingly, as Shanghai has made known its intentions to be the commercial leader in China, its legal system has come under some scrutiny. In contrast to Hong Kong, Shanghai has a reputation for rendering verdicts "in the national interest"—at least in its maritime courts. See Richard McGregor, *Shanghai Sees Law as Key to Being Commercial Hub*, *FIN. TIMES*, July 1, 2002. See also Mei Ying Gechlik, *Judicial Reform in China: Lessons from Shanghai*, 19 *COLUM. J. ASIAN L.* 97, 99-100 (2005).

101. Yahong Li, *supra* note 98, at 650.

102. See Working Group on the Development of Competition Law in the People's Republic of China, International Bar Association, Comments on the Draft Anti-Monopoly Law of the People's Republic of China (PRC) 69-70 (2005), available at <http://www.ibanet.org/images/downloads/IBA%20Submission.pdf>.

whether this provision, as it will be enforced, will result in the loss or diminution of adequate intellectual property protection in China. They urge that the law be significantly clarified and note:

Absent such clarification, holders of valuable IP may fear the imposition of compulsory licensing (or compulsory disclosure of technical data) as a sanction for a finding of an abuse based on a mere refusal to license IP, or the imposition of conditions in IP licenses that are later determined to be unfair.¹⁰³

The United States has been especially pointed in its criticism of China's IPR policies. The Office of the United States Trade Representative annually issues a "*Special 301 Report*" on the adequacy and effectiveness of intellectual property rights (IPR) protection by U.S. trading partners.¹⁰⁴ This Report provides an important worldwide benchmark for the evaluation of China's IPR regime. Article 55 of the AML is an attempt to deal with the problematic nature of China's IPR protection.¹⁰⁵

Concerns have been raised concerning the vagueness of Article 55. Some observers have been optimistic that this provision will, in fact, be further clarified and that Article 55 will provide adequate protection of intellectual property rights. They point to the creation of a Judicial Court of Intellectual Property as an

103. Harris & Ganske, *supra* note 66, at 7.

104. See OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 2008 SPECIAL 301 REPORT 19 (2008), available at http://www.ustr.gov/Document_Library/Reports_Publications/2008/2008_Special_301_Report/Section_Index.html. Concerning China, the Report notes:

China remains a top intellectual property enforcement and TRIPS compliance priority for the United States. China will remain on the Priority Watch List, and remain subject to Section 306 monitoring. The United States is seeking to resolve its concerns with respect to three IPR protection and enforcement issues through WTO dispute settlement with China The United States recognizes and appreciates the efforts of the many officials in China who continue to give voice to China's commitment to protecting intellectual property rights and are working hard to make it a reality. In spite of these efforts, the shared goal of significantly reducing IPR infringement throughout China has not yet been achieved.

Id. The Special 301 Report placed forty-six countries on the *Priority Watch List*, the *Watch List*, and the *Section 306 Monitoring List*. There are nine countries that have been placed on the 2008 Priority Watch List: China, Russia, Argentina, Chile, India, Israel, Pakistan, Thailand, and Venezuela. According to the United States government, through the office of the United States Trade Representative, countries on the Priority Watch List "are the focus of increased bilateral attention concerning the problem areas." *Id.* at 18. Thirty-six trading partners are on the lower level Watch List, meriting *bilateral attention* to address IPR problems: Algeria, Belarus, Bolivia, Brazil, Canada, Colombia, Costa Rica, Czech Republic, Dominican Republic, Ecuador, Egypt, Greece, Guatemala, Hungary, Indonesia, Italy, Jamaica, Kuwait, Lebanon, Malaysia, Mexico, Norway, Peru, Philippines, Poland, Republic of Korea, Romania, Saudi Arabia, Spain, Taiwan, Tajikistan, Turkey, Turkmenistan, Ukraine, Uzbekistan, and Vietnam. Paraguay will continue to be subject to Section 306 monitoring under a bilateral Memorandum of Understanding that establishes objectives and actions for addressing IPR concerns in that country. *Id.*

105. AML, art. 55, translated in Bush, *supra* note 2, at app. 14.

indication of the seriousness of China's intentions.¹⁰⁶ Harris stresses the importance of effecting further concrete steps in the area of IP protection:

One step toward reaping these rewards would be clarifying the provision regarding possible violations of the new law by virtue of undefined "abuses" of intellectual property rights. Otherwise, a contraction in investment in China's high technology markets and a forestalling in the licensing of leading technologies to Chinese enterprises can be expected.¹⁰⁷

However, on the other hand, other commentators are less optimistic, noting recent comments by We Zhenguo, Deputy Director General of MOFCOM's Department of Treaty and Law/Anti-Monopoly Office, who described common abuses from IP holders that limit "competition and seek monopolies by means of a package of compulsory licensing, placement of supplementary irrational conditions in licensing contracts and collection of irrational license fees by making use of their dominant market positions."¹⁰⁸

Finally, a substantive criticism of Article 55 lies in the fact that the AML is silent on the question of punishment of an Article 55 violation. Columnist Adam Cohen notes that the Article must clarify whether a consequence of a violation of Article 55 should include nullification of the rights or compulsory licensing.¹⁰⁹

D. Legal Liabilities and Penalties

A discussion of *Legal Liabilities and Penalties* may be found in Chapter Seven, Articles 46-50. These articles are "subject matter/category" based. In general, Article 46 provides for several generic penalties by the AML Enforcement Authority in the case where undertakings *conclude and implement* illegal Monopoly Agreements. These penalties and actions include:

- an order to the undertakings to stop such illegal acts (similar to a "cease and desist" order under U.S. antitrust law);

106. *China to Open Anti-piracy Court*, BBC NEWS, March 10, 2006, <http://news.bbc.co.uk/2/hi/business/4793530.stm>. The article reported that in 2005, 700 people had been convicted in 505 criminal piracy cases; China also shut down 76 websites and demanded that 137 others remove illegal materials. Ironically, the BBC reported that "The vast majority of product piracy cases—95%—involve *imitation of Chinese products by Chinese companies*." *Id.* (emphasis added).

107. Harris, *supra* note 2, at 171.

108. Reported in Harris & Ganske, *supra* note 66, at 8.

109. Adam Cohen, *China's Draft Antitrust Law Sows Worries in the West*, WALL ST. J., Jan. 30, 2006, at A12 (describing the concerns of the world's largest holders of patents and the possibility of forced royalty-free licensing). The WTO defines compulsory licensing as "[W]hen a government allows someone else to produce the patented product or process without the consent of the patent owner. It is one of the flexibilities on patent protection included in the WTO's agreement on intellectual property — the TRIPS (Trade-Related Aspects of Intellectual Property Rights) Agreement." WORLD TRADE ORGANIZATION, COMPULSORY LICENSING OF PHARMACEUTICALS AND TRIPS (2006), http://www.wto.org/english/tratop_e/TRIPS_e/public_health_faq_e.htm. See also Agreement on Trade—related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Dec. 15, 1993, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Multilateral Trade Negotiations—Results of the Uruguay Round, 33 I.L.M. 81 (1994).

- confiscation of “illegal gains”;¹¹⁰ and
- the imposition of fines of more than 1% and less than 10% of their sales in the preceding year.¹¹¹

Article 46 provides that if the monopoly agreement has *not been implemented*, fines of less than RMB 500,000 may be imposed.¹¹² Further, if the undertakings on their own initiative report information and provide important information, the AML Enforcement Authority may reduce the penalty imposed or grant an exemption from the penalty.

Article 47 provides for the same penalties as noted above where undertakings illegally abuse their Dominant Market Positions.¹¹³ Article 48 provides for penalties in the cases of illegal concentrations, relating to illegal merger or acquisition activities. In such cases, the AML Enforcement Authority shall:

- order the undertakings to stop implementing the concentration;¹¹⁴
- dispose of equity or an asset within a specified time limit;¹¹⁵
- transfer their business within a specified time limit;¹¹⁶ and
- take other necessary measures to revert to the condition of the undertakings before the concentration.¹¹⁷

In addition, the AML Enforcement Authority may impose a fine of no more than RMB 500,000. In considering the appropriateness of any potential fines to be levied under Articles 46, 47, and 48, Article 49 stipulates that the AML Enforcement Authority shall take into account the “nature, extent and duration of the illegal act and other factors in determining the specific amount” of any fine imposed.¹¹⁸

Article 50 is both interesting and potentially controversial. It provides that “Undertakings that cause loss to others as a result of their Monopolistic Conduct

110. In infringement cases, damages are usually calculated on one of the following bases: “(1) the intellectual property owner’s actual economic loss caused by the infringement; (2) the infringer’s total profits derived from the infringement; or (3) an amount no less than a reasonable royalty.” Jianyang Yu, *supra* note 100, at 159.

111. AML, art. 46, *translated in* Bush, *supra* note 2, at app. 12.

112. As of the writing of this paper, 1 CNY (China Yuan Renminbi- RMB) = 0.1458 USD (July 7, 2008). Exchange Rates Data, Chinese Yuan, American Dollar, x-rates.com, <http://www.x-rates.com/d/USD/CNY/data120.html> (last visited Nov. 15, 2008). RMB 500,000 would amount to a maximum fine of approximately \$72,900. The RMB is a “fixed currency.” The current amount of any fine would not be expected to fluctuate greatly.

113. AML, art. 47, *translated in* Bush, *supra* note 2, at app. 12.

114. *Id.* art. 46.

115. *Id.* art. 48.

116. *Id.*

117. *Id.*

118. *Id.* art. 49.

shall be liable for civil liabilities in accordance with laws.”¹¹⁹ At least one commentator has argued that this provision applies to consumers¹²⁰ but may not be applicable to competitors within or outside the Chinese market.

VI. TENTATIVE OBSERVATIONS AND CONCLUSIONS

China's new AML represents a significant step in China's transition from its command-and-control economy toward the creation of a socialist market economy—however that may ultimately be defined. The enactment of the comprehensive AML also represents a significant step towards assuring the global acceptance of China as a full international partner in international trade and in the continued attraction of significant amounts of foreign direct investment.¹²¹ However, the AML which became effective on August 1, 2008, is but the first step in what may prove to be a long process of reconstruction and revision of China's antimonopoly regime. In their evaluation, Harris and Ganske lay out several major concerns that will need to be addressed if China is to remain on its glide path to success and continued economic progress.¹²² We strenuously urge policy makers—both in China and in the capitals of their trading partners—to pay special and close attention to the recommendations of these noted policy experts. Based upon our detailed analysis of the most important provisions of the AML, we will amplify upon these conclusions and add our own concerns. These include:

1. Provisions of the AML related to dominant market position (Articles 6 and 17) are vague and will require significant refinement and the adoption of clarifying guidelines in a relatively short time after the effective date, through the adoption of Implementation Rules or other clarifying guidelines.

119. *Id.* art. 50.

120. Michael X.Y. Zhang, Private Civil Lawsuits under China Anti-Monopoly Law, Antitrust Law Blog, <http://www.antitrustlawblog.com/2008/04/articles/article/private-civil-lawsuits-under-china-antimonopoly-law> (April 7, 2008) (hosted by Sheppard Mullin Richter & Hampton L.L.P.). It appears that the writers of the AML changed the wording of Article 50 to “others” from the terms previously used in earlier version—“party with interest.” *Id.* Zhang concludes that “The AML should be very cautious in granting the right to sue to competitors, and perhaps withhold entirely until the potential procedural abuses are resolved, and the scope of the AML itself is more established.” *Id.*

121. The CIA reports that aggregate FDI into China had reached 758,900,000, 000 in 2007. In addition, Chinese exports reached 1,217,000,000,000 and imports into China were 901,300,000,000 in 2007. CIA, *supra* note 1. The Asian Development Bank reported that government policy in China has “changed substantially” and has evolved through several stages. In the initial stage (1978-1985), foreign investors were restricted to export-oriented operations. This stage saw “export processing zones” established for Hong Kong, Guangdong, and the four original “special economic zones” that had been created in Shantou, Shenzhen, Xiamen, and Zhuhai. Hainan was later added, offering foreign investors preferential treatment in the form of tax incentives. The second phase (1986-1991) provided a list of industrial sectors to which FDI was “encouraged, restricted, and prohibited.” Foreign investors were also allowed to sell and manufacture goods in China. See ASIAN DEVELOPMENT BANK, *supra* note 29, at 16.

122. Harris & Ganske, *supra* note 66, at 1-2.

2. Because of the enormity of the issues involved and their importance in attracting FDI, the AML's relationship to intellectual property rights needs more clarity, especially in light of the strong worldwide perception of the lack of enforcement of IPRs in China in the past. Issues relating to *piracy, industrial espionage, and "grey market goods"* must be specifically addressed.
3. The Chinese approach to what has been termed "collective dominance," which presumes the dominant position of multiple entities based on their combined market share, "is unique and troubling."¹²³
4. There have been grave concerns raised about the administration of the AML in two quarters. First, the AML Enforcement Authority has been placed within the competency of the Chinese State Council—essentially a political body with close ties to the Chinese Communist Party. In addition, there is concern that under Article 10, administration of the AML may be devolved to lower level or local government bodies with potentially skewed or biased views¹²⁴ against foreign competition.
5. The lack of experience within the legal system in the administration of antitrust¹²⁵ or anti-competition law and a lack of expertise on the proper functioning of a capitalist market economy in courts of "general jurisdiction" throughout China may indicate that Chinese courts may be unable to properly interpret the AML.
6. Provisions relating to "national security" need to be fleshed-out and limited to circumstances generally accepted as such under international norms and international law with due respect given to Chinese sovereignty.
7. Provisions relating to the "well being of the national economy" found in Article 31 need to be developed and defined. A clear reference point must be established.
8. The term "public interest" found in Article 1 and Article 15 must be defined and explained.
9. The phrase, "legitimate interest in foreign trade and foreign economic cooperation," must be refined and extrapolated.

123. *Id.* at 1.

124. There continues to be a problem with enforcing judgments in the Chinese legal system. Attorney Lindsay Wilson reports "Judgments also remain unenforced because of local protectionism and 'selfish departmentalism.' Government departments often simply refuse to cooperate, and parts of the government, such as the military, are immune from any legal action unless they choose to submit. In the private sector, insolvent corporations can escape payment, and it is difficult to dock the wages of employees. Courts, which depend on political capital even in the most balanced systems, are reluctant to coerce compliance with their dictates." Wilson, *supra* note 24, at 1022 nn.105-108 (citing LUBMAN, *supra* note 100, 266-68).

125. See Tucker & Waldmeir, *supra* note 53. The authors note that ironically, in fact China's threshold for merger filings may be *too low*—fearing that enforcement agencies may lack both the resources and expertise to deal with more complex merger cases.

10. Chinese authorities must explain exactly what is meant when they assert that they will *balance* any anticompetitive effects of an agreement against “social or political benefits.” What exactly are these “social or political benefits”?
11. Concerning abuses in the market, Chinese authorities must define “unreasonable conditions” concerning the existence of permissible “tie-ins” in the domestic Chinese economy, especially as China continues to develop its activities in international franchising and leasing.¹²⁶
12. The persistent use of the term “other factors related to its determination” needs to be accompanied by clear legislative or administrative guidance so as to avoid the impression that the established rules are subject to the vagaries of interpretation of the Anti-Monopoly Law Enforcement Authority.
13. China must continue to reform its legal system, especially emphasizing the need for the existence of a judiciary free from Communist Party influence.

However, even given these perceived deficiencies—which may more positively be considered as opportunities for significant improvements—China’s experience with developing its unique “socialist market economy” has generally proven to be positive.

Today, China is very different from the one established in revolution in 1949 when “Chairman Mao mounted Tiananmen and declared the founding of the People’s Republic of China”,¹²⁷ or when China began its “March to the Market” in 1978; or when China began creating an efficient and functioning antimonopoly regime in 2002. In fact,

[Three hundred] million people have escaped poverty in less than a generation, and millions are migrating from the countryside to places like Chongqing, where the juggernaut of capitalism is powering a rapid transformation.... In the past one saw the occasional car; now the nation is putting 25,000 new vehicles on the road every day.... People talked openly about wanting to get rich, a desire once verboten.¹²⁸

The 2008 AML is yet another step in this progression.

126. See generally Héctor R. Lozada et al., *Master Franchising as an Entry Strategy: Marketing and Legal Implications*, 4 COASTAL BUS. J. 16, 24-25 (2005), available at: http://www.coastal.edu/business/cbj/pdfs/articles/spring2005/lozada_hunter_kritz.pdf.

127. Berring, *supra* note 11, at 443.

128. Felicia R. Lee, *Ted Koppel Tours a China Brimming with Dreams and Consumerism*, N.Y. TIMES, July 8, 2008, at E3 (discussing Ted Koppel’s recent visit to China and the documentary “Koppel on Discovery: The People’s Republic of Capitalism”).

