

THE IMPLICATIONS OF CHINA'S ANTI-MONOPOLY LAW FOR INVESTORS: PROBLEMATIC PROTECTION OF INTELLECTUAL PROPERTY

MARY J. HANZLIK*

Abstract

After almost two decades in the drafting stage, China has finally passed its Anti-Monopoly Law. The Law was passed largely to curb monopolistic conduct by both foreign-owned and domestically-owned businesses in China. This new Law has created debate and worry among commentators and analysts. Some of these commentators and analysts foresee China enforcing the law disproportionately against foreign businesses and investors, while allowing state-owned enterprises to operate as they will.

This Note narrows its focus to the intellectual property provision contained in the Anti-Monopoly Law. Because of China's history and its problems with enforcement, it is unlikely that the long-awaited Anti-Monopoly Law and its intellectual property provision will have much impact on the world of business. The Law itself not only lacks a method of enforcement, but it also lacks a specific enforcement mechanism or agency. Additionally, China has faced numerous issues when it comes to the enforcement of its own laws, especially those passed to protect intellectual property owners.

“Inadequate protection of intellectual property rights in China costs US firms and workers billions of dollars each year.”¹ After thirteen years in

* J.D., The Ohio State University Michael E. Moritz College of Law, expected May 2009. Special thanks to Ed, Cheryl, and Eric.

¹ BBC NEWS, *U.S. files case over China Piracy*, Apr. 9, 2007 (quoting U.S. Trade Representative Susan Schwab), <http://news.bbc.co.uk/2/hi/business/6539947.stm> (last visited Sept. 22, 2008).

draft, China has finally passed its long-awaited Anti-Monopoly Law (“AML” or “the Law”).² The Law was passed on August 30, 2007 and came in to effect on August 1, 2008.³ The AML has taken somewhat of a backseat in comparison to the more heavily publicized news of the importation of defective products from China into the United States, but the savviest of businesspeople and the world of business news have taken notice of the monumental event.

International investors and businesses have grown weary of China’s inability to curb monopolies and to protect intellectual property rights. A business may create a product and expect that it will be protected through intellectual property laws. The business may later find out that state-owned or domestically-run businesses in China are producing that same product more cheaply and efficiently. Alternatively, a foreign business investor, who has invested a substantial amount of money in a business overseas, finds that business’s profits are dwindling because another enterprise has created a monopoly. This was the landscape before the passage of the AML and its intellectual property provision.

Many analysts had hoped that the AML would curb some of these occurrences. However, recent articles and news reports suggest that the fear of these situations has not been placated as shown in recent articles and news concerning the Law.⁴

Although the AML is an attempt to curb monopolies in China, this Note specifically focuses on the intellectual property provision. By looking at the AML as a whole, the Note attempts to discern what is driving foreign concern behind this new law, and specifically, how this concern relates to the intellectual property provision. In addition to the more traditional fears of infringement of intellectual property rights in China, there is the fear that this new law will be construed favorably toward Chinese businesses at the expense of foreign businesses and investors. Some commentators fear that foreign businesses which have a substantial stranglehold on a particular market will be found in violation of the AML, but state-owned enterprises which are violative of the Law, will be left alone.

Part I of this Note focuses on the more recent legal and economic history of Chinese law and politics. It addresses the legal landscape in China in connection with intellectual property law currently in place. Part II of this note addresses the general issues that commentators and officials

² See William D’Amico, *One Step Closer to Market Economy: China Adopts New Antitrust Law*, MONDAQ.COM, Sept. 17 2007, <http://www.mondaq.com/article.asp?articleid=53556>.

³ Thomas M. Shoesmith, et al., *The New Antimonopoly Law and Its Impact on Foreign M&A Transactions*, MONDAQ.COM, Nov. 13, 2007, <http://www.mondaq.com/article.asp?articleid=54318>.

⁴ See e.g., China Law Blog, *China’s New Anti-Monopoly Law: What is it Good For?*, http://www.chinalawblog.com/2007/08/chinas_new_antimonopoly_law_wh_1.html (last visited Sept. 22, 2008).

foresee in the new AML and focuses specifically on the intellectual property provisions contained therein. Part III analyzes at how some of these problems could be alleviated. Foreign businesses and investors do not need to worry that the passage of the AML will lead to greater hardships in intellectual property areas because it is not likely that the AML will be enforced. The biggest fear investors should have is that the legal landscape in China will remain the same and infringement of intellectual property rights in China will continue.

The answer to these problems is simple: enforce the laws and enforce them equally. That China was willing and able to pass a law such as the AML indicates that it may be willing to fix some of these internal problems. In order to fix the issue of intellectual property right infringement in China, there must be an agency named and created to implement it and there must be an understanding that it will be enforced both against state-owned businesses and foreign businesses in China. Until this is done, foreign investors need not worry about the AML, but can continue to worry about protecting their intellectual property rights as they have previously done.

I. OVERVIEW OF CHINESE HISTORY AND INTELLECTUAL PROPERTY

China has generally failed to enforce its intellectual property laws. This failure has led to increased criticism of the Chinese legal system. This constant criticism may have helped to pave the way for the passage of the AML.

A. *The Legal and Economic Landscape in China*

1. A Brief Overview of Chinese Legal History

China has come a long way from the era of communism, but the Chinese legal system still has trouble with enforcement of laws due to its tumultuous past. Before China welcomed the ideology of communism, the country was ruled by emperors, sometimes warlords, and at times, foreign imperialists.⁵ This shifting of power partially explains why China continues to struggle with finding its legal philosophy.⁶

⁵ Jared A. Berry, *Anti-Monopoly Law in China: A Socialist Market Economy Wrestles with Its Antitrust Regime*, 2 INT'L L. & MGMT. REV. 129, 130 (2005). The bulk of this section is taken from Jared A. Berry's article. For further reading, the author cites to a number of different sources in his assessment of Chinese history. See DANIEL C.K. CHOW, *THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA IN A NUTSHELL* (Thompson/West 2003); JUNE TEUFEL DREYER, *CHINA'S POLITICAL SYSTEM: MODERNIZATION AND TRADITION* (Longman 2d ed. 1996).

⁶ Berry, *supra* note 5, at 130.

When the Chinese Communist Party took over in 1949, it ousted a system in which local and foreign imperialism ruled.⁷ The Chinese Communist Party did not respect traditional Chinese philosophies, such as Confucianism, nor did it respect traditional Chinese judicial institutions.⁸ The Party believed these traditional philosophies and institutions played a large role in oppressing the working people in China.⁹

The Chinese Communist Party, led by Mao Zedong, replaced all Chinese historical notions of law and structure with Communist ideology and notions of justice.¹⁰ The years that followed saw a further break down of the traditional legal system.¹¹ In 1975, the National People's Congress completely destroyed what was left of the independent judiciary in China.¹²

In 1978 Deng Xiaoping became the leader of the Chinese Communist Party and was faced with a destabilized legal system.¹³ Seeing the chaotic result, Deng attempted to bring a steadying effect to China and its judicial system by changing the constitution to give back independence to the judiciary.¹⁴ This independence of the judiciary was further enhanced under the 1982 Constitution.¹⁵ Today, the Chinese legal system attempts to embody the principles from the leadership of Deng and the 1978 and 1982 constitutions.¹⁶

However, even with China's ability to overcome an imperialistic legal system, there remains significant room for improvement.¹⁷ For example, despite the principles laid out in the 1978 and 1982 constitutions, the judiciary in China is not wholly independent.¹⁸ The judiciary is often influenced by political controls.¹⁹ Additionally, corruption plays a large role in the Chinese legal system.²⁰

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 131.

¹¹ *Id.*

¹² Berry, *supra* note 5, at 131.

¹³ *Id.* at 132.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* Berry explains that the changes brought about by Deng were an attempt to make the legal system more predictable by the use of codified laws and regulations. *Id.* The 1978 Constitution specifically announced the equality of the classes and the importance of an independent judiciary. *Id.* The 1982 Constitution built upon these notions, even changing the words describing China as a "people's *democratic* dictatorship." *Id.* (emphasis added).

¹⁷ *Id.* at 133.

¹⁸ Berry, *supra* note 5, at 133.

¹⁹ *Id.* at n.20. Berry notes that the Chinese Communist Party continues to involve itself with the Chinese judiciary. *Id.* Additionally, the congresses in China have great influence over who is appointed to the local, regional and national judiciaries. *Id.* The different congresses also control the judiciaries' funding. *Id.*

²⁰ *Id.* at 133.

2. A Brief Overview of China's Economic Landscape

After 1949, the Chinese Communist Party and the central government managed the economy.²¹ This management did not lead to economic prosperity.²² Because all enterprises were state-run with communistic ideals, the industries in China were replete with workers who had no incentive to work especially hard at their jobs.²³ All profits were turned over to the national government.²⁴ If a state-owned enterprise was losing more money for the economy than it was gaining, the enterprise would continue to operate and sap the economic prosperity China gained from other, more productive enterprises.²⁵

Much like the legal system, the Chinese economy did not start to show promise until the rise of Deng Xiaoping in 1978.²⁶ Incentives were used in the more rural areas, and China became open to foreign investment.²⁷ Especially important were the special economic zones that were mandated.²⁸ These special economic zones increasingly became more capitalistic rather than communistic.²⁹ In addition, state enterprises were finally allowed to retain their profits and some, though not all, stagnant enterprises were slowly removed.³⁰

Today the Chinese economic system is often characterized as a free-market system with socialistic characteristics.³¹ This system has allowed the Chinese economy to burgeon into one of the leading production markets of the world's goods.³² But, these economic reforms have not been fully realized or utilized.³³ The central government continues to believe that communism and its ideals are paramount to Chinese existence.³⁴ The government is often disinclined to close a state-owned business even if its

²¹ *Id.*

²² *Id.*

²³ *Id.* at 134.

²⁴ Berry, *supra* note 5, at 134.

²⁵ *Id.*

²⁶ *Id.* Berry notes that during the last twenty years, the Chinese economy has experienced an average of nine percent annual growth due to the changes made by Deng.

²⁷ *Id.* at n.36. The rural economy was based on set quotas for the area, region, or farm. *Id.* Farmers who were able to produce in excess of their quota could sell their product on the market, thereby making an individual profit that was not required to be given to the state. *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Berry, *supra* note 5, at n.36.

³¹ H. Stephen Harris, Jr., *The Making of an Antitrust Law: The Pending Anti-Monopoly Law of the People's Republic of China*, 7 CHI. J. INT'L L. 169, 173 (2006).

³² *Id.* at 174.

³³ *Id.*

³⁴ Berry, *supra* note 5, at 135.

continued existence is detrimental to China's macroeconomic prosperity.³⁵ This reluctance is driven by the fear that closing stagnant state-owned enterprises would lead to movements in the countryside which would undermine the central government's power.³⁶ Therefore, many state-owned enterprises continue to weaken China's economy.³⁷ This is especially true in China's agricultural sector.³⁸

Administrative monopolies also hinder China's economic growth.³⁹ These administrative monopolies discourage competition, which in turn, discourages greater chances of prosperity in the economy.⁴⁰ These monopolies are often state-owned enterprises, which account for a marked percentage of Chinese wealth.⁴¹ The profits from these state-owned monopolies are filtered either directly or indirectly to individuals in the central government.⁴² There appears to be a greater incentive for the central government to allow state-owned monopolies to continue to operate than enforce laws such as the AML.⁴³

B. *The Current Landscape of IP Law in China*

1. Overview of the Complex Nature of Intellectual Property law in China

China has numerous laws that are meant to enforce intellectual property rights and to curb monopolies.⁴⁴ In general, these laws have done little to protect intellectual property rights in China or to curb state-owned

³⁵ *Id.*

³⁶ *Id.*

³⁷ Harris, Jr., *supra* note 31, at 174.

³⁸ See Berry, *supra* note 5, at 134.

³⁹ *Id.* at 135.

⁴⁰ *Id.* Berry explains how such an administrative monopoly operates in China. For example, he notes that some local municipalities in China will attempt to protect their own market at the expense of others by enacting laws that create barriers to other businesses, thereby keeping competition out. *Id.*

⁴¹ Harris, Jr., *supra* note 31, at 174.

⁴² *Id.*

⁴³ See *id.*

⁴⁴ See Deirdre Shanahan, Counsel for Asia-Pacific, Fed. Trade Comm'n, Presentation for International Competition Law: Real World Issues and Strategies for Success: The Development of Antitrust in China, Korea and Japan (June 16-17, 2005), <http://www.ftc.gov/bc/international/docs/shanahanmontreal.pdf>. Shanahan notes that since the early 1990s, China has been developing its own legal system that deals with competition laws. *Id.* Such laws include the 1993 Anti-Unfair Competition Law and the Price Law of 1997. *Id.*

monopolies.⁴⁵ Because these laws are relatively new, Chinese law is often complex and can seem unstable to outside investors.⁴⁶

China has laws that attempt to regulate areas such as patent, industrial design, copyright, trademark, and other intellectual property-like areas.⁴⁷ Some of these laws were enacted merely as prerequisites to China's ability to join the World Trade Organization.⁴⁸ In the early 1990s, China began to amend its intellectual property laws in order to appease foreign discontent.⁴⁹ Because of the constant urging from foreign sources, China has enacted numerous laws and regulations that purport to regulate intellectual property in China. Some of these laws include: Patent Law of the People's Republic of China, Trademark Law of the People's Republic of China, Copyright Law of the People's Republic of China, and Regulations of the Protection of Computer Software.⁵⁰

In addition to its own laws, China is also subject to international treaties that address the protection of intellectual property.⁵¹ These treaties are usually dissimilar to the laws in the United States.⁵² This unfamiliarity can cause confusion to the ordinary investor.⁵³

Although the Chinese government is party to an international treaty, it will not necessarily enforce specific treaty provisions.⁵⁴ Apart

⁴⁵ See Samir B. Dahman, Note, *Protecting Your IP Rights in China: An Overview of the Process*, 1 ENTREPREN. BUS. L.J. 63, 65 (2006).

⁴⁶ See e.g., Elizabeth Chien-Hale, *Intellectual Business Property Aspects of Doing Business in China*, 1626 Practising Law Institute, Corporate Law and Practice Course Handbook Series 109, 112 (2007).

⁴⁷ *Id.* at 111.

⁴⁸ Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China*, 55 AM. U. L. REV. 901 (2006) reprinted in Chien-Hale, *supra* note 46, at 122. The United States was part of the group of countries that urged China to enact such laws. *Id.* Yu notes that the United States used methods such as threatening economic sanctions and opposing China's ability to enter the W.T.O if China did not pass laws for the protection of intellectual property rights. *Id.*

⁴⁹ *Id.* at 125.

⁵⁰ See Chien-Hale, *supra* note 46, at 112, 113. See also Dahman, *supra* note 45, at 68.

⁵¹ Yu *supra* note 48, at 125.

⁵² *Id.*

⁵³ *Id.* For an interesting comparison of the Agreement on Trade Related Aspects of Intellectual Property (TRIPS) and Chinese intellectual property laws; see Douglas Clark, *IP Rights Protection Will Improve in China-Eventually*, CHINA BUS. REV., May-June 2000, available at <http://www.chinabusinessreview.com/public/0005/clark.html>.

⁵⁴ *Id.* The lack of enforcement of laws already in place is in part what fuels the discussion of whether the AML will be enforced at all. Logically, if China refuses to enforce or is lackadaisical about the enforcement of laws already in place to protect intellectual property rights, it seems doubtful that they will enforce one provision in a law.

from the grumblings of outsiders, there appears to be little recourse when China chooses inaction.⁵⁵

2. The Intellectual Property Landscape in China: Lack of Enforcement and Discontent

The lack of enforcement of intellectual property law in China may lead foreign investors to think twice about freely investing their money. In particular, those in the United States should be concerned when it comes to the protection of their intellectual property rights in China.⁵⁶ China has been placed high on the United States “priority watch list” because it is one of the top piracy nations in the world.⁵⁷

Foreign investors believed that China’s admission into the WTO in 2001 would help to alleviate the lack of enforcement of intellectual property rights. But, according to an estimate by the Assistant Minister of Public Security, Zheng Shaodong, between 2001 and 2005, there were almost seven thousand cases of intellectual property infringement which involved an amount equal to \$437.5 million.⁵⁸ Another estimate claims that global losses due to infringement of intellectual property rights in China range from \$20 to \$250 billion each year.⁵⁹

In a recent survey of US-China Business Council members, seventy-five percent of the businesses surveyed saw China’s membership in

⁵⁵ *Id.* Although technically the foreign nations or organizations that are part of these treaties can take action against China, they too appear to have enforcement problems when it comes to such matters. *Id.*

⁵⁶ Bradley S. Butterfield, et al., *Human Resources and Intellectual Property in a Global Outsourcing Environment: Focus on China, India, and Eastern Europe*, 15 INT’L HR J. (Issue 2) 1, 1 (2006). The authors state that as of 2006, the United States dominated the intellectual property field with over \$44 billion earned overseas in foreign countries and investments. *Id.* (citing U.S. Government Accountability Office, Report to Congressional Requesters, Intellectual Property: U.S. Efforts Have Contributed to Strengthened Laws Overseas, but Challenges Remain, at 1 (Sept. 2004)).

⁵⁷ Reuters.com, *China, Russia Top U.S. Piracy List*, <http://www.reuters.com/article/domesticNews/idUSN3041927620070430?feedType=RSS&rpc=81> (last visited Sept. 22, 2008). The WTO has received formal filed complaints from the United States against China for its failure to protect U.S. business investors from piracy. *Id.* Russia’s position at the top of the list is one of the impediments Russia faces in attempting to join the WTO. *Id.*

⁵⁸ Embassy of the People’s Republic of China in the United States of America, *China Warns Officials against IPR Violations*, <http://www.china-embassy.org/eng/xw/t249600.htm> (last visited Sept. 22, 2008).

⁵⁹ Butterfield et al., *supra* note 56, at 1; see also Venkatesan Vembu, *Why China is a “Pirate” Nation*, <http://www.dnaindia.com/dnaPrint.asp?NewsID=1069547> (last visited Sept. 22, 2008).

the WTO as being extremely important to their business ventures.⁶⁰ However, these companies viewed China's failure to enforce intellectual property laws as the "most important commitment" to the WTO that China has ignored.⁶¹ It is not surprising that many industries are impacted by this non-enforcement of intellectual property rights in China. Although one obstacle to China's economic growth is the lack of enforcement in media and entertainment, other areas of concern include consumer goods, pharmaceuticals, and food products.⁶²

Many commentators warn foreign investors that infringement of their intellectual property rights in China is likely to occur, but they also explain how a foreign business can protect these rights abroad.⁶³ Two of the avenues recommended are suing in court for infringement of these rights and registration with Customs.⁶⁴ Protecting intellectual property rights in China is not easy, but the optimists still believe that there are protective measures that can be taken even without strong enforcement from the Chinese legal system.⁶⁵ These optimists, however, appear to be in the minority.⁶⁶

⁶⁰ Written Testimony by the US-China Business Council, *China's WTO Implementation: An Assessment of China's Fourth Year of WTO Membership*, http://www.uschina.org/public/documents/2005/09/ustr_testimony.pdf.

⁶¹ *Id.* at 2.

⁶² *Id.* at 6.

⁶³ See, e.g., Aaron R. Wininger and Xiao Luo, *China: Intellectual Property Administrative Enforcement in China*, THELEN REID BROWN RAYSMAN & STEINER, LLP, <http://mondaq.com/article.asp?articleid=49926>; see also Dahman, *supra* note 45, at 65. Dahman explains that the best avenue for intellectual property protection in China is through trademark. *Id.* Chinese officials have a better understanding as to what constitutes trademark infringement as opposed to the more complex review of patent and copyright infringement. *Id.*

⁶⁴ Wininger and Luo, *supra* note 63.

⁶⁵ Willi Vett, *China: An Area in which there is No Legal Regulation of Intellectual Property?* MONDAQ.COM, Nov. 30, 2006, <http://mondaq.com/article.asp?articleid=44520> (last visited Sept. 1, 2008). This is one of the more promising examples of how China has taken it upon itself to enforce its own intellectual property laws. Vett discusses the recent case brought by Starbucks Corporation against Shanghai Xingbake Café Company in Shanghai No. 2 Intermediate People's Court. *Id.* The Court held that because the Chinese translation of Starbucks is "Xingbake", the defendant business Shanghai Xingbake could not use that name as it was protected by Starbucks' registration of the name. *Id.* The holding of this case shows promise in trademark protection. *But see* Written Testimony by the US-China Business Council, *supra* note 60, at 7 (discussing how China, in December 2004, issued a judicial interpretation meant to be harsher on intellectual property law violators, but only half of the businesses surveyed saw improvement after the decree. And even among those who saw improvement, it was merely "some" [improvement]). *Id.*

⁶⁶ For example, some private companies initially welcomed the new AML and had hoped it would help curb state-owned monopolies and state corporations. See Chen Shasha, *Private Chinese Companies Welcome Anti-Monopoly Law*, CHINA ENERGY

II. THE ANTI-MONOPOLY LAW

The AML was passed in part to curb state-owned enterprises from monopolistic conduct and in part because of continuing criticism of China and its lack of enforcement over areas such as intellectual property rights.⁶⁷ One of the purposes of the Law is to balance needed protection of intellectual property rights in China while restricting monopolistic conduct.⁶⁸ The large obstacle of passage has been overcome, but there are other areas of concern that need to be dealt with before the AML can become effective.⁶⁹ Some generally troublesome areas are the enforcement mechanism that will be used to implement the Law and the concern over the language of the AML itself.⁷⁰ These areas of concern help to explain why many commentators fear that the AML will be interpreted at the expense of foreign businesses.⁷¹

However, there are some who believe that the mere passage coupled with official comments offer hope to the idea that China will enforce this law fully and fairly.⁷²

A. Generally Troublesome Areas

1. The Implementation of the Anti-Monopoly Law

One of the biggest concerns about the AML is that it does not clearly designate one agency to enforce or review violations.⁷³ In 2005, the drafters contemplated two very different solutions to the problem of designating a body to implement the law.⁷⁴

WEEKLY, Sept. 5, 2007; *but see* Matthew Drummond, *China Reforms May Target Foreigners*, AUSTL. FIN. REV., Dec. 7, 2007, at 60.

⁶⁷ See Shanahan *supra* note 44, at 2. The purpose of the AML is to bring “cohesion” to the laws already in place in China. *Id.*

⁶⁸ See, e.g., Shoemith et al., *supra* note 3, at 5 (noting that the law will primarily focus on four areas: “monopoly agreements, abuse of dominance, administrative monopoly, and concentrations”).

⁶⁹ See D’Amico, *supra* note 2.

⁷⁰ *Id.*

⁷¹ See Drummond, *supra* note 66.

⁷² See Shasha *supra* note 66.

⁷³ David Tang & Bill Zhang, *The PRC’s New Antimonopoly Law Has a Long Way to Go*, MONDAQ.COM, Nov. 14, 2007, <http://www.mondaq.com/article.asp?articleid=54318>.

⁷⁴ Nathan Bush, *It Takes More Than a Law*, THE CHINESE BUS. REV. ONLINE, <http://www.chinabusinessreview.com/public/0505/bush.html> (last visited Sept. 22, 2008).

The first option was the creation of the Anti-Monopoly Enforcement Agency which would be overseen by the State Council.⁷⁵ The second option was a joint venture by three agencies already in existence in China.⁷⁶ Each agency would be responsible for interpretation and enforcement of different provisions within the AML.⁷⁷

Some scholars looked at the specific wording of the statute and believed that a new authority or agency would be created.⁷⁸ Those with the opinion that an entirely new agency would be created look at the imperfect translation of the law, the political and social culture of China, and its legal system.⁷⁹ Under Article 10, the Law states that the State Council will designate the Anti-Monopoly Enforcement Authority and that this authority may give power to other national and local agencies to help with the enforcement.⁸⁰

But, according to recent reports, China has opted to name three government agencies who will share in the duties of implementation and enforcement of the new Law.⁸¹ Recent news indicates that the commerce minister will be in charge of antimonopoly investigations, the National Development and Reform Commission (NDRC) will be in charge of deciding pricing issues, and finally, the State Administration for Industry and Commerce (SAIC) will enforce the law and decide issues related to abuse of dominant position.⁸²

If these three agencies are to share in the interpretation and implementation of the AML, the question remains “Who is in charge?”⁸³ If three different bodies are in charge of implementing and enforcing the law, there will likely be power struggles between the three agencies. Even if China had chosen a single agency to be named or created to act as the Anti-Monopoly Enforcement Authority, the issue of how the agency would

⁷⁵ *Id.* The State Council operates much like a cabinet in a parliamentary system, where members are typically the heads of organizations and agencies. *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Anti-trust China, *Anti-Monopoly Law of the People's Republic of China Has Passed!*, <http://www.antimonopolychina.com> (last visited Sept. 22, 2008).

⁷⁹ Chinese Law Prof Blog, http://lawprofessors.typepad.com/china_law_prof_blog/2007/week35/index.html (last visited Sept. 22, 2008).

⁸⁰ Anti-trust China, *supra* note 78.

⁸¹ Antitrust Duties to be shared HOT STOCKS, INT'L HERALD TRIB., July 17, 2008, at 15. This is contrary to what scholars predicted one year ago after the Anti-Monopoly Law's enactment. Morrison & Foerster, LLP, *United States: People's Republic of China Passes Comprehensive Anti-Monopoly Law*, MONDAQ.COM, Sept. 20, 2007, <http://mondaq.com/article.asp?articleid=52478> (last visited Sept. 22, 2008).

⁸² Antitrust duties to be shared HOT STOCKS, *supra* note 81. See also Shoesmith et al., *supra* note 3, at 6 (noting that either MOFCOM or SAIC will be named as the agency to enforce the AML because they are already in charge of enforcing other types of anti-monopoly laws in China).

⁸³ Morrison & Foerster, LLP, *supra* note 81.

review regulations would remain. Moreover, the Law does not address the enforcement mechanism appropriately.⁸⁴

2. “Public Interest” and “National Security Review”

Another concern about the AML is its use of the terms “public interest” and “national security review.” The use of these terms is, in part, a source of the fear that the intellectual property provision will be construed at the expense of foreign investors. Article 1 states:

This law will be enacted for the purpose of guarding against or ceasing monopolistic conduct, safeguarding and promoting the order of market competition, improving economic sufficiency, protecting the legitimate rights and interests of the consumer, *protecting the public interest*, and promoting the healthy development of a socialist economy.⁸⁵

Article 30 states that where

national security is concerned, besides the examination on concentration in accordance with this Law, the examination on *national security* according to the relevant regulations by the State shall be conducted as well on the acquisition of domestic undertakings by foreign capital or other circumstances involving the concentration of foreign capital.⁸⁶

These two provisions have led people such as the European Chamber’s members to be concerned. The “national security” review provision does not stipulate which foreign investors will be subject to it, and the phrase “public interest” is not defined within the Law.⁸⁷ Additionally, because the AML focuses on protection of state-owned enterprises, many analysts question how these vaguely worded requirements will be used.⁸⁸

⁸⁴ *Id.*

⁸⁵ Anti-trust China, *supra* note 78 (emphasis added).

⁸⁶ *Id.* (emphasis added).

⁸⁷ Harris, Jr., *supra* note 31, at 227. See Rowan Callick, *China Anti-Monopoly Law Concerns*, ADELAIDE NOW, Sept. 2, 2007, <http://www.news.com.au/adelaidenow/story/0,22606,22350658-462,00.html> (last visited Sept. 22, 2008).

⁸⁸ *Id.* Despite these general concerns, the European Chamber feels certain that China will implement these provisions fairly in order to avoid causing unnecessary burdens on foreign business ventures in China. *Id.*

Implementation of the law in these areas has become a grave concern for foreign nations as they try to discern which direction China will go.⁸⁹ Historically, countries like China have utilized “public interest” concerns to justify avoid closing domestically-owned businesses, even though they are no longer profitable.⁹⁰ The fear is that these provisions will be used to increase burdens on foreign companies in order to curb foreign monopolies in China, while considering state-owned monopolies outside of the laws.⁹¹

Although the use of the term “national security review” can commonly be found in Chinese law, many are still worried about the implications of its use in the AML.⁹² For example, during the drafting stages of the AML, a large Chinese-owned construction manufacturer was taken over by a United States business.⁹³ This type of takeover, which would be considered common in other nations, was subject to strict review by the Chinese government under the claim of national security.⁹⁴

Even with these dire predictions, however, there are many who feel that China will use these provisions appropriately. China has repeatedly stated one of the primary purposes for enacting this law was to regulate state-owned monopolies in hopes of encouraging competition and profit-maximization.⁹⁵

Such strategic uses of vaguely worded laws are not new in the world of intellectual property law. National security reviews have been used before in other industries, thereby creating increased obstacles for foreign investors to overcome.⁹⁶ Because such reviews are not new and are somewhat commonplace, perhaps the fear is a little overstated.

B. *The Text of the Anti-Monopoly Law: The Intellectual Property Provision*

1. What Does It Say?

The language that was eventually enacted is much broader and vaguer than previous drafts. This vague wording has caused concern

⁸⁹ Jamil Anderlini, *Foreign Investors fear China law to curb monopolies*, FIN. TIMES, Aug. 31, 2007, at 5.

⁹⁰ Bush, *supra* note 74.

⁹¹ Sheppard Mullin, *China Joined World Antimonopoly Club*, <http://www.antitrustlawblog.com/article-china-joined-world-antimonopoly-club.html> (last visited Sept. 22, 2008).

⁹² Shoesmith et al., *supra* note 3, at 16.

⁹³ *Id.* at 10.

⁹⁴ *Id.*

⁹⁵ See China Daily, *China's Anti-Monopoly Law May Help*, http://www.chinadaily.com.cn/bizchina/2006-06/21/content_622623.htm (last visited Sept. 22, 2008).

⁹⁶ Sheppard Mullin, *supra* note 91.

amongst analysts regarding how the provision will be used against foreign enterprises. It is possible, however, that because the provision is so vague, it may be used in the same way that other intellectual property law in China is used, which neither protects nor unequally harms foreign investors: the intellectual property laws in China are not usually enforced at all.⁹⁷

a. The 2002 and 2005 Drafts

The 2002 draft of the AML's intellectual property provision 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.⁹⁸

The 2005 draft of the AML's intellectual property provision stated:

This law is applicable to the conduct[] by undertakings by eliminating or restricting competition by the abuse of the rights stipulated by the Intellectual Property Right Laws or administrative regulations.⁹⁹

b. The 2007 Law

Article 55 of the AML intellectual property provision states:

This law is not applicable to conducts by undertakings to protect their legitimate intellectual property rights in accordance with IP law and relevant administrative regulations; however, this Law is applicable to the conduct of undertakings to eliminate or restrict market competition by abusing intellectual property rights stipulated in the IP law and administrative regulations.¹⁰⁰

⁹⁷ Clark, *supra* note 53.

⁹⁸ Harris, Jr., *supra* note 31, at 227.

⁹⁹ *Id.*

¹⁰⁰ Anti-trust China, *supra* note 78.

c. Analysis of the Changes

The different drafts and the subsequent law appear to indicate that China is taking notice of the concerns expressed by foreign investors. The original 2002 draft is worded similarly to the actual law passed in 2007. Both state that if one is acting in accordance with intellectual property laws, one will not be subject to the AML.¹⁰¹ By contrast, the 2005 draft only included the phrasing that abuses of intellectual property law would make persons subject to the AML, but did not attempt to assure persons who acted in accordance with the Law.¹⁰² The fact that this language was originally considered, then discarded, and then restored and passed into law may show that China is sensitive to these voiced concerns.

China's choice to insert language that would protect a person from being subject to the AML so long as they are acting in accordance with intellectual property laws has several implications.

First, it empowers the intellectual property laws already in place.¹⁰³ If one must act in accordance with the intellectual property laws in China so as not to be in violation of the AML, the intellectual property laws in China must still be viewed by the Chinese government as important.¹⁰⁴ Second, the language chosen may indicate that the specific intellectual property provision will be enforced fairly. If a person is not found in violation of any intellectual property laws, then they are not subject to the AML.¹⁰⁵ However, if a person is in violation of intellectual property laws, then they may also be subject to the AML and the intellectual property provision in Article 55.¹⁰⁶ The drafters likely considered that these laws should and must be enforced against infringers, even if they are domestic infringers.

2. Problems Foreseen Relate to Current Intellectual Property Law and the Generally Troublesome Areas in the Anti-Monopoly Law

The concern with the AML and the Intellectual Property Provision is that they will be used prejudicially against foreign businesses while turning a blind eye to domestic and state-owned enterprises. This concern

¹⁰¹ See *id.*; see also Harris, Jr., *supra* note 31, at 227.

¹⁰² Harris, Jr., *supra* note 31, at 227.

¹⁰³ Anti-trust China, *supra* note 78.

¹⁰⁴ It is the opinion of this author that the mention of the laws already in existence may signify that China is willing to enforce some of these laws more fully than they have previously. Of course this is an optimistic view and may not be held by all analysts.

¹⁰⁵ Anti-trust China, *supra* note 78.

¹⁰⁶ *Id.*

arises from the existing problems previously discussed including the use of the phrases “public interest” and “National Security Review.”¹⁰⁷ Although these provisions are specifically pertinent to monopolies, it appears that they, taken together with the vagueness of the Intellectual Property Provision, are fueling the concern.¹⁰⁸ The greatest concern is that Article 55 does not define what constitutes abuse of intellectual property rights.¹⁰⁹ Foreign investors are thus obviously concerned: China has been known to be lax in its enforcement of its intellectual property laws. China’s laws are vaguely worded, and the meanings are made known only through judicial opinions or administrative decisions.¹¹⁰

For example, one concern is that the AML will require compulsory licensing for foreign investments firms.¹¹¹ This fear stems from statements made by Chinese officials who claim that China is plagued with foreign technology businesses that use unfair licensing practices at the expense of state-owned enterprises.¹¹²

In order to alleviate some of these concerns, China should seek to define terms such as “abusing.” Because much of foreign concern rests on the broad language of the AML, perhaps if they knew more readily what it meant to “abuse” the law, they could take precautions to stay within the Law’s limits.

III. IS THIS FEAR TRULY WARRANTED, AND IF SO, HOW CAN IT BE ALLEVIATED?

A. *Should We Really Be Worried?*

It is the opinion of this author that foreign businesses and investors should not be too concerned about an unequal interpretation of the AML at

¹⁰⁷ See D’Amico, *supra* note 2.

¹⁰⁸ See Harris, Jr., *supra* note 31, at 229.

¹⁰⁹ *Id.* This lack of specificity in the Intellectual Property provision is particularly confusing as the drafters took the time to define “abuse” in relation to “market dominance” and “administrative power” in Article 17, but not in Article 55, the intellectual property provision. *Id.* See Anti-trust China, *supra* note 81. See Nathan Bush, *Anticipating Chinese Antitrust Policy*, 35 CHINA BUS. REV. 1, Jan. 1, 2008, at 46.

¹¹⁰ See, e.g., Embassy of the People’s Republic of China in the United States of America, *supra* note 58. See also, Secretary Kimmitt, Remarks to the U.S.-GCC Investment Forum in Bahrain (Dec. 4, 2007) available at <http://www.ustreas.gov/press/releases/hp710.htm> (noting that China’s Anti-Monopoly Law goes further than most protectionist “national security reviews” in other comparable laws).

¹¹¹ Gerald F. Masoudi, Deputy Assistant Attorney Gen., Dept. of Justice, Remarks at the International Seminar on Review of Antimonopoly Law: Key Issue Regarding China’s Anti-Monopoly Legislation (May 19, 2006), <http://www.usdoj.gov/atr/public/speeches/217612.pdf>.

¹¹² *Id.*

their expense. It is likely that the same issues that have been plaguing China, such as poorly conceived implementation and lax enforcement, will continue even with the enactment of the AML. Or, at the other end of the spectrum, there may actually be some minimal improvement for foreign business investors.

The more likely result is that the intellectual property provision will not be enforced at all, or enforced poorly as has been typical of China with its intellectual property laws.¹¹³ The biggest problem analysts identify is the AML's lack of an enforcement mechanism.¹¹⁴ Given China's problems enforcing its own laws and those it agreed to abide by through international treaties, the AML will likely share the same fate.¹¹⁵

Alternatively, if we assume that the AML will be enforced as written, it seems rather unlikely that it will be construed at the expense of foreign enterprises. Although there is certain evidence that it could be construed at the expense of foreign businesses, this evidence is due to inferences made from the language used in the statute and from statements made by a handful of Chinese officials.¹¹⁶ But the Chinese government has not given any clear indication that they are truly worried about foreign businesses and that they are planning on manipulating the AML in this

¹¹³ Interestingly, according to a recent survey in mainland China, only fourteen percent surveyed were happy with the new AML, because it needed a better enforcement mechanism and should be aimed at state-owned enterprise, rather than foreign businesses. SOUTH CHINA MORNING POST, Sept. 11, 2007, at 4.

¹¹⁴ Tang & Zhang, *supra* note 73.

¹¹⁵ See, e.g., Morrison & Foerster, LLP, *supra* note 81.

¹¹⁶ Cecile Kohrs Lindell, *China's Merger Law Raises Concerns*, LAW.COM, Nov. 27, 2007, <http://www.law.com/jsp/article.jsp?id=1196181554778>. The Xinhua News Agency reported that the vice chairman of the Standing Committee of the National People's Congress announced the accompaniment of regulations to the new AML to go into effect when the Law does. *Id.* Many fear that these new regulations will create further obstacles for not only foreign businesses who acquire Chinese enterprises, but for other foreign investors as well. *Id.* See Masoudi, *supra* note 111; but see *Microsoft Ruling Could Set Broad Precedent in EU, China*, ITWORLD.COM, Sept. 21, 2007, <http://www.itworld.com/Man/2699/040319eumsruling>. A recent decision by the European Court of the First Instance points to a trend of conservatism and protectionism where antitrust is concerned. *Id.* Commentators fear this ruling will spark China's use of the new AML in a way that will focus on protecting state-owned businesses rather than consumers. *Id.*

way.¹¹⁷ Additionally, some note that the AML as written does not contain enough penalties even if it were to be enforced.¹¹⁸

If the AML becomes enforceable, China will probably attempt to enforce the Law equally to both foreign and domestic businesses.¹¹⁹ To support this theory, there are some who look at the wording in Article 55 and believe that the wording chosen will be construed as facially neutral, despite the dire predictions of others.¹²⁰ As one commentator noted, although the law contains some protectionist wording, such as the exemption for certain types of state-owned enterprises, the law itself does not stipulate that preferential treatment should be given to state-owned businesses compared to foreign-owned businesses.¹²¹

Additionally, through the drafting stage of the AML, China sought and received feedback from other nations.¹²² Many countries, including the United States, have been involved in the process of writing the law.¹²³ If China allows these countries to have continued involvement, they will likely want to provide their feedback and thoughts on the implementation

¹¹⁷ In all of the sources looked at and in all the opinions given, there has been no clear indication that China plans to scrutinize more heavily transactions involving foreign firms and businesses, even though there is concern about “national security.”

In fact, in an article that began “[l]awyers in Hong Kong are more open about China when they’re drunk,” the author claimed that business men in China view the AML as a “sham.” *Driven to Drink*, INT’L FIN. L. REV., Nov. 11, 2007. Given this thought, it seems unlikely that China will be enforcing the law at all, much less focusing specifically against foreign investors and businesses.

¹¹⁸ Tang & Zhang, *supra* note 73. Tang & Zhang also note that even if there was an enforcement mechanism in place and even with harsher penalties, the law creates so many exemptions to violation that very few businesses would be punished. *Id.*

¹¹⁹ William Blumenthal, General Counsel, Federal Trade Comm’n, Speech at the US Patent and Trademark Office Program on “Challenging the United States: Intellectual Property Issues in China,” July 11, 2007, <http://www.ftc.gov/speeches/blumenthal/20070711china.pdf>.

¹²⁰ *Id.*

¹²¹ Jonathan Palmer, *Viewpoint: Competition Law Should Help Create a Level Playing Field*, FT.COM, Sept. 11, 2007, <http://www.ft.com/cms/s/0/699a1894-6061-11dc-8ec0-0000779fd2ac.html> (last visited Sept. 22, 2008).

¹²² See Pamela Jones Harbour, Commissioner, Federal Trade Comm’n, Speech at the NYSBA International Law and Practice Section on Adoption of Trade Regulations in China, Scope and Effect: An American’s View, Oct. 20, 2006, <http://www.ftc.gov/speeches/harbour/061020nysbaintllawpracticesection.pdf>.

¹²³ *Id.* See also *Calls for a Single Anti-monopoly Agency*, CHINA DAILY.COM, Dec. 14, 2007, http://www.chinadaily.com.cn/bizchina/2007-12/14/content_6321654.htm (some experts point to China’s enforcement experience with the Anti-Unfair Competition Law to indicate that China can and should be able to enforce fully and fairly the AML); see also Ariana Eunjung Cha, *As China Opens, Lobbyists Get Ready to Move In*, WASH. POST, Oct. 2, 2007, at D01. (noting that even though lobbying is not the norm in China, some foreign businesses were successful in lobbying to remove some of the wording used in earlier drafts of the AML).

process. The involvement of the United States seems likely to continue as China's relationship with the United States continues to grow.¹²⁴

Additionally, there have been other indications that China is aware of concerns over its lack of enforcement. For example, Justice Wan Exiang has recently told reporters that he was striving to make the Chinese courts more Western-like.¹²⁵ Justice Wan Exiang believes that if the courts become more Westernized, they will be able to understand and fairly decide complex law and issues.¹²⁶ He believes that foreign concern will dwindle if there is a judicial body that can apply laws such as the AML in a uniform manner.¹²⁷

Finally, and perhaps most importantly, China certainly is aware that foreign investment plays a role in its economic success.¹²⁸ Even though the role is perhaps becoming minimal, it does create jobs and affect the growth of China's exporting.¹²⁹ It would not be in the best interests of the Chinese economy in the long run to alienate foreign businesses.¹³⁰

B. *What Can be Done to Fix This Problem?*

China needs to enforce the laws it has and it needs to do so without favoring state-owned enterprises. Specifically, for the AML, China must create or designate an agency that will be both independent and fair in its enforcement of the Law.¹³¹

As noted, one of the major concerns regarding China's AML is its failure thus far to name an enforcement agency. Furthermore, China must

¹²⁴ See, e.g., *China and US Reach Agreement on Food Safety*, SHIPPING DIG., Dec. 24, 2007, at WP. The two countries signed an agreement that would allow US officials to be present in Chinese manufacturing plants for closer inspection of foods and products that will be imported into the United States. *Id.* Even though the agreement does not cover all of the goods and products that the US wanted to have control over, many optimists point to this as a good start in building US-China relations. *Id.* See also, Steven R. Weisman, *Trust Grows in Sessions with China*, U.S. REPORTS, INT'L HERALD TRIB., Dec. 13, 2007, at 1. The article describes current talks between Chinese and U.S. officials as "friendly" and "lively." *Id.*

¹²⁵ Rachel Kaufman, *Chinese Jurist Touts Judicial Reforms*, WASH. TIMES, Sept. 26, 2007, at A16.

¹²⁶ *Id.*

¹²⁷ *Id.* See also GTZ China Legal Advisory Service Newsletter, Nr. 02-2007, lawprofessors.typepad.com/china_law_prof_blog/files/newsletter_207.doc. (last visited Sept. 22, 2008) (announcing a training course program to be held in May 2007 in one of China's Autonomous Regions).

¹²⁸ *China: An Uncertain Business*, ECONOMIST INTELLIGENCE UNIT, Sept. 21, 2007, at 6.

¹²⁹ *Id.* See also Susan S. Schwab, U.S. Trade Representative, Speech at the George H.W. Bush U.S.-China Relations Conference (Oct. 23, 2007) (transcript available at http://www.ustr.gov/assets/Document_Library/Transcripts/2007/October/asset_upload_file961_13422.pdf).

¹³⁰ *China: An Uncertain Business*, *supra* note 128.

¹³¹ CHINA DAILY, *supra* note 123.

mandate greater penalties for violations of the Law.¹³² Even if it becomes clear who will enforce the law, there may be little to enforce with vague wording and scant penalties in the area of intellectual property. China's goal should be to designate an agency which will enforce not only the AML, but also scrutinize the other intellectual property laws it has.¹³³ If China can follow the law that it has created, many of the concerns harbored by foreign investors and businesses will be alleviated.

This author suggests that the United States should further its friendly relationship with China. We can only hope that China would be willing to allow western countries to help solidify the enforcement process in China, especially for intellectual property laws. The United States has long been involved in helping other nations draft their competition laws.¹³⁴ Agencies such as the Federal Trade Commission and the U.S. Department of Justice advised and critiqued the drafting process of the AML and there is great hope that China will continue to welcome such assistance.¹³⁵

IV. CONCLUSION

The overall scheme of the AML has many problems that Chinese law-makers must address, but it is likely that nothing consequential will come from the specific intellectual property provision contained therein. Foreign investors should be more worried about protecting their intellectual property rights in China than having the AML used as a protectionist measure for state-owned enterprises.

This Note addressed just a few of the numerous resources that foreign investors may use to protect themselves and their intellectual property interests. It is the belief of this author that true protection will come from private efforts rather than through China's enforcement of its intellectual property laws.

On the other hand, even if the AML is enforced, it will likely be enforced uniformly. Enforcement of the AML will not cause as great a disturbance to foreign and domestic businesses in China, contrary to the beliefs of many commentators.

¹³² Tang & Zhang, *supra* note 73.

¹³³ *See id.*

¹³⁴ Harbour, *supra* note 122, at 2.

¹³⁵ *Id.* Harbour looks at the 2006 draft of the AML and points out areas of concern. *Id.* She also compares the draft to United States law, noting differences and changes that could be made to improve the draft of the AML substantially. *Id.* This is not to say that China necessarily needs outside help, such as from the United States. But, as this Note has shown, China may not have the expertise needed to take on such an endeavor alone. Perhaps the process would be easier for all involved if China was willing to ask for advice and commentary from Western nations who have enforceable schemes of intellectual property law in place.