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An Anti-Monopoly Legal Regime in the Making in China as a Socialist Market Economy

ZHANG XIAN-CHU*

In the course of dynamic market development in the People's Republic of China (PRC), antimonopoly legislation has increasingly received both domestic and international attention, and has become a crucial criterion to test the level playing field and the government's commitment to a free market economy.¹ After three decades of economic liberalization and reform, particularly after China's accession to the World Trade Organization (WTO), a sound antimonopoly legal regime has never been of such great importance to domestic consumers, private entrepreneurs and foreign investors as it is today.² The Chinese government has recognized that an anti-monopoly law is a fundamental legal institution, necessary to ensure effective market resource distribution on a fair, open, and predictable basis. The adoption of the law as the "economic constitution" will be crucial to deepening reform in China, and promoting its international trade and economic cooperation.³ Against this backdrop, the Standing Committee of the National People's Congress adopted the Antimonopoly Law (AML) on August 30, 2007, effective August 1, 2008, for the first time in the history of the PRC.⁴

This article provides a critical examination of the development of the antimonopoly legal regime in China. Part one sets out the background and difficulties in developing the legislation; part two reviews the major provisions of the AML and some detailed implementing rules; part three highlights some unsettled issues and the continuing debates concerning the implementation of the law; part four reflects on certain political and

* Professor of Law, The University of Hong Kong. The author would like to express his gratitude to the Research Grant Committee of the University of Hong Kong and the Mrs. Li Ka Shing Fund of the University of Hong Kong for their kind support to his research project.

1. Sundeep Tucker & Patti Waldmeir, *Deal on Hold?*, FINANCIAL TIMES, July 29, 2008, at 9, available at http://www.ft.com/cms/s/0/3336b2ba-5ccf-11dd-8d38-000077b07658.dwp_uuid=89fe9472-9c7f-11da-8762-0000779e2340.html.

2. For example, in the recent overview of sectoral dialogues between China and the European Commission, it is stated that "[c]ompetition policy is a crucial issue in the context of China's efforts to restructure its economy." EUROPEAN COMMISSION, EXTERNAL RELATIONS CHINA (2008), http://ec.europa.eu/external_relations/china/sectoraldialogue_en.htm#Competition_policy.

3. Explanation on the Draft Anti-monopoly Law (statement of Cao Kangtai, Dir. of the Legislative Office of the State Council) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 265, 523-24 (P.R.C.).

4. Anti-monopoly Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) LAWINFOCHINA (last visited Aug. 4, 2009) (P.R.C.).

infrastructural features of China that may affect the enforcement of the AML in practice; and finally, part five provides some concluding remarks.

I. The Legislative Background

In the course of opening up and reform, a drafting group designed to confront the antimonopoly issue was first formed in 1987 within the Legislative Office of the State Council; however, the group only produced a draft of the Anti-Unfair Competition Law as a half-done product in 1993.⁵ The legislative process was not resumed until 1994, when the State Council established a working group to further study the competition policy of the country.⁶ It took more than a decade of effort to finally submit the draft AML to the Standing Committee of the National People's Congress for "the first read" on June 24, 2006 (2006 Draft).⁷ The legislative deliberation was also a process of difficult labor marked by sharp controversies.

It should be noted that China embarked on its undertaking to establish an antimonopoly regime with social, political, economic, and legal conditions quite different from those of other developed or developing markets. Subject to a socialist country ruled by the totalitarian government of the Communist Party with a planned economy for over thirty years, the current reform has not allowed the market disciplines and competition culture to really take their roots in the country.⁸ Due to a lack of independence and experience in dealing with emerging issues in market developments, the People's Courts have played a limited role in developing the framework of competition law. Moreover, the reluctance of the government at all levels to give up their powers in market reform, and local firms' heavy reliance on local government protectionism has made the administrative power on the market even stronger in certain sectors in recent years.⁹ As a result, local protectionism and administrative monopoly are considered the most serious obstacles to the development of an antimonopoly regime in China.¹⁰

The long delay of adopting the AML, however, does not mean that there was no action in this regard during the period. The government promulgated quite a few national laws and administrative regulations, as well as government policies, to address different anti-

5. H. MYERS, HONG KONG LEGISLATIVE COUNCIL, OFFICIAL REPORT OF PROCEEDING, WEDNESDAY (1987).

6. MARK WILLIAMS, COMPETITION POLICY & LAW IN CHINA, HONG KONG & TAIWAN 173 (2005).

7. Hu Yuanyuan, *China Okays Draft Anti-monopoly Law*, CHINA DAILY, June 8, 2006, at 1, available at http://www.chinadaily.com.cn/china/2006-06/08/content_611238.htm.

8. Lucian W. Pye, *An Overview of 50 Years of the People's Republic of China: Some Progress, but Big Problems Remain*, 159 CHINA QUARTERLY 569, (1999); William C. Jones, *Trying to Understand the Current Chinese Legal System*, in UNDERSTANDING CHINA'S LEGAL SYSTEM, 7-45, (C. Stephen Hsu ed., 2003).

9. Stanley Lubman, *Looking for Law in China*, 20 COLUM. J. ASIAN L. 1, 6 (2006).

10. See CHAOWU JIN & WEI LUO, COMPETITION LAW IN CHINA 208 (2002) (stating "the administrative monopoly disturbs the market economy more than the economic monopoly does."); Vivienne Bath, *Reducing the Role of Gov't—The Chinese Experiment*, 3 ASIAN J. COMP. L., art. 9 (2008), <http://www.bepress.com/cgi/viewcontent.cgi?article=1104&context=asjcl> (arguing that despite the substantial progress, the government still has its strong hand on the market); Zhuoyao Hui, *Chinese Anti-Monopoly Law: a Pretext for Local Protection or an Aspiration to comply with the International Norm?*, ILL. BUS. L.J. (2007), available at http://ibljournal.typepad.com/illinois_business_law_soc/2007/11/chinese-anti-mo.html#more (stating that administrative monopoly and local protectionism are two major concerns in China's anti-monopoly legislation).

monopoly concerns.¹¹ For example, the Anti-Unfair Competition Law of 1993, the Law on Protection of Consumer Rights and Interests of 1993, the Advertising Law of 1994, the Price Law of 1997, the Bidding Law of 1999, the Government Procurement Law of 2002 and the Law on Ports of 2003, and the Foreign Trade Law of 2004 all include provisions to deal with monopolies or related practices. In addition, several government authorities have promulgated numerous administrative decrees in different business areas during the past two decades.¹² Furthermore, the central government issued several policy decrees in order to deal with some pressing tensions between local governments on market access and distribution.¹³

Despite these notable efforts, all of these enactments and administrative measures suffer fundamental and intrinsic defects. First, the piecemeal approach to legislation failed to develop a coherent competition policy and legal system. Second, the vague and general provisions made application and enforcement of the regulations ineffective. In many such enactments, a one-sentence provision prohibiting monopolist or anti-unfair competition conducts looks more like an empty policy statement than a legal rule with real enforceability. Most of the provisions do not include definitions, handling procedures, or penalties.¹⁴ Third, certain provisions actually restricted, rather than promoted, healthy market competition. For instance, the State Planning Commission and the State Commission of Economy and Trade, in their Provisions to Curb Dumping Industrial Products at Predatory Price of 1998, required state authorities in different trades to use the average cost of the trade as the admonitory line of self-discipline in determining the existence of dumping

11. See Steven L. Snell, *The Development of Competition Policy in the People's Republic of China*, 28 N.Y.U. J. INT'L L. & POL. 575, 577 (1996).

12. The Decisions of the State Council on Rectifying & Standardizing the Order in the Market Econ., Art. II § 7 (promulgated by the State Council, Apr. 27, 2001, effective Apr. 27, 2001) LAWINFOCHINA (last visited Aug. 28, 2008) (P.R.C.); Anti-Dumping & Countervailing Rules (promulgated by the State Council, Mar. 25, 1997, effective Mar. 25, 1997) LAWINFOCHINA (last visited Aug. 28, 2009) (P.R.C.); Interim Provisions on Preventing the Acts of Price Monopoly (promulgated by the State Dev. and Reform Comm'n, June 18, 2003, effective Nov. 1, 2003) LAWINFOCHINA (last visited Aug. 28, 2008) (P.R.C.); Provisions on the Admin. Punishment of Price-related Violations, Art. 4 § 2 (promulgated by the State Dev. and Planning Comm'n, Aug. 1, 1999, effective Aug. 1, 1999) LAWINFOCHINA (last visited Aug. 28, 2009) (P.R.C.); Certain Regulations on Prohibiting Anti-competitive practices of Public Enters, (promulgated by the State Admin. for Indus. & Commerce, Dec. 24, 1993, effective Dec. 24, 1993) LAWINFOCHINA (last visited Aug. 28, 2008) (P.R.C.).

13. Decisions of the State Council on Rectifying and Standardizing the Order in the Market Economy (promulgated by the State Council, Apr. 27, 2001, effective Apr. 27, 2001) LAWINFOCHINA (last visited Aug. 28, 2008) (P.R.C.); Provisions of the State Council On Prohibiting Regional Blockade in Market Economy Activities (promulgated by the State Council, Apr. 21, 2001, effective Apr. 21, 2001) LAWINFOCHINA (last visited Aug. 28, 2008) (P.R.C.); The Interim Provisions on Developing and Protection of Socialist Competition of (promulgated by the State Council, Oct. 17, 1980, effective Oct. 17, 1980) LAWINFOCHINA (last visited Aug. 28, 2009) (P.R.C.).

14. See Law on Ports (promulgated by the Standing Comm. Nat'l People's Cong., June 28, 2003, effective Jan. 1, 2004) art. 29 LAWINFOCHINA (last visited Aug. 28, 2009) (P.R.C.) (stating "[t]he State encourages and protects fair competition in the activities of business operation of port. A business operator of port shall not commit any monopoly act or unfair competition act, and shall not force others by any means to accept the port services it provides."); Advertising Law (promulgated by Standing Comm. Nat'l People's Cong., Oct. 27, 1994, effective Feb. 1, 1995) art. 21 LAWINFOCHINA (last visited Aug. 28, 2009) (P.R.C.) (stating "[i]n carrying out advertising activities, advertisers, advertising agents and advertisement publishers should not engage in any form of unfair competition.").

at a predatory price and the basis to penalize the enterprises concerned.¹⁵ As Professor Wang Xiaoye of the Chinese Academy of Social Science pointed out, this practice of judging the trade price of private autonomy by the state authority with its arbitrary power illustrates the remains of the old ideology of the planned economy.¹⁶

Even the State Administration of Industry and Commerce (SAIC), the state authority responsible for the market administration, openly admitted for a long time the existence of serious problems concerning market competition, including a lack of a specific legislation and definitions applicable to monopolistic practices, weak control on administrative monopolies, the state monopoly in public utilities sectors, a lack of professional service and support, ineffective enforcement and penalties, and overlapping government authorities in regulating the market.¹⁷

Despite the pressing challenges to the healthy development of the market economy, the introduction of an antimonopoly law into China was very controversial. From the very beginning, the law's enactment was opposed by some scholars on the ground that such legislation would be unnecessary and unworkable, as the proposed law was "riddled with uncertainties and anomalies."¹⁸ Such opposition was echoed by some government officials who claimed that current market conditions in China were still too young to legislate.¹⁹ Although the debate was open and frank, much of the opposition was associated with the ideology and the mentality of the government to maintain its strong position and influence on the market. Even long after the start of the legislative process, some scholars still questioned the seriousness of the government's commitment. Several pointed out that the real test for the government in the antimonopoly enactment was whether it would give up its monopolistic restriction on market access; otherwise, promulgation of the law would not help to improve market conditions.²⁰

Another interesting aspect that reflects the government's commitment to the introduction of an antimonopoly law into China is its willingness to make serious reference to foreign experience, and to take advice from, and cooperate with foreign governments and international organizations. In the course of drafting, the Chinese government held several international conferences on the antimonopoly legislation supported by foreign gov-

15. Anti-Dumping & Countervailing Rules, (promulgated by the State Council, Mar. 25, 1997, effective Mar. 25, 1997) arts. 8, 10, & 12 LAWINFOCHINA (last visited Aug. 28, 2009) (P.R.C.).

16. Adam Charles Ritter, *China Near Finalizing Anti-Monopoly Law*, CHINA NEWSLETTER, July 2006, <http://www.hklaw.com/id24660/PublicationId1636/ReturnId31/contentid47523/>.

17. Wang Xiaoye, *Fan long duan fa dui kua guo gong si xian zhi jing zheng xing wei de guan zhi* [Regulating Conducts to Restrict Competition by Multinationals under Antimonopoly Law], in JING JI QUAN QIU HUA XIA JING ZHENG FA DE XIN FA ZHAN [NEW DEVELOPMENT OF COMPETITION LAW UNDER GLOBALIZATION] 248 (2005); see also Wang Xuezheng, *Contribution from China* 3-5, OECD GLOBAL FORUM ON COMPETITION CCNM/GF/COMP/WC (2001) 10, available at <http://www.oecd.org/dataoecd/40/61/2491690.pdf>; Bruce M. Owen et al., *China's Competition Policy Reforms: The Antimonopoly Law & Beyond* 33-39 (John M. Olin Program in Law & Econ. of Stanford Law Sch., Working Paper No. 339, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=978810.

18. WILLIAMS, *supra* note 6, at 162.

19. *Id.*

20. David Tang & Bill Zhang, *China: The PRC's New Antimonopoly Law Has A Long Way to Go*, MONDAQ, Nov. 14, 2007, <http://www.mondaq.com/article.asp?articleid=54318>; Xu Guangyao, *Xing zheng long duan de fan lang duan gui zhi* [The Anti-Monopoly Law's Regulation of Administrative Policy], 6 CHINA LEGAL SCIENCE 123 (2004).

ernments with the participation of international experts.²¹ China participated in the OECD Global Forum on Competition as early as 2001 with some frank submissions.²² A couple of drafts of the law were passed to foreign countries and professional associations for comments. For example, the government branches of the European Union and Japan, and the three sections of the American Bar Association all submitted their detailed comments on, and proposals for the drafts of the legislation.²³

II. The Antimonopoly Law of 2007

The final version of the AML includes eight chapters and fifty-seven articles. At the beginning, the legislative purposes are stated: "preventing and curbing monopolistic conducts, protecting fair market competition, enhancing economic efficiency, maintaining the consumer interests and the public interests, and promoting healthy development of the socialist market economy" in China.²⁴ As such, the AML apparently is loaded with several, possibly even competing, goals.

On its surface, the AML does not provide any clear definition of "monopolistic conduct," but rather sets out three categories of such conduct: (1) any monopoly agreement among undertakings; (2) abuse of the dominant market positions by undertakings; and (3) concentration of undertakings that may eliminate or restrict competition.²⁵ According to Article 12 of the AML, "undertakings" refer to legal persons, other organizations, or natural individuals that engage in commodities and services trades.²⁶ The narrow definition seems to indicate the government's unwillingness to directly subject state entities and the monopolized businesses under its control to the jurisdiction of the AML.²⁷

In the 2005 draft of the AML, abuse of administrative power by government agencies and their subordinate departments that would eliminate or restrict competition was listed as a form of monopolistic conduct.²⁸ In the final version of the AML however, an admin-

21. WILLIAMS, *supra* note 6, at 175; see William Blumenthal, Presentation to the International Symposium on the Draft Anti-Monopoly Law of the People's Republic of China, (May 23-24, 2005) (transcript available at <http://www.ftc.gov/speeches/blumenthal/20050523SCLAOFinal.pdf>); MEMORANDUM FROM EU-CHINA CONFERENCE ON COMPETITION (Apr.22, 2005), available at http://www.euchinawto.org/index.php?option=com_docman&task=doc_download&gid=94.

22. Xue Zheng Wang, *The Relationship Between Competition Authorities & Sectoral Regulators*, OECD GLOBAL FORUM ON COMPETITION DAF/COMP/GF/WD, (2005) 13, available at www.oecd.org/dataoecd/49/21/34284999.pdf; Xue Zheng Wang, *Challenges/Obstacles Faced by Competition Authorities in Achieving Greater Economic Development Through the Promotion of Competition*, OECD GLOBAL FORUM ON COMPETITION CCNM/GF/COMP/WC (2004) 16, available at www.oecd.org/dataoecd/18/51/23727203.pdf.

23. John Yong Ren & Ning Yang, *The Imminent Release of China's Anti-Monopoly Law—What to Expect*, CHINA L. & PRAC., Sept. 2005, at 26; Adam F. Bobrow et al., *Joint Submission of the ABA's Sections of Antitrust Law, in INTELLECTUAL PROP. LAW & INT'L LAW ON THE PROPOSED ANTI-MONOPOLY LAW OF THE PEOPLE'S REPUBLIC OF CHINA*, (2005), http://www.abanet.org/intlaw/committees/business_regulation/antitrust/chinacommentantimonopoly.pdf.

24. Anti-monopoly Law, *supra* note 4, art. 1.

25. *Id.* art. 3.

26. *Id.* ch.1, art.12.

27. See The Competition Act, No. 12 of 2003, India Code (2003), s.2(h), available at <http://indiacode.nic.in/> (discussing that in India, any department of the government, which is or has been engaged in any business activity, investment or other undertaking is subject to the uniform governance of the Act).

28. See David Huang & David Richardson, *China's Proposed Anti-Monopoly Law* (June 24, 2005), <http://www.dorsey.com/Resources/Detail.aspx?pub=bdd82a88-75ab-4aa3-bca8-5e4a5c0e4978>.

istrative monopoly characterized by an abuse of government powers was deleted from the list. Instead, a vague statement was added to the general principles that administrative agencies shall not abuse their powers to eliminate or restrict competition of the market.²⁹ Thus, on the one hand, abuse of government powers by administrative agencies may not be considered monopolistic conduct as such.³⁰ Article 4 of the AML explicitly stipulates that the government shall formulate and implement competition rules suitable to the socialist market economy of China.³¹ Moreover, the AML allows the government to protect the undertakings of state monopolized businesses because of their strategic importance to national economic lifelines and national security, although protection of consumers' interests is also generally mentioned.³² In explaining such a provision, the Ministry of Commerce (MOFCOM) has made it clear that the special feature of the so-called socialist market economy in relation to the antimonopoly regime lies in the leading position of the public ownership.³³ Thus market efficiency, as a crucial antimonopoly goal, may only be achieved in line with the public ownership principle.³⁴

On the other hand, the AML does attempt a different approach in dealing with administrative monopoly with some separate rules. Chapter 5 of the AML sets out some more detailed rules that prohibit abuse of administrative powers, including forced purchase, regional blockage, discriminating standards, forced restriction on competition, and eliminating or restricting competition by enactments in violation of the national laws and regulations.³⁵ With regard to this approach, some in the legislative branch are of the view that, given the current political and market conditions, one can hardly expect the AML to fundamentally solve the problem of administrative monopoly. But as the specific legislation in this regard, the AML must include some rules to reflect the position of the state and prevent such conduct in the market.³⁶ A careful reading will further show that the current AML subjects only administrative monopoly with trade of goods to its jurisdiction, leaving all the government monopolistic schemes with services trade untouched.³⁷

Any agreement to eliminate or restrict competition among undertakings is prohibited. Article 13 of the AML prohibits such agreements between market competitors, including those to fix or change the price of products; to limit the output or sales of the products; to separate the sales markets or the raw material purchasing markets; to limit the purchase of new technology or new facilities, or the development of new products or new technology; to jointly boycott transactions; or other kinds of monopoly agreements identified by state enforcement agencies.³⁸ Moreover, undertakings are banned to enter into monopoly

29. Anti-monopoly Law, *supra* note 4, art. 8.

30. *Id.*

31. *Id.* ch.1, art.4

32. *Id.* art. 7.

33. *Id.* art. 8.

34. SHANG MING & YANLING YIN, "ZHONGHUA RENMIN GONGHEGUO FAN LONG DUAN FA" LI JIE YU SHI YONG [ANTI-MONOPOLY LAW OF THE PEOPLE'S REPUBLIC OF CHINA: INTERPRETATIONS AND APPLICATION], DI 1 BAN. BEIJING SHI: FA LU CHU BAN SHE 16 (2007).

35. See Anti-monopoly Law, *supra* note 4, arts. 32-37.

36. ZHONGHUA RENMIN GONGHEGUO FAN LONG DUAN FA TIAO WEN SHUO MING, LI FA LI YOU JI XIANG GUAN GUI DING. BEIJING SHI: BEIJING DA XUE CHU BAN SHE, 37 (2007).

37. Anti-monopoly Law, *supra* note 4, ch. 5, art. 33.

38. *Id.* art. 13.

agreements with their trading partners for transferring goods to third-parties at a fixed price or fixing the floor price of such transfers.³⁹

Like the legislation in other jurisdictions, the prohibition is subject to some important exceptions such as agreements to develop new products, agreements for quality upgrading, efficiency improvement or standardization, agreements to improve competitiveness of small enterprises, agreements to deal with economic depression, or other agreements of this kind.⁴⁰ Certain exceptions, however, may not be familiar to some other market economies. For instance, Article 15 exempts agreements to safeguard lawful interests of undertakings in foreign trade and economic cooperation.⁴¹ Such undefined interests may not only create different treatment of domestic firms on the domestic market (depending on whether they can link their otherwise unlawful agreements with export to the international market), but also lead to potential conflict of laws by allowing domestic undertakings to use such prohibitive agreements in China with impacts on the international market. According to the MOFCOM, such agreements among domestic undertakings are needed to deal with cut-throat competition on exporting prices, and the antidumping investigations in foreign countries against Chinese goods.⁴²

Abuse of dominant market position is another focus of the legislation. Article 17 of the AML defines "dominant market position" as the status of undertakings to control the price, quantity, or other trading conditions of relevant products to eliminate or affect competition within the relevant market.⁴³ According to the AML, such a position can be established by proof of certain key factors, such as market share and status of the undertakings concerned, as well as the relevant market conditions.⁴⁴ A dominant market position may be assumed if a single undertaking's market share accounts for one half or more, or two undertakings that jointly account for two-thirds market share or more, or three undertakings that jointly account for three-quarters market share or more, of the relevant market. In these calculations, undertakings with a market share of less than one-tenth are excluded.⁴⁵ Once a market-dominant position is established, abuse of such a position will be found through trading at a monopolistic high price, predatory pricing, discriminatory treatment, refusal to deal, exclusive or forced transactions, tie-in schemes, or refusal of access to network.⁴⁶

The AML also sets out rules governing market concentration, which arises in mergers of undertakings, obtaining control of other undertakings by way of acquisition of shares or assets, or by contract.⁴⁷ A concentration that meets the statutory threshold shall not be carried out, unless notification is made to the state anti-monopoly authority.⁴⁸ In this regard, the State Council promulgated the Provisions on Notification Thresholds for Concentration of Undertakings on August 3, 2008, as the first detailed regulation adopted to implement the Antimonopoly Law (Concentration Provisions). According to the Con-

39. *Id.* art. 14.

40. *Id.* art. 15.

41. *Id.*

42. MING & YIN, *supra* note 34, at 86.

43. Anti-monopoly Law, *supra* note 4, ch. 3, art. 17.

44. *Id.* art. 18.

45. *Id.* art. 19.

46. *Id.* art. 17.

47. *Id.* art. 20.

48. *Id.* art. 21.

centration Provisions, notification must be filed before any concentration can be carried out if either of the following thresholds is met: (1) the worldwide turnover of all the parties to the proposed concentration in the last accounting year exceeds RMB ten billion and turnover of any two participating undertakings within China exceeds RMB 400 million in the last accounting year; or (2) the turnover of all the parties to the proposed concentration within China in the last accounting year exceeds RMB two billion and turnover of any two participating undertakings within China exceeds RMB 400 million in the last accounting year.⁴⁹ The state authorities, however, may initiate an anti-monopoly investigation into certain market concentrations that do not meet the filing thresholds if it can be proved that the concentrations have, or may have the effect of eliminating or restricting competition on the market.⁵⁰ Although the revenue-based test provides some important and detailed guidelines for foreign mergers and acquisition in China, further clarity on both substantive and procedural standards is still urgently needed.⁵¹

The decision of the preliminary examination of the antimonopoly authority on a proposed concentration shall be adopted within thirty days of receipt of all the required documents.⁵² But the proposed concentration may be implemented on the basis of no objection if the state authority decides not to further scrutinize the case or fails to make its decision within the statutory period.⁵³ If the antimonopoly authority decides that it is necessary to further examine the proposed concentration, it shall inform the parties concerned and carry out the investigation within ninety days of the decision.⁵⁴ In special circumstances, the examination period may be further extended by up to sixty days.⁵⁵ The major considerations for government scrutiny include the control and concentration of the undertakings concerned in the market, possible impacts on market access, consumers, technological innovations, national economic development, and other factors concerned with the antimonopoly enforcement agencies.⁵⁶ The state antimonopoly authority may nevertheless allow certain concentrations after balancing the positive and negative factors of proposed transactions, or on public interest considerations, although no detail is provided yet in this regard.⁵⁷

According to the Law, the Antimonopoly Commission of the PRC is established as the state authority under the State Council in charge of rule and policy-making and the coordination of implementation.⁵⁸ But in terms of enforcement of the AML, the powers are divided. Different state agencies enjoy their own powers in carrying out investigations,

49. See Notification Thresholds Regulations (promulgated by the State Council, Aug. 3, 2008, effective Aug. 3, 2008), art. 3, http://www.gov.cn/zwggk/2008-08/04/content_1063769.htm.

50. Anti-monopoly Law, *supra* note 4, art. 4.

51. See Hannah Ha & Gerry O'Brien, Update on China's Anti-Monopoly Law- Final Merger Filing Thresholds Introduced, (Aug. 7, 2008), http://lawyers.martindale.com/international-law/article_JSM-Mayer-Brown-JSM_490080.htm; Michael M. Hickman, et al., New Rules Proposed For Chinese Merger Control, (April 4, 2008), http://lawyers.martindale.com/legal-management/article_Fried-Frank-Harris-Shriver-Jacobson-LLP_414798.htm.

52. Anti-monopoly Law, *supra* note 4, ch.4, art. 25.

53. *Id.*

54. *Id.*

55. *Id.*

56. See *id.* art. 27.

57. See *id.* art. 28.

58. See *id.* art. 9.

taking enforcement measures and entrusting the functions to their local branches.⁵⁹ As a result, the limited authority of the national Antimonopoly Commission would render the entire legal regime defective in lack of uniformity.

The AML has three types of legal liabilities for violations: criminal liability, administrative penalties, and civil compensation to the victims concerned.⁶⁰ If an interested party to the agreement disagrees with the decision of the antimonopoly authority, the People's Court may conduct its judicial review upon the party's petition as the legal remedy.⁶¹ It should be noted, however, that the penalties under the AML are much more lenient than those of earlier drafts. For example, the maximum fine has been reduced to RMB 1 million from RMB 10 million in the 2005 Draft and RMB 5 million in the 2006 Draft. Civil compensation of up to twice the actual loss suffered by the victim that was included in the 2005 Draft has been deleted.

Since the adoption of the AML, a series of detailed implementing rules has been promulgated. In addition to the Concentration Provisions of the State Council, other regulations adopted by lower-ranking authorities include the Provisions on the Guideline for Defining the Relevant Market,⁶² the Thresholds for Prior Notification of Concentration of Undertakings,⁶³ and the Procedural Provisions to Deal with Cases of Monopoly Agreements and Abuse of Dominant Market Position.⁶⁴ In the same period, some draft provisions were circulated for public comments, and thus more detailed regulations to implement the AML are expected to be adopted soon.⁶⁵

III. Continuing debates and controversies

The adoption of the AML has apparently failed to end the debates and controversies. In addition to many technical concerns, the two most controversial issues on the way to establish an antimonopoly framework in China are how to form an effective and unified

59. See *id.* arts. 10, 38 & 39.

60. See *id.* ch. 7.

61. See *id.* art. 53.

62. Guide of the Antimonopoly Comm. of the State Council for the Definition of the Relevant Market (promulgated by the Anti-monopoly Auth. under the State Council, May 24, 2009, effective May 24, 2009) LAWINFOCHINA (last visited Aug. 24, 2009) (P.R.C.); Andrew Batson, *China's Anti-trust Rules Will Carry a Limited Scope*, WALL ST. J., Aug. 5, 2008, at A8. For a recent comment, see Andrew Batson, *China Rules Set Limited Reach over Mergers*, WALL ST. J., Aug. 5, 2008, available at <http://chinese.wsj.com/big5/20080805/bch100127.asp?source=article>.

63. Regulation on Notification Thresholds for Concentrations of Undertakings (promulgated by the Antimonopoly Authority under the State Council, May 24, 2009, effective May 24, 2009) (P.R.C.).

64. The Procedural Provisions to Deal with Cases of Monopoly Agreements and Abuse of Dominant Market Position (promulgated by the Anti-monopoly Auth. under the State Council, June 5, 2009, effective July 1, 2009) (P.R.C.).

65. Thus far, the draft provisions that have been circulated by the MOFCOM for public comments include Draft Interim Provisions Concerning Notification for Concentration of Undertakings, Draft Interim Provisions Concerning Examination of Concentration of Undertakings, Draft Interim Provisions Concerning Evidence Taking for Undertaking Concentration below the Notification Threshold with Monopoly Suspicion, Draft Interim Provisions Concerning Investigation and Handling of Undertaking Concentration below the Notification Threshold with Monopoly Suspicion, and Draft Interim Provisions Concerning Investigation and Handling of Concentration of Undertakings without Notification in Accordance with the Law, which were made public by the Ministry of Commerce of the People's Republic of China Anti-Monopoly Bureau, at <http://ldj.mofcom.gov.cn/zcfb/zcfb.html> (last visited July 5, 2009).

antimonopoly framework within the government structure and how to develop a consistent legal regime equally applicable to monopolistic conducts of all market players.

For a long time, different state agencies have claimed jurisdiction over competition-related matters. Among them, the SAIC and the MOFCOM are the two major bidders in the power struggle. The State Commission of National Development and Reform (SCNDR) and the State-Owned Assets Supervision and Administration Commission (SASAC) also have some authority on nationwide price control and maintaining the leading position of the state sector on the market, respectively. Although both the SAIC and the MOFCOM agreed that the antimonopoly authority should be formed under the State Council, both of them have been trying to reserve more powers in the regime to be established. The MOFCOM established its Antimonopoly Office in 2004, which is responsible "for upsetting market monopoly and regional blockage, preventing monopolistic activities, and promoting the establishment of a unified, open, competitive, and orderly market system."⁶⁶ At the same time, the SAIC claimed that as a ministerial unit directly under the State Council, its duties included, *inter alia*, supervising market competition and dealing with violations, such as monopoly and unfair competition.⁶⁷ In particular, it currently has a well-developed supervision network with 70,000 enforcement officers on the front line of the market, and thus, should be more capable than other state authorities of performing the regulatory duties.⁶⁸

In the new round of streamlined government departments with redefined structures and functions,⁶⁹ the MOFCOM seems to be getting the upper hand in the power struggle over the SAIC. According to the State Council's recent approval, its Market Order Bureau has been retained and the Antimonopoly Office has been upgraded to the Antimonopoly Bureau, with the responsibility to play a leading role in regulating and maintaining good market order while carrying out an anti-monopoly examination on market concentration as well as dealing with overseas antimonopoly activities.⁷⁰ The SAIC on the other hand is permitted to establish the Enforcement Bureau of Antimonopoly and Anti-Unfair Competition with the responsibility to implement the AML through investigation and enforcement powers on the market.⁷¹ The SCNDR is also given the power to formulate and

66. See Zhongguo Xinwen Wang, *The Ministry of Commerce Established an Anti-monopoly Investigation Work Undertaken by the Office Anti-monopoly Legislation*, CHINA NEWS NET, Sept. 17, 2004, available at <http://www.cns.hk:89/news/2004/2004-09-17/26/484912.shtml>.

67. Mission, State Administration for Industry & Commerce (SAIC) of the P.R.C., <http://www.saic.gov.cn/english/aboutus/Mission/> (last visited Aug. 26, 2009).

68. Sheng Jiemin, Address at the 7th Annual Conference of Peking University-Hong Kong University Legal Research Centre (Dec. 21, 2005); see also Mr. Zhou Bohua, Address at the 2007 International Symposium on Antimonopoly Law Enforcement, in GONGSHANG XINGZHENG [JOURNAL OF STATE ADMINISTRATION AND COMMERCE], Nov. 2, 2008, at 6-7.

69. See *China to Test Run Super-ministries in Central Government Reform*, XINHUA NEWS, MAR. 5, 2008, http://www.chinadaily.net/china/2008npc/2008-03/05/content_6510152.htm.

70. The approval of the State Council was dated August 23, 2008. See State Administration for Industry & Commerce (SAIC) of the P.R.C., *The Ministry of Commerce of the State Council Formally Approved the New "Three Fixed" Scheme*, MINISTRY OF COMMERCE, Aug. 23, 2008, http://big5.gov.cn/gate/big5/www.gov.cn/gzdt/2008-08/23/content_1077586.htm.

71. The approval of the State Council to the SAIC was dated July 11, 2008. See The State Council on the Issuance of SAIC Main Responsibilities of their Internal Structure and Staffing Requirements of the Notice, State Administration for Industry & Commerce (SAIC) of the P.R.C., (promulgated by the Anti-Monopoly Authority under the State Council, July 11, 2009, effective July 11, 2009) (P.R.C.).

adjust the prices of the commodities and services under state control, and deal with price violation and monopolistic conducts.⁷²

The AML tries to compromise the power struggle by allowing the regulatory and enforcement authority to be shared by different state departments. This approach, however, is strongly opposed by virtually all of the experts involved in the legislation. According to Professor Wang Xiaoye: "No country in the world appoints so many administrative departments to enforce a law and to protect market competition. Without a unified and authoritative law enforcement organ, it will be difficult to effectively enforce the Antimonopoly Law."⁷³

As such, the two-tier, three-pronged structure with separate enforcement powers for different state agencies was identified as a major defect of the AML immediately after its adoption. In fact, the final version of the AML retreated from the design of the 2006 Draft to create a unified enforcement system, and as a result, the current regime may inevitably suffer from conflicts, unpredictability, and lack of independence in the fragmented implementation.⁷⁴

According to the AML, the national Antimonopoly Commission was established on July 28, 2008, with Vice Premier Wang Qishan as the Director. The top leaders of the MOFCOM, the SAIC and the SCNDR have been appointed deputy directors and the fourteen members of the Commission are representatives of different state ministries and agencies.⁷⁵ It was further reported that according to the working procedures approved by the State Council, the main duties of the Commission shall be carried out through meetings to formulate competition policy, coordinate investigation and enforcement, and adopt antimonopoly guidelines. As such, the Commission shall not engage in any concrete enforcement, which will be left to the MOFCOM, the SAIC and the SCNDR.⁷⁶

Under this arrangement, the independence and impartiality of the Antimonopoly Commission may hardly be guaranteed because it is clearly subject to the administrative personnel and budgetary control of the Central Government. James Rose, Asia-Pacific Editor of Ethical Corporation, considers such structure a sign that the "de-politicising" antimonopoly efforts are curtailed to serve the so-called socialist market economy.⁷⁷

72. The approval of the State Council was dated August 21, 2008. See National Development and Reform Commission, State Administration for Industry & Commerce (SAIC) of the P.R.C. (promulgated by the Anti-monopoly Auth. under the State Council, Aug. 21, 2009), http://www.ndrc.gov.cn/gzdt/t20080822_231895.htm (last visited August 27, 2009) (P.R.C.).

73. Liu Li, *Anti-monopoly Draft Provokes Debate*, CHINADAILY, Nov. 15, 2006, http://www.chinadaily.com.cn/china/2006-11/15/content_733279.htm.

74. Xinzhu Zhang & Vanessa Yanhua Zhang, *The Antimonopoly Law in China: Where Do We Stand?* 3 COMPETITION POL'Y INT'L, 195-97 (2007); Andrew Baton & Jason Leow, *Beijing's Antitrust Plan Raises Questions*, WALL ST. J., Aug. 30, 2007, at A6; A. Ji, *Fan Longduan Lifu Beibou De Zhazheng [The War Behind the Antimonopoly Law Legislation]*, 11 FAZHI YU SHEHUI [RULE OF LAW AND THE SOCIETY] (2007), at 12-13.

75. Guowuyuan Bangongting Guanyu Guowuyuan Fanlongduan Weiyuanhui Zhuyao Zhize He Zucheng Renyuan De Tongzhi [The State Council on the State Department Anti-Monopoly Committee's Main Responsibilities and Composition of the Notice], State Administration for Industry & Commerce (SAIC) of the P.R.C., <http://www.competitionlaw.cn/show.aspx?id=4487&cid=32> (last visited Aug. 27, 2009).

76. See *State Council Approved the Anti-monopoly Committee's Work in an Orderly Fashion the Work of Antimonopoly Rules*, XINHUA NEWS AGENCY, Sept. 13, 2008, <http://politics.people.com.cn/BIG5/1027/8015028.html>.

77. James Rose, *Monopolising Anti-Monopoly Law in China*, ETHICAL CORP., Nov. 22, 2004, <http://www.ethicalcorp.com/content.asp?ContentID=3227>.

Moreover, assignment of the antimonopoly function to government branches against, *inter alia*, administrative monopoly, would lead to potential conflict of interests and the weakening of their authority. As such, the current design may not be able to allow all of the agencies to carry out their duties effectively.⁷⁸ In fact, some members of the Antimonopoly Commission sitting with the MOFCOM and the SAIC on equal footing are representatives of the state monopolized sectors, such as telecommunication, transportation, and electricity supply.⁷⁹ According to a report of the SAIC, between 1993-2006, over 5,600 monopoly cases were dealt with; among them administrative monopoly counted for only 519, a surprisingly small percentage in the environment of a strong, government-led economy. The reason provided is not that there were not many such violations, but that the SAIC was not able to effectively deal with these kinds of cases.⁸⁰

Another serious test to the effectiveness of the AML in China, which is also related to the three way split of enforcement authority, is whether the legislation will ensure a fair, level playing field to deal with both domestic administrative and foreign monopolies in the market. On the one hand, the strong position of the government and abuse of administrative monopoly in the market has been considered "pernicious,"⁸¹ including local and sectoral monopolistic conduct under government protection through restrictive means, such as administrative approval, discriminative enactments, technical barriers, and excessive fee charge.⁸²

In 2005, before the Draft AML was submitted to the national legislature for deliberation, the SASAC made an open and high-profile statement that in the transitional period the state authority ought to be more involved in development of state-owned enterprises in order to prevent any shaking-up of the leading position of public ownership in China. Mr. Li Rong-Rong, the Director General of the Commission, even warned that irresponsible withdrawal of the public economy from the market would not only deny the state sector the ability to play its major role, but would also cause more trouble for the national economy.⁸³ In the legislative process, such political wrestling was well-reflected in the complete deletion of the section addressing administrative monopoly from the drafts a couple of times.⁸⁴

Directly before the adoption of the AML, the central government made it clear through an administrative circular that the state would maintain "absolute control" in seven business sectors, including the military industry, power, oil and coal supply, telecommunication, civil aviation, and other transportation means. In other industries, such as

78. Owen et al., *supra* note 17; Andrew Batson, *China Draws Criticism on New Antimonopoly Law*, WALL ST. J., July 23, 2008, available at <http://chinese.wsj.com/big5/20080723/chw152619.asp?source=article>.

79. Wang Jianping, *Gaming of the Interest Groups under Administrative Monopoly*, Fanxingzhengxing Longduan Yo Cuijin Jingzheng Zhengce Quanyan Wenti Yanju [A Study of Pressing Issues on Anti-Administrative Monopoly and Policy to Promote Competition], ECON. SCI. PRESS OF CHINA 78-87 (2008).

80. *Report of Hong Kong*, COMMERCIAL DAILY, Jan. 12, 2006, <http://www.fayhoo.com/servlet/info.info-lanmuxe?lmid=20100104&id=20060112:1515128>.

81. WILLIAMS, *supra* note 6, at 139-40; see also Jared A. Berry, *Anti-Monopoly Law in China A Socialist Market Economy Wrestles with its Antitrust Regime*, 2 INT'L L. & MAN. REV. 129, 138-139 (2005).

82. Peter Wang & Stephen G. Harris, *China: The China Anti-Monopoly Law Becomes Effective*, MONDAQ, Aug. 26 2008, <http://www.mondaq.com/article.asp?articleid=65184&login=true&nogo=1>.

83. See *Report of Li Rongrong Speech, Chairman of SASAC*, SHANGHAI SEC. NEWS, Jan. 21, 2005, <http://finance.qianlong.com/26/2005/01/21/206@2483110.htm>.

84. See *Report of Hong Kong*, *supra* note 80; see also WILLIAMS, *supra* note 6, at 158-59.

equipment manufacturing, the auto industry, electronic information, construction, iron and steel production, nonferrous metals, the chemical industry, exploration and design, and science and technology, the state would keep "relatively strong control."⁸⁵ Although the AML finally included some general provisions dealing with administrative monopolistic conducts,⁸⁶ the lack of enforcement details and the unclear exemptions granted by Article 7 have disappointed scholars, practitioners, and private entrepreneurs, and have raised further concerns on social justice, fairness, and market efficiency.⁸⁷

Such a state policy has triggered deep concerns with consumer protection,⁸⁸ fair participation of private sectors, rent seeking and corruption, market efficiency, and further political and economic reform in China. There are many studies in China to reflect such situations that record the public cries of discontent with such monopolistic conduct and exorbitant profits.⁸⁹ The government, however, has shown no intention of changing the current market condition, and even denies the existence of such government-controlled monopolies.⁹⁰ In fact, according to state statistics, the domination of the state sector in the national economy has reached its peak in recent years since the SOE reform in the late 1970s, and the trend has been accelerated under the "national champion" strategy after China's WTO accession.⁹¹ Between 1998 and 2006, the number of SOEs and state controlled companies was reduced from 64,700 to 26,100, or by fifty-nine percent. However, their total assets increased by seventy-eight percent to RMB 13.4 trillion. By 2007, through seventy-seven rounds of government arranged reorganization, the number of large companies directly under central government control was down further from 196 to 151, but their contribution to the national economy reached forty-four percent of China's GDP.⁹² According to the latest plan, the state sector concentration will be further enhanced by reducing the number of enterprises directly controlled by the central government from 151 to between eighty and 100 by 2010, and establishing thirty to fifty super-sized companies with international competitiveness.⁹³ In this regard, some experts have

85. Zheng Jian Fa, *Guiding Opinions of the CSRC, SASAC, MOF, PBC, and the MOFCOM on Share-Trading Reform of Listed Companies*, ASIANLII, Aug. 23, 2005, <http://www.asianlii.org/cn/legis/cen/laws/gooteempatmosrocl823/>.

86. See Anti-monopoly Law, *supra* note 4, art. 8, ch. 5.

87. See Huang Yong, *Pursuing the Second Best: the History, Momentum, and Remaining Issues of China's Anti-Monopoly Law*, 75 ANTITRUST L.J. 117 (2008).

88. See Grace Li & Angus Young, *Competition Laws and Policies in China and Hong Kong: A Tale of Two Regulatory Journeys*, 7 J. INT'L. TRADE L. & POL'Y 186 (2008) (noting that the AML does not have a clear focus on the protection of consumer welfare).

89. See Bruce M. Owen et al., *Antitrust in China: The Problem of Incentive Compatibility*, 1 J. COMPETITION L. & ECON. 123, 123-48 (2005), <http://jcle.oxfordjournals.org/cgi/content/abstract/1/1/123>.

90. See Guozhiwei Fuzhuren Cheng Dianxinye Bucanzai Longduan Juzuoqiejing [The Denial of the Telecommunication Monopoly by the Deputy Director of the SASAC Shocks the Public], NANFANG ZHIJOU [SOUTHERN WEEKEND], Mar. 14, 2008.

91. See Chao Xi, *Transforming Chinese Enterprises: Ideology, Efficiency, and Instrumentalism in the Process of Reform*, in ASIAN SOCIALISM AND LEGAL CHANGE: THE DYNAMICS OF VIETNAMESE RENEWAL AND CHINESE REFORM, 91-110 (John Gillespie & Pip Nicholson eds., 2005).

92. See Gao Yi & Ren Baoping, *Zhongguo 30 Nian De Qiye Gaige: Huigu Yu Fazhan Zhanwang* [30 Years of Enterprise Reform in China: Review and Prospect], 1 GUIZHOU CAIJING XUEYUAN XUEBAO [J. OF FIN. C. OF GUIZHOU] 45 (2009); see also 2007 Total Sales of Central Enterprises to 9.84 Trillion Yuan, JINGJIAO SHIBAO [BEIJING TIMES], Mar. 5, 2008, <http://business.sohu.com/20080305/n255532126.shtml>.

93. Mr. Li Rongrong, the Director of State-Owned Assets Supervision and Administration Commission (SASAC), Address at a Central Work Conference on Corporate Executives (Dec. 16, 2008), transcript availa-

concluded that “the monopolistic interests of SOEs have always been sophistically preserved by various government departments using commercial and national reasons. In turn, this creates poor services and uncompetitive rates for consumers. A futile regulation like Chapter 5 would only be nominal and symbolic at best.”⁹⁴

On the other hand, the aggressive expansion of foreign investment in China gave rise to sensitive questions concerning the degree of equal application of the anti-monopoly rules to foreign investors. Although the business environment in China is quite different from that in other jurisdictions because of the level of government control in China, foreign mergers and acquisitions (M&As) have been a dynamic means of foreign investment since the 1990s. The wave of foreign M&As in China has gained more momentum from accelerated marketization, the further opening of markets, and the improving legal conditions under China’s WTO obligations and commitments. In fact, M&As in China were at an all-time high in 2008, with US\$159.6 billion worth of deals recorded – forty-four percent more than 2007. The inbound M&As posted a 34.2 percent increase as compared with 2007, making China a global investment haven despite the global financial meltdown.⁹⁵ According to some legal experts, conditions seem ripe in China for significant growth in M&A activities, and the investment landscape in China, together with innovative transaction structures and legal framework can be expected to expand to new horizons.⁹⁶

In dealing with the wave of foreign M&As after China’s accession to the WTO, some state authorities jointly issued the Interim Provisions on Acquisition of Domestic Enterprises by Foreign Investors in 2003 (2003 Provisions). In addition to the requirement for compliance with state industrial and investment policy, the 2003 Provisions subjected foreign investors to compulsory notification to the MOFCOM and the SAIC for anti-monopoly clearance before the transactions could proceed.⁹⁷

In May 2004, the SAIC published an investigative report entitled, “Multinationals’ Activities to Restrict Competition in China and the Counter-Measures to support the acceleration of the anti-monopoly legislation.” According to the report, some multinationals have obtained their dominant market position in China with monopolistic tendencies in several business sectors. Large multinationals such as Eastman Kodak, Microsoft, and Tetra Pak were named in the SAIC’s investigation and its accusation list. Other unnamed transnational companies were also found to have built up dominant positions in China through their technological, capital, and managerial advantages. According to the report,

ble at <http://www.sinofile.net/clients/amcweb.nsf/amcA/2CB8A20B55B7C33A48257522001D0BDA?open> document.

94. Li & Young, *supra* note 88.

95. See *China All Alone in Asian M&A Growth*, CHINA DAILY, Jan. 6, 2009, http://www.chinadaily.com.cn/bizchina/2009-01/06/content_7368947.htm.

96. Shane Knowler & Raymond Yung, *Asia Banking Insights: Tackling the Key Issues in Banking and Capital Markets in Asia*, PRICEWATERHOUSECOOPER, Oct. 2007, http://www.pwc.com/en_SG/sg/financial-services/assets/publication-asia-banking-insights-200710.pdf; Xian Chu Zhang, *New Landscape of Foreign Mergers and Acquisitions in China after Its WTO Accession*, 6 J. CHINESE AND COMP. L. 229, 229-55 (2003).

97. Interim Provisions on Acquisition of Domestic Enterprises by Foreign Investors (jointly issued by MOFCOM & SAIC Mar. 7, 2003, effective Apr. 8, 2003) arts. 19 & 20.

the multinationals' aggressive expansion constituted a threat to the safety of the national economy.⁹⁸

The MOFCOM, however, disagreed with this radical position. In a research paper, the Research Institute of the MOFCOM argued that foreign investments that had made an important contribution to China's economic development had neither threatened the economic safety of China, nor controlled the technology market or any sensitive business sector.⁹⁹ Mr. Shang Ming, as the Head of the Treaty and Law Department and the Director of the Antimonopoly Office of the MOFCOM, then further pointed out that the anti-monopoly law should be equally applied to both domestic and foreign enterprises.¹⁰⁰ The anti-monopoly enactment should aim to promote and safeguard fair competition in all kinds of enterprises on the market while also preventing monopolistic activities.¹⁰¹

The divergence escalated and led to further twists when the AML drafting entered the final stage. In early 2006, in an interview Li Deshui, the then-Director General of the National Bureau of Statistics warned that foreign "malicious [M&As in China] could threaten [China's] 'economic security and national sovereignty,'" and called for action to curb the trend of multinationals in China.¹⁰² On the contrary, Hu Jingyan, Director of Foreign Investment Department of the MOFCOM then continued openly to refute the proposition against the expansion of foreign business in China.¹⁰³ He noted that foreign funds make up less than three percent of the market share in industries that are key to the nation's economic development, and added that foreign investment mainly focuses on high-tech and machinery and electronics industries, which witnessed fasted growth in export.¹⁰⁴ As such, there was neither an emerging foreign monopoly in any region or business sector, nor any foreign control of the economic lifeline in China.¹⁰⁵

Despite the disagreement, the Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors was jointly re-promulgated by the MOFCOM, the SAIC, the SASAC, the State Taxation Bureau, the China Securities Regulatory Commission, and the State Foreign Exchange Administration in August 2006 as amendments to the 2003 Provisions (2006 Provisions).¹⁰⁶ According to the 2006 Provisions, foreign M&As shall

98. *Multinationals' Activities to Restrict Competition in China and the Counter-Measures to Support the Acceleration of the Anti-monopoly Legislation*, 5 GONGSHANG GUANLO [J. STATE ADMIN. OF INDUS. & COMM.], May, 2004, <http://www.cnki.com.cn/Article/CJFDTTotal-GSXZ20040531.html>.

99. Thomas R. Howell et al., *China's New Anti-Monopoly Law: A Perspective From the United State*: PACIFIC RIM L. & POL'Y J. 53 (2009), <http://www.competitionlaw.cn/show.aspx?id=4804&cid=29>.

100. Xinhua Wang Xiaobo, *Shang: Antimonopoly Law Not Only for Multinational Companies*, CHINA NETWORK, Dec. 23, 2004, http://expo2010.china.com.cn/news/txt/2004-12/23/content_5736697.htm.

101. Interview with Shang, the Director of the Antimonopoly Office of MOFCOM (Dec. 23, 2004), in ZHONGGUO WANG [CHINA NET], http://expo2010.china.com.cn/news/txt/2004-12/23/content_5736697.htm.

102. Mure Dickie, *Chinese Official Demands Curbs on 'Malicious' Buying by Multinationals*, FIN. EXPRESS, Mar. 12, 2006, <http://www.financialexpress-bd.com>.

103. *China Plans to Introduce Foreign Funds of \$60 Bln*, CHINA VIEW, Jan. 16, 2006, http://news.xinhuanet.com/english/2006-01/16/content_4058912.htm.

104. *Id.*

105. Xinhua News Agency Report (Jan. 17, 2006), <http://www.sccwto.net:7000/wto/content.jsp?id=12385>.

106. Guan yu wai guo tou zi zhe bing gou jing nei qi ye de gui ding [Provision on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors] (promulgated by the Ministry of Commerce, State-Owned Assets Supervision & Admin. Comm'n of the State Council, State Admin. of Taxation, State Admin. for Indus. & Commerce, China Sec. Regulatory Comm'n & State Admin. of Foreign Exch., Aug. 8, 2006, effec-

not be allowed to “create over-concentration, eliminate or hinder competition, or disturb the social and economic order or harm the societal public interests, or lead to the loss of state-owned assets.”¹⁰⁷ For this purpose, a compulsory notification procedure was created for foreign M&As that would lead to de facto control in key industries, and could affect the national economic safety or transfer control over well-known trademarks or enterprises of China.¹⁰⁸ Moreover, Chapter 5 of the 2006 Provisions mandated notification of a foreign M&A to the MOFCOM and the SAIC with the separate and low thresholds.¹⁰⁹ Although the 2006 Provisions were not considered sophisticated enough,¹¹⁰ they were once criticized for their biased protection of domestic enterprises.¹¹¹

As a positive development to build up a uniform antimonopoly regime in China, the MOFCOM recently further amended the 2006 Provisions with immediate effectiveness (2009 Provisions).¹¹² The unilateral revision of the 2006 Provisions that were jointly promulgated by six state authorities seems to indicate the exclusive jurisdiction of the MOFCOM on foreign M&As in the new enforcement structure.¹¹³ More importantly, the 2009 Provisions completely delete Chapter 5 of the 2006 Provisions, and subject notifications of foreign M&As to the Concentration Provisions of the State Council.¹¹⁴ As such, on the one hand, some special foreign M&A rules are being merged into the newly established anti-monopoly regime. On the other hand, the 2009 Provisions, as a separate set of rules governing foreign M&As are still retained where unclearly defined “public interests,” “the social and economic order,” and “loss of state assets” will continue to be the concerns of foreign investors.¹¹⁵

Multinational corporations, although having praised the government’s continuing effort to improve the legislation, do not hide their worries about the possible market barriers

tive Sept. 8, 2006) 2007 STATE COUNCIL GAZ. 29–36 (P.R.C.), available at <http://tfs.mofcom.gov.cn/aarticle/zcfb/200608/20060802839438.html>.

107. *Id.* art. 3.

108. *Id.* art. 12.

109. According to art. 51 of the 2006 Provisions, a foreign M&A had to be subject to the notification procedure if the foreign investor’s annual sales in China exceeded RMB 150 million, the number of domestic enterprises in the relevant business it has taken over within a year exceeded ten, the foreign party’s market share in China has reached twenty percent, or the proposed M&A would result in twenty-five percent market share of the foreign party in China. Even these thresholds were not met, any competing domestic enterprise, government departments or business associations may still petition to the MOFCOM and the SAIC to require the foreign party submit a report on the ground that the proposed M&A involves a huge market share, or would seriously affect the market competition. *See id.* art. 5.

110. Emma Davies & Cheng Li Yow, *China’s Anti-trust Regime*, CHINA L. & PRAC., April 2005, at 24.

111. Wang, *supra* note 17, at 282.

112. The 2009 Provisions were issued on June 22, 2009.

113. *Id.*

114. *Id.*

115. Article 3 of the 2009 Provisions stipulates that foreign investors shall not cause over concentration, restrict or eliminate competition, disturb the social and economic order and public social interests, and result in loss of the state assets.

created by the new AML and abuse of the procedures.¹¹⁶ Some foreign investors have further expressed their worries about M&A reviews on national security grounds.¹¹⁷

The differing views of the various state authorities and the trepidatious evolution inevitably led to uncertainty and unpredictability in practice. Some recent cases illustrate the situation. The leading example in this regard is the government resistance to the proposed acquisition of eighty-five percent of shares of Xuzhou Construction Machinery Group Co. (known as Xugong) for USD \$375 million by Carlyle, which was the largest private investment fund in the world in 2005, with the local government's support.¹¹⁸ The proposed deal triggered a heated debate nationwide on the protection of key industries and safeguarding national economic security. But during the debate, the State Council issued the Several Opinions on Speeding up the Revitalization of Equipment Manufacturing Industry on June 16, 2006, to the backdated effect of frustrating the deal by designating the construction machinery industry as a key industry of the nation.¹¹⁹ As a result, any transfer of control of a large enterprise in this industry must involve consultation with relevant state authorities.¹²⁰ Issued shortly thereafter, the 2006 Provisions had more emphasis on the protection of key industries and national economic security.¹²¹ In this context, some experts have voiced concerns over the government's imposition of political pressure toward a specific foreign acquisition.¹²² In July 2008, Carlyle reluctantly gave up its acquisition plan after a three-year struggle, which included agreeing to reduce its stake to forty-five percent.¹²³

Despite Carlyle's frustration, two French companies, SEB and Alstom, successfully completed their acquisition deals with leading Chinese cookware maker Supor, and with Wuhan Boiler, a major power company, in 2007.¹²⁴ In both cases, the foreign investors'

116. Junfeng Li, *Foreign-invested Companies: More Risky Facing up to China's Antimonopoly Law?*, 51 INT'L. J. L. & MGMT. 179-86 (2009); Peter A. Neumann & Tony Zhang, *China's New Foreign-funded M&A Provisions: Greater Legal Protection or Legalized Protectionism?*, CHINA L. & PRAC., Oct. 2006, at 21-29. Recently, at least three senior officials of the MOFCOM and the SAIC in charge of foreign acquisition approval were arrested for the conspired corruption. See *Senior SAIC Official Arrested*, FIN. MAG., Oct. 28, 2008, <http://english.caijing.com.cn/2008-10-28/110024002.html>.

117. Keith Bradsher, *Beijing Seeks New Security of Investment by Outsiders*, N.Y. TIMES, Aug. 28, 2007, at A1.

118. Joe McDonald, *China to Review Coca Cola Bid for Juice Maker*, ASSOCIATED PRESS, Sept. 8, 2008, <http://abcnews.go.com/Business/wireStory?id=5750324>; Jiang Yuxia, *China Wants Funds From Foreign Private Equity Firms*, SHANGHAI DAILY, May 28, 2007, http://english.gov.cn/2007-05/28/content_628129.htm.

119. Opinions on Speeding up the Revitalization of Equipment Manufacturing Industry, art. 7 (promulgated by the State Council, June 16, 2006), available at http://gys.ndrc.gov.cn/zcfg/t20060626_74595.htm.

120. *Id.*

121. *Id.* art. 12.

122. See Statement of Mr. Zhang Hanya as the Deputy Chairman of the China Investment Association, JINGHUA SHIBAO [BEIJING TIMES], June 30, 2006, <http://business.sohu.com/20060630/n244017606.shtml>.

123. *Private Equity: Foreign Funds Face Beijing Blockade*, ASIA MONEY, Sept. 1, 2008, http://www.asiamoney.com/Article/2055617/Search/Results/PRIVATE-EQUITY-Foreign-funds-face-Beijing-blockade.html?PartialFields=CATEGORY_313_IDS%3A5923.

124. *France SEB Completes Takeover of China's Supor*, CHINA DAILY, Dec. 24, 2007, http://www.chinadaily.com.cn/bizchina/2007-12/24/content_6344205.htm; Xiao Wan, *Nod to Alstom to Buy Wuhan Boiler Stake*, CHINA DAILY, July 12, 2007, http://www.chinadaily.com.cn/cndy/2007-07/12/content_5433319.htm.

equity holdings exceeded fifty percent and the state granted approvals (*against oppositions by domestic competitors*).¹²⁵

Since the AML entered into force, the MOFCOM has published three decisions on foreign-related concentrations. The MOFCOM approved the InBev N.V./S.A. and Anheuser-Busch merger on November 18, 2008.¹²⁶ But given the size of the acquisition, the large market share represented, and the competitiveness of the new company to be established,¹²⁷ some conditions have been imposed. The company has to reduce possible adverse effects on future competition in the Chinese beer market, both parties shall not increase their holdings of the relevant Chinese breweries, and any further acquiring or increasing stakes in certain breweries must be approved by the MOFCOM.¹²⁸ Although the first publication of the anti-monopoly examination result with the legal remedies should be welcomed for improved transparency in operation, concerns have been raised about its lack of substantive information in the one page decision.¹²⁹ The latest approval with restrictive conditions was granted to the US\$1.6 billion takeover of Lucite International of the United Kingdom by Mitsubishi Rayon of Japan.¹³⁰

The first disapproval based on the AML was the MOFCOM-rejected proposed acquisition of Huiyuan, the largest juice maker in China, by Coca-Cola through a wholly owned subsidiary for HK\$17.9 billion.¹³¹ The one and a half page decision apparently leaves more questions than answers. The decision identified the focus of MOFCOM in scrutinizing the proposed merger under Article 27 of the AML, including the negative impacts of the merger on the competitive level of the market, the combination of two well-known brands, and the pressure on domestic small and mid-sized enterprises.¹³² But without any further explanation and justification, the rejection does not seem convincing or transparent enough. According to some experts, the fruit juice market in China has been very open and fully competitive without any discernable elements of a business monopoly. Currently, the per capita consumption of fruit juice is less than one kilogram, far below the average annual consumption of fifty to seventy kilograms in developed countries.¹³³

125. See *France SEB Completes Takeover of China's Supor*, *supra* note 124; *Nod to Alstom to Buy Wuhan Boiler Stake*, *supra* note 124; see also Lu Pingxin, *Jiedu 2007 Nian Waizi Binggou Dashijian* [Understanding Large Foreign M&As in 2007], 12 FAREN [LEGAL PERSONS] 2007, at 38-41.

126. Michael J. de la Merced, *Anheuser-Busch Agrees to Be Sold to InBev*, N.Y. TIMES, July 14, 2008, http://topics.nytimes.com/top/news/business/companies/anheuser_busch_companies/index.html.

127. After the merger, the Anheuser-Busch InBev would be the world's largest beer company and a top-five consumer products company. For the details of the merger, see Press Release, Anheuser-Busch Companies, InBev and Anheuser Busch Agree to Combine, Creating the Global Leader in Beer with Budweiser as its Flagship Brand (July 13, 2008), available at <http://www.anheuser-busch.com/Press/PressImages/FINAL%20PRESS%20RELEASE.pdf>.

128. MOFCOM, The People's Republic of China Ministry of Commerce Announcement [2008] No. 95, Nov. 18, 2008, <http://fldj.mofcom.gov.cn/aarticle/ztxx/200811/20081105899216.html>.

129. Jun Wei & Janet McDavid, *Explaining China's Anti-Monopoly Law*, NAT'L L. J., Mar. 19, 2009, <http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202429178088>.

130. *Antitrust in China*, FIN. TIMES, May 5, 2009, at 8.

131. *Id.*

132. MOFCOM, The People's Republic of China Ministry of Commerce Announcement [2009] No. 22 (Ministry of Commerce on the Prohibition of Coca-Cola's acquisition of China firm Huiyuan firm), Mar. 18, 2009, <http://fldj.mofcom.gov.cn/aarticle/ztxx/200903/20090306108494.html>.

133. *The Huiyuan Internal Public Figures Refer to the Coca-Cola Operation Purchase*, ZHONGGUO PINGLUN XINWEN [CHINA REV. NEWS], Mar. 21, 2008, <http://www.chinareviewnews.com/doc/1009/1/9/7/100919759.html?coluid=7&kindid=0&docid=100919759>.

As such, the MOFCOM decision has not only divided scholars,¹³⁴ but also put the MOFCOM on the defensive to deny any protectionism behind its decision.¹³⁵

Recently, the MOFCOM published the statistics of its market concentration examinations. In the period from August 1, 2008 through the end of June 2009, the MOFCOM received fifty-eight concentration notifications.¹³⁶ Among the forty-six finished cases, all were approved, aside from one rejection and two approvals with restrictive conditions as highlighted above.¹³⁷

The first batch of anti-monopoly decisions has no doubt demonstrated the government's seriousness about implementing the AML. At the same time, it has also shown that the detailed competition rules are still in the early stages of development. As a result, the decisions may not be consistent, predictable, and transparent enough as expected in the practice. Moreover, in terms of justification it is advised that in enforcing the AML the government should not "confuse antitrust with industrial policy" in order to avoid the accusation of protectionism.¹³⁸

IV. Some Further Concerns

China has come a long way in a short time to have integrated in the global economy with its commitments to a market economy. The establishment of an anti-monopoly regime as a crucial institution to support the healthy economic development of the country may be taken as the latest evidence in this regard. But because of China's socialist market economy, the development of an anti-monopoly regime may face some tough institutional challenges in addition to many technical difficulties.

Perhaps most important, it should be noted that the establishment of an effective competition and anti-monopoly regime may have profound political implications on democratic governance in China. As an economically level playing field is being built up for more equal competition, the model of the totalitarian governance will inevitably be challenged. Despite the desire of leadership to utilize capitalist tools to modernize socialism in China with the ultimate goal being to remain in power and not to liberalize,¹³⁹ the inherent conflict of the two systems becomes unavoidable and may eventually become a real threat to the entire political regime.¹⁴⁰ As such, it would be a daunting question to be answered in China as to what extent political democracy and equal entitlement on the market can be compatible with the economic growth. In this context, the enactment of

134. For the different views held by domestic scholars, see Jin Sun, *The Implementation of China's Anti-Monopoly Law: A Case Study on Coca-Cola's Abortive Acquisition of Huiyuan Juice*, PERSPECTIVES: CHINA AND THE WORLD, 2009, http://article.chinalawinfo.com/article_print.asp?articleid=48398; see also Ron Knox, *The GCR poll: Coca-Cola/Huiyuan*, GLOBAL COMPETITION REV., Mar. 30, 2009, <http://www.globalcompetitionreview.com/news/article/13154>.

135. "No Protectionism" in *Coca-Cola Ruling*, XINHUA NEWS AGENCY, Mar. 19, 2009, <http://english.mofcom.gov.cn/aarticle/counselorsreport/americandoceanreport/200903/20090306117020.html>.

136. *Id.*

137. *Id.*

138. *Antitrust in China*, *supra* note 130.

139. Perry Link & Joshua Kurlantzick, *China's Modern Authoritarianism*, WALL ST. J. ASIA, May 25, 2009, <http://online.wsj.com/article/SB124319304482150525.html>.

140. William I. Friedman, *One Country, Two Systems: The Inherent Conflict Between China's Communist Politics and Capitalist Securities Market*, 27 BROOK. J. INT'L L. 477, 516 (2002).

the AML has been viewed as a “catalyst to accelerate China’s political reform” and raised the expectation of the private sector to use the AML to fight for a fair market.¹⁴¹

To the government’s great surprise, the first batch of lawsuits filed under the AML were not disputes between competing enterprises, but were brought by small and mid-sized private enterprises against government administrations. Within eighteen days after the AML became effective, the State Administration of Products Quality Inspection was named as a defendant in three cases citing abuse of administrative powers in blocking market access by way of monopolized and compulsory licensing, certifying and fee charging.¹⁴² It was also further reported that a department head of the Administration committed suicide in this period after the allegations triggered some criminal investigation on the violations dealing with fee profit.¹⁴³ Thus far, the Court has refused to accept the lawsuits on the grounds of statutory limitations.¹⁴⁴ Later, some private firms tried to sue two large state-controlled companies, Sinopec and China National Petroleum, for alleged market monopolistic conduct, which resulted in the closing of 663 private oil dealers and 45,000 gas stations.¹⁴⁵ Some consumers have also instituted actions against China Mobile, the largest domestic operator of mobile phones, for its abuse of a dominant market position.¹⁴⁶

Although none of these cases have seen any concrete results, such a dynamic start to the implementation of the AML clearly demonstrates not only the strong demands of the private sector and consumers for a level playing field in the market, but also profound political implications in challenging Party-State governance in the country. But given the political reality in China, it is predicted that the challenges to the government branches and state-controlled market giants may not go anywhere in the near future.

In China, the implantation of a foreign-direct-investment-driven and export-orientated manufacturing approach over the last thirty years has inevitably led to the accumulation and domination of foreign investment in certain areas.¹⁴⁷ The government’s ferocious protection of the state sector from competition has created even further market concentration with administrative power.¹⁴⁸ Thus, although some developing countries, including China and India, have been supporting a strategy of promoting “national champions,” the potential abuse and impact on private sector development are much more serious in China. As Professor Yasheng Huang from the Massachusetts Institute of Technology pointed out, excessively relying on foreign investment is a reflection of an irrational domestic financial and legal system, which would inevitably lead to aggressive expansion of

141. Wang Ye, *Rushi Cuisheng Zhongguo Falongdua Fa* [Birth Accession to the WTO China’s Anti-Monopoly Law], ZHONGGUO FAXUE WANG [LEGAL SCIENCE WEBSITE OF CHINA], <http://www.iolaw.org.cn/shownews.asp?id=242>, at 1.

142. Wu Jianping, *Director General Administration of Quality Supervision Inspection Jumped to his Death?*, CHINACOURT, Aug. 14, 2008, <http://bbs.chinacourt.org/index.php?showtopic=292451>.

143. *Id.*

144. *Id.*

145. Liu Yong, *China’s Independents To Sue Oil Majors Over Fuel*, CHINA DIGITAL TIMES, Oct. 13, 2008, <http://chinadigitaltimes.net/2008/10/chinas-independents-to-sue-oil-majors-over-fuel/>.

146. Juliet Ye, *Anti-Monopoly Law Inspires Consumer Suit Against China Mobile*, WALL ST. J., Apr. 6, 2009, available at <http://blogs.wsj.com/digits/2009/04/06/anti-monopoly-law-inspires-consumer-suit-against-china-mobile/>.

147. Huang & Tarun Khanna, *Can India Overtake China?*, FOREIGN POLICY, July/Aug. 2003, at 74.

148. *Id.* at 75.

multinationals in China.¹⁴⁹ Moreover, development under this model is made at the cost of domestic-sector development. As a result, the crucial problem facing China is not an excessive openness to foreign investors, but a seriously insufficient opening to the domestic private sector.¹⁵⁰ In this regard, economic and institutional liberalization in China is much more challenging, not only because the private sector may bring more competition to the market, but also because privatization has been highly sensitive in China because of its status as a socialist country.¹⁵¹

According to some scholars, the biased anti-monopoly enactment on the ground of national economic safety, with the different standards applicable to domestic administrative monopoly and foreign expansion respectively, would obliterate the essence of the law and further harm domestic consumers who have suffered from the callous administrative monopoly on the market for a long time. In this sense, foreign M&As in China, which have subjected the government and the public sector to competitive pressure and accelerated the anti-monopoly legislation, are even thought of as a good thing from the perspective of the rule of law development in China.¹⁵² Moreover, it is predicted that biased competition legislation will have considerable vitality.¹⁵³

In terms of a development path, close attention has been paid to the experiences of both the European Union (EU) and the United States in developing their anti-monopoly legal regimes. The current AML of China is influenced far more by the EU regime due to its civil law tradition and diversified economic development. As a result, private enforcement and strong judicial participation, two of the main features of American antitrust laws, are not incorporated into the current framework.¹⁵⁴ Moreover, divergences between the anti-monopoly laws of China and the United States arise because the principles under the AML are still based on regulations with political, social, and ideological considerations, whereas these principles have been replaced by economic principles in the United States.¹⁵⁵ Indeed, China has insisted that the model of its economic development may not be the same as the ones of developed countries with different social-political and economic conditions. Some experts argue that in a developing country like China, current economic conditions should be adequately considered in formulating competition law and policy. As a result, promotion of domestic economic development should be the primary goal of the current anti-monopoly legislation. Thus the government-driven economy (evindenced by such devices as the "national champion" policy),¹⁵⁶ although opposed by devel-

149. *Id.* at 74.

150. YASHEUNG HUANG, *SELLING CHINA: FOREIGN DIRECT INVESTMENT DURING THE REFORM ERA* (2003).

151. *China's Coming Recession*, *ECONOMIST*, May 2, 1998 (even after the reform of the past two decades, "privatization is still a dirty word in China"); Toshiki Kanamori & Zhijun Zhao, *Private Sector Development in the People's Republic of China*, *ASIAN DEVELOPMENT BANK*, Sept. 2004, at 43-57; *Private Sector Assessment: The People's Republic of China*, *ASIAN DEVELOPMENT BANK*, Nov. 2003, at 32-40; Howell *supra* note 99.

152. Qui Feng, *The Logical Disarray of Anti-monopoly*, *NANFANG DUSHI BAO* [SOUTHERN METROPOLIS DAILY], Mar. 16, 2006, at A3.

153. PETER J. WANG, ET AL., *NEW CHINESE ANTI-MONOPOLY LAW* (Oct. 2007), http://www.jonesday.com/pubs/pubs_detail.aspx?pubID=S4662.

154. Nicholas H. Cramer, *Progress and Uncertainty: The Development and Implementation of a United Competition Regime in the People's Republic Of China*, *SOCIAL SCIENCE RESEARCH NETWORK*, June 1, 2008, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1175542#.

155. Howell, *supra* note 99, at 54.

156. WILLIAMS, *supra* note 6.

oped countries, should still be carefully considered given China's needs.¹⁵⁷ Against this background, the anti-monopoly regime in China will take more time to develop and will see some fundamental differences from the developed countries in the near future.

On the international level, China's short WTO membership has not allowed her to develop any sophisticated theory or position to deal with competition policy in the global context, which was one of the so-called Singapore Issues of the WTO when it was on the discussion table. A recent search on the MOFCOM web site did not reveal any official policy statement or submission in this regard.¹⁵⁸ But according to Professor Wang Xiaoye, a leading expert of competition law in China,¹⁵⁹ the proposal of the European Union to establish a uniform competition regime within the WTO framework was widely supported, and China should take a proactive attitude toward participation in the multilateral negotiations. She further believes that such an agreement would restrain multinational corporations' unfair competition practices in China, and thus, China should accept the European Union's proposal of the non-discriminatory application of national treatment.¹⁶⁰ It is interesting to note that this position appears quite different from the one insisted on by the Indian Government and scholars against the European Union's proposal to extend the "national treatment" principle automatically to competition policy of the WTO members.¹⁶¹

It should also be noted that WTO membership has brought further pressure on China to improve its competition policy and market conditions.¹⁶² For example, in June 2008, Canada and the United States requested consultation with China with respect to measures that would require foreign financial information suppliers to provide their services only through a designated official agent, rather than directly soliciting subscribers for their services in China. They claimed that such a practice was inconsistent with the provisions on market access and national treatment of the General Agreement on Trade in Services (GATS).¹⁶³ The dispute ended with the promulgation of a new decree by Chinese authorities that allows foreign institutions to provide information services directly to their subscribers in China under the government's approval.¹⁶⁴ Recently, the WTO panel handed

157. Huang Yong & Li Zhiqiang, *Conflict of Laws and International Cooperation in Antitrust Enforcement*, in NEW DEVELOPMENT OF COMPETITION LAW UNDER GLOBALIZATION 224-25 (Wang Xiaoye ed., 2002).

158. Ministry of Commerce of the People's Republic of China (MOFCOM), <http://english.mofcom.gov.cn/> (last visited Aug. 26, 2009).

159. See WILLIAMS, *supra* note 6, at 156.

160. Xiaoye, *supra* note 17.

161. See WTO Document: Communication from India, WT/WGTCP/W/216, Sept. 26, 2002; Aditya Bhattacharjee, *India's Competition Policy: An Assessment*, 38 ECON. & POL. WKLY. 3561, 3570-73 (2003); Rakesh Basant & Sebastian Morris, *Competition Policy in India: Issues for a Globalising Economy*, 35 ECON. & POL. WKLY. 2735, 2746 (2000); Adita Bhattacharjee, *Export Cartel—A Developing Country Perspective*, 38 J. WORLD TRADE 331, 355 (2004).

162. *Foreign Investment Industrial Guidance Catalogue (Amended in 2007)*, P.R.C. L. & PRAC., Dec. 2007-Jan. 2008, <http://www.chinalawandpractice.com/Article/1853571/Channel/9950/Foreign-Investment-Industrial-Guidance-Catalogue-Amended-in-2007.html>.

163. See General Agreement on Trade in Services, arts. 16-18, Apr. 15, 1994, 1869 U.N.T.S. 183, 33 I.L.M. 1125.

164. Joint Communication from China and Canada, *China-Measures Affecting Financial Info Services and Foreign Financial Information Suppliers*, WT/DS378/3 (Dec. 9, 2008); see also WTO, *Dispute Settlement: DS378* (2009) http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds378_e.htm (summarizing the dispute); *Provisions on Administration of Provision of Financial Information Services in China by Foreign Institutions*, BEIJING REVIEW, Jul. 2009, http://www.bjreview.com.cn/document/txt/2009-07/20/content_208369.htm.

down another decision on the dispute between the United States and China on China's domestic measures to, *inter alia*, reserve the trading rights with respect to imported films, audiovisual entertainment products, sound recording, and publications to state designated or owned enterprises. The panel found that such measures were inconsistent with the rules of the WTO, including the national treatment and market access commitments under the GATS.¹⁶⁵ These WTO proceedings will no doubt play an important role by challenging the state monopoly to pave a new level playing field under the non-discrimination principle.

The lack of expertise may also pose a serious challenge to the smooth implementation of the AML. For instance, the function of the AML gets into an awkward situation from the very beginning because only one of the approximately forty detailed regulations that have been prepared under the state implementation plan was promulgated when the AML became effective.¹⁶⁶ Some foreign experts even questioned whether the AML was a "source of uncertainty or a new economic constitution."¹⁶⁷ In this regard, a recent study found that there were few officials capable of carrying out their duties of competition law enforcement with professional qualification and specialized knowledge.¹⁶⁸

Last but not the least, the role of the judiciary in enforcing the relevant laws may also raise a serious concern. In China, the checks and balances principle has not been recognized, and thus the judiciary may have only limited independence and may be subject to the budgetary and personnel control of the government as well as its policy influence. As a result, despite continuing reform in the last decade, the quality of judicial independence and impartiality is still questionable.¹⁶⁹

Such an infrastructure gap may be illustrated with an interesting case in China, where a patient in Sichuan Province found there was no medicine name on her prescription issued by a local hospital, but only some unreadable code so that the medicine could only be purchased from the hospital.¹⁷⁰ She filed her complaint with the local office of the SAIC. The investigation found that the hospital was selling outdated drugs and that the unreadable code violated the patient's right to information as stipulated in the Anti-Unfair Competition Law.¹⁷¹ The hospital, however, filed a legal action against the local SAIC for unlawful enforcement.¹⁷² The People's Court ruled in favor of the hospital on the grounds that the hospital was only subject to the supervision of the Ministry of Public

165. Panel Report, *China-Measures Affecting Trading Rights and Distribution Services for Certain Publication and Audiovisual Entertainment Products*, WT/DS363/R (Aug. 12, 2009), available at http://www.wto.org/english/news_e/news09_e/363r_e.htm.

166. Xin Hong, *Anti-Monopoly Law Face Dilemma: More than 40 Supporting Regulations Without an Introduction*, XINHUA NEWS, Aug. 1, 2008, <http://finance.sina.com.cn/g/20080727/11055136074.shtml>.

167. Paul Jones, *China's New Anti-Monopoly Law: An Economic Constitution for the New Market Economy?*, 3 P.R.C. L. REP. 2007, at 3, 12; see also Joanna Law, *Anti-Monopoly Law: The Lawyers Are Ready, But the Law Isn't*, P.R.C. L. & PRAC., Jul./Aug. 2008, at 10-16.

168. ZHONGWAI FANLONGDUAN FA SHISHI TIZHI YANJIU [A STUDY ON IMPLEMENTATION SYSTEMS OF ANTIMONOPOLY LAW IN CHINA AND FOREIGN COUNTRIES] 318 (Liu Junjing ed. 2005).

169. ALBERT HUNG-YEE CHAN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 131-59 (3rd ed. LexisNexis, 2007) (1992).

170. WANG CHUANHUI, FANLONG DUAN DE JINGJIXUE FENXI [ECONOMIC ANALYSIS OF ANTITRUST] 277-90 (2004).

171. *Id.*

172. *Id.*

Health, and thus the SAIC had no authority to carry out its enforcement measures.¹⁷³ The appeal of the SAIC put the appellant People's Court in a very difficult position between two state authorities.¹⁷⁴ Finally, the case ended with a conciliation of the parties concerned for saving both sides' faith. While being interviewed, the judges indicated that in such a tough situation the court may not be able to firmly support the implementation of antimonopoly/unfair competition rules.¹⁷⁵

Directly before the AML entered into force, the Supreme People's Court issued a two-page circular on July 28, 2008 to local People's Courts on the implementation of the AML.¹⁷⁶ In addition to the requirements to study the AML carefully and to summarize trial experience in a timely manner, the Supreme People's Court assigns hearings of the AML related cases to the Intellectual Property Tribunal within the court system. Although anti-monopoly-law-related cases do not all fall into the jurisdiction of intellectual property trials, the current arrangement of concentrated jurisdiction is made due to the tribunal's experience in handling unfair competition claims and reflects a cautious approach taken by the Supreme People's Court in the early time of the implementation.¹⁷⁷

Soon after, the Supreme People's Court openly admitted that handling antimonopoly cases would be very challenging to the judiciary. In particular, seven areas that are governed by no clear rules or no rules at all have been identified: (1) jurisdiction over antimonopoly cases; (2) standing of a plaintiff; (3) legal remedies and compensations; (4) other types of monopolies beyond the AML provisions; (5) procedural issues; (6) tests applicable to antimonopoly cases; and (7) the relations between antimonopoly and intellectual property right protection. Rules for these areas are needed urgently in order to effectively implement the AML.¹⁷⁸

Despite many uncertainties, the Supreme People's Court has made clear that in implanting the AML against administrative monopoly, the People's Court will only accept legal actions against concrete administrative decisions, and not those against government provisions, regulations, and policies.¹⁷⁹ As such, a government monopoly policy can neither be sued, nor subject to other legal enforcement schemes.¹⁸⁰ The recent reports that many local governments have adopted various protectionist measures during the international financial crisis in order to protect local products and enterprises have further

173. *Id.*

174. *Id.*

175. *Id.*

176. FRESHFIELD BRUCKHAUS DERINGER, LLP, PRIVATE ANTI-MONOPOLY LITIGATION TAKING SHAPE IN CHINA (2009), available at <http://www.freshfields.com/publications/pdfs/2009/aug09/26530.pdf>.

177. Peter Wang et al., *China: Filing Antitrust Suits in Chinese Court*, MONDAQ, Aug. 12, 2008, <http://www.mondaq.com/article.asp?articleid=64680>.

178. See Interview by Liu Lan with the head of the Third Trial Division of the Supreme People's Court (Sept 8, 2008), <http://www.zwmsep.com/list.asp?unid=8048>.

179. *Id.*

180. Administrative Procedure Law art. 12 (adopted by the Supreme People's Court of the People's Republic of China, Apr. 4, 1989, effective Apr. 4, 1989), Supreme People's Court of the P.R.C., <http://en.chinacourt.org/public/detail.php?id=2695> (last visited Aug. 26, 2009); Anti-monopoly Law, *supra* note 4, art. 51.

illustrated the gravity of the challenge.¹⁸¹ In this sense, the law is called “a tiger without teeth.”¹⁸²

V. Conclusion

The adoption of the AML is a milestone in China's market development and has received a world-wide welcome. The legislative history of more than a decade and the serious efforts to learn from other countries reflects the government's commitment to a market economy with an more-level playing field. But China's socialist market economy has provided the antimonopoly legal regime with some unique characteristics, including special concerns with administrative monopoly, the equal and rational treatment to all market players, and the independence and impartiality of enforcement authorities. Moreover, the introduction of the Anti-monopoly Law in China will inevitably have a profound impact far beyond the legislation itself. Thus the current legislation may just be an encouraging beginning.¹⁸³ But the Anti-monopoly Law and its practice may not be effectively advanced unless further political reform and competition culture are well developed in China.¹⁸⁴

181. Sun Xiaolin, *Gedi Chutai Zheng Ce Zhiyuan Bendi Qiye, Difang Baobu Zhiyi Taotou* [Local Governments Adopt Measures to Support Local Enterprises, Local Protectionism], XINHUA NET, Feb. 4, 2008, <http://news.hexun.com/2009-02-04/113963588.html>.

182. Zhengzin Huo, *A Tiger without Teeth: The Antitrust Law of the People's Republic*, 10:1 ASIAN-PACIFIC L. & POL'Y J., 2008, http://www.hawaii.edu/aplpj/articles/APLPJ_10.1_huo.pdf.

183. See Jones, *supra* note 167, at 12-13.

184. See Chris Devonshire-Ellis, *Will the Anti-Monopoly Law Assist Central Regional Development?*, P.R.C. BRIEFING, Feb. 2008, <http://www.china-briefing.com/news/2008/02/26/will-the-anti-monopoly-law-assist-central-regional-development.html>; Susan Ning, *Overview of the Anti-monopoly Law*, P.R.C. L. & PRAC., Oct. 2007, at 23-25.

