

5th Mises Seminar

Sestri Levante – 3-5 October 2008

**A Substantial Step with Vague Consequences
Evaluating China's Antimonopoly Law in light of "Chinese Capitalism" and the
fear of Protectionism and Other Government Interests**

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A Substantial Step with Vague Consequences: Evaluating China's Antimonopoly Law in Light of 'Chinese Capitalism,' Uncertainty, and the Fear of Protectionism

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In recent years, there has been a movement in China¹ towards what at least one author has termed 'Chinese Capitalism.'² Since the late 1970's, China has undergone a transition from a centralized to a market-oriented economy³ in a way that is unique to China's historical, political, and economic shift from a classic socialist state to a state legally recognizing private enterprise.⁴ Consequently, in addition to being unique to China, it also leaves open an important question: Does China want to pursue capitalism? Although this question evades a clear answer, a creditable method of assessing Chinese intent regarding capitalism is to review Chinese competition law.

Since the most effective measure of China's advance towards capitalism is the growing role of the private sector in the economy,⁵ it is necessary to gauge the extent to which the private sector is regulated. Thus, analyzing competition law allows one to determine China's posture towards private trade barriers that could merely replace government trade barriers, thereby undermining any apparent economic shift towards privatization.⁶ If private trade barriers are allowed to persist, it suggests suppression of a competitive market economy, which implies Chinese crony capitalism as competition law is used merely to strengthen the monopoly position of state firms.⁷ In which case, improvements in social welfare may be nil. On the other hand, if private trade barriers are curbed with competition law, it suggests promotion of competitive markets, which is a prerequisite in the

1 For the purposes of this article, use of the term China refers solely to the People's Republic of China.

2 HENRY WAI-CHUNG YEUNG, *CHINESE CAPITALISM IN A GLOBAL ERA: TOWARDS A HYBRID CAPITALISM 1* (London: Routledge 2003); see also Maher M Dabbah, *The Development of Sound Competition Law and Policy in China: An (Im)possible Dream?*, 30(2) *WORLD COMPETITION* 341, 341 (2007) (stating that many people would argue there is emerging 'capitalism' in China resulting from a transformation in economic thought).

3 Xinzhu Zhang et al., *The Antimonopoly Law in China: Where Do We Stand?*, 3(2) *COMPETITION POL'Y INT'L* 184, 186 (2007), available at <http://www.globalcompetitionpolicy.org/index.php?id=839&action=600>.

4 See Mark Williams, *Adopting a Competition Law in China*, in *CHINA AND THE WORLD TRADING SYSTEM: ENTERING THE NEW MILLENNIUM* 299, 300 (Deborah Z. Cass et al. eds., Cambridge University Press 2003) (discussing the political and economic conditions in china).

5 An Chen, *Why Does Capitalism Fail to Push China Toward Democracy?*, in *CHINA'S EMERGENT ECONOMY: CAPITALISM IN THE DRAGON'S LAIR* 146, at 147 (Christopher A. McNally ed., Routledge 2008).

6 See Michal Gal, *The Ecology of Antitrust: Preconditions for Competition Law Enforcement in Developing Countries*, in *COMPETITION, COMPETITIVENESS, AND DEVELOPMENT: LESSONS FROM DEVELOPING COUNTRIES* 21, at 23 (Philippe Brusick et al. eds., UNCTAD 2004), available at http://www.unctad.org/en/docs/ditcclp20041_en.pdf.

7 See Christopher A. McNally, *Capitalism in the Dragon's Lair*, in *CHINA'S EMERGENT ECONOMY: CAPITALISM IN THE DRAGON'S LAIR* 228, at 240-41 (Christopher A. McNally ed., Routledge 2008).

pursuit of capitalism.⁸ Thus, in evaluating competition law, one can gauge intent regarding the nature of Chinese capitalism and, in turn, make predictions about the legitimacy of Chinese competition policy and what it is likely to achieve.

Initially, this article will briefly trace the development of Chinese competition law. This will provide the context in which China's 2007 Antimonopoly Law (AML) was drafted and show why some are concerned about what it will achieve. Then I will briefly layout AML's structure and discuss the concerns and benefits surrounding AML. At the same time, I will consider AML in the context of ongoing developments in Chinese socio-economic ideology. In this context, I will suggest what should be legitimately expected of China's first comprehensive competition law. The article will conclude by offering a suggestion as to what AML is likely to achieve, while considering the inherent AML uncertainties and limited foresight into China's unique and ever-changing political regime.

1 What is the Structure of Chinese Competition Law?

1.1. Current Law

Given its explosive economic development in recent years, one would suspect China has a set of comprehensive legal market rules, with supporting infrastructure, to help regulate efficient market activity.⁹ Presently, however, Chinese competition law is merely a hodgepodge of laws and regulations dating back to the early 1980s.¹⁰ The first legitimate glimpse of Chinese competition law came with the enactment of the Anti-Unfair Competition Law 1993,¹¹ which is mainly a consumer protection law.¹² Since then, developing competition law has increasingly become a significant policy objective in China.

Between 1994 and 2006, the Chinese government showed continued interest in an economic reform program by adopting numerous laws and regulations dealing with a variety of antitrust

⁸ See Christopher A. McNally, *Reflections on Capitalism and China's Emergent Political Economy*, in CHINA'S EMERGENT ECONOMY: CAPITALISM IN THE DRAGON'S LAIR 3, at 21, 27-28 (Christopher A. McNally ed., Routledge 2008). This argument accepts that the pursuit of capitalism is premised on three elements: (1) a drive to accumulate capital, (2) an emerging market economy, and (3) bifurcation of secular authority. *Id.*

⁹ MARK WILLIAMS, COMPETITION POLICY AND LAW IN CHINA, HONG KONG AND TAIWAN 95 (Cambridge University Press 2005); see also Dabbah, *supra* note 2, at 341-43 (discussing China's economic growth over the past two decades).

¹⁰ See *Id.* at 95.

¹¹ Anti-Unfair Competition Law of the People's Republic of China (promulgated by the Standing Comm. People's Cong., effective Dec. 1, 1993), available at <http://en.chinacourt.org/public/detail.php?id=3306> (in English).

¹² WILLIAMS, *supra* note 9, at 166.

issues.¹³ These issues range from prohibition of improper pricing behavior (e.g. *Price Law of 1997*)¹⁴ to monitoring mergers and acquisitions to preventing abuses of dominance.¹⁵ Consequently, because these laws provide fragmented jurisdiction, the institutions responsible for enforcing them are widespread, overlapping, and include government agencies, sector specific regulators, and Chinese courts.¹⁶ Primarily, however, three administrative government agencies share responsibility for enforcing the antitrust laws: (1) the State Administration of Industry and Commerce (SAIC), which is in charge of micromanagement of market activities, as authorized by the Anti-Unfair Competition Law; (2) the National Development and Reform Commission (NDRC), which enforces the 2003 Provisional Rules on Prevention of Monopoly Pricing (dealing with abuse of market power) and has general authority to enforce the Price Law; and (3) the Ministry of Commerce (MOFCOM), which enforces the merger and acquisition rules (especially foreign acquisitions of domestic companies).¹⁷

Based on the wide array of laws, regulations, and enforcement mechanisms, China's competition law is deeply fragmented. It is 'interwoven with uncertainty, inconsistency, and unenforceability.'¹⁸ As a result, the system is greatly inefficient because it is unpredictable and thereby increases all-around costs. For example, under the *Interim Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors 2003* and the *Circular on Issues Related to Transferring State-owned Shares and Institutional Shares of Listed Companies to Foreign Investors 2002*, when a foreign firm seeks to acquire State-owned shares, it is subject to review by multiple government agencies: MOFCOM, Ministry of Finance, China Securities Regulatory Commission, and the State Council in certain circumstances. Yet, 'the *Circular* contains no clear indication of the notification thresholds or the substantive test to be used for the purposes of appraising a transfer.'¹⁹ Clearly, this creates an unpredictable and inefficient environment for firms acquiring State-owned shares.

13 See Dabbah, *supra* note 2, at 345-47 (providing an extensive list of over thirty relevant general and special legislative competition instruments).

14 Price Law of the People's Republic of China, art. 14, (promulgated by the Standing Comm. People's Cong., effective Dec. 29, 1997), available at <http://en.chinacourt.org/public/detail.php?id=99> (in English).

15 See Zhang et al., *supra* note 3, at 187-89 (briefly discussing the provisions and purpose of the various competition laws and regulations).

16 *Id.* at 189-95.

17 *Id.* at 189-90.

18 Dabbah, *supra* note 2, at 347-48.

19 *Id.*

Consequently, there are numerous problems existing in current Chinese competition law because there is no uniform framework that incorporates the laws' objectives. The laws grant different agencies overlapping authority to enforce any given case and are sometimes inconsistent in procedural and substantive requirements.²⁰ They also fail to properly divide enforcement authority between sectoral and non-sectoral regulators. Thus, there is a risk of conflicting competition decisions in certain cases, which increases administrative and firm costs because of added bureaucracy.²¹ Additionally, the laws lack clarity on judicial supervision: firms' right to remedies or appeals is unknown in many cases, particularly because of the judiciary's ineffectiveness. Similarly, the laws are often narrowly drawn and focus on anticompetitive conduct such as predatory pricing while ignoring equally harmful anticompetitive conduct in other forms.²² As such, they often fail to punish anticompetitive behavior (or commit Type 2 errors), and the framework appears to promote monopolization as opposed to promoting competition across sectors.

Finally, uncertainty arises due to the regular and inconsistent application of non-competition factors by enforcement agencies when enforcing the laws, which is often aggravated by poor drafting quality of legal documents and the loss of accurate meaning when translating Chinese text into English.²³ For instance, when the US Carlyle Group sought to purchase an 85 percent stake in the subsidiary of a Chinese state-owned enterprise (Xuzhou Construction Group) in 2005, MOFCOM required Carlyle Group's interest be limited to 45 percent, although the investment was eventually permitted. As such, China maintained a 50 percent interest in Xuzhou, which allowed the enterprise to retain its state-owned status. Thus, it is arguable that MOFCOM acted primarily in the interest of state control instead of competition concerns.²⁴ While consideration of non-competition factors is not unique to China's competition regime, it is notable that social factors seem to be preferred over economics.²⁵

Notwithstanding the confusion and inconsistency in Chinese competition law, rapid policy developments have occurred in less than two decades. Not to mention the most remarkable piece of

²⁰ *Id.* at 348-49.

²¹ *Id.*

²² *See Id.* at 350.

²³ *Id.* at 350-51.

²⁴ *See* Zhang et al., *supra* note 3, at 191-95 (providing a summary of the Carlyle Group acquisition and three other recent controversial Chinese competition cases).

²⁵ Dabbah, *supra* note 2, at 350.

Chinese competition legislation to date: AML, which will presumably modernize and refine China's competition law by creating uniformity and reducing the current problems.

1.2 The 2007 Antimonopoly Law²⁶

The 2007 Antimonopoly Law (AML) is the product of a working group established by the Chinese government in early 1994.²⁷ This Working Group, led by two State Council departments, was initially created to study China's need to adopt comprehensive competition policy.²⁸ Between 1994 and 2001 the Working Group's progress was sporadic and with little success.²⁹ Following China's accession to the World Trade Organization (WTO) in 2001, however, the process accelerated in an effort to respond to WTO commitments.³⁰ While a comprehensive competition law was not required by China's accession agreement, the reaction followed from the increased likelihood of competition from foreign firms on the domestic Chinese market.³¹ As a result, on August 30, 2007, after thirteen years of drafting, the Standing Committee of the National People's Congress (NPC) enacted AML as China's first comprehensive competition statute.³² As China's first major stride in competition policy, AML aims to seriously refine China's competition law regime when it takes effect on August 1, 2008.³³

Despite this substantial step, however, many additional rules will be required to implement the provisions of AML due to its vague and general nature.³⁴ While AML's 57 Articles bear similarity to European competition laws, it leaves out many of the nuances, which results in

26 Antimonopoly Law of the People's Republic of China (promulgated by the Standing Com. People's Cong. on Aug. 30, 2007, effective on Aug. 1, 2008) [AML].

27 WILLIAMS, *supra* note 9, at 172-73. "The State Council is the highest organ of state power and state administration in the executive branch." Zhang et al., *supra* note 3, at 189. More specifically, the two departments making up the Working Group were SAIC and the State Economic and Trade Commission (SETC), which, in 1998, was merged with MOFCOM. *Id.* at 189-90.

28 *Id.* at 172-73.

29 Nathan Bush, *The PRC Antimonopoly Law: Unanswered Questions and Challenges Ahead*, THE ANTITRUST SOURCE, Oct. 2007, at 1, available at <http://www.abanet.org/antitrust/at-source/07/10/Oct07-Bush10-18f.pdf>.

30 *Id.*

31 WILLIAMS, *supra* note 9, at 177, 215.

32 Bush, *supra* note 29, at 1. The NPC is the top of the hierarchy in China's legislative branch and is composed partially of a permanent body called the Standing Committee. Zhang et al., *supra* note 3, at 189. Together, the NPC and its Standing Committee enact Chinese legislation. *Id.*

33 AML, art. 57.

34 Adrian Emch et al., *The New Chinese Anti-Monopoly Law - An Overview*, ESAPIENCE Ctr. FOR COMPETITION Pol'y, Nov. 2007, at 2, available at SSRN: <http://ssrn.com/abstract=1030451>.

deferring many key decisions to judicial interpretations and case-by-case decisions.³⁵ Further, the relationship between AML and the existing piecemeal legislation is left unclear. AML is likely to receive greater weight where conflicts exist because of its last-in-time nature. But until this position is verified in practice, there is some uncertainty about how overlaps and conflicts with existing legislation will be treated.³⁶

Yet, in AML's defense, it does provide a uniform and comprehensive framework for regulation across a wide spectrum of monopolistic behavior (e.g. anticompetitive monopoly agreements, abuses of dominant market positions, and concentrations that are likely to eliminate or restrict competition).³⁷ And its stated purpose is to prevent monopolistic conduct, protect market competition, promote efficiency, safeguard the interests of consumers and public welfare, and promote the development of the socialist market: many of the aims pursued by competition law in more developed jurisdictions.³⁸ Of course, whether these aims will be vigorously pursued is questionable, as we will see by discussing the relevant substantive provisions.

2 What are the AML Concerns?

2.1 Two Categories of Concerns

I will start by proposing that given China's historical, political, and economic conditions, there exists two interrelated, yet distinct, categories of concern that are raised with regard to what AML will achieve in practice. The first category involves the Chinese institutions' ability to properly administer and enforce AML. Essentially, this category consists of two problems in Chinese competition law: (1) conflicting jurisdictional authority by enforcement agencies and (2) corruption in China's judicial and administrative systems. Thus, institutions need to be sound in that they are competent, impartial, uncorrupt, and can exercise authority to create a deterrent effect.³⁹ As for the first problem, it requires strong identifiable institutions to be in place to carry out AML's stated purposes. But given the inherent conflicts over who has authority to enforce Chinese competition law, the problems are evident.⁴⁰ Unless the institutions intended to enforce AML are clearly identified, and the relationship of AML with existing legislation clarified, conflicts and

35 Bush, *supra* note 29, at 2.

36 Emch et al., *supra* note 34, at 6.

37 AML, art. 3.

38 AML, art. 1.

39 See WILLIAMS, *supra* note 9, at 421-22.

40 See *supra* Part 1.1.

unpredictability will inevitably remain. As for the second problem, the judiciary needs to operate independently to avoid government interference and be able to impose effective sanctions or remedies. This is problematic because the Chinese Communist Party (CCP) often appoints judges, which means there is often corruption and local interference within the judicial system.⁴¹ Ultimately, the lack, or failure, of physical institutions to effectively administer and enforce AML is the stated concern regarding what AML achieves or is capable of achieving.

Still, while institutional capacity is a legitimate concern, there is reason to believe that suitable administration and enforcement is achievable under AML. First, AML creates one body (an Antimonopoly Law Enforcement Authority (ALEA) under the State Council) that is responsible for enforcing competition law in accordance with AML, which may reduce or eliminate the concerns over institutional capacity if it is provided the necessary tools.⁴² Given the framework provided by AML, there is no question greater certainty can be provided for under AML by identifying the relevant authority to enforce competition law. Rather, the question is whether the administrative framework identified by AML will actually be implemented.

Further, at least one author says ‘[t]he Chinese system does not lack institutions meant to keep officials honest,’ which implies potential to overcome corrupt institutions.⁴³ Irrespective of their effectiveness, the author cites three existing mechanisms in China that support this statement: (1) a traditional petition system, which provides an avenue to take grievances directly to higher authorities; (2) the CCP’s Central Commission for Discipline Inspection, the Ministry of Supervision, the Anti-Corruption Bureau of the Supreme People’s Procuratorate, which are all responsible for fighting misconduct by party members; and (3) the Xinhua News Agency, which gathers information and produces reports on corruption for central leadership.⁴⁴ And, arguably, China’s judiciary is becoming increasingly professionalized as it is continuously revamped.⁴⁵ Finally, Article 54 AML provides that misconduct by ALEA staff (e.g. activity for personal gains or disclosure of commercial secrets obtained in AML enforcement) is punishable both civilly and criminally.⁴⁶ But all of these mechanisms rely on good-faith execution of duties. Thus, corruption is still a serious problem in China, as evidenced by the 97 thousand officials disciplined in 2006 for

41 McNally, *supra* note 8, at 29.

42 AML, Art. 10.

43 John L. Thornton, *Long Time Coming: The Prospects for Democracy in China*, 87(1) FOREIGN AFFAIRS 2, 13 (2008).

44 *Id.* at 13-14.

45 McNally, *supra* note 8, at 29.

46 AML, art. 54.

dereliction of duty and taking bribes, among other things.⁴⁷ While resources may prevent eradication of all institutional concerns, it does not appear that the institutional framework is lacking to overcome institutional concerns; rather, any stated corruption problems seem to stem from lack of intent to eradicate misconduct.

As a result, the second category of concern relates to Chinese ideology. In its present context, I take Chinese ideology to mean the existing socio-economic ideology or competition policy culture in China. In other words, where does competition law fit within the greater socio-economic ideology that shapes China's public policy?⁴⁸ In the end, the concern is whether China's appearance of pursuing market-oriented competition policy with AML contradicts its actual intent.⁴⁹ This would create an inherent conflict. And yet, why would any country adopt a competition law without the intent to implement sound competition policy? As simple as it sounds, this gives rise to the second category of often-cited concerns.⁵⁰

What is AML's enactment intended to achieve? Or what are the motives behind China's current drive for a comprehensive competition law?⁵¹ Surely, the intent should be to achieve AML's stated aims.⁵² But the inability to gauge intent with certainty, coupled with developing 'Chinese capitalism,' troubles many observers.

Consequently, because of its underlying impact on competition law, this socio-economic ideology directly impacts any AML concern that may be raised, including the institutional capacity concerns stated above. Thus, while maintaining legitimate, uncorrupt, institutions to enforce Chinese competition law is important, the appropriate competition culture is the necessary initial stepping-stone to greater market-oriented competition policy. And based on the existing institutional mechanisms to support capacity and confront institutional concerns (examined above), socio-economic ideology may be the genuine reason for AML concern, provided reason for concern exists. In any case, institutional capacity seems to be surmountable with the right intent. So while recognizing that institutions are a key factor in AML achieving its aims, this analysis will focus on AML concerns involving Chinese ideology.

47 Thornton, *supra* note 43, at 14.

48 See Gal, *supra* note 6, at 24.

49 *Id.*

50 *Id.* at 24, 27.

51 *Id.* at 27.

52 See *supra* Part 1.2.

2.2 Specific Concerns

Clearly, the overarching AML concern stems from uncertainty in Chinese socio-economic ideology or its competition culture. Generally, this uncertainty can have two undesirable outcomes. One is the risk that AML will be used in pursuit of national interests to the detriment of non-Chinese entities. Essentially, will AML be used to promote local industries in competition with foreign competitors?⁵³ The other is the risk of overall inefficiency or reduction in social welfare because both foreign and domestic firms are operating in an uncertain and sporadic environment. However, to appreciate these general concerns, it is first necessary to analyze specific concerns embedded in the AML text. By examining the text, the general concerns are readily apparent and they expose Chinese government's maneuverability to pursue whatever aims it chooses because of vagueness. Although it would be impossible to address all specific AML concerns, I will attempt to flush out problematic provisions that raise questions. After doing so, I will return to the general concerns of protectionism and inefficiency to assess their legitimacy in light of the specific concerns analyzed.

2.2.1 Administrative Monopoly

The first specific concern arises from abuse of administrative power by agencies empowered by the law. This concern is often termed administrative monopoly. It is a consequence of the tendency by provincial governments and regulators to favor or promote certain competitors (often state-owned enterprises (SOEs)) over others, particularly foreign firms.⁵⁴ These abuses of power, which flourish under existing law, often result in regional blockades, restrictions on market access, prohibited conducts, designated deals, or similar competition restricting activities.⁵⁵ As a result, Article 8 and Chapter 5 AML (Articles 32-37) expressly prohibit abuses of administrative power that restrict or eliminate competition. And, more specifically, Chapter 5 identifies explicit instances of prohibited administrative abuse.⁵⁶ For example, 'Article 37 prohibits "abuse of administrative power by" issuing regulations that "eliminate or restrict competition."' ⁵⁷ However, despite expressly prohibiting such abuses, arguably AML's administrative monopoly rules simply duplicate existing measures, such as the *Anti-Unfair Competition Law*.⁵⁸

⁵³ See Bush, *supra* note 29, at 2.

⁵⁴ *Id.* at 4.

⁵⁵ Zhang et al., *supra* note 3, at 199.

⁵⁶ AML, Ch. 5.

⁵⁷ Bush, *supra* note 29, at 4.

⁵⁸ Emch et al., *supra* note 34, at 20.

Under AML, those government authorities higher in the bureaucratic system can challenge administrative monopolies and impose sanctions on lower-level authorities.⁵⁹ While specific sanctions are not identified by AML, it does suggest that an order to correct the competition restricting activity should be issued and that disciplinary sanctions in accordance with the law be imposed. But at the same time, AML only authorizes ALEA to propose recommendations on how the higher authority should address these problems within the law.⁶⁰ Thus, given ALEA's constrained role in administrative monopoly enforcement, the system relies heavily on good-faith supervision by China's administrative institutions. There needs to be adequate incentives for Chinese authorities to take a stance against administrative monopolies if AML is going to be effective. Yet, many local governments are dependant on financial income from the SOEs that often benefit from administrative monopoly. So an inherent conflict exists.⁶¹

In turn, the most significant limitation of AML's administrative monopoly rules is their failure to indicate whether an undertaking victimized by administrative monopoly can seek redress under the rules. This may hint that China is intent on maintaining the existing administrative monopoly enforcement regime. Without further AML implementing legislation, procedure for eradicating administrative monopoly may be the same under AML; therefore, not eliminating any competition law concerns in China. Because AML's administrative monopoly provisions are vague about who can seek redress, AML does not necessarily indicate whether there will be fewer abuses of administrative power post-AML.

But bearing in mind China's incentives to enforce AML's administrative monopoly provisions, there is an important consideration vis-à-vis China's recent accession to the World Trade Organization (WTO). Generally, it is arguable that the best way to confront state protectionism (a result of administrative monopoly) is through trade laws rather than competition law. Where China's administrative monopolies discriminate against foreign investors, the WTO dispute settlement body is a legitimate alternative to AML. Thus, China, as a WTO member, has an incentive to avoid flagrant protectionism in an attempt to avoid extensive WTO litigation and sanctions. While the WTO's position on national competition policies may not be explicit, competition policy considerations cannot be excluded from dispute settlement.⁶² For example, if

59 AML, art. 51.

60 *Id.*

61 Zhang et al., *supra* note 3, at 199.

62 Kathy Y. Lee, *The WTO Dispute Settlement and Anti-Competitive Practices: Lessons Learnt From Trade Disputes 10-11* (The Univ. of Oxford Centre for Competition Law and Policy, Working Paper No. (L) 10, 2005), available at <http://www.competition.law.ox.ac.uk/lawvle/users/ezrachia/CCLP%20L%2010-05.pdf>.

AML is used to privilege domestic firms over foreign investors, China could face WTO litigation for violating the National Treatment provisions of Article III (4) General Agreement on Tariffs and Trade (GATT) or Article XVII General Agreement on Trade in Services (GATS).⁶³

As a result, the potential for WTO litigation seems to incentivize China's use of AML to eradicate administrative monopoly, particularly because the United States has expressed an increased willingness to take WTO action against China.⁶⁴ This directly contradicts using AML as a protectionist measure. So while it may appear that AML's administrative monopoly rules merely replace those already existing, there is a possibility, based on incentives, that China legitimately intends to address administrative monopoly problems. There is a strong likelihood AML's administrative rules will be enforced by either exercising greater top-down restraints over lower-level authorities or by passing supplemental legislation that grants ALEA a greater role in administrative monopoly enforcement.

2.2.2 National Security Review

A second concern involves AML's national security review provisions. Article 7 AML provides that the State retains the power to regulate and supervise undertakings in industries 'controlled by the state-owned economy and that are critical to the well-being of the national economy and national security.'⁶⁵ Under this provision, it appears that any state-owned undertakings in industries crucial to China's national security or economy would be excluded from AML's application altogether and instead subject to governmental regulation with regards to all activities in order to promote consumer welfare and technological progress.⁶⁶ As such, because SOEs will presumably be excluded from AML application under this provision, depending on governmental goals, it could curtail the rules on administrative monopoly by restricting AML's application. To exacerbate this problem, Article 7 does not specify the industries to which it applies. Because many SOEs exist in the most inefficient sectors of the economy (e.g. energy, mining, and manufacturing),⁶⁷ AML may not be able to promote competition in the sectors AML initially appears to target. Still, the product

63 *Id.*

64 See David H. McCormick, Treasury Under Sec'y for Int'l Affairs, Remarks at the Council on Foreign Relations, *U.S.-China Economic Engagement: The Road to Faster, Deeper Reform* HP-788 (Jan. 30, 2008), available at <http://www.ustreas.gov/press/releases/hp788.htm>; see also U.S.-CHINA ECON. AND SEC. REVIEW COMM'N, 110TH CONG., 2007 REPORT TO CONGRESS (Comm. Print Nov. 2007), available at <http://www.uscc.gov/>.

65 AML, art. 7.

66 *Id.*

67 Bush, *supra* note 29, at 5.

of Article 7 depends on its interpretation and interplay with other AML provisions; pending clarification, however, the uncertainty created by the text warrants concern.⁶⁸

On the other hand, while we may not be able to gauge the reach of national security in Article 7, we can identify the industries that are controlled by the state-owned economy. And because the number of SOEs has been drastically reduced as China has moved towards privatization in recent years, the risks created by uncertainty under this provision seem minimal. Further, even if China wanted to curtail the administrative monopoly rules with Article 7, the risk of WTO litigation, as discussed above, would suggest an incentive not to do so. Finally, according to the second paragraph of Article 7, excluded industries must ‘conduct business in accordance with the law, shall be honest and reputable in their business dealings, ...accept public supervision,’ and not harm consumer interests ‘by utilizing their controlling positions or their status as the exclusive provider of certain services or products.’⁶⁹ Thus, the concern here seems remote. The intent appears to be maintaining a balance between competition policy and industrial policy and other social interests. In which case it may be beneficial to pursue multiple public policy concerns alongside AML, primarily because ‘in some cases, [competition law] need[s] to be broadened to include distributional effects, which may be an important factor in the social-welfare function.’⁷⁰

In a related provision, national security risks arise in the context of mergers. Article 31 AML provides that where foreign investors attempt to merge with, or acquire, a domestic enterprise, and the transaction concerns national security, such transaction will be subject to ‘relevant regulations of the State’ dealing with national security.⁷¹ The problem here is that it is unclear which industries or firms fall within Article 31’s application. This differs from Article 7 because there we can identify the industries that are part of the state-owned economy even if we don’t know what constitutes national security. Here national security could be applied to any industry. Thus, it creates uncertainty for all foreign firms merging with domestic firms in China. And the express singling out of foreign investors naturally raises concern about protectionism. Still, just because the investment raises national security risks in China, does not mean it will be excluded. It simply subjects the investment to national security review along with AML review.⁷² From this perspective, the

68 See Morrison & Foerster LLP, *United States: People’s Republic Of China Passes Comprehensive Anti-Monopoly Law*, MONDAQ, Sept. 20, 2007, at <http://www.mondaq.com/article.asp?articleid=52478>.

69 AML, art. 7.

70 Gal, *supra* note 6, at 28.

71 AML, art. 31.

72 *Id.*

provision is extremely difficult for Western countries to criticize in light of Western countries' laws that directly allow review of foreign investments on national security grounds.⁷³

2.2.3 AML's Jurisdictional Reach

Generally, there is a broad concern over AML's jurisdictional reach. The primary concern lies in Article 2 AML, which extends jurisdiction over monopolistic conduct occurring outside China if it restricts or eliminates competition in China's domestic market.⁷⁴ This potentially extraterritorial jurisdiction provided by Article 2 is troublesome because it omits the common qualifications in EU and US law that require the anticompetitive conduct to 'have a direct, substantial, and reasonably foreseeable effect' on competition.⁷⁵ Simply stated, AML provides China with greater transnational jurisdiction over monopolistic conduct than traditionally exists. Thus, in the near future, along with the United States and European Union, China will play a key role in determining what actually constitutes monopolistic conduct, particularly if a firm wants to operate in China.

Consequently, this can create two problems: unilateral action by China (contrary to majority view in the international community) or prolonged review of potentially monopolistic conduct by China. In either case, Chinese authorities would probably be creating negative extraterritorial effects on other jurisdictions. For example, there could be loss of efficiencies or consumer benefits internationally if a firm wanting to operate in China must comply with Chinese rulings, despite not violating competition law in other jurisdictions. Or large international merger may be blocked or delayed by Chinese review. Thus, Article 2 could be used to pursue national interests by benefiting national champions or creating negative extraterritorial effects.⁷⁶ This inherent uncertainty creates concern.

In response to these concerns, China probably would only act contrary to the international community in rare circumstances. Unless the monopolistic conduct is in a truly strategic sector and legitimately impacts China's national interests, there is little incentive to take unilateral action against multinational firms. And, in the first place, unilateral action presupposes other jurisdictions approve of the arguably monopolistic conduct. Thus, the risk of unilateral action seems minimal at best. And even assuming the risk of unilateral action was to materialize, such action would surely

73 For instance, the Committee on Foreign Investments in the United States regularly reviews acquisitions by foreign investors on national security grounds.

74 AML, art. 2.

75 Emch et al., *supra* note 34, at 4.

76 Harry Wilson et al., *China Enters New Year of Regulation*, FIN. NEWS ONLINE, Feb. 15, 2008 at <http://www.financialnewsus.com/?page=ushome&contentid=2449777414> (visited Mar. 10, 2007).

attract political attention, create tension, and probably result in retaliation by other jurisdictions, particularly if it has negative extraterritorial effects: there are incentives for China to avoid such conflicts. Concerns centered on uncertainty in unilateral action might not be as worrisome as they initially appear. As for additional delays and costs for firms seeking competition approval from Chinese regulators, little can be said. Of course, these concerns probably will result as China's competition authorities begin to play a greater role, but it is simply part of China having a greater role in the global economy. Ultimately, the burden on firms facing review by US or EU competition authorities is the same.

2.2.4 Merger Remedies

Here the concern deals specifically with Chinese enforcement officials' abuse of merger and acquisition (M&A) remedies. Article 29 AML provides that following an M&A review, a concentration of undertakings may be subject to conditions that reduce any potential adverse effects, even if the concentration is not outright prohibited.⁷⁷ Not surprisingly, Article 29 is vague about its intended application: there is not hint of what conditional remedies may be required or how they would be structured. While the Chinese M&A remedies may include a range structural and behavioral requirements similar to those under European or US competition law, Article 29 provides no certainty.⁷⁸ For example, it seems possible for Chinese authorities to condition an M&A involving a foreign investor on specific technology sharing, granting of compulsory market access, or subsidization or asset divestitures in favor of small Chinese firms.⁷⁹ Although such remedies may promote strong competition policy through negotiation, the abuse of these remedies could also divert foreign investors from the Chinese market to the benefit of domestic firms.

For example, a technology transfer remedy could be used by China as a backdoor method for addressing current intellectual property (IP) violations in China.⁸⁰ By requiring technology transfer to Chinese competitors, the incentive for Chinese firms to engage in piracy could be reduced; in turn, current global concerns about IP violations would also be reduced.⁸¹ While it is difficult to ascertain the consequences of such a policy agenda, or its legitimacy from a competition

⁷⁷ AML, art. 29.

⁷⁸ See GIORGIO MONTI, *EC COMPETITION LAW 283-90* (Cambridge University Press 2007).

⁷⁹ *Id.*

⁸⁰ See Matthias Stecher et al., *China: Intellectual Property Strategies For The People's Republic of China*, MONDAQ, Feb. 13, 2008, at <http://www.mondaq.com/article.asp?articleid=57226&print=1> (discussing the piracy problem).

⁸¹ Bradley S. Klapper, *US Hints at New WTO Challenge Vs. China*, ASSOCIATED PRESS, Jan. 30, 2008, at <http://ap.google.com/article/ALeqM5jNLghq5gQrBuwDTIK0LjUbaYnjegD8UGK3700>.

policy perspective, any convergence of external policy motives with competition policy directly correlates to concerns about Chinese intent.

Nevertheless, Article 29 might not warrant real concern for two reasons. First, in merger remedy situations, ultimately the firms seeking the M&A decide whether or not to follow through with the transaction in light of conditionality. So for foreign firms, they could always abandon the transaction, and it does not appear to be in China's interest to turn away foreign direct investment (FDI). If China were to turn away FDI with strict merger remedies, the likelihood would be a slowing of economic growth, an increase in unemployment, and, ultimately, discontent within the country.⁸² This is simply not in the CCP's interest.⁸³ Thus, if China wants to appear merger friendly to attract FDI, it may give the parties to the merger the upper hand in negotiations.⁸⁴ Article 29 probably will be used to address legitimate competition policy concerns, as opposed to being used in a way that jeopardizes FDI.

Second, through Article 5, AML appears to view concentrations in a positive light. Article 5 provides that 'undertakings are entitled to engage in concentrations'⁸⁵ in order 'to expand their business scale and to improve their market competitiveness.'⁸⁶ While this provision could be viewed as part of industrial policy to promote small firms merging into larger firms, it suggests that at least small undertakings being reviewed in a transaction might have the upper hand in remedy negotiations because approving the merger would be preferred. Even if the provision were used to create stronger Chinese competitors, it would arguably be legitimate industrial policy, as China is a developing country.⁸⁷ On the other hand, this would be of little benefit to large firms seeking a merger. Of course, the line between small and large firms is difficult to draw; therefore, the provision may actually create greater uncertainty in approving mergers. But, in any case, the provision's explicit promotion of greater market competitiveness through fair competition suggests that mergers would be granted provided competitiveness is maintained. If it were not, then the imposition of remedies would be appropriate. Unavoidably, however, there is uncertainty in

82 See YASHENG HUANG, *SELLING CHINA: FOREIGN DIRECT INVESTMENT DURING THE REFORM ERA 6-10* (Cambridge University Press 2003); see Chen, *supra* note 5, at 158, 160 (suggesting the private sector is the key to sustainable economic growth and that policy failures will result in unemployment and discontent among the lower classes).

83 See Chen, *supra* note 5, at 158, 160.

84 See, e.g., *Commission of the European Communities v. Tetra Laval BV*, 2005 E.C.R. 987, para. 85 (suggesting that in order to appear merger friendly, the parties to the merger had the upper-hand in negotiations).

85 Emch et al., *supra* note 34, at 16.

86 AML, Art. 5.

87 Gal, *supra* note 6, at 28.

borderline cases. Still, because FDI helps expand domestic competitors, it seems that in most cases AML's merger remedy provisions would be legitimately applied to both foreign and domestic firms.

2.2.5 Abusive Conduct

The fifth concern category stems from AML's provisions on abuse of dominance. Within these provisions, there are potentially three areas of concern: one involving the definition of abuse, one involving abusive conduct with regard to intellectual property rights (IPRs), and one dealing with Chinese authorities' view of predatory pricing. First, the general concern arises from Article 17 AML, which provides a non-exhaustive list of activities that firms with a dominant market position must not engage in (unless engaged in 'with justification'): predatory pricing, exclusive dealing and refusals to supply, tying, and discrimination.⁸⁸ Although Article 17's prohibited activities reflect basic EU competition law, the Article also provides a catchall provision that negates the initial certainty. It generically prohibits 'other abuses' as determined by the enforcement Authorities.⁸⁹ Because the Chinese enforcement authorities could arguably define 'other abuses' in a manner that protects certain competitors or industries, Article 17's potential reach is difficult to gauge.⁹⁰ Yet, it does seem logical that most activities by a dominant firm could be categorized as abusive under certain circumstances. Therefore, it's not difficult to see how the enforcement authorities could achieve a desired outcome.

On the other hand, without a catchall provision, Article 17 could be easily circumvented. Without a catchall, firms could simply tailor their conduct to avoid the specified list of prohibited activities, which would undermine the effective application of Article 17 in its effort to prohibit abusive conduct by dominant firms. That is, it is impossible to know *ex ante* all activities or conduct by dominant firms that will have anticompetitive effects on the market. Whether conduct has anticompetitive effects depends on the relevant industry and market conditions at a given point in time. Thus, certain conduct can become abusive, or not abusive, as market conditions change. While this undeniably creates uncertain competition enforcement, it is necessary if AML is to play a legitimate role in deterring abusive conduct. This provision is beneficial; it counters the problem of narrowness in existing Chinese competition law, which often results in Type 2 errors by not addressing abusive conduct. It merely requires firms with a dominant market position to closely

⁸⁸ AML, art. 17.

⁸⁹ *Id.*

⁹⁰ *See generally* AML, art. 9 & ch. 6.

monitor their conduct so not to harm competition, even if this means taking a precautionary approach in AML's early stages.⁹¹

Second, Article 55 AML states that AML will 'not apply to Undertaking[s]...[lawfully] exercising their intellectual property rights,' unless the conduct 'eliminate[s] or restrict[s] competition by abusing...intellectual property rights.'⁹² Despite its similarity to international provisions on abuse of IPRs, this provision attracts criticism from foreign commentators worried about IPR exploitation.⁹³ Essentially, without further implementing measures to make the scope of Article 55 clear, the Article could have a chilling effect on firms' innovation efforts if they fear a finding of abuse.⁹⁴ But while this is a legitimate concern, provided the conduct complies with IPR laws, AML does not appear to apply if an IPR holder's conduct occurs in the market to which the IPR belongs. And even if AML applies, Article 55 does not expressly expand the list of potential abuses in Article 17;⁹⁵ therefore, to find abuse of IPRs, the conduct needs to qualify as an Article 17 abuse. But again, if the enforcement authority wants to fit abuse of IPRs into Article 17, it could always do so under the 'other abuses' provision, which eliminates the need to expand Article 17 in the first place. It is questionable whether this observation actually provides any reassurance. But as suggested above, the need for the 'other abuses' provision is evident.

Third, the Chinese authorities' approach to predatory pricing remains unclear. Given the great divergence in the treatment of predatory pricing among various influential antitrust systems (e.g. Europe, Canada, and the United States),⁹⁶ Article 17 AML creates uncertainty because its prohibition on predatory pricing does not clarify China's desired stance.⁹⁷ Ultimately, this makes one wonder how Chinese authorities will approach cases of predatory pricing. Unfortunately, this creates uncertainty for firms operating in China when coordinating pricing practices. And as a result, firms fearing AML liability may refrain from pricing practices that would otherwise benefit consumers. This inevitably creates a slippery slope until enforcement authorities allude to their

91 A similar position is taken with regards to application of Article 82 EC, which provides a non-exhaustive list of prohibited abusive activities. See *Tetra Laval v. Commission of the European Communities*, 2002 E.C.R. II-4381 (T-5/02), para. 157.

92 AML, art. 55.

93 See, e.g., Joy K Fuyuno et al., *Antitrust and Intellectual Property Law in China*, presented at the ABA Antitrust Law meeting (Apr. 20, 2007).

94 Emch et al., *supra* note 34, at 12.

95 *Id.*

96 Brian A. Facey et al., *Predatory Pricing in Canada, the United States and Europe: Crouching Tiger or Hidden Dragon*, 26(4) *WORLD COMPETITION* 625, 632 (2003).

97 AML, art. 17(2).

stance on predatory pricing. In the meantime, however, firms face uncertainty and may forego efficient conduct.

Further, provided China adopts an approach to predatory pricing similar to the EC, Chinese authorities could arguably protect individual competitors as opposed to protecting elimination of effective competition.⁹⁸ At the same time, pointing to the EC model would provide legitimacy. This is problematic because it would result in legitimized Chinese protectionism: a general AML concern. Still, protecting individual competitors is not a stated aim of AML;⁹⁹ therefore, how predatory pricing will evolve under AML is unclear, but for now the uncertainty it produces is clear.

2.3 Legitimacy of General Concerns in Light of Specific AML Concerns

The list above is hardly exhaustive when discussing AML specific concerns. But it does provide a good idea of how AML's vagueness creates risk of inefficiency for foreign or domestic firms because of uncertainty (in the case of abuses of dominance or merger remedies) and can be used as a protectionist measure against foreign competition. This will depend on how AML is applied in practice: inevitably, uncertainty results in concern. Still, while AML does possess overall vague language, vague language is often inherent in competition laws across jurisdictions.¹⁰⁰ So vagueness in AML's text alone is not a sufficient justification for concern. In order to determine the legitimacy of protectionist and inefficiency concerns (the general concerns), it is necessary to examine the incentives and intent likely to influence AML's specific provisions. In this section I will consider the incentives.

Based on the specific provisions' discussion, there are recurring considerations that should mitigate the specific concerns giving rise to the two general concerns. As a result, it would seem disadvantageous for China to use AML to pursue protectionism or create inefficiency for foreign and domestic firms.

Generally, there are three considerations worth noting to counter the risk of protectionism to promote domestic industry. First, China has an interest in attracting FDI, which is a driving force

⁹⁸ MONTI, *supra* note 78, at 181.

⁹⁹ See AML, art. 1.

¹⁰⁰ See EDWIN S. ROCKEFELLER, THE ANTITRUST RELIGION 5-9 (Cato Institute 2007).

behind privatization in China and is indispensable to continued growth in China.¹⁰¹ This interest in FDI may be best illustrated by the recent trend towards privatization of SOEs in the hands of foreign firms.¹⁰² Because this trend is likely to continue,¹⁰³ it does not appear China is intent on pursuing a strict protectionist path with AML. And alternatively, if China were to pursue a flagrant protectionist path with AML, uncertainty among foreign investors would begin to rise and the Chinese market would suddenly appear less attractive. Second, as the discussion on China's WTO accession shows, there is an incentive to provide a level playing field for domestic and foreign firms operating in China. While some suggest AML is an avenue to protect Chinese industries in the wake of increased FDI, failure to treat foreign investors equally probably will result in WTO litigation and the risk of retaliation by other countries. Because economic progress in 'China depends on the willingness and ability of other countries to import its goods...[a]ny disruption of this flow has a direct effect on the Chinese economy.'¹⁰⁴ Thus, China is placed 'in a position to keep its customers happy' because it 'is totally dependent on the world to keep buying its goods rather than someone else's goods.'¹⁰⁵ And 'the fact is that the rest of the world is far less dependent on China's exports than China is dependent on the rest of the world.'¹⁰⁶ Consequently, tension with Western countries over protectionist measures resulting from competition policy is not likely to be a regular occurrence.

Third, the drastic reduction in the number of SOEs over the last two decades greatly increases China's dependence on the private sector for economic progress. Because the reason for abandoning many SOEs was due to their inefficiency, there is an incentive to promote a competitive environment among private firms operating in China, particularly since private sector employment has drastically increased.¹⁰⁷ Inevitably, this should also reduce the risk of operating in an uncertain environment that creates inefficiency. Additionally, due to the reduced number of SOEs, it may be easier to identify the specific sectors where protectionist risks most likely exist. Thus, the risk of protectionism because of uncertainty is probably not that great.

101 Bennis So Wai Yip, *Privatisation*, in CRITICAL ISSUES IN CONTEMPORARY CHINA 49, 63 (Czeslaw ed., Routledge 2006).

102 Yip, *supra* note 74, at 67.

103 *Id.*

104 George Friedman, *The Geopolitics of China: A Great Power Enclosed*, STRATFOR 1, at 10, June 15, 2008, available at <http://web.stratfor.com/images/GEO POLITICS%20of%20China%20080615.pdf> (visited 20 July 2008).

105 *Id.*

106 *Id.*

107 Chen, *supra* note 5, at 148.

Further, three considerations need to be examined along with the risk of inefficiency and uncertainty for foreign and domestic firms. First, as for unilateral burdensome procedures resulting from China's broad jurisdictional reach, it seems that unilateral action creates unwanted tension via extraterritorial effects. Not to mention unilateral action presupposes all others approve of the potentially anticompetitive conduct. Thus, it appears the only legitimate concern is the risk of additional delays and costs for firms. For instance, the burden for companies coordinating an M&A across multiple jurisdictions can create inefficiencies. Because there are different political and economic structures among economies, regulation of M&A's can differ, thereby increasing firm costs to ensure compliance. A recent example shedding light on this possibility involves discussion of Chinese competition authorities reviewing *BHP Billiton's* proposed acquisition of *Rio Tinto*. Although the Chinese government subsequently denied that its competition regulators would block the acquisition, there was talk that China might seek to review the transaction,¹⁰⁸ thereby increasing the costs, and possibly time, of acquisition. A second example involves *Microsoft's* ongoing bid to takeover *Yahoo*. In this case, some commentators have expressed concern that AML may pose a substantial hurdle to the acquisition, particularly given the transaction's potential impact on the Internet, which plays a key role in China's economic and political affairs.¹⁰⁹ Consequently, a prolonged review of the acquisition by Chinese authorities could have negative extraterritorial effects and actually damage the value of the business.¹¹⁰ Still, while the concern over China as an additional burden to global competition law does have merit, it is merely a consequence of China's role in the global economy. This means it is difficult to criticize increased time and costs due to Chinese authorities playing a greater role. United States and European Union competition authorities impose the same burdens on foreign firms.

Given China's inevitable role as a prominent competition authority, the constructive approach to this concern would be to coordinate competition reviews across the European Union, United States, and China and make the process transparent. Seeking such coordination could prompt a greater role of the International Competition Network (ICN). While China is not currently a member, it is likely to become a member in the wake of AML implementation.¹¹¹ As such, the ICN can reduce concerns about Chinese competition law in two ways: (1) it can work with China to

108 Wilson et al., *supra* note 49.

109 John Markoff, *China may pose hurdle to Microsoft's bid for Yahoo*, INT'L HERALD TRIBUNE, Mar. 28, 2008, at <http://www.iht.com/articles/2008/03/28/technology/yahoo.php> (visited Apr. 15, 2008).

110 Markoff, *supra* note 81.

111 See WILLIAMS, *supra* note 9, at 93.

improve AML implementation; and (2) it creates an international accountability mechanism that puts peer pressure on Chinese competition authorities to comply with soft law principles other jurisdictions adhere to, which is beneficial to bring about coordination.¹¹² Additionally, coordination may be easier than initially envisioned for two reasons: (1) because AML is modeled after EU and US competition law, the basis for coordination is already in place; (2) given the interconnectedness of economies and companies involved in international M&A reviews,¹¹³ there is an incentive for coordination because international anticompetitive conduct will produce similar effects on all economies, provided there are not country specific concerns. As for the second point, it also means that China has incentives to coordinate potential anticompetitive conduct reviews in order to maintain its attractive investment environment through transparency.

The second consideration in gauging inefficiency risks is that it is difficult to criticize national security concerns that are accounted for in AML. As mentioned, every country has mechanisms to ensure national security is not breached. Although national security review may place additional burdens on firms operating in China, the same result endures in even the most developed jurisdictions. For example, the United States recently denied of a Chinese company's acquisition of 3Com on national security grounds.¹¹⁴ Consequently, AML's national security provisions do not create any greater uncertainty than exists in other jurisdictions. Similarly, AML's provisions that arguably account for industrial policy are difficult to criticize in light of China's status as a developing country.¹¹⁵ Third, AML's catchall provisions may create uncertainty, but they are necessary to AML's effective operation. Without such provisions, there is inherent risk of circumvention by firms: catchall provisions help overcome the concerns in existing Chinese competition law that result in excessive type 2 errors.

Based on these considerations, the general concerns (protectionism and inefficiency from uncertainty) resulting from specific AML provisions may simply be an overreaction to new Chinese legislation. While the specific concerns may carry some legitimacy based on AML's vague text, they would appear to materialize into the general concerns only in limited circumstances. However, AML arguably does not clarify its relationship with existing legislation, it maintains provisions that allow promotion of industrial policy, and it does not provide ALEA jurisdiction to directly confront

112 *Id.* at 92.

113 See DAVID HELD ET AL., *GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS, AND CULTURE* 27-28 (Stanford University Press 1999) (discussing the increase in global interconnectedness in all domains of social activity).

114 Henny Sender et al., *China fears scupper \$2bn deal for 3Com*, FIN. TIMES ONLINE, Feb. 20, 2008, at <http://www.ft.com/cms/s/0/0b3e3988-dfe6-11dc-8073-0000779fd2ac.html> (visited July 20, 2008).

115 See Gal, *supra* note 6, at 28.

administrative monopoly. Thus, AML provides little comfort to those hoping for certainty in Chinese competition policy.

Still, as I have attempted to show here, the proper incentives are in place to prevent the specific provisional concerns from materializing into the general concerns. The question is whether these incentives will influence AML enforcement and wider Chinese competition policy. In other words, even though the mechanisms are in place to address the general concerns, will they affect China's decision-making to prevent protectionism and inefficiency? Ultimately, this depends on where competition policy fits within China's greater socio-economic ideology or competition culture: the overarching concern allowing the general concerns to arise in the first place.

3 Chinese Socio-economic Ideology: Where Does Competition Policy Fit?

Thus far, I have argued that many of the AML specific concerns carry limited legitimacy in practice, primarily because they are not likely to materialize into the general concerns due to incentives. Yet, when coupled with traditional Chinese socio-economic ideology, AML's provisions still raise concerns because they are unhelpfully vague in areas. While vagueness is often inevitable in competition law, it is especially problematic for AML because critics are hastily doubtful of China's competition law.

Thus, merely showing the incentives are in place to promote legitimate competition policy is not enough to eradicate concerns. It is also essential to determine whether China's socio-economic ideology supports competition law to the extent necessary for these incentives to be effective. For instance, if China views competition law as subordinate to all other social policies, then the general concerns are probably legitimate because authorities will use AML's vagueness to pursue non-competition policies, despite the consequences. But if there is intent to pursue legitimate competition policy in China, then the incentives should add the needed thrust to do so. On this front, three observable features in current Chinese competition policy may be telling when they are compared with traditional Chinese competition culture. To this end, AML provides an outlook into China's intent or socio-economic ideology, which, as I suggest, results in more pro-competition policy aims than was the case in pre-AML China.

First, although AML may not yet create greater transparency in individual cases, the overall process of drafting and adopting AML was much less opaque than other Chinese legislation.¹¹⁶ Actually, the drafting process was open to input from a wide range of stakeholders: foreign scholars and private practitioners, domestic firms and scholars, and multilateral organizations (e.g. World

¹¹⁶ Bush, *supra* note 29, at 1.

Bank and United Nations Conference on Trade and Development), among others.¹¹⁷ Thus, one would suspect that Chinese intent is to pursue legitimate competition policy goals with the enactment of AML, particularly because it made efforts to incorporate non-Chinese parties into the legislative process (a non-mandatory involvement). Additionally, an ongoing training partnership between Chinese and US regulators has been established to ensure ‘market-driven competition, non-discriminatory treatment and consumer welfare,’ which is a response to China’s 2007 commitment ‘to address US concerns about the implementation and effects’ of AML.¹¹⁸ Under the program, the ‘US Department of Justice, the Federal Trade Commission, the Department of Commerce and others will take part in the training and consultations’ regarding AML’s application.¹¹⁹ With this ongoing engagement, it suggests the pursuit of competition policy via external influence will not end with the implementation of AML.

Second, China is devoting resources to educate its society on the benefits of competition policy. By assigning Chinese personnel, academics, and students to the study of antitrust systems worldwide,¹²⁰ China has promoted the ‘competition advocacy’ necessary to influence ‘public acceptance and awareness of competition law and policy.’¹²¹ According to Michal Gal, this advocacy may actually be the most significant task in adopting legitimate competition policy in developing countries.¹²² So what significance does this have with regards to AML and Chinese intent? Initially, it is inconsistent for China to advocate, and assign resources to, promotion of strong competition policy if China’s true intent is not to promote such policy. And by promoting competition advocacy, China was able to draft AML in a way that tends to draw ‘closer to modern U.S. and EC [antitrust] rules,’¹²³ which suggests China’s more specific intent to adopt prevailing international competition standards with AML’s enactment. Finally, as an example of the Chinese competition advocacy movement, we can draw on the work of Justin Yifu Lin (recently appointed as chief economist at the World Bank). Lin, who is a top Chinese economist, regularly advises the

117 *Id.*

118 *US Launches Training Scheme in China*, GLOBAL COMPETITION REVIEW NEWS, June 25, 2008, at http://www.globalcompetitionreview.com/news/news_item.cfm?item_id=6914 (visited July 20, 2008).

119 *Id.*

120 Bush, *supra* note 29, at 1-2.

121 Gal, *supra* note 6, at 28.

122 *Id.* at 28-29.

123 Bush, *supra* note 29, at 2.

central government and heads a think-tank at Peking University.¹²⁴ Having received a doctorate in economics from the University of Chicago, Lin believes that a ‘government’s first duty... is “to remove all possible obstacles for the function of free, open and competitive markets.”’¹²⁵ Not only is this line of thinking unconventional in the context of traditional Chinese socio-economic ideology, but also, it suggests the possibility of a completely different direction for Chinese competition policy under AML, particularly if Chicago School intellectuals are influencing governmental decisions. Therefore, given the trend of involving individuals such as Lin in government decisions, I suggest that Chinese intent is to create the competition advocacy necessary for strong competition policy development in China.

Third, by creating an Antimonopoly Commission responsible for guiding, organizing, and promoting AML and a centralized ALEA,¹²⁶ AML has produced a competition structure with greater accountability. Although it is still unclear what the ultimate enforcement structure will look like under AML, it is the State Council’s responsibility to establish both the Commission and ALEA.¹²⁷ Hence, both will be directly accountable to the State Council. Of course, one could argue that, as drafted, AML maintains the same confusing enforcement environment as existed pre-AML.¹²⁸ It simply does not clarify the relationship between AML and existing enforcement measures.¹²⁹ Thus, the intent is to maintain an environment with multiple enforcement authorities pursuing different agendas and leading to inconsistent enforcement.

But the mere recognition of the need for centralized enforcement suggests China is drifting towards an improved enforcement environment. And Article 54 directly confronts the risk of ALEA misconduct and corruption by imposing civil and criminal liability in appropriate situations.¹³⁰ According to Maurice Hoo (a partner at the Hong-Kong based law firm Paul Hastings), ‘[t]he new commission will likely centralize enforcement amongst the different state agencies and signals that China is serious about enforcing antitrust issues.’¹³¹ By directly addressing enforcement structure,

124 Lesley Wroughton, *World Bank names China's Lin as top economist*, REUTERS, Feb. 4, 2008, at <http://www.reuters.com/article/bondsNews/idUSB30343620080204>.

125 *Lin's Long Swim: An Economist with an Unusual Past*, ECONOMIST.COM, Jan. 17, 2008, at http://www.economist.com/world/international/displaystory.cfm?story_id=10534473.

126 AML, arts. 9-10.

127 *Id.*

128 *See supra* Part 1.1.

129 Bush, *supra* note 29, at 4.

130 AML, art. 54.

131 Wilson et al., *supra* note 49.

AML does create a more transparent and accountable system. While there could be more than one enforcer appointed under ALEA, it is clear that ALEA is the enforcer that will begin to build precedence, which is better than the existing system where overlapping enforcement authority makes it unclear who is accountable to whom. AML specifically identifies ALEA as the AML's enforcer, which creates greater certainty.¹³² And because the State Council creates ALEA, the line of accountability is apparent in AML enforcement. Accordingly, AML implies intent to move competition policy forward.

These three features seem to provide insight into the future path of Chinese competition law. By showing effort to pursue legitimate competition policy, it suggests a shift in China's socio-economic ideology towards a more pro-competitive marketplace often present in more developed regimes. Thus, when coupled with the incentives in place, Chinese socio-economic ideology should begin to reduce AML uncertainty.

Additionally, while the expressed concerns about AML enforcement are greater than those expressed in relation to similar enforcement in more developed jurisdictions, the same risks exist across jurisdictions due to potential changes in competition culture (e.g. a shift in political or economic ideology could result in completely different competition law outcomes).¹³³ Partially, this may be attributable to China's status as a developing economy lacking democratic society, and thereby excluding predictable outcomes.¹³⁴ But I suggest that it is primarily due to the failure of a predominant competition culture to take hold in China. So while the concerns may be exacerbated by the current state of Chinese competition policy, the same uncertainty and risks surround competition policy in all jurisdictions.

Arguably, politics, economics, and institutions equally shape competition policy within a given jurisdiction.¹³⁵ That is, political decisions about competition law's aims, the economic theory of how markets behave, and the institutions in charge of enforcing competition law all affect the role of competition law in China.¹³⁶ But each plays a role in predicting the future path of any competition regime. Thus, a shift on any of these fronts should create unpredictability and concern in any jurisdiction. Yet, concern is especially evident surrounding AML.

¹³² AML, art. 10.

¹³³ MONTI, *supra* note 78, at 4. For instance, in the United States, a change in power from Republicans to Democrats can greatly influence competition law outcomes. Similarly, if more 'Chicago' school economists making competition decisions, the outcomes will be remarkably different than with 'Harvard' school economists.

¹³⁴ Thornton, *supra* note 36, at 14-16.

¹³⁵ MONTI, *supra* note 78, at 4.

¹³⁶ *Id.*

With its relatively novel presence in China (less than twenty years), competition law has yet to fully establish itself. As a comparator, the more developed competition regimes (United States and European Union) have existed for substantially longer periods. EC competition policy dates back nearly six decades, while US competition policy dates back to the Sherman Act in 1890. Further, in these jurisdictions, shifts in political and economic thinking have taken at least a decade to affect actual competition law enforcement: there is a lag.¹³⁷ For example, it is only recently that economics has begun to play a greater role in EC competition policy. And in the United States, post-Chicago literature began to emerge in the 1980's but has not yet taken hold as the predominant paradigm.¹³⁸ Thus, with its less than two-decade history, Chinese competition policy arguably has not been around long enough to establish itself: uncertainty and concern are exacerbated. Consequently, it appears difficult, if not impossible, to gauge the future path of Chinese competition policy. Predictions must be made based on current Chinese policy. But based on the current environment, pro-competition policy is promising in that the place of competition policy in socio-economic ideology is beginning to reflect the same ideology existing in more developed countries.

First, as for politics, China has begun to embrace the private sector as the key to China's economic progress. As such, the enactment of AML suggests a recognition that competition law needs to play a greater role in China's socio-economic ideology. And it seems to contradict the idea that non-competition social interests are the sole aim of competition policy because other social interests appear easier to pursue under the fragmented laws existing pre-AML. Second, as suggested above, economics should begin playing a greater role in political decision-making as intellectuals study global antitrust systems. Additionally, one of AML's express aims is to promote 'efficiency of economic operation,'¹³⁹ which arguably represents recognition of the benefits of efficiency in light of the shift towards privatization resulting from SOEs' inefficiency. Third, the recognition of the need for a unified institution to enforce competition law also reflects a greater role for competition policy.

Certainly, none of these developments have fully materialized. Yet, based on the lag traditionally associated with competition law development, the promise of legitimate competition policy should not be undermined merely because it has not materialized to date. And while China has made a gradual progression towards AML over the past two decades, any obvious shift in

¹³⁷ See, e.g., MONTI, *supra* note 78, at 74 (discussing the historical time lags between ideological paradigm shifts in the United States).

¹³⁸ MONTI, *supra* note 78, at 74.

¹³⁹ AML, art. 1.

competition policy is highly unlikely until AML has an opportunity to operate in practice. This could make AML appear to be a mere continuation of China's existing competition structure, but it could also be that AML's implementation is the first substantial step in China's competition policy shift.

Finally, although competition policy is playing a greater role in China's socio-economic ideology, it could be argued that China is not pursuing 'legitimate' competition policy. But what is 'legitimate' competition policy? Differences in competition policy's aims can erupt between even the most developed competition regimes.¹⁴⁰ Thus, judging how China should apply AML in practice becomes a difficult task, especially when the differences between other regimes are often based on legitimate opinions. Competition law is anything but 'a static appraisal of business conduct;' sometimes, societal policies (e.g. distributional effects) 'might be even more important than market failures.'¹⁴¹ And '[s]uch social policies may be especially important in the first years of transition to a more competitive economy.'¹⁴² Therefore, because of its unique market structure, China should not merely adopt another countries' entire competition system.

In summary, at the very least, China's socio-economic ideology is more supportive of competition law, which is an initial hurdle in legitimate market-oriented competition policy. And even though a pro-competitive environment has not fully materialized, it does not undermine the hold competition policy is taking in China's socio-economic ideology. Still, it is not appropriate to impose any specific competition policy system on China. The result is that AML helps clarify competition law's role in China's greater socio-economic ideology. However, how much value does AML add in the context of this socio-economic ideology, along with the incentives, to move China towards a unified and transparent competition policy?

4 Chinese Competition Policy: Is AML Just One Step in the Right Direction?

With respect to becoming a market-oriented economy, it is difficult to deny that China's enactment of AML is a political stride in the right direction. Despite years of drafting and an often-uncertain Chinese legislative process,¹⁴³ the mere fact that the NPC enacted AML suggests a desire that China

140 See, e.g., Charles Forelle, *Europe's Antitrust Chief Defies Critics, and Microsoft*, WALL STREET J., Feb. 25, 2008, at A1 (discussing the differing treatment by the US and EU competition enforcement authorities of Microsoft's potentially anticompetitive practices).

141 Gal, *supra* note 6, at 28.

142 Asia-Pacific Economic Cooperation [APEC], *Competition Law for Developing Countries*, prepared by PriceWaterhouse-Coopers (Aug. 1999).

143 Dabbah, *supra* note 2, at 352.

wants to regulate its markets in a more structured manner. But given China's political, institutional, and historical conditions, will AML alone move China towards market-oriented competition policy?¹⁴⁴ In making this determination it is necessary to compare the post-AML legal environment with the pre-AML legal environment.

Initially, the issue is whether AML's text moves Chinese competition policy forward by confronting the problems in pre-AML competition law. While not attempting to provide an exhaustive list, five prominent legal problems exist in the pre-AML legal texts based on the discussion above: (1) fragmentation of the law, (2) fragmentation of enforcement, (3) narrowly drawn laws that fail to capture anticompetitive conduct, (4) lack of clarity on available remedies and causes of action for affected parties, (5) regular consideration of non-competition factors in reaching decisions. First, at minimum, AML does provide the uniform framework for a more efficient and consistent competition law regime.¹⁴⁵ It brings together all potentially anticompetitive conduct typically found in competition laws, and it provides the rules necessary to address such conduct.

Second, while it is unclear whom the enforcer will encompass, we do know that the competition enforcer will be ALEA. This is a substantial improvement over the existing regime where different agencies are enforcing different laws. Even assuming multiple agencies do comprise ALEA, these agencies will at least operate to enforce a uniform law, which should result in the precedence building and uniform aims. Thus, the enforcement environment surely creates greater certainty than existed pre-AML. Third, as discussed in the context of abuse of dominance, AML does provide a catchall provision that adapts to the concern over failure to catch anticompetitive conduct. Similarly, AML provides catchall provisions in the context of vertical and horizontal monopolistic agreements, as well as, for agreements that may be authorized because of pro-competitive benefits.¹⁴⁶

Fourth, AML provides specific penalty provisions for firms abusing dominance or entering unlawful agreements or concentrations, which will be imposed by ALEA.¹⁴⁷ And it expressly offers a civil cause of action for firms or individuals suffering loss because of monopolistic conduct.¹⁴⁸ These civil actions are likely to be enforced by the 'Supreme Judicial People's Court (SPC) through

¹⁴⁴ See Zhang et al., *supra* note 3, at 195.

¹⁴⁵ *Id.*

¹⁴⁶ AML, arts. 13-15.

¹⁴⁷ AML, arts. 46-49.

¹⁴⁸ AML, art. 50.

a quasi-legislative judicial interpretation,' with the SPC probably confining 'actions for damages to cases where the [ALEA] has already found a violation of the AML.'¹⁴⁹ Allowing ALEA to 'serve as gatekeeper for private damages actions would, at minimum, mitigate the risks of inconsistent enforcement.'¹⁵⁰ Finally, AML allows for filing of an administrative review of all ALEA decisions, or parties can file an administrative lawsuit against ALEA's decisions in all cases except those to block a merger or impose merger remedies; in which case, an administrative lawsuit can only be filed after an administrative review.¹⁵¹ Because AML provides clear rights to remedies and appeal, it seems to reduce the uncertainty resulting from pre-AML fragmentation.

Based on the first four problems, AML does seem to make substantial strides in addressing pre-AML problems and concerns. As for the fifth problem, AML on its face does not necessarily reduce the risk of non-competition considerations seeping into competition enforcement. This is evident based on my discussion of AML specific provisions, which suggest that AML's vague language leaves room for maneuverability.¹⁵² Thus, AML's text does not eradicate the risks of protectionism or inefficiency and uncertainty that result from the possibility of pursuing non-competition objectives. Despite being significant in that it helps address four of the problems just considered, AML itself is just one step in the right direction for Chinese competition policy. To be sure, Michal Gal suggests, workable competition policy requires primarily four elements: (1) a legislative instrument, (2) competition culture or appropriate socio-economic ideology within the state, (3) mechanisms to combat political pressures that limit the implementation of competition law, and (4) institutional and organizational instruments that can effectively enforce the competition laws.¹⁵³ Clearly, AML's text alone does not address all of these elements. Consequently, AML cannot provide the answer to all of China's competition law problems.

However, as I have attempted to show in this article, the elements necessary to complement AML's success are beginning to emerge in China. I have already shown the emergence of a competition culture in China. And when coupled with the right incentives, China's competition law environment may already be more market-oriented than initially appears. Thus, here the question is whether AML is effective in advancing Chinese competition policy. Drawing on its effectiveness in

149 Nathan Bush, *Implementing China's New Antimonopoly Law*, THE ASIA PACIFIC ANTITRUST REVIEW (2008), at <http://www.globalcompetitionreview.com/apar2008/chinaantimonopoly.cfm> (visited July 28, 2008).

150 *Id.*

151 AML, art. 53.

152 *See supra* Part 2.2.

153 *See Gal, supra* note 6, at 24-50.

addressing the first four problems discussed, China's enactment of AML does provide the much-needed foundation for competition policy. By creating an all-encompassing legal framework and centralized enforcement authority, AML at least invites Gal's fourth requirement of strong institutional and organizational instruments that can effectively enforce competition law. If not initially, the adoption of specific implementing legislation creates the incentive for the ALEA, Commission, and the judiciary to take charge and carry out the AML's aims, particularly because of developing Chinese socio-economic ideology.

As a result, AML is effective in advancing competition policy not only because it confronts many of the problems existing in current Chinese competition law, but also because it invites legitimacy by creating a uniform framework to address all anticompetitive conduct affecting the Chinese marketplace. It also is effective because it sheds light on China's current socio-economic ideology. Even though AML is just one step in Chinese competition policy, it is a substantial one.

5 What will the China's 2007 Antimonopoly Law Achieve?

By exploring AML, this discussion has exposed the current concerns in Chinese competition law, primarily because of vague AML text and China's traditional socio-economic ideology. There are questions about what path AML will pursue. Consequently, AML appears to be a substantial step with vague consequences. Will AML's application result in the general concerns of protectionism or inefficiency because of uncertainty? As I have attempted to argue, this does not seem to be the case. Rather, based on the China's current socio-economic ideology, AML probably will be used in a way that limits the general concerns that arise from the specific AML provisional concerns. In which case, is China advancing capitalism with the enactment of AML?

First, it is important to recognize that China's 'political economy is in the midst of a capitalist transition.'¹⁵⁴ And because of traditional Chinese ideology, this transition has not spontaneously evolved; but rather, it has been guided by an ideologically anti-capitalist party-state, which does suggest a form of specialized 'Chinese capitalism' has developed in China. There is still an inherent conflict in China: Chinese government is not pursuing capitalism out of ideological conviction, but because it is more economically efficient than socialism. Therefore, China has essentially 'wrapp[ed] capitalism in a socialist package.'¹⁵⁵ So it may be difficult to gauge political measures that are intended to advance capitalism. And even if they are, the CCP is not likely to make it apparent.

154 Chen, *supra* note 5, at 146.

155 *Id.* at 148-49.

Yet, China's market reforms do appear to be 'pushing China toward full-fledged capitalism.'¹⁵⁶ Despite Chinese government's intent on maintaining its ideological legitimacy, it recognizes that 'the survival of the [governmental] regime hinges on economic performance whose success entails the dominant role of the market.'¹⁵⁷ Thus, it seems that the government needs to use AML to advance capitalism, even if it does not declare it. AML is necessary for the continuance of the regime through economic performance, which is in accord with the current socio-economic ideology I have explored. The answer to the question appears to be that AML does advance capitalism in China because it creates a structure for greater market-oriented competition by creating greater certainty in markets. So what does this mean for the future of Chinese competition policy? Will AML be followed by continued measures and efforts to legitimize Chinese competition policy?

In all likelihood, Chinese competition policy will probably continue to adapt to Chinese culture without taking a hard stance to follow any other regime flawlessly, which is arguably what competition policy should do in the first place. But given current socio-economic ideology and the incentive mechanisms (e.g. the WTO and FDI dependence) that promote market-oriented competition policy, there is less reason for concern than has dominated discussions among China's skeptics. Further, it seems to be in China's interest to not allow AML to fail, especially since AML's critics are waiting to say 'I told you so.'

Should we expect more at this stage? Probably not since Chinese competition policy has really only been in the works for about two decades. This makes it novel when compared to US and EU competition policy, which leaves room for further development. China does appear to be in the midst of a significant ideological transition that is being heavily influenced by economics and politics. At the same time, this transition is requiring China to reevaluate its institutions that enforce competition law and to form a more legitimate basis for enforcement. Thus, instead of greater concern, AML should bring at least some relief to Chinese competition policy critics. AML is unlikely to serve strictly as a tool to pursue non-competition government interests even if there is room for maneuverability based solely on AML's text. While sporadic acts of protection may arise under AML, non-competition objectives do not appear to be the intent behind the legislation. Nor can China afford to apply AML in a contrary manner, primarily because the uncertainty it will create for foreign and domestic firms. Rather, AML's enactment suggests that Chinese competition

¹⁵⁶ *Id.* at 146.

¹⁵⁷ *Id.*

culture is ready to take the next step in advancing capitalism and promoting market-oriented competition in China even if it is restricted by traditional 'Chinese capitalism.'

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