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CHINA'S NEW ANTI-MONOPOLY LAW: A PERSPECTIVE FROM THE UNITED STATES

Thomas R. Howell, Alan Wm. Wolff, Rachel Howe, and Diane Oh[†]

Abstract: In August 2007, China enacted an Anti-Monopoly Law, becoming one of roughly ninety nations to establish a comprehensive regulatory regime governing competition. Since the advent of China's economic reform program beginning three decades ago, China has been moving to integrate its economy within the global trading system. This article provides an overview of China's Anti-Monopoly Law ("AML") emphasizing key areas of significant apparent divergence from U.S. antitrust policy. The article addresses the evolution of anti-monopoly policy in China and the United States, observing that, where differences exist, China's AML frequently reflects principles similar to those once embedded in U.S. antitrust policy, but which have been abandoned or modified by U.S. policymakers and courts in a sustained process of policymaking through trial and error. The article also examines specific areas of divergence between the AML and U.S. antitrust policy, describing how past U.S. policies, which find parallels in the AML, were modified or abandoned over time. Finally, the article concludes that in enacting the AML, Chinese policymakers aim to promote economic growth and innovation. It also expresses the hope that the U.S. experience, which was driven by the need to increase its own economic dynamism, may serve as an abiding point of reference to China's policymakers.

I. INTRODUCTION

In August 2007, China enacted an Anti-Monopoly Law, becoming one of roughly ninety nations (including the U.S., the European Union, Canada and Japan) to establish a comprehensive regulatory regime governing competition.¹ Since the advent of China's economic reform program

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¹ Anti-Monopoly Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) LAWINFOCHINA (last visited Nov. 30, 2008) (P.R.C.), available at <http://www.lawinfochina.com/law/display.asp?db=1&id=6351&keyword=monopoly> [hereinafter AML].

beginning three decades ago, China has been moving to integrate its economy within the global trading system.

In contrast to China's World Trade Organization ("WTO") accession, no established global framework of rules exists with respect to competition policy, reflecting a lack of global consensus on the goals and methods of competition policy enforcement.² National competition regimes and policies differ substantially. Accordingly, in enacting anti-monopoly legislation, China could not—even if it had so chosen—conform its competition policy regime to a single unitary system of multilateral norms. For China, divergence from at least some national competition regimes has been inescapable.

This article provides an overview of China's Anti-Monopoly Law ("AML") with emphasis on key areas of significant apparent divergence from U.S. antitrust policy. Part II of this article addresses the evolution of anti-monopoly policy in China and the United States, observing that where differences exist, China's AML frequently reflects principles similar to those once embedded in U.S. antitrust policy, which have been abandoned or modified by U.S. policymakers and courts in a sustained process of policymaking through trial and error. In general, U.S. antitrust policy has evolved from a system of regulation based on political, social, and ideological considerations to one premised on modern economic principles. Part III examines specific areas of divergence between the AML and U.S. antitrust policy, describing how past U.S. policies, which find parallels in the AML, were modified or abandoned over time. Particular emphasis is given to U.S. antitrust policies which came to be seen as impediments to economic growth, such as the antitrust treatment of agreements constituting so-called "per se" violations (II.A), dominant market position (II.B), intellectual property rights (II.C), and differential treatment of various industries as a result of their relationships with government organizations (II.D, E and F). Part IV concludes that in enacting the AML, Chinese policymakers aim to promote economic growth and innovation. It also expresses the hope that the U.S. experience, which was driven by the need to increase its own economic dynamism, may serve as an abiding point of reference to China's policymakers.

² See generally Eleanor M. Fox, *International Antitrust and the Doha Dome*, 43 VA. J. INT'L L. 911 (2003).

II. EVOLUTION OF ANTI-MONOPOLY POLICY IN CHINA AND THE UNITED STATES

In both China and the United States, the enactment of anti-monopoly legislation was characterized by uncertainty and lack of consensus. It has taken nearly a century for the United States to arrive at a workable solution. While China will undoubtedly find its own path, as the U.S. academic Hans B. Thorelli observed in the Preface to his magisterial history of the early evolution of U.S. antitrust doctrine, “other nations and international bodies considering measures to repress or control monopoly should stand to gain” by studying the evolution of U.S. antitrust policy.³

A. *Background of China's Anti-Monopoly Law*

In 1978, China's leaders launched the country on a program of long-run economic reform, emphasizing the introduction of market-based principles, enterprise autonomy, private ownership, and entrepreneurialism.⁴ Prior to these reforms, although government-owned and run factories and other economic units competed to achieve production quotas and other goals set by central planners, Western-style profit-driven competition between enterprises for markets was virtually unknown.⁵ After these reforms, however, a dynamic private sector emerged in many economic sectors.⁶ Competition among enterprises not only became widespread, but frequently took on such an intensity that Chinese observers characterized it as “malignant,” “malicious,” and “excessive.”⁷ In 1993, China adopted an Anti-Unfair Competition Law to place curbs on certain kinds of competitive excesses, such as deceptive advertising, coercive sales, appropriation of business secrets, and bribery.⁸ However, China's leadership saw the need for more comprehensive anti-monopoly legislation as a key element in the

³ HANS B. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* vii (1955).

⁴ The reform program was initiated at the Eleventh Central Committee Communist Party Plenum in December 1978.

⁵ Youngjin Jung and Qian Hao, *The New Economic Constitution in China: A Third Way for Competition Regime?*, 24 *NW J. INT'L L. AND BUS.* 107, 110 (2003).

⁶ See Bruce M. Owen, Su Sun & Wentong Zheng, *China's Competition Policy Reforms: The Anti-Monopoly Law and Beyond* 10 (Stanford Inst. for Policy Research, SIEPR Discussion Paper No. 06-32, 2007), available at <http://siepr.stanford.edu/papers/pdf/06-32.pdf>.

⁷ *Id.* at 19.

⁸ *Id.* at 4.

creation of the sort of sophisticated civil legal system necessary to support the functioning of a market economy.⁹

China's State Council called for enactment of Anti-Monopoly legislation in the late 1980s, and drafting of what was to become the Anti-Monopoly Law began in 1994.¹⁰ The Ministry of Commerce ("MOFCOM") emerged as the principal drafting agency, although many other governmental organizations were consulted.¹¹ The officials involved in the drafting consulted extensively with foreign competition officials, academics, attorneys, and business executives. The U.S. Department of Justice, the Federal Trade Commission, the American Bar Association, the U.S. Chamber of Commerce, and other U.S. organizations reviewed and commented extensively on various drafts of the AML and held a series of legal exchanges and conferences with Chinese officials involved in the drafting process.¹² International bodies such as the World Bank, the Organization for Economic Cooperation and Development, the International Bar Association, and the United Nations Conference on Trade and Development were consulted.¹³ The Chinese government reviewed the draft law with public and private sector experts in the European Union, Japan and Korea.¹⁴ Commentators believed that these extensive consultations resulted in substantial improvements in the law that was ultimately enacted.¹⁵

⁹ Between 2000 and 2004, China promulgated 94,288 laws and regulations, triple the number from the preceding four-year period. These include a recently-enacted Property Code, a Labor Contract Law, and individual and corporate tax codes. As of 2005, China had admitted 114,471 lawyers to practice (compared with 6,218 in 1981), many of them with advanced degrees. *Business Week* observed in 2007 that "virtually every area of business life in China is now covered by a modern statute or regulation." *China Makes Remarkable Progress in Civil Law Making*, XINHUA WANG [XINHUA NET] (Dec. 4, 2007), http://en.ce.cn/National/Local/200712/05/t20071205_13816882.shtml#.

¹⁰ H. Stephen Harris, Jr., *The Making of an Antitrust Law: The Pending Anti-Monopoly Law of the People's Republic of China*, 7 CHI. J. INT'L. L. 169, 175 (2006).

¹¹ *Id.* at 175-80.

¹² *Id.* at 181.

¹³ Nathan Bush, *The PRC Anti-Monopoly Law: Unanswered Questions and Challenges Ahead*, THE ANTITRUST SOURCE, Oct. 2007, available at <http://www.abanet.org/antitrust/at-source/07/10/Oct07-Bush10-18f.pdf>.

¹⁴ Harris, *supra* note 10, at 181.

¹⁵ See *id.* at 228-9; Federal Trade Commission Chairwoman Deborah Platt Majoras commented in 2007 after enactment of the AML: "We have been pleased with the opportunities afforded to the U.S. antitrust agencies to provide our views, and we have taken advantage of that through frequent high-level contacts, including my trip to Beijing last year and a recent training program for Chinese staff involved in merger review The Anti-Monopoly Law reflects many suggestions from the U.S. agencies, which also were consistent with recommendations of [European Union] DG-Camp and others." Deborah Platt Majoras, Chairwoman, Fed. Trade Comm'n, Remarks at Fordham Law School 34th Annual Conference on International Antitrust Law & Policy: Convergence, Conflict and Comity: The Search for Coherence in International Competition Policy (Sept. 27, 2007).

B. *The U.S. Perspective on Antitrust*

No country, including the United States, can claim to have a perfect competition policy system, but the U.S. has a far longer history of implementing anti-monopoly legislation than any other country, and its policymakers and academics have grappled at great length with certain basic questions that confront any government seeking to regulate competition. The U.S. experience, including what are now generally regarded as U.S. mistakes, has referential value for China today.

The original U.S. anti-monopoly legislation, the Sherman Antitrust Act of 1890 (“Sherman Act”), was enacted by Congress as a response to public agitation against “trusts” and “big business.”¹⁶ Although the Sherman Act governed commercial relationships, professional economists were not consulted in any meaningful way during the drafting of the law and, for many decades, it was unclear whether antitrust had a coherent underlying economic rationale.¹⁷ The evolution of U.S. antitrust policy is a checkered saga in which a variety of political, social, moral and ideological considerations gradually gave way to a rational system of commercial regulation based on widely-accepted, modern economic principles.¹⁸

While China will pursue its own course in implementing anti-monopoly policy, its policymakers must address the same fundamental questions that have confronted U.S. antitrust policymakers since 1890: should competition policy try to protect small businesses from competitive pressure by large firms? What should government policy be when intense competition results in the emergence of a single dominant enterprise? In other words, is monopoly itself intrinsically pernicious? Should innovators be allowed to monopolize their inventions for a limited time, or should they be compelled to share them with actual and potential rivals? Should certain areas of the economy be sheltered from competition law enforcement? Do the answers to all these questions have a bearing on overall economic growth and international competitiveness?

¹⁶ See generally ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF*, at ix-xvii (Free Press 1993) (1978); see also Thomas B. Leary, Comm’r, Fed. Trade Comm’n, Speech at the Western Economic Association: Antitrust Economics: Three Cheers and Two Challenges (July 7, 2001), available at <http://www.ftc.gov/speeches/leary/learythreecheers.htm>; see also J. Thomas Rosch, Comm’r, Fed. Trade Comm’n, Speech at the International Bar Association Antitrust Section Conference: I Say Monopoly, You Say Dominance: The Continuing Divide on the Treatment of Dominant Firms, is it the Economics? 5-10 (Sept. 8, 2007), available at <http://www.ftc.gov/speeches/rosch/070908isaymonopolyba.pdf>; see also William E. Kovacic, *The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy*, 34 WAYNE L. REV. 1413, 1423-30, 1445-46 (1990).

¹⁷ *Id.*

¹⁸ *Id.*

To the extent that the evolution of U.S. antitrust policy offers a lesson of universal applicability, it is that competition policy can serve either as a brake or a stimulus to economic growth. Arguably the Sherman Act and subsequent U.S. antitrust laws were intended as much as a political constraint on the power of big business as a system of rational economic regulation.¹⁹ As one professor of antitrust law reportedly said, the government should “eschew policy analysis and just keep bringing lawsuits in order to keep businessmen ‘shook up.’”²⁰ Not surprisingly, U.S. antitrust policy was often criticized by economists as irrational and an impediment to economic growth and innovation.

Fundamental reappraisals of U.S. antitrust policy have coincided with serious economic crises. In the 1970s, the U.S. economy was struggling with economic “stagflation,” a seemingly intractable mix of low productivity growth, inflation, and declining rates of innovation, and antitrust policy came under scrutiny as a contributing factor. In the preceding four decades, U.S. antitrust policy had emphasized the curtailment and even breakup of “dominant” firms and the imposition by the courts of severe limits on the free exercise of intellectual property rights.²¹ IBM, a world-class high technology firm, was the target of one of the largest lawsuits ever undertaken by the federal government. In retrospect, it is recognized that as former Deputy Assistant head of the Antitrust Division, William Kolasky, expressed it, “pursuit of these types of antitrust policies contributed . . . to the stagflation we experienced during the 1970s.”²²

By the 1970s, an intensive intellectual reexamination of U.S. antitrust policy, which began in the 1950s at the University of Chicago, had led new perspectives to emerge which subsequently found expression in U.S. judicial decisions, legislation, and antitrust policy.²³ The new U.S. thinking on

¹⁹ As a former Chairman of the Federal Trade Commission observed in 2001, “up to relatively recent times there was a rigorous debate about possible alternative sources [to economic consideration] for antitrust decisions, like dispersion of political power, wealth transfer effects, and various social considerations.” Leary, *supra* note 16.

²⁰ BORK *supra* note 16. Another attorney, who later was nominated to the U.S. Supreme Court, reportedly characterized antitrust as “in the good old American tradition of the sheriff of a frontier town: he did not sift through evidence, distinguish between suspects, and solve crimes, but merely walked the main street and every so often pistol-whipped a few people.” *Id.* at 6.

²¹ See William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic Thinking*, 14 J. OF ECON. PERSP. 43, 50-52 (2000), in David M. Hart, *Antitrust and Technological Innovation*, ISSUES IN SCI. AND TECH. (Winter 1998), <http://www.issues.org/15.2/hart.htm>.

²² William J. Kolasky, Deputy Assistant Att’y Gen. for Int’l Enforcement, Antitrust Div., U.S. Dep’t of Justice, Address at the Tokyo America Center: The Role of Competition in Promoting Dynamic Markets and Economic Growth (Nov. 12, 2002).

²³ See generally Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

antitrust was based on economic principles rather than the social, moral, and ideological considerations that had until then comprised important underpinnings of U.S. antitrust policy. The new interpretations of antitrust law “precipitated a sea change ‘In the 1960s through the 1980s [antitrust scholars generally associated with the University of Chicago] explained how many market structures and practices that antitrust treated with hostility could be beneficial.’”²⁴ One observer later commented that “[t]he closest approximation to a pure triumph of ideas in regulatory policy was the revolution in antitrust incited by the work [of the Chicago School and its adherents].”²⁵

The Chicago School perspective on antitrust rejected former notions that “big is bad,” that any particular class of competitors (such as small businesses) should be protected by the antitrust laws, or that innovators should be compelled to share their inventions with competitors. The sole purpose of antitrust, it was argued, should be to promote economic efficiency for the benefit of consumers²⁶—and if such benefits were promoted by dominant or even monopoly enterprises, there should be no inconsistency with a U.S. antitrust law. These concepts won wide acceptance and are now firmly embedded in U.S. antitrust law and policy. Arguably the new policies played a role in restoring robust U.S. economic growth after the 1970s.²⁷ In decades the U.S. witnessed the appearance of dynamic new high technology industries, a veritable explosion in U.S. innovation, and the emergence of an array of new world class technology-intensive firms which are the envy of other countries, including China.

²⁴ ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 33 (2007) (quoting GELLHORN ET. AL., ANTITRUST L. AND ECON. 105 (5th ed. 2004)).

²⁵ BORK, *supra* note 16, at xii-xiii (quoting Christopher DeMuth).

²⁶ BORK, *supra* note 16, at 427.

²⁷ In *Brunswick v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 320 (1962)), the Supreme Court declared that the “antitrust laws . . . were enacted for the protection of competition not competitors.” While it is beyond the scope of this paper to examine why the Chicago School approach won such complete and comparatively rapid acceptance by U.S. courts, policymakers, and the public, a number of analysts have pointed out that the popular hostility toward big business that once animated the antitrust movement had largely died out, as had the antitrust movement itself; see also RICHARD HOFSTADTER, *What Happened to the Antitrust Movement?*, in *THE PARANOID STYLE IN AMERICAN POLITICS* 188 et. seq. (1965); see also Daniel Scroop, *A Faded Passion? Estes Keufauver and the Sen., Subcomm. on Antitrust and Monopoly*, 5 BUSINESS AND ECONOMIC HISTORY ONLINE (2007), <http://www.thebhc.org/publications/BEHonline/2007/scroop.pdf> (last visited Nov. 30, 2008); see also William H. Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency*, 75 VA. L. REV. 1221 (1989).

C. *Synopsis of China's New Law*

China's AML was enacted August 30, 2007 and became effective on August 1, 2008.²⁸ Like U.S. antitrust statutes, China's AML is short and broadly worded, with the interpretation and application of specific prohibitions left to be determined by subsequent implementing regulations and decisions of the enforcement authorities.²⁹

The AML governs "monopolistic conduct" in China and outside of China to the extent that such conduct "eliminates or restricts competition in China."³⁰ Monopolistic conduct can take three forms: (1) monopoly agreements between undertakings;³¹ (2) abuse of a dominant market position by undertakings;³² and (3) concentrations (mergers and acquisitions) that eliminate or restrict competition.³³ These three forms of "monopolistic conduct" are prohibited and subject to civil penalties unless an exemption is provided pursuant to the AML. There is no criminal liability under the AML.

The stated purposes of China's AML are to prevent and prohibit "monopolistic conduct," to protect "fair market competition," to promote "economic efficiency," to safeguard the interests of consumers, and to "promote the healthy development of the socialist market economy."³⁴ Earlier versions of China's AML stated that the purpose of the law included "protecting the legitimate rights and interests of *undertakings* [e.g. competitors] consumers and public interest, and promoting healthy development of the socialist market economy."³⁵ The final version of the law as enacted eliminated protection of "undertakings" as a stated purpose of the law. However, a number of provisions in the law suggest that notwithstanding this change in Article 1, the AML may in some cases be applied to protect one group of competitors against another in order to

²⁸ AML, *supra* note 1.

²⁹ The rationale of the U.S. Congress with respect to this broad approach was explained by an eminent U.S. political scientist as follows: "[I]t is very likely that, with its broadly worded prohibition of conspiracies in restraint of trade and of efforts to monopolize, Congress was attempting to lay down a declaration of policy that would serve as a guide to future action in much the same flexible way as the Constitution itself had served the country after 1787." HOFSTADTER, *supra* note 27, at 199.

³⁰ AML, *supra* note 1, art. 2.

³¹ *Id.* at art. 3(i).

³² *Id.* at art. 3(ii).

³³ *Id.* at art. 3(iii).

³⁴ *Id.* at art. 1.

³⁵ Draft Anti-Monopoly Law transmitted to the National People's Congress, June 7, 2006, Art. 1 (emphasis added).

further industrial policy objectives.³⁶ If this occurs it would diverge from current U.S. practice, which is enforced to protect “competition not competitors” and has the sole objective of maximizing consumer benefits by promoting economic efficiency.

By its terms China’s AML makes no distinction between domestic and foreign enterprises, and following enactment of the AML, Chinese officials have given extensive assurances to the effect that the new AML is not aimed at foreign firms.³⁷ However, in the policy debates accompanying the drafting of the AML, Chinese officials often cited the need for the AML to serve as a foil against foreign multinationals that sought to dominate or monopolize China’s market.³⁸ During the course of National People’s Congress (“NPC”) deliberations on the AML in 2006, various NPC Standing Committee members indicated that promulgation of the AML would “strike multinationals behavior restricting competition such as control of market

³⁶ AML, *supra* note 1, art. 17(i) (a prohibition in the new law on “dominant” undertakings “buying products at unfairly low prices” found in Article 17(i) seems intended only to protect competitors, not consumers.); *see* AML, *supra* note 1, art. 15(v) (similarly an exemption from the prohibition on monopoly agreements “for the purpose of mitigating a severe decrease in sales volume or excessive overstock during economic recessions” found in Art. 15(v) can only benefit undertakings and is actually disadvantageous to consumers.). In light of such ambiguities in the AML, it remains to be seen how Chinese policymakers will interpret the purpose of the law.

³⁷ MOFCOM made this point in its Foreign Investment Report 2007. Zhang Qiang of the State Council’s Legislative Affairs Office said that “the Anti-Monopoly Law regulates mergers and acquisitions, and is the same for domestic [enterprises] and foreign-invested [enterprises]. It does not give the domestic [enterprises] a way out, and does not put the screw on foreign-invested [enterprises].” Guo wu yuan fa zhi ban fan long duan fa bu ying xiang qi ye zheng dang bing gou [Legislative Affairs Office of the State Council: Anti-Monopoly Law Does not Affect Normal Mergers and Acquisitions of Enterprises], XINHUA WANG [XINHUA NET] (Sept. 10, 2007), http://news.xinhuanet.com/newscenter/2007-09/10/content_6699043.htm (P.R.C.); *see also* Gong shang zong ju fan long duan shen cha bu cun zai dui wai zi de te bie yao qiu [State Administration of Industry and Commerce: Anti-Monopoly Investigation not Specific to Foreign Investors], XINHUA WANG [XINHUA NET] (Dec. 13, 2007), http://news.xinhuanet.com/newscenter/2007-12/13/content_7244074.htm (P.R.C.); *see also* Ren Siqiang, Zhuan jia fan bo shang wu bu wai zi long duan xian xiang yi chu xian zai ge bie hang ye [Experts Refute Ministry of Commerce: Foreign Monopoly Already Appears in Some Industries], BEIJING BUSINESS TODAY, Sept. 10, 2007 (Ministry of Finance asserts there is no foreign monopolization of domestic industries), *available at* <http://xinping.mofcom.gov.cn/article/dongtai/200709/20070905076714.html>; Zhuan jia cheng fan long duan fa wu fa zhen dong guo qi long duan di wei [Experts Say AML Cannot Shake the Monopoly Position of SOEs], Di yi cai jing ri bao [The First Financial and Economic Daily], Sept. 13, 2007 (P.R.C.) (debating how the AML may affect state-owned monopolies).

³⁸ China’s State Administration of Industry and Commerce (“SAIC”) warned in 2004: “[C]ompared with China’s domestic enterprises, multinational companies possess great competitive advantages with respect to technology, size, capital, etc. As a result, it is much easier for them to obtain a dominant and even a monopoly position in the Chinese market.” Off. of Anti-Monopoly, Fair Trade Bureau, State Admin. of Indus. and Com., Zai hua kua guo gong si xian zhi jing zheng xing wei biao xian ji dui ce [Anticompetitive Practices of Multinational Companies in China and Countermeasures], 2004.4 Gong shang xing zheng guan li [Biweekly of Administration for Industry and Commerce] 42, 42 (2004), *available by subscription at* www.cnki.net.

price and product quality, and abuse of market dominance”³⁹ More specifically cited as a concern was the “monopoly behavior of multinationals in China, such as in computer operating systems, photographic material, tires, network equipment, cameras, soft packaging, etc.”⁴⁰

Even as Chinese leadership debated anti-monopoly legislation, some Chinese lawmakers argued that the AML would provide a solution to a specific issue at the time — the takeover and intellectual property rights (“IPR”) dispute involving a domestic Chinese beverage manufacturer, Wahaha, and the French food company Danone (known as Dannon in the U.S.). The Wahaha chairman, Zong Qinghou, was also an NPC member and argued in NPC testimony that special mergers and acquisitions (“M&A”) provisions should be incorporated in the AML⁴¹ to address certain challenges posed by foreign firms.⁴² Wahaha was the target of a takeover bid by Danone which was simultaneously charging Wahaha with inappropriate use of trademark.⁴³ After the Wahaha discussion, another NPC member, Li Guoguang—a member of the NPC Legal Committee and a vice-president of the Supreme People’s Court⁴⁴—commented that an AML proceeding might eventually result: “launching anti-monopoly investigations against Danone and seeking legal measures to break its monopolized status

³⁹ Fa yan zhai deng fan long duan fa cao an [Speech Excerpts: Draft of the Anti-Monopoly Law], June 30, 2006 [hereinafter *Speech Excerpts*] (collecting excerpts of various members of the Tenth Standing Committee of the National People’s Congress, including Cong Bin and He Yicheng, quoted here), <http://cms.npc.gov.cn:87/servlet/PagePreviewServlet?siteid=1&nodeid=3064&articleid=350218&type=1> .

⁴⁰ *Id.* (summarizing the speech of Jiang Zhuping). One member of the Standing Committee, Vice Chairman Cheng Siwei, noted “there are two major target categories of the Anti-Monopoly Law. One is state-owned enterprises, and the other foreign enterprises.” *Id.* Zheng Gongcheng noted “[a] market economy must fight against monopoly, but at the present stage we need to protect our enterprises so as to expand their market shares. Besides, so long as foreign trade is concerned, we need price fixing to a certain extent to remove ruinous competition and safeguard our national interests. A balance must be properly kept on the one hand to help our enterprises keep expanding and increasing market share, and gain advantageous position in international competition, and on the other hand to fight monopoly.” *Id.*

⁴¹ Zong Qinghou, Zong Qinghou guan yu li fa xian zhi wai zi tong guo bing gou long duan wo guo ge ge hang ye wei hu jing ji an quan de ti an [Zong Qinghou’s Proposal on Legislation Restricting Foreign Investment from Monopolizing Various Industries in China Through Mergers and Acquisitions and Maintaining Economic Security], XINHUA WANG [XINHUA NET] (Mar. 14, 2007), http://news.xinhuanet.com/video/2007-03/14/content_5845841.htm.

⁴² Zheng quan shi bao [SECURITIES TIMES], Wahaha dong shi zhang Zong Qinghou ying tong guo li fa xian zhi wai zi e yi bing gou [Chairman of Wahaha: Use Legislation to Restrict Hostile Mergers and Acquisitions by Foreign Investment] (Mar. 15, 2007), available at <http://www.p5w.net/today/200703/t826564.htm>; see Zong, *supra* note 41.

⁴³ See Lan Xinzheng, *Wahaha vs. Danone*, 51 BEIJING REVIEW 23, 23 et. seq. (2007), available at http://www.bjreview.com.cn/business/txt/2007-06/04/content_65226.htm.

⁴⁴ Biography of Li Guoguang, National People’s Congress of the People’s Republic of China, www.npc.gov.cn/npc/bmzz/falv/node_1622.htm (last visited Jan. 23, 2008).

according to international practice could eventually occur.”⁴⁵ Such statements suggest that the AML is viewed as having special implications for foreign firms in China.

If the AML is employed in a manner that singles out foreign enterprises, Chinese practice will diverge from that of the United States. The U.S. does have various statutory and regulatory schemes that treat foreign enterprises in a differential manner, reflecting concerns such as national security, international trade policy, and consumer protection.⁴⁶ However, the sole purpose of U.S. antitrust policy is to safeguard competition in U.S. commerce without regard to the nationality of individual competitors.

III. A U.S. PERSPECTIVE ON POINTS OF DIVERGENCE BETWEEN THE AML AND U.S. ANTITRUST POLICY

In bilateral U.S.-China discussions during the drafting phase of the AML, U.S. officials often pointed out differences between current U.S. antitrust policy and certain aspects of China's emerging AML. It was less commonly observed that China appeared to be adopting policies that closely resembled past U.S. antitrust ideas and doctrines that have been abandoned. Chinese policymakers may find it useful to consider what the U.S. now regard as “wrong turns” in its own anti-monopoly experience as they begin to define their own anti-monopoly policies.

A. *Monopoly Agreements*

China's AML prohibits “monopoly agreements” between undertakings.⁴⁷ The types of prohibited agreements are very similar to

⁴⁵ Li reportedly said that “during the past decade Danone has acquired many well-known Chinese beverage companies, including Wahaha . . .” and that “Danone is actually monopolizing China's beverage industry . . .” Lan, *supra* note 43. Although the two parties reportedly agreed to resolve their differences amicably, it is not clear that they have actually done so. Mure Dickie, *Danone and Wahaha Agree Truce*, FINANCIAL TIMES, Dec 24, 2007, http://www.ft.com/cms/s/0/edc8a52e-b186-11dc-9777-0000779fd2ac.html?nclick_check=1.

⁴⁶ Section 721 of the Defense Production Act of 1950, as amended by the Omnibus Trade and Competitiveness Act of 1988 and the National Defense Authorization Act for Fiscal Year 1993 codified at 50 U.S.C. § 2170 (2007) (providing authority for the President to suspend or prohibit any foreign acquisition, merger or takeover of a U.S. corporation that is determined to threaten the national security of the United States). For a comprehensive synopsis of U.S. federal and state laws treating foreign enterprises in a differential manner in areas which include air and maritime transportation, insurance communications, banking, public utilities, agriculture, energy and mining, see ORG. FOR ECON. COOPERATION AND DEV., NATIONAL TREATMENT FOR FOREIGN-CONTROLLED ENTERPRISES: LIST OF MEASURES REPORTED FOR TRANSPARENCY 83-91 (2007), available at <http://www.oecd.org/dataoecd/57/46/38273182.pdf>.

⁴⁷ AML, *supra* note 1, art. 13 and 14.

certain anticompetitive combinations that have traditionally been prohibited under U.S. antitrust law (with the exception of the restriction on purchasing new technologies, which is an outlier here). If applied throughout China's economy, as is the practice in the U.S., a number of these prohibitions are likely to enhance competition, benefit consumers, and increase efficiency throughout China's economy. Specific prohibitions include: agreements involving price fixing;⁴⁸ restricting output or sales volume;⁴⁹ division of sales markets or raw materials purchasing markets;⁵⁰ restrictions on purchasing of new technology or new facilities, or the development of new technologies or products;⁵¹ joint boycotts;⁵² fixing the price for resale to a third party;⁵³ restricting the minimum price for resale to a third party;⁵⁴ and other monopoly agreements confirmed by the Anti-Monopoly Enforcement Authority.⁵⁵

Several of the prohibitions in the AML are paralleled by prohibitions under U.S. antitrust law, which holds that practices such as price-fixing,⁵⁶ big-rigging⁵⁷ and collective restraints⁵⁸ on output or sales are illegal "per se"—that is, never justified under any circumstances. U.S. courts have dramatically curtailed the range of other commercial practices once deemed per se illegal, however, reflecting the application of modern economic principles.⁵⁹ Beginning with a landmark Supreme Court decision in *Continental T.V. Inc. v. GTE Sylvania Inc.*,⁶⁰

[T]he Court systematically went about the task of dismantling many of the per se rules it had created in the prior fifty years, and increasingly turned to modern economic theory to inform its interpretation and application of the Sherman Act Rule

⁴⁸ *Id.* at art. 13(i).

⁴⁹ *Id.* at art. 13(ii).

⁵⁰ *Id.* at art. 13(iii).

⁵¹ *Id.* at art. 13(iv).

⁵² *Id.* at art. 13(v).

⁵³ *Id.* at art. 14(i).

⁵⁴ *Id.* at art. 14(ii).

⁵⁵ *Id.* at art. 13(vi) and 14(iii).

⁵⁶ See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940); see also *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927).

⁵⁷ See *United States v. Mistle Bus. & Equip. Co.*, 967 F.2d 1227, 1235 (8th Cir. 1992) (citing *United States v. Bensinger Co.*, 430 F.2d 584, 589 (8th Cir. 1970)).

⁵⁸ See *United States v. American Linseed Oil Co.*, 262 U.S. 371, 389-90 (1923); see also *United States v. Andreas*, 216 F.3d 645, 666-669 (7th Cir. 2000), *cert. denied*, 531 U.S. 1014 (2000).

⁵⁹ See *Leegin Creative Leather Prod., Inc. v. PSKS Inc.*, 127 S. Ct. 2705, 2712 (2007) (ruling that resale price maintenance agreements, long regarded as illegal "per se," are to be subject to "rule of reason" analysis, meaning that their anticompetitive effects must be balanced against pro-competitive considerations, and that in some cases such agreements may not be unlawful).

⁶⁰ 433 U.S. 36, 57-59 (1977).

of reason analysis allows this examination of potential efficiency rationales for challenged conduct. Although there are exceptions, of course, the use of per se rules of automatic illegality is now substantially reduced, replaced by a more discriminating analysis under the rule of reason.⁶¹

China's antitrust policymakers may wish to study recent U.S. decisions with respect to commercial practices prohibited under Articles 14 and 15 of the AML. Too sweeping an application of conclusive, "per se" presumptions of illegality could penalize some forms of efficiency-enhancing commercial behavior, to the detriment of the economy and consumers.

B. *Abuse of Dominance*

An important area in which China's AML and current U.S. antitrust policy diverge is the treatment of enterprises with so-called "dominant" market positions. Under U.S. law, market dominance by one company commonly reflects that entity's superior efficiency, innovative ability and competitiveness. U.S. antitrust policy does not regard such enterprises as necessarily problematic because of their market position alone, and recognizes that their competitive acts—even if highly aggressive—are usually pro-competition.⁶² Antitrust liability arises only when "specific conduct, in a particular market situation, undermines the competitive process by allowing a dominant firm to strengthen or preserve its market dominant position."⁶³ By contrast, China's AML subjects dominant enterprises to heightened scrutiny and prohibits a number of commercial practices that would be considered normal in the U.S.

Although current U.S. antitrust law does not expressly recognize the notion of abuse of a dominant market position, the original U.S. antitrust movement was driven by a popular antipathy to large firms that dominated markets and, in some cases, monopolized them—sentiments similar to those

⁶¹ ANTITRUST MODERNIZATION COMMISSION, *supra* note 24, at 36.

⁶² Zheng Gongcheng, member of the NPC Standing Committee, expressed this perspective as follows: "I think we should encourage our companies to try to expand their market share. Within this context, are companies with a dominant market position alleged monopolists? I think we should be more cautious [W]hether an abuse exists should not be decided according to market share, but in the manner that administrative power is exercised [A] company should not be regarded as an alleged monopolist simply because it gets a large market share. Otherwise it would not be conducive to the development and growth of our companies." *Speech Excerpts, supra* note 39.

⁶³ Gerald F. Masoudi, Deputy Assistant Att'y Gen., Antitrust Division, U.S. Dep't of Justice, Address Before the University of International Business & Economics Competition Law Center Conference on Abuse of Dominance: Theory and Practice: Some Comments on the Abuse-of-Dominance Provisions of China's Draft Anti-Monopoly Law 6 (July 21, 2007), <http://www.usdoj.gov/atr/public/speeches/225357.pdf>.

expressed in the recent Chinese debates over anti-monopoly legislation. The populist U.S. politician William Jennings Bryan gave voice to what was once a common popular sentiment when he said in 1899 that “[t]here is no good monopoly in private hands. There can be no good monopoly in private hands until the Almighty sends us angels to preside over the monopoly.”⁶⁴ For generations this perspective found expression in U.S. antitrust policy and judicial decisions, which were infused with subjective moral judgments regarding large enterprises. Justice Louis Brandeis, who served on the U.S. Supreme Court from 1916 through 1939, epitomized the view that “bigness” in business was a “curse” which it was necessary to curb through the application of antitrust. Brandeis believed that:

The idea of concentrating and specializing in one area . . . was wrong. Each state, each city, each village should be partially self-sufficient; industry and agriculture should be balanced; and the whole trend toward urban centralization and absentee control should be checked. The nation, in other words, should try to recapture some of the enduring values of its rural upbringing, recognize that Big Business and High Finance were false gods, and get back to a simpler and more satisfying system.

The Chairman of the House Judiciary Committee commented in 1936 that new antitrust legislation was necessary because “we must make some effort to maintain the yeomanry in business.”

The Brandeis “big is bad” perspective found many adherents in the courts and successive U.S. administrations from the presidency of Franklin Roosevelt onward. Supreme Court Justice William O. Douglas, a Roosevelt appointee and an admirer of Brandeis who authored many antitrust opinions, stated in 1948 that:

[S]ize can become a menace both industrial and social. It can be an industrial menace because it creates gross inequalities against existing or putative competitors Industrial power should be decentralized. It should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men. The fact that they are not vicious

⁶⁴ CIVIC FEDERATION OF CHICAGO, CHICAGO CONFERENCE ON TRUSTS, SPEECHES, DEBATES, RESOLUTIONS, LIST OF DELEGATES, ETC. 497 (1900).

men but respectable and social minded is irrelevant. That is the philosophy and the command of the Sherman Act.⁶⁵

Through the early 1970s U.S. antitrust embodied a hostility toward large enterprises with strong market positions, like “dominant” enterprises. A wide range of commercial practices were designated as “illegal per se,” meaning that they could not be justified regardless of circumstances,⁶⁶ and courts “grew more willing to find that dominant firms had acted improperly.”⁶⁷ In a 1962 decision, the Supreme Court disallowed a merger that would have produced a firm with a market share of 5 percent, citing Congress’ “desire to promote competition through the protection of viable, small, locally-owned business.”⁶⁸ Thomas B. Leary, a Federal Trade Commissioner, has observed that “[until the early 1970s] antitrust lawyers and judges did not pay much attention to economics, and the economics they did apply tended to be wrong.”⁶⁹ Efficiencies were suspect, for example, and monopolists were not supposed to compete very hard.⁷⁰

But in the 1970s, U.S. economic growth and productivity stagnated, while annual inflation rates reached double-digit levels. As policymakers searched for a way out of stagflation and economic malaise, U.S. competition policy came under withering criticism, particularly from the Chicago economists.⁷¹ They emphasized the efficiencies and consumer benefits that large-scale enterprises—including near or outright monopolies—bring to an economy when they resulted from scale economies and superior innovation and efficiency.⁷² One prominent critic of U.S. antitrust policy characterized the emphasis on decentralization and protection of small businesses as superficially attractive, but ultimately a reflection of social and political values reflecting “a jumble of half-digested

⁶⁵ *United States v. Columbia Steel Co.*, 334 U.S. 495, 535-36 (1948) (Douglas, J., dissenting); see also *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 542 (1973) (Douglas, J. concurring) (Douglas complained that the rise of large corporations transferred business decisionmaking from local entrepreneurs to “distant cities where men on the 54th floor with only balance sheets and profit and loss statements before them decide the fate of communities with which they have no relationship [and] responsible entrepreneurs in counties and states are replaced by clerks.”)

⁶⁶ Kovacic & Shapiro, *supra* note 21, at 50.

⁶⁷ See *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting) (complaining that the sole consistency he could see in Supreme Court decisions blocking mergers leading to dominance was that “the Government [seeking to block a merger] always wins”); see also Kovacic & Shapiro, *supra* note 21, at 51-52 (during this era, economists and the courts “tended to downplay efficiencies associated with large-scale enterprises”).

⁶⁸ *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962); see also Kovacic & Shapiro, *supra* note 21, at 51.

⁶⁹ Leary, *supra* note 16.

⁷⁰ *Id.*

⁷¹ BORK, *supra* note 16.

⁷² *Id.*

notions and mythologies” rather than rational economic thought.⁷³ The Chicago perspective began to win acceptance in U.S. courts, in part, because of “a sense that U.S. firms were losing ground in international markets and surrendering market share at home. This perception increased sensitivity to efficiency arguments.”⁷⁴

Today, a widely dispersed Chicago School perspective provides the underpinning for U.S. antitrust policy in the competition agencies and the courts. Big is no longer bad, nor is market dominance or even monopoly. Federal Trade Commission (“FTC”) General Counsel William Blumenthal expressed current U.S. antitrust thinking with respect to dominant firms:

Innovation, economic growth, and vigorous competition would be stifled if the law were to punish successful market participants who achieve a dominant or monopoly position [E]ven firms with monopoly power are permitted to compete aggressively on the merits, even if a collateral effect is a bad outcome for their competitors. Competition is a rigorous process, and it will inevitably yield both winners and losers. If a firm is more efficient and can thereby reduce costs and expand sales at the expense of its less-efficient competitors, our competition laws are not infringed.⁷⁵

China’s AML “abuse-of-dominance” provisions bear a closer resemblance to U.S. antitrust policies of the 1940s through the 1960s than to current policy. “Dominance” may be found even in situations where a firm confronts vigorous competition. Like the old U.S. policy the AML appears to contemplate a web of constraints that will bind large efficient enterprises and limit an array of commercial practices that would otherwise enhance competition and benefit consumers. In implementing the AML provisions regarding market dominance, Chinese policymakers may wish to make reference to the U.S. debates of the 1970s as they related to the impact of antitrust policy on national economic dynamism.

Article 18 of China’s AML establishes parameters for use in determining whether an undertaking has a dominant market position,

⁷³ *Id.* at 54.

⁷⁴ Kovacic & Shapiro, *supra* note 21, at 53; *see also* William E. Kovacic, *The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy*, 36 WAYNE L. REV. 1413, 143 (1989-90).

⁷⁵ William Blumenthal, General Counsel, Fed. Trade Comm’n, Government Policy for Fostering Innovation, Remarks at the Global Forum on Intellectual Property Rights Protection and Innovation (Mar. 28, 2007).

including market share,⁷⁶ “competitive status,”⁷⁷ and “financial and technical conditions.”⁷⁸ One parameter for determining dominance is “the degree of difficulty for other business operators to enter the relevant market.”⁷⁹ Similarly, Article 17 defines “dominant market position” as a market position held by undertakings “that have the ability to control the price or quantity of commodities or other transaction conditions in the relevant market or block or affect the entry of other business operators into the relevant market.”⁸⁰ Another parameter, “the extent of the reliance on the business operator by other business operators in the transactions”⁸¹ could be applied to a wide range of other situations in which Chinese enterprises must “rely” on technology and technical support from foreign firms holding proprietary technology.

Article 19 of the AML establishes an arithmetic formula for use in determining whether undertakings hold a dominant market position. Dominance can be “presumed” if the market share of one undertaking accounts for half of the relevant market,⁸² the joint market share of two undertakings amounts to two-thirds of the relevant market,⁸³ or the joint market share of three undertakings amounts to three-fourths of the relevant market.⁸⁴ The law provides that “[a] business operator that has been presumed to have a dominant market position shall not be deemed to have a dominant market position if the operator can provide opposite evidence,” indicating that the inference of dominance is rebuttable.⁸⁵

In contrast, U.S. antitrust enforcement agencies do not believe that presumptions of monopoly power based on market share alone are appropriate or helpful, given the unique factors that characterize different product markets. A firm with a large market share may face robust competition and, as a practical matter, may not possess the power to control

⁷⁶ AML, *supra* note 1, art. 18(i).

⁷⁷ *Id.* at art. 18(i).

⁷⁸ *Id.* at art. 18(iii).

⁷⁹ *Id.* at art. 18(v).

⁸⁰ *Id.* at art. 17. U.S. antitrust officials have expressed concern that such provisions could be applied to a situation in which a U.S. multinational holding proprietary technology refuses to transfer it, thus “blocking access” or making it very “difficult” (or impossible) for other undertakings to enter that product market. Gerald F. Masoudi, Deputy Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Just., Some Comments on the Abuse-of-Dominance Provisions of China’s Draft Antimonopoly Law, Remarks at the UIBE Competition Law Center Conference on Abuse of Dominance: Theory and Practice (July 21, 2007) available at <http://www.usdoj.gov/atr/public/speeches/225357.htm>.

⁸¹ AML, *supra* note 1, art. 18(iv).

⁸² *Id.* at art. 19(i).

⁸³ *Id.* at art. 19(ii).

⁸⁴ *Id.* at art. 19(iii).

⁸⁵ *Id.* at art. 19.

prices or exclude competitors even if it seeks to do so. One U.S. antitrust official indicated that he was “pleased” that in China’s AML “whatever the precise percentage market share set forth in the presumption, the respondent firm has the right . . . to rebut any presumption [of dominance].”⁸⁶ However, he said:

[T]he experience in the United States indicates that a market share of 50 percent is too low to provide a firm with monopoly power. We generally would not begin examining whether a firm has a dominant market position unless it has at least a 60 or 70 percent market share. Even when a firm has such a share, we examine the actual market situation—including barriers to effective new entry, the likelihood of leapfrog competition, and the durability of the high market share—to determine whether the firm actually has the power to raise price significantly over competitive levels.⁸⁷

China’s concept of collective dominance of a market by two or three enterprises has no parallel in U.S. antitrust doctrine and has been criticized by U.S. competition policymakers as lacking an economic rationale. One U.S. official comments that only one scenario exists under which three firms with a large joint market share might pose a collective threat to competition—when all three collude to limit competition—a scenario which can easily be addressed through the application of Articles 13 and 14 of the AML, which prohibit monopoly agreements.⁸⁸ The presumption of collective “dominance” by three firms, he said “is unclear and confusing, and is likely to harm, rather than promote, competition in Chinese markets.”⁸⁹

Commercial practices which constitute prohibited “abuses” of a dominant position are itemized in Article 17 of China’s AML, and are defined in sweeping and general terms.⁹⁰ U.S. Federal Trade Commissioner Pamela Jones Harbour commented in 2006 with respect to these designated

⁸⁶ Gerald F. Masoudi, Deputy Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Just., Some Comments on the Abuse-of-Dominance Provisions of China’s Draft Antimonopoly Law, Remarks at the UIBE Competition Law Center Conference on Abuse of Dominance: Theory and Practice (July 21, 2007), available at <http://www.usdoj.gov/aatr/public/speeches/225357.htm>.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ AML, *supra* note 1, art. 17

“abuses” that “[e]ach example of abusive conduct is a type of conduct that [under U.S. law] will usually constitute legitimate competitive behavior.”⁹¹

Article 17, section (i) of the AML cites as an abuse of a dominant market position “selling products at unfairly high prices or buying products at unfairly low prices.”⁹² A senior U.S. antitrust official recently commented on this provision:

I do not believe that high pricing is an appropriate subject for antitrust enforcement. High pricing, standing alone, does not harm the competitive process; if anything, it serves as a signal and an inducement for other firms to enter the market Second-guessing the unilateral, non-exclusionary pricing decisions of dominant firms will lead to price regulation by the government, which is not consistent with the market-oriented goals of competitive laws.⁹³

The proscription on selling products at “unfairly high prices” could be applied, among other things, to IP licensing fees that are deemed “too high.” The prohibition on buying products at unfairly low prices could also be applied to inhibit a range of normal pricing practices commonly found in a competitive market, such as the use of bulk purchasing power to bargain for lower prices⁹⁴—a practice which U.S.-based retailers like Wal-Mart use to secure dramatically lower prices for consumers.

A second form of prohibited abuse is “[s]elling products at prices below cost without any justification.”⁹⁵ Normally, low prices are an indicator of competition, which benefits consumers. U.S. antitrust doctrine recognizes that in extremely rare cases a dominant firm may price below cost for a sustained period in order to drive competitors out of the market, then raise prices to monopoly levels—so-called “predatory pricing.”⁹⁶ However, the U.S. competition agencies have concluded that almost all below-cost pricing has a non-predatory explanation, such as clearing out inventory, enticing consumers to try new products, or meeting competition from other firms.⁹⁷ Their recommendation to China with respect to this

⁹¹ Pamela Jones Harbour, Commissioner, Fed. Trade Comm’n, Adoption of Trade Regulations in China, Scope and Effect: An American’s View, Remarks at the New York State Bar Ass’n International Law and Practice Section, Shanghai, China, 6 (Oct. 20, 2006), available at <http://www.ftc.gov/speeches/harbour/061020nysbaintllawpracticesection.pdf>.

⁹² AML, *supra* note 1, art. 17(i).

⁹³ Masoudi, *supra* note 86.

⁹⁴ *Id.*

⁹⁵ AML, *supra* note 1, art. 17 (ii).

⁹⁶ Masoudi, *supra* note 86.

⁹⁷ *Id.*

provision is that it should find that below cost pricing is “without justification” only in the narrow range of circumstances in which prices are below marginal cost and there is a likelihood that the firm in question will be able to recover lost profits later by raising prices after driving competitors out of the market.⁹⁸

A third form of prohibited abuse is “refusing to transact with a trading party without any justifiable causes.”⁹⁹ This proscription could be applied to any situation in which an undertaking decides—for whatever reason—it does not wish to enter into a commercial relationship with another undertaking, whether with respect to research and development (“R&D”), distribution, sales joint manufacturing, or cross-licensing of technology.¹⁰⁰ The stakes are potentially very large if the provision is interpreted to apply to the unilateral refusal to license IPR, which is regarded as a fundamental right under U.S. law.¹⁰¹ A 2007 report issued jointly by the U.S. Department of Justice and the Federal Trade Commission stated the agencies’ conclusions with respect to unilateral refusals to license patents:

[Supreme Court] jurisprudence support[s] the traditional understanding that the unilateral right to refuse to [license] a patent is a core part of the patent grant. Antitrust liability for mere unilateral, unconditional refusals to license patents will not play a meaningful part in the interface between patent rights and antitrust protections. Antitrust liability for refusals to license competitors would compel firms to reach out and affirmatively assist their rivals, a result that is “in some tension with the underlying purpose of antitrust law.”¹⁰²

“Restricting their trading party so that it may conduct deals exclusively with themselves or with the designated business operators without any justifiable causes” is a prohibited abuse.¹⁰³ This prohibition could be applied to prohibit a wide variety of commercial practices, such as exclusive distribution arrangements and cross-licensing of technology.

⁹⁸ *Id.*

⁹⁹ AML, *supra* note 1, art. 17 (iii).

¹⁰⁰ A specific example given by SAIC in 2004 of this type of “abuse” was a U.S. multinational, the largest manufacturer of network equipment in the world, which was not willing to authorize any other company to use its private protocols for which it owned patent rights or business secrets. Off. of Anti-Monopoly, *supra* note 38 at 42.

¹⁰¹ Masoudi, *supra* note 86.

¹⁰² U.S. DEP’T OF JUST. AND THE FED. TRADE COM’N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 6 (2007) (citing Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 3398, 4407 (2004)).

¹⁰³ AML, *supra* note 1, art. 17(iv).

The AML prohibits dominant firms from “[i]mplementing tie-in sales or imposing other unreasonable trading conditions at the time of trading without any justifiable causes.”¹⁰⁴ This provision does not prohibit tying agreements but requires that they be “justifiable” and not involve “unreasonable” terms. Interpreted most broadly, this provision could be applied to prohibit virtually any agreement that in some way links the sale of a product subject to IPR protection with other products, such as sale of a whole computer with proprietary components. A narrower interpretation might approximate U.S. practice, which considers both anticompetitive effects and the efficiencies arising out of a tying agreement. U.S. competition agencies are more likely to challenge a tying arrangement if: 1) the seller has market power with respect to the tied product; 2) the agreement has an adverse affect on competition in the relevant market for the tied product; and 3) the efficiency effects do not outweigh the adverse affects on competition.¹⁰⁵

The AML prohibits dominant firms from “[a]pplying discriminatory treatment on trading prices or other trading conditions to their trading parties with equal standing without any justifiable causes.”¹⁰⁶ A 2004 survey by China’s State Administration of Industry and Commerce suggests invoking this provision against multinationals that price their products differently in various geographic markets around the world.¹⁰⁷

Finally, there is a catchall category that embraces “[o]ther forms of abusing the dominant market position as determined by the Anti-Monopoly Law Enforcement Agency.”¹⁰⁸ This language vests the enforcement authority with discretion to identify other commercial practices that are to be deemed “abusive.”

In 2006, Gerald F. Masoudi, Deputy Assistant Attorney General in the Antitrust Division of the U.S. Department of Justice, reviewed the practices defined as “abuses” by China’s then-draft AML. He stated:

Refusals to deal, exclusive dealing, tying and price discrimination all can be used for pro-competitive, efficiency-enhancing reasons and in only very limited circumstances will have anticompetitive effects, even when used by a firm with a dominant market position. Indeed, practices such as these are very common in highly competitive markets, reflecting that

¹⁰⁴ *Id.* at art. 17(v).

¹⁰⁵ See U.S. DEP’T OF JUST. AND THE FED. TRADE COMM’N, *supra* note 102, at 11-12.

¹⁰⁶ AML, *supra* note 1, art. 17(vi).

¹⁰⁷ Off. of Anti-Monopoly, *supra* note 38 at 42.

¹⁰⁸ AML, *supra* note 1, art. 17(vi).

such distribution methods can reduce costs and improve efficiency. Therefore, it is important that these practices not be presumed to be anticompetitive, either in the law or by the anti-monopoly enforcement agency in implementing the law. These practices should be viewed as unlawful only if, after a detailed analysis of the conduct, the market, and proffered business justifications, it is determined that the conduct harms competition by creating, maintaining or strengthening the monopoly power of the dominant firm and that the conduct makes economic sense to the firm only because of its anticompetitive effects.¹⁰⁹

C. *Intellectual Property Rights and Innovation*

An aspect of competition policy closely related to market dominance is the treatment of IPR, such as patents and copyrights, which confer upon the owners a monopoly of limited duration during which to exploit their inventions. Because competition laws commonly prohibit or restrict monopolies, the question commonly arises how the seeming inconsistencies between IPR and competition rules are to be reconciled. China's AML does not, by its terms, clarify how China will address this question other than to state that the AML will not apply to the exercise of IPR *except* when IPR is "abused" to "eliminate or restrict competition."¹¹⁰ However, statements by Chinese officials have raised concerns that the AML will be applied in a manner which will substantially curtail the rights of IPR holders.¹¹¹ This would represent a major and significant divergence from current U.S. antitrust policy. Moreover, the historic U.S. experience with respect to the antitrust treatment of IPR suggests that substantial curtailment of IPR by rigorous application of the AML would undermine a key long range Chinese policy objective, the promotion of innovation in the Chinese economic system.

¹⁰⁹ Gerald F. Masoudi, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Key Issues Regarding China's Antimonopoly Legislation, Presented to the International Seminar on Review of the Antimonopoly Law (May 19, 2006).

¹¹⁰ Chen Ziyun, an NPC delegate, commented in the 2006 NPC debates over the AML that Article 54 needed clearer definition. "We should have a definition or concept of 'intellectual property abuse' in a bid to clarify the term due to its absence in intellectual property related laws. While 'intellectual property right abuse by business operators' hasn't been defined, I hope a clear definition can be provided." *Speech Excerpts*, *supra* note 39.

¹¹¹ Masoudi, *supra* note 86, at 10.

Article 55 of the AML provides that it “shall not apply to conduct of business operators to exercise their intellectual property rights according to the laws and administrative regulations on intellectual property rights.”¹¹² However, it states that “this law shall apply to the conduct of business operators to eliminate or restrict market competition by abusing their intellectual property rights.”¹¹³ “Abuse” of IPR is not further defined, but the provisions of Article 17 of the AML itemizing the forms of “abusing the dominant position” include “selling . . . at unfairly high” prices,¹¹⁴ which could be applied to IP licensing fees, and “refusing to trade with a trading party without any justifiable causes,”¹¹⁵ which could be applied to instances of refusal of an IPR holder to license proprietary technologies to competitors.¹¹⁶

Precisely what constitutes an “abuse” of IPR may be clarified by the issuance of AML-specific intellectual property guidelines by the Chinese government. In the interim, however, a combination of administrative actions, pending legal changes, and statements by Chinese officials have heightened foreign concerns with respect to compulsory licensing of patented technologies used for national standards, the setting of royalty rates, and abuse of IPR generally. For example, in 2003 and 2004, the State Administration for Industry and Commerce (“SAIC”) undertook a survey and held a series of conferences regarding anticompetitive conduct of foreign multinationals and published certain of its findings in its official journal.¹¹⁷ In the journal, SAIC expressed concern that there were no laws or regulations “enacted in China to deal with such practices as . . . refusal to deal through abuse of intellectual property . . .”¹¹⁸ indicating that their “technological advantages” were “the most important advantages of multinationals.”¹¹⁹ SAIC gave a specific example of an IPR-related “abuse”

¹¹² AML, *supra* note 1, art. 55.

¹¹³ *Id.*

¹¹⁴ *Id.* at art. 17(i).

¹¹⁵ *Id.* at art. 17(iii).

¹¹⁶ China's draft Patent Law is under review for amendment in 2008. The inclusion of Article 55 in the AML as enacted raises the question whether it creates a new or discrete cause of action under the AML with respect to intellectual property rights, including in the course of an existing intellectual property dispute or negotiation.

¹¹⁷ See Off. of Anti-Monopoly, *supra* note 38; Jin Minglu, *Kua guo gong si xian zhi jing zheng xing wei ji qi jian kong dui ce* [Methods for Monitoring Anti-Competitive Behaviors of Multinationals], 2003.23 *Gong shang xing zheng guan li* [Biweekly of Administration for Industry and Commerce] 18 (2003), available by subscription at www.cnki.net; Yin Huiming, *Tan kua guo gong si xian zhi jing zheng xing wei jian guan dui ce* [Discussion of Methods for Monitoring Anticompetitive Behaviors of Multinationals], 2003.23 *Gong shang xing zheng guan li* [Biweekly of Administration for Industry and Commerce] 24 (2003), available by subscription at www.cnki.net.

¹¹⁸ Off. of Anti-Monopoly, *supra* note 38, at 43.

¹¹⁹ Jin Minglu, *supra* note 117, at 19.

whereby a U.S. multinational, “the largest manufacturer of network equipment in the world,” was “not willing to authorize any other company to use its ‘private protocols’ for which it owned patent rights or business secrets.”¹²⁰ Hence, SAIC urged swift enactment of the AML “to complete the competition law system and stop the anticompetitive practices of multinational companies in a timely manner.”¹²¹

In 2005, Shang Ming, Director of Treaty and Law, MOFCOM, reportedly stated that:

[T]he most extreme [examples of] anti-competitive behaviors of multinationals against Chinese enterprises are seen in the abuse of intellectual property rights. But the Anti-Monopoly Law has not been promulgated in China so there is no effective measure to restrict these behaviors As multinationals usually own several core technologies or core patents, Chinese enterprises have to ask for help in their manufacturing procedures. And some multinationals use their advantageous position to place restrictions on their licensing of patents to Chinese enterprises.¹²²

In 2007, an official from the Ministry of Information and Industry (“MII”) reportedly spoke in other contexts of breaking “the intellectual property monopoly of foreign [companies]” as it related to royalty rate-setting, an area of frequent tension between foreign IPR holders and potential Chinese users of that intellectual property.¹²³ The official echoed a statement by another MII official just months earlier who reportedly said “[we] oppose the monopoly through intellectual property standards”¹²⁴

The provisions in China’s AML addressing market dominance and IPR appear to comprise parts of a broader national effort to promote

¹²⁰ Off. of Anti-Monopoly, *supra* note 38, at 42.

¹²¹ *Id.* at 43.

¹²² Kua guo gong si lan yong zhi shi chan quan shi dian xing wei fa long duan [MOFCOM: Multinationals’ Abuse of Intellectual Property Rights Is a Typical [Example of] Illegal Monopoly], FA ZHI RI BAO [LEGAL DAILY], May 19, 2005, http://www.legaldaily.com.cn/bm/2005-05/20/content_136026.htm.

¹²³ Zhong cai lian ming yun duo chuan cheng li xiong mao wan li da deng tui chu [Zhongcailian Suffers Many Mishaps, but Is Finally Established; Panda and Malata Quit], Ma Weiqiang, ed., TOM KE JI [TOM SCIENCE & TECHNOLOGY], Apr. 23, 2007, <http://tech.tom.com/2007-04-23/04BM/32665659.html> (quoting Chen Ying, Deputy Director, Dep’t of Electronic Info. Products, MII); *see also* Wo guo shi da cai dian ju tou lian shou zu cheng ke ji chuang xin lian he ti [Ten Color TV Giants in China Join Hands in a Scientific & Technological Innovation Alliance], XINHUA WANG [XINHUA NET] (Apr. 24, 2007), http://news.xinhuanet.com/tech/2007-04/25/content_6023741.htm.

¹²⁴ Xin chan bu jiu mei cai dian zhuan li fei biao tai jie zhi shi chan quan long duan [MI: US Color TV Set Patent Fee Monopolizes through Intellectual Property], XIN LANG KE JI [SINA SCI. & TECH.], Dec. 31, 2006.

“indigenous” innovation in China by domestic individuals and enterprises. The government has implemented a number of “top down” type measures to foster indigenous innovation, such as government funding for R&D, the establishment of incentive measures to reward indigenous innovation, and the encouragement of foreign technology transfer and absorption by domestic enterprises.¹²⁵ The numerous statements by Chinese policymakers about the role of the AML in China’s national innovation effort indicate a strong intention to break “foreign monopolies” on existing technologies protected by patents and other forms of intellectual property rights. But the experience of the United States—a nation with a strong record of innovation—raises questions about the soundness of an innovation policy predicated, in significant part, on curtailing the commercial latitude and IPR of innovators, whether foreign or domestic.

The Founding Fathers of the United States placed such importance on the promotion of innovation in the new republic that they expressly provided for the protection of intellectual property rights in the Constitution. Article I grants Congress the authority to “promote the Progress of Science and useful Arts by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹²⁶ Thomas Jefferson, himself an inventor who was extensively involved in the administration of the early U.S. patent system, commented that “the issue of patents for new discoveries has given a spring to invention beyond my conception.”¹²⁷ Throughout the nineteenth and early twentieth centuries, American inventors produced a stream of revolutionary technologies—the steamboat, the mechanical reaper, the telegraph, the electric light, the telephone, the airplane—and the patent system afforded them the opportunity to reap the rewards of their genius.

¹²⁵ See Guo jia zhong chang qi ke xue he ji shu fa zhan gui hua gang yao (2006—2020 nian) [Outline of the National Program for Long-and Medium-Term Scientific and Technological Development (2006-2020)], (promulgated by the St. Council, Feb. 9, 2006, effective Feb. 9, 2006), 2006 ST. COUNCIL GAZ. (P.R.C.); Guo wu yuan guan yu shi shi guo jia zhong chang qi ke xue he ji shu fa zhan gui hua gang yao (2006-2020 nian) ruo gan pei tao zheng ce de tong zhi [Notice of the State Council Distributing Affiliated Policies Implementing the Outline of the National Medium-and Long-Term Program on Scientific and Technological Development (2006-2020)] (promulgated by the St. Council, Feb. 7, 2006, effective Feb. 7, 2006) 2006 ST. COUNCIL GAZ. 6 (P.R.C.).

¹²⁶ U.S. Const. art 1, § 8.

¹²⁷ DUMAS MALONE, *JEFFERSON AND THE RIGHTS OF MAN* (Little, Brown and Company 1951). Abraham Lincoln commented on the significance of the exclusive right granted to the innovator by a patent as follows: “Before then any man [could] instantly use what another had invented; so that the inventor had no special advantage from his own invention. The patent system changed this; secured to the inventor, for a limited time, the exclusive use of his invention; and thereby added the fuel of interest to the fire of genius, in the discovery and production of new and useful things.” Abraham Lincoln, Second Lecture on Discoveries and Inventions (Feb. 11, 1859), in *ABRAHAM LINCOLN: SPEECHES AND WRITINGS (1895-1865)* 10-11 (Don E. Fehrenbacher, ed., Library Classics of the United States, Inc., 1989).

But in the early twentieth century the rise of big businesses—many of which had large patent portfolios—became the source of considerable public concern. Big business, it was feared, not only would not innovate but would crush the small enterprises that were idealized as the true American wellsprings of invention. President Woodrow Wilson gave voice to a common sentiment when he warned that “monopoly . . . always checks development” and that the advent of large firms with monopoly power put at risk the traditional American genius that had given rise to inventions.¹²⁸ He said that “[th]e instinct of monopoly is against novelty, the tendency of monopoly is to keep in use the old thing, made in the old way,” he said.¹²⁹ Calling for curbs on monopoly, he asked, “who can say what patents now lying, unrealized, in secret drawers and pigeonholes, will come to light, or what new inventions will astonish and bless us, when freedom is restored?”¹³⁰

These popular and political anxieties manifested in U.S. antitrust policy. “During much of the twentieth century, the courts, antitrust enforcers, and antitrust practitioners viewed intellectual property with deep skepticism.”¹³¹ Between 1930 and roughly the mid-1970s, antitrust concerns commonly overrode patent rights in court decisions. “[During this] ‘anti-patent’ era . . . U.S. policy-makers and regulators remained largely suspicious of the power of big business. The courts generally viewed patents as automatic sources of monopoly power and measures were taken to weaken patent rights”¹³²—a perspective not entirely dissimilar to that of Chinese officials who have expressed recent concerns about “monopoly” of intellectual property by multinational enterprises. Most U.S. patents that became the subject of litigation during the “anti-patent” era were declared invalid, and one Supreme Court Justice observed in 1949 that “the only patent that is valid is one this Court has not been able to get its hands on.”¹³³ The anti-patent stance of the U.S. competition agencies culminated in the promulgation of the Justice Department’s so-called “Nine No-Nos,” setting forth fee arrangements and contractual restraints that could not be legally

¹²⁸ HOFSTADTER, *supra* note 27, at 135 (citing WOODROW WILSON, *THE NEW FREEDOM* 265-66. (Doubleday-Page, 1913)).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ ANTITRUST MODERNIZATION COMMISSION, *supra* note 24, at 36.

¹³² Anthony Williams, *Governing Innovation Commons: Private Ordering of Intellectual Property Rights* 5 (Mar. 2005) (unpublished working paper, on file with the Dep’t of Gov’t, London Sch. of Econ.). *See also* Tadayoshi Homma, *TRIPS and After—A Realists’s View*, 13 CHIBA U. L. J. 2 (Oct. 1998).

¹³³ *Jungerson v. Ostby & Barton Co.*, 335 U.S. 560, 572 (1949) (Jackson, J., dissenting).

incorporated in technology licensing agreements.¹³⁴ Some of the Nine No-Nos are similar to the practices currently cited as “abuses of dominance” in China’s AML.¹³⁵

The hostility of U.S. antitrust policy toward IPR in the mid-twentieth century—particularly in the hands of “big business”—was criticized by contemporary analysts. In a 1952 study the economist John Kenneth Galbraith observed that “the showpieces of American industrial progress” were primarily “dominated by a handful of large firms,” and that “the foreign visitor, brought to the United States by the Economic Cooperation Administration, visits the same firms as do the attorneys of the Department of Justice in their search for monopoly.”¹³⁶ In 1966, Richard Hofstadter rejected as a “curiosity” the Wilsonian notion that big firms restricted innovation, observing that “today the public needs no persuading that it is the large corporations, with their programs of research, that are technologically progressive.”¹³⁷ Even Senator Estes Kefauver, long one of the most prominent critics of “big business,” conceded in 1958 “that the wealth and resources of Du Pont made possible the long years of research from which came such developments as cellophane and nylon.”¹³⁸

However, a change in U.S. antitrust policy with respect to IPR did not occur until the stagflation of the 1970s led to a reassessment of the underpinnings of the U.S. economic system. The Chicago School’s critique of U.S. antitrust policy placed a major emphasis on what was seen as a misguided application of antitrust rules to IPR. The Chicago economists encouraged a reappraisal of the U.S. patent system due to a “general concern

¹³⁴ R. Hewitt Pate, Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice, observed in 2005 that “hostility toward intellectual property . . . held sway in the U.S. in the 1970’s [sic]. During this era the Antitrust Division had a section devoted to attacking IP licensing practices that we routinely applaud today. This was the era of the ‘Nine No Nos’ during which we applied *per se* rules to many licensing practices.” H. Hewitt Pate, Assistant Att’y Gen., U.S. Dep’t of Just., Competition and Intellectual Property in the U.S.: Licensing Freedom and the Limits of Antitrust, Address at the 2005 EU Competition Workshop, (June 3, 2005), available at <http://www.usdoj.gov/atr/public/speeches/209359.htm>.

¹³⁵ The Nine No-Nos were articulated in speeches by then Deputy Assistant Attorney General Bruce Wilson beginning in 1970. He cited a list of nine practices regarded as *per se* illegal, including royalties “not reasonably related to sales of patented products,” “post-sale restraints on resale,” and “setting minimum prices on the resale of patented products.” Bruce Wilson, Deputy Assistant Att’y Gen., U.S. Dep’t Just., Patent and Know-How License Agreements, Field of Use, Territorial, Price and Quantity Restrictions (Nov. 6, 1970); Bruce Wilson, Deputy Assistant Att’y Gen., U.S. Dep’t of Just., Is the Past Prologue, or Where Do We Go from Here? (Sept. 21, 1972), in RICHARD GILBERT ET AL., ANTI-TRUST ISSUES IN THE LICENSING OF INTELLECTUAL PROPERTY: THE NINE NO-NOS MEET THE NINETIES 284-85 (Brookings Institution Press 1997).

¹³⁶ HOFSTADTER, *supra* note 27 (citing GALBRAITH, AMERICAN CAPITALISM 96 (Houghton-Mifflin, 1952).

¹³⁷ HOFSTADTER, *supra* note 27, at 135.

¹³⁸ Daniel Scroop, A Faded Passion? Estes Kefauver and the Senate Subcommittee on Antitrust and Monopoly, 5 BUS. AND ECON. HIST. ONLINE (2007).

about industrial stagnation and a lack of significant technological innovations.”¹³⁹ Their views were reinforced by the findings of an advisory committee established by President Carter to examine U.S. innovation policy, which concluded that “diminished patent incentive” was contributing to U.S. economic stagnation.¹⁴⁰

Changing attitudes were reflected in a series of court decisions and policy shifts in the 1980s that fundamentally reoriented the relationship between U.S. antitrust and IP protection policies. Two critical Supreme Court decisions, *Diamond v. Chakrabarty* and *Diamond v. Diehr* significantly expanded the scope of patentable subject matter, with the Supreme Court declaring that patentable subject matter can “include anything under the sun that is made by man.”¹⁴¹ Also in 1981, the Department of Justice (“DOJ”) renounced the “Nine No-Nos” governing IP licensing, articulating efficiency-enhancing justifications for the same licensing practices that had been treated as per se illegal under the Nine No-Nos.¹⁴² In 1981, a DOJ official outlined how thorough economic analysis could result in a finding of pro-competitive effects of certain licensing practices whereas incomplete analysis might draw opposite conclusions.¹⁴³

The following year Congress created the Court of Appeals for the Federal Circuit, vesting in it exclusive jurisdiction over all appeals of federal district court decisions involving patents. The creation of this new appellate court is seen as a watershed in the history of the U.S. patent system because it has upheld patent validity with far more consistency than was the case with U.S. courts in the “anti-patent” era.

Finally, in 1988, the DOJ issued the Antitrust Enforcement Guidelines for International Operations, which reinforced its earlier statements with respect to the antitrust/IPR interface. These were updated in 1995 and 2007, but all versions have committed the competition agencies to the continued and extensive use of the rule of reason in IPR cases, ensuring that any

¹³⁹ FED. TRADE COMM’N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY (Oct. 2003).

¹⁴⁰ ADVISORY COMMITTEE ON INDUSTRIAL INNOVATION, INDUSTRIAL SUBCOMMITTEE FOR PATENT AND INFORMATION POLICY, REPORT ON PATENT POLICY ISS (1979).

¹⁴¹ *Diamond v. Diehr*, 450 U.S. 175, 182 (1981) (quoting S. REP. NO. 1979, at 5 (1952)) (holding that computer programs were patentable).

¹⁴² Abbott B. Lipsky, Jr., Deputy Assistant Attorney General, Antitrust Division, Department of Justice, *Current Antitrust Division Views on Patent Licensing Practices*, 50 ANTITRUST L. J. 515, 515 (1981-82).

¹⁴³ Robert B. Andewelt, Chief, Intellectual Property Section, Antitrust Division, Department of Justice, *Basic Principles to Apply at the Patent-Antitrust Interface*, Bureau of National Affairs D-1 (Dec. 17, 1981).

antitrust challenges to patents and other IPR will be subject to extensive economic analysis.

These changes in U.S. antitrust policy had the effect of significantly broadening the exclusive rights of innovators to exploit their inventions—which arguably fueled the dramatic growth of technology-intensive U.S. industries in subsequent decades. With respect to what were in 1980 “nascent industries such as semiconductors, software, and biotech,” the Supreme Court was “a driving force behind a series of legal precedents and legal reforms” that extended more secure patent coverage to new life forms, semiconductor designs, software programs, business methods, and nanotechnologies.¹⁴⁴ Companies in these industries that did not exist or were relatively obscure in 1980 have grown to become world leaders in their fields. In certain cases, they are the very “dominant” foreign enterprises that worry Chinese policymakers today. The relationship between the change in U.S. IPR policy and the success of these industries was direct. In the case of biotechnology, for example, the 1980 Supreme Court held in *Diamond v. Chakrabarty* that biological inventions could be protected by patents. This had dramatic, long-term consequences. Representatives of the biotech industry “generally credited the [Supreme] Court’s decision in *Chakrabarty* as the beginning of their industry without which genetic engineering would not have made nearly as much progress.”¹⁴⁵ Robert P. Taylor, an expert on intellectual property law, testified in 2002 on behalf of the American Bar Association Section of International Property Law that “[w]ithout patent protection, the venture capital which has been critical in fostering the [biotech] industry would not have been available. This entire industry, in which the United States is the clear leader, would have languished.”¹⁴⁶

Today U.S. antitrust authorities recognize that innovation itself is one of the most pro-competitive forces in an economy, and that curbs on the exclusive rights of innovators deter innovation itself.

If the inventor [in a discovery] commits funds and the investment fails, it absorbs the entire loss; it does not receive any subsidy from its competitors. But if the investor commits funds and the investment succeeds, it must now share the benefits with its competitors. An asymmetrical system of this type discourages entrepreneurial risk-taking, encourages free-riding, and becomes what one of our commentators has called

¹⁴⁴ See Williams, *supra* note 132, at 6.

¹⁴⁵ FED. TRADE COMM’N, *supra* note 139, at 21.

¹⁴⁶ Robert P. Taylor, *Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy: Hearing Before the Federal Trade Commission and U.S. Department of Justice* (July 11, 2002).

“an insurance policy for laggards.” To assure that investment and innovation are not discouraged, competitors must be confident in advance that they will not be required to share their successful assets with competitors.¹⁴⁷

D. *Government Administered Industries*

Until its economic reforms, China’s economy was completely dominated by state-owned enterprises (“SOEs”), and the government exercised pervasive regulatory control over the conditions of competition, including pricing, output volume, and market entry and exit. With the progress of these reforms, a dynamic private sector has emerged in many parts of the economy and many former state enterprises have been privatized. However, a number of key sectors remain dominated by SOEs, and administrative authorities are still extensively involved in regulating competition in a number of industries. The AML makes reference to these government-administered industries,¹⁴⁸ but the extent to which the terms of the AML will be fully applied to them remains uncertain. Wang Xiaoye, a prominent Chinese legal scholar and member of the Anti-Monopoly Law Working Committee, warns that “the law provides no answer as to who will have priority when conflicts arise between industrial policy and anti-monopoly legislation [This should be clarified and] specifics of implementing regulations should be released as soon as possible.”¹⁴⁹

Article 7 of the AML provides that “[t]he State shall protect the lawful business activities of undertakings in industries that are controlled by the State-owned economy [The] State shall supervise and control the price of commodities and services provided by these undertakings to protect the interest of consumers and facilitate technical progress.”¹⁵⁰ SOEs are directed to “be self-disciplined” and not to “harm the interest of the consumer from a controlling or exclusive dealing position.”¹⁵¹ This provision appears to contemplate a continuation of the current practice of government-administered pricing in many SOE-dominated sectors. It is unclear from this provision whether SOEs are subject to, exempt from, or

¹⁴⁷ William Blumenthal, General Counsel, Fed. Trade Comm’n, Government Policy for Fostering Innovation, Remarks Before the China Council for the Promotion of International Trade and U.S. Chamber of Commerce, Global Forum on Intellectual Property Rights Protection and Innovation, Beijing (Mar. 28, 2007).

¹⁴⁸ AML, *supra* note 1, art. 7.

¹⁴⁹ Wang Xiaoye, *Anti-Monopoly Law, A Tough Start*, CAIJING MAGAZINE ANNUAL 101-102 (2008).

¹⁵⁰ AML, *supra* note 1, art. 7.

¹⁵¹ *Id.*

partially subject to the AML. They are not included in the list of exemptions expressly set forth in Article 15, and Article 7 states that SOEs shall operate “in accordance with the law.” However it is not clear whether this is a reference to the AML, to the industry-specific laws that commonly govern SOE-dominated sectors (e.g., Energy Law, Electricity Law, Air Law, Telecommunications Law, Insurance Law) or to both the AML and such other laws.

Read together with the remainder of the AML, Article 7 suggests that there will be, in effect, two competition policy regimes: one characterized by government oversight and regulation of enterprise behavior pursuant to the AML and the other by direct government administration of pricing and enterprise conduct in SOE-dominated sectors pursuant to Article 7 and industry-specific laws. It is entirely possible that the SOE-dominated sectors will be subject to more lenient treatment under the AML than those sectors in which foreign enterprises play a more important role.

There is little parallel between China's AML provisions regarding SOEs and U.S. antitrust practice, because state-owned enterprises do not play a significant role in the U.S. economy overall. However, the government-owned U.S. Postal Service (USPS) holds a statutory monopoly on the delivery of non-overnight first-class mail, outbound international mail, and the placement of mail in private mailboxes.¹⁵² USPS has long been criticized for inefficiency and constantly increasing prices, and some argue that private delivery services have performed better in areas they have been allowed to enter, such as parcel and express mail services. Few, if any, economists would contend that the U.S. economy would benefit from the extension of similar statutory monopolies to other sectors of the economy.¹⁵³

Some Chinese observers have embraced a similar perspective and called for the AML to be applied fully to SOEs. During the debates on the AML, some NPC members pointed out that SOE monopolies harm consumers and should be brought under AML disciplines, with high rates charged by the telecommunications industry singled out as a particular concern. “Governmental agencies should stand up for the whole society and

¹⁵² The postal monopoly is established in the Private Express Statutes, 18 U.S.C. 1693-99 and 39 U.S.C. 601-601.

¹⁵³ The Federal Trade Commission recently called for curtailment of the United States Postal Service monopoly authority, concluding that its government-related benefits and restrictions hurt the competitive mail industry, distort the market, and result in higher prices to the consumers. *U.S. Postal Service Needs More Autonomy—FTC Report*, REUTERS (Jan. 16, 2008).

strengthen regulation of SOEs,” said one NPC Standing Committee member during the debates.¹⁵⁴

Articles 8 and 32 through 37 of the AML establish constraints on anticompetitive acts by administrative authorities and “organizations authorized with administrative powers of public affairs by laws and regulations.”¹⁵⁵ The language regarding organizations vested with administrative power was added in the final version of the AML and presumably would encompass trade associations, standards-setting working groups, and other non-state actors vested with delegated regulatory authority. Because of the substantial potential for anticompetitive, restrictive and nontransparent actions by such quasi-public entities, this change represents an improvement over earlier drafts of AML legislation.

The sections governing administrative monopolies consist entirely of a listing of prohibited actions.¹⁵⁶ The AML does not subject administrative monopolies to the jurisdiction of AML enforcement authorities. There are no specific penalties established for violation of the prohibitions. Article 51 simply provides that administrative agencies and organizations vested with authority that commit abuses “shall be admonished by the superior authorities,” and that “individuals who are directly responsible shall be punished in accordance with law.”¹⁵⁷ No procedures are established for parties that are adversely affected by the abuse of administrative powers to seek relief. Thus, it is unclear what effect these new safeguards will actually have in the market.

These concerns led Wang Xiaoye, one of the framers of the AML, to warn that under this provision, “the anti-monopoly law is like a tiger without

¹⁵⁴ Fan long duan fa cao an er shen fan long duan qian lu man man [*The Second Reading of AML Draft, A Long Way to Go*], SHI JIE CAI JING BAO DAO [WORLD FINANCE REPORT], July 12, 2007. Cheng Siwei, Vice Chairman of the NPC Standing Committee, warned in 2006 that “the state-owned monopolistic enterprises mainly depend on the government for support, with administrative authorities granting them privileges and barring others from entering the competition. Therefore, if we do not combat administrative monopoly, there is no way we can fight against economic monopoly,” *Speech Excerpts, supra* note 39.

¹⁵⁵ AML, *supra* note 1, arts. 8, 32-37.

¹⁵⁶ Article 32 of the AML provides that “administrative agencies and organizations authorized with administrative powers of public affairs by laws and shall not abuse their administrative powers by limiting, or limiting in disguised form, organizations or individuals by requiring them to deal, purchase or use commodities provided by designated undertakings.” Article 33 provides that such entities “shall not abuse their administrative powers to block regional commodity circulation” by employing specified “behaviors” which include, among other things “setting discriminatory charging items, fixing discriminatory prices, or implementing discriminatory charging standards for commodities originating from other regions” *Id.* at art. 33(i); stipulating technical requirements that differ from those applied to “local like commodities” *Id.* at art. 33(ii); taking discriminatory technical measures, such as repeated inspections of commodities from other regions *Id.* at art. 33(ii); and creating administrative licensing procedure aimed at commodities from other regions to restrict their access to the local market *Id.* at art. 33(iii).

¹⁵⁷ AML, *supra* note 1, art. 51.

teeth when dealing with administrative monopolies. The combating of monopolies cannot be left only to the higher authorities.”¹⁵⁸

Although far less of the U.S. economy was ever dominated by SOEs, as recently as the 1980s many U.S. industries were heavily regulated by government agencies that exercised control over basic decisions such as pricing, output, and market entry and exit. In some cases, government agencies held statutory authority that enabled them to authorize industry price-stabilization measures and other cartel-type arrangements. In the late 1970s and 1980s, recognizing that this type of industry regulation not only harmed consumers but acted as a drag on economic growth, Congress enacted legislation deregulating a number of major industries, including air, rail, and motor carrier transportation.¹⁵⁹ The power of government agencies to authorize anticompetitive agreements has largely been abolished, and the deregulated sectors are now subject to U.S. antitrust enforcement.

Deregulation, and the increased competition that has resulted, have been important factors underlying the increased dynamism and rates of productivity growth that have taken place in the U.S. economy in recent decades.¹⁶⁰ One comprehensive study of the empirical evidence on the U.S. post-regulation experience concluded that “[s]ociety has gained at least \$36-\$46 billion (1990 dollars) annually from deregulation,” principally in the U.S. transportation (airlines, railway, road freight) sector, but also in the telecommunications, cable television, stock broking, and natural gas industries.¹⁶¹ The gains achieved through regulatory reform reportedly resulted in an approximately seven to nine percent improvement in GNP.¹⁶² Each industry examined dramatically improved productivity and achieved real operating cost reductions ranging from twenty-five to seventy-five percent, with consumers being the primary beneficiaries, but with labor and producers also experiencing a net benefit.¹⁶³ There is little question that full

¹⁵⁸ Wang Xiaoye, *supra* note 149, at 101-02.

¹⁵⁹ Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in various sections of 49 U.S.C.); Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (codified in various sections of 11, 45, and 49 U.S.C.); Motor Carrier Act of 1980, Pub. L. 96-296, 94 Stat. 793, 49 U.S.C. §10101.

¹⁶⁰ Deborah Platt Majoras, Chairman, Fed. Trade Comm’n, Promoting a Culture of Competition, Remarks before the Chinese Academy of Social Sciences (Apr. 2006).

¹⁶¹ Numerous studies have been conducted on the benefits of deregulation in the U.S. One such study was conducted by Clifford Winston, *Economic Deregulation: Days of Reckoning for Microeconomists*, 31 J. ECON. LITERATURE 1263, 1284 (1993).

¹⁶² *Id.* at 1284.

¹⁶³ Elizabeth E. Bailey, *Price and Productivity Change Following Deregulation: The U.S. Experience*, 96 ECON. J. 1, 1-17 (1986).

application of the AML to China's SOE-dominated sectors and administrative monopolies would bring similar benefits to China's economy.

E. Regional Blockades and Other Restrictions

The AML prohibits a variety of restrictions by regional governments to limit trade and investment originating outside the regions themselves.¹⁶⁴ The provision is a response to measures that have been taken by provincial governments to restrict the inflow of products from other regions that compete with local enterprises.¹⁶⁵ The prohibition on regional blockades arguably serves a function similar to the Commerce Clause of the U.S. Constitution, which has been applied to strike down state laws that provide for "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."¹⁶⁶ This application of the Commerce Clause has been recognized as an essential element of the commercial integration of the U.S. economy.¹⁶⁷ If the AML is to play a similar role in China, it will be necessary for the central government to ensure and clarify that these provisions override restrictive measures employed by the governments of Provinces, Autonomous Regions, and Municipalities. Zheng Gongcheng, a member of the NPC Standing Committee, commented that "[t]he formation of a unified market nationwide might be the [most] pressing issue to be addressed by this [Anti-Monopoly] Law."¹⁶⁸

F. Exemptions

Article 15 of the AML provides exemptions from the basic prohibition on monopoly agreements set forth in Articles 13 and 14 "for the purpose of mitigating a severe decrease in sales volume or excessive overstock during economic recessions."¹⁶⁹ This exemption appears to permit price stabilization agreements and joint production and curtailment agreements

¹⁶⁴ AML, *supra* note 1, art. 33-35.

¹⁶⁵ Cheng Siwei, Vice Chairman of the National People's Congress Standing Committee, noted, "Some regions have set up various kinds of barriers blocking the access of products from other regions. The case could even be established for the real estate sector in Beijing. Companies registered in the Dongcheng District will have to register another company in the Xicheng District if they want to do business in the latter." *Speech Excerpts*, *supra* note 39.

¹⁶⁶ *Oregon Waste Sys. Inc. v. Department of Env'tl. Quality of State of Or.*, 511 U.S. 93, 99, 114 S.Ct. 1345 (1994).

¹⁶⁷ *Granolm v. Heald*, 544 U.S. 460, 472 (2005).

¹⁶⁸ Zheng Gongcheng, Member, as reported in *Speech Excerpts: Draft of the Anti-Monopoly Law*, 22nd Session of the 10th Standing Committee of the National People's Congress (June 30, 2006).

¹⁶⁹ AML, *supra* note 1, art. 15(v).

during recessions. The Law also provides for exemptions “for the purpose of safeguarding the legitimate interests in foreign trade and foreign economic cooperation.”¹⁷⁰ By apparently permitting what are arguably the most common types of cartel agreements, Article 15 significantly weakens the pro-competitive potential of the new law.

The U.S. has a number of statutory exemptions to the antitrust law, many of them enacted in the first half of the twentieth century.¹⁷¹ A recent review of U.S. antitrust policy by the Antitrust Modernization Commission, a body created by Congress to determine whether the antitrust laws should be modernized in light of our global, high-tech economy, concluded that “statutory immunities from the antitrust law should be disfavored.” The Commission found that exemptions should be granted rarely, when a clear case has been made that the case for the exemption outweighs the benefits of competition.¹⁷²

G. Trade Associations

Article 11 of the AML provides that “[t]rade associations shall strengthen the self-discipline of undertakings within their industries and guide the undertakings to compete in accordance with the law and maintain the order of market competition.”¹⁷³ It is unclear whether this provision is intended to encourage industry associations to undertake actions that protect consumers or whether it contemplates a role for the associations in maintaining “market order” and restricting competition. Article 16 of the AML states that trade associations “shall not organize undertakings within their industries to engage in monopolistic conduct prohibited by [Chapter II Monopoly Agreements],”¹⁷⁴ and Article 46 provides for the levying of fines and revocation of registration with respect to violations by trade associations.¹⁷⁵ However, as noted, Article 15 of the AML exempts many forms of collective activity from the general prohibition on monopoly agreements, including recession cartels.¹⁷⁶

¹⁷⁰ *Id.* at art. 15(vi).

¹⁷¹ Examples of U.S. statutory exemption from the antitrust laws include: the Agricultural Marketing Agreement Act, 7 U.S.C. § 608b-608c; Fisherman’s Collective Marketing Act, 15 U.S.C. §§ 521-22; Newspaper Preservation Act, 15 U.S.C. §§ 638(d), 640; Sports Broadcasting Act, 15 U.S.C. §§ 1291-95; and the Anti-Hog-Cholera Serum and Hog-Cholera Virus Act, 7 U.S.C. § 852. For a more complete inventory see ANTITRUST MODERNIZATION COMMISSION, *supra* note 24.

¹⁷² *Id.* at 335.

¹⁷³ AML, *supra* note 1, art. 11.

¹⁷⁴ *Id.* at art. 16.

¹⁷⁵ *Id.* at art. 46.

¹⁷⁶ See, e.g., *id.* at art. 15(v).

Since the 1990s, Chinese trade associations, encouraged by the government, have played a major role in facilitating industry-wide price stabilization measures, suggesting that notwithstanding enactment of the AML, they will continue to play such a role.¹⁷⁷ Many of China's trade associations evolved out of the old *you guan bumen* ("departments-in-charge"), and are staffed with former ministry officials. They play an important role in carrying out sectoral government policies. Article 11, like Article 7 regarding SOEs, appears to contemplate a continuing government administrative role with respect to enterprise decisions on matters such as pricing and output levels.

In the United States, during the Great Depression of the 1930s, the federal government and some state governments experimented with authorizing trade associations to promulgate and enforce industry codes limiting competition, effectively suspending the operation of the antitrust laws.¹⁷⁸ One rationale was that restraints on competition were necessary to protect farmers, small businesses and ailing sectors like coal and oil.¹⁷⁹ Pursuant to federal legislation and parallel state and municipal laws, barbershops, beauty shops, shoe repair shops, bowling alleys, dry-cleaning establishments, and laundries, adopted minimum-price rules. Used-car dealers adopted rules forbidding sales below a "list" price, and similar rules were adopted throughout much of the U.S. economy.¹⁸⁰ Government and business spokesmen adopted a new lexicon: "competition" became "economic cannibalism"; antitrust advocates were "corporals of disaster"; and the pejorative term "chiseler" came into common use in reference to firms that undercut the minimum prices established by industry association codes.¹⁸¹

¹⁷⁷ This perspective finds support in State Council Notice No. 36 of May 13, 2007, *Some Opinions of the General Office of the State Council on Accelerating the Promotion of Reform and Development of Industrial Associations and Chambers of Commerce*, which directs industry associations to form into bodies conducting "market supervision," to formulate and enforce "good behavior rules," to implement "control systems for industry self-discipline," and to "maintain a market environment for fair competition."

¹⁷⁸ The National Industrial Recovery Act of 1933 (NIRA), 48 Stat. 195, was enacted to address economic distress arising out of the Great Depression. Among other things NIRA provided for the creation of "codes of fair competition" with rules regulating prices, wages and a range of business practices. NIRA created the National Recovery Administration (NRA), which worked with various industry sectors to develop and implement the fair competition codes. The codes were exempt from the antitrust laws and enforceable in U.S. courts.

¹⁷⁹ ELLIS W. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY* 268-78 (Princeton: Princeton U. Press, 1966).

¹⁸⁰ See *id.* at 263-66; MARK A. FRANKENA AND PAUL A. PAUTLER, *ANTITRUST POLICY AND DECLINING INDUSTRIES* 72-75 (Bureau of Economics, Federal Trade Commission, October 1985), available at <http://www.ftc.gov/be/econrpt/231948.pdf>.

¹⁸¹ HAWLEY, *supra* note 179, at 54.

Although the U.S. industry codes were often styled as “pro-competitive,” their basic purpose was anticompetitive, “promot[ing] scarcity and thus balanc[ing industry] output and demand, regardless of the dislocations that such action might bring in other areas of the economy.” Their net effect was to “restrict production, prevent change, hold up prices, and bilk the consumer.” This system of “government-sponsored cartelization” not only did not end the Depression, but arguably deepened and extended it. In his seminal study of U.S. Depression-era antitrust policies, the political economist Ellis W. Hawley observed with respect to the impact of the codes that “[i]n the ‘sick’ industries and the transportation field the typical [industry self-regulation] program was designed to arrest technological innovation and protect inefficiency, not to encourage economic progress or ease the transition to newer, cheaper and more productive methods of providing the necessary goods and services.”¹⁸²

In the worst case, Article 11 of the AML could foster the spread of arrangements in China that resemble U.S. Depression-era industry codes. In its journal article on the anticompetitive practices of foreign multinationals, SAIC envisioned a restrictive role for China’s trade associations as they interfaced with foreign companies: “[We shall] help and guide the establishment of industrial organizations and associations in the industries which involve investment of multinationals, and effectively supervise the market competition behaviors of multinationals in these industries through industrial organizations and associations”¹⁸³ Market regulation of this kind by government-sanctioned industry associations would likely produce results similar to those experienced in the U.S. in the 1930s: scarcity, high prices, fewer choices for consumers, and the inhibition of innovation.

H. *Review of Concentrations*

Article 3 of the AML prohibits “concentrations” of undertakings that have or are likely to have the effect of eliminating or restricting competition.¹⁸⁴ Article 5 provides that “[u]ndertakings may implement concentration in accordance with the law through fair competition and voluntary combination to expand their business scale and to improve their market competitiveness.”¹⁸⁵ Articles 20 through 31 establish procedures by which Chinese authorities can review prospective mergers and other

¹⁸² *Id.* at 277.

¹⁸³ Yin Huiming, *Discussion of Methods for Monitoring Anticompetitive Behaviors of Multinationals*, 23 J. ADMIN. INDUS. & COM. (2003).

¹⁸⁴ AML, *supra* note 1, art. 3(iii).

¹⁸⁵ *Id.* at art. 5.

combinations and disapprove them if the transaction “has or may have the effect of restricting or eliminating competition.”¹⁸⁶ A rule-of-reason type standard is established for review of concentrations, and a problematic transaction may not necessarily be disapproved if “the undertakings can prove that the positive effects of such concentration on competition obviously outweigh the negative effects or that the concentration is in the public interest.”¹⁸⁷

Chinese policymakers have expressed concern that in many domestic industrial sectors, Chinese enterprises are too small to achieve the economies of scale necessary to compete internationally on an equal footing with large foreign enterprises. For this reason, it is unlikely that the AML will be applied to domestic combinations in an excessively rigorous manner, particularly if there is little or no likelihood that a given combination will create conditions of monopoly or otherwise reduce competition.

Foreign comment on the AML merger review provision has focused largely on the extent to which Chinese government review of a merger outside of China would be triggered. The concern was that the draft AML established standards pursuant to which notification might be required with respect to mergers elsewhere in the world with limited or even no impact on China.¹⁸⁸ The final version of the AML eliminates statutory thresholds, stipulating when a prior notification of a merger or acquisition is required. Article 21 now states simply that notification will be required pursuant to a “threshold of notification” to be stipulated at a future date by the State Council.¹⁸⁹ This defers but does not eliminate concerns that the notification thresholds will be set too low, giving rise to unnecessarily burdensome notification requirements for foreign multinationals that are active in acquiring firms around the world.

U.S. antitrust policy is designed to “ensure that transactions have an adequate nexus with the United States by exempting certain foreign acquisitions from notification requirements.”¹⁹⁰ In addressing U.S. concerns over potential Chinese notification thresholds under the AML in 2006, a U.S. DOJ official pointed out that in the U.S., acquisition of stock in a foreign company is exempt if the foreign firm has less than \$57 million in assets in

¹⁸⁶ *Id.* at art. 28.

¹⁸⁷ *Id.*

¹⁸⁸ Masoudi, *supra* note 86.

¹⁸⁹ AML, *supra* note 1, art. 21.

¹⁹⁰ Gerald F. Masoudi, Deputy Assistant Attorney General, Antitrust Division, U.S. Dept. of Justice, *Key Issues Regarding China's Anti-Monopoly Legislation*, International Seminar on Review of Anti-Monopoly Law, Hangzhou, China (May 19, 2006), available at <http://www.usdoj.gov/atr/public/speeches/217612.htm>.

the U.S. or less than \$57 million in sales in the U.S. He indicated that acquisition of stock by one foreign company in another is exempt from review if the block of stock concerned does not give the acquiring company a 50% or more interest, and that combinations are also exempt if both parties are foreign, the value of the transaction is less than \$227 million, and their combined sales and combined assets in the U.S. are both \$125 million.¹⁹¹ Chinese policymakers may wish to adopt similar guidelines to ensure that review is not required of combinations that have little or no nexus with China.

I. *National Security Review*

Article 31 provides that, with respect to acquisition of domestic undertakings by “foreign capital” as well as “other circumstances involving the concentration of foreign capital,” if national security is concerned, an examination shall be conducted “according to the relevant regulations of the State.”¹⁹² This provision contemplates a security-related policy review of acquisitions comparable to the scrutiny given inward foreign investment in the U.S. by the Committee on Foreign Investment in the United States (“CFIUS”).¹⁹³ The addition of Article 31 to the AML has created some confusion as to whether a new national security review process has been created. As a practical matter, such review occurs already with respect to foreign direct investment, and transactions with national security implications are likely to be continued under separate procedures as before.¹⁹⁴

¹⁹¹ *Id.*

¹⁹² AML, *supra* note 1, art. 31.

¹⁹³ The Committee on Foreign Investment in the United States [hereinafter CFIUS] is an interagency committee in the U.S. federal government which reviews inward foreign investment policy and specific foreign investment transactions which have national security implications. Chaired by the representative of the Secretary of the Treasury, CFIUS was established by executive order in 1975. Exec. Order 11858(b), 40 F.R. 20263 (May 7, 1975).

¹⁹⁴ China's Catalog for the Guidance of Foreign Investment restricts foreign investment in a range of designated sectors including some which have a clear nexus with national security, such as manufacturing of weapons and ammunition, processing of radioactive materials, and operation of power networks. In addition, the 2006 *Interim Provisions for Merger and Acquisition of Domestic Enterprises by Foreign Investors* established the need for government approval of foreign investment if the transaction affects national economic security, involves a major industry, or might result in the transfer of famous trademarks or traditional Chinese brands. A number of other Chinese laws and regulations also require approval of foreign investment transactions, and although national security is not an explicitly stated concern, the industries designated suggest a sensitivity to national security. *See generally* General Accountability Office (GAO), *Foreign Investment: Laws and Policies Regulating Foreign Investment in 10 Countries*, Report to the Honorable Richard Shelby, Ranking Member, Committee on Banking, Housing and Urban Affairs, United States Senate (February 2008) GAO-08-320, 43-50.

The implications of this provision, if any, with respect to inward foreign investment remain to be seen. Most countries, including the United States, have rules providing for screening of inward foreign investment on national security grounds. The extent to which such screening constitutes a significant impediment to inward foreign direct investment depends on the extent to which a particular government associates various industries with the concept of “national security.” Since its entry into the WTO, China has permitted extensive inward foreign investment in high-technology industries that some other countries have regarded as sensitive. However, there have been recent signs that the government may be moving toward a more expansive view of national security and that the AML may play a role in addressing national security concerns.

One recent example involved the soybean processing industry. A State Council official reportedly suggested during an interview with reporters and during a trade conference that the soybean industry might be protected in various ways, including through the AML, on the basis of national security. “The soybean industry is related to the national economy and the people’s livelihood. It would have an adverse impact on China’s macroeconomic control and market stability, it would be a hidden trouble for China’s foodstuffs too, if [the soybean industry] were completely monopolized by foreign investment”¹⁹⁵ The same official was quoted elsewhere as suggesting that China should “formulate a development plan in the soybean industry First, foreign capital is forming a monopoly in the soybean processing industry in China In the end, Cheng Guoqiang suggests that we should be vigilant for and prevent the overall monopoly of multinationals in the soybean industry in China.”¹⁹⁶

U.S. antitrust policy is designed to promote competition regardless of the identity, size, or nationality of individual competitors. To the extent that the U.S. government sees economic and/or national security reasons to restrict some foreign commercial activities affecting the U.S. market, it does so pursuant to separate statutory regimes regulating trade, investment, and national security. To the extent that China uses the AML to address national security and other concerns unrelated to competition issues, it will diverge from U.S. practice and may reduce rather than promote competition. For example, Chinese officials may disapprove of a proposed merger that raises

¹⁹⁵ Cheng Guoqiang is Director of the Research Institute of Market Economy, Development Research Center of the State Council. *The Domestic Soybean Industry Faces Being Nibbled at by Foreign Investment*, Xinhua wang Fujian pin dao [Xinhua Net Fujian Channel] (June 6, 2006).

¹⁹⁶ Cheng Guoqiang, as reported in *Expert Suggests Including Soybean Processing in the National Grain Security Emergency System*, Jilin Province Grain Administration (July 31, 2006).

some anti-monopoly and some national security concerns (and perhaps other policy concerns), but which would survive scrutiny on either anti-monopoly or national security grounds standing alone. Such a policy would deter market entry by competitors that could otherwise enhance efficiency and benefit consumers in the Chinese market.

J. Administration

China's AML provides for the establishment of two anti-monopoly organizations. An "Anti-Monopoly Commission Under the State Council" is given a mandate to research and formulate competition policy, assess competitive conditions in the market, promulgate anti-monopoly guidelines, and coordinate enforcement efforts.¹⁹⁷ An "Anti-Monopoly Enforcement Authority" is entrusted with enforcing the law directly or through delegation of authority to regional and local governments.¹⁹⁸ Article 9(iv) provides that one of the Anti-Monopoly Commission's tasks will be to "[c]oordinat[e] anti-monopoly administrative enforcement work."¹⁹⁹

In China, interministerial coordination will be required because a number of ministries administer industry-specific laws that will give rise to tensions with AML enforcement efforts. Telecommunications, for example, is one of the seven sectors considered by the State-owned Assets Supervision and Administration Commission ("SASAC") to be "critical to the national economy and national security"²⁰⁰ and over which SASAC intends to maintain "absolute control."²⁰¹ In October 2007, the MII stated, in its *People's Post and Telecommunications News*,²⁰² that "because there is some

¹⁹⁷ AML, *supra* note 1, art. 9.

¹⁹⁸ *Id.* at art. 10.

¹⁹⁹ *Id.* at art. 9(iv). It can be inferred from this language that more than one agency will be involved in AML enforcement, hence the need for a coordinating Commission. This could imply coordination with MOFCOM (mergers), SAIC (Unfair Competition Law), and the National Development and Reform Commission (NDRC) (prices). A major merger, for example, in an SOE-dominated sector administered by an industry ministry might engage the jurisdiction of that ministry, the AML Enforcement Authority, MOFCOM, and perhaps other agencies, with no clear statutory guidance as to which agency was ultimately responsible for approval.

²⁰⁰ AML, *supra* note 1, art. 4.

²⁰¹ *Notice of the General Office of the State Council on Distributing the Opinions of the State-owned Assets Supervision and Administration Commission on Guidelines for Promoting Restructuring of State-Owned Assets and State-Owned Enterprises*, General Office of the State Council, Guo Ban Fa [2006] No. 97, (Dec. 5, 2006); *see also* Li Rongrong, Chairman and Party Secretary, SASAC, Statement in *China Confirms that Seven Big Industries Shall be Controlled by the State-owned Economy*, XINHUA WANG [XINHUA NET] (Dec. 19, 2006). The six other industries are munitions, power generation and distribution, oil and petrochemicals, coal, aviation, and shipping.

²⁰² China Information Industry Net is commissioned by the Ministry of Information and Industry to publish *The People's Posts and Telecommunications News* and is exclusively approved by the State Council Information Office to do so.

overlap in jurisdiction” between the telecom regulator, MII, and the Anti-Monopoly Law Enforcement Authority, “the agencies may conflict with one another in the conduct of authority.”²⁰³ MII argues that the AML Enforcement Authority “shall ask for the opinion of the telecommunications supervisory agency when investigating competition cases” and that the two should cooperate including by trying “to regulate the telecom industry together.” Such statements suggest ministries that have policy agendas not exclusively devoted to the promotion of competition may seek a role in influencing AML enforcement policy.

Given the existence of enforcement institutions likely to oppose full application of the AML, a key challenge facing the new AML authorities will be the advocacy of AML principles within the councils of the Chinese government. In the United States, experience has demonstrated that, in the words of FTC Chairman Deborah Platt Majoras, “the idea of competition as a way to organize an economy often must struggle against other regulatory structures that are hostile to free markets.”²⁰⁴ In a famous 1974 address, then-Chairman of the FTC, Lewis Engman, pointed out how agencies regulating the U.S. transportation industry effectively sanctioned price-fixing, limited market entry, and in other ways inhibited competition, thereby acting as a drag on the U.S. economy.²⁰⁵ Over time, advocacy by U.S. competition agencies and economists helped bring about economic deregulation in the transportation sector and other regulated areas of the economy.²⁰⁶ Underlying this emphasis on institutional advocacy has been a recognition that other agencies can adopt regulations that impair competition that ordinary consumers are ill-equipped to recognize or to oppose effectively.²⁰⁷

Article 10 of the AML states that the Anti-Monopoly Law Enforcement Authority “if appropriate, may empower corresponding government agencies at the provincial autonomous region, and municipal

²⁰³ Wu Zhipeng, *The Anti-Monopoly Law: New Basis of Telecom Supervision*, People’s Post and Telecommunications News (Oct. 11, 2007). Wu Zhipeng is affiliated with the local Tianjin Communications Administration Bureau, which is managed by the Ministry of Information Industry. *Organizational Setup*, Ministry of Information Industry web site, <http://www.mii.gov.cn/col/col2491/index.html>.

²⁰⁴ Deborah Platt Majoras, Promoting a Culture of Competition (April 2006), <http://beijing.usembassy-china.org.cn/041006e.htm>.

²⁰⁵ Lewis A. Engman, Chairman, Fed. Trade Comm’n, Address before the Full Conference of Financial Analysts Federation (Oct. 7, 1974).

²⁰⁶ The FTC has challenged regulatory restraints in telecommunications, broadcasting, cable TV surface and air transportation, electricity generation, and health care.

²⁰⁷ James C. Cooper, Paul A. Butler and Todd J. Zywicki, *Theory and Practice of Competition Advocacy at the FTC* 3 (George Mason U. Sch. of L. Working Paper Series, No. 6, 2004).

level to be responsible for anti-monopoly enforcement activities in accordance with this Law.”²⁰⁸ While it is not known whether and to what extent this provision will be given effect, the prospect that AML enforcement authority might be delegated to regional and local government officials with no grounding in competition law or economics is worrying. It could result in inappropriate AML enforcement actions by local authorities against foreign firms, influence over AML enforcement by local industry, inconsistent legal rulings in different regional jurisdictions, and other problems.

IV. CONCLUSION

China's AML is broadly worded and no clarifying guidelines or decisions have yet been forthcoming, therefore any analysis of the AML must necessarily be tentative and conditional. In general, China's enactment of the AML, after long deliberation and extensive consultations, stands as a formidable achievement and a significant milestone in its progress towards a market economy. The full application of its prohibitions on price fixing and other similar anticompetitive practices will be highly beneficial to the Chinese economy and consumers. The areas of divergence from U.S. antitrust practice recall an earlier era in the United States, when antitrust was an expression of popular anxieties, political and social values, and a system of economic regulation. Hopefully this article, which highlights what appear to have been some wrong turns by U.S. antitrust policy in the past, will prove useful to Chinese policymakers as they prepare to implement the new law.

²⁰⁸ AML, *supra* note 1, art. 10.