
H. Stephen Harris Jr.

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I. INTRODUCTION

Though many jurisdictions have adopted competition laws in recent decades, none of these laws has engendered the level of interest sparked by China’s proposed Anti-Monopoly Law (“AML”). Several factors have combined to inspire an unprecedented flow of commentary and consortia on each iteration of China’s draft AML. These factors include the sheer scale and astounding growth of China’s markets, the vast amounts of foreign capital recently invested in China, the burgeoning sales of Chinese goods abroad, the substantial growth in the participation of Chinese firms in foreign markets, and a recognition of the significant challenge posed by the establishment of free market competition in China’s socialist market economy. To China’s great credit, the State Council, the Ministry of Commerce (“MOFCOM”), the National Development and Reform

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† The Chicago Journal of International Law expresses no opinion as to the accuracy of this Article’s Chinese citations and references.

1 The State Council is the “highest executive organ of State power” and of “State administration.” Regarding the State Council’s functions and organizations, see generally the State Council website, available online at <http://english.gov.cn/links/statecouncil.htm> (visited May 7, 2006).

2 MOFCOM is a ministry under the State Council. For information regarding the organization and functions of MOFCOM, see generally the MOFCOM website, available online at <http://english.mofcom.gov.cn/> (visited May 7, 2006).
Commission ("NDRC"), and the State Administration for Industry and Commerce ("SAIC") have solicited and studied numerous sets of comments from public and private organizations, companies, and academic experts around the world. The language of the draft AML pending before the National People's Congress ("NPC") has incorporated many of these useful comments.

However, concerns about the current draft remain. Broadly speaking, China's economy presents three principal features raising competition concerns: so-called local blockage or regional monopolies; sectoral monopolies by Chinese firms, including state-owned enterprises ("SOEs"); and a perception of alleged abuses of dominant positions by some foreign multinationals. Earlier drafts of the proposed AML contained a chapter prohibiting so-called administrative monopolies, which are typically large "local champions" protected from competition by local and regional government bodies. The elimination of that chapter from the November 11, 2005 Draft AML ("Current Draft AML" or "November 2005 Draft AML") essentially exempts such anticompetitive conduct from the reach of the Anti-Monopoly Law.

Another recent revision to Article 2 of the Current Draft AML has subordinated the Anti-Monopoly Law to administrative laws and regulations that cover specific industries or sectors of the economy. A related revision to Article 38 of the AML gives sectoral and industrial organs of the State Council the initial authority to investigate and apply special sectoral regulations to alleged anticompetitive conduct in industries and sectors governed by such special laws and regulations. The revision also allows these organs of the State Council to report the outcome of their investigations to the Anti-Monopoly Law.

3 Regarding the general functions and organization of the NDRC, see generally the NDRC website, available online at <http://en.ndrc.gov.cn/> (visited May 7, 2006).

4 SAIC is an organization directly under the State Council. For additional information regarding the functions and organization of SAIC, see generally the SAIC website, available online in Chinese at <http://www.saic.gov.cn> (Chinese) (visited May 7, 2006).

5 See the discussion of regional blockage in Xue Zheng Wang, Challenges/Obstacles Faced by Competition Authorities in Achieving Greater Economic Development through the Promotion of Competition, (2004), available online at <http://www.oecd.org/dataoecd/18/51/23727203.pdf> (visited May 7, 2006). The author elaborates upon the serious problems that arise when local governments block competitive products produced externally from entering their markets, in part because tax revenue collected on products is shared by the local government where production is located. Although the Unfair Competition Law prohibited such local blockage, those provisions have not been effectively enforced. Id at 2–3. See also Wang Shaoguang, The Rise of Regions: Fiscal Reform and the Decline of Central State Capacity in China, in Andrew G. Walder, ed, The Waning of the Communist State: Economic Organs of Political Decline in China and Hungary 109 (Berkeley 1995) ("Because power and resources are dispersed, the exercise of central control now depends to a large extent upon the consent of the sub-national units whose actions are slipping from central control.").

6 An unofficial English translation of the November 2005 Draft AML ("Current Draft AML") is on file with the author.
Enforcement Authority (the “Anti-Monopoly Authority,” “Anti-Monopoly Law Enforcement Authority,” or “Authority”). Only in the event that such organs fail to conduct an investigation may the Authority initiate an investigation. Even under these circumstances, the Authority must consult with the relevant sectoral and industrial organs of the State Council. These changes pose a severe impediment to applying the Anti-Monopoly Law to many significant industries and economic sectors of the Chinese economy.

As a consequence of these revisions, enforcement efforts will, at least initially, likely focus on foreign companies. The insulation of broad swaths of the Chinese economy from equal application of transparent competition rules risks depriving Chinese consumers of the benefits of market competition and may disincentivize continued foreign investment in China.

Certain substantive provisions in the Current Draft AML appear to be inconsistent with international norms of competition law. Foremost among these is a vague article stating that an “abuse” of intellectual property (“IP”) rights resulting in the elimination or restriction of competition is subject to sanctions under the law. The absence of any definition of what conduct may constitute such an abuse of IP rights, and the possible imposition of compulsory licensing as a remedy, have engendered expressions of great concern, especially from foreign high technology companies with substantial operations or sales in China. The May 2005 Draft AML’s elimination of an article establishing compulsory access to network and infrastructure (the so-called “essential facility provision”) may alleviate some of these concerns.

A potentially significant procedural issue may arise from another recently revised provision that places the principal antitrust enforcement entity, the Anti-Monopoly Authority, under the aegis of three government entities: the State Council, MOFCOM, and SAIC. This enforcement approach may cause interagency conflicts while creating inconsistencies and inefficiencies in policy development; administrative practices; and enforcement procedures, standards, and decisions.

7 Drafts leading up to the Current Draft AML usually referred to an “Anti-Monopoly Authority,” which, in context, appeared to be the sole competition policy and enforcement agency under the AML. The Current Draft AML has introduced a new structure, as discussed in Section II.H below, that includes an “Anti-Monopoly Committee” under the State Council. Under this proposed law, the Anti-Monopoly Committee will formulate policies and direct the activities of the newly-named “Anti-Monopoly Law Enforcement Authority.” As the new name indicates, the “Anti-Monopoly Law Enforcement Authority” will be charged with investigating cases involving legal violations. The Authority will also be responsible for proposing and publishing rules and regulations related to the underlying goals of the Anti-Monopoly Law.

8 Current Draft AML, art 48 (cited in note 6).
Notwithstanding these serious grounds for concern, the Current Draft AML contains many features that are basically consistent with international norms, including provisions that create a modern merger review regime, proscribe abuses of a dominant position, and prohibit joint conduct such as price fixing and market allocation. Implementing regulations could elaborate upon the new agency’s substantive interpretation of some of the vague and more sweeping provisions in the draft AML and explain the agency’s intended procedural approach to enforcement. Under the applicable rules, the proposed draft AML must be submitted to the Standing Committee of the NPC for three readings. As of this writing, the first of these readings is expected to take place in June 2006. Although no precise timetable has been set for subsequent readings (and there is no guarantee of passage during the NPC’s 2006 session), many informed commentators have indicated that the AML will likely be enacted by the end of this session. Other commentators privately express doubts that the law can be enacted within the coming year, in part due to continuing internal disputes about whether the AML should address regional blockage and sectoral monopolies.

II. A BRIEF OVERVIEW OF THE CONTEXT AND HISTORY BEHIND THE DRAFTING OF THE ANTI-MONOPOLY LAW

In the early 1960s, Deng Xiaopeng declaimed his quintessential maxim of pragmatic economics: “Whether a cat is black or white makes no difference. As long as it catches mice, it is a good cat.” To address the great famines caused by Mao’s failed “Great Leap Forward” policies, Deng turned collectivist farms over to individual peasants. His proposals calling for free markets for farmers resulted in his denunciation as a “capitalist roader,” and he was placed under house arrest and exiled. After surviving other purges, Deng and his supporters gained power in 1978, two years after Mao’s death. Deng almost immediately abolished rural agricultural communes, allowing peasants to cultivate family plots. Harvests grew rapidly, and by 1984, China had become self-sufficient in food for the first time in modern history. Deng also pursued other policies of economic liberalization, including allowing urban Chinese to open small businesses and

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9 For a general overview of the deliberative and legislative process within the NPC, see the China Internet Information Center, available online at <http://www.china.org.cn/english/features/legislative/75857.htm> (visited May 7, 2006).


purchase commercial goods. He encouraged Chinese youth to study abroad and opened China to foreign investments, albeit with required participation and control by Chinese joint venture partners.12 These policies and many subsequent structural reforms have been pursued in an avowed effort to transform China’s centrally planned economy, dominated by state-owned enterprises, to a system that embodies free-market characteristics but retains certain socialist attributes.13 The reforms were accompanied by legislative enactments. First proposed by Deng Xiaoping in 1978, the Enterprise Act was enacted in 1988, punctuated by monitory assurances that factories would no longer be able to depend on state support and would face bankruptcy if they failed to adapt to market competition.14 The law was described as moving away from direct control of government departments over industries toward a system in which “the state regulates the market, which in turn guides the enterprises,”15 in part by making managers responsible for profits and losses.16 Since the advent of the Enterprise Act, however, it is broadly agreed that entrenched government monopolies and local and regional protectionism have hampered any wholesale transition to market competition.

These steps toward liberalizing the Chinese economy, coupled with investment attracted by the large and growing Chinese middle-class market, have spawned the astonishing economic boon of recent decades. The agricultural segment of the Chinese economy plunged from approximately half of GDP in 1979 (as officially measured by China) to about 15 percent of GDP in 2002.17

12 See generally Richard Evans, Deng Xiaoping and the Making of Modern China (Penguin 1995).
16 Id.
that year, the industrial sector had grown to account for over 51 percent of GDP and services comprised over 30 percent of GDP.\(^{18}\) The SOEs' dominance in the industrial sector waned markedly from 1979 to 2002 with the advent of new ventures in various forms, including township and village enterprises ("TVEs"), purely private entrepreneurship, and foreign investors entering the market through joint ventures or direct means.\(^{19}\)

Efforts to reform the SOEs were sparked by their poor economic performance.\(^{20}\) Losses by SOEs grew tremendously during the late 1980s and early 1990s, and by early 1994, 50.1 percent of SOEs were running at a loss.\(^{21}\) Estimates vary, but the share of industrial output represented by SOEs has remained at approximately one-third throughout the past decade. Although the "1986 Chinese Bankruptcy Law" was enacted in 1988, and was applicable to SOEs, it did not stem the tide of failing SOEs or result in the privatization of any marked portion of the remaining, entrenched SOEs.\(^{22}\) Efforts, begun in 1994, to draft a new bankruptcy law have still not borne fruit.\(^{23}\) In short, despite much exhortation and some structural reforms, SOEs have continued to hamper China's economic growth. A large percentage of these entities have not, in any meaningful sense, been transitioned into participants in the market economy.\(^{24}\)

During this economic transition, the formerly robust relationship between the government and SOEs has weakened, and money-losing SOEs have been bankrupted or privatized. However, many of the largest and most profitable SOEs have been retained in state hands and represent a substantial share of the Chinese economy.\(^{25}\)

Serious discussions about enacting a competition law have taken place since at least the mid-1980s, especially among political leaders and legal scholars who early on viewed a competition law as an essential element for transforming SOEs into private enterprises with the ability to compete effectively. As early as 1988, lawmakers considered incorporating antitrust principles into what would

\(^{18}\) Id.

\(^{19}\) Id.


\(^{21}\) Id.

\(^{22}\) Neal Stevens, Note and Comment, *Confronting the Crisis of Insolvency in China’s State-Owned Enterprises: Can the Proposed Bankruptcy Law Erase the Red Ink?*, 16 Wis Ind L J 551, 551–53 (1998).


become the Anti-Unfair Competition Law of 1993 ("UCL"). Indeed, Articles 6 and 7 of the UCL expressly prohibit public and private monopolists from "forcing" purchases of commodities or "prohibiting competition from other enterprises." Article 11 prohibits sales below cost with the purpose of driving competitors out of business (subject to certain exceptions). Article 12 prohibits tying. Collusion in bidding is forbidden by Article 15. Nevertheless, as enacted and enforced, the UCL was essentially limited to the protection of trademarks and "passing off" offenses, primarily because counterfeit goods were seen as the most pressing issue prompting repeated complaints from various countries, including the US. Efforts to include any "core" antitrust content in the statute were considered unnecessary and ultimately abandoned, at least in part because of disagreements over which agency or agencies would implement and enforce such laws.

The Company Law, enacted in 1993 and made effective in 1994, sought to establish and harness property rights in order to induce enterprises to compete more effectively and efficiently, with an ultimate goal of fostering a competitive market structure. Work toward a comprehensive antitrust law began in earnest in 1993, when China established a group comprised of officials from SAIC and the State Economic and Trade Commission ("SETC") to study the anti-monopoly laws of other jurisdictions and begin work on a draft Anti-Monopoly Law of China. From the outset, the working group received comments and support from both antitrust agencies in major jurisdictions—including the US, Germany, Japan, Australia, and South Korea—and international organizations like the Organization for Economic Co-operation and Development ("OECD"), the Asia-Pacific Economic Cooperation ("APEC"), the United Nations

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27 See generally Paul B. Birden, Jr., Trademark Protection in China: Trends and Directions, 18 Loyola LA Intl & Comp L J 431, 447-49 (1996); Derek Devgun, Crossborder Joint Ventures: A Survey of International Antitrust Considerations, 21 Wm Mitchell L Rev 681, 688-90 (1996) (stating that the Anti-Unfair Competition Law was passed "[i]n response to a US threat to impose trade sanctions on China because of its failure to protect US investors' intelectual property rights").
28 Bei Hu, China Unveils Competition Rules; Observers Fear Political Resistance May Delay Implementation of the Country's First Antitrust Law, South China Morning Post 1 (July 2, 2003); Youngjin Jung and Qian Hao, The New Economic Constitution in China: A Third Way for Competition Regimes, 24 Nw J Intl L & Bus 107, 112-13 (2003) (noting "intense opposition" to inclusion of anti-monopoly regulations and arguments by some that such a law during the transition to a market economy would be "anachronistic").
29 See Monfort, 22 Okla City U L Rev at 1095 (cited in note 14).
Conference on Trade and Development ("UNCTAD"), and the World Bank.  

Reports of cartel activity within numerous industrial sectors in the late 1990s broadened the perceived need for antitrust legislation.  

In 1997, China enacted its Price Law, which became effective in 1998 and sought to establish a new pricing system "compatible with the requirements of a socialist market economy." While the law technically outlaws price-fixing and states that businesses may set their prices, in practice it provides for price controls and direction by local agencies empowered to enforce the law to serve goals other than ensuring free competition. While the Price Law was being enacted, the draft Anti-Monopoly Law was being "shelved" by the central government because of fears that it would impede the growth of SOEs, which are seen as the "key engines of economic development."  

China's accession to the World Trade Organization ("WTO") on November 11, 2002 raised Chinese concerns that job losses would result from the "inevitable demise of unproductive state-owned industries," but the accession also fostered a belief, within and outside China, that such disruptions would be ameliorated by the benefits of market liberalization and free competition. Furthermore, China's accession to the WTO did spark concerns among foreigners who felt that China would face serious difficulties in complying with the WTO's requirements of transparency and non-discrimination. In response, the NPC Standing Committee stated that China

32 See China—Antitrust Law to Curb Cartel Collusion, China Daily (Oct 5, 1998) (reporting that Professor Sheng Jiemen of Beijing University was “concerned about spreading abuse of market power via... cartel actions [in five industrial sectors that had engaged in cartel actions to fix prices, with other sectors expected to follow suit]”); Chang Weimin, China: Antitrust Rules Planned, China Daily 5 (Aug 9, 1999), quoting Professor Wu Hanhong of Renmin University as saying that he believed the “government ha[d] decided to step in because cartels, backed by industrial associations, have already failed to solv[e] pricing problems.”
34 Action Urged on Antitrust Law, China Daily (Sept 1, 1998).
36 Lindsay Wilson, Note, Investors Beware: The WTO Will Not Cure All Ills with China, 2003 Colum Bus L Rev 1007, 1020 (“Ambiguity, conflicts and uneven enforcement of legislation all create pitfalls for foreign investors that are not addressed by China’s accession to the World Trade Organization.” Furthermore, “[l]egislation governing antitrust and anti-subsidy issues does not exist.”). See also Stanley B. Lubman, Bird in a Cage: Legal Reform in China after Mao 315 (Stanford 1999) (“The operation of Chinese legal institutions... calls into question China's ability to meet the GATT requirement of transparency.”).
would draft an antitrust law as part of its preparation for entry into the WTO.37 Government officials highlighted the need to address China’s administrative monopolies and private restraints.38 However, since China’s accession, internal support for liberalization and legal reform have been tempered by the prospect of consequential bankruptcies, job losses, and social unrest.39 Nevertheless, the persistent pressure from other WTO members has impelled the Chinese government to take deliberate action toward enacting legislation, including antitrust legislation, that is seen as necessary to satisfy WTO norms.40 Other factors, such as a massive influx of foreign investment; the concomitant internationalization of Chinese markets; and the rapidly growing participation of Chinese entities, both state-owned and private, in the market have combined to increase support of, and a broad recognition of the need for, a comprehensive, strongly enforced competition law.

In 2002, the Ministry of Foreign Trade and Economic Cooperation (“MOFTEC”), a predecessor of MOFCOM, promulgated draft rules on the notice and approval process for concentrations involving foreign multinationals.41 These rules were built upon, and to some extent based on, preexisting restrictions on foreign investment, and were criticized for the implication that they would be applied solely to foreign companies.42 In March 2003, the Provisional Merger & Acquisitions Rules were promulgated by MOFCOM and SAIC. In June 2003, the NDRC promulgated the Provisional Rules on the Prohibition of Monopolistic Pricing Behaviors (“Provisional Rules”). The Provisional Rules, which included antitrust provisions purportedly

38 China: Break Down Monopoly for a Fairer Market, China Daily 4 (June 28, 2001) (quoting Wang Qishan, Minister of State Council Office for Economic Restructuring, as stating that “if any sectors or conglomerates operate in a manner which is against competition, they must restructure’’); Mitch Dudek and Alex Wang, China’s Accession to the WTO: Ready and Willing . . . But Able?, China L & Prac 18 (Dec 1, 2001).
39 See Zhu Jianrong, China—10 Years after WTO Entry: Hardships and Dreams to Become a Major Economic Power Go Hand in Hand, 21 Jap Trade & Indust 30 (Jan/Feb 2002).
40 Text of Li Peng’s Work Report to China’s National People’s Congress, BBC Monitoring Intl Rep (Mar 19, 2002); China to Set Up Unified, Fair National Market, AsialInfo Daily China News (Mar 26, 2002) (outlining remarks of Wang Yang, Vice Minister of the State Development Planning Commission (“SDPC”) at the 2002 China Development Forum in Beijing to the effect that new laws, including an antitrust law, consistent with the development of a market economy, would be enacted, while laws in conflict with a market economy would be cancelled or modified); Expert: China Making Rapid Headway on WTO Requirements, Bus Daily Update 19 (Jan 19, 2004) (summarizing remarks by former MOFTEC Vice Minister Tong Zhiguang to the effect that China had repealed 2,300 laws and regulations deemed incompatible with WTO requirements since accession and had implemented or was drafting laws, including an antitrust law, to facilitate the opening of markets).
41 New Anti-Trust Rules, Economist Intelligence Unit (Oct 24, 2002).
42 Id.
banning price-fixing, monopolistic conduct, and predatory pricing,\textsuperscript{43} were heralded by some as a serious move toward the enactment of a comprehensive antitrust law. Others, however, saw the Provisional Rules as an indication that the drafting of such a law was bogged down, resulting in a few elements of the draft law being issued in the form of the Provisional Rules.\textsuperscript{44} Enforcement of the Provisional Rules was ultimately abandoned.\textsuperscript{45}

In 2003, the State Council Legislative Affairs Office ("LAO") undertook review of an October 2002 draft Anti-Monopoly Law\textsuperscript{46} ("October 2002 Draft AML") prepared by the former SETC. The October 2002 Draft AML proscribed collusion among businesses, abuse of market dominance, and excessive concentration.\textsuperscript{47} It also included provisions prohibiting abuses of administrative power by governmental units through so-called administrative monopolies. Chapter Six of that draft law provided for the creation of an Anti-Monopoly Management Body of the State Council, which would be charged with investigation, prosecution, issuance of policies and rules, and resolution of all matters requiring its approval under the law. A later draft allocated authority for enforcement of the law among three agencies: MOFCOM (for merger review and administrative monopolies), SAIC (for "monopoly agreements" and abuses of dominant position), and the NDRC (for price collusion and bid rigging). Foreigners expressed concern about possible foreign-focused enforcement of provisions in these early AML drafts that were partially based on certain foreign-only provisions in the Provisional Rules.\textsuperscript{48} LAO, MOFCOM, and SAIC subsequently solicited the views of foreign governments and non-governmental organizations ("NGOs") regarding the revised September 2003 Draft AML.\textsuperscript{49} That draft law was also the topic of a two-day conference hosted

\textsuperscript{43} For a discussion of principal provisions of the Provisional Rules and their relationship to the proposed Anti-Monopoly Law, see Yee Wah Chin, \textit{Antitrust Considerations in China Mergers} (2003) (on file with author).

\textsuperscript{44} Hu, \textit{China Unveils Competition Rules}, South China Morning Post at 1 (cited in note 28).

\textsuperscript{45} See Shu-Ching Jean Chen, \textit{China Quietly Scraps M&A Review}, Daily Deal (July 15, 2003) (quoting MOFCOM official Zheng Zhao as saying that MOFCOM would "simply not enforce an antitrust review when approving M&A transactions.").


\textsuperscript{47} An unofficial English translation of the October 2002 Draft AML is on file with the author.


\textsuperscript{49} An unofficial English translation of this draft is on file with the author. Regarding the September 2003 Draft AML, see generally \textit{Competition Laws Outside the United States}, in \textit{Antitrust Law} 5 (ABA
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by MOFCOM outside Beijing in October 2003. Leading Chinese academics and a few practitioners from Japan, Germany, and the US attended the conference.\(^5^0\)

A February 2004 draft of the law ("February 2004 Draft AML") called for a "competent Anti-Monopoly Authority under the Ministry of Commerce," a concept that was retained in the July 2004 draft ("July 2004 Draft AML") promulgated by MOFCOM in March 2004 (despite the July date borne by the publicly released version) and listed on the legislative agenda of the Tenth National People's Congress, whose session ends in 2008.\(^5^1\) Concern about law enforcement centered on foreign firms was heightened in May 2004 with the release of the "SAIC Report," a paper prepared by the Fair Trade Bureau of SAIC that identified alleged abuses of dominant positions by certain foreign firms, including Microsoft, Kodak, and TetraPak\(^5^2\)—accusations denied by the named firms.\(^5^3\) SAIC's support of limiting the scope of enforcement of the new

\[\text{1st Supp 2005) EU Official Says China Has Made 'Important Steps' Forward on Competition Policy, BBC Monitoring Intl Rep (Nov 24, 2003) (reporting that European Union ("EU") Commissioner Mario Monti was "impressed by the 'openness and willingness' shown by Chinese officials in cooperation on competition policy" and citing the execution of a memorandum of understanding between the EU and China for establishing a dialogue mechanism on competition policy).}\]

\[\text{The author was a participant in this conference.}\]


\[\text{Wang Xiaoye, Report: Anti-Monopoly Law Vital, China Daily 11 (Aug 20, 2004); Tang Zhengyu, Towards an Anti-Monopoly Law; China Vows to Upgrade Its Competition Safeguards, China L & Prac 1 (July 1, 2004); Dai Yan, Monopoly Law Badly Needed, Report Says, China Daily 1 (May 25, 2004). A copy of an unofficial English translation of the SAIC Report is on file with the author. The concern about selective legal enforcement continues. See, for example, Chris Buckley, China to Consider Introducing Anti-Monopoly Law, Reuters (Dec 28, 2005) (predicting that "it may be foreign multinationals—not China's state conglomerates—that are the initial targets of the law" and quoting Nathan Bush as stating that "[a]lthough the draft Anti-Monopoly Law does not distinguish foreign and domestic firms, its initial targets are likely to be foreign firms with prominent positions in Chinese markets"); Antitrust Distrust, Economist Intelligence Unit (Jan 16, 2006) ("Many foreign companies fear that they may become victims of China's first law against monopolies.").}\]

\[\text{See, for example, Kodak Denies Monopolistic Accusations, Bus Daily Update 8 (June 8, 2004). Professor Sheng Jiemen of Peking University Law School, Director of the Economic Law Institute of Peking University and an advisor on the drafting of the Anti-Monopoly Law, states, in a paper entitled How Does the Chinese Government Regulate Foreign Investors' M&A of Domestic Enterprises? (on file with author), that the reports are "merely a legal analysis of the monopolization trend and the unfair competition acts carried out by some multinational corporations and some industries, aiming at arousing the attention of the Chinese government." Professor Sheng goes on to write that "antitrust regulation should be nationality-free" and that "unfair competition acts and abuses of the dominant position conducted by the Chinese}\]

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law to private conduct, and thereby excepting government conduct, was also reflected in a January 2004 submission by a SAIC official to the OECD Global Competition Forum.\textsuperscript{54} Underscoring the continuing disagreement about which agencies would have enforcement and policy-making powers under the law, MOFCOM proceeded to set up its own Anti-Monopoly Office in September 2004.\textsuperscript{55} Activity toward completing a draft of the AML intensified during the latter part of 2004.\textsuperscript{56}

MOFCOM’s Anti-Monopoly Office submitted a “Submission Draft” of the law, bearing the signature of MOFCOM Minister Bo Xilai, to the LAO in February 2004.\textsuperscript{57} The Submission Draft was apparently substantially similar to the draft subsequently released on March 30, 2005 (“March 2005 Draft AML”),\textsuperscript{58} which deleted references to an enforcement authority under MOFCOM and instead called for the creation of an “anti-monopolization authority under the State Council.” In April 2005, the State Council released a draft law (“April 2005 Draft AML”) for comments. The April 2005 Draft AML provided for the establishment of an “Anti-Monopoly Authority” under the State Council, and enterprises should also be subject to legal regulation.” He notes that the report “is only an analysis of a social economic phenomenon, which does not mean that [it is] a ‘killer of multinational corporations,’ nor does it show that China’s Antitrust Law is targeted at multinational corporations only.” Id at 5.

\textsuperscript{54} Wang, Challenges/Obstacles Faced by Competition Authorities at 2 (cited in note 5) (asserting that “[a]ntitrust law is supposed to be against private anticompetitive conduct and is not supposed to be applied to markets that are controlled or regulated by the government”).

\textsuperscript{55} Yan Yang, Ministry Sets up Anti-Monopoly Office, China Daily 9 (Sept 17, 2004). See also MOFCOM Press Release (Sept 17, 2004), available online in Chinese at <http://tfs.mofcom.gov.cn/aarticle/dzgg/f/200411/20041100306394.html> (visited May 7, 2006) (stating that “[t]he Antimonopoly Office, a non standing organization at present, will perform its function through the Department of Treaty and Law. The main function and duty of Anti-Monopoly Office involves international exchange and cooperation on competition policy, legislation concerning antimonopoly law, investigation of antimonopoly law violations. The goal of the antimonopoly office is to promote the establishment of a unified, open, competitive and orderly national market and to protect the consumer interests by prohibiting monopolistic behaviors and maintaining fair competition.”).

\textsuperscript{56} See Dai Yan, Making of Anti-Trust Law is Speeded Up, Fin Times 28 (Oct 28, 2004), quoting Shang Ming, Director-General of the Department of Treaty and Law of MOFCOM, as saying that China would accelerate the drafting of the law “to guarantee a fair and orderly market” and that “[a]dministrative monopolies are a problem that more attention should be paid to in the antitrust law.”

\textsuperscript{57} MOC Finishes Draft Antitrust Law, Comtex News Net (Nov 12, 2004), quoting Shang Ming, Director-General of the Department of Treaty and Law of MOFCOM. Regarding the drafting and sources of inspiration for the 2004 drafts of the AML, see generally Mark Williams, Competition Policy and Law in China, Hong Kong and Taiwan (Cambridge 2005).

\textsuperscript{58} An unofficial English translation of the March 2005 Draft AML is on file with the author.
The Authority was granted broad powers to implement and enforce the law. This draft AML was the subject of the International Seminar on Anti-Monopoly Legislation, which was held in Beijing in May 2005 and hosted by the LAO. Participants included leading academics and officials from antitrust agencies in the US, the European Community ("EC"), Germany, Japan, Korea, and Russia as well as representatives of the ABA, the International Bar Association, and NGOs like UNCTAD and the OECD. Conference participants discussed the allocation of certain policy-making, implementation, and enforcement powers among the three host agencies, which would be overseen and directed by the State Council. Conference attendees also offered substantive critiques of the draft and suggested proposals for changes to the draft to bring it into closer conformity with international norms.

A revision dated July 27, 2005, which was regarded by some Chinese officials as an unofficial version of the draft AML, subsequently came to light.

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59 For a general overview of principal provisions of this draft, see H. Stephen Harris, Jr. and Kathy Lijun Yang, China: Latest Developments in Anti-Monopoly Legislation, 19 Antitrust 89 (2005).


61 China has thereafter fostered its outreach efforts by establishing cooperative links with foreign antitrust authorities. See Russia, China Sign Cooperation Accords, BBC Worldwide Monitoring (Nov 3, 2005) (reporting that China signed a "memorandum on mutual understanding on implementing the intergovernmental agreement on cooperation in preventing unfair competition and implementing antimonopoly policy for 2006 and 2007" in November 2005).

62 See, for example, remarks given by participants at the International Seminar on Anti-Monopoly Legislation (May 23–24, 2005): Wang Xiaoye, Comments on Latest Draft of Chinese Antitrust Law (May 24, 2005); William Blumenthal, Presentation to State Council Legislative Affairs Office Regarding the Anti-Monopoly Law of the People's Republic of China (May 24, 2005). See also presentations submitted in writing on behalf of the US Department of Justice ("DOJ") Antitrust Division entitled Presentation Concerning Monopoly Agreements (Concerted Practices) (May 23–24, 2005); Presentation Concerning Investigation Procedures and Remedies (May 23–24, 2005); Presentation Concerning the Abuse of Market Dominant Position (May 23–24, 2005). Copies of these presentations are on file with the author.
A conference of Chinese scholars, officials, and counsels of multinational corporations was held in Beijing on July 30, 2005. During that conference, representatives of multinational corporations emphasized their concerns about the draft’s compulsory access provision and its clause prohibiting undefined “abuses” of IP rights. They also expressed general concerns prompted by the American Bar Association.

The July 27, 2005 Draft AML continued to provide for an Anti-Monopoly Authority under the State Council, as do the three most recent draft AMLs known as of this writing—the September 14, 2005 draft AML (“September 14, 2005 Draft AML”), the September 30, 2005 draft AML (“September 30, 2005 Draft AML”), and the November 2005 Draft AML. The most recent draft AML has been submitted to the Standing Committee of the NPC, which will consider enactment of the law, perhaps with revisions by that committee, during 2006. Chinese officials have continued to reassure foreign companies that the new law will be applied in a manner consistent with the antitrust laws of other major jurisdictions, although only fair and non-discriminatory enforcement in practice is likely to assuage many fearful multinational corporations.

Open communication with the Chinese officials pursuing passage of the law continued in November 2005 with an Industry Panel Discussion on China’s Draft Anti-Monopoly Law in New York, which was co-sponsored by the US Council for International Business, the US–China Business Council, and the US Chamber of Commerce. Meeting attendees included representatives from the

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63 An unofficial English translation of the July 2005 Draft AML is on file with the author. For a discussion of revisions in the July 2005 Draft AML that may reflect consideration of the ABA 2005 Comments, see John Yong Ren and Yang Ning, The Imminent Release of China’s Anti-Monopoly Law—What to Expect, China L & Prac 1 (Sept 1, 2005).


65 Unofficial English translations of the September 14, 2005 Draft AML and the September 30, 2005 Draft AML are on file with the author.

66 China to Consider Introducing Anti-Monopoly Law, Reuters (Dec 28, 2005).

67 See, for example, Mure Dickie, Beijing’s Antitrust Law Moves Closer to Fruition, Fin Times Asia-Pacific 5 (Jan 21, 2006) (stating that “[s]ome Beijing officials are keen to rein in international companies, such as Microsoft, that they see as exploiting market monopolies in China,” but quoting Zhang Qiong, Vice-Minister of the LAO, as saying that “[f]oreign companies do not need to worry about this” and that “[t]he basic content and principles for application of [China’s] anti-monopoly law will be consistent with those of other major countries”).

NPC, MOFCOM, and the State Intellectual Property Office ("SIPO"). US antitrust practitioners and in-house counsel also participated in the meeting.

III. THE PENDING DRAFT ANTI-MONOPOLY LAW: BACKGROUND AND SUBSTANTIVE PROVISIONS

As of this writing, the most current draft available to the author is the November 11, 2005 Draft AML, whose date represents the third anniversary of China’s accession to the WTO. The AML drafters have acted laudably in requesting comments from foreign governments and NGOs, and have seriously considered these suggestions in revising the draft AML. The AML drafters have also participated in conferences with foreign governments and NGOs. However, the drafting process has not been entirely transparent, and it is important to note that further revisions are possible during the NPC Standing Committee’s review of the legislation, and, potentially, the NPC’s own amendment procedures. This Article will seek to highlight aspects of the Current Draft AML that have generated the most comment and concern among officials, scholars, commentators, and practitioners—Chinese and non-Chinese alike. Many of the Current Draft AML’s provisions are, at least if read literally, consistent with international competition law norms. These require little comment beyond noting that fact, except where serious concerns persist about the way in which such provisions may be implemented in a non-normative or discriminatory manner. Thus, this Article does not attempt to provide a thorough comparative law exegesis of each provision in the Current Draft AML. Instead, it seeks to provide comparisons that may facilitate understanding of the drafters’ apparent intent or may point to potential inconsistencies between the Current Draft AML and the approaches of other major competition law regimes.

A. THE OBJECTIVES OF THE LAW

Article 1 of the Current Draft AML provides: "This law is enacted for the purposes of prohibiting monopolistic conduct, protecting and promoting the market competition, safeguarding the legitimate rights and interests of

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69 Unless indicated otherwise, all subsequent citations to the Draft AML in this Article will refer to the November 11, 2005 Draft AML.

consumers and public interests, and ensuring the healthy development of the socialist market economy.”

The October 2002 Draft AML prohibited “monopoly,” apparently condemning a status of having achieved dominance in a market, even if through lawful competition. Comments at conferences, and in written submissions, noted that this language could support attacks on monopolists on the basis of their status rather than their conduct,71 despite recognition in other major jurisdictions that “[t]he mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system.”72 The April 8, 2005 Draft AML and all subsequent drafts have clearly prohibited “monopolistic conduct”73 rather than monopoly itself.

“Monopolistic Conduct” is defined in Article 3 of the Current Draft AML as follows:

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

(i) actions among undertakings to come to agreements, decisions, or other consensus that eliminate or restrict competition (hereinafter “Monopoly Agreements”);

(ii) abuse of dominant market positions by undertakings;

(iii) concentration of undertakings that are likely to have the effects of eliminating or restricting competition.

Concern had also been expressed about the October 2002 Draft AML’s use of the phrase “fair competition.” Commentators wondered whether the term

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71 See, for example, ABA 2003 Comments at 7 (cited in note 46). The October 2002 Draft AML did list types of conduct under Article 3 defining “monopoly,” but the inclusion of “excessive concentration of enterprises” as one category of prohibited conduct left some doubt as to whether a status-based attack on a dominant firm could be based on this definition (despite the drafters’ likely intent that this language was to refer to mergers and acquisitions subject to review under Chapter 4 of that draft).


73 The breadth of the meaning of “monopolistic conduct” in recent drafts, including Article 3 of the Current Draft AML, indicates that the term is somewhat of a misnomer. The draft AMls have used the phrase “monopolistic conduct” to describe not only conduct by firms with dominant market shares (or which threaten to gain a dominant market share), but also various types of well-recognized anticompetitive conduct of firms of any size, such as price-fixing agreements between competitors.
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was intended to mean something short of "free competition" or whether it referred to consumer protection concerns, which would correspond with the meaning given to the phrase in the context of trademark law. During conferences, Chinese officials from the State Council, MOFCOM, and SAIC sought to allay apprehensions by giving assurances that there was no intent that "fair competition" meant anything other than market competition. Indeed, in the Current Draft AML, Article 1 provides for safeguarding "the order of market competition" in lieu of fair competition.

Article 1 of the Current Draft AML retains the language and meaning of the October 2002 Draft AML in describing the purpose of the law as "safeguarding the legitimate rights and interests of consumers and public interests" and "ensuring the healthy development of the socialist market economy." The amendments to the Chinese Constitution that incorporated the concept of a "socialist market economy" did not offer a precise definition of that term. However, it appears to embrace the idea of using market competition to enhance the efficient allocation of resources while restricting, or at least transitioning gradually towards, private ownership of property. Although virtually every Chinese law includes this language, the interpretation and enforcement of such laws is rarely grounded in this concept. Nevertheless, the continued inclusion of the term in the Current Draft AML remains worrisome to some because its meaning is unknown and so flexible as to present agencies and courts with a tool for applying the law in ways inconsistent with competition law norms. Several commentators viewed the October 2002 Draft AML as providing a basis for unsuccessful competitors to attempt to seek shelter from

74 On this general distinction, see Allen R. Kamp, Legal Development, Between-the-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context, 59 Albany L Rev 325, 368 n 220 (1995). See also Rudolph J. Peritz, The "Rule of Reason" in Antitrust Law: Property Logic in Restraint of Competition, 40 Hastings L J 285, 293–94 (1989) (describing congressional debates over the pending Sherman Act regarding the distinction between industrial liberty and unrestrained competition as well as the view that "free and fair competition" was "seen as the victim of both unrestricted competition and unrestricted combination"); Spencer Weber Waller, Market Talk: Competition Policy in America, 22 L & Soc Inquiry 435, 438–39 (1997) (noting that the meanings of "free competition" and "fair competition" have not remained stable over time, and that, at one time, fair competition included a "right to combine to avoid the excesses of competition to the death"). See also N Pac Railway v United States, 356 US 1, 4 (1958), where the Court stated that the Sherman Act:

rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.

75 See text accompanying note 13.

76 See generally Jung and Hao, 24 Nw J Intl L & Bus at 125 (cited in note 28).
competition and stressed the need to avoid the use of competition law to protect competitors, as opposed to the competitive process, consumer welfare, and efficiency. However, the language referring to “the legal rights of business operators” was deleted from Article 1 of the February 2004 Draft AML and remains absent from Article 1 of the Current Draft AML, fostering concerns about anti-competitive uses of the law.

B. EXTRATERRITORIAL REACH OF THE LAW

Article 2 of the Current Draft AML provides that:
This Law is applicable to monopolistic conduct in economic activities within the territory of the People’s Republic of China.

This Law is applicable to monopolistic conduct outside the People’s Republic of China that have eliminative or restrictive effects on competition in the domestic market of the People’s Republic of China.

As for monopolistic conduct prohibited by this Law, this Law does not apply where laws or administrative regulations of relevant industries or sectors provide provisions; however, this Law applies when activities of undertakings fall outside the provisions of the laws or administrative regulations of relevant industries or sectors, eliminating or restricting competition.

Attempts to define the proper limits of extraterritorial jurisdiction have engendered limitless debate. In the United States, the Foreign Trade Antitrust Improvements Act (“FTAIA”) limits the jurisdictional reach of the Sherman Act to conduct that has, in part, a “direct, substantial and reasonably foreseeable effect” on US commerce. Both Articles 81 and 82 of the Treaty Establishing the European Community (“EC Treaty”) expressly require an effect upon trade between member states before either is applicable. The European Court of First Instance has also adopted language embracing the effects doctrine, including a requirement of a foreseeable, immediate, and substantial effect in the

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77 See 2003 ABA Comments at 2, 40–41 (noting that competition laws should follow US antitrust law in focusing on protecting the competitive process and not individual market participants) (cited in note 46). See also Brown Shoe Co, Inc v United States, 370 US 294, 320 (1962) (noting that the antitrust laws were enacted for “the protection of competition, not competitors”).
78 See Reiter v Sonotone Corp, 442 US 330, 343 (1979) (stating that the Sherman Act was designed as a “consumer welfare prescription”).
European Community.\textsuperscript{82} Several commentators familiar with China's draft AMLs have emphasized the need for the inclusion of, at a minimum, a substantiality requirement to ensure that Article 2 could not be used to support extraterritorial application of the law in cases of insubstantial effects on the Chinese domestic market.\textsuperscript{83} However, Article 2 of the Current Draft AML does not require that the anticompetitive effect be direct, substantial, or foreseeable, causing observers to worry about the law's possible application to extraterritorial conduct with indirect, insubstantial, or unforeseeable effects in China.

The final paragraph of Article 2 of the Current Draft AML recognizes the potential inapplicability of the law to regulated sectors of the economy, at least to the extent that the challenged conduct falls within the scope of specific sectoral laws and regulations. Together with Article 38, Article 2 seems to provide the Anti-Monopoly Authority and sectoral regulatory bodies with a type of concurrent jurisdiction. The Anti-Monopoly Authority will likely defer to the sectoral agency unless that body fails to act. Until these provisions are implemented, one cannot know if they will operate to create a de facto sectoral exemption for at least some industries and economic sectors. However, these recent revisions seem to adumbrate an enhancement of the power of sectoral regulators and a diminution of the reach of the Anti-Monopoly Law within certain sectors.

Chapter 5 of previous draft AMLs, which addressed administrative monopolies, seemingly provided Chinese antitrust authorities with a means of resisting demands to carve out regionally and locally-controlled SOEs from the Anti-Monopoly Law's, and thus market economy's, purview. However, the July 2005 Draft AML deleted key provisions of that Chapter, although it retained other aspects of Chapter 5 that prohibited the abuse of administrative powers through discriminatory treatment, restriction of market access, and compelled restrictions on competition. The Current Draft AML has entirely eliminated the former Chapter 5, rekindling concerns that the AML will focus, at least initially, on regulating foreign enterprises and protecting SOEs.\textsuperscript{84} The possibility of enforcement efforts centered upon limiting the access of foreign companies to the Chinese market, thereby further sheltering SOEs, seemed underscored by

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See, for example, ABA 2005 Comments at 2 (suggesting that the "geographically expansive enforcement permitted by the proposed law [referring to the April 8, 2005 Draft] is likely to discourage foreign companies from trading with, or investing in, China" and proposing inclusion of a substantiality standard for the required effect on competition in China) (cited in note 60).

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See, for example, Adam Cohen, Experts Concerned over China's New Antitrust Law, Dow Jones Chin Fin Wire (Jan 30, 2006).
the comments of one Chinese official during the recent National People’s Congress and Chinese People’s Political Consultative Conference. Some Chinese officials have commented that a separate law dealing with administrative monopolies may be enacted in the future, although others doubt the feasibility of such a development, particularly in light of the seemingly peremptory, wholesale deletion of Chapter 5 from the most recent draft AML. In any event, it appears that the ambitious goal of directly tackling anticompetitive SOE conduct has been at least temporarily abandoned.

C. MARKET DEFINITION

Article 4 of the October 2002 Draft AML provided that “[a] ‘specific market’ in this law means the territorial area affected during a limited time period by the sales of particular products by business operators.” The proper definition of a relevant geographic market and a relevant product market are, of course, central to modern competition law analysis. The October 2002 Draft AML did not appear to embrace accepted concepts central to product market definition, including substitutability and elasticity of demand. A similar formulation persisted through the April 8, 2005 Draft AML, and this was one of the subjects discussed at length during the International Seminar on Anti-Monopoly Legislation. Commentators from various jurisdictions emphasized the importance of adopting more rigorous definitions of a relevant geographic market and a relevant product market, and they recommended definitions that would be consistent with the economic analyses used by major competition law jurisdictions. The Current Draft AML contains a much-improved provision in Article 4: “A ‘relevant market’ in this Law refers to the scope or area within


If China lets multinationals’ malicious mergers and acquisitions go ahead freely, proprietary brands and innovation ability of China's national industry would disappear gradually and core parts, key technologies and high added value of China's leading enterprises might be completely controlled by multinationals. As a result, China can only act as a worker in the overall structure of division of labor in the globe.

86 Professor Sheng Jiemen, Address at the 2005 Annual Meeting of the ABA (Aug 2005).


88 Copies of materials distributed during this seminar are on file with the author.
which the undertakings compete against each other during a certain period of
time for relevant products and services.”

This definition of relevant product market has deleted the September 30,
2005 Draft AML’s language incorporating the concept of mutual substitutability
in product market definition. The Current Draft AML has also excised the
September 30, 2005 Draft AML sentence defining a relevant geographic market
as one in which “undertakings supply products and consumers buy products and
within which the conditions of competition are basically homogeneous.” The
prior draft’s use of the term “basically homogeneous” in the definition of
relevant geographic market apparently derived from the European
Commission’s competition law. The term’s absence from the Current Draft
AML may indicate that implementing regulations or guidelines will provide
additional guidance about market definition, perhaps tracking the analysis
contained in US agencies’ Horizontal Merger Guidelines.

D. PROHIBITION OF CONCERTED ACTION

The provision roughly analogous to Section 1 of the Sherman Act and
Article 82 of the EC Treaty is found in Chapter II of the Current Draft AML (“Prohibition of Monopoly Agreements”), which comprises Articles 8 through
11. Early draft AMLs, such as the October 2002 Draft AML, did not
differentiate between horizontal agreements, which are proscribed by all modern competition laws, and vertical agreements, which, with the exception
of resale price maintenance, are generally accorded more lenient treatment in
light of economic thinking that such agreements are often procompetitive. This
was another subject of considerable discussion at the International Seminar on
Anti-Monopoly Legislation. Subsequent draft AMLs, including the Current
Draft AML, recognize this important distinction. Article 8 states, in relevant
part, that “[a]ny Monopoly Agreements among competing undertakings shall be

Valentine Korah, An Introductory Guide to EC Competition Law and Practice § 4.3.1.2 (Hart 8th ed
2004).
90 US Department of Justice and US Federal Trade Commission, Horizontal Merger Guidelines (revised
Apr 8, 1997), available online at <http://www.usdoj.gov/atr/public/guidelines/hmg.htm>
(visited May 7, 2006).
92 EC Treaty, art 82 (cited in note 72).
93 Defined as agreements between competitors at the same level of production.
94 Defined as agreements between economic actors at different levels of a supply chain, such as an
agreement between a manufacturer and a wholesaler or a wholesaler and a retailer.
95 See generally Glen O. Robinson, Explaining Vertical Agreements: The Colgate Puzzle and Antitrust
prohibited.” The provision goes on to provide a non-exhaustive list of prohibited horizontal agreements, including: agreements that “fix, maintain or change prices of products”; “limit the production volume or sales volume of products”; “segment the sales markets or the raw materials purchasing markets”; “limit the purchase of new technology, new facilities or limit the development of new products, new technology”; or “jointly boycott transactions.”

Article 10 is a separate prohibition on rigging bids to eliminate or restrict competition. Article 10 is not referenced in Article 11, which may provide exemptions for certain agreements otherwise prohibited under Articles 8 and 9, thus apparently rendering bid-rigging the only type of anticompetitive agreement categorically excluded from qualifying for an exemption, unlike other forms of “hard core” price-fixing agreements.

The vertical agreements provision, Article 9 of the Current Draft AML, prohibits resale price maintenance and the imposition of “other trading conditions that materially eliminate [or] restrict competition.” While this latter clause appears rather open-ended, it is appropriately limited—and hence the risk of its potential misuse diminished—by the express requirement for proof of a material adverse effect on competition.

The overall structure of the Current Draft AML’s provisions relating to agreements appears to derive from the original structure of the EC’s competition laws, which prohibited broad categories of conduct while providing for “voluntary notification” to a central competition law agency that could grant exemptions from those proscriptions. This approach contrasts starkly with US antitrust law, under which competitive activity, with the exception of a few narrow “per se” offenses, is lawful unless it is shown to unreasonably restrict competition in the specific relevant markets. The Current Draft AML adheres to the EC’s initial approach despite recent EC reforms. The requirements for an exemption from Article 8 or 9 are set forth in Article 11, which provides as follows:

96 See also Japan Fair Trade Commission, Designation of Unfair Trade Practices § 13 (June 18, 1982) (prohibiting “dealing with the other party on conditions which unjustly restrict any transaction between the said party and his other transacting party or other business activities of the said party”).
97 EC Treaty, arts 81, 82 (cited in note 72).
98 This point was made in the ABA 2003 Comments at 3 (cited in note 46).
99 Regarding the abolition of such a notification system in the EC, and the devolution of enforcement and exemption authority to include agencies and courts of EC member states (effective May 1, 2004 by virtue of Council Regulation 1/2003, 2003 OJ (L 1) 1), see generally Van Bael and Bellis, Competition Law of the European Community 1–2 (Aspen 4th ed 2005). See also ABA 2003 Comments at 6 (cited in note 46) (noting that “the EC has found that individual exemptions require a tremendous amount of governmental resources to process, while offering little benefit in preventing anticompetitive conduct”).
The Monopoly Agreements among undertakings with the following objectives shall be exempted from application of Article 8 [and] Article 9 of this Law:

(i) to improve technology, research and develop new product;
(ii) to upgrade the product quality, reduce cost, enhance efficiency, and unify the specifications and standards of product;
(iii) to improve operational efficiency and enhance competition capacity of small and medium-sized undertakings;
(iv) to realize the social public interests such as to save energy, protect [the] environment, and contribute for disaster [sic];
(v) to enhance the competitiveness of export products in the global market; and
(vi) during the period of economic depression, to moderate serious decreases in sales volumes or distinct production surpluses.

Undertakings shall prove the following conditions in order to apply the provisions of the preceding paragraph:

(i) the Monopoly Agreements aim for the realization of the objective stated in the preceding paragraph, and are necessary for the realization of the objectives;
(ii) can enable consumers to share fairly the interests derived from it; and
(iii) will not substantially eliminate competition in the relevant market.

The subsections of Article 11 that address standard-setting and potential innovative benefits from certain legitimate joint ventures are generally consistent with US agencies' *Antitrust Guidelines for Collaborations among Competitors* and Article 81(3)(b) of the EC Treaty. The third subsection of Article 11 supports

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100 This requirement seems to reflect the language in Article 81(3) of the EC Treaty disallowing exemptions for concerted conduct that "impose[s] on [the parties undertaking the concerted conduct] restrictions which are not indispensable to the attainment of [an improvement in the production of goods or promotion of technical or economic progress]." EC Treaty, art 81(3) (cited in note 72).

101 "Interests" may be a more appropriate translation than "benefits."

102 This language appears to derive from the provision in Article 81(3) of the EC Treaty that requires, as one of the requisites for an individual exemption from Article 81, that the concerted conduct "allow[ ] consumers a fair share of the resulting benefit." EC Treaty, art 81(3) (cited in note 72).

103 This wording is apparently based on the language in Article 81(3) of the EC Treaty requiring that a practice, in order to qualify for a possible exemption, not "afford [the parties to the concerted action] the possibility of eliminating competition in respect of a substantial part of the products in question." EC Treaty, art 81(3) (cited in note 72).

exemptions where joint conduct will assist the competitiveness of small- and medium-sized entities. Although other jurisdictions acknowledge the importance of small- and medium-sized enterprises to competition, they do not generally allow size alone to constitute a basis for an exemption for conduct otherwise in violation of the law or harmful to competition. The unqualified language of Article 11(iii) in the Current Draft AML poses a risk of protecting small enterprises from competition solely by virtue of their size. Consumer welfare is often best served by a few large competing enterprises because such companies can, in many circumstances, operate more efficiently than their small counterparts. As such, Article 11(iii)’s basis for an exemption seems inconsistent with international competition law norms. Perhaps the express inclusion of a rule of reason weighing anticompetitive harm against procompetitive benefit, or a safe harbor provision taking into account the maximum combined market share of the small enterprises concerned, would alleviate this problem.

The fourth and sixth grounds for exemptions, Article 11 subparts (iv) and (vi), contain language that is either unrelated to a consumer welfare rationale or is too vague to provide useful guidance to any agency or court. “Saving energy” should either be dealt with through the market mechanism, thereby ensuring that the most efficient producer will, ceteris paribus, be the most efficient user of energy and hence the winner in price competition, or by legislation distinct from the Anti-Monopoly Law. In addition, the Current Draft AML’s provisions addressing the economic effects of a “disaster,” economic depressions, and sharp decreases in sales or product surpluses should be expunged since such grounds for an exemption would be insufficient under US antitrust law in the absence of special legislation. Today, EC competition law is generally in

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105 See EC Treaty, art 130 (cited in note 72) (expressing support for the creation of an environment hospitable to small- and medium-sized business but noting that the EC Treaty “shall not provide a basis for the introduction by the Community of any measure which could lead to a distortion of competition”). While Section 1.1 of Canada’s Competition Act, RSC 1985 c 19 (2d Supp), provides that one of the Act’s purposes is “to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy,” the Canadian Competition Tribunal has interpreted that provision not as a measure affording special protection to small businesses, but as a recognition of the fact that such enterprises will have meaningful opportunities to compete as a consequence of the competition fostered generally by enforcement of the Act. Commissioner of Competition v Superior Propane Inc, 2000 Comp Trib 15 ¶ 409 (Aug 30, 2000).

106 See ABA 2003 Comments at 9 (cited in note 46) (asserting that because such considerations are not generally regarded as appropriate purposes of competition law and “do not lend themselves to economic analysis,” they are best dealt with through separate legislation).

107 Though the notion of crisis cartels (or any exemption for cartel activity) is antithetical to modern US antitrust law, this was not the case during the 1930s. See Diane P. Wood, 2003 Milton Handler Antitrust Review: The U.S. Antitrust Laws in a Global Context, 2004 Colum Bus L Rev 265, 267 (2004) (“Even the United States . . . flirted with this idea [of justifying cartels in response to an economic
accord with US law involving most instances of overcapacity. Before its recent abolition of the individual notification system, the EC had granted exemptions to a few “crisis cartels” that had demonstrated structural overcapacity or other sector-wide distortions over a sustained period of time. Some commentators have regarded this approach as an aspect of industrial—not competition—policy. The express inclusion of such concepts in the exemption provisions of the Anti-Monopoly Law (particularly the references to a “serious decrease in sales volumes” or a “distinct product surplus”) risks the widespread justification of exemptions not because of a serious nationwide, or at least industry-wide, economic crisis, but because of fluctuations in production and sales that are commonplace in, and indeed part and parcel of, aggressive competition.

Article 12 of the September 30, 2005 Draft AML (“Voluntary Notification”) set forth procedures for seeking an exemption. Under this draft law, the requesting entity would have needed to submit a notification to the Anti-Monopoly Authority, which would then have been required to decide, within thirty days, whether to grant an exemption. If the Anti-Monopoly Authority had failed to render a decision within thirty days, the agreement in question would have remained in effect. This previous draft required any decision prohibiting an agreement to be made in writing, and it gave the Anti-Monopoly Authority the power to place additional restrictions on the implementation of the exempted agreement. Publication of a decision approving an agreement, with or without additional restrictions, was required to have been made “in time.” The Anti-Monopoly Authority was empowered to withdraw an approval on the grounds enumerated in Article 13 of the September 30, 2005 Draft AML, including where: (i) the economic situation has substantially changed; (ii) the original reasons for approval no longer exist; (iii) the undertakings breach the additional conditions imposed upon; or (iv) the original approval was made based on false information provided by the undertakings.

The Current Draft AML has deleted all references to standards or procedures for seeking, granting, or withdrawing an exemption. It is unclear whether such procedures will be provided in subsequent regulations or whether the exemptions described in Article 11 of the Current Draft AML will be “self-executing”—in other words, presumed valid unless and until challenged by the

crisis] during the Great Depression of the 1930s, and the Supreme Court took a surprisingly lenient view of the arrangement before it in Appalachian Coal”).


110 This agency is the central competition law enforcement body created by the AML (under Article 5), and it reports to the State Council. Its procedures and powers are set forth in Chapter 6 and are discussed in detail below in Section II.H.
Authority. To the extent that the Authority may, under the most recent draft AML, consider the factors listed in Article 13 of the September 30, 2005 Draft AML, such factors are worth commenting on.

The second basis for withdrawing approval under the September 30, 2005 Draft AML generally paralleled EC competition law, under which an exemption applies to an agreement only if the four conditions of EC Treaty Article 81(3) continue to be fulfilled. These conditions are as follows: first, the agreement must contribute to an improvement in the production or distribution of goods or must promote technical or economic progress; second, it must be implemented in a manner that allows consumers a "fair share" of its benefits; third, the agreement cannot impose restrictions that are not necessary to achieve the aforementioned two objectives; and fourth, the agreement cannot contain provisions that may eliminate competition with regard to a substantial part of the products in the relevant market.\footnote{Van Bael and Bellis, \textit{Competition Law of the European Community} at 84–87 (cited in note 99).}

The third and fourth grounds for withdrawing approval under the September 30, 2005 Draft AML were based on the wrongdoing of the entities seeking the exemption, and these grounds thus appeared to be fair and necessary to ensure that the notification process would be used in good faith. The conduct proscribed by the relevant provisions would have constituted grounds for a US agency to seek relief (or sanctions) under a consent decree.

However, the September 30, 2005 Draft AML’s first rationale for withdrawal of an exemption is troubling. To the extent it means that the facts underlying the grant no longer obtain, it seems superfluous, given that this is the precise basis of the second ground. The provision must therefore envision the withdrawal of an approval for changes in circumstances other than those on which the exemption was based. Economic “situations” are, of course, constantly in flux. Absent greater guidance regarding the types of substantial changes sufficient to nullify an exemption, competitors may be hesitant to seek (or rely upon) an exemption. Such uncertainty about the value and duration of an exemption may undermine the intended liberalizing effects of the notification system, assuming that the system will survive (as a future regulation or in some other form) in the final AML.

E. ABUSE OF DOMINANCE

Chapter III ("Prohibitions of Abuse of Dominant Market Position") comprises Articles 12 through 15 of the Current Draft AML and generally tracks the EC competition law formulations for the assessment of unilateral firm conduct and collective dominance. Article 12 prohibits dominant entities from
abusing their market position “to eliminate or restrict competition” and defines a “Dominant Market Position” as referring to “a controlling market position held by one undertaking or several undertakings as a whole which is capable of controlling the price or quantity of products or other trading conditions in the relevant market or restricting or affecting other undertakings in entering into the relevant market.” This formulation appears to roughly parallel concepts in the US antitrust law definition of market power, which is described as “the ability to raise prices above those that would be charged in a competitive market” or “the ability of a single seller to raise price and restrict output, for reduced output is the almost inevitable result of higher prices.”

The European Court of Justice (“ECJ”) has defined a dominant position under the Article 82 of the EC Treaty as “... a position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition of the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers.”

The Current Draft AML deleted the September 30, 2005 Draft AML’s language defining a “dominant market position” as, in part, a market position having the effect of eliminating or restricting competition. The Current Draft AML replaced this language with a requirement that the position restrict or affect “other undertakings in entering into the relevant market.” Under both Section 2 of the Sherman Act and Article 82 of the EC Treaty, many instances of monopolization, attempted monopolization, and abuses of dominance do not involve prevention of entry. Instead, such situations often involve activities that may threaten to (or in fact do) drive an existing competitor from the market. Article 15 of the Current Draft AML lists specific abuses of a dominant position and proscribes conduct that would appear, in context, to constitute more than an abusive entry barrier. Presumably, then, the revised language in Article 12 of the Current Draft AML is not intended to exclude exploitative and discriminatory conduct or exclusionary conduct practiced against existing

112 Article 14 of the October 2002 Draft AML provided that “[a] business operator shall not abuse its dominant marketing position, obstruct the activities of other business operators, eliminate or limit competition.” While this draft did not make the elimination or limitation of competition a requisite element of abuse or “obstruction,” the April 8, 2005 Draft AML rectified the overbreadth problem.


competitors in the market from Chapter III’s scope, assuming that such conduct otherwise fulfilled the requirements contained in that Article.

Article 13 of the Current Draft AML sets forth the following factors to be used in determining dominant market position:

(i) market share of the undertaking and the other undertakings which have a competitive relationship with the undertaking in the relevant market;
(ii) ability of the undertaking to control purchase market or sales market;
(iii) [omitted]117
(iv) financial status and technical conditions of the undertaking;
(v) association condition of the undertaking with other undertakings;
(vi) the difficulty of entering the relevant market by other undertakings;
(vii) the dependent relationship on the undertaking of other undertakings and the extent of it; [and]
(viii) other factors affecting market competition.

All of these factors may bear on the ability to raise prices or restrict output. Under US law, market share is often the “traditional starting point”118 for assessing the existence of market power, and low market shares “virtually preclude a finding of market power, whereas a high market share indicates the possibility that market power exists.”119 However, a high market share alone is not proof of market power. An economic analysis of other competitive factors may demonstrate the absence of market power despite a high market share.120 In short, US antitrust law does not establish presumptions of market power based solely on market share.

EC law recognizes that “the existence of a dominant position may derive from several factors which, taken separately, are not necessarily determinative but among these factors a highly important one is the existence of very large market share.” EC competition law relies more upon market share than its US counterpart, as evidenced by the ECJ’s pronouncement that high shares necessarily provide “that freedom of action which is the special feature of a

117 The original Chinese version and English translation of the Current Draft AML omit subsection (iii) of this Article.
118 ABA Section of Antitrust Law, I Antitrust Law Developments 68 (ABA 5th ed 2002).
119 Id (footnotes omitted). Indeed, proof of a “dominant market share” has been held to be a requirement for the establishment of market power. See Flegel v Christian Hosp, 4 F3d 682, 689 (8th Cir 1993).
120 See, for example, Ball Memorial Hospital v Mutual Hospital Insurance, Inc, 784 F2d 1325, 1336 (7th Cir 1986). See generally ABA Section of Antitrust Law, Market Power Handbook: Competition Law and Economic Foundations (ABA 2005).
121 Hoffman-La Roche, 1979 ECR at 520 (emphasis added).
dominant position.” As a consequence, EC courts and the European Commission have found dominant positions based solely on high market shares. However, this rather peremptory finding is generally regarded as being an appropriate substitute for further economic analysis only in the “most obvious of cases.”

The Current Draft AML expressly presumes dominance based on market shares, taking into account not only the share of the entity accused of the abuse, but the sum of its shares and those of the other market leaders. Article 14 ("Direct Determination of Dominant Market Position") provides as follows:

Undertakings that have any of the following conditions, are directly considered to be holding a dominant market position:

(i) the market share of one undertaking in [a] relevant market accounts for 1/2;

(ii) the joint market share of two undertakings as a whole in [a] relevant market accounts for more than 2/3;

(iii) the joint market share of three undertakings as a whole in [a] relevant market accounts for more than 3/4.

The undertakings which have the conditions stipulated in the preceding Paragraph 2 [(ii)] or Paragraph 3 [(iii)] are not subject to the preceding provisions if they can prove that there is material competition between them.

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122 Id at 521.
123 Id at 526–29 (market shares in excess of 75 percent held to be “so large that they are in themselves evidence of a dominant position” and shares over 84 percent are “so large that they prove the existence of a dominant position”); AKZO Chemie BV v Commission, Case C-62/86, 1991 ECR 1-3359, 3453 (July 3, 1991); Commission Decision 92/163, 1992 OJ (L72) 1, 20–21.
124 Christopher Bellamy and Graham Child, European Community Law of Competition § 9-046 at 707 (Sweet & Maxwell 5th ed 2001):

Except in the most obvious of cases . . . where one of the suppliers had a massive share of a commodity product, the proof of a significant market share is seldom a substitute for a full economic analysis of the issue of dominance. First, even if the market share figures are reliable, maintenance of a significant market share provides little information about the competitive process without an understanding of the reasons for, and the pressures determining, the output and price decisions made by the firms in the market. Secondly, even if the market has been defined correctly, market share figures do not show relative efficiencies and do not necessarily show that similar market shares can be sustained in the future. Thirdly, the decisions that any firm makes may be influenced by potential competitors who have not yet entered the market but who would do so if a profitable opportunity were to arise. By their nature, market share figures cannot measure this potential competition, even though the threat that it presents may be a powerful influence restraining the independence of an allegedly dominant firm. Fourthly, market power on the part of the customers of the undertaking may limit its ability to act independently of their wishes.

125 “Presumption” may be a more accurate translation than “Determination.”
The first subpart establishes a presumption of dominance based on the single firm’s ownership of a 50 percent market share. This figure is strikingly lower than comparable presumptions seen in EC law. Furthermore, unlike EC law, Article 14 of the Current Draft AML seems to preclude consideration of other factors that may explain why a firm legitimately has a substantial market share—including some of the factors referred to in Article 13 of the Current Draft AML. The Current Draft AML provides no guidance about whether the Article 13 factors may or may not be used to rebut a presumption under Article 14. One troubling reading would permit firms to avail themselves of the consideration of such factors only when the firms were found “to be in a dominant position” by virtue of one of the “direct determinations” in Article 14. If this description captures the intended interplay between these two provisions, and if the factors in Article 13 cannot be used to rebut a presumption of dominance under Article 14, the AML would be inconsistent with most modern competition law regimes. Furthermore, such an interpretation would appear to render Article 13 a nullity in instances of single, or joint, holdings of sizable market share. The relationship between these provisions should be clarified, either in the text of the AML or in subsequent regulations.

The second and third subparts of Article 14 are even more clearly incompatible with international norms. Under the Current Draft AML, a competitor with a third-largest market share of 5 percent may be deemed dominant by virtue of the fact that the first- and second-largest competitors hold a combined share in excess of 70 percent. A safe harbor in Article 15 of the April 8, 2005 Draft AML had stipulated that undertakings with less than a 10 percent share would not be deemed to have a dominant market position, even if they otherwise fell within the ambit of Article 14(iii). However, the language of this Article does not appear in the Current Draft AML.

Finally, Article 14 of the Current Draft AML appears to embrace the concept of “collective dominance” found in EC law. Article 82 of the EC Treaty expressly prohibits “one or more undertakings” from abusing a dominant position and the ECJ has found that such collective dominance may be abused even under circumstances in which the entities are “legally independent of each

126 The only clear exceptions are for those firms deemed to be dominant by virtue of Article 14(ii) or 14(iii). Such firms must demonstrate “material competition between them” under the last sentence of Article 14. This savings clause did not appear in the September 30, 2005 Draft AML and may have been added to respond to the concern that a firm with a fairly small market share might be deemed dominant if its share was combined with the total market shares of its one or two larger competitors.

127 April 8, 2005 Draft AML, art 15.

128 Collective dominance is also recognized in On the Control of Concentrations between Undertakings (“EC Merger Regulation”), Council Regulation 139/2004, OJ 2004 (L24) 1.
other, . . . [where they] act together on a particular market as a collective entity." In conceptual terms, such an arrangement would apparently qualify as concerted action in violation of Article 81 of the EC Treaty, not Article 82, and under US law, acting jointly to monopolize a market may violate Sections 1 and 2 of the Sherman Act. However, under the Sherman Act, "conscious parallelism" absent an agreement does not constitute a conspiracy necessary to prove a violation of Section 1 or a conspiracy to monopolize under Section 2. In contrast, concerted action between entities is not required for a collective dominant position to exist under EC law. Such a position may result solely from the unilateral conduct of the parties, and it may be expected as a natural consequence of the oligopolistic structure of a market.

In the US, EC, and other major jurisdictions, the possession of market power, or dominance, does not in itself constitute an abuse. As noted above, early drafts of the Anti-Monopoly Law seemed to disagree with this presumption, and these draft AMLs contained broad language "prohibiting monopoly [sic]," as opposed to proscribing abusive conduct alone. Since the April 8, 2005 Draft AML, Chinese commentators have clearly indicated that only an abuse of market power would constitute a violation of the AML. The International Seminar on Anti-Monopoly Legislation underscored this idea, as


130 See, for example, Theatre Enterprises v Paramount Film Distribution Corp, 346 US 537, 541 (1954) ("Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely.") (internal citations omitted). See also Wood, 2004 Colum Bus L Rev at 277 (cited in note 107) (discussing the US Federal Trade Commission's efforts, in the 1970s, to pursue "shared monopoly" or "oligopoly theories" in various industries, and the failure and subsequent abandonment of those efforts).

131 See, for example, Airtours plc v Commission, Case T-342/99, 2002 ECR II-2585, 2613 (June 6, 2002):

In view of the actual characteristics of the relevant market and of the alteration in its structure that the transaction would entail, the latter would make each member of the dominant oligopoly, as it becomes aware of common interests, consider it possible, economically rational, and hence preferable, to adopt on a lasting basis a common policy on the market with the aim of selling at above competitive prices, without having to enter into an agreement or resort to a concerted practice within the meaning of Article 81 EC.

132 See, for example, KMB Warehouse Distributions, Inc v Walker Mfg Co, 61 F3d 123, 129 (2d Cir 1995) ("[A] showing of market power, while necessary to show adverse effect indirectly, is not sufficient.").

133 See Foreign Investors Set to be Granted Wider Access to Chinese Market, Asia Pulse (July 5, 2005) (quoting Sheng Jiemen, Dean of Peking University's Institute of Economic Law, as saying that ". . . it should be made very clear that the law does not prohibit dominant market position itself but does prohibit abuse of such a position.").
Two key principles of United States law on monopolization should be highlighted for [China's] consideration in connection with [its] draft law. The first and most important principle is that United States competition law does not condemn the mere possession of monopoly power, but punishes only misuse that results in a substantial injury to competition. In our view, punishment of a firm that obtains a dominant or monopoly position by reducing price or offering new or improves products or services is contrary to the goal of promoting competition. A free market system envisions that competitors will strive for a superior position through innovation, greater efficiency, or other legitimate competitive behavior. Innovation, economic growth, and vigorous competition would be stifled if the law were to punish successful market participants who achieve a dominant or monopoly position.

A second principle is that even firms with monopoly power are permitted to compete aggressively on the merits, even if a collateral effect is the failure of their competitors. Competition is a rigorous process, and it will inevitably yield both winners and losers. If a firm is more efficient and can thereby reduce costs and expand sales at the expense of its less-efficient competitors, our competition laws are not infringed. There may be harm to competitors, but no harm to competition. Competitive conduct frequently looks like exclusionary conduct, because aggressive competition may harm less efficient firms. We do not protect less efficient businesses from legitimate, vigorous competition, even where a firm holds a dominant or monopoly position. On the other hand, our competition laws prohibit a firm with monopoly power from engaging conduct that has no legitimate business justification other than to control prices or exclude competition, because this type of conduct injures competition. In other words, a firm with monopoly power may not engage in conduct that would be unprofitable except for its exclusionary effects.\(^\text{134}\)

However, the Current Draft AML’s non-exhaustive list enumerating examples of abuses of a dominant position contravenes accepted modern competition law norms in many respects. Article 15 provides as follows:

Undertakings are prohibited from the abuse of their dominant market position by committing the following acts:

(i) [Monopoly Price] selling products at unfairly high or buying products at unfairly low prices;

(ii) [Predatory Price] without valid reasons, selling products at prices below cost;

(iii) [Refusing Trade] without valid reasons, refusing to trade with trading partners;

(iv) [Mandatory Trade, Exclusive Trade] compelling trading partners to trade with undertakings, or without valid reasons, restricting trading

partners to only trade with the undertaking or the undertakings designated by the undertaking;
(v) [Tying and Imposing Other Unreasonable Trading Conditions] contrary to the will of the trading partners, tying products or imposing other unreasonable trading conditions;
(vi) [Differentiated Treatment] without valid reasons, applying differentiated treatment in regards to transaction conditions such as trading prices to equivalent trading partners, so as to put some trading partners at a competitive disadvantage; [and]
(vii) other abuses of [a] dominant market position.

Article 15(i) reflects a concept encapsulated in the competition laws of several jurisdictions, although not the US. Many jurisdictions, including the EC, have determined that it may constitute an exploitative abuse for a dominant competitor to charge prices that are “unfairly” low or high. In United Brands, the ECJ acknowledged that charging prices that have no “reasonable relationship to the economic value of the product supplied is . . . an abuse” while annulling the European Commission’s finding of such an abuse under the facts of that case.135

The Japan Anti-Monopoly Act (“AMA”)136 includes within its definition of “unfair trade practices” “[d]ealing at unjust prices.” As elucidated by Sections 6 and 7 of the General Designations,137 unjust low price sales and unjust high price purchasing are defined as follows:

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135 United Brands, 1978 ECR at 301. The Commission initially engaged in an analysis that included three types of price comparisons. It examined whether differences existed: (1) among prices in several EC member states; (2) between prices charged by United Brands for branded “Chiquita” bananas and non-branded bananas; and (3) between prices of Chiquita-branded bananas and competing banana products. The Commission found substantial differences: (1) prices were considerably higher in certain members states than in Ireland (sometimes 100 percent higher); (2) branded prices exceeded unbranded prices by 20 to 40 percent; and (3) prices of competing brands were “generally lower” than those of the Chiquita brand. Id at 299–300 (citing Commission Decision 76/353, 1976 OJ (L95) 1). On appeal, the ECJ annulled the finding of excessive pricing, noting that the Commission’s determination of a “very substantial profit” ignored the fact that the lower prices in Ireland had actually resulted in losses, rendering the inference of unfairness of higher prices elsewhere insupportable. Id at 303.


137 AMA § 2(9)(ii). See also AMA § 19 (“No entrepreneur shall employ unfair trade practices.”).

Section 6 (Unjust Low Price Sales)
Without a proper justification, supplying a commodity or service continuously at a price which is excessively below cost incurred in the said supply, or otherwise unjustly supplying a commodity or service at a low price, thereby tending to cause difficulties to the business activities of other entrepreneurs.

Section 7 (Unjust High Price Purchasing)
Unjustly purchasing a commodity or service at a high price, thereby tending to cause difficulties to the business activities of other entrepreneurs.

As with the Current Draft AML, such provisions beg the question of what is “excessive” or “unjust” and what kinds of “difficulties” for other entrepreneurs are sufficient to render a given firm’s pricing decisions unlawful. “Excessive” and “unjust” are highly subjective words and the enforcement of laws incorporating these terms is likely to result in prices that protect inefficient or otherwise unsuccessful competitors from the “difficulties” of free competition, thereby frustrating the proper pro-efficiency and consumer welfare goals of competition law.

Current US antitrust laws and policies are averse to firms that attempt to use courts or enforcement agencies to impose and police a “fair price.” Determining such a price is considered to be practically impossible, and the concept of government-set prices belies the purpose of having competition laws. As noted above, the US Supreme Court has recently reiterated that the charging of monopoly prices is an important and useful element of the free market system, particularly because such profits “induce[] risk taking that produces innovation and economic growth.” Monopoly profits are seen as the reward for using superior “business acumen” or creating a “superior product.” They are an important component of the incentive system that continuously causes the free market to generate better products and services.

Such products and services may be costly in the short-run, but they may otherwise be unavailable at any price, and in the long run, lower overall prices will prevail. In essence, the “fair” price, under US law, is the price determined

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139 Id at §§ 6–7.
140 See ABA 2005 Comments at 17–18 (cited in note 60).
141 Note that US antitrust law does recognize a “failing firm” defense that excludes unsuccessful firms from some forms of antitrust scrutiny. See US Horizontal Merger Guidelines § 5.1 (cited in note 90). But the purpose of these laws is to prevent harm to innocent third parties—for instance, the thousands of employees who would be laid off if a factory was forced to close—rather than to protect the firm itself.
142 Verizon, 540 US at 407.
143 United States v Grinnell Corp, 384 US 563, 570–71 (1966) (distinguishing the garnering of monopoly prices through better products or better business practices from the “willful acquisition or maintenance of [monopoly] power” that would violate Section 2 of the Sherman Act).

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through negotiations between independent buyers and sellers acting in their respective self-interests in a free market. The EC, Japan, and other jurisdictions with laws prohibiting “unfair” or “unjust” prices have rarely undertaken enforcement actions based on such provisions. One possible reason for this sporadic legal enforcement is that no economic theory (other than use of a market-based price) can determine what constitutes a “fair” or “just” price. Furthermore, the duty to monitor and police any decision imposing a “fair” price places an enormous burden on government entities that may need to adjust the “fair” price to accommodate constantly changing market conditions.

Article 15(ii) of the Current Draft AML prohibits “selling products at prices below cost.” The September 30, 2005 Draft AML required that the below-cost sales be undertaken “in order to eliminate competition.” It is important that such a purpose and effect be demonstrated in order for below-cost pricing to constitute a competitive concern. The US Supreme Court has required a showing that the purpose of the pricing was to “eliminate competitors in the short run and reduce competition in the long run.” Because “cutting prices in order to increase business is the very essence of competition,” the Court has warned that adopting a rule authorizing “a search for a particular type of undesirable pricing behavior [may] end up by discouraging legitimate price competition.”

Current US antitrust law only allows a claim of predatory pricing to be sustained if two conditions are satisfied: an appropriate measure of cost is used and the claimant can prove the alleged predator’s ability to recoup its losses after eliminating competition. Both these requirements stem from the bedrock foundation of US antitrust law—consumer welfare. Although courts in the United States have applied varying measures of cost, generally if a seller can sell another unit of a line of products at a price above its reasonably anticipated marginal cost (the cost of producing an additional unit), then the consumer is obtaining the low-priced product as a consequence of the seller’s efficient production (and not any sacrifice of profit), and is thus benefiting from lawful aggressive, profit-maximizing competition. The requirement of proof that the

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144 See Van Bael & Bellis, *Competition Law* § 8.7(2) at 914 (cited in note 99) (stating that Article 82 cases based on excessively low prices are “likely to be rare”).
145 September 30, 2005 Draft AML, art 17(ii).
148 The seminal article from which this price-cost analysis springs is Phillip Areeda and Donald F. Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 Harv L Rev 697 (1975). The “Areeda-Turner Test” deems as predatory those prices set below reasonably anticipated marginal costs. Id at 712. As marginal costs often cannot be measured with any accuracy, long-term average variable cost is often used as a surrogate. Id at 716. Many US courts
predatory firm is likely to recoup its losses from below-cost sales after eliminating competition reflects the US Supreme Court’s recognition that, absent recoupment, “predatory pricing produces lower aggregate prices in the market and consumer welfare is enhanced... [U]nsuccessful predation is in general a boon to consumers.”\textsuperscript{149} The Current Draft AML’s absence of an appropriate definition of “cost” and a requirement of proof of a likelihood of recoupment poses the risk that the predatory pricing provision may be used to condemn pricing behavior that benefits consumers.

Article 15(iii) prohibits refusals to deal “without valid reasons.” This provision is inconsistent with US antitrust law, particularly the \textit{Colgate} doctrine,\textsuperscript{150} under which firms have discretion in deciding with whom they will, or will not, deal in the absence of proof that the refusal is part of an attempt to create or maintain a monopoly. Although the European Commission and European courts have imposed an obligation to deal more frequently than US courts, and refusals to deal may constitute an abuse of a dominant position in violation of EC Treaty Article 82 (unless “objectively justified”),\textsuperscript{151} firms competing in Europe are, “as a rule, free to choose their business partners.”\textsuperscript{152}

An unqualified compulsion to deal is inconsistent with the protection of consumer welfare.\textsuperscript{153} Replacing the phrase “without valid reasons” with “absent proof of a purpose to create or maintain a monopoly” would bring subpart (iii) into line with international competition law norms. Alternatively, the NPC, or, post-enactment, the Anti-Monopoly Law Enforcement Authority, should consider defining “valid reasons” in a manner generally consistent with the

\textsuperscript{149} Brooke Group Ltd v Brown & Williamson Tobacco Corp, 509 US 209, 224 (1993). Predatory prices could help consumers if, after a period of predation, a price increase merely resulted in new entrants that kept prices low and prevented the predator from raising prices sufficiently to recoup losses.

\textsuperscript{150} United States v Colgate & Co, 250 US 300, 307 (1919) (“In the absence of any purpose to create or maintain a monopoly, the [Sherman A]ct does not restrict the long recognized right of a [seller] . . . to exercise his own independent discretion as to parties with whom he will deal.”).

\textsuperscript{151} For a comparison of the more flexible (but less certain) EC approach and the more rigid (but more predictable) US approach, see Eleanor M. Fox, \textit{A Tale of Two Jurisdictions and an Orphan Case: Antitrust, Intellectual Property, and Refusals to Deal}, 28 Fordham Int'l L J 952 (2005).

\textsuperscript{152} Van Bael & Bellis, \textit{Competition Law § 8.8(1)} at 940 (cited in note 99).

\textsuperscript{153} As pointed out in the ABA 2005 Comments: [c]hanging a dominant seller to sell to all willing resellers is unlikely to protect consumers’ legitimate interests, because, for example, a willing reseller may be unqualified to provide facilities or services desired by consumers or necessary to the efficient distribution of the products and may instead ‘free ride’ on efforts by others.

Id at 19 (cited in note 60).
European Commission’s use of “objectively justified” grounds for refusals to deal.

Notably, the much-criticized broad draft provision that had prohibited refusals of access to a “network or other infrastructure” owned by a dominant firm has been deleted from the Current Draft AML. As Article 22 of the April 8, 2005 Draft AML, it read as follows:

In the case that an undertaking is unable to compete with the undertakings with dominant market position without the access to a network or other infrastructures owned by those dominant undertakings in relevant market, the undertakings in dominant position shall not refuse to grant access to the network or other infrastructures to other undertakings at reasonable prices. However, the undertaking in dominant position may be exempted if it can establish that it is impossible or unreasonable to grant access to the network or other infrastructures to other undertakings on account of technology, security or other justifiable reasons.

Although some lower US courts have applied the essential facilities doctrine, the US Supreme Court has rejected its broad application as a matter of US antitrust law.\textsuperscript{154} The ECJ has found violations based on refusals to deal (including refusals to license intellectual property rights) in “exceptional circumstances.”\textsuperscript{155} The provision in the April 8, 2005 Draft AML contained few of the limitations and requirements of proof established for the “exceptional” application of the essential facilities doctrine under EC law. It thus posed a serious risk of establishing a general right of compelled access, including mandated sharing of infrastructure and networks, that would have chilled innovation and investment. The deletion of this provision from the Current Draft AML is a welcome development.\textsuperscript{156}

\textsuperscript{154} See Verizon, 540 US at 408. Although, “[u]nder certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate [Section 2 of the Sherman Act],” the Court has “been very cautious in recognizing . . . exceptions to the Colgate doctrine, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm.” But see also id at 411 (“Thus it is said that ‘essential facility claims should . . . be denied where a state or federal agency has effective power to compel sharing and to regulate its scope and terms,’” but saying nothing about the doctrine’s vitality otherwise.).

\textsuperscript{155} See IMS Health GmbH \& Co OHG v NDC Health GmbH \& Co KG, Case C-418/01, 2004 OJ (C118) 14. The author was counsel to NDC Health in this matter.

\textsuperscript{156} For a discussion of the criteria that numerous US Circuit Courts of Appeal have used to narrowly circumscribe the essential facilities doctrine, the US Supreme Court’s recent decision recognizing risks to competition and innovation posed by any broad application of the doctrine, and the ECJ’s limitation of the doctrine’s applicability to “exceptional circumstances,” see ABA 2005 Comments at 20–21 (cited in note 60). See also H. Stephen Harris, Jr., Conference—U.S.—China Trade: Opportunities and Challenges: An Overview of the Draft China Antimonopoly Law, 34 Ga J Intl \& Corp L 131 (2005).
Article 15(iv) of the Current Draft AML prohibits "mandatory trade" and exclusive dealing "without justification." As with the other subparts of this Article, clarification—through regulations or other measures—is necessary regarding what constitutes "justification." Article 20 of the April 8, 2005 Draft AML prohibited only exclusive selling, not exclusive buying, but both types of exclusive transactions are prohibited in the Current Draft AML.

Because of the exclusionary effect, which forecloses a buyer (or seller) from dealing with a competing seller (or buyer) for the duration of an exclusive dealing agreement, the US, EC, and Japan have competition laws that proscribe exclusive dealing under certain circumstances. In the US, such agreements may be condemned as violative of Section 1 of the Sherman Act (banning agreements that unreasonably restrain trade); Section 2 of the Sherman Act (prohibiting monopolization and attempts to monopolize); Section 3 of the Clayton Act (only applicable to agreements involving goods); and Section 5 of the Federal Trade Commission Act. Under EC law, exclusive dealing may be condemned as a violation of Article 81 (particularly as a supplementary obligation having no connection with the subject of the contract of sale under paragraph (1)(e)) or Article 82. During discussions at state-sponsored seminars on China's draft AML, exclusive dealing was discussed in the context of an abuse of a dominant position. Such conduct could arguably also be attacked under a provision that is part of Chapter II ("Prohibition of

157 See discussion in ABA 2003 Comments at 20 (cited in note 46).
158 General Designations at § 11 (cited in note 138) (prohibiting "[u]njustly dealing with the other party on condition that the said party shall not deal with a competitor, thereby tending to reduce transaction opportunities for the said competitor").
164 See Council Regulation 1215/1999, 1999 OJ (L148) 1. See also European Commission, Competition Policy in Europe: The Competition Rules for Supply and Distribution Agreements (European Communities 2002), available online at <http://europa.eu.int/comm/competition/publications/rules_en.pdf> (visited May 7, 2006) (hereinafter Vertical Guidelines). The Vertical Guidelines provide a 30 percent market share safe harbor for vertical agreements among (or by) non-dominant firms but note that it may be necessary to withdraw the vertical block exemption "in situations where the buyer has significant market power and imposes exclusive supply obligations upon its suppliers." Id at 11, 15.
165 Hoffman-La Roche, 1979 ECR at 539 ("An undertaking which is in a dominant position on a market and ties purchasers—even if it does so at their request—by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position within the meaning of Article 82.").
Monopoly Agreements”) in the Current Draft AML. This provision, Article 9, prohibits the imposition of “other trading conditions” that materially eliminate or restrict competition. Clarification of whether the AML is intended to address exclusive dealing solely under Article 15, or under both Articles 9 and 15, would be useful in determining whether a non-dominant competitor might run afoul of the law by entering into an exclusive supply arrangement. An explanation of what constitutes a “justification” rendering exclusive dealing lawful would also be helpful.

The prohibition on tying, or imposing “unreasonable conditions” in a manner “contrary to the will of the trading partners” under Article 15(v) appears designed primarily to attack “coerced” tying. Under US law, most courts have required proof that the buyer was forced to buy the “tied” product in order to be permitted to buy the “tying” product.166 The EC law of tying (as contrasted with “soft bundling”) resembles US law in that it requires the presence of two separate products in different product markets, a seller that is dominant in the tying product market, the preclusion of the buyer’s option to purchase only the tying product (without the tied product), and proof that the tying caused actual foreclosure of competition.167 Although the Current Draft AML does not specify the elements required for a finding of tying in violation of the Anti-Monopoly Law, it is hoped that implementing regulations will provide guidance that accords with international competition law norms exemplified by US and EC laws.

Article 15(v)’s prohibition on the imposition of “unreasonable conditions” is troublingly vague. It gives parties no guidance about the types of conditions that may be considered unreasonable and seems as likely to stifle innovative, procompetitive arrangements as it is to stop anticompetitive activity. This language, like that contained in other less definite provisions of the Current Draft AML, should be removed or clarified through regulations.

Article 15(vi) prohibits “applying differentiated treatment” to “equivalent trading partners,” absent valid reasons, where such conduct puts some entities at a “competitive disadvantage.” In the United States, section 2 of the Robinson-Patman Act168 provides a somewhat similar prohibition on price discrimination. The Robinson-Patman Act is frequently criticized as bad competition policy and

166 See, for example, Suburban Propane v Proctor Gas, Inc, 953 F2d 780, 788–89 (2d Cir 1992) (affirming grant of summary judgment for defendant because there was no proof that any buyer had felt compelled to purchase the tied product in order to get the tying product).


168 15 USC §§ 13(a)–13(b), 21(a) (2000).
as an extremely difficult statute to administer. One commentator describes its origins and current unfavorable reputation as follows:

The Robinson-Patman Act was enacted as an antitrust law during the Great Depression of the 1930s in response to intensive lobbying by independent wholesalers, brokers, and retailers who complained of price discrimination by their suppliers, who favored the large chains. Since its enactment in 1936, the Act has been the object of unrelenting criticism by legal scholars and economists. Critics charge that the Act has been invoked to protect individual competitors and to deprive consumers of low prices, a course they view as in direct conflict with the basic goals of antitrust law: protecting competition, not competitors, and advancing the consumer welfare. Indeed, during the period from 1955 through 1979, various presidential, executive department, and bar association task forces recommended partial repeal or radical revision of the Act. Despite the criticism and calls for repeal or revision, at the threshold of the twenty-first century, the Robinson-Patman Act remains structurally intact.\(^{169}\)

Given that the Robinson-Patman Act was born of concern for competitors, not competition, it should come as no surprise that the consequences of enforcing this price discrimination statute have been roundly and repeatedly criticized as being inconsistent with, and indeed antithetical to, sound competition policy. As Judge Bork has noted: "[N]o other antitrust statute has been subjected to so steady a barrage of hostile commentary as the Robinson-Patman Act. Indeed, the scholarly and professional literature on the statute resembles a cascade of vituperation."\(^{170}\)

Given that the law has not been repealed by Congress, but reflecting broad consensus that the law conflicts with general antitrust principles, the US Supreme Court has, in recent decades, consistently sought to narrow the application of the Robinson-Patman Act. It has resisted an "interpretation geared more to the protection of existing competitors than to the stimulation of competition"\(^{171}\) and has construed the Act "consistently with the broader policies of the antitrust laws."\(^{172}\) The high court's "interpretation," which seeks to ensure that enforcement of the Robinson-Patman Act reflects broad antitrust policies concerned with interbrand competition (not intrabrand competition) and promotes price competition (not price uniformity and rigidity), may do injury to the literal meaning of the statute. However, the Supreme Court has striven to


\(^{172}\) Id at 873, quoting *Brooke Group*, 509 US at 220.
construe the Robinson-Patman Act in a manner that does not undermine the primary goals of antitrust law: consumer welfare and allocative efficiency, not the protection of small or inefficient enterprises.\footnote{173}{See also ABA Section of Antitrust Law, Monograph No 4, I The Robinson-Patman Act: Policy and Law (ABA 1980); ABA Section of Antitrust Law, Monograph No 4, II The Robinson-Patman Act: Policy and Law (ABA 1983).}

Moreover, under US law, both statutory and court-created defenses recognize competitive realities necessitating or justifying price discrimination. Such defenses include meeting competition, cost justification, changing conditions, and practical availability, as well as discounts justified by functions performed for the seller by the buyer, and promotional allowances.\footnote{174}{See generally ABA, I Antitrust Law Developments at 455–523 (cited in note 118).}

The language of Article 15(vi) is apparently based on Article 82(c) of the EC Treaty, which prohibits “applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.”\footnote{175}{EC Treaty, art 82(c) (cited in note 72).} The European Commission has condemned price discrimination by dominant firms under this provision without considering whether or not the different prices resulted from a fidelity rebate scheme.\footnote{176}{Hoffman-La Roche 1979 ECR at 540; Commission Decision 97/624, 1997 OJ (L258) 1, 21–25; Michelin, 1983 ECR at 3513.} The provision has been enforced against pricing that has been found to place the discriminator’s customers at a disadvantage vis-à-vis their competitors (“secondary-line discrimination”) as well as against discrimination that injures the discriminator’s competitors (“primary-line discrimination”).\footnote{177}{See, for example, British Airways plc v Commission, Case T-219/99, available online at <http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&doc=docj&docop=docop&docor=docor&docjo=docjo&numaff=T-219/99&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100> (visited May 7, 2006); Commission Decision 88/138, 1998 OJ (L65) 19, 37.} As in the US, the European Commission and European courts have recognized various defenses and justifications for price discrimination (and other dissimilar non-price conditions, including meeting competition and “objective justification” for rebate schemes).\footnote{178}{See generally Van Bael & Bellis, Competition Law §§ 8.7(2)–(4) at 914–34 (cited in note 99).}

Notwithstanding the limitations to, and defenses available under, US and EC discrimination law, those laws are routinely criticized as giving rise to claims (and decisions) inconsistent with the consumer welfare goals of competition policy. Given the absence of such defenses and limitations in the Current Draft AML, the risk of unintended anticompetitive consequences from this statute...
would seem to be even greater, but these concerns could be mitigated through implementing regulations.

The final subpart of Article 15 ("other abuses of [a] dominant market position") would not be as troubling as it appears if the AML or its implementing regulations were to require a modern economics-based and effects-based analysis of harm to competition as a prerequisite to finding an abuse. Absent any assurances about what exactly might constitute an "abuse" or how such a conclusion may be arrived at, this vague provision renders meaningful counseling on compliance with Chapter III extremely difficult.

F. MERGER REVIEW

Chapter IV ("Prohibition of Concentrations of Undertakings"), which spans from Articles 16 through 24, contains the Current Draft AML's merger control provisions, including procedures and substantive tests for approving or rejecting a proposed concentration. This comprehensive and competition-focused merger control regime will presumably supersede the abandoned Provisional Rules. Chapter IV has undergone substantial revisions since the October 2002 Draft AML, and most of these revisions have helped to significantly align the latest draft AML with the international norms exemplified by the ICN's Recommended Practices.

"Situations of Concentrations of Undertakings" are defined in Article 16 as: 
(1) a merger of undertakings; (2) an undertaking's acquisition of voting shares or assets of one or more other undertakings to an adequate extent; (3) an acquisition of control of other undertakings by contract, technology or other means, or the capability of imposing material effects on competition.

Clarification of the terms "adequate extent" in subpart (2) and "control" in subpart (3) is necessary in order for entities to determine whether or not a given transaction falls within the requirements of this Chapter. In addition, the reference to "entrusted operation" in subpart (3) could potentially subject the establishment of management contracts to the merger control requirements. If

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179 See Sheng Jiemen, *How Does the Chinese Government Regulate Foreign Investors' M&A of Domestic Enterprises* (on file with author) (stating that the draft Anti-Monopoly Law's provisions will "only consider whether the merger or concentration will hinder competition or not" and will "not consider the nationality of applicants").

180 International Competition Network, *Guiding Principles and Recommended Practices for Merger Notification and Review Procedures*, available online at <http://www.internationalcompetitionnetwork.org/guidingprinciples.html> (visited May 7, 2006). See also *ABA 2005 Comments* at 21–26 (cited in note 60) (discussing the many desirable changes from the October 2002 Draft AML to the April 8, 2005 Draft AML and noting that these modifications have generally been retained in the Current Draft AML).

181 A more accurate translation may be "forms" in lieu of "situations."
this interpretation reflects the drafters’ intent, such a provision would plainly be out of sync with comparable laws in other major jurisdictions and would appear to be inconsistent with the intended purpose of merger control regulation—namely to assess the competitive effects of any increase in market concentration stemming from a change in control (beneficial ownership or the power to make decisions typically reserved to owners of a business). Finally, the intended purpose of the reference to “the capability of imposing material effects on competition” in subpart 3 is unclear.

Article 17 (“Standard for Notification and Calculation of Turnover Etc.”) sets forth the “size of transaction” and “size of parties” prerequisites for a required filing. It provides as follows:

A prior notification shall be filed with the Anti-monopoly Law Enforcement Authority under the State Council by the undertakings of the concentration where a concentration of undertakings meets any of the following standards:

(1) the value of the transaction involved in the concentration is more than RMB 400 million, the total assets of one party undertaking of the concentration in China’s domestic market or total turnover in the preceding year exceeds RMB 1.5 billion, and any other party undertaking’s total assets in China’s domestic market or total turnover in the preceding year exceeds RMB 500 million;

(2) the value of the transaction inside China for the concentration is above RMB 1.5 billion.

(3) where there is no value of the transaction of the concentration of the undertakings, or the value of the transaction of the concentration does not reach the amount stipulated in above Paragraph (1) [or] Paragraph (2), [and] the aggregate assets or turnover in the preceding year in China’s domestic market exceeds RMB 5 billion.

In order to calculate the total assets and turnover mentioned in the preceding paragraphs, it shall include the assets and turnover of all the undertakings with which the undertaking has controlling or affiliation relationships.

The Anti-Monopoly Law Enforcement Authority under the State Council may adjust the standard for notification of concentrations of undertakings stipulated in the preceding Paragraph 1, in light of the economic development and market situations, and report such adjustments to the State Council for approval before putting them into practice.

Although subpart (1) does not expressly provide a threshold that is applicable to the acquired party, it would appear to require that the acquired party have an annual turnover of at least RMB 500 million, bringing the procedure into compliance with ICN Recommended Practice I. This Recommended Practice is intended to ensure that only concentrations having a meaningful nexus with competition within the reviewing jurisdiction are subject
Moreover, the Current Draft AML abandons the alternative market-share based test of Article 24(3) and (4) in the April 8, 2005 Draft AML, bringing the Current Draft AML into conformity with ICN Recommended Practice II. However, a clear definition of “control” is necessary for entities to assess which undertakings are to be included within the calculation of turnovers that is used to determine whether the materiality thresholds are met.

Article 18 (“Exemption of Notification”) provides as follows:

If a concentration of undertakings fulfills any of the following circumstances, the undertakings need not file the notification with the Anti-Monopoly Law Enforcement Authority under the State Council:

1. Among the undertakings involved in the concentration, one undertaking owns more than 50% of the voting shares or the assets of each and every other undertaking; or
2. More than 50% of the entire voting shares or the assets of every undertaking to the transaction are owned by one undertaking which is not involved in the concentration.

Article 18 exempts transactions that would otherwise be caught under the definition of “concentration”—essentially intra-company reorganizations. However, if applied literally, this Article would also apparently have the (presumably unintended) consequence of exempting all mergers between SOEs since all SOEs are controlled by the same parent.

Articles 19 through 24 provide the procedures for notification and review, beginning with the filing of an application (including a competitive assessment, a summary of the agreement, audited financial and accounting information for the preceding accounting year, and “other information required by the Anti-Monopoly Law Enforcement Authority”). Under Article 20, if a filing is deemed incomplete, the Authority will request supplemental information within fifteen days after the initial filing. An application is deemed received when determined to be complete. The Anti-Monopoly Authority will then undertake a preliminary review under Article 21. The Authority must decide whether to initiate further review within twenty working days after receipt of the application, and it must inform the applicants of its decision in writing. In the interim, the parties are precluded from implementing the transaction. If the Authority makes no decision within this time, the parties are free to implement the concentration. Under Article 22, if the Authority initiates a further review in a timely manner, it must notify the parties. The Authority must then approve or block the transaction within ninety working days after the date of its decision to undertake

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183 Id.
a further review. The Authority has discretion to extend that period by no more than thirty working days if: the parties consent to the extension, the documents submitted are inaccurate or require further verification, or the "relevant circumstances" have changed significantly after notification. Under Article 24, the Authority must publish any decision approving a concentration, and it must notify the parties of a decision, whether an approval or a prohibition, in writing. The approval may include restrictive conditions. Any decision blocking a transaction must include reasons for the denial. All of these provisions, including the narrowing of categories of information required for initial review, reflect substantial improvements from earlier drafts and are largely consistent with both the ICN Recommended Practices and the approach of most major competition law regimes. In this respect, the Current Draft AML's general alignment with the merger control regulations of other major jurisdictions will significantly lessen the burden and disruption that would have likely ensued if any of the earlier drafts of these provisions had been codified.

Article 25 of the September 30, 2005 Draft AML provided a substantive test for prohibition of a concentration, as follows:

The Anti-Monopoly Authority under the State Council shall make a decision to prohibit a concentration where the concentration will substantially eliminate or restrict competition within the relevant market. The Anti-Monopoly Authority under the State Council shall make its decision on whether to prohibit a concentration based on the following factors:

(1) the market shares of the undertakings participating in the concentration on the relevant market and their ability to control the market;
(2) the extent of concentration in the relevant market;
(3) the likelihood of competition on the relevant market as a result of the proposed concentration;
(4) the effect of the proposed concentration on market access and technological progress;
(5) the effect of the proposed concentration on consumers, upstream and downstream undertakings;
(6) rationales for the concentration and improvement in economic efficiency which is likely to make [sic]; and
(7) the effect of the proposed concentration on the development of the national economy and public interest.

This explicit list of factors was a useful outline of considerations for the Authority to take into account during its decision-making process. For unknown reasons, the list was deleted from the Current Draft AML and replaced with a short provision, Article 23, which merely provides that:

The Anti-Monopoly Authority under the State Council shall make a decision to prohibit a concentration and explain the reasons where the concentration of the undertakings will substantially eliminate or restrict competition in the relevant market.
If the Anti-Monopoly Law Enforcement Authority under the State Council decides to approve the concentration the Authority can attach restrictive conditions to the implementation of the concentration.

As with the US Merger Guidelines, perhaps later regulations or guidelines will provide notifying parties with greater certainty regarding the Authority’s standards and its weighting of particular considerations when analyzing concentrations. Such measures will hopefully assist parties in structuring transactions that will pass muster under the Authority’s approach or will guide parties to forego transactions that are unlikely to be approved.\footnote{For a thorough treatment of the merger review process under US law, see Ilene K. Gotts, ed, \textit{The Merger Review Process} (ABA 2d ed 2001) and Neil W. Imus, ed, \textit{Premerger Notification Practice Manual} (ABA 3d ed 2003). Regarding the substantive US antitrust law governing concentrations, see Robert S. Schlossberg, ed, \textit{Mergers and Acquisitions: Understanding the Antitrust Issues} (ABA 2d ed 2004).}

\section*{G. Administrative Abuses}

Chapter V of the September 30, 2005 Draft AML ("Prohibition of Abuse of Administrative Powers to Restrict Competition") prohibited abuses of the powers of Chinese governmental organizations that eliminate or restrict competition. However, this Chapter had excised an explicit prohibition of administrative monopolies that had been present in a similar chapter of the preceding draft AML. For example, Article 35 of the April 8, 2005 Draft AML provided as follows: “The Government and its subordinate departments shall not promulgate rules with provisions eliminating or limiting competition in violation of laws and administrative regulations so as to prevent the establishment of a unified and orderly national market and of a fair competitive environment.”

Unfortunately, the entire chapter proscribing administrative monopolies has been deleted from the Current Draft AML. The provisions in this chapter, if implemented, might have significantly addressed the competitive distortions resulting from various practices of SOEs and the likely broad exemptions of certain sectors of the Chinese economy. The enactment of these provisions would undoubtedly have sparked significant political opposition.\footnote{See Bei Hu, \textit{China Unveils Competition Rules; Observers Fear Political Resistance May Delay Implementation of the Country’s First Antitrust Law}, South China Morning Post, Business Post 1 (July 2, 2003) (quoting one observer as saying that “the government’s encouragement of competition could be hampered by its need to support state-owned enterprises identified as China’s first multinationals.”).} A few commentators have stated that a separate statute prohibiting administrative monopolies may be promulgated.\footnote{Comments of Prof. Sheng Jiemian to representatives of the American Bar Association, at the ABA Annual Meeting in Chicago (2005).} But it appears that the opportunity to pass
such measures in conjunction with the rollout of the new Anti-Monopoly Law may have been lost. This revision severely undermines the extent to which the new competition law regime can play a substantial role in China’s transition to a market economy, and it apparently reflects a continuing desire by some officials to attempt to control the market as it affects government-related enterprises.  

The entire chapter that was focused on administrative monopolies in the earlier draft AMLs has been replaced with a provision in Article 2 (“Scope of Application”) stating that the AML “applies when activities of undertakings fall outside the provisions of the laws or administrative regulations of relevant industries or sectors, eliminating or restricting competition.” The language in Chapter I (“General Provisions”) of the September 30, 2005 Draft AML that had prohibited “the administrative organs and other organizations granted the public affairs administration power by laws and regulations from conduct that abuses administrative power to exclude or restrict competition” has also been deleted from the Current Draft AML. There appears to be reason for concern that these revisions could create a de facto exemption of a substantial segment of the Chinese economy.

The deletion of the anti-administrative monopoly provisions is seen as a victory for the so-called “elimination through reform” side, which asserts that economic monopolies should be the sole focus of the Anti-Monopoly Law. This group reportedly believes that because administrative monopolies “resulted from the evolution of political and economic systems in the transitional period, it [sic] must therefore be eliminated through further system restructuring.” The opposing “legislative enforcement” group argues that the Anti-Monopoly Law must “take into account the unique Chinese situations”—such as administrative monopolies and regional blockages. The final decision to remove these provisions from the draft was said to be based primarily on concerns about providing effective legal liability for administrative monopolies. Although both sides reportedly favor eliminating administrative monopolies, with the abandonment of these provisions in the Anti-Monopoly Law, advocates hope to address the administrative monopoly issue through separate legislation and regulations. A member of the Anti-Monopoly Law drafting team and another person close to the LAO have expressed pessimism about the likelihood of

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187 Compare Stanley B. Lubman, Bird in a Cage at 182 (discussing SAIC’s position that it should be able to “supervise and manage” contracts in which one party is a state or collective enterprise and which could injure ‘state interests”) (cited in note 36).

188 September 30, 2005 Draft AML, art 3.
success for such efforts in light of the failure to achieve meaningful results through other legislative initiatives targeting administrative monopolies.\textsuperscript{189}

Other jurisdictions have balanced the state’s interest in displacing the application of competition law under certain circumstances where plainly intended in order to serve another societal interest. This approach would continue to provide the benefits of antitrust law where no such express exemption is intended. Under US law, for example, the state action doctrine\textsuperscript{190} provides an exemption for private and state economic actors where the conduct is undertaken “pursuant to a ‘clearly articulated and affirmatively expressed state policy’ to replace competition with regulation”\textsuperscript{191} and “the policy [of displacing competition is] ‘actively supervised’ by the state itself.”\textsuperscript{192} The requirement of active supervision is intended to ensure that the exemptions are the product of purposeful and closely overseen state control and are “not simply [the result of] agreement among private parties.”\textsuperscript{193} The wholesale removal of the chapter addressing administrative monopolies ignores, at least in the short term, the need to ensure that state-protected regional monopolies that engage in business conduct do not, in the absence of any actual determination by the government of a need for their exemption, and without any requirement of ongoing governmental supervision of their activities under such an exemption, engage in anticompetitive conduct with impunity.

H. THE ANTI-MONOPOLY AUTHORITY

Chapter V of the Current Draft AML (“Anti-Monopoly Authority”), comprising Articles 25 through 38, establishes and sets out the basic powers and procedures of the antitrust enforcement agency of China, known as the Anti-Monopoly Law Enforcement Authority, and the Anti-Monopoly Committee under the State Council (“Committee”). During the AML drafting process, there was considerable debate about how many enforcement agencies there should be and which, if any, existing government body should be in charge of such an agency or agencies. All recent previous drafts provided for a single agency under the aegis of the State Council. However, the Current Draft AML introduces the Committee, which, according to Article 25, is “composed of the principals of relevant departments and organs of the State Council and certain experts.”

\textsuperscript{189} The “Anti-Administrative Monopoly” Section Completely Removed from the Anti-Monopoly Law to Ease Its Burden, Beijing News (Jan 11, 2006).

\textsuperscript{190} See generally ABA, \textit{Antitrust Law Developments}, 12, 13–22 (cited in note 118).

\textsuperscript{191} \textit{Hoover v Ronwin}, 466 US 558, 569 (1984) (4 to 3 decision) (citation omitted).


\textsuperscript{193} \textit{FTC v Ticor Title Ins Co}, 504 US 621, 634 (1992).
While its “rules of procedures and work are stipulated by the State Council,” the involvement of multiple agencies and experts raises concerns about inefficient oversight and the possible inconsistent direction of competition policy. The authorization of multiple agencies also risks the Authority’s independence although the State Council’s express oversight of all these activities should to some extent mitigate that concern. Finally, reliance upon the contemplated Anti-Monopoly Committee, comprising representatives of numerous entities with varying political goals and priorities, may also entail the politicization of competition policy, perhaps risking the use of competition enforcement as a weapon in trade disputes, for example.

Under Article 26 of the Current Draft AML, the Committee will perform the following functions:

1. Formulating policies relating to competition, putting forward legislative proposals on anti-monopoly laws and administrative regulations;
2. Organizing investigation[s], evaluation [of] the overall competition condition[s] in [the] market, and publish[ing] ... evaluation reports;
3. Supervising, coordinating the enforcement activities of the Anti-monopoly Law Enforcement Authority under the State Council and the relevant industrial regulators of the State Council;
4. Deciding [of] major anti-monopoly cases; [and]
5. Other functions stipulated by the State Council.

Article 27 of the Current Draft AML sets out the functions of the Authority as follows: “(1) putting forward and publish[ing] anti-monopoly regulations, rules and specific measures; (2) accepting and reviewing notification of concentrations of the undertakings; (3) investigating and handling Monopolistic Conducts; (4) investigating and evaluating marketing competition conditions; (5) other functions stipulated by the State Council.”

It is unclear which specific entities and experts will constitute the Committee or which agencies will assume certain roles within the Authority.

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194 It would be difficult to establish a truly independent authority, even if only a single agency was to be created. See Wang Xue Zheng, Challenges/Obstacles Faced by Competition Authorities in Achieving Greater Economic Development through the Promotion of Competition, (Jan 9, 2004), available online at <http://www.oecd.org/dataoecd/18/51/23727203.pdf> (visited May 7, 2006), stating that
   A totally neutral or independent competition authority is... difficult to imagine in China because of the current political system. All officials or authorities, except the State Council, must accept the leadership or guidance from their higher authority, so does the competition authority [sic]. The higher authority of the competition authority would possibly put other values on top of competition value in some occasions [sic].

However, based on statements by Chinese officials, it is anticipated that MOFCOM and the SCDR will play substantial roles in analysis and enforcement activities, and that SAIC, as well as MOFCOM and other entities under the aegis of the State Council, will continue to be involved within the Committee during the policy review and development stages. Broader concerns about the Authority's ability to implement the law in a transparent, consistent manner stem from well-known difficulties that China has encountered in developing a law-based administrative system.  

Article 28 requires that officials working in the Authority be “faire, [sic] decent, honest and faithful, equipped with legal and economic knowledge and education background, and with more than 3 years related working experience in legal and economic sectors.” This last requirement is encouraging because the AML's success in facilitating China's transition to a market-based economy depends to a significant degree on the extent to which the Authority can ensure that the Anti-Monopoly Law is enforced in a manner consistent with modern economic principles. Application of these principles requires a staff capable of rigorous economic analysis. In that sense, the qualifications required under Article 28, if implemented, may prove as important a contributor to the new law's success as any of its substantive or procedural provisions.

Article 29 permits “[a]ny organizations or individuals” to report, in confidence, violations of the law to the Authority. If a report is in writing and includes “related facts and necessary evidence[],” the Authority “shall conduct


The biggest obstacles to a law-based administrative system in China are institutional and systemic in nature: a legislative system in disarray; a weak judiciary; poorly trained judges and lawyers; the absence of a robust civil society populated by interests groups; a low level of legal consciousness; the persistent influence of paternalistic traditions and a culture of deference to government authority; rampant corruption; and the fallout from the unfinished transition from a centrally planned economy to a market economy, which has exacerbated central-local tensions and resulted in fragmentation of authority.

necessary investigation." The Authority has been granted significant police powers to investigate suspected violations under Article 30 ("Investigatory Functions and Powers"), which reads as follows:

When conducting investigations of the suspect Monopolistic Conduct[], the Anti-Monopoly Authority [sic] can take the following measures:

1. conducting investigations of business locations or other relevant places of the undertakings;
2. requesting the undertakings, interested parties and other relevant entities or individuals subject to the investigation to submit relevant documents and information including related documents, agreements, contracts, accounting books, correspondence, electronic data etc. and receive questioning;
3. examining, copying, digesting, sealing or retaining relevant evidence;
4. inquiring about the bank account information of the undertakings; and
5. sealing up the business locations of the undertakings concerned.

It is unclear whether subpart (5) is intended to permit the closing of a business location before any decision of wrongdoing is reached. If so, this provision may raise serious concerns about the fundamental fairness of the process. It is hoped that, in practice, the "sealing" will apply only to files and other evidence that must legitimately be preserved to ensure the integrity of the investigation.

Major jurisdictions' antitrust enforcement agencies have dramatically increased their caseloads through the use of leniency or amnesty programs, which provide immunity or a reduction in fines to participants in antitrust cartels that report the violation and cooperate with investigators and enforcement authorities. The establishment of a leniency program to encourage the disclosure of violations was suggested in a paper submitted by the Antitrust Division of the US Department of Justice during the International Seminar on Anti-Monopoly Legislation, and it was suggested that such a program would increase the rate at which violations are detected. The Current Draft AML does not include a detailed leniency system providing the type of predictable benefits from reporting that will likely engender much self-reporting. However, as discussed below, Article 39 states that parties guilty of entering into monopoly agreements in violation of Article 8, but that self-report their illegal actions, may receive a "mitigated punishment or be exempted from punishment... in accordance with the circumstances." The Authority could increase the likelihood that undertakings would take advantage of leniency by promulgating implementing regulations that assure specific lenient treatment for the first self-reporter of a violation, as under US practice. The Authority could possibly offer lesser...

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197 See Presentation Concerning Investigation Procedures and Remedies, Antitrust Division, US Department of Justice (May 23, 2005) (on file with author).
rewards for a certain number of subsequent self-reporters, following the practice of the European Commission, Japan, and other jurisdictions.

Article 31 requires at least two investigating officers from the Authority to carry out investigations, and it mandates that these officers present valid documents and make a written record when conducting questioning. Article 32 requires the Authority and its staff to maintain the confidentiality of commercial secrets obtained in the course of their duties.

Under Article 33 of the Current Draft AML, parties under investigation, as well as interested parties and "other relevant entities or individuals subject to the investigation" (presumably witnesses, competitors, suppliers, and customers, as well as any others having knowledge about the relevant market or alleged anticompetitive practices) are required to cooperate with the Authority and are precluded from refusing to cooperate or hindering the investigation. Article 34 allows both the undertakings under investigation and interested parties to submit "statements and defenses."

Article 35 of the Current Draft AML provides as follows: "Where the Anti-Monopoly Law Enforcement Authority after investigating the suspect[ed] Monopolistic Conduct[] determines the conduct constitutes [] Monopolistic Conduct[] prohibited by this Law, it shall make a decision in accordance with this Law, and publish the decision to the public."

It would be preferable for this provision to include a standard of proof and a requirement that the Authority include its detailed reasoning, findings of fact, and application of law in its decision. This is not only an issue of fairness for those found to have violated the law. Such decisions will be considered an important source for understanding the Authority’s methods of analysis, and when there is a subsequent challenge, the decisions will serve as an important basis for a court to understand and assess the correctness (or erroneousness) of the Authority’s decision.

Article 36 of the Current Draft AML sets forth the “System of Undertaking by the Undertakings” as follows:

If the undertaking subject to the investigation admits the suspect[ed] Monopolistic Conduct[] being investig[igated] by the Anti-Monopoly Law Enforcement Authority and undertakes to take specific measures within [a] certain time limit to eliminate the effect of the Monopolistic Conduct[], the Anti-Monopoly Law Enforcement Authority can make the decision to suspend the investigation; if it is subject to punishment pursuant to this Law, the punishment shall be reduced or relieved. The decision of the suspension of the investigation shall state the detailed content of the undertaking.

The Anti-Monopoly Law Enforcement Authority shall supervise the conditions of the performance of the undertaking by the undertakings. If
the undertakings do not perform the undertaking, the Anti-Monopoly Law Enforcement Authority shall restore\textsuperscript{198} the investigation.

Especially in the context of the establishment of the first comprehensive antitrust regime in the country, the availability of consensual settlement of a matter under investigation is a sensible option, and this provision should reduce the new Authority’s caseload. The Current Draft AML has deleted certain specific grounds, described in the September 30, 2005 Draft AML, that would have allowed an investigation to be resumed even under circumstances in which the parties had complied with the undertaking, including if there had been “substantial changes in the facts” and apparently without regard to whether the defendant had played any role in causing such changes to come about. Such a risk that the investigation would be resumed for uncontrollable reasons would likely have constituted a substantial deterrent to seeking a resolution through undertakings. Under the Current Draft AML, breach of the undertaking is apparently the sole ground for reopening a specific investigation.

Article 37 of the Current Draft AML creates a right of administrative reconsideration or “administrative litigations in accordance with law” for “undertakings concerned and interested parties” that are “dissatisfied with decisions” of the Authority. None of the personnel, procedures, or substantive criteria for such an administrative review is described in the Current Draft AML. Such requirements should be included in implementing regulations in order to ensure that the review is carried out by a truly independent and unbiased panel or individual and that there is procedural fairness. In contrast, the October 2002 Draft AML provided for a review within sixty days of the receipt of a decision and specified that an aggrieved party had a subsequent right to appeal to the People’s Court within fifteen days of receiving the reconsideration decision.\textsuperscript{199} The September 30, 2005 Draft AML unambiguously provided for judicial review\textsuperscript{200} and some participants in various seminars on earlier drafts of the AML emphasized the perceived need for an express right to judicial review. Nevertheless, the absence of such a clear provision in the Current Draft AML may not be a serious concern because the Administrative Litigation Law and Administrative Review Law (“Administrative Laws”) provide detailed procedures for court remedies. The omission of express provisions for court review in the Current Draft AML thus presumably results from avoiding the repetition of those laws’ provisions, and judicial review of administrative decisions under the Anti-Monopoly Law, as with all other laws, will be available

\textsuperscript{198} “Resume” may be a more accurate translation than “restore.”

\textsuperscript{199} October 2002 Draft AML, art 53.

\textsuperscript{200} September 30, 2005 Draft AML, art 44.
in accordance with the applicable provisions of the Administrative Laws.\textsuperscript{201} Chinese experts have commented that the right to administrative litigation incorporates the right to subsequent judicial review under the Administrative Laws since administrative litigation is also conducted within the court system.\textsuperscript{202} Finally, there may be redress to the state through the constitutional right to lodge complaints and the right of compensation for losses suffered by state action.\textsuperscript{203}

A related concern arises from the Chinese judiciary’s dearth of experience and lack of training in competition law concepts. The creation of a specially trained court with jurisdiction limited to Anti-Monopoly Law cases would provide a more reliable path to consistent, high-quality antitrust jurisprudence than reliance on the widely scattered People’s Courts of general jurisdiction. Establishment of such a court would generally be consistent with the recently announced creation, by the China Supreme Court, of a Judicial Court of Intellectual Property to adjudicate intellectual property litigation throughout the country, although that court is apparently expected to have concurrent jurisdiction with local courts over IP matters.\textsuperscript{204}

Article 38 (“Relationship between the Anti-Monopoly Authority and Relevant Authorities”) provides as follows:

If there are relevant laws and administrative regulations stipulating that the Monopolistic Conduct prohibited by this Law shall be investigated and handled by the industrial directing departments or supervisory organs of the State Council, the laws and regulations are to be applied. The relevant

\textsuperscript{201} For a discussion about the rights of legal persons to judicial review of administrative acts under the Administrative Litigation Law of the People’s Republic of China and efforts to address challenges to China’s compliance with its WTO commitment to independent judicial review, see Veron Mei-Ying Hung, \textit{China’s WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform}, 52 Am J Comp L 77 (2004).

\textsuperscript{202} China’s People’s Courts are comprised of three sections: criminal, civil, and administrative. Regarding the general structure of the Chinese judicial system, see Stanley B. Lubman, \textit{Bird in a Cage} at 251–53 (cited in note 36).

\textsuperscript{203} Under the 1982 PRC Constitution, the state is obligated to investigate complaints concerning a “violation of law or dereliction of duty by any state organ or functionary.” The same constitution restored from the 1954 Constitution the “right of compensation for loss suffered through infringement of rights by the actions of state employees.” However, these rights may obtain only to Chinese citizens, as, conceptually, rights are considered to be derived from citizenship, not “human personhood.” See R. Randle Edwards, Louis Henkin, and Andrew J. Nathan, \textit{Human Rights in Contemporary China} 117, 121 (Columbia 1986).

departments and supervisory organs of the State Council shall notify the result of the investigation on the Monopolistic Conduct to the Anti-Monopoly Law Enforcement Authority under the State Council.

Where the relevant departments and supervisory organs of the State Council fail to investigate and handle the Monopolistic Conduct prohibited by this Law in accordance with the above paragraph, the Anti-Monopoly Law Enforcement Authority under the State Council could conduct the investigation and handling. When investigating and handling of the Monopolistic Conduct, the Anti-Monopoly Law Enforcement Authority under the State Council shall consult for the opinions of the relevant departments and supervisory organs of the State Council.

In light of the Current Draft AML's deletion of Article 36 of the April 8, 2005 Draft AML, which prohibited the government and its subordinate departments from promulgating rules eliminating or limiting competition, the laudable apparent primary purpose of Article 38 of the Current Draft AML—to prevent a sectoral regulator from "turning a blind eye" to violations of the Anti-Monopoly Law by firms within its sector of the economy—may be circumvented through the establishment of anticompetitive rules or regulations inconsistent with this law. Article 38 of the Current Draft AML appears to be a regressive provision when compared with Article 45 of the April 8, 2005 Draft AML. If this earlier version had become law, the Authority would have exercised ultimate power over all competition matters, ensuring a more consistent interpretation and enforcement of the new law throughout all sectors of the economy. Under current Article 38, sectoral regulators will have the final word on competition issues related to certain sectors governed by sector-specific laws and regulations. Telecommunications laws, laws governing the energy sector, and other laws will supersede national competition policy. Furthermore, sectoral regulators, many of which have strong interests in protecting certain state-controlled "champions" from competition, will be tempted to interpret the Anti-Monopoly Law differently with respect to favored sectors. The text of Article 38 would appear to be a triumph for the lobbying efforts of sectoral regulators and participants in particular sectors of the economy. In the short term, this provision will deprive Chinese consumers of the benefits of a broad and consistent application of competition policy.

I. LEGAL LIABILITY

Chapter VI of the Current Draft AML ("Legal Liability") comprises Articles 39 through 46, and it sets out the penalties applicable for various types of violations of the Anti-Monopoly Law. For entering into an unlawful monopoly agreement, Article 39 prescribes cessation of the unlawful conduct,

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205 The chapter is misnumbered as Chapter VII in the English translation of the Current Draft AML.
confiscation of the illegal gains gleaned from such conduct, and possible fines not exceeding 10 percent of the firm's turnover in the relevant market in the preceding year. Punishment of firms that report a monopoly agreement and provide important evidence to the Authority shall be mitigated or foregone according to the circumstances.

Under Article 40, abuses of a dominant market position subject the defendant to cessation of the conduct, confiscation of the illegal gains, and fines not to exceed 10 percent of the turnover in the relevant market in the preceding year. For unknown reasons, mitigation for the provision of important evidence is not expressly provided for defendants guilty of abuses of a dominant position.

Article 41 of the Current Draft AML ("Penalty Against the Concentration Implemented Violating this Law") obligates parties that implement a concentration in violation of the law to "correct the situation" and pay fines of up to RMB 5 million. The Authority may also declare the concentration void or partially void, order the parties to dispose of some or all of their stock or to transfer part of the business, or require resignation from a given position within the company.

Article 42 of the Current Draft AML ("Factors to be Considered for Fines") provides that the Authority, in imposing fines under Articles 39, 40, or 41, shall take into consideration "the nature, extent and [duration] of the illegal act."

Article 43 of the Current Draft AML adds teeth to the obligation to cooperate in an investigation by the Authority, providing as follows:

In case of violating the regulations of this Law, [i]f there is any of the following conduct[i], the Anti-Monopoly Law Enforcement Authority shall order it to correct and may impose the fine above 20,000 RMB and below 200,000 RMB on the individuals, above 500,000 RMB and below 5,000,000 RMB on entities in accordance with the seriousness of the situation; [i]f the conduct [violates] the public security supervision regulations, the police shall impose security supervisory penalties pursuant to laws:

(1) hinder or refuse to be investigated;
(2) refuse to submit relevant materials and information or submit fraudulent materials or information; [or]
(3) conceal, destroy or remove . . . evidence that [is] sealed.

Article 44 of the Current Draft AML ("Obligations to Compensate the Injury") provides that violators whose acts cause a "loss to others shall be responsible for the civil liabilities" to compensate for the injury. This formulation replaces Articles 49 and 50 of the October 2002 Draft AML and Article 52 of the April 8, 2005 Draft AML, each of which was more specific than the Current Draft AML. Article 49 of the October 2002 Draft AML provided as follows: "If the legal rights and interests of business operators or consumers are
Article 50 of that draft stated:

If a business operator violates the provisions of this law and injures the rights and interests of others, the victim can petition the People’s Court for compensation from the business operator for its losses. The amount of compensation will be the actual loss suffered and the forecasted profit of the victim. When it is difficult to calculate the loss of the victim, the amount of compensation will be the profit gained by the perpetrator during the period when the victim’s interests are damaged plus the reasonable expenses of the victim incurred during the course of investigation and legal proceedings.

Article 52 of the April 8, 2005 Draft AML provided as follows:

The undertaking that violates the provisions of this law and injures the rights and interests of others shall make compensations to the victim. The amount of compensation will be twice of the actual loss suffered by the victim. When it is difficult to calculate the loss of the victim, the amount of compensation will be the profit gained by the perpetrator during the period when the victim’s interests are damaged plus the reasonable expenses of the victim incurred during the course of investigation and legal proceedings.

The replacement of these earlier drafts with Article 44 of the Current Draft AML appears to reflect an abandonment of any multiple damages remedies, perhaps because such remedies are regarded as punitive, not compensatory, but it is unclear why the Current Draft AML did not return to the “actual loss suffered and forecasted profit of the victim” language in the October 2002 Draft AML or why the right to recover the reasonable expenses incurred in legal proceedings was deleted. The right to resort to the People’s Court is no longer express, although the creation of a civil obligation to make compensation may support resort to the courts for failure to fulfill such a legal obligation.

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206 A related issue is the need for continued legal reform to ensure that courts are able to undertake independent, rule-based decision-making on the merits. See Jerome A. Cohen, Chinese Legal Reform at the Crossroads, 169 Far E Econ Rev 23, 25 (Mar 2006):

Judges are hired, paid, promoted and fired by local officials. . . . Usually, decisions in nonroutine cases are made by administrative superiors within the court rather than the customary panel of three judges who hear the case. The court’s “adjudication committee,” composed of its administrative leaders, decides sensitive or complex cases behind closed doors after only listening to a report from the judge in charge of the trial. Outside agencies—including higher courts as well as the local and central Party apparatus—frequently influence rulings behind the scenes.

In antitrust cases between local “champions” and foreign competitors (or Chinese competitors from other regions), conflicts of interest and political pressure may seriously undermine judicial independence. There are ongoing efforts to address these concerns. See the Second Five-Year Reform Program for the People’s Courts (2004–2008), available online in Chinese at <http://www.law-lib.com/law/law_view.asp?id=120832> (visited May 7, 2006) and <http://www.cecc.gov/pages/virtualAcad/index.php?showsingle=38564> (partial English translation) (visited May 7, 2006). Such initiatives are likely to take years, and likely decades, to
Article 45 of the Current Draft AML provides for administrative sanctions if the Authority itself violates the law and causes “serious consequences.” This falls short of the approaches taken in previous drafts. Article 55 (“The Responsibilities of the Public Servants”) of the October 2002 Draft AML provided as follows:

If staff of the Anti-Monopoly Management Body of the State Council [the term used in that draft for what is now designated the Authority] abuse their power, neglect their duties or play favoritism and commit irregularities, he/she will receive administrative punishment. If it is serious and becomes a criminal offense, he/she will be prosecuted and penalized accordingly.

Article 53 of the April 8, 2005 Draft AML (“The Responsibilities of the Enforcers”) stated: “In the case that the staff of the Anti-Monopoly Authority under the State Council violate this law and commit criminal offenses in executing this law, he/she will be prosecuted and penalized accordingly. If the violation does not constitute a criminal offense, he/she will receive administrative punishment.”

The stricter formulations in the earlier drafts would have provided the Chinese public and the parties under investigation, or cooperating with an investigation, greater assurances of regularity in the Authority’s processes and decision-making.

Article 46 of the Current Draft AML provides that “[c]onduct in violation of this Law constituting crime, shall be subject to criminal liability in accordance with relevant laws and regulations.” This provision would appear to ensure that, just as an antitrust violation in the US may also constitute mail fraud or other crimes and is punishable as such, a violation of the Anti-Monopoly Law that also violates criminal laws will be subject to punishment as such.


Chapter VII207 of the Current Draft AML (“Supplementary Provisions”) includes several odds and ends, one of which has the potential to be extremely bear fruit. This Plan includes “upholding the authority of judicial decisions” and “constructing responsibility systems for judges to independently decide cases.” Id. See also Paul Gewirtz, The U.S.-China Rule of Law Initiative, 11 WM & Mary Bill of Rts J 603 (2003). One possible approach to enhancing the independence of competition law jurisprudence is the creation of an independent Competition Court with judges trained in competition law and economics. China’s Intellectual Property Courts could present a useful precedent. See generally Gregory S. Kolton, Copyright Law and the People’s Courts in the People’s Republic of China: A Review and Critique of China’s Intellectual Property Courts, 17 U Pa J Int’l Econ L 415 (1996).

207 This provision is misnumbered at Chapter VIII in the English translation of the Current Draft AML.
important. This provision, Article 48 ("Applicability to Abuse of Intellectual Property Rights"), provides that "[t]his Law is applicable to the conduct[] by undertakings eliminating or restricting competition by the abuse of the rights stipulated by the Intellectual Property Right Laws or administrative regulations."

Concerns about China’s inadequate protection of intellectual property rights have been a source of constant friction between China and its principal trading partners, although recent improvements have been noted. The Current Draft AML provides no guidance regarding what conduct may be deemed an "abuse" of IP rights. Earlier drafts of Article 48 gave greater, although still insufficient, assurance that the enforcement of such rights in accordance with the laws creating them would not be considered a violation of the Anti-Monopoly Law. Article 56 of the October 2002 Draft AML stated:

This law is not applicable to the conduct of business operators exploiting intellectual property in accordance with the copyright law, trademark law and other laws protecting intellectual property rights. However, this law shall apply where there is abuse of intellectual property rights with the effect or potential effect of over-broadly limiting or eliminating competition.

Article 56 of the April 8, 2005 Draft AML provided as follows: "This Law is not applicable to undertakings who exercise their rights under the Patent Law, the Trademark Law and the Copyright Law. However, abuse of intellectual property rights in violation of this Law will be dealt with pursuant to this Law."

The Current Draft AML’s deletion of a provision that would have enacted an extremely broad variant of the essential facilities doctrine may mollify widely declaimed concerns about the draft law’s effect on intellectual property rights, but greater clarity is still necessary to ensure that owners of IP rights will not be prosecuted for an "abuse" by merely exercising their rights. Absent such clarification providing owners of valuable intellectual property rights with the protection embodied in standards worldwide, there could be a chill in investments in Chinese markets. Fear produced by the prospect of the unfettered application of a vague provision like Article 48 may also destroy the


Incentives Chinese high technology enterprises have to innovate and could deny such enterprises access to technologies critical for competing in the global market. Such a situation would be detrimental to Chinese consumers and would, more broadly, hamper continuing efforts to expand the Chinese economy.

In any event, the consequences of an abuse of IP rights should be delineated. For example, would such consequences include nullification of the rights or compulsory licensing? Recent decisions in various jurisdictions have rekindled serious concerns about the protection of intellectual property rights during the latest profusion of new antitrust laws.

Other supplementary provisions in Chapter VII include Article 47, which makes the AML applicable to business groups and industrial associations that eliminate or restrict market competition in violation of the law. Although such broad language could be interpreted as applying to administrative monopolies, it is highly unlikely that this is the intended construction. Instead, this provision will probably apply to trade associations, chambers of commerce, and other business-related groups. Chinese government entities are heavily involved in many Chinese business organizations, raising the possibility that Article 47 could render the law applicable to such quasi-government entities in spite of the Current Draft AML's exclusion of the chapter on administrative monopolies.

Article 49 of the Current Draft AML provides that the law is not applicable to the “cooperation, association or other coincident conduct[] by farmers and the farmers’ professional economic organizations during the course of the production, manufacture, transportation, storage and other operating activities of the agricultural products.” This is the only sectoral exemption in the Current Draft AML (if one excludes Article 2's exemption for conduct covered by laws or administrative regulations of relevant industries or sectors). The exemption is broader than the Capper Volstead Act’s immunity for agricultural cooperatives under US law.

IV. Conclusion

Overall, China has approached the drafting of its Anti-Monopoly Law with remarkable openness and a willingness to hear and consider the views and experiences of Chinese experts as well as foreign antitrust agencies, academics, economists, and practitioners. The improvements in the Current Draft AML

210 See Adam Cohen, China's Draft Antitrust Law Sows Worries in the West, Wall St J A12 (Jan 30, 2006) (describing concerns of the world’s largest patent-holding companies and the possibility of forced royalty-free licensing).


reflect the value of that deliberative, serious process. However, as noted in this Article, serious concerns remain, many of which could be ameliorated through implementing regulations that clarified the AML’s substantive and procedural provisions. But some of the problematic revisions, especially the removal of provisions curbing administrative monopolies and the introduction of provisions empowering sectoral regulators to serve as the primary interpreters and enforcers of the law in certain sectors, can only be rectified through a revision of the draft law or subsequent legislation. The apparent inapplicability, at least initially, of normative competition rules to SOEs and significant sectors of the Chinese economy, and the feared non-normative interpretation and application of the proposed law’s substantive provisions, threaten to deprive Chinese consumers (and more broadly, the Chinese economy) of the benefits that would follow if the law’s principal goals were achieved. The AML’s ambitious objective is to foster a broad market-based restructuring of China’s economic system, and the concomitant benefits of implementing the AML would include the further development of the rule of law, an increase in the economic welfare of workers, social stability in an expanding economy, and the continuing attraction of foreign capital. One step toward reaping these rewards would be clarifying the provision regarding possible violations of the new law by virtue of undefined “abuses” of intellectual property rights. Otherwise, a contraction in investment in China’s high technology markets and a forestalling in the licensing of leading technologies to Chinese enterprises can be expected.

Despite these shortcomings of the Current Draft AML, the need for continuing support of China’s competition law initiatives is clear. It is difficult to overstate the potential importance, to China and the world economy, of China’s adoption, implementation, and rigorous and fair enforcement of a modern competition law. China’s remarkable economic expansion, and the consequent progress made by many of its people and enterprises, is a testament to the investment Chinese leaders have made in modernity and a market economy. The continuation of such growth will require a broader reliance on a market economy along with fair and transparent rules of competition that apply to all sectors of the Chinese economy, including administrative monopolies and many sectors now subject to special laws and regulations. To do less would imperil the many social benefits gained to date through modern economic reforms and would undermine the execution of China’s bold commitment to transition from a planned economy to a market economy. Although many developments are possible, and the Current Draft AML is less ambitious than had been hoped, it nevertheless provides grounds for cautious optimism and an incentive for all interested antitrust enforcers, businesses with interests in China, competition law academics, and practitioners to remain engaged in constructive dialogue with relevant Chinese agencies and officials.