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Comments

“Tain’t What You Do”:* Effect of China’s Proposed Anti-Monopoly Law on State Owned Enterprises

Joel R. Samuels**

I. Introduction

As the globalization phenomenon continues to intertwine nations, economic activities of one country affect others in turn. No longer are markets separate, independent actors cloistered from global effects, but rather one, unified marketplace is emerging. As a part of this transition, countries that had little global economic impact are starting to develop international trade. One region of the world that has partaken in this movement consists of the countries on the Pacific Rim.

China, one of the world’s most populated countries, is a growing

* Jimmy Lunceford, *Tain’t What You Do (It’s The Way That Cha Do It)*, (Classics Records 1939).

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international economic force. Long viewed as a treasure trove of underutilized economic potential, China appropriately acquired the nickname “sleeping giant.” In recent history, China has awakened and is realizing its economic potential.¹ Ingrained in this transition are changes in the government’s role in the economy, including regulation of one of China’s economic pillars, the state owned enterprise.

In most cases, government market regulation occurs through Antitrust enforcement. Antitrust laws regulate the amalgamation of capital in a single entity. These laws originated in the United States at the turn of the 20th Century when companies in industries such as oil, beef, railroads, sugar, and whisky merged to form large corporations, or “trusts.”² Concerned about the potential for anticompetitive abuses, many states passed antitrust laws.³ Following their lead, Congress enacted the Sherman Act in 1890,⁴ which was shortly followed by other Acts such as the Clayton Act,⁵ the Federal Trade Commission Act⁶ and the Robinson-Patman Act.⁷ Taken together these Acts limit abuses by business entities that “unreasonably restrain trade,”⁸ conspire with one another,⁹ “attempt to monopolize,”¹⁰ fix prices,¹¹ or pursue other anticompetitive behavior.¹² Following the lead of the United States, other countries have enacted their own antitrust laws.¹³

Recognizing the importance of market regulation, both the World Trade Organization (WTO) and the European Union (EU) have made the existence of antitrust laws¹⁴ a requirement for entry.¹⁵ In order to join

1. China is currently the fourth largest economy based on GDP. Ben Bernanke, Chairman, Fed. Res., Remarks at the Chinese Academy of Social Sciences: The Chinese Economy: Progress and Challenges (Dec. 15, 2006), available at <http://www.federalreserve.gov/BoardDocs/Speeches/2006/20061215/default.htm>.

2. A.D. NEALE & D.G. GOYDER, *THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA* 15-20 (3d ed. 1980).

3. Interview with John Lopatka, Professor of Law, The Dickinson School of Law of the Pennsylvania State University, in University Park, Pa. (Jan. 23, 2007).

4. See 15 U.S.C. § 1 (1890).

5. See 15 U.S.C. § 12 et seq. (1914).

6. See 15 U.S.C. § 41 (1914).

7. See 15 U.S.C. § 13 (1936).

8. 15 U.S.C. § 1 (1890).

9. See *id.*

10. *Id.*

11. See 15 U.S.C. § 12 et seq. (1914).

12. See 15 U.S.C. § 41 (1914).

13. In recent years, newly industrialized countries, such as Taiwan, India, Korea and the Philippines have enacted antitrust laws. *E.g.*, The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India).

14. Antitrust statutes are also referred to as competition laws. See, *e.g.*, European Commission, *Directorate General for Competition*, http://ec.europa.eu/comm/competition/index_en.html (last visited July 18, 2007).

15. WTO values free competition. See The World Trade Organization,

these organizations and receive trade benefits,¹⁶ a country must have "existence of a functioning market economy."¹⁷ The European Economic Community issued regulations in 1957 pursuant to Article 81 of the Treaty of Rome,¹⁸ restricting abuse of a dominant position, price fixing, and other anticompetitive actions similar to those addressed by the U.S. Sherman Act.¹⁹

As a part of its transition from a Marxist society and with the goal of fostering economic development and competition,²⁰ China has started the process of moving to a market economy.²¹ A challenge to this change is the presence of large, inefficient, and anticompetitive state owned enterprises (SOEs).²² A ten year process²³ culminated in the drafting of an Anti-Monopoly Law (AML) in 2004.²⁴ This law has gone through many revisions resulting in a draft recently passed by the Cabinet in June of 2006 (Current Draft).²⁵ If fruitful, the AML will further integrate China into greater acceptance in the global marketplace

Understanding the WTO: Basics, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm (last visited July 18, 2007).

16. The criteria promulgated at the 1993 Copenhagen European Council states, in order to accede to the EU, a country must have the "existence of a functioning market economy and the capacity to cope with competitive pressure and market forces." That implies that a country has antitrust and other competition laws in place. See European Commission, *Copenhagen Criteria*, http://europa.eu/scadplus/glossary/accesion_criteria_copenhagen_en.htm (last visited Jan. 20, 2007).

17. *Id.*

18. The Treaty of Rome established the European Economic Community and was ratified in 1957. See European Commission, *Treaties and Laws*, http://europa.eu/abc/treaties/index_en.htm (last visited Jan. 20, 2007).

19. Treaty Establishing the European Economic Community arts. 81, 82, Mar. 25, 1957, 298 U.N.T.S. 4 [hereinafter Treaty of Rome].

20. See Draft Anti-Monopoly Law, art. 1 (June 22, 2006) (PRC).

21. China started enacting market regulation legislation including anti-monopoly legislation in 1995. Throughout this process, China has solicited advice from the international antitrust enforcement community. See Selene Ko, *Chinese Anti-Monopoly Law: An Introduction to Chinese Legislation*, 3 WASH. U. GLOBAL STUD. L. REV. 267-68 (2004). Several drafts of the Anti-Monopoly law have been circulated such as the 2002, 2004, 2005 and 2006 drafts which have received feedback from international antitrust enforcers. See H. Stephen Harris, *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, 172-83 (2006).

22. See David Blumenthal, "Reform" or "Opening"? *Reform of China's State Owned Enterprises and WTO Accession—The Dilemma of Applying GATT to Marketizing Economies*, 16 UCLA PAC. BASIN. L.J. 198, 201-03 (1998).

23. China started drafting the AML in 1994. See Hu Yuanyuan, *China Okays Draft Anti-Monopoly Law*, CHINA DAILY, June 8, 2006, available at http://www.chinadaily.com.cn/china/2006-06/08/content_611238.htm.

24. *Id.* The current draft, dated June 22, 2006 is entitled *Anti-Monopoly Law of the People's Republic of China*. Draft Anti-Monopoly Law (P.R.C.) June 22, 2006 (China) [hereinafter 2006 Draft AML], available at <http://www.buyusa.gov/asianow/270.pdf> (last visited Jan. 29, 2007).

25. The draft law requires approval from the State Council and the National People's Congress in order to take effect. See Hu Yuanyuan, *supra* note 23.

and further cement relations between the Asian nation and its fellow WTO members.²⁶ The AML's success is dependent in part upon China enforcing its provisions against state run interests.²⁷ Adequately enforced regulations curbing SOEs' involvement will create a market conducive to foreign investment.²⁸

This Comment focuses on the AML's importance and how it may significantly impact state-owned enterprises. Part I provides economic background. Part II describes the current Chinese marketplace and the importance of SOEs. Part III provides a brief overview of China's policies for market regulation. Part IV explains the proposed AML and its effect on SOEs. Part V discusses whether China's enforcement of the AML will sufficiently comport with the Western world's expectations, particularly those of the United States. This analysis will be conducted in a game theoretical forum.

II. Economic Principles²⁹—"Take a piece of the pie."³⁰

Judge Richard Posner notes that economics is an integral part of antitrust and market regulation analysis.³¹ While there are economic applications in various areas of the law, this Comment focuses on economic analysis of marketplace interactions and governmental regulation. To provide a basis for analysis and understand China's new law, an understanding of key economic terms is helpful.

A. *Governmental Role in the Economy*

In a capitalist market, economic actors interact with little

26. Joining the WTO will allow China to receive preferential trade relations with member countries, provide an international trade dispute resolution remedies, and allows the formation and regulation of international trade agreements. See The World Trade Organization, *Understanding the WTO: Basics Principles of the Trading System*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Jan. 21, 2007). Market regulation and transparency is crucial to accessing WTO relations and benefits. *Id.*

27. China's State Owned Enterprises account for seventeen to fifty percent of GDP. George Wehrfritz et al., *The New State Capitalists: Governments Are Getting Back into the Business of Business*, NEWSWEEK INT'L, May 1, 2006, at 3. The AML aims to provide a competitive business environment to which government operated SOEs provide an obstacle. *Id.*

28. See The World Trade Organization, *Understanding the WTO: Basics Principles of the Trading System; The Case for Open Trade*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact3_e.htm (last visited Jan. 21, 2007).

29. These definitions reflect an American view and are not meant to be definitive. Where possible, different views are indicated.

30. DAVE FRISHBERG, *Walkin' on Wallstreet, on RETROMANIA: AT THE JAZZ BAKERY* (Arbors Records 2006).

31. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 23 (6th ed. 2003).

government intervention.³² Under Adam Smith's laissez-faire doctrine,³³ government interference is only justified to set up the rules of the economic game and to intervene in situations of market failure.³⁴ In accordance with these principles, antitrust laws seek to preserve competition between economic actors and prevent market distortions.³⁵

The United States is a global leader in antitrust enforcement.³⁶ Even though competition control measures were present at common law, the Sherman Act of 1890 was the first federal statute that made anticompetitive behavior a felony.³⁷ The Sherman Act expressly prohibits unilateral monopolization and multilateral restraints of trade.³⁸ The EU followed suit in the 1950s with Article 81 of the Treaty of Rome.³⁹ As the Pacific Rim countries⁴⁰ industrialize, they are enacting

32. Capitalism refers to the economic principles that marketplace decisions (what to produce, how much to produce and at what price) are decided by private (non-governmental) actors. See DAVID O'CONNOR, *BASIC ECONOMICS* 47-48 (2004). Capitalism embodies the ideals of the laissez-faire doctrine promulgated by Adam Smith. This doctrine promotes a "hands off" view of governmental involvement in economic functions. *Id.* According to the doctrine, government involvement is limited to establishing boundaries for market interaction, providing a stable and peaceful environment for market interactions, and should only intervene in situations of market failure such as monopolies, asymmetric information, public goods, and to control certain externality effects. See *id.* at 52; see also ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF WEALTH OF NATIONS* (1776).

33. See SMITH, *supra* note 32.

34. *Id.*

35. Antitrust laws seek to prevent monopolization effects such as shortages caused by extreme reductions in output coupled with high demand for the product, price disequilibrium as a result of price fixing, and distributional inequities such as geographic market divisions. See generally WILLIAM LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ACT* (1965).

36. The United States was one of the first countries to enact competition laws and continues to have large enforcement agencies such as the Department of Justice, the Federal Trade Commission and State Attorneys General. U.S. enforcement officials are sought for advice by other countries as they develop their own antitrust laws. Interview with Susan Beth Farmer, Professor of Law, The Dickinson School of Law of the Pennsylvania State University, in University Park, Pa. (Jan. 23, 2007). For example, China solicited advice from U.S. officials in the drafting of the AML. *Id.*

37. Prior to the passing of the Sherman Act, the United States lacked a federal law providing criminal punishment such as fines and imprisonment. See NEALE & GOYDER, *supra* note 2, at 18.

38. 15 U.S.C. 2 ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize . . . shall be deemed guilty of a felony.')

39. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

Treaty of Rome, *supra* note 19, art. 81.

40. Pacific Rim countries include Japan, South Korea, Taiwan, Singapore, and China. See generally RAVI ARVIND PALAT, *CAPITALIST RESTRUCTURING AND THE PACIFIC*

competition laws to fully interact with the global market.

B. *Market Interactions Under Perfect Competition*

The purpose of marketplace interactions is the accumulation of capital through trade of goods and services.⁴¹ In a perfectly competitive environment,⁴² market supply and demand control the price and quantity of goods bought and sold.⁴³ A seller does not have the power to unilaterally set market price and sells the quantity that will maximize its profit given the conditions set by the market.⁴⁴ Charging prices lower than the equilibrium price set in the market results in shortages and forbearance of profits that could be realized by selling additional units.⁴⁵ Charging a price above the equilibrium price will also result in diminished profits due to decreased sales.⁴⁶

One of the core principles of a free market economy is that no firm has market power.⁴⁷ Market power is derived from the firm's percentage share of the relevant market and is defined as the ability of a firm to set prices above marginal cost.⁴⁸ A firm that has a large enough market share to unilaterally affect market conditions, including the ability to maintain a higher setting price by reducing output, has market power.⁴⁹

C. *Monopoly Behavior*⁵⁰

The U.S. Supreme Court held that a firm restrains competition, and

RIM (2004).

41. See E. THOMAS SULLIVAN & HERBERT HOVENKAMP, *ANTITRUST LAW, POLICY AND PROCEDURE: CASES, MATERIALS, PROBLEMS* 41 (5th ed. 2004).

42. Perfect Competition assumes free entry and exit from the market, free exchange of information, and no market power or multiple firms. See ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 37 (4th ed. 2004).

43. Firms take price as a given and set output based on marginal cost. See William M. Landes & Richard A. Poser, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 938-55 (1981). Therefore, a firm produces where price and marginal cost intersect. *Id.*

44. See O'CONNOR, *supra* note 32, at 117-18.

45. *Id.* at 137-41.

46. *Id.*

47. *Id.* at 117-18.

48. SULLIVAN & HOVENKAMP, *supra* note 41, at 51-52.

49. The European Commission has determined that abuse of a dominant position occurs at fifty percent or when a firm has twice the market share of the next largest firm. See D.M. RAYBOULD & ALISON FIRTH, *LAW OF MONOPOLIES; COMPETITION LAW AND PRACTICE IN THE USA, EEC, GERMANY AND THE UK* 323-34 (1991). The U.S. courts have indicated that a market share of seventy percent or more is sufficient to support a section 2 claim. See AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST, *ANTITRUST LAW DEVELOPMENTS* 243-45 (4th ed. 1997) [hereinafter ANTITRUST LAW DEVELOPMENTS].

50. For an in-depth economic analysis of monopolies see POSNER, *supra* note 31, at 273-86.

thereby violates Section 2 of the Sherman Act,⁵¹ if it artificially creates and maintains monopoly power.⁵² The Court defined monopoly power as the "power to control prices or exclude competition."⁵³ Natural monopolies⁵⁴ have not been subject to rigid antitrust enforcement.⁵⁵

Economically, a monopolist can have a negative impact on the market.⁵⁶ Whereas a competitive firm will charge a price equal to its marginal cost, a monopolist prices above its marginal cost, which often results in a price higher than the competitive price.⁵⁷ Monopolies are often further criticized as being inefficient and lacking innovation.⁵⁸ Economists claim the total marketplace is injured through dead weight loss,⁵⁹ waste,⁶⁰ higher prices, and lower output.⁶¹ Moreover, monopolists have an incentive to create barriers to entry into that market.⁶² Ultimately, monopolists prevent free competition and perpetuate inefficiencies that harm consumers by preventing optimal consumption and charging a price higher than the purely competitive price.⁶³

51. 15. U.S.C. § 2 ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony."). See fn 39.

52. *United States v. Grinell*, 384 U.S. 563, 570-71 (1966) ("[S]ection 2 of the Sherman Act has two elements(1) the possession of monopoly powering the relevant market and (2) the willful acquisition or maintenance of that power."). The second element includes anticompetitive effects such as exclusive dealings, price fixing, price discrimination, raising rivals costs, and refusals to deal. See *Antitrust Law Developments*, *supra* note 49, at 244-45.

53. *Grinell*, 384 U.S. at 571 (citing *United States v. E.I. du Pont Nemours & Co.*, 351 U.S. 377, 391 (1955)).

54. Natural monopolies occur as a result of "a superior product, business acumen, or historical accident." *Id.* at 571.

55. See ERNEST GELLHORN ET AL., *ANTITRUST LAW AND ECONOMICS* 142-43 (2004).

56. See generally POSNER, *supra* note 31, at 278-84.

57. The seller will sell a quantity where marginal revenue of selling an additional unit will be outweighed by the marginal cost of production of the unit. *Id.* at 57.

58. Instead of developing a better product and lower cost, a monopolist may spend resources on maintaining its monopoly on the existing product. *Id.* at 56-58.

59. Dead weight loss is the value of goods that would be produced in a purely competitive society, but are not produced by monopolist. POSNER, *supra* note 31, at 278-80.

60. Waste refers to inefficient use of resources, such as creating and maintaining a monopoly, rather than improving the product. See SULLIVAN & HOVENKAMP, *supra* note 41, at 56-57.

61. Thus, consumers who would purchase X quantity of goods at Y price are forced to pay higher prices (assuming relatively inelastic demand) or are shut out of the market (in the case of elastic demand). See POSNER, *supra* note 31, at 273-76.

62. See SULLIVAN & HOVENKAMP, *supra* note 41, at 57. Assuming the monopolist is able to prevent entry, entry barriers are a form of waste, as resources that would normally go into production are spent maintaining the monopoly through restricting entry. *Id.* Theoretically, existence of a monopoly invites entry efforts as potential entrants realize profit by increasing output at a lower price. *Id.*

63. See POSNER, *supra* note 31, at 276-78.

D. *State-Owned Enterprises*

State-owned enterprises (SOEs) operate differently than public companies.⁶⁴ Ownership is one such aspect; publicly held companies are owned by private investors and controlled by a Board of Directors,⁶⁵ comparatively, government agencies manage and control SOEs.⁶⁶ Publicly held corporations are subject to government regulation⁶⁷ but are not controlled by the government. Another difference is that SOEs act anti-competitively especially when given favorable treatment to the detriment of other firms in the marketplace.⁶⁸ This may result in SOEs serving as a barrier to entry into the market.⁶⁹

In regards to profitability, while private companies are profit seekers,⁷⁰ SOEs have different goals. SOEs objectives include providing employment, expansion, or increased revenue, typically without cost concerns.⁷¹ These behaviors can lead to market inefficiencies.⁷² Public companies that act without regard to profit can sustain losses, ultimately forcing a company to file either Chapter 7 or Chapter 11 bankruptcy.⁷³

China has used SOEs to provide increased supply and employment to specific industries without profit motivation.⁷⁴ Due to the lack of profit driven incentives, Chinese SOEs became inefficient and often faced budgetary shortfalls.⁷⁵ Instead of exiting the market as one would

64. See Deborah Kay Johns, *Reforming the State-Enterprise Property Relationship in the People's Republic of China: The Corporatization of State-Owned Enterprises*, 16 MICH. J. INT'L L. 911, 923-27 (1995).

65. JEFFREY BAUMAN ET AL., CORPORATIONS LAW AND POLICY 33 (5th ed. 2003).

66. *Id.*

67. See, e.g., Federal Trade Commission Act, 15 U.S.C. § 41-51 (1914), Delaware Corporation Act, DEL. CODE ANN. tit. 8, § 101.

68. SOEs typically receive favorable treatment from politicians including financial bail-out arrangements for poorly performing SOEs. See generally Yiping Huang & Ligang Song, *State Owned Enterprise and Bank Reform in China: Conditions for Liberalization of the Capital Account*, in REFORM AND RECOVERY IN EAST ASIA: THE ROLE OF THE STATE AND ECONOMIC ENTERPRISE 214, 214-16 (Peter Drysdale ed. 2000).

69. As a result of state objectives for SOEs, normal economic activity is injured as other firms may face substantial entry costs including lengthy and expensive bureaucratic approval processes. Further, in many countries SOEs are not allowed to exit the market, even when running substantial deficits. See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, PRIVATISING STATE OWNED ENTERPRISES; AN OVERVIEW OF POLICIES AND PRACTICES IN OECD COUNTRIES 20 (2003) [hereinafter OECD].

70. David E.M. Sappington & J. Gregory Sidak, *Competition Law for State-Owned Enterprises*, 71 ANTITRUST L.J. 479, 499-500 (2003).

71. See OECD, *supra* note 69.

72. See *id.*

73. See Sec. & Exch. Comm., *Corporate Bankruptcy*, <http://www.sec.gov/investor/pubs/bankrupt.htm> (last visited Nov. 8, 2006).

74. See DONALD HAY, DEREK MORRIS, GUY LIU & SHUIE YAO, ECONOMIC REFORM AND STATE-OWNED ENTERPRISES IN CHINA 1979-1987, at 5 (1994).

75. *Id.*

expect in perfect competition, these budgetary shortcomings were offset by government allocations, which allowed the business to survive.⁷⁶ The allocations created market distortions and slowed economic growth.

In effect, SOEs can act as monopolies.⁷⁷ Monopolistic abuses by SOEs can manifest in several ways. SOEs operate like monopolies because they set price and output without regard to market forces.⁷⁸ This can result in anti-competitive prices and inefficiencies.⁷⁹ An SOE may act anti-competitively by forcing its competitors to raise costs.⁸⁰ Expansion and revenue dominate profit interests and allow the SOE to accept a price lower than the competitive price.⁸¹ This can result in market distortions that further injure consumers.⁸² Ultimately, welfare is harmed by the presence of an inefficient firm through waste and the higher prices it can charge after driving rivals from the market.⁸³

III. Market Interactions in China—"China, on the sea shore"⁸⁴

A. *Economic Impact Of State Owned Enterprises*

In order to conduct a fair analysis of the draft Anti-Monopoly Law (AML), an overview of the composition of China's market is warranted. Prior to 1978, China was a command economy⁸⁵ controlled by leaders who stymied reforms, such as privatization of SOEs.⁸⁶ With the election of President Deng Xiaoping, China instituted reforms and started to move toward a competitive economy.⁸⁷ Most notably, Deng encouraged markets to operate with little support or control from the State.⁸⁸

The Deng initiatives had little success in the 1980s.⁸⁹ However,

76. See Blumenthal, *supra* note 22, at 213-15.

77. SOEs pose economic harms similar to those caused by monopolies such as inefficiencies, output restrictions, and financial waste. See Johns, *supra* note 64, at 915-16.

78. See POSNER, *supra* note 31, at 276-78.

79. See Sappington & Sidak, *supra* note 70, at 504-07.

80. See *id.* at 508-12.

81. *Id.* at 509.

82. *Id.* at 509-11.

83. See SULLIVAN & HOVENKAMP, *supra* note 41, at 57-58, 187.

84. WANG CHUNG, *China, on HUANG CHUNG* (One Way Records 1995) (1982).

85. A command economy is one in which the allocation of resources, product type and quantity produced, and other economic decisions are made by the government. See O'CONNOR, *supra* note 32, at 7-8.

86. See ANDREW WEDEMAN, FROM MAO TO MARKET: RENT SEEKING, LOCAL PROTECTIONISM, AND MARKETIZATION IN CHINA 4 (2003).

87. Jared A. Berry, *Anti-Monopoly Law in China: A Socialist Market Economy Wrestles with Its Antitrust Regime*, 2 INT'L L. & MGMT. REV. 129, 134-35 (2005).

88. *Id.* at 134.

89. See Harris, *supra* note 21, at 173.

gradual change toward a competitive economy occurred in the 1990s, as China passed legislation creating free market incentives in preparation for accession into the World Trade Organization.⁹⁰ China acceded to the WTO in 2002⁹¹ and continues to address the conditions of accession. Even with a push for reform and transition to a free market economy, progress has been slowed by SOEs.

State owned enterprises are an invention of the Chinese Communist Party (CCP).⁹² After coming to power, the CCP sought to solidify its control and prevent the Kuomintang from returning to power.⁹³ As a part of this strategy, the CCP acquisitioned ownership in private companies and replaced most managerial positions with loyal party members.⁹⁴ By 1955, the majority of private companies were operated by state managers and were transformed into SOEs.⁹⁵

SOEs account for a large percentage of Chinese economic growth. There are approximately 380,000 SOEs⁹⁶ with over 78 million employees⁹⁷ and SOEs have a significant impact on gross domestic product (GDP).⁹⁸ In 1978, SOE economic activity accounted for eighty percent of GDP.⁹⁹ As a result of recent privatization of SOEs,¹⁰⁰ current indices assess SOE contribution to GDP between seventeen to fifty percent.¹⁰¹ Considerable efforts have been made in most market sectors to privatize SOEs.¹⁰² In other sectors, China is increasing state control in

90. In order to accede to the WTO, China agreed to publish laws and regulations relating to trade, place restrictions on price controls, and enact legislation permitting market forces to determine price and allocation of resources. See *World Trade Organization, Protocol on the Accession of the People's Republic of China to the World Trade Organization*, WT/L/432 (Nov. 10, 2001), available at <http://www.mac.doc.gov/China/ProtocolandDecision.pdf>.

91. Press Release, World Trade Organization, *WTO Ministerial Conference Approves China's Accession* (Nov. 11, 2001), available at http://www.wto.org/English/news_e/pr252_e.htm.

92. JUNE TEUFEL DREYER, *CHINA'S POLITICAL SYSTEM, MODERNIZATION AND TRADITION* 145 (5th ed. 2006).

93. *Id.* at 145-46.

94. *Id.*

95. The CCP purchased shares or outright replaced management of private enterprises and transformed them into SOEs. See MARK BORTHWICK, *PACIFIC CENTURY: THE EMERGENCE OF MODERN PACIFIC ASIA* 404 (1992).

96. Xinqiang Sun, *Reform of China's State-Owned Enterprises: A Legal Perspective*, 31 *ST. MARY'S L.J.* 19, 21 (1999).

97. See ERIC THUN, *CHANGING LANES IN CHINA: FOREIGN DIRECT INVESTMENT, LOCAL GOVERNMENTS AND AUTO SECTOR DEVELOPMENT* 49 (2006).

98. Gross Domestic Product measures the total value of goods and services produced by a country in one year. O'CONNOR, *supra* note 32, at 224.

99. Wehrfritz, *supra* note 27.

100. See WEDEMAN, *supra* note 86.

101. Wehrfritz, *supra* note 27.

102. See WEDEMAN, *supra* note 86, at 4-12.

furtherance of socialist values.¹⁰³ For example, in the interest of promoting safe work environments, China plans to increase state control in the mining industry from seventy percent to seventy-eight percent by 2010.¹⁰⁴

SOEs are not characteristic of an open market and can exercise anticompetitive behavior resulting in adverse economic effects. In some regard, China's SOEs make the market stagnant. SOEs have been highly inefficient, often incurring large budget shortfalls due to non-economic goals.¹⁰⁵ China's major banks compounded the issue by extending loans to SOEs that have not been repaid.¹⁰⁶ In 2002, SOEs accounted for 48.2 percent of all non-performing debt within China.¹⁰⁷ Non-performing loans lead to insolvency in the financial markets,¹⁰⁸ effectively drain the money supply, and lead to stagnation.¹⁰⁹ Effective regulation of SOEs is needed to curtail further economic stagnation and fully transition to an open market economy.

B. *China's Regulation of Markets*

1. Administrative Agencies

A number of Ministries oversee economic activity in China.¹¹⁰ In regard to comprehensive regulation, the State Administration for Industry and Commerce (SAIC) and Ministry of Commerce (MOFCOM) are charged with creating and setting economic policy on a national scale.¹¹¹ SAIC oversees private and public competition,¹¹² creates

103. See Wehrfritz, *supra* note 27.

104. *Id.*

105. See Sappington & Sidak, *supra* note 70.

106. See Blumenthal, *supra* note 22.

107. Geng Xiao, *Nonperforming Debts in Chinese*

Enterprises: Patterns, Causes, and Implications for Banking Reform, (April 12-13, 2004) (unpublished panel paper on file with the Ctr for Strategic and Intl Stud. and Mass. Inst. of Tech).

108. See Blumenthal, *supra* note 22, at 213-15.

109. *Id.*

110. Economic activity is regulated by various government departments such as the Ministry of Commerce, the State Administration for Industry and Commerce, the National Development and Reform Commission and the State Administration on Foreign Exchange. See, e.g., CHINA MINISTRY OF COMMERCE, *Mission*, <http://english.mofcom.gov.cn/mission.shtml> (last visited July 18, 2007); State Admin. For Ind. & Commerce, *Mission*, http://gsyj.saic.gov.cn/wcm/WCMData/pub/saic/english/About%20Us/t20060225_14598.htm (last visited July 18, 2007) (PRC).

111. See Ministry of Commerce, *Mission*, <http://english.mofcom.gov.cn/mission.shtml> (last visited July 18, 2007); see also, China Internet Infor. Ctr, *The Organizational Structure of the State Council*, <http://www.china.org.cn/english/kuaixun/64784.htm> (last visited Nov. 7, 2006).

112. See State Admin. for Ind. & Commerce, *Mission*, <http://gsyj.saic.gov.cn/wcm/>

regulations,¹¹³ drafts laws to be considered by the National People's Congress and enforces competition policy.¹¹⁴ In early 2006, SAIC passed laws regulating joint ventures,¹¹⁵ advertisements,¹¹⁶ consumer rights,¹¹⁷ and product quality.¹¹⁸

MOFCOM's purview is similar to that of SAIC, with an additional concentration on foreign investments.¹¹⁹ While SAIC focuses on individual actors, MOFCOM regulation centers on domestic and foreign trade.¹²⁰ MOFCOM addresses issues such as customs procedures,¹²¹ regulations on imports and exports,¹²² and anti-dumping regulations.¹²³

2. Legislation

China enacted laws governing different elements of competition. In 1992, SAIC promulgated "Certain Regulations on Prohibiting Anti-Competitive Practices of Public Enterprises Decree."¹²⁴ These regulations protect against abuses by public enterprises (including SOEs) from artificially interfering with supply and demand.¹²⁵ The People's Congress¹²⁶ passed the Anti-Unfair Competition Law of 1993,¹²⁷ with the intention of creating an open market economy, free of corrupt practices,

WCMDData/pub/saic/english/About%20Us/t20060225_14598.htm (last visited July 18, 2007) (PRC).

113. *Id.*

114. *Id.*

115. See State Admin. for Ind. & Commerce, *Laws and Regulations*, <http://gsyj.saic.gov.cn/wcm/WCMDData/pub/saic/english/Laws%20and%20Regulations/default.htm> (last visited Oct. 10, 2006) (P.R.C.).

116. *Id.*

117. *Id.*

118. *Id.*

119. Ministry of Commerce, *Mission*, <http://english.mofcom.gov.cn/mission.shtml> (last visited July 18, 2007) (PRC).

120. *Id.*

121. See Ministry of Commerce, *Policy*, <http://english.mofcom.gov.cn/static/column/policyrelease/domesticpolicy.html/1> (last visited Oct. 10, 2006)(PRC).

122. *Id.*

123. *Id.*

124. Certain Regulations on Prohibiting Anti-Competitive Practices of Public Enterprises Decree No. 20 (promulgated by the State Admin. for Ind. & Commerce effective Dec. 12, 1992).

125. *Id.* at art. IV.

126. The National People's Congress (NPC) is China's highest administrative, legislative and enforcement body. Members are elected representatives based on provincial designations. See Nat'l People's Cong. of China, *Organization Information: National Peoples Congress*, <http://www.npc.gov.cn/zgrdw/english/organization/congress/congressLink.jsp>. (last visited Jan. 12, 2006). The NPC functions in a similar fashion as the United States Congress. See *id.*

127. Law for Countering Unfair Competition Promulgated by Order No. 19 of the State Administration of Industry and Commerce on December 24, 1993 (P.R.C.), available at <http://www.apeccp.org.tw/doc/China/Decision/cndec04.html>.

fraud, and price controls.¹²⁸ The Anti-Unfair Competition Law also contains supervisory measures and sanctions for violating its mandate.¹²⁹ In 1997, the State Development and Reform Commission¹³⁰ promulgated the "Provisional Rules for Monopoly Pricing"¹³¹ that seeks to curtail artificially high prices and prevent abuse of market power.¹³²

In 1998, SAIC promulgated "Interim Provisions on Prohibiting Bid-Rigging" to prevent and regulate fraud in bidding processes.¹³³ In 2003, after China's accession into the WTO, the SAIC was concerned that foreign investors would have too much control in the domestic market. In response, the SAIC and State Administration of Foreign Exchange¹³⁴ enacted "Provisional Rules for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors".¹³⁵ These rules limit the control that foreign investors may attain in domestic companies.¹³⁶ In the aggregate, these acts restrict anticompetitive behavior, but in limited and targeted areas.¹³⁷

In 2004, MOFCOM established an anti-monopoly office with greater enforcement power than previous agencies.¹³⁸ This agency oversees enforcement of the AML, including investigating and prosecuting violations.¹³⁹ In order to aptly provide incentives for open market interactions, China will need further regulations. Unless the AML is enacted, this antitrust agency will have minimal basis for enforcement.

128. *Id.*

129. *Id.*

130. The National Development and Reform Commission oversees strategic economic planning and addresses social, infrastructure, and economic issues as well as promulgates economic growth plans in order to increase economic activity. See Nat'l Dev. and Reform Comm., Main Functions of the NDRC, <http://en.ndrc.gov.cn/brief/default.htm> (last visited Jan. 12, 2006).

131. Provisional Rules for Monopoly Pricing (promulgated by the State Admin. for Ind. & Commerce 1997).

132. *Id.*

133. Interim Provisions on Prohibiting Bid-Rigging (promulgated by the State Admin. for Ind. & Commerce 1998).

134. State Administration on Foreign Exchange (SAFE) monitors and regulates economic and financial transactions including trade regulations, foreign reserves, and balance of payments, surpluses, and deficits. See Chinese Government Official Web Portal, *State Administration on Foreign Exchange*, available at http://english.gov.cn/2005-10/09/content_75318.htm (last visited Jan. 12, 2006).

135. Interim Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (promulgated by the State Admin. of Foreign Exchange 2003).

136. This was a valid concern as China's foreign trade increased by \$311 billion from 1978-1998. Xinqiang Sun, *supra* note 96, at 21.

137. *Id.*

138. Yan Yang, *Ministry Sets Up Anti-Monopoly Office*, CHINA DAILY, Sept. 17, 2004, available at http://www.chinadaily.com.cn/english/doc/2004-09/17/content_375331.htm.

139. *Id.*

IV. Proposed Anti-Monopoly Law—"You like potato and I like potahto."¹⁴⁰

China has been working on an anti-monopoly law since 1996.¹⁴¹ The draft AML's purpose is to serve as a comprehensive antitrust law, similar to Articles 81 and 82 of the European Union.¹⁴² The draft version of this law purports to address competition issues in general, not just monopolies.¹⁴³ Additionally, the draft legislation tackles market definition, price fixing, conspiracies, monopolies, mergers, and penalties for violators.¹⁴⁴

The Chinese legislative process requires consent from numerous sources. Most legislation is drafted by an administrative department such as MOFCOM under the purview of the State Council, which subsequently votes on approval of the regulation.¹⁴⁵ If approval is given, the State Council records the measure to the Standing Committee of the National People's Congress (NPC).¹⁴⁶ The Standing Committee is composed of fifteen members¹⁴⁷ and acts as the legislative body when the General Assembly is not in session.¹⁴⁸ A bill needs a majority vote for approval in both the Standing Committee and the General Assembly.¹⁴⁹

Scholars predicted that China would pass the AML in 2005 or late 2006.¹⁵⁰ The May 2006 draft of the AML passed by the State Council on June 7, 2006,¹⁵¹ was submitted to the Standing Committee for consideration.¹⁵² Presently, the Standing Committee has held the first of

140. LOUIS ARMSTRONG & ELLA FITZGERALD, *Let's Call the Whole Thing Off*, on ELLA AND LOUIS AGAIN (Mobile Fidelity 1995) (1957).

141. Yee Wah Chin, *The Final Stages of China's Anti-Monopoly Law*, <http://www.asianresearch.org/articles/2921.html> (last visited Oct. 10, 2006).

142. Articles 81 and 82 of the Treaty of Rome comprise the EU antitrust statutes and establish anticompetitive activity within the European Union. *See* Treaty of Rome, *supra* note 19, arts. 81, 82.

143. *See* 2006 Draft AML.

144. *Id.*

145. *See* Nat'l People's Cong. of China, *China's Legislative System*, <http://www.npc.gov.cn/zgrdw/english/aboutCongress/aboutCongressDetail.jsp?id=Legislative> (last visited Oct. 10, 2006).

146. *Id.*

147. People's Daily Online, *The National People's Congress*, <http://english.peopledaily.com.cn/data/organs/npc.shtml> (last visited Oct. 10, 2006).

148. Nat'l Peoples Cong., *Functions and Powers of the Standing Committee*, <http://www.npc.gov.cn/zgrdw/english/organization/committee/funcionAndPowers.jsp> (last visited July 18, 2007).

149. *Id.*

150. *See, e.g.*, Harris, *supra* note 22, at 173.

151. Chin, *supra* note 141.

152. Press Release, Embassy of the PRC in the U.S.A., Chinese Government Approves Draft of Anti-Monopoly Law (June 7, 2006), *available at* <http://www.china-embassy.org/eng/xw/t256891.htm>.

three readings of a draft dated June 22, 2006 (Current Draft).¹⁵³

Previously, representatives from American Antitrust agencies met with Chinese officials to provide advice and opinions with regard to the language and enforcement of the AML.¹⁵⁴ These meetings attempted to explain the U.S. system and tried to influence AML drafters to adopt the U.S. approach. In December 2006, Chinese officials met with American enforcers and members of the legal community to discuss the provisions of the current draft AML.¹⁵⁵ Despite best efforts by American enforcers, the current draft closely resembles the EU antitrust laws; Articles 81 and 82.¹⁵⁶ The Current Draft prohibits abuse of a dominant position, an EU

153. Lillian Yang, *Anti-Monopoly Bill for Review*, SOUTH CHINA MORNING POST, Nov. 7, 2006, at 1.

154. China has solicited feedback from the international antitrust community. Members of the American Bar Association met with Chinese officials, reviewed the draft AML and provided official comments. See H. Stephen Harris, Jr. & Kathy Lijun Yang, *China: Latest developments in Anti-Monopoly Law Legislation*, 19 SPG ANTITRUST 89 (2005); see also Am. Bar Ass'n, *Joint Comments of the American Bar Association's Section of Antitrust Law, Section of Intellectual Property Law & Section of International Law on the Proposed Anti-Monopoly Law of the People's Republic of China*, May 20, 2005, available at http://www.abanet.org/intlaw/committees/business_regulation/antitrust/abaprcat2005finalcombowapp.pdf (last visited July 18, 2007) [hereinafter Joint Comments].

155. There were three conferences at different locations in the United States: Seattle, WA, Washington D.C., and Cleveland, OH. U.S. Dep't of Commerce, *US-China Legal Exchange 2006*, <http://www.buyusa.gov/asianow/chinalegalexchange.html> (last visited Jan. 20, 2007).

156. EU Article 81 enumerates per se violations similar to Article VII of the AML. EU Article 82 is comparable to the approach of AML articles 8, 9 and 12. Further, Article 10 of the AML provides exemptions similar to those recognized by the EU Directorate General for Competition. See 2006 Draft AML, arts. 6, 10, 11, 12; see also Treaty of Rome, *supra* note 19, arts. 81, 82.

Table 1: Prohibited Actions by Jurisdiction

Article 81 EU	Article VII AML	Sherman Act § 1
(a) directly or indirectly fix purchase or selling prices or any other trading conditions;	(i) fix, maintain or change prices of products;	
(b) limit or control production, markets, technical development, or investment;	(ii) limit the production volume or sales volume of products; (iv) limit the purchase of new technology, new facilities or limit the development of new products, new technology;	
(c) share markets or sources of supply;	(iii) segment the sales markets or the raw material purchasing markets;	
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;	(v) jointly boycott transactions;	

term for monopolization, but with a lower threshold for enforcement than U.S. antitrust laws.¹⁵⁷ Further, the format of the Articles resembles the format of EU Articles 81 and 82 as it specifically identifies prohibited practices and standards for review in the statute.¹⁵⁸

The Current Draft prohibits various forms of anticompetitive behavior, and is not limited to monopolistic behavior.¹⁵⁹ The Current Draft defines anticompetitive behavior,¹⁶⁰ mergers,¹⁶¹ prevents monopolization,¹⁶² certain horizontal and vertical agreements,¹⁶³ and bid rigging.¹⁶⁴ It establishes an anti-monopoly enforcement agency under the State Council,¹⁶⁵ creates exemptions,¹⁶⁶ and fashions fines for violators.¹⁶⁷ As written, the AML appears to further China's integration into the global market economy through the provision of incentives for competitive business practice.

Article 1 states that the purpose of the AML is to ensure competition in economic activity.¹⁶⁸ The article lists goals economists are likely to recognize as open market characteristics, such as the prevention and prohibition of monopolistic activities, economic efficiency, consumer protection, and competitive business practices.¹⁶⁹

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.	(vi) other monopoly agreements determined by the Anti-Monopoly Law enforcement Authority.	Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.
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157. Europe and U.S. enforcers have different market share thresholds when assessing anticompetitive behavior and effects. *See* ANTITRUST LAW DEVELOPMENTS, *supra* note 49, at 243-45; *see also supra* text accompanying note 49.

158. Chin, *supra* note 141.

159. The Current Draft addresses anticompetitive behavior such as monopolization, collusion, mergers and bid-rigging. *See* 2006 Draft AML.

160. *Id.*

161. *Id.* at arts. 15-21.

162. *Id.*

163. *Id.*

164. 2006 Draft AML.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at art. 1.

169. Article I indicates the AML is

[E]nacted for the purposes of protecting market competition, preventing and prohibiting monopolistic conduct, promoting efficiency of economic operation, safeguarding the legitimate rights and interests of undertakings, consumers and

Article 2 indicates that the AML is effective against all economic activity conducted within China as well as activity conducted outside Chinese borders having anticompetitive effects¹⁷⁰ on China's domestic market.¹⁷¹

The Current Draft prohibits vertical and horizontal monopolies and monopolistic agreements.¹⁷² The AML determines a monopoly exists under Article 14 when a firm has fifty percent market share, when two joint undertakings have sixty-six percent of the market, or when three joint undertakings have seventy-five percent market share.¹⁷³ Articles 3 and 8 define prohibited vertical monopolistic conduct¹⁷⁴ to include collusive monopoly agreements,¹⁷⁵ abuse of dominant market positions,¹⁷⁶ and "concentration of undertakings"¹⁷⁷ that eliminate or restrict competition.¹⁷⁸ Article 7 curtails monopoly agreements between competitors.¹⁷⁹ Prohibited economic activity includes price fixing,¹⁸⁰ output restrictions,¹⁸¹ market divisions,¹⁸² limitation on technological advancement¹⁸³ and boycotts.¹⁸⁴ Collusive bid rigging is prohibited under Article 9.¹⁸⁵

Articles 12 and 15 prohibit anticompetitive behavior from undertakings¹⁸⁶ that have a dominant position in the market, but do not

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

2006 Draft AML at Art. 1.

170. *Id.* at Art. 2 (indicating the AML is "applicable to monopolistic conduct outside the territory of 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").

171. *Id.*

172. Article VII of the Current Draft prohibits horizontal agreements that constitute price fixing, output restrictions, market divisions and boycotts. *Id.* at art. 7. Article VIII prohibits anticompetitive vertical agreements such as resale price maintenance. *Id.* at art. 8.

173. *Id.* at art. 14, § 1.

174. Vertical agreements occur between two levels of a distribution chain, for example, between a supplier and retailer. Horizontal agreements occur between competitors on the same level of the distribution chain, for example, agreements between manufacturers. See SULLIVAN & HOVENKAMP, *supra* note 41, at 187, 427.

175. 2006 Draft AML, art. 3, § 1.

176. *Id.* at art. 3, § 2.

177. *Id.* at art. 3, § 3.

178. *Id.*

179. 2006 Draft AML, art. 7.

180. *Id.* at § 1.

181. *Id.* at § 2.

182. *Id.* at § 3.

183. *Id.* at § 4.

184. 2006 Draft AML, art. 7, § 5.

185. *Id.* at art. 9.

186. Article 4 defines "undertaking" as any "natural person, legal person, other organization that engages in manufacturing, selling products, or providing services in a relevant market." 2006 Draft AML, art. 4.

have monopoly power.¹⁸⁷ Article 12 defines dominant market position as the ability to control price or output quantity and create or maintain entry barriers in the relevant market.¹⁸⁸ Article 15 expands this list to include monopoly pricing,¹⁸⁹ predatory pricing,¹⁹⁰ refusals to deal,¹⁹¹ exclusive dealings,¹⁹² tying arrangements¹⁹³ and price discrimination.¹⁹⁴ Dominant position is determined by factors listed in Article 13 such as market shares, entry barriers, and interdependence of undertakings.¹⁹⁵

The Current Draft AML creates anti-monopoly agencies under the direction of the State Council.¹⁹⁶ Articles 5 and 33 of the AML direct the State Council to establish an “Anti-Monopoly Commission” to oversee the implementation of Anti-Monopoly Law and work to coordinate government actions on all levels.¹⁹⁷ Article 5 also instructs the State Council to establish an enforcement agency, deemed the “Anti-Monopoly Law Enforcement Authority.”¹⁹⁸ Article 34 grants the Anti-Monopoly Law Enforcement Authority the power to enforce the AML and control various ministries and agencies across China.¹⁹⁹ The Anti-Monopoly Law Enforcement Authority has the ability to determine other prohibited anticompetitive behavior beyond those activities listed in the

187. 2006 Draft AML, arts. 12, 15.

188. “Dominant Market Position” in this Law refers 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.

2006 Draft AML, art. 12, § 1.

189. 2006 Draft AML, art. 15, at § 1.

190. *Id.* at § 2.

191. *Id.* at § 3.

192. *Id.* at § 4.

193. *Id.* at § 5.

194. 2006 Draft AML, art. 15, § 6.

195. *Id.* at art. 8, § 6.

196. *Id.* at arts. 1, 5, 33.

197. 2006 Draft AML, art. 5 (“The State Council shall set up the Anti-Monopoly Commission. The Anti-Monopoly Commission of the State Council shall be responsible to organize, lead, and harmonize the anti-monopoly work.”).

198. According to Article 5 of the current draft, the Anti-Monopoly Enforcement Authority will be able to control all government agencies in any province in order to enforce the AML. *See* art. 5.

The authority responsible for the Anti-Monopoly Law enforcement appointed by the State Council (hereinafter “the Anti-Monopoly Law Enforcement Authority”) shall be in charge of the work of Anti-Monopoly Law enforcement pursuant to this Law. According to necessity, the Anti-Monopoly Law Enforcement Authority under the State Council can authorize the corresponding organs of the People’s Government of provinces, autonomous regions, municipalities to be in charge of Anti-Monopoly Law enforcement works pursuant to the Law.

Id.

199. 2006 Draft AML, art. 34.

AML.²⁰⁰

The final article of relevance to SOEs is Article 10, which provides exemptions for certain economic activities.²⁰¹ Article 10 provides exemptions from the AML as long as the economic actor proves that the monopolistic conduct does “not substantially eliminate competition in the relevant market”²⁰² and provides public benefit such as technological advancement,²⁰³ research and development,²⁰⁴ production efficiencies,²⁰⁵ public interest measures,²⁰⁶ increased foreign trade²⁰⁷ and mitigated effects of a depression.²⁰⁸ It appears economic behavior that is not grossly anticompetitive will be governed under the rule of reason presented by Article 10.²⁰⁹ It is likely that behavior falling into this category will be given a favorable rating and thus exempt from AML enforcement.

V. Post-Enactment Enforcement of the AML—“Games People Play”²¹⁰

China has indicated it will pass the AML.²¹¹ It remains unclear whether China is enacting regulations for economic gain or to assuage Western concerns. This section identifies barriers to AML enforcement and analyzes reasons the Chinese approaches may be different than those advocated by the United States.

A. *Doctrinal Obstacles to Enforcement*

The United States Supreme Court has recognized two exemptions for government economic involvement in the free market. The first is an exclusion for federal executive agencies,²¹² and the second precludes federal action from antitrust liability.²¹³

200. *See id.* at art. 7, § 6. The scope and powers of the Anti-Monopoly Commission and the Anti-Monopoly Enforcement Authority are delineated in Articles 32-44. *Id.*

201. 2006 Draft AML, art. 10.

202. *Id.*

203. *Id.* at § 1.

204. *Id.*

205. *Id.* at § 2.

206. 2006 Draft AML, art. 10, at § 4.

207. *Id.* at art. 10, § 5.

208. *Id.* at art. 10, § 6.

209. *See id.* at art. 10.

210. HANK WILLIAMS JR., *Games People Play*, on I’M ONE OF YOU (Curb Records 2003).

211. *Id.*

212. *See* USPS v. Flamingo, 540 U.S. 736, 747 (2004).

213. Also known as the State Action Doctrine promulgated by Parker v. Brown, 317 U.S. 341 (1943).

1. Exemption for Federal Agencies

In America, the United States Postal Service (USPS) functions like a state-owned enterprise.²¹⁴ Like typical SOEs, the USPS was created by federal law.²¹⁵ USPS is financed and controlled by the federal government and driven by non-profit incentives.²¹⁶ Although the USPS may have market power in some areas of the country,²¹⁷ it competes directly with private companies, such as Federal Express, United Parcel Service, and DHL.²¹⁸ Due to competition with those corporations, in most U.S. markets, the USPS is not a monopoly.²¹⁹ However, in a recent case, a plaintiff alleged that USPS was a monopoly and should be subject to antitrust laws.²²⁰

The Court rejected this contention,²²¹ holding instead that the Sherman Act applied to “persons” such as corporations,²²² and specifically noted that USPS was not a federal corporation,²²³ could not set prices²²⁴ and was not a market actor separate from the United States.²²⁵ In rejecting these antitrust claims, the Court held, entities that

214. Sappington & Sidak, *supra* note 70, at 499-02.

215. *See* 1 Stat. 354. Congress officially established the post office on May 8, 1794. *See* United States Postal Service, *The United States Postal Service; An American History 1775-2002*, <http://www.usps.com/cpim/ftp/pubs/pub100/pub100.htm#thepostal>. (last visited Jan. 20, 2007).

216. *USPS v. Flamingo*, 540 U.S. 736, 747 (2004).

217. In some remote areas in which other postal providers such as Federal Express, UPS and DHL do not have extensive coverage, like Montana. USPS has a non-profit mandate to deliver mail to every residence in the country. Other providers are limited by profit concerns. *See id.* at 747.

The Postal Service has different goals, obligations, and powers from private corporations. Its goals are not those of private enterprise. The most important difference is that it does not seek profits, but only to break even, 39 U.S.C. § 3621, which is consistent with its public character. It also has broader obligations, including the provision of universal mail delivery, the provision of free mail delivery to certain classes of persons, §§ 3201-3405, and, most recently, increased public responsibilities related to national security.

Id.

218. While USPS competes for consumers, it cannot lower prices in response to competitors' actions. *See id.* 747-48.

219. In most locations, USPS is not the sole provider of mail services, does not possess market power and lacks the ability to raise prices. *See* POSNER, *supra* note 31, at 276-78 (discussing elements of a monopoly).

220. *See Flamingo*, 540 U.S. 736 (2004).

221. *Id.* at 748.

222. “The word ‘person’ . . . shall be deemed to include corporations and associations existing under . . . the laws of . . . the United States.” Sherman Act, 15 U.S.C. § 7; *Flamingo* 540 U.S. at 744.

223. *USPS v. Flamingo*, 540 U.S. 736 (2004).

224. *Id.* at 747.

225. *Id.* at 744.

are "independent establishments of the executive branch"²²⁶ are considered a part of the federal government and are exempt from antitrust liability.²²⁷ Because the Court held that the USPS was not separate from the federal government, it determined that the USPS is not a "person" as defined by the Sherman Act and immune from antitrust claims.²²⁸ Thus, the Court held that agencies of the federal government are immune from antitrust liability.

The USPS holding could have significant parallels in China. While most SOEs in China compete with private industries,²²⁹ many are still financed and controlled by governmental administrative agencies²³⁰ and could be considered a part of the government.²³¹ If China imports the USPS precedent into its proposed AML, it may be interpreted as not applicable to government entities, thereby eliminating SOE liability. Exclusion of these entities from the AML may result in the proposal becoming largely ineffective in assisting China's transition to a free-market economy.

2. Government Economic Activity

The second governmental exemption of governmental economic development recognized by the Supreme Court is the state action doctrine. In *Parker v. Brown*,²³² the Supreme Court held that the Sherman Act was "not intended to restrain state action."²³³ According to the Doctrine, when the state chooses to intervene in the market,²³⁴ private parties acting pursuant to the state's "clearly expressed policy"²³⁵ and subject to state supervision²³⁶ are immune from antitrust challenges.²³⁷ If China were to adopt this doctrine, it may interpret the act of creating and

226. *Id.*

227. *Id.*

228. *USPS v. Flamingo*, 540 U.S. 736 (2004).

229. *See Johns*, *supra* note 64, at 919-20.

230. *Id.*

231. If China follows the logic of *Flamingo* where the Supreme Court held that USPS is an executive agency, thus considered part of the federal government. *See Flamingo*, 540 U.S. at 737-38.

232. *Parker v. Brown*, 317 U.S. 341 (1943).

233. *Id.* at 351.

234. According to the laissez-faire doctrine, the government intervenes in the event of market failure. *See O'CONNOR*, *supra* note 32, at 47-48; *see also supra* text accompanying note 32. The key element to the state action doctrine is that the government is consciously choosing to enter the market with the purpose of regulation. *See Brown*, 317 U.S. 341.

235. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (citing *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410, (1978)).

236. *Id.*

237. *Id.* at 410.

maintaining SOEs as official state action.²³⁸ The “clear policy”²³⁹ rationale can arguably be supported by a national goal of a robust economy, full employment, and economic competitiveness on a global scale. Similarly, China could argue its control over SOEs amounts to adequate supervision.²⁴⁰ Adopting this doctrine will hinder attempts at full and effective implementation and enforcement of the provisions in the AML.

China may use the rationale²⁴¹ of these doctrines to fashion an exemption for its state interests, such as SOEs. If China chooses to do so, the movement away from government intervention and toward government regulation and competition laws may be significantly stymied. Even if the current version of the AML is enacted, enforcement may be weak. If China allows the anticompetitive effects of SOEs to exist, it will adversely affect China’s integration into the global marketplace.

B. Implementation Strategies: Game Theory Analysis

Once China passes the AML, there are a variety of available implementation strategies. Determining the best course of action will be a product of China’s preference and payoffs.²⁴² In order to determine the best strategy, some economists apply a game theory analysis.²⁴³

Game theory seeks to determine the choice that an individual actor will choose in any given situation.²⁴⁴ Assuming that the actor acts rationally²⁴⁵ and has knowledge of each option and the payoffs,²⁴⁶ a

238. China would argue that state control over industry advances social welfare policies, such as safe mines in the coal industry. See Wehrfritz, *supra* note 27.

239. See *Midcal Aluminum, Inc.* 445 U.S. 97, (citing *Louisiana Power & Light Co.*, 435 U.S. at 410).

240. State managerial control and operation enables China to supervise activity of SOEs. See generally Wehrfritz, *supra* note 27.

241. I do not presume that China would wholesale import U.S. style exemptions, especially since the Current Draft of the AML reflects EU style enforcement.

242. See WILLIAM C. CHARON, *THE LOGIC OF STRATEGIC DECISION: GAME THEORY FOR MORAL & POLITICAL PHILOSOPHERS* 2-4 (2004).

243. Economists such as John Nash have used strategic behavior analysis to determine the best move available to an actor based on the actions of his competitors. See TOM SIEGFRIED, *A BEAUTIFUL MATH: JOHN NASH, GAME THEORY, AND THE MODERN QUEST FOR A CODE OF NATURE* (2006). For more reading on game theory see DOUGLAS BAID, *GAME THEORY AND THE LAW* (1994), RICHARD ROUSE *GAME DESIGN: THEORY & PRACTICE* (2nd ed. 2004), and WILLIAM C. CHARON, *THE LOGIC OF STRATEGIC DECISION: GAME THEORY FOR MORAL & POLITICAL PHILOSOPHERS* (2004).

244. CHARON, *supra* note 242, at 1.

245. According to game theory, a player acts rationally when he or she chooses a course of action that “maximizes the satisfaction” of the actors’ preferences and beliefs of corresponding payoffs. *Id.* at 20-21. Further, a decision is only rational if it suffices cognitive and practical consistency. *Id.* at 17-20.

player will make choices based on his own preferences and available payoffs of each outcome.²⁴⁷ Preferences allow an actor to rank different outcomes in relation to one another.²⁴⁸ Preferences are a function of morals,²⁴⁹ pleasure,²⁵⁰ avoidance of pain,²⁵¹ traditions and cultural customs,²⁵² as well as economic rewards.²⁵³ An actor will choose the strategy resulting in the outcome that maximizes payoffs in light of his or her preferences.²⁵⁴

The process of transitioning from a command economy²⁵⁵ to a market economy involves many decision nodes²⁵⁶ with multiple actors. China will choose a course in response to its own preferences, to the actions of environmental actors and to their corresponding payoffs.²⁵⁷ For example, arguably China has decided to transition to a market economy based on treaties, regulations and international economic objectives by joining the WTO.²⁵⁸ This Comment analyzes a part of the sub-game of implementing the AML by limiting the game to three decision nodes: passage, enforcement of the AML, and application to SOEs.²⁵⁹

1. Decision Node A: To Pass or Not Pass the AML

China's decision to pass the Anti-Monopoly Law will be a function

246. Payoffs are the value of an outcome of any particular action based on the preferences of the actor. *Id.* at 12. Preferences are the values that an actor assigns to an outcome in relation to each other. *Id.* at 1. For example, preferences are expressed as favoring A over B. Outcomes are expressed by valuations of each outcome such as placing a value of 90 on A and 10 on B.

247. *Id.* at 1.

248. CHARON, *supra* note 242, at 14-15.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. CHARON, *supra* note 242, at 14.

254. As preferences change, so do the payoffs for each outcome. Thus, the "best" strategy for a player changes. *See id.* at 12.

255. *See* O'CONNOR, *supra* note 32, at 47-48; *see also supra* text accompanying note 83.

256. A decision node is a point within a game where one actor chooses one course of action over another. For example, the passage of the AML is a decision node for China as China has a choice to pass or reject the AML. *See* CHARON, *supra* note 242, at 7-8.

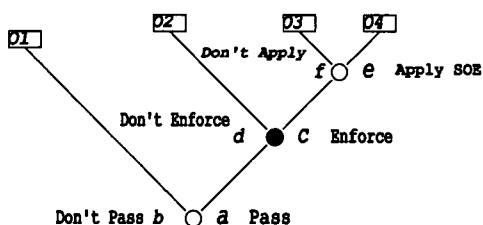
257. In this case, "environment" refers to the environment of the game in which strategic choice is decided. Environmental actors include economic, political, national, and others. CHARON, *supra* note 242, at 5.

258. Decisions on course of action indicate the preferences and interests of the actor. *See id.* at 13. China has decided to join the WTO and has enacted economic competition regulations which indicate that China values the payoffs of a socialist style market economy.

259. The game is graphically represented as follows:

of its preferences and the corresponding outcomes.²⁶⁰ China's preference to pass the AML will be based on the value assigned to government regulation of the economy. Underlying China's valuation of outcomes are the fundamental views of its market actors.²⁶¹ The United States has adopted an "individual capitalistic" approach that leaves economic activity in the hands of market actors.²⁶² Although there has been an extensive government role in the U.S. economy,²⁶³ a widespread acceptance of laissez-faire economics²⁶⁴ and a growing distrust of government action have created a bias against government involvement in the economy.²⁶⁵ In the United States, the divorce of government and the economic market was reestablished in the deregulation of industry under the Reagan Administration in the mid-late 1980s.²⁶⁶

Although U.S. economic policy rejects extensive government involvement and prefers a market-driven economy, the U.S. antitrust laws value competition within limits.²⁶⁷ Current U.S. economic policy recognizes business, that when left to its own practices, can be



260. A decision to pass an Anti-Monopoly law presumes a prior decision to open the economy.

261. Views of other players and environmental factors affect the preferences of an outcome. *See id.* at 5, 12-13.

262. *See O'CONNOR, supra* note 32, at 44-49; *see also supra* text accompanying note 32.

263. For example, the Public Work Acts of the Great Depression Era, Lyndon Johnson's Great Society legislation as well as government regulation prior to the Regan Era.

264. Laissez-faire economics values economic activity to occur with minimal, or absence of government intervention. Market actors through competition determine what is produced and purchased based on the laws of supply and demand. *See SMITH, supra* note 32.

265. Clyde O. Ruggles, *Government Control of Business* (1945), reprinted in *ANTITRUST AND REGULATION* 349 (Giles H. Burgess, Jr. ed. 1992).

266. President Reagan initiated reforms that led to the deregulation of banks and the transportation industry, notably airlines. *See Daniel K. Bubb, The Successes and Failures of Presidential Policy on Commercial Air Travel*, 71 *J. AIR L. & COM.* 653, 665-66 (2006); *see also John C. Panzar, Regulation, Deregulation and Economic Efficiency: The Case of the CAB* (1980), reprinted in *ANTITRUST AND REGULATION* 415 (Giles H. Burgess, Jr. ed. 1992).

267. The United States has adopted a capitalistic economic approach. *See O'CONNOR, supra* note 32.

anticompetitive and thus is in need of regulation.²⁶⁸ In this capacity, the government acts as a referee, not a manager.²⁶⁹ Regulation in the form of clear guidelines accentuates beneficial aspects of market interaction and limits corruption.²⁷⁰ Due to this preference, the U.S. values market activity with boundary regulations, and would likely choose to pass the AML.

It is important to note that player preferences change over time, resulting in different strategies in different periods.²⁷¹ Historically, China has valued government control of the economy.²⁷² According to Maoist economics, the State is the optimal vehicle for economic growth.²⁷³ Choosing to open the market would result in a loss of government control, possibly leading to undesirable economic stratifications.²⁷⁴ Based on these preferences, it appears that China would choose to preserve government control and choose not to pass the AML.

In light of recent history, China seems to be shifting its preference from a strong government role in the economy to a market driven by competition.²⁷⁵ This is illustrated through China's efforts to attract Foreign Direct Investment (FDI),²⁷⁶ the formation of closer diplomatic ties with the U.S.,²⁷⁷ as well as accession to the WTO.²⁷⁸ In addition,

268. *Id.* at 32.

269. Laissez-faire economics mandates that government involvement in the economy is only warranted to set macroeconomic parameters that allow a market to exist and to only intervene in cases of market failure. See SMITH, *supra* note 32.

270. Antitrust laws provide incentives for fair business practices resulting in beneficial outcomes such as efficiency, equilibrium pricing, and welfare benefits. See LETWIN, *supra* note 35.

271. See CHARON, *supra* note 242, at 12-13.

272. See WEDEMAN, *supra* note 86, at 4-6.

273. See *id.*

274. "Opening a market" refers to removal of governmental limitations on market interactions and allows competition to govern economic transactions. See Blumenthal, *supra* note 22, at 200-02. Inherently, competition reduces government control. *Id.*

275. See Berry, *supra* note 87, at 134-35.

276. In 2003, China attracted \$52.7 billion dollars in Foreign Direct Investment. Simon Cartledge, *The Other Side of China's Success Story*, FIN. TIMES, Jan. 20, 2003, at 11. The increase in Foreign Direct Investment is partly attributed to China's accession to the WTO and other measures reducing restrictions on foreign investment such as the Interim Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (promulgated by the State Administration of Foreign Exchange 2003). *Id.*

277. In December 2001, China received permanent normal trade relations status from the United States effective January 1, 2002. Press Release, White House Office of the Press Sec'y, *President Grants Permanent Trade Status to China* (Dec. 27, 2001), available at <http://www.whitehouse.gov/news/releases/2001/12/20011227-1.html>. Further, President Bush has met with Chinese President Jiang Zemin on at least two occasions. Press Release, White House Office of the Press Sec'y, *President Bush Meets with Chinese President Jiang Zemin*, (June 1, 2001), available at <http://www.whitehouse.gov/news/releases/2002/02/20020221-7.html>.

China is instituting economic reforms such as the AML to allow administrative agencies to oversee different aspects of the economy.²⁷⁹ Further, the current legislative status of the AML, including the presentation of the draft to the international community seems to indicate China's desire to align with U.S. preferences of government regulation.²⁸⁰

For China, the payoffs of passing the AML include increased Foreign Direct Investment,²⁸¹ most-favored nation status (a benefit of joining the WTO),²⁸² increased product markets,²⁸³ and availability of global resources.²⁸⁴ Failure to pass the AML may result in forbearance of these benefits.²⁸⁵ (Strategy *b*, Outcome 1). Therefore, it seems beneficial to China to pass the AML. (Strategy *a*).

2. Decision Node B: Actively Enforce AML

China's preference to enforce the AML will be determined in part by the cultural value of *Guanxi*.²⁸⁶ *Guanxi* refers to the system of social networking in which trust is integral to any business transaction.²⁸⁷ Reputation and character are integral in ensuring that business interactions occur along social lines.²⁸⁸ Accordingly, under *Guanxi*,

278. China acceded to the WTO in 2002. See World Trade Organization, Ministerial Decision of 10 November 2001, WT/L/432, available at <http://www.mac.doc.gov/China/ProtocolandDecision.pdf> (last visited Nov. 7, 2006).

279. Assisting MOFCOM and SAIC in regulating economic activity, China is also creating a separate antitrust agency. See Yang, *supra* note 138.

280. However, the role of government is currently being debated. The question is whether to maintain Maoist practices or deviate and fully embrace U.S. or EU agency regulation systems or a hybrid of both. See Berry, *supra* note 87, at 134-35.

281. World Trade Org., 10 Top Benefits of the WTO Trading System, http://www.wto.org/english/thewto_e/whatis_e/10ben_e/10b00_e.htm (last visited Jan. 12, 2006).

282. Most favored trade status refers to favorable trade relations, such as lower tariffs and increased quotas. See *id.* A member country in the WTO must extend any favorable trade status with one country to all member states. *Id.*

283. *Id.*

284. *Id.*

285. Usually, once an actor chooses a course of action at a decision node, that choice cannot be revisited. Each decision results in a different outcome with unique payoffs. See CHARON, *supra* note 242, at 12-13. Thus, choosing not to pass the AML will result in a different outcome and China will not realize the same payoffs available as passing the AML.

286. In the following analysis, I attempt to apply the concept of *Guanxi* to preference formulation. Admittedly, I have no firsthand knowledge of Chinese business culture. I have attempted to control for "white-washing" as much as possible. For an in depth study of *Guanxi* and Corporate China, see Udo C. Braendle et. al., *Corporate Governance in China- Is Economic Growth Potential Hindered by Guanxi?*, 110 BUS. SOC. REV. 389, 389-05 (2005).

287. *Id.* at 390.

288. *Id.*

business ventures are more a function of relationships than profits.²⁸⁹ Under such practices, the probability of corruption increases.²⁹⁰ Indeed, *Guanxi* can be used to further cronyism, or "kick-backs," to close friends and business partners.²⁹¹ While the government may take official action in passing laws, social networks provide alternative routes to bypass government statutes.²⁹²

Although *Guanxi* can facilitate corrupt practices, it primarily stands for interconnected relationships.²⁹³ In a regulation context, this implies that an antitrust enforcer needs to have integral knowledge of the company's inter-working.²⁹⁴ It appears that without an existing relationship, in which the company trusts the knowledge and character of a regulator, third-party enforcement would have limited success.²⁹⁵ In an antitrust context, *Guanxi* may be equated to collusion.²⁹⁶ In China, collusion is deemed to be inherent in cultural business practices.²⁹⁷

American antitrust policy prefers to penalize collaboration.²⁹⁸ American regulation seems to emphasize neutral third-party enforcement, leaving a regulator with little or no ties to the regulated industry.²⁹⁹ In utilities regulation for example, an official must not have any ties with the utility.³⁰⁰ Politicians' business ties are scrutinized according to the same standard, where close connections are discouraged.³⁰¹ These contrasting views impact preferences of enforcement and lead to different outcomes.³⁰²

289. *See id.* at 393.

290. *Id.* at 390-91.

291. Braendle, *supra* note 286, at 401.

292. *Id.* at 399.

293. *See* CHINESE CULTURE, ORGANIZATIONAL BEHAVIOR, AND INTERNATIONAL BUSINESS MANAGEMENT 44-46 (ed. Ilan Alon) (2003) [hereinafter Alon].

294. *See id.*

295. *See id.* This raises the issue of allegiances. Will regulators choose to strictly enforce the law against colleagues and friends?

296. *See* John H. Matheson, *Convergence, Culture and Contract Law in China*, 15 MINN. J. INT'L L. 329 (2006). Generally collusion between competitors is regarded as anticompetitive behavior due to the likelihood of illegal agreements such as price fixing, market allocations and cartelization. *See* O'CONNOR, *supra* note 32, at 119.

297. *See* Alon, *supra* note 293.

298. *See* 15 U.S.C. § 1 (forbidding agreements and collaboration between competitors and expressly declaring that anticompetitive contracts and conspiracies are illegal).

299. To prevent corruption, federal ethics rules require government employees to disclose any connections with the industry they primarily regulate. *See, e.g.*, Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635 (2002), available at http://www.usoge.gov/pages/forms_pubs_otherdocs/fpo_files/reference/rfsoc_02.txt.

300. Interview with John Lopatka, Professor of Law, The Dickinson School of Law of the Pennsylvania State University, in University Park, Pa. (Nov. 2, 2006).

301. For example, U.S. Vice President Richard Cheney has received considerable criticism from his association with Halliburton.

302. Preferences of an actor govern choice at each decision node, which leads to

The nature of the final language will signify China's preference on enforcement. Specific language of the AML may signify greater enforcement, while broader language may facilitate greater discretion in enforcement.³⁰³ The difference between the United States and European Commission illuminates this difference.³⁰⁴ The Sherman Act uses language that is purposely broad, in order to provide enforcement flexibility.³⁰⁵ As a result, there has been 100 years of judicial interpretation on both sides of any given economic analysis.³⁰⁶ This flexible jurisprudence has provided the Department of Justice and the Federal Trade Commission discretion in enforcing antitrust laws.³⁰⁷

In contrast, Article 81 of the EU lays out specific violations.³⁰⁸ Any activity that violates Article 81 is deemed illegal per se and automatically void³⁰⁹ and activities that fall under the purview of Article 82 are reviewed for legality.³¹⁰ It appears that Articles 81 and 82 provide little discretion for enforcement in comparison to the Sherman Act.³¹¹ In both cases, legislative intent on enforcement may be signified through statutory language.³¹²

The Chinese AML will be enacted by the General Assembly and enforced by administrative agencies, such as the new antitrust agency.³¹³ Since the General Assembly of the NPC is not currently in session, in order for the General Assembly to consider the AML, the legislation

different outcomes. See CHARON, *supra* note 242, at 12; see also *supra* text accompanying note 240.

303. See Berry, *supra* note 87, at 148-49.

304. Compare E.U. Articles 81 and 82 with U.S. Sherman Act. See Treaty of Rome, *supra* note 19, at arts. 81, 82.

305. See 15 U.S.C. § 1 ("Every contract, combination . . . or conspiracy, in restraint of trade . . . is declared to be illegal."). This does not specifically identify practices.

306. In deciding the applicable standard for horizontal and vertical restraints, the Supreme Court initially adopted a per se illegality approach. See RAYBOULD & FIRTH, *supra* note 48, at 24-27. In the twentieth century the Court shifted to a Rule of Reason approach which considers relevant factors such as market power and anticompetitive effects in determining legality of an action. *Id.*

307. The Department of Justice and the Federal Trade Commission have prosecutorial discretion to enforce the antitrust laws. Interview with John Lopatka, *supra* note 300.

308. See Treaty of Rome, *supra* note 19, art. 81 (defining price fixing, supply controls, geographic market divisions, predatory pricing, and tying arrangements as illegal).

309. *Id.* ("Any agreements or decisions prohibited pursuant to this Article shall be automatically void."), available at <http://ec.europa.eu/comm/competition/antitrust/legislation/articles.html> (last visited July 18, 2007).

310. *Id.* at art. 82.

311. Articles 81 and 82 directly list prohibited anticompetitive acts while the Sherman Act generally prohibits actions that "restrain trade." See *id.* at arts. 81, 82; see also *supra* Table 1 accompanying note 156.

312. See Berry, *supra* note 87, at 148-49.

313. See Current Draft, at art. 5 (establishing the Anti-Monopoly Enforcement Authority).

must first be passed by the Standing Committee.³¹⁴ In one view, the General Assembly is a rubber stamp for the Standing Committee.³¹⁵ At any time during consideration of a bill, the Standing Committee can hold special meetings to discuss the measure and then report its decisions or propose amendments to the General Assembly at large.³¹⁶ Historically, the members of the General Assembly and Standing Committee were members of the Communist party.³¹⁷ Party loyalty still prevailed in 2000 when Li Peng, chairman of the NPC championed a "party-first" platform.³¹⁸ Theoretically, the preferences of the CCP may manifest during the formation and approval of legislation and these preferences are translated into enacted legislation.³¹⁹ If the party prefers not to enforce the AML, the language of the AML will most likely reflect that preference.

Should China choose to actively enforce the AML (*Strategy ac*), there will be significant economic costs, bureaucratic costs, and benefits.³²⁰ The resulting enforcement of the AML will require a developed judiciary, administrative enforcement agencies, national regulations, increased enforcers, and channels of communication between business and government.³²¹ The United States has developed a working system that may serve as a model for China.³²²

314. See Nat'l People's Cong. of China, *Organization information: Procedures of the National People's Congress Sessions*, <http://www.npc.gov.cn/zgrdw/english/organization/congress/procedureNPC.jsp> (last visited Jan. 12, 2006); see also China's Official Gateway to Information, *What is the legislative process of the National People's Congress?* <http://www.china.org.cn/english/features/56976.htm> (last visited Jan. 20, 2007).

315. See TONY SAICH, *GOVERNANCE AND POLITICS OF CHINA* 115-16 (2001).

316. See National's People Congress of China, *supra* note 314; see also China's Official Gateway to Information, *supra* note 314.

317. See SAICH, *supra* note 315, at 115-16.

318. *Id.*

319. See *generally id.* at 113-18.

320. Economic costs refer to opportunity costs. See O'CONNOR, *supra* note 32, at 10. The costs of privatizing SOEs will be compared to the value of social and economic welfare produced by maintaining status quo. Bureaucratic costs in this context refer to expenses such as operation costs of the Anti-Monopoly Enforcement Agency. See *generally*, SULLIVAN & HOVENKAMP, *supra* note 41, at 46-51. Enforcement of the AML may result in economic benefits such as increased FDI, favorable trade status with foreign companies, efficiency gains, and increases to consumer surplus.

321. The AML will not aid China's transition unless it is enforced. In order for enforcement to occur, China needs the infrastructure to evaluate, regulate, and adjudicate economic behavior. See SAICH, *supra* note 315, at 109-10. The current AML establishes the Anti-Monopoly Enforcement Agency and authorizes it to work with all branches of government to enforce the AML. See 2006 Draft AML, art. 5.

322. There are four primary actors in the U.S. antitrust enforcement arena: the Department of Justice, the Federal Trade Commission, State Attorneys General and private citizens. Throughout this Comment, I have focused on a few of the many different policies the United States has adopted, but the discussion is not exhaustive.

A key element of the U.S. system is the Freedom of Information Act³²³ which requires decisions of administrative agencies to be published.³²⁴ There is also a trend to publish all judicial proceedings.³²⁵ In order to be effective, businesses need to know what type of competitive business conduct is prohibited.³²⁶ Currently, China does not have a publishing requirement.³²⁷ However, a provision in the AML would require publication of any decisions of State agencies and judicial opinions.³²⁸ This should lead to increased information, which is an essential element in a market economy.³²⁹ Asymmetrical information can result in market distortions as consumers will be unable to discern true quality and price information and therefore may reduce transactions for fear of overpaying or purchasing a lemon.³³⁰ Therefore, it appears that China should pass the AML with Article 15 in order to promote competitive economic activity.

If these measures are adopted, enforcing the AML will be in China's best interest. It remains to be seen whether the passing of the AML will merely be to assuage Western concerns and attract Foreign Direct Investment³³¹ or will actually have the effect of furthering economic reform. Choosing not to enforce (Strategy *ad*, Outcome 2), will result in minimal change to the status quo.³³²

3. Decision Node C: Application of the AML to SOEs

On its face, it seems that China would not enforce anti-monopoly

323. Freedom of Information Act, 5 U.S.C. § 552.

324. 5 U.S.C. § 552(2)(A).

325. Most judicial opinions are published through the West reporter system, or available through electronic databases. *See, e.g.*, 207 PA CODE § 2/201 (1996). However, there is not a mandatory publishing requirement for judicial opinions. *See United States v. Pajooch*, 143 F.3d 203, 204 (5th Cir. 1998) ("In general decisions regarding publication . . . is driven by whether a full opinion will benefit the bench, bar or litigants.").

326. *See* Stephen Harris, Jr., *An Overview of the Draft China Antimonopoly Law*, 34 GA. J. INT'L COMP. L. 131, 140 (2005).

327. *See* Blumenthal, *supra* note 22, at 234-36.

328. Article 15 of the Current Draft mandates publication of enforcement decisions. Art. 15. ("The Anti-monopoly Law Enforcement Authority under the State Council shall publish the decision prohibiting the concentration or the decision attaching restrictive conditions to the concentration in time.").

329. *See* COOTER & ULEN, *supra* note 42, at 37.

330. *See id.* at 47.

331. Foreign Direct Investment refers to foreign governments or businesses investing in the local economy through capital shares, corporate ownership, or joint ventures. *See* THUN, *supra* note 97, at 3-8.

332. If the AML is passed but not enforced, there will be limited incentive for businesses to continue the transition to a competitive market such as privatization of SOEs.

laws against state owned enterprises.³³³ However, there has been pressure from abroad,³³⁴ as well as increasing desire within China to reform SOEs.³³⁵ In order to be effective, the AML will have to be enforced against local governments.³³⁶ Local governments may be reluctant to relinquish control of SOEs.³³⁷ Implementing the AML will require the cooperation of local governments in removing preferential treatment for SOEs.

Facially, Article 50 appears applicable only to administrative agencies and not to SOEs.³³⁸ Though the Current Draft AML prohibits certain behavior and specific actors, the absence of a particular provision does not appear to indicate an exemption for anticompetitive behavior.³³⁹ Therefore, SOEs that engage in anticompetitive behavior will be subject to the AML. Conversely, SOEs may solicit refuge under Article 10 alleging that their conduct is necessary in order to provide production efficiencies or increase foreign trade.³⁴⁰

The payoffs of each outcome will determine whether China will choose to enforce the AML against SOEs. There are substantial reasons to not enforce the AML against SOEs.³⁴¹ Since SOEs focus on growth and employment and not on profitability, they have functioned as public work projects, creating employment opportunities that otherwise might not exist.³⁴² China has started SOE reform through such measures as privatization and "stockification",³⁴³ but these measures have had little

333. The CCP interest of control over microeconomic activity seems to conflict with new competitive policies such as the AML. *See generally* Wehrfritz, *supra* note 27.

334. *See* Organisation for Economic Co-Operation and Development, *OECD Guidelines on Corporate Governance of State-Owned Enterprises* (2005), available at <http://www.oecd.org/dataoecd/46/51/34803211.pdf> (last visited Jan. 20, 2007).

335. *See* *SOE Reform Heads in Right Direction*, CHINA DAILY, Sept. 30, 2004, available at http://www.chinadaily.com.cn/english/doc/2004-09/30/content_379106.htm.

336. This raises federalism problems. *See* Zhu Suli, 'Federalism' in *Contemporary China: A Reflection on the Allocation of Power Between Central and Local Government*, 7 SING. J. INT'L & COMP. L. 1 (2003).

337. *Id.*

338. Article 50 prohibits administrative agencies or public organizations from engaging in anti-competitive behavior. Current Draft, art. 50.

339. Article 7 reserves the right of the Anti-monopoly Enforcement Authority to determine other prohibited acts not otherwise itemized. Art. 7, § 6 ("other monopoly agreements determined by the Anti-Monopoly Law enforcement Authority."). Further, the draft AML outlines criteria for granting exemptions. *See* art. 10.

340. *See id.* at art. 10. Article 10 provides exemptions from AML enforcement provided that competition is not reduced and that there are gains to consumer welfare.

341. *See* Berry, *supra* note 87, at 145-47 (describing the Self-Amputation theorem and postulating why China may be hesitant to "cut-off" SOEs from existing protection measures through active enforcement of the AML).

342. *See* Blumenthal, *supra* note 22, at 221-26.

343. *Id.*

effect on SOE's efficiency, profitability, or market power.³⁴⁴

The AML will need to proscribe methods of dealing with SOEs that operate as monopolies. U.S. style antitrust enforcement would result in breaking the SOE into smaller units.³⁴⁵ Due to the role of collusion in current Chinese business practice, the significance of such action is debatable, as smaller companies might simply operate as a cartel rather than a monopoly.³⁴⁶

In order to achieve the goals of the AML, the benefits of competition created by effective enforcement must outweigh the losses sustained by the demise of SOEs. Quantitatively, the AML's effects need to result in a greater or equal shift of benefits from those achieved under inefficient SOEs³⁴⁷ to productive, competitive benefits created through open market interactions.³⁴⁸ More importantly, the Chinese populace must realize that they will not be worse off without SOE support.³⁴⁹ Barriers to enforcement³⁵⁰ may be reduced as long as people believe that the SOE job they lose will be replaced by an effective substitute under the AML.³⁵¹ In addition, each stakeholder in the Chinese marketplace needs to believe that change is in its best interest.³⁵² Unless this idea is communicated effectively, preferences will not change, and there will be considerable support to maintain SOEs free of AML interference.³⁵³

Conversely, if the AML is not applied to SOEs, global business may view it as an anti-foreign company act. In this regard, the AML may

344. *Id.*

345. *See, e.g.,* United States v. AT&T, 524 F. Supp. 1336, 1372 (D.D.C. 1981) (American Telephone and Telegraph Company ("AT&T") consent decree in which AT&T was forced to divest into four separate companies).

346. In a market where all firms have close relationships, the firms may have a tendency to collude to either decrease costs or increase profits. Though individually, firms do not possess market power, collectively as a cartel, the firms can fix prices and restrict output in a segment of the market. Interview with Susan Beth Farmer, Professor of Law, The Dickinson School of Law of the Pennsylvania State University, in University Park, Pa. (Jan. 23, 2007).

347. Such as social welfare compensation packages including employment opportunities, retirement packages, and health care. *See* Johns, *supra* note 64.

348. *See* Blumenthal, *supra* note 22, at 221-26.

349. Ultimately, in a democratic society, elected officials need the support of the electorate. *See* WILLIAM FLANIGAN & NANCY ZINGALE, POLITICAL BEHAVIOR OF THE AMERICAN ELECTORATE 1-3 (8th ed. 1994). If the populace does not believe that they will benefit from AML enforcement, then they might pressure their leaders to change the law or elect new leaders.

350. Such as local government's refusal to cooperate and corruption. *See* Berry, *supra* note 87, at 149-50.

351. *Id.*

352. In game theory terms, outcome 4 is better than outcome 3, *see supra* illustration note 259.

353. This places a huge burden on effective communication by enactors of the AML.

serve to protect domestic firms at the expense of foreign companies.³⁵⁴ This may signify that China is skeptical that foreign investors will usurp a large role in its economy and that China intends to maintain a strong control of its economic activity.³⁵⁵ This may result in foreign investors avoiding investment in China if such steps are seen as favoring Chinese business.³⁵⁶ Historically, China has placed an emphasis on non-profit motivations.³⁵⁷ However, the current trend in Chinese trade policies reflects that China prefers to engage in international trade and increase GDP.

The analysis above indicates that the best outcome for China is to follow Strategy *ace* (Outcome 4). Therefore, China should pass the AML, actively enforce the law and apply the law to SOEs. This decision could lead to increased economic growth and greater acceptance on the world stage. To follow any other strategy will result in a stagnation of China's economic transition, hinder efforts to reform SOEs, and the loss of economic opportunities.³⁵⁸

VI. Conclusion—"It's the Way that Cha Do it"³⁵⁹

In summary, China will choose to enact and implement the AML based on its cultural, social and economic preferences.³⁶⁰ Consequently, wholesale export of U.S. antitrust law, preferences, and enforcement polices to China may not lead to an optimal outcome. Any country should tailor regulations to its own preferences in order to achieve desired economic success. The resulting AML will most likely differ from current U.S. style antitrust laws. Indeed, the Current Draft resembles EU antitrust laws and enforcement. If the current language is officially enacted, it may pose significant challenges to U.S. businesses

354. Indeed, when China first announced consideration of the AML, foreign investors were concerned that they would be targeted. See Joint Comments, *supra* note 154.

355. See Wehrfritz, *supra* note 27.

356. Through Foreign Direct Investment, investors receive ownership and control in exchange for capital. See YASHENG HUANG, *SELLING CHINA* 15 (2003). Foreign investors seek to maximize return on investment and seek markets free of government regulation such as investment and ownership caps. *Id.* at 46-47.

357. China values non-profit goals such as full employment. See HAY AND MORRIS, *supra* note 74. In comparison, United States businesses operate in a capitalist society. See *supra* text accompanying note 31. In a capitalist society, firms seek to maximize profits. See COOTER AND ULEN, *supra* note 42, at 30. In the United States, it appears that externalities such as fair trade, anti-sweat shops, and condemning child labor are ancillary concerns to portfolio growth and increased return on investments.

358. See CHARON, *supra* note 242, at 12-13; see also *supra* text accompanying note 285.

359. LUNCFORD, *supra* note *.

360. See CHARON, *supra* note 242, at 12-16.

that are accustomed to interacting under U.S. guidelines.³⁶¹

Such an outcome would not be detrimental to the world economy. Precedent established by other economic actors, notably the EU, establishes that different goals, definitions, and enforcement do not significantly hinder economic interactions. However, such differences require global antitrust collaboration.³⁶² Current indications suggest that China will pass the AML and further their integration with the global economy.³⁶³ The world waits to see what China will do, and, more importantly, how they do it.

361. The AML proposes anti-monopoly enforcement at fifty percent market share compared to the higher U.S. market share requirement. *See supra* text accompanying note 49; *see also* Current Draft, art. 15, at § 1.

362. Jurisdictional elements will be needed to prevent another GE-Honeywell fiasco, where the United States “blessed” the merger only to have the EC condemn it, resulting in the collapse of the merger. *See* Case COMP/M.220 July 3, 2001.

363. At time of publication, China introduced a new Anti-Monopoly Law. The 2007 version is currently under consideration by the State Council. The 2007 version closely follows the 2006 version and continues to adopt a EU approach. However, there are notable differences including the reduction in amount of fines, removal of criminal liability and restatement of socialist market economy goals. More importantly, the 2007 version exempts SOEs from AML regulation. *See* 2007 Draft AML, art. vii (“Industries controlled by the State-owned economy . . . shall be protected by the State to conduct lawful operation by the undertakings.”).