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# The New Economic Constitution in China: A Third Way for Competition Regime?

*Youngjin Jung* \* & *Qian Hao* \*\*

*Market needs a regulator. Greedy businessmen try to stand on high position to take control of the trade for big profits.*

—Mencius (372-289 B.C.)

## I. INTRODUCTION

Despite China's astounding economic growth in the midst of a world-wide economic downturn,<sup>1</sup> concerns both in China and abroad have been mounting over the looming threats that may endanger China's high-gear economic engine. A particularly urgent challenge is its chaotic market, saddled with years of unruly competition.<sup>2</sup> The drafting of an anti-monopoly law, deemed to be the core of an effective competition regime, has thus gained renewed attention in China.<sup>3</sup> The public, in effect, has been

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<sup>1</sup> See, e.g., Liu Shucheng et al., *An Analysis of China's Economic Growth Trend (1998-2002)*, 4 CHINA & WORLD ECONOMY 9 (2002), at [http://www.iwep.org.cn/wec/english/articles/2002\\_04/2002-4-liushucheng.pdf](http://www.iwep.org.cn/wec/english/articles/2002_04/2002-4-liushucheng.pdf).

<sup>2</sup> See Zhou Qiren, *Competition, Monopoly and Regulation: A Report on Anti-Monopoly Policy* (Sept. 10, 2002), at <http://www.ccer.edu.cn> (displaying a working paper requested and coordinated by the Office of State Mechanism Reform).

<sup>3</sup> As early as 1987, a working group on drafting the antimonopoly law was established under the Legislative Affairs Bureau of the State Council, which produced a draft on anti-monopoly and anti-unfair competition regulations in 1988. In 1993, the Anti-Unfair Compe-

calling for an “economic constitution” to harness the rampant market disorder, occasioning intensified discussion among scholars.<sup>4</sup> This has prompted the State Economic and Trade Commission (“SETC”) and State Administration of Industry and Commerce (“SAIC”)<sup>5</sup> to accelerate the drafting of the anti-monopoly law. During 2001 and 2002, four drafts have been written and circulated for review amongst Chinese and foreign anti-monopoly experts.<sup>6</sup> On the basis of these drafts, the basic framework for a long awaited antitrust regime has started to take shape.<sup>7</sup>

Although the willingness to accommodate foreign insight and coordinate the drafting clearly indicates China’s determination to tap into the experiences of the most advanced competition legal regimes, the most recent draft (the “Draft”), reveals that the problems that the legislation is expected to tackle are different from those in developed economies, such as the United States. Most notably, China (like many other transitional countries) must first strive to create a free market by overcoming the hurdles originating from its anti-market legacy, such as administrative intervention. In addition, years of rapid economic development have fostered market distortions that deter competition, while the increased presence of foreign companies has also brought forth additional monopoly concerns. Furthermore, both the design and future enforcement of the antitrust law are inevitably constrained by China’s incomplete economic reform and weak legal institutions. Observers have criticized China as lacking the necessary po-

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tion Law was passed. In 1994, the 8th National People’s Congress (“NPC”) included the anti-monopoly law in its legislative plan and authorized the State Economic & Trade Commission and the State Administration of Industry & Commerce to work on drafting the legislation. See Hu Shuli, *Long Way to Go for Antimonopoly Mission*, at <http://www.chinapostnews.com.cn/288/kd04.htm> (last visited Mar. 22, 2002).

<sup>4</sup> For example, during the 5th Plenary Session of the 9th NPC held in March 2002, the first bill submitted was one to urge the enactment of People’s Republic of China (“PRC”) anti-monopoly law from 31 representatives. A Bill on Promulgation of Antimonopoly Law in Near Future, CHINA NPC NEWS (Mar. 7, 2002), available at <http://www.npcnews.com.cn/gb/paper289/1/class028900001/hwz204276.htm>.

<sup>5</sup> Following a general practice, the drafting of the anti-monopoly law, which will eventually be promulgated by the NPC as a statute, can be assigned to the State Council (the chief executive branch) or concerned ministries thereof, in this case, the SETC and SAIC.

<sup>6</sup> The discussion of this article is based on the latest two drafts, which came out in April and October 2002, respectively. All the drafts were obtained during the process of soliciting comments. Only Chinese versions were circulated and the English translation in this article is not official.

<sup>7</sup> From a comparison of the two latest drafts, it is clear that both the framework and most of the stipulations have been settled. This has been officially confirmed in China’s note submitted for the OECD Global Forum on Competition (Feb. 10-11, 2003), in which the anti-monopoly law draft was included as the basis for overview. People’s Republic of China, *Objectives of the Competition Law of PRC and the Optimal Design of Competition Authorities* (Jan. 9, 2003), at <http://www.oecd.org/dataoecd/58/25/2485968.pdf>. Although changes may still be made before the enactment, they will very likely be limited to minor or expressional ones.

litical will or capital to usher in a competent antitrust regime.<sup>8</sup> However, it appears the impasse may have been as much due to the difficulty of the mission as to any politically-deliberated decision to retain certain flexibility and influence on the part of the government or its surrogates.

Such extraordinary challenges have prompted far-reaching innovations in the Draft, which is currently the most hotly-debated and closely-followed legislation to be enacted in China. China's national competition regimes are predicated on the notion that public regulatory anticompetitive behaviors and private anticompetitive behaviors are fundamentally distinct and should be addressed with different mechanisms. In other countries, it is longstanding practice that competition authorities do not address anticompetitive behaviors created and fostered by other administrative agencies. However, Chinese competition law apparently attempts to integrate the two enforcement areas that have been traditionally demarcated: administrative and private anticompetitive behaviors.

Second, Chinese competition law allows private suits, which play a role in deterring anticompetitive behaviors, but are not so impressive in comparison to the competition regimes that follow the E.U. model. The eagerness to combat widespread anticompetitive activities seems to have deterred a much-deserved deliberation as to whether private suits will bear fruit under the current underdeveloped litigation system in China.

Third, the Draft does not allow some of the derogations from the basic obligations that other countries codify in their competition laws. For instance, the Draft does not contain a blank exemptions provision that puts out of its scope acts of private enterprises in accordance with other regulatory statutes. In short, the Draft demonstrates peculiarities of varying degree that challenge conventional notions of competition policy. In tune with its ambition to achieve a market economy without completely abandoning the socialist political system, China is experimenting with what may be referred to as "a third way" in framing competition law, which rejects both pure capitalism and socialism.

Not only will the legislation lay the fundamental rules for the still-nascent market and substantially reshape the economic landscape, it will also present solutions to the increasing challenges that developing and transitional countries face today, thereby adding novel elements to competition law at the international level.

Nevertheless, the Draft also contains significant drawbacks in terms of substantive standards for enforcement. The Draft allows for significant ranges of exemptions with respect to cartel regulations. As for the substantive appraisal standard in merger control review, while countries as a gen-

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<sup>8</sup> See, e.g., Bing Song, *Competition Policy In A Transitional Economy: The Case of China*, 31 STAN. J. INT'L L. 389 (1995); Tanglong Yu, *An Anti-unfair Competition Law Without a Core: An Introductory Comparison Between U.S. Antitrust Law and the New Law of the People's Republic of China*, 4. IND INT'L & COMP. L. REV. 315 (1994).

eral rule review merger mainly on competition grounds, China adopts a multi-prong standard which assigns equal weight to “national economy” and “public interests,” factors often in conflict with competition considerations. As a result, under the Draft, China’s competition authorities will entertain a significant degree of discretion in combating anticompetitive behaviors. Decades to come will testify to the impact of the newly-minted competition law on the economic and legal development of China and the world.

It is against this backdrop that this article will discuss the basic features of the competition regime China is ready to set up, as envisioned in the Draft. By comparing different antimonopoly systems worldwide and their relevance to China’s idiosyncrasies in its antimonopoly law, this article intends to promote a better understanding of China’s emerging antitrust regime by providing illustrative comments and legislative suggestions. Part II of this article will focus on the economic and legal contexts of the drafting of the antimonopoly law in order to illuminate the unique priorities of the Chinese lawmakers. Part III will highlight the distinctive traits of China’s competition law. Part IV will analyze the Draft provisions’ merits and demerits. Part V concludes by offering comments on and observations about the Draft.

## II. WHY NOW?

### A. Competition Policy Gains Momentum with the Deepening of Economic Reform

Chinese attitude towards competition has undergone a gradual but undeniable reversal since the founding of the People’s Republic of China in 1949. The central planning system that was pursued until the late 1970s was a close replica of the Soviet model of “state syndicate.”<sup>9</sup> Each state-owned enterprise (“SOE”) had to abide by the central mandatory planning delivered through the administration agency directly in charge. Immune to the supply and demand rule and solely concerned with fulfilling their planned task, the SOEs were reduced to mere production organs. As the economy was for the most part dominated by the state, with private enterprises playing a negligible role,<sup>10</sup> it is not surprising that competition was

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<sup>9</sup> Wu Jinglian, *China’s Economic Reform: Past, Present and Future*, 1 PERSPECTIVES 5 (Apr. 20, 2000) (Shirley Zhang et al., trans.), available at [http://www.oycf.org/Perspectives/5\\_043000/china.htm](http://www.oycf.org/Perspectives/5_043000/china.htm); see also Wang Lixin & Joseph Fesmith, *Bulwark of the Planned Economy: The Structure and Role of the State Planning Commission*, in DECISION-MAKING IN DENG’S CHINA 52 (Carol Lee Harmrin & Suisheng Zhao eds., 1995).

<sup>10</sup> In 1978, for example, state-owned enterprises (“SOE”) consisted of 77.6% of the national industrial output, collectively-owned enterprises (“COE,” another form of public ownership, which, as far as decision-making power is concerned, were subject to almost the same degree of central planning) made up 22.2%, and private enterprises only 0.2%. SOEs

virtually nonexistent during this period. In fact, the prevalent ideology of socialism labeled competition as the crux of capitalism's inferiority. According to Lenin, competition based on anarchic production and motivated by unlimited greed for profits would inevitably lead to economic monopoly and political oppression, which heralded the inevitable fall of capitalism and justified socialist revolution.<sup>11</sup> Competition was thus not only irrelevant to the economic reality but also inherently condemned by enshrined communist ideology.

When China embarked on a new journey to modernization in 1978, the "over-concentration of authority" in economic management became subject to reform.<sup>12</sup> The initial strategy was to develop a "planned commodity economy,"<sup>13</sup> which supposedly operated in a market setting but did not amount to an overall market economy.<sup>14</sup> Accordingly, the policy makers displayed a modified interest in competition: it was no longer considered to be unique to capitalism, but could "stimulate the economy and benefit socialism."<sup>15</sup> At the same time, however, it was stressed that "competition between socialist enterprises" was "fundamentally different from that under capitalism".<sup>16</sup> At this point, the endorsement of competition was only incidental to implanting vitality into state enterprises entrusted with more autonomy. For example, competition was discouraged when it posed a threat to other more favorable strategies to strengthen enterprises, such as merger.<sup>17</sup>

The unleashing of market incentive forces and gradual expansion of non-state enterprises in turn propelled economic liberalization to an even higher level. In 1992, the goal of China's economic reform was further re-adjusted to establish a socialist market economy, in which the market would

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also made up 54.6% of the national retail sales, COEs 43.3%, and private enterprises 2.1%. See Statistical Yearbook of China, at <http://www.cei.gov.cn> (last visited May 15, 2003).

<sup>11</sup> 22 V. I. LENIN, *Imperialism, the Highest Stage of Capitalism* (1916), in COLLECTED WORKS, DEC. 1915-JULY 1916, 185 (Yuri Sdobnikov trans., George Hanna ed., 1964).

<sup>12</sup> *Communiqué of the Third Plenary Session of the 11th Central Committee of the Communist Party of China* (Dec. 22, 1978), available at <http://www.people.com.cn/GB/shizheng/252/5089/5103/index.html>.

<sup>13</sup> See *Decision of the Central Committee of the Communist Party of China on Reform of the Economic Structure*, pt. IV, adopted by the 12th Central Committee of the Communist Party of China at its Third Plenary Session on October 20, 1984. For an English translation, see CHINA'S SOCIALIST ECONOMY—AN OUTLINE HISTORY 672, 680-83 (Liu Suinian & Wu Qangan eds., 1986).

<sup>14</sup> See, e.g., Shou Shulian, *The Prerequisites to Successfully Reform State Enterprises* (July 6, 2001), at [http://www.chinareform.org.cn/cgi-bin/BBS\\_Read.asp?Topic\\_ID=604](http://www.chinareform.org.cn/cgi-bin/BBS_Read.asp?Topic_ID=604).

<sup>15</sup> Suinian & Qangan, *supra* note 13, at 688.

<sup>16</sup> *Id.*

<sup>17</sup> Also horizontal economic co-operation (*jing ji liang he*) between enterprises. See, e.g., Center of Economics Studies of Fu Dan University, NEW APPROACH TO ENTERPRISE REFORM AND DEVELOPMENT 199-203 (1988).

replace planning in allocating resources.<sup>18</sup> Competition gained recognition by its own right as an integral part of the market mechanism.

China has since accelerated its endeavor to overhaul the old planning system by carrying out gradual privatization and government administration. It also has carried out gradual reforms of SOEs and pricing, tax, fiscal, and banking systems.<sup>19</sup> Consequently, a legal structure has been laid down and general consciousness regarding rule of law has improved. However, the transition process has been saddled with trial and error, and the interdependent nature of the different reforms has often meant a single improvement has been constrained by countless limitations. In fact, a handful of reforms in China leave much to be desired, and some institutions have yet to be established from scratch. Yet China's chosen path toward marketization has proven to be an irreversible trend. China's successful accession to the World Trade Organization ("WTO") in December 2001 not only attests to international recognition and confidence in China as an emerging market economy,<sup>20</sup> but also has been a catalyst to the maturation of its market mechanism. Drawing experience from other transitional economies, where rapid privatization without simultaneous promotion of competition resulted in enormous cost,<sup>21</sup> protecting competition by improving regulatory framework has become one of the key missions of the Chinese policy makers.

### B. Competition Issues in the Spotlight

The Draft of regulations against monopoly and unfair competition in 1988<sup>22</sup> met with intense opposition. As a result, only the section opposing unfair competition was enacted in 1993. China has been continuously deliberating over the feasibility and desirability of regulating monopoly actions. Some opponents of this particular law believe that monopolies can only arise in advanced markets where intense competition renders it possible for large companies to become monopolies or oligopolies. While China is still in the process of establishing a market economy, they argue, the leg-

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<sup>18</sup> See *Report of the 14<sup>th</sup> National Congress of the Chinese Communist Party* (Oct. 12, 1992), available at <http://www.people.com.cn/GB/shixheng/252/5089/index.html>.

<sup>19</sup> See, e.g., Lan Cao, *Chinese Privatization: Between Plan and Market*, 63 LAW & CONTEMP. PROBS. 13 (Autumn 2000).

<sup>20</sup> See, e.g., Brett Williams, *The Influence and Lack of Influence of Principles in the Negotiation for China's Accession to the World Trade Organization*, 33 GEO. WASH. J. INT'L L. & ECON. 791 (2001).

<sup>21</sup> See, e.g., Joseph E. Stiglitz, *Promoting Competition and Regulatory Policy*, Speech in Beijing, China (July 25, 1999), at <http://www.worldbank.org/knowledge/chiefecon/articles/beijing/pdf>.

<sup>22</sup> See Shuli, *supra* note 3.

isolation effort would be anachronistic.<sup>23</sup> Leading economists, such as Zhang Wuchang, go further to question the presumption of whether a monopoly ever even merits regulation, citing the debate in the United States over the antitrust law and siding with those who criticize the U.S. antitrust law to be an arbitrary pretext under which the government interferes with the economy; they say this is exactly the problem China should counter at this stage through deregulation.<sup>24</sup> A practical concern of the Chinese legislators is that the law will be severely undermined by weak enforcement clouded by widespread local protectionism,<sup>25</sup> the entrenched interests which effectively blocked the first legislation draft of 1988.<sup>26</sup>

During the past few years, however, monopoly-related problems have aroused public uproar over market control. Concerned that economic development and further reform may be stifled, Chinese leaders are resolved to carry on a full-scale anti-monopoly campaign. Against the backdrop of such public support, the clamor for an anti-monopoly legislation has never been stronger. In fact, three key factors have contributed to the resurgence of the legislation efforts to curb monopolistic behaviors.

### *1. The Focal Point: Widespread Administrative Monopoly*

Unlike in economically-advanced countries, the most hotly-debated and intensely-condemned monopoly in China today is the administrative monopoly. "Administrative monopoly," widely used in China, refers to monopolistic activities initiated by government agencies at various levels by abusing regulatory or administrative power, including a wide variety of activities such as legalized monopolies and explicitly-prohibited *ultra vires* measures. The rampant administrative monopoly, a remnant of the old planning system, takes two forms: industry monopoly and regional monopoly.

The planning system was so designed that SOEs were under dual leadership. Vertically, each SOE belonged to one specific industry headed by a Ministry under the State Council and was subject to the Ministry's policies. At the same time, except for those that were directly operated by the Ministries, the enterprises were also horizontally subject to the authority of local government at all levels, depending on their size, importance and formation. Despite reform efforts to separate administration and management, institutional inertia and vested interests have reinforced the "stripe" (*tiao*, indus-

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<sup>23</sup> See *The Starting Point of Anti-Monopoly* (Apr. 12, 2001), at <http://www.sinolaw.net.cn/zhuanti/fld/hgbd/bd06.htm>.

<sup>24</sup> Zhang Wuchang, *An Economic Interpretation: The Fuzzy Nature of Antitrust Law*, at <http://www.stevenxue.com>; see also Paul E. Godek, *A Chicago-School Approach to Antitrust for Developing Countries*, ANTITRUST BULLETIN, Spring 1998.

<sup>25</sup> See *Starting Point to Fight Monopoly* (Apr. 12, 2001), at <http://www.sinolaw.net.cn/zhuanti/fld/hgbd/bd06.htm>.

<sup>26</sup> See Shuli, *supra* note 3.



try/department) and “block” (*kuai*, regional) fragmentation, by which the ministries and local governments retained incentive and power to engage in restrictive activities.

## 2. Industry/Department Monopoly

Now, after consecutive rounds of government restructuring,<sup>27</sup> state monopolies are only found in a limited number of industries. They include national security, natural monopoly, public goods and services, and key high-technology enterprises.<sup>28</sup> The Ministries and their subsidiaries operating or regulating those industries, however, have been widely criticized for abusing their regulatory power.<sup>29</sup> In industries where state monopolies have been abolished, such as machine manufacture, corresponding ministries have officially relinquished their power to interfere directly with management of the enterprises. However, even in those industries, the ministries and their subsidiaries often either manage to keep their affiliate companies or maintain close ties with certain enterprises, and therefore continue to exert discriminatory influence in varying degree by using their regulatory power. To illustrate this point, many ministries have fixed industry self-disciplinary prices, which have in fact functioned as price cartels since 1998.<sup>30</sup> To obtain a license from the Ministry of Radio, Film and Television, foreign service providers must buy products from one specific semi-affiliated company.<sup>31</sup> At local levels, the administrative departments often condition issue of approvals or licenses on acceptance of designated services. For example, the department of motor vehicles may require vehicle

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<sup>27</sup> Wang Leiming et al., *Five Comprehensive Government Restructures 1982-2003*, XINHUA NEWS (Mar. 6, 2003), available at <http://www.people.com.cn/GB/shizheng/252/10434/10435/20030306/937651.html>.

<sup>28</sup> Fourth Plenum of the 15<sup>th</sup> National Congress of the Chinese Communist Party (“CCP”) solidified the policies of SOE reform and state sector adjustment laid out by the 15<sup>th</sup> National Congress of the CCP.

<sup>29</sup> For instance, in early 1999, when its affiliated airlines started to lower airfare price, the China Civil Aviation Bureau imposed a ban on ticket discounts. *Official Notice from State Planning Commission and China Civil Aviation Bureau on Strengthening the Administration of Domestic Airfare to Ban Low-Price Competition* (Jan. 25, 1999). In 1999, a power department in Jiang Su Province required users to buy electric products they provided, based on an official circular issued by the Ministry of Electricity. SAIC GAZETTE, Oct. 26, 1999, at 275. In many areas, consumers can only use post packages offered by postal departments, and are required to accept other services by certain providers. See, e.g., SAIC GAZETTE, 1999, at 278 (reporting that in Hu Bei Province, the postal department required customers to open savings accounts with them); *id.*, at 132 (stating that in Jiang Su Province, the postal and telecommunication department required customers to use debit card service from a specific bank).

<sup>30</sup> See SETC, *Opinions on Self-Disciplinary Prices Adopted by Some Ministries*, Aug. 17, 1998.

<sup>31</sup> Interview with Han Yan, employee of the company in Beijing, China (Aug. 25, 2002).

owners to use designated garages for maintenance services in order to obtain or renew licenses.<sup>32</sup>

### 3. *Regional Monopoly*

Regional monopoly is motivated by economic (increasing local revenue) and political (promotion of local government officials depends partially on local economic performance) considerations. Local governments take various measures to prevent or discriminate against non-local products and services, which effectively set up regional blockades. Those measures include: forbidding local businesses to engage in wholesaling or retailing non-local products; employing discriminative standards in quality inspection, license issuance and technical requirements; fixing higher prices or price standards for non-local commodities; and setting up checkpoints on the local border to obstruct, intercept, or even confiscate products originating in other regions.<sup>33</sup> For example, in Jilin and Hebei, regional governments once required non-local beer manufacturers to contribute to a "beer adjustments fund" which in effect, imposed an additional fee on each bottle of beer sold in the local market.<sup>34</sup> An unidentified local government in the Northeast was reported to have issued an official circular requiring all local retailers to sell only locally-manufactured fertilizers. Any violation would result in confiscation of the "illegal goods," punitive fines and even revocation of the retail license.<sup>35</sup>

Widespread administrative monopoly at all levels of Chinese government has become a cancer in the Chinese economy. It fosters low efficiency and poor-quality service, creates income gaps,<sup>36</sup> encourages corruption, and prevents the formation of a unified national market. In April 2001, the State Council (the chief executive branch) held a working conference on regulating the market order. In the two official documents adopted in this meeting, the State Council made clear that priority should be given to combating department/industry monopoly and local blockade/protectionism.<sup>37</sup> Authorities have focused exclusively on addressing

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<sup>32</sup> See *The Forms and Features of Administrative Monopoly and Industry Monopoly*, at <http://www.sinolaw.net.cn/zhuanti/fld/fxpl/pl30.htm> (May 13, 2001).

<sup>33</sup> See *Authorities Exposed Monopolistic Practices that Harm the Interests of the Customers*, at <http://www.sinolaw.net.cn/zhuanti/fld/hgbd/bd72.htm> (Apr. 30, 2001).

<sup>34</sup> See *Difficulties in Combating Monopolies*, at <http://finance.sina.com.cn/o/59830.html> (May 11, 2001).

<sup>35</sup> See *The Forms and Features of Administrative Monopoly and Industry Monopoly*, *supra* note 32.

<sup>36</sup> See Suhainan et al., *The Adjustment of High Income in Monopoly Industries*, *ZHONG GUO JINGJI SHI BAO* (June 1, 2001), available at <http://www.people.com.cn/GB/jinji/36/20010601/479667.html>.

<sup>37</sup> See State Council Decision on Regulation of Market Economic Order, State Council Order #11, Apr. 27, 2001; State Council Provision on Prohibiting Regional Blockade in Market Economic Activities, State Council Order #303, Apr. 21, 2001.

administrative monopoly during national and local “enforcement campaigns”<sup>38</sup> designed to restore market order, acknowledge the seriousness of the problem, and echo public resentment against public anticompetitive behaviors.<sup>39</sup>

#### 4. *Private Monopoly On the Rise*

Private monopoly as a result of market competition and concentration has also started to appear in China. However, a salient feature of private monopoly is that it is active at a local rather than national level. This is due to a lack of national industry concentration, underdeveloped enterprises and fragmentation of the market.

The rapid economic development of China has seen a rise in the number of large enterprises. However, they are small in size compared with their foreign counterparts. According to the National Bureau of Statistics, there were 2,710 enterprise groupings in the year 2001.<sup>40</sup> In 2000, the total revenue of the top 500 Chinese enterprise groupings was only 89% of the total income of the world’s top three companies.<sup>41</sup> Furthermore, the largest enterprises in China are often found in state monopoly industries. Statistics from the State Economic and Trade Commission show that in 2000, the profits of the top ten enterprises constituted 74.2% of total profits earned by the country’s 520 major enterprises;<sup>42</sup> all of them were from state monopoly or state dominated industries. Enterprises in monopolized industries other than those influenced by the state have not been developed.

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<sup>38</sup> Enforcement campaigns are a common practice in China: during a certain period of time, normally up to six months, the authorities focus and intensify work on enforcement of specific laws to address serious violations.

<sup>39</sup> For example, the SAIC’s campaign was at a national level in April 2001. The same is true with local authorities, see for example <http://www.sinolaw.net.cn/zhuanti/fld/hgbd/bd22.htm>; <http://www.sinolaw.net.cn/zhuanti/fld/hgbd/bd24.htm> (the campaign in Beijing, which began on Apr. 1, 2001); <http://www.sinolaw.net.cn/zhuanti/fld/hgbd/bd08.htm> (the campaign in Shanghai, which began in Apr. 2001 and lasted half a year); <http://www.sinolaw.net.cn/zhuanti/fld/hgbd/bd54.htm> (the campaign in Sichuan, which began in Apr. 2001); <http://www.sinolaw.net.cn/zhuanti/fld/hgbd/bd50.htm> (the campaign in Kunming, which began in Mar. 2001); <http://www.people.com.cn/GB/other4788/20011018/584573.html> (the campaign in Jilin, which began in Oct. 2001).

<sup>40</sup> See Han Zhenjun, *Chinese Enterprise Groupings Increased Total Asset by 19.7% Last Year*, GUO JI JIN RONG BAO, Sept. 16, 2002.

<sup>41</sup> See Statistics, at <http://economy.enorth.com.cn/system/2001/09/22/000150552.html> (Sept. 22, 2000).

<sup>42</sup> The top ten were China National Petroleum Corp., China Mobile, China Petrochemical Corp., China Telecom, China National Offshore Oil Corp, The State Power Corp. of China, Guangdong Electricity Corp., Shanghai Automotive Industry Corp. (group), China Unicom, and Yuxi Hongta Tobacco (group) Co., Ltd. Their total profit was 156.3 billion RMB (\$18.8 billion). See Statistics, at <http://www.setc.gov.cn/gjzdyxx/zhfx/200209140072.htm> (last visited Mar. 13, 2003).

### 5. *National Private Monopoly: A Case Study*

The generally small size and low competitive capacity of Chinese enterprises has made it almost impossible to form private monopolies on a national scale. A case study of a failed color TV cartel is helpful in illustrating the situation. On June 9, 2000, nine leading Chinese color television manufacturers met in Shenzhen for a "color TV producers summit," during which they established a price cartel and fixed minimum sale prices of color TVs. Unlike previous price cartels, it was not orchestrated in any way by the government<sup>43</sup> and therefore was widely alleged by the media as a high-profile private monopoly. The State Planning Commission immediately declared the cartel in violation of Article 14 of Price Law by attempting to form a monopoly.<sup>44</sup> But the authorities did not move to ban the cartel, as it turned out to be a failure from the beginning. The biggest color TV producer, Changhong, refused to join the cartel, retailers ignored the minimum price agreement, and three cartel members did not enforce the price restrictions.<sup>45</sup> Despite two follow-up "summits," the price cartel was never effectuated; instead, a new round of price wars was triggered.<sup>46</sup>

In fact, a closer examination reveals that the reason the cartel failed was the low degree of market concentration, even though the TV industry had the highest degree of competition allowed in China.<sup>47</sup> In 1995, there were 91 Chinese color TV producers. Ten of these producers had the capacity to manufacture one million color televisions each year. By the end of 2002, the number of producers decreased to 68, but the number of larger producers (with over one million units of production capacity) remained at ten.<sup>48</sup> Concentration has been slow and the development of large producers has been impeded mainly by the following three factors. Many of the color TV producers are SOEs, who often choose, and can afford to, sustain loss to maintain some market share. In addition, the large, profitable producers are routinely asked to take over poorly-performing enterprises to avoid the con-

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<sup>43</sup> See Lin Yifu, *Price Cartel Should be Banned*, China Center for Economic Study of Beijing University, NEWS LETTER SERIES, No. 175, 43/2000 (June 22, 2000), available at <http://old.ccer.edu.cn/newsletter/2000/175.htm>.

<sup>44</sup> See Li Weiwei, *Nine Color TV Enterprises Seeking Consensus*, XINHUA NEWS (June 9, 2000), available at <http://www.people.com.cn/GB/channel3/22/20000609/97046.html>.

<sup>45</sup> See Guan Yawen, *Color TV Price Cartel Doomed*, at <http://finance.sina.com.cn/news/2000-06-16/36897.html> (June 15, 2000).

<sup>46</sup> See Yang Cui, *Analysis of the TV Industry Cartel*, SHI CHANG BAO (Aug. 12, 2000), available at <http://www.people.com.cn/GB/paper53/1209/183787.html>.

<sup>47</sup> See *Concentration in the Market of Electronics Products*, ZHONG GUO GONG SHANG SHI BAO (Sep. 13, 2002), available at <http://www.ctoc.com.cn/free/dcbg/2002/dcbg0914.htm>.

<sup>48</sup> Statistics from the Ministry of Information Industry, available at <http://economy.enorth.com.cn/system/2003/01/18/000493579.shtml> (last visited Sept. 28, 2003).

sequences of bankruptcy, such as unemployment.<sup>49</sup> This practice has added substantial costs to those producers and is undoubtedly detrimental to their growth. Local protectionism has also constrained the larger and more competitive producers from expanding their market share.<sup>50</sup> When production exceeds domestic demand,<sup>51</sup> the rigid market structure forces the TV producers to engage in constant and fierce price wars, in which certain color TVs are sold below cost.<sup>52</sup> In fact, the 2000 price cartel was an effort to stop the suicidal price war and minimize loss rather than secure high profits.

In addition, Chinese producers are only competing with each other in the conventional TV market, which has lower profit yields than the high-tech color TV market. Foreign color TV producers dominate the high-tech color TV market in China. According to a survey in September 2002, five foreign producers (Toshiba, LG, Sony, Panasonic and Samsung) jointly held 71.3% of the rear projections TV market in China, while Changhong held only 9.1%.<sup>53</sup> In 2000, Sony alone profited one billion RMB from one million color TV sales in China, while all the domestic producers combined only profited 540 million RMB.<sup>54</sup> The high cost and low return of Chinese color TV producers greatly restrict their potential competitiveness.

Qu Weizhi, Vice Minister of the Ministry of Information Industry, pointed out that the survival of the Chinese color TV industry depends on further concentration, expansion of production scale, elimination of less-competitive producers, and improvement of technology.<sup>55</sup> Until then, no Chinese color TV producer will be capable of dominating the national market and initiating any monopolistic activities. Since the attempt in 2000 to create a color TV price cartel, no comparable attempt in any industry has been made at the national level. In this respect, the color TV industry is representative of the majority of industries in China today, consisting of a large number of small firms unable to monopolize the market.

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<sup>49</sup> For an example, see the mergers between Konka and Ruyi, Haixin and Jinfeng. See Wang Xiu, *One Perspective on the TV Cartel*, ZHONG GUO JI JING SHI BAO (July 6, 2000), available at <http://finance.sina.com.cn/view/market/2000-07-06/39927.html>.

<sup>50</sup> See Qu Weizhi, *Color TV Industry Structural Adjustment Urgently Needed*, XINHUA NEWS AGENCY (Aug. 23, 2001), available at <http://finance.sina.com.cn/b/20010827/100556.html>.

<sup>51</sup> For example, according to a survey in 2001, the yearly domestic production was 30 million, while the domestic demand was 23 million. See *Winner and Losers of the TV Industry*, BEIJING CHEN BAO (Jan. 15, 2001), available at <http://www.trident.com.cn/news/section/20010115.htm>.

<sup>52</sup> For example, in 2001, the average price of color TVs dropped 18% and the loss of the whole industry amounted to 3 billion RMB. See <http://www.people.com.cn/GB/jinji/32/176/20021105/859110.html> (last visited Sept. 28, 2003).

<sup>53</sup> See ZHONG GUO DIAN ZI BAO, No. 135, Dec. 6, 2002.

<sup>54</sup> See Lu Xiaohong, *Sony Profits Doubles Whole Industry*, at <http://www.people.com.cn/GB/jinji/222/5246/5248/20010828/545648.html> (Aug. 28, 2001).

<sup>55</sup> See Weizhi, *supra* note 50.

### 6. Local Private Monopoly

At various local levels, by contrast, monopolistic activities have become more common. The original structure of the Chinese economy was based on decentralization and de-specialization.<sup>56</sup> The emphasis on self-reliance during the Mao era encouraged provinces and localities to establish all-encompassing regional economies. Since the late 1970s, reform strategies to decentralize power to local governments<sup>57</sup> further reinforced the cellular structure. Local protectionism, especially the above-mentioned regional administrative monopoly, has significantly increased barriers between local markets and has exacerbated market fragmentation. A World Bank study in 1994 revealed a low level of variation of industry structures across the regions in China.<sup>58</sup> In late 2001, the Chinese government acknowledged the persistent problem that “regional industry structures are still seriously similar.”<sup>59</sup>

One of the negative implications of the fragmented nature of the Chinese market is that even companies not large enough to influence the national market are able to effectively monopolize the relatively closed and isolated local market. In the more economically-developed areas, where companies have experienced substantial growth, local private monopolies are more likely to develop. Most of those monopolistic actions take the form of concerted action. For example, five big shopping malls in Jinan boycotted Changhong color TVs in 1997, forcing the producer to lower its price.<sup>60</sup> In June 2002, seven gas companies in Xinyang, Henan Province, jointly raised gas prices by 66%. One term of the agreement even required each to deposit 5,000 RMB as a “good faith pledge,” which would be forfeited upon violation of the price cartel.<sup>61</sup> A recent trend is cartels orchestrated by trade associations. In Shanghai, the minimum price for gold was set by the local trade association, and TV retailers uniformly raised prices

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<sup>56</sup> See, e.g., Stephen P. Andors, *China's Industrialization in Historical Perspective*, in CHINA'S ROAD TO DEVELOPMENT 27 (Neville Maxwell ed., 2d ed. 1979).

<sup>57</sup> In the Third Plenary Session of the 11<sup>th</sup> Central Committee of the Communist Party, which marks the historical turning point to reform, it was decided that “it is necessary to shift the . . . [authority] to lower levels so that the local authorities and industrial and agricultural enterprises will have great power of decision in management under the guidance of unified state planning. . . .” See *Communiqué of the Third Plenary Session of the 11<sup>th</sup> Central Committee of the Communist Party of China* (December 22, 1978), translated in Suinian & Wu Quangan, *supra* note 13.

<sup>58</sup> CHINA: INTERNAL MARKET DEVELOPMENT AND REGULATION 2 (World Bank East Asia & Pacific Regional Office ed., 1994).

<sup>59</sup> State Economic & Trade Commission: Guidelines of the Industry Structure Adjustment for the Tenth Five-Year Plan, October 2001.

<sup>60</sup> See Kong Xiangjun & Du Dengbin, *How to Effectively Protect Competition*, ZHONG GUO JI JING SHI BAO (Jan. 9, 2001), at <http://www.people.com.cn/GB/jinji/36/20010109/374202.html>.

<sup>61</sup> See Yang Jun, *Ugly “Co-Operation”*, at <http://www.people.com.cn/GB/guandian/30/20020914/822295.html> (Sept. 14, 2002).

the second day after an association meeting in early 2002.<sup>62</sup> The powerful Shenzhen Furniture Association constantly controls price, “recommends color or style,” and uses furniture exhibition as leverage to enforce its decisions.<sup>63</sup>

### 7. *The Globalization Impetus: WTO Membership Raises Concern on Foreign Competition*

China’s accession to the WTO in 2001 started a new era for its integration into the rest of the world economy. As China’s market opens up to the world, a legitimate concern is whether Chinese companies can compete with foreign firms, and whether China’s many fledgling industries can fare well or even survive.

At present, most Chinese business entities are still small and weak. Even China’s large, industrial companies are relatively small when put in the context of the global market. In 2002, China had only eleven firms listed in Fortune’s Global 500,<sup>64</sup> all of which have operated under a protected domestic environment and enjoyed preferential treatment as large SOEs; half of them prospered as monopolies or oligopolies. Five of the biggest employers in the Global 500 are Chinese companies,<sup>65</sup> which indicates serious inefficiency and downsizing problems. Furthermore, despite countless reform efforts, Chinese enterprises are still vulnerable to international competition in most sectors.<sup>66</sup> Currently no Chinese firm is qualified as a global giant corporation, and the daunting difficulties in SOE reform and economic transition may continue to dim that prospect.<sup>67</sup>

Due to China’s WTO commitments, however, the large Chinese firms will soon find themselves competing with multinational firms on a global level. China has promised to fully open up an array of protected sectors after relatively short grace periods.<sup>68</sup> At the same time, because of global

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<sup>62</sup> Interview with Xiang Ti, Official at the Legal Affairs Office of the Shanghai Municipal Government, in New Haven, Conn. (June 25, 2002) (Xiang Ti is in charge of drafting a bill of local association legislation).

<sup>63</sup> Interview with Du Xingqiang, Official at the State Council’s Office of Legislative Affairs, in charge of market regulation, in New Haven, Conn. (June 5, 2002).

<sup>64</sup> Those firms are: State Power (Number 60), China National Petroleum (81), SINOPEC (86), China Telecom (214), Industrial and Commercial Bank of China (243), Bank of China (277), China Mobile (287), Sinochem (311), China Construction Bank (389), Chinese Petroleum (467), and the Agricultural Bank of China (471). *Global 500*, FORTUNE, July 22, 2002, at F-1.

<sup>65</sup> *Id.*

<sup>66</sup> See, e.g., Peter Nolan & Jin Zhang, *The Challenge of Globalization for Large Chinese Firms*, available at [http://www.unctad.org/en/docs/dp\\_162.en.pdf](http://www.unctad.org/en/docs/dp_162.en.pdf) (July 2002).

<sup>67</sup> *Id.*

<sup>68</sup> For example, in the telecommunication industry, long-considered one of China’s key national industries, foreign investment will be allowed. After various phasing periods (2-6 years), geographical restrictions will be removed and foreign ownership will be allowed for

economic slowdown and China's steady growth, foreign companies have also intensified their efforts to penetrate the Chinese market. More than 400 of the Fortune Global 500 companies have made investments in China,<sup>69</sup> and approximately 110 of them established study and design centers in China.<sup>70</sup> Two-thirds of the world's largest fifty retailers have established business in China since China joined the WTO.<sup>71</sup> These are just a few examples of China's changing role in the multinational firms' global strategy: transition from merely a large potential market to the world's manufacturing factory. A few trends in Foreign Direct Investment ("FDI") have confirmed this transition in recent years, including diversification of investment structure, localization of management and use of more advanced technology.<sup>72</sup> One notable change is the increase of wholly foreign-owned enterprises and decrease of joint ventures.<sup>73</sup> Foreign investors are also showing a growing interest in mergers and acquisitions as a channel for ex-

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up to 49% for mobile telephone, and domestic and international service, and up to 50% for value-added services. In the banking sector, where China's commercial banks lag far behind other banks, foreign banks will be allowed by 2007, among other things, to offer Chinese currency (RMB) services to both foreigners and Chinese nationals without geographical restrictions. In the automobile industry, which has been protected by high tariffs (55%) and an import quota, China will reduce the automobile import tariff to 25% by 2006, cut the average import tax on car spare parts to 10%, and phase out the import quota. Relaxation in other sectors, such as distribution, energy, securities, insurance and agriculture, will similarly subject Chinese firms to intense competition. In addition, in those industries which were originally less protected, foreign investors and firms will benefit from China's compliance with WTO rules that improve transparency, promote rule of law, enforce national treatment and eliminate trade barriers. See Protocol on the Accession of People's Republic of China, Annex 9: Schedule of Specific Commitments on Services, available at <http://www.chinawto.gov.cn/article/articleview/555/1/280/> (last visited May 12, 2003).

<sup>69</sup> See Li Yushi, *Review of Last Year and Prospect of China's Foreign Trade*, at [http://www.moftec.gov.cn/article/200302/20030200070999\\_1.xml](http://www.moftec.gov.cn/article/200302/20030200070999_1.xml) (Feb. 25, 2003).

<sup>70</sup> See San Feng, *China's Development: Win-win Instead of Threat*, JINGJI CAN KAO BAO (Feb. 12, 2003), at <http://www.people.com.cn/GB/jinji/36/20030212/921890.html>.

<sup>71</sup> See Qiu Ju, *One Year After Accession to WTO* (2002), available at <http://www.saic.gov.cn/redshield/xw/2002/zx62.htm> (working report by SAIC). Major multinational giants, such as IBM, Intel, and Sony, have moved their production lines from other parts of the world to China in the last couple of years. Toshiba has made China its color TV technology and marketing headquarters, and LG is turning Beijing into its global technology center. Wal-Mart, GE, and Unilever have also established procurement centers in China. See Yushi, *supra* note 69.

<sup>72</sup> See *New Trends in Foreign Investment in China by Multinational Companies* (working paper of MOFTEC), at [http://www.moftec.gov.cn/article/200302/20030200071266\\_1.xml](http://www.moftec.gov.cn/article/200302/20030200071266_1.xml) (last visited Feb. 26, 2003).

<sup>73</sup> According to Ministry of Foreign Trade and Economic Cooperation ("MOFTEC") statistics, joint-equity ventures decreased 4.74% in 2002 from the previous year and cooperative joint ventures dropped 18.59%, while wholly foreign-owned enterprises increased by 32.87%. There were 22,173 newly-established, wholly foreign-owned enterprises in 2002, comprising 65% of the 34,171 newly-established FDI enterprises that year. See [http://www.moftec.gov.cn/table/wztj/2002\\_12.html](http://www.moftec.gov.cn/table/wztj/2002_12.html) (2002).



pansion rather than joint ventures since 2002.<sup>74</sup> This is clearly an indication of foreign firms' elevated confidence in their long-term presence in China and in China's competitive capacity.

Chinese leaders are fully aware of the double-edged nature of the foreseeable intensification of competition in China's home market. While policy makers have counted on competition to improve the performance of domestic firms and boost economic growth, they are concerned that foreign firms may "muscle in" too swiftly and become monopoly powers before the Chinese enterprises are well-established. Foreign conglomerates with technical expertise, efficient management and ample capital possess a formidable power sufficient to crush many of China's fledgling industries. Early signs have given some foundation to this fear. Foreign companies already dominate the markets of computers, cables, sedan cars, rubber, switchboards, beer, paper, elevators, pharmaceuticals, and detergent, among other products.<sup>75</sup> In the electronics market, foreign manufacturers tend to form and comply with price cartels on the high-tech products they control to guarantee high-margin profits.<sup>76</sup> Mergers and acquisitions with the purpose of obtaining a larger market share have also been noted.<sup>77</sup>

In anticipation of WTO obligations to reduce trade barriers, China put into place a viable legal mechanism to address competition ramifications. In October 2001, on the eve of the WTO accession, the Chinese government pledged to enact or revise "a series of laws in compliance with WTO rules to preserve fair competition and protect domestic industries," including specifically an anti-monopoly law.<sup>78</sup> The Anti-Dumping, Anti-Subsidy and Safeguard Regulations were enacted shortly afterwards,<sup>79</sup> which China has prepared itself to use fully whenever possible.<sup>80</sup> The envisioned anti-monopoly law, with fundamental and far-reaching implications for competition and market order, has thus become a top priority on the legislative agenda. However, it remains to be seen whether China will resort to competition law to materialize its intentions to protect domestic firms from international competition. An unintended consequence of the enforcement of

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<sup>74</sup> *Id.*

<sup>75</sup> See LU JIONGXING, STUDIES OF CHINA'S FOREIGN INVESTMENT LAW 167 (2001).

<sup>76</sup> See Yi Huize, *Foreign Products Involved in Price War*, XIN MIN WAN BAO (Sept. 16, 2001), at <http://news.fm365.com/caijing/caijinga/20010916/390658.shtml>.

<sup>77</sup> For example, Kodak's merger with two Chinese firms in 1998 led to its 70% market share in film products in 2001. See *Perspectives of Mergers of Chinese Firms by Foreign Investors* (working paper by MOFTEC), at [http://www.moftec.gov.cn/article/200302/20030200071550\\_1.xml](http://www.moftec.gov.cn/article/200302/20030200071550_1.xml) (Feb. 27, 2003).

<sup>78</sup> State Economic & Trade Commission: Guidelines of the Industry Structure Adjustment for the Tenth Five-Year Plan, October 2001.

<sup>79</sup> The three regulations were adopted on Oct. 31, 2001 and became effective on Jan. 1, 2002.

<sup>80</sup> See Youngjin Jung, *China's Aggressive Legalism—China's First Safeguard Measure*, 36 J.W.T. 1037 (2002).

an antimonopoly law, especially the fight against administrative monopoly, may well create a better environment for the multinational firms to compete more effectively in China's market.<sup>81</sup>

### III. A THIRD-WAY: SOCIALIST MARKET ECONOMY

Around the world today, 100 countries have established competition laws or antitrust laws,<sup>82</sup> as well as enforcement institutions, to promote economic efficiency by protecting competition in the market.<sup>83</sup> Although every country has its own version of competition law, competition regimes can be divided into two prototypes: the U.S. Model and the E.U. Model. There are several distinctive characteristics for each model.

First, the U.S. Model is court-oriented, whereas the E.U. Model is more administrative agency-oriented. In the United States, a variety of actors actively participate in court proceedings to enforce antitrust laws. For instance, private parties motivated by such incentives as a treble damages system aggressively pursue their interests in court proceedings. The Antitrust Division of the U.S. Department of Justice ("DOJ"), a major criminal antitrust enforcement agency, along with the Federal Trade Commission ("FTC"), which enforces civil antitrust laws, discharges its statutory responsibilities by pursuing criminal cases through court proceedings. Second, profoundly influenced by scholars of the so-called Chicago School,<sup>84</sup> the U.S. model is more prone to promote exclusive economic efficiency as the objective of competition law,<sup>85</sup> while the E.U. model pursues more di-

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<sup>81</sup> A greater enforcement of competition law may result in an increase in market access. For the implications of competition law on market access, see Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L. L. 1 (1997).

<sup>82</sup> See OECD Secretariat, *Optimal Design of a Competition Policy* (submitted to the Global Forum on Competition held on February 10-11, 2003), at <http://www.oecd.org/pdf/M00038000/M00038298.pdf> (last visited on Feb. 11, 2003).

<sup>83</sup> *Id.*

<sup>84</sup> See, e.g., RICHARD A. POSNER, *ANTITRUST LAW* (2d ed. 2001); RORBER H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (2d ed. 1993); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984).

<sup>85</sup> PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* 1 (2d ed. 2000).

Today it seems clear that the general goal of the antitrust law is to promote 'competition' as the economist understands that term. Thus we say that the principal objective of antitrust policy is to maximize consumer welfare by encouraging firms to behave competitively, while yet permitting them to take advantage of every available economy that comes from internal or jointly created production efficiencies, or from innovation producing new processes or new or improved products.

However, there are many who criticize this view. See Eleanor M. Fox, *What is Harm to Competition? Exclusionary Practices and Anti-competitive Effect*, 70 ANTITRUST L.J. 371, 374-80 (2002); F.M. Scherer, *Some Principles of Post-Chicago Antitrust Analysis*, 52 CASE W. RES. L. REV. 5 (2001); Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust—Retrospective and Prospective: Where are We Coming from? Where are We Going?*, 62 N.Y.U. L. REV.

verse or inclusive objectives such as market integration, small and medium-sized firms, and fair competition.<sup>86</sup> Third, the founders of each system had different views of the term “bigness” in the context of competition law. As far as statutory languages go, U.S. antitrust law would suppose that the state of monopoly itself could be condemned, where European Community (“EC”) competition law posits that one should be subject to discipline only when one abuses a dominant position. The drafters of EC competition law imported this concept from German Competition Law. The term “bigness” was not an imminent problem to the EC drafters. Rather, they were of the view that corporations in the Community were too small and fragmented, especially compared to U.S. companies, to face international competition.<sup>87</sup>

With its long history and rich precedents, the U.S. Model has been used as a yardstick by many other nations. In China, U.S. antitrust law has been extensively discussed.<sup>88</sup> Nevertheless, the E.U. Model appears to be gaining momentum throughout the world. Recent years have witnessed the E.U. Model’s frequent adoption by most transitional economies for the reasons set out below.<sup>89</sup> China also follows the E.U. Model in its basic structure and legal setting.

First, the civil law traditions of countries emulating the E.U. Model greatly affect the decision of which model to follow. Because China is not equipped with a well-developed judicial review system, the Chinese government would have found it very difficult to adopt the U.S. antitrust system. The legal tradition of a country oftentimes overcomes semantic differences between the U.S. and E.U. Model. For instance, the legislative history shows that Japan has adopted the U.S. Model because the U.S.

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936 (1987); William S. Comanor, *Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy*, 98 HARV. L. REV. 983 (1985); Thomas J. DiLorenzo, *The Origins of Antitrust: An Interest-Group Perspective*, 5 INT’L. REV. L. & ECON. 73, 74-76 (1985); Gordon B. Spivak, *The Chicago School Approach to Single Firm Exercises of Monopoly Power: A Response*, 52 ANTITRUST L.J. 651 (1983); Louis B. Schwartz, *Justice and Other Non-Economic Goals of Antitrust*, 127 U. PA. L. REV. 1051 (1976); Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (1981) (harmonizing nonefficiency goals with efficiency goals); Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979); Paul L. Joskow & Alvin K. Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213, 220 (1979); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982); Rudolph J. Peritz, *A Counter-History of Antitrust Law*, 1990 DUKE L.J. 163 (1990).

<sup>86</sup> VALENTINE KORAH, AN INTRODUCTORY GUIDE TO EC COMPETITION LAW AND PRACTICE 10-11 (6th ed. 1997).

<sup>87</sup> See Eleanor M. Fox, *U.S. and E.U. Competition Law: A Comparison*, in GLOBAL COMPETITION POLICY 339, 343-44 (Edward M. Gram & J. David Richardson eds., 1997).

<sup>88</sup> See, e.g., Xue Zhaofeng, *Lessons from the Microsoft Case*, 21ST CENTURY ECONOMIC REPORT (Mar. 12, 2001), at <http://www.stevenxue.com>.

<sup>89</sup> See Eleanor M. Fox, *The Central European Nations and the EU Waiting Room—Why Must the Central European Nations Adopt the Competition Law of the European Union?*, 23 BROOK. J. INT’L. L. 351 (1997).

planted its own version of antitrust law into the Japanese legal system,<sup>90</sup> but even some of the elements similar to U.S. antitrust law are practiced in line with the continental civil law tradition. As China is commonly classified as having a civil law tradition, it is quite natural that it has shown a penchant for the E.U. Model.

Second, since China's Constitution proclaims that it pursues a socialist market economy, China cannot adopt the objective of U.S. antitrust law, which many courts and scholars believe has "economic efficiency" as its exclusive goal. Article 1 of the Draft states "[t]his law is enacted for the purposes of prohibiting monopoly, safeguarding fair competition, protecting the legal rights of business operators and consumers, and the public interest, and to ensure the healthy development of the socialist market economy." Apart from the language "prohibiting monopoly," all the other elements Article 1 enumerated as goals of the Draft clearly deviate from "economic efficiency," the goal of U.S. antitrust law.

Third, China is not confronted with the "bigness" problem. Rather, the Chinese government believes that Chinese companies are too small and too vulnerable to foreign competition. Thus, it is quite understandable that the Chinese government followed the E.U. Model and adopted the scheme of "abuse of dominant position."

Chinese competition law also greatly resembles German competition law. This is because German competition law has a large number of sophisticated provisions which are thought to have had a significant impact on the drafting of E.U. competition law.<sup>91</sup> One commentator advocates the values and ideas (so-called "ordoliberalism") that underlie German competition law to those of post-socialist countries.<sup>92</sup> Many provisions of German competition law lend themselves to situations in the Chinese socio-political economy because German competition law pursues neither a pure capitalist market economy nor pure socialism.<sup>93</sup>

Despite these similarities, China follows neither the E.U. nor German prototypes exactly. China distinguishes itself from both, for example, by addressing administrative monopoly, its paramount concern. In this respect, the Chinese draft legislation has much in common with other East Asian neighboring countries such as Korea and Japan. They contain in their

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<sup>90</sup> JOHN O. HALEY, *ANTITRUST IN GERMANY AND JAPAN* 52-63 (2001).

<sup>91</sup> See David J. Gerber, *Law & Competition In Twentieth Century Europe: Protecting Prometheus*, 6 COLUM. J. EUR. L. 259, 263 (2000) (book review commenting on Germany's completion of almost a decade of debates over competition, and its passing of Europe's first modern competition statute).

<sup>92</sup> See David J. Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe*, 42 AM. J. COMP. L. 25, 28-52 (1994) (Ordoliberalism had a profound impact in laying out the foundation for German competition law. Unlike pure liberalism advocated by such intellectuals as Friedrich von Hayek, it recognizes the need for the state to play a major role in maintaining the conditions of competition.).

<sup>93</sup> *Id.* at 79-80.

competition laws a very unique set of provisions that deals with the issue of general concentration.<sup>94</sup> For instance, Korean and Japanese competition laws contain provisions restricting cross-share holding and holding companies.<sup>95</sup> Competition law is not merely legislation related to economics, but is at the heart of the broader socio-economic system in each country; thus, the laws are carefully crafted to address the most important economic problems in each country. China, for example, has problems with administrative monopoly, while Korea and Japan have problems with industrial business conglomerates, Chaebol,<sup>96</sup> and prewar Zhaibatsu/postwar Keitetsu,<sup>97</sup> respectively.

The specific focus on administrative monopoly in the Draft demonstrates that China is striving to lead its economic system from a centrally-planned to a market-oriented system. The successful transition from a centralized economic system to a market economy requires a massive amount of privatization and exposes state-owned companies to competitive market forces. A tough stance toward administrative monopoly is the first positive step toward a more competitive market environment in China because, as a former communist country, the regulatory legal monopoly is widely prevalent. The Organization for Economic Cooperation and Development ("OECD") advocates the idea of combating administrative monopoly with regulatory reform.<sup>98</sup> In fact, a sufficient regulatory reform should precede competition enforcement, since the latter is supposed to be applied to private anticompetitive behaviors. This is a daunting task. However, China's initiatives to crack down on administrative monopoly are more focused on integrating fragmented national markets. In the U.S., the dormant commerce clause under the U.S. Constitution was employed to integrate the national market. In the E.U., other potent legal instruments, such as trade policies, prohibition of quantitative restrictions, and non-discrimination

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<sup>94</sup> Korea's Monopoly Regulation and Fair Trade Act, Chapter 3: Restrictions on Business Combinations and Economic Concentration; Japan's Act Concerning the Prohibition of Private Monopoly and Maintenance of Fair Trade, Chapter IV: Stockholdings, Interlocking Directorates, Merger and Acquisitions.

<sup>95</sup> Monopoly Regulation and Fair Trade Act Ch. 3 (S. Korea), *translated in* 8 STATUTES OF THE REPUBLIC OF KOREA (Korean Legislation Research Institute, 2001); Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade, Ch. 4 (Japan), *translated in* Carl J. Green and Douglas E. Rosenthal, COMPETITION REGULATION IN THE PACIFIC RIM 239-244 (1996).

<sup>96</sup> See generally EDWARD M. GRAHAM, REFORMING KOREA'S INDUSTRIAL CONGLOMERATES (2003).

<sup>97</sup> For a general explanation of Keiretsu, see Akira Goto & Kotaro Suzumura, *Keiretsu: Interfirm Relations in Japan*, in COMPETITION POLICY IN THE GLOBAL ECONOMY: MODALITIES FOR COOPERATION 361-78 (Leonard Waverman et al. eds., 1997).

<sup>98</sup> See OECD, Introduction on Regulatory Reform, at <http://www.oecd.org/EN/about/0,EN-about-2-nodirectorate-no-no-no-2,00.html> (last visited June 8, 2003).

principles, have been used extensively to accelerate the integration of the E.U. market into the E.U. competition law regime.

With a single competition law, the Chinese government is attempting to achieve two objectives: integration of a national market and realization of a competitive market. The Draft is a good manifestation of all-out efforts by the Chinese government to clamp down on anticompetitive behaviors in the market, which requires cooperation from all levels of its society. Article 7 of the Draft codifies the government's expectation of such cooperation: "[t]he State encourages, supports and protects social supervision of monopoly by all organizations and individuals."

This is a very ambitious project and quite an innovation for competition law. Competition law is traditionally perceived as dealing with only private anticompetitive behaviors. China is taking the additional legislative actions required to address government-based monopolies. In this sense, China's competition regime will consist of an economic constitution, which overrides other laws and regulations that hinder the creation of an effective competitive market. It is unclear how such a novel notion will play out, particularly given the fact that all statutes have equal weight and status. Clearly, Chinese competition laws are pursuing a non-traditional third way in the name of realizing a socialist market economy.

#### IV. CHINESE ANTI-MONOPOLY REGULATIONS

##### A. Formative Years of China's Competition Regulations

As early as 1980, the State Council promulgated the Transient Provisions on the Development and Protection of Socialist Competition,<sup>99</sup> China's first legal document on competition. With the benefit of hindsight, one can easily identify the contradictions in this competition policy, due to the constraints of its underlying ideology. This regulation tried to introduce a maximum degree of competition into the planning system. For example, although it acknowledged that necessary adjustments should be made to the pricing system in order to effectuate competition, it also stipulated that the enterprises needed to apply for government approval to raise prices. Furthermore, the regulation stated that prices of designated key products must remain "stable."<sup>100</sup> While it encouraged technology development and commercial transfer, the regulation also urged enterprises to engage in technology exchange in the spirit of socialist co-operation.<sup>101</sup>

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<sup>99</sup> Promulgated on October 17, 1980. See Transient Provisions on the Development and Protection of Socialist Competition, OFFICIAL GAZETTE OF THE STATE COUNCIL, No. 487, available at <http://foreignlawguide.com/FLG/frameset.htm>.

<sup>100</sup> *Id.* at art. 5.

<sup>101</sup> *Id.* at art. 7.

The most significant provision in this legislation, and the earliest attempt to address administrative monopoly was Article 6, which prohibited “regional blockade” and “department fragmentation.”<sup>102</sup> But overall, the regulation was toothless without any implementing mechanism. Instead of enforcement institutions, legal remedies or sanctions, the legislation required involved regions and departments to implement detailed measures.

In 1993, the Law of the People’s Republic of China for Countering Unfair Competition (“LCUC”) was enacted. Rather than incorporating a separate anti-monopoly law, several anti-monopoly provisions were inserted into the LCUC. Article 6 of the LCUC prohibited public utility operators or other monopolies from imposing transactions in order to eliminate competitors.<sup>103</sup> Article 11 forbade setting predatory prices;<sup>104</sup> Article 15 prohibited collusion in bidding;<sup>105</sup> Article 7 explicitly opposed administrative monopoly in the form of forced transactions and local protectionism.<sup>106</sup> In relevant provisions, the LCUC stipulated legal liabilities and sanctions of those monopolistic activities (except the predatory price in article 11).<sup>107</sup> Although the term ‘anti-monopoly’ is avoided, the LCUC addresses certain forms of restrictive agreement, abuse of dominant market position, and administrative monopoly.

The LCUC authorized the SAIC and its local branches (“AICs”) to act as enforcement institutions. This was particularly important for enforcing its anti-monopoly provisions, because SAIC has the ability to pass regulations to implement the general terms used in the LCUC, substantiating those provisions and maximizing their applicability in practice. Over the years, SAIC enacted and issued numerous regulations and circulars, including: Provisions on Prohibiting Restrictive Activities on Competition by Public Utility Enterprises,<sup>108</sup> Reply on the Definition of Illegal Acts and Calculation of Illegal Earnings under Article 23 of LCUC,<sup>109</sup> Reply on the Nature of Restrictive Measures by the Travel Administration, and Unreasonable Charges by the Travel Agencies.<sup>110</sup> This body of legislation constitutes the real operating rules in combating the specified monopolistic activities under the LCUC. Thus, under LCUC and its ramifications, the

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<sup>102</sup> *Id.* at art. 6. Article 6 states that “[n]o region or department is allowed to blockade the market, or prohibit the sale of commodities from other regions in the local market or within the department.”

<sup>103</sup> Law of the People’s Republic of China Against Unfair Competition, Art. 6 (1993) (P.R.C.), translated in 4 CHINA LAWS FOR FOREIGN BUSINESS: BUSINESS REGULATION (1999).

<sup>104</sup> *Id.* at art. 11.

<sup>105</sup> *Id.* at art. 15.

<sup>106</sup> *Id.* at art. 7.

<sup>107</sup> *Id.* at arts. 23, 27, 30.

<sup>108</sup> SAIC Order # 20, Dec. 24, 1993.

<sup>109</sup> SAIC (1999) 310, Nov. 29, 1999.

<sup>110</sup> SAIC (2000) 245, Oct.17, 2000.

Chinese government set up a narrow and limited de facto competition mechanism.

Although some jurisdictions, such as Taiwan,<sup>111</sup> combine restrictions against monopoly and unfair competition together under one law, China's current competition structure does not, and thus fails as a complete and effective competition regime. Furthermore, as will be detailed later, institutional and legal limitations have developed since its establishment, which has reduced its strength to the point of paralysis. With rapidly mounting pressure for an anti-monopoly law, China's competition structure has become patently inadequate and desperately in need of an overhaul for the following reasons.

The leeway left by the LCUC as a compromise to accommodate conflicting interests that has obviously backfired. According to Article 3, SAIC and AICs of the governments above county level are the enforcement institutions, but "where laws or administrative rules and regulations provide that other departments shall exercise supervision and inspection, those provisions shall apply." This in effect allows any other department in the government unchecked exemption to the application of the LCUC, and gives them a share of the anti-competition enforcing power. Indeed, quite a few departments notoriously engage in administrative monopoly, taking advantage of this inviting opportunity. For example, the China Civil Aviation Bureau, Ministry of Information Industry, People's Bank, and Ministry of Justice have adopted regulations and taken over power to regulate monopolistic activities in their sphere of influence.<sup>112</sup> Those regulations severely spoil the effect of anti-monopoly provisions under the LCUC.

As the LCUC is limited in scope and its implementing regulations have little authority, anti-monopoly provisions have appeared in legislation beyond the reach of the LCUC. An example is the Price Law passed in 1997.<sup>113</sup> Article 14 of the Price Law forbids "unfair pricing activities," such as collusion to manipulate market price, to impair the interests of other business operators or consumers, to sell products below costs in order to eliminate competitors or monopolize the market, or to offer the same products or services at discriminative prices.<sup>114</sup> The Price Law grants enforcement power to "price administrations above county level." As China has enacted more laws to modernize its legal system, the number of such com-

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<sup>111</sup> Lawrence L.C. Lee, *Taiwan's Antitrust Statutes: Proposals for a Regulatory Regime and Comparison of U.S. and Taiwanese Antitrust Law*, 6 IND. INT'L & COMP. L. REV. 583 (1996).

<sup>112</sup> See generally Regulations Against Unfair Competition in the Civil Air Transportation Market, Feb. 27, 1996 (P.R.C.), available at <http://qis.net/chinalaw/prclaw94.htm> (last modified May 1, 1998); Telecommunication Regulations of the People's Republic of China, Sept. 25, 2000 (P.R.C.) translated in 4 CHINA LAWS FOR FOREIGN BUSINESS: BUSINESS REGULATION, *supra* note 103.

<sup>113</sup> Enacted in 8th NPC Standing Committee 29th Session, Dec. 29, 1997.

<sup>114</sup> Price Law arts. 14.1, 14.2 and 14.5.



petition provisions has increased.<sup>115</sup> To complicate the legislative chaos, different authorities have issued directives, interpretations and circulars at all levels, with diverging effects. Without a single “umbrella scheme,” the widely-dispersed competition provisions have given rise to inconsistencies, contradictions and enforcement difficulties.

The SAIC and local AICs, as primary enforcement agencies, have proven to be weak. The AICs at all levels are part of the executive branch and lack the independence and authority necessary to be effective. Not only are they often challenged by contradictory regulations adopted by other departments, but others often interfere with their investigations and obstruct their enforcement.<sup>116</sup>

The State Council, in an attempt to empower the AICs to better combat monopoly, upgraded the SAIC to a Ministerial level in April 2001.<sup>117</sup> This has had little effect, revealed in a recent case in Fangchenggang of Guangxi province. In early 2003, three local government departments jointly issued a circular, requiring gas users to buy designated burners before the end of June. Alarmed by a high number of public complaints, the mayor intervened and the circular was repealed. Meanwhile, the local AIC played no role other than an advocate of relevant LCUC provisions to the mayor and involved departments.<sup>118</sup> Consultations and coordination are still the working rule of the Chinese government, and AICs inherently lack the leverage to prevail in carrying out many of their anti-monopoly missions.

Under the current system, legal sanctions are rarely effective. For example, although setting predatory prices is prohibited by Article 11 of the LCUC, no corresponding sanction is provided, which deprives it of its enforceability. Under Article 23, AICs can impose fines of RMB 50,000-200,000 (roughly between \$6,040 and \$24,155) on a public utility enterprise or other monopoly for restricting consumers to purchasing certain designated commodities. Such a range is normally only a fraction of the

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<sup>115</sup> See Law on Bidding and Inviting Biddings Arts. 6 and 32, Aug. 30, 1999 (P.R.C) (“[B]idders shall not collude each other in a tender’ and no bidding or bidding-inviting shall be subject to local or department intervention.”); see also Regulations on Administration of Import and Export of Technologies Art. 29, Oct. 31, 2001 (P.R.C.) (prohibiting certain restrictive clauses in technology import contracts, including clauses imposing conditions to purchase “unnecessary technologies, raw materials, products, equipment or services,” clauses requiring the assignee or licensee to obtain similar to or competitive technologies from other sources, and clauses “unreasonably restricting the channels or sources for the assignee or licensee to purchase raw materials, spare parts, products or equipment”).

<sup>116</sup> See, e.g., Zhou Yan, *Further Perfecting the Legal System of Competition in China by Antimonopoly Legislation*, at <http://www.jftc.go.jp/e-page/about/apec/advocacy/China.pdf>.

<sup>117</sup> See *SAIC Upgraded to Combat Industry Monopoly* (April 11, 2001), at <http://www.sinolaw.net.cn/zhuanti/fld/hgbd/bd19.htm>.

<sup>118</sup> See Liao Kaijun et al., *Monopoly by Power: Three Departments Assigned Products*, GUANG ZHENGFA BAO (March 4, 2003), available at <http://www.gxnews.com.cn/news/20030304/gxxw/091636.htm>.

profits made by those enterprises and thus can hardly deter them from violating the statute. When an administrative monopoly violates Article 7 of the LCUC, its Article 30 only requires administrative agencies at a higher level to “make corrections.” Even if “the circumstances are serious,” the higher agency may only impose internal administrative sanctions on the officials directly responsible. Neither the AICs nor the victims injured by monopolistic activities can challenge those decisions.

### B. The Draft of China’s Anti-Monopoly Act

The Draft is composed of eight chapters and 58 articles. It is notable that the Draft contains a series of provisions to address “abuse of administrative powers,”<sup>119</sup> in addition to abuse by private enterprises of dominant position monopolies. The Draft also contains a very strong enforcement mechanism, working in conjunction with the LCUC, explained *supra*, as part of a total competition regime. The Draft does not have provisions for “unfair trade practices” in a strict sense, such as those provided in Korea and Japan’s competition laws, which were supposedly influenced by Article 5 of the U.S. Federal Trade Commission Act.<sup>120</sup> Both countries also adopted discrete laws for “unfair trade practices” outside their narrowly-defined competition laws, modeled after the German Unfair Trade Law.<sup>121</sup>

The concept of “unfair trade practices” is nebulous. At the minimum, the regulation of “unfair trade practices” is to protect “fairness in competition process” or “fair competition” so as to include even competitors as its object. As such, in transactions between interested parties, unfair trade laws regulate practices that have less direct effects on the market itself than on the process. Because the competition law system regulates abuse of the dominant position, inclusion of unfair practices law in competition law may create overlapping regulations against unfair trade practices. In this respect, it is understandable that in following the principles of the German competition regime, China addresses unfair trade practices separately in the LCUC, not in the Draft.<sup>122</sup>

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<sup>119</sup> See Chapter Five of the Draft, “Prohibition of Administrative Monopoly.”

<sup>120</sup> *Id.* at art. 5(a)(1) (“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.”).

<sup>121</sup> Gesetz gegen den unlauteren Wettbewerbs (“UWG”), translated in BUSINESS TRANSACTIONS IN GERMANY (Dennis Cambell, Christian Campell, & Bernard Ruster, eds., 1983).

<sup>122</sup> Some scholars argue that the structure of Korea’s competition law should be reconsidered because it has provisions on abuse of dominant position as well as lengthy “unfair trade practices.” OHSEUNG KWON, WIRTSCHAFTSRECHT 311 (4th ed. 2002).

### 1. Territorial Scope

Following the model of the German Competition Law,<sup>123</sup> the Draft explicitly recognizes the possibility that China's law can be applied outside the territory of China.<sup>124</sup> The drafters may have believed that since the extraterritorial application of competition law is common in major countries such as the United States and the European Union, it would be appropriate to codify the basic principle of extraterritoriality of competition law.

Indeed, the *International Antitrust Guidelines*, which were promulgated in 1995 by the U.S. antitrust authorities, the DOJ and FTC, refer to an "effect" doctrine, stating that "anticompetitive conduct that affects U.S. domestic or foreign commerce may violate the U.S. antitrust laws regardless of where such conduct occurs or the nationality of the parties involved."<sup>125</sup> The Guidelines refer to the U.S. Supreme Court's 1993 decision in *Hartford Fire Insurance Co. v. California*<sup>126</sup> and state that "imports into the United States by definition affect the U.S. domestic market directly, and will, therefore, almost invariably satisfy the intent requirement of the *Hartford Fire* test. Whether they in fact produce the requisite substantial effects will depend on the facts of each case."<sup>127</sup> For instance, when a cartel formed by foreign producers with no U.S. subsidiaries or production has raised the prices of products, the substantial sales of which, both in absolute terms and relative to total U.S. consumption, have been imported into the United States, U.S. enforcement agencies would find Sherman Act jurisdiction in line with the *International Antitrust Guidelines* because of an intended and foreseeable effect on U.S. commerce.<sup>128</sup>

The European Union employs the "implementation" test adopted by the European Court of Justice.<sup>129</sup> This test produces a similar outcome to

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<sup>123</sup> Law Against Restraints of Competition Art. 130(2) (Sept. 24, 1980) (F.R.G) *translated in* LAW AGAINST RESTRAINTS OF COMPETITION WITH 1980 AMENDMENTS (Alexander Riesenkauff & Joachim Gres trans., 1980) [hereinafter "GWB"] (stating that "[t]his Act shall apply to all restraints of competition having an effect within the area of application of this Act, also if they were caused outside the area of application of this Act").

<sup>124</sup> Article 2 of the Draft states that "[t]his Law shall apply to behavior outside the territory of the People's Republic of China that violates provisions of this Law and limits or affects domestic market competition within the territory of the PRC."

<sup>125</sup> U.S. DEP'T OF JUSTICE AND THE FTC, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS (April 1995) § 3.11.

<sup>126</sup> *Hartford Fire Insurance Co.*, 509 U.S. 764 (1993).

<sup>127</sup> INTERNATIONAL ANTITRUST GUIDELINES, § 3.11 (Oct. 1994); *see also* Caribbean Broad. Sys. v. Cable & Wireless PLC, 148 F.3d 1080 (D.C. Cir. 1998) (holding that the Foreign Trade Antitrust Improvements Act of 1982 conferred jurisdiction over a foreign radio station's complaint alleging anticompetitive conduct by another foreign radio station based on injuries to U.S. advertisers).

<sup>128</sup> INTERNATIONAL ANTITRUST GUIDELINES, *supra* note 127, at Illustrative Example A.

<sup>129</sup> Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, *Re Wood Pulp Cartel: A. Ahlstrom Osakeyhtio v. Commission*, 1988 E.C.R. 5193, 4 C.M.L.R. 901 (1988).

the “effects” test employed in the United States.<sup>130</sup> Articles 81(1) and 82 of the Treaty of Rome prohibit certain conduct that may affect trade between Member States and has an anticompetitive effect “within the Common Market”: the former requirement is fulfilled whether the effect is direct or indirect, actual or potential.<sup>131</sup> However, the tests in both systems are different. According to the E.U., in the “appreciable” effect test, the effects must be more than “de minimis” or “perceptible.” However, in the United States, such effects must be “substantial,”<sup>132</sup> more stringent than the E.U. “appreciable” standard.

The foregoing discussions are only the very first threshold question to be answered in the exercise of extraterritorial jurisdiction, a concept generally known as subject matter jurisdiction.<sup>133</sup> Even if such a test is passed and subject matter jurisdiction is found, a country intent on extraterritorial application of competition law should pass another hurdle such as personal jurisdiction,<sup>134</sup> judicial service, and so on.<sup>135</sup> Most importantly, such a country must find the foreign conduct at issue has violated any of the substantive provisions of its competition law. Essentially, when a country applies competition law extraterritorially, it imposes its own substantive competition model on foreign countries with a different economic system. As such, it is much more likely that a country that has a more mature competition market would be willing to exercise its competition law over conduct taking place in foreign countries with less-developed competition markets. It remains to be seen whether China will aggressively exercise its competition law over foreign anticompetitive behaviors, but one cannot rule

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<sup>130</sup> Compare Charles F. Rule, Assistant Attorney General, Antitrust Division, The Justice Department’s Antitrust Enforcement Guidelines for International Operations, Address Before the International Trade Section and Antitrust Committee of the D.C. Bar (Nov. 29, 1988) with Sir Leon Brittan, Jurisdictional Issues in E.E.C. Competition Law, Hersch Lauterpacht Memorial Lectures, Cambridge (Feb. 8, 1990) (In Wood Pulp, “the Court did not endorse the effects doctrine.”). Apparently, the Community’s jurisdiction to apply its competition rules to conducts outside the E.U. market is covered by the (objective) territorial principle, as universally recognized in public international law.

<sup>131</sup> Case 56/65, *Societe Technique Miniere v. Maschinenbau Ulm GmbH*, 1966 E.C.R. 235, 248, 5 C.M.L.R. 357, 375 (1966); Case 61/60, *Cooperative Stremsel-en Kleurselabriek v. Commission*, 1981 E.C.R. 851, 867 (1981)

<sup>132</sup> Case 5/69, *Volk v. Veveaecte*, 1969 E.C.R. 295, 302, 1 C.M.L.R. 273, 282 (1969); Commission Notice on Agreements of Minor Importance, 1986 O.J. (C 231) 2, as amended, 1994 O.J. (C 368) 20 and 1997 O.J. (C 372) 13.

<sup>133</sup> It is a question of whether a country has jurisdiction to prescribe and enforce rules of law governing persons and conduct beyond national borders.

<sup>134</sup> Even if subject matter jurisdiction exists, a country cannot exercise its jurisdiction without personal jurisdiction. In *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), the U.S. Supreme Court held that due process “requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”

<sup>135</sup> ABA, ANTITRUST LAW DEVELOPMENT 2, 1176-1201 (5th ed. 2002).

out the possibility that China may do so given the recent showing of its “aggressive legalism.”<sup>136</sup>

## 2. *Prohibition of Administrative Monopoly*

Ironically, administrative monopoly, though the most important catalyst behind China’s antimonopoly law, is not a commonly-found element in other countries’ competition laws, and is particularly absent in developed economies. Even in comparison with competition laws of other transitional countries that have similar regulations, China’s efforts to curb governmental anticompetitive actions in Chapter Five of the Draft are far-reaching and ambitious. Unlike other competition regimes, where private monopolies are the main target of enforcement agencies, administrative monopoly in China constitutes the most destructive barrier to the formation of an orderly market, as it encourages other types of monopolistic activities, such as abuse of dominant position and cartels. More importantly, it reflects the recurring problem Chinese reformers have continuously strived—and failed—to solve: to harness administrative power and replace direct administration of economy with legal rules. The various constraints in China’s current stage of development, however, render the prohibitive measures on administrative monopolies less potent than they appear.

Under the Draft, the term “administrative monopoly” is used to refer to anticompetitive activities by governments and their subordinate departments who abuse their administrative power through industry monopoly and regional monopoly.<sup>137</sup> Chapter five divides these two types of administrative activities into five categories of prohibited government actions: (1) discriminatory practices that force purchases from certain business operators or restricting other business operators’ legal business activities under Article 31; (2) regional monopolies, which limit inflow of products into the local market or outflow of local products to other markets using all kinds of proscribed means under Article 32; (3) department and industry monopolies, which limit operators from entering into the markets of particular industries and eliminate or restrict market competition under Article 33; (4) the compulsion of business operators to take actions to eliminate or restrict market competition prohibited by the Draft under Article 34; and (5) the enactment of regulations that eliminate or limit competition to obstruct fair competition under Article 35.

While state or government actions sometimes inflict deleterious distortion on competition, most countries do not address this problem primarily through competition law. In a sense, the notion of civil or criminal enforcement by one government department against another government department does not appear to be consistent with the notion of the government

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<sup>136</sup> Jung, *supra* note 80.

<sup>137</sup> The Draft, *supra* note 6, at Art. 3(4).

as a single entity. For instance, the Japanese Act Concerning the Prohibition of Private Monopoly and Maintenance of Fair Trade, as its title reveals, openly set its scope against only “private monopolization.” Competition enforcement is often impeded when private anti-competitive actions are the result of government collaboration. Starting in World War II, a pattern of close cooperation developed between Japanese business and Japanese government.<sup>138</sup> To enforce “industrial policy,” Japan’s administrative agencies, notably the Ministry of International Trade and Industry (“MITI”), routinely provided “administrative guidance” through informal persuasion that effectively induced voluntary cooperation of private companies.<sup>139</sup> For obvious reasons, this created thorny problems for competition law enforcement. For example, as part of a 1980 landmark decision by the Tokyo High Court that imposed the most severe punishment on antitrust offenders, the defendants in an output restriction case were still not convicted criminally, based on the finding that their illegal activities were a result of close MITI supervision and guidance, and under the erroneous assumption that their conduct was not unlawful.<sup>140</sup> As such, widely-practiced state interference, though in most cases not legally binding, is both beyond the reach of competition law and serves as a defense to private competition law violations in Japan.

Moreover, many, if not most, competition laws including German,<sup>141</sup> Japanese,<sup>142</sup> and Korean<sup>143</sup> versions have provisions explicitly exempting actions by other government agencies from the scope of such laws. For instance, Article 58 of the Korean competition law states “[t]his Act shall not apply to the acts of an enterprise or an enterprisers organization conducted in accordance with any Act or any decree to such an Act.” Through this type of exemption clause, competition authorities practically condone monopolistic acts of regulatory enterprises authorized by the legislations, not to mention other abuses of authority by other government agencies responsible for regulatory industries. However, China does not recognize such

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<sup>138</sup> HALEY, *supra* note 90, at 52.

<sup>139</sup> See, e.g., James D. Fry, *Struggling to Teethe: Japan’s Antitrust Enforcement Regime*, 32 LAW & POL’Y INT’L BUS. 825 (2001).

<sup>140</sup> See John O. Haley, *Antitrust Sanctions and Remedies: A Comparative Study of German and Japanese Law*, 59 WASH. L. REV. 471 (1984).

<sup>141</sup> GWB, *supra* note 123, Chapter V (“Special Provisions for Certain Sectors of the Economy”).

<sup>142</sup> Japan’s Fair Trade Act, *supra* note 95, Chapter VI Exemptions; For a suggestion for reconsideration of these exemptions clauses, see Toshiaki Takigawa, *The Prospect of Antitrust Law and Policy in the Twenty-First Century: In Response to the Japanese Antimonopoly Law and Japan Fair Trade Commission*, 1 WASH. U. GLOBAL STUD. L. REV. 275, 294-298 (2002).

<sup>143</sup> Korea’s Fair Trade Act, *supra* note 95, Chapter XI Exemptions.

blank exemptions in an apparent attempt to send an unambiguous signal to other administrative bodies and related industries.<sup>144</sup>

In the United States, the Supreme Court in 1943 established immunity from antitrust liability under the state-action doctrine in *Parker v. Brown*.<sup>145</sup> The Court concluded that the Congress had no intent in the Sherman Act to “restrain state action or official action directed by a state.” State agents acting in furtherance of state policies and private parties acting on state law or legal mechanisms are therefore immune from antitrust enforcement under the Sherman Act. In its 1992 decision on *FTC v. Tocar Title Insurance Company*,<sup>146</sup> the Supreme Court applied the same principle to suits brought under the Federal Trade Commission Act. The establishment and development of state-action immunity in antitrust enforcement reflects political rather than economic considerations. As noted by the majority in *Parker*, the court relied on principles of federalism in its conclusion. In *Tocar*, Justice Kennedy stressed that the purpose of the active state supervision inquiry was “not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices.”<sup>147</sup> Nor is “the question is [ ] how well state regulation works but whether the anticompetitive scheme is the States’ own.”<sup>148</sup> In the final analysis, the state-action exemption is predicated by the necessity to preserve the State’s own administrative policies and the legitimate need to replace competition by state regulation. Only actions taken by cities and municipalities that are not acting to enforce state policies are subject to antitrust law.

To achieve the overriding goal of an open market, the European Union is open to broader competition enforcement to curb state measures that distort free competition.<sup>149</sup> The Spaak report, which preceded the Treaty of Rome establishing the EC, expressly stated that the Commission might propose the removal of distortions of competition that create a real and serious threat to the competition relations.<sup>150</sup> While in many cases it is hard to determine whether state intervention has gone too far, several explicit provisions on state actions were included in the Treaty of Rome (“EC

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<sup>144</sup> Following most competition regimes, the Draft exempts exercise of intellectual property rights from its scope with some provision. As Article 56 of the Draft states, “This law is not applicable to the conduct of business operators exploiting intellectual property in accordance with the copyright law, trademark law, patent law and other laws protecting intellectual property rights.” The Draft, *supra* note 6, at Art. 56.

<sup>145</sup> *Parker v. Brown*, 317 U.S. 341 (1943).

<sup>146</sup> *FTC v. Tocar Title Insurance Company*, 504 U.S. 621 (1992).

<sup>147</sup> *Id.* at 634.

<sup>148</sup> *Id.* at 635.

<sup>149</sup> For a detailed discussion, see CARL MICHAEL VON QUITZOW, STATE MEASURES DISTORTING COMPETITION IN THE EC (2001).

<sup>150</sup> *Id.* at 12.

Treaty”).<sup>151</sup> It must be noted, however, as an inter-states institution, the European Union can only aim to remove those measures that seriously hamper integration of the different national markets.<sup>152</sup>

Generally speaking, it is common to assert that competitive concerns over other government departments should be addressed by “deregulation” programs or regulatory reform initiated by the central government. In recent years, OECD has tried to bring attention to the importance of regulatory reform<sup>153</sup> because driving out anticompetitive practice from the market via competition law is not possible until sufficient regulatory reform is achieved. For instance, the Korea Fair Trade Act has some provisions that facilitate cooperation or coordination between Korea’s Fair Trade Commission and relevant Ministries that have statutory authority to regulate certain industries.<sup>154</sup>

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<sup>151</sup> The Treaty of Amsterdam of 1997 renumbered the EC Treaty. Article 86 (1) prohibits member states, when grant special or exclusive rights, enact or maintain any measure contrary to the rules of the Treaty, in particular those on competition. Article 87 forbids, subject to exceptions, state aid that distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods to the extent incompatible with the common market. Procedural rules to regulate State aid are found in Articles 88 and 89. Articles 90-93 deal with distortions due to indirect discriminatory taxation. Treaty Establishing the European Community, Nov. 10, 1997, O.J. (C 340) 3 (1997) [hereinafter EC Treaty].

<sup>152</sup> VON QUITZOW, *supra* note 149, at 8.

<sup>153</sup> OECD, *supra* note 98.

<sup>154</sup> Korea’s Monopoly Regulation and Fair Trade Act, *supra* note 95, at Art. 3.2: “The Fair Trade Commission may give opinions to the chief-officers of the appropriate administrative authorities as to the introduction of competition or other measures necessary to improve market structures, where it appears to be necessary for the Commission to carry out action plans . . . .” Article 63 (“Consultation on Enactment of Acts which Restrain Competition”) also has elaborate provisions to facilitate cooperation and coordination between the competition agency and other government agencies in charge of regulation. It states:

The chief-officer of the competent administrative authority shall seek, in advance, consultation with the Fair Trade Commission, where he wishes to propose legislation or amend enactments containing anti-competitive regulations such as restrictions on the fixing of prices or the terms of transaction, entry to markets, business practices, unfair collaborative acts, prohibited practices of an enterpriser or an enterprisers organization, etc. and where he wishes to approve or make other measures involving anti-competitive factors against an enterpriser or an enterprisers organization.

The chief-officer of the competent administrative authority shall give, in advance, notice to the Fair Trade Commission when he intends to enact or amend any rules or regulations involving anti-competitive factors.

With regard to approvals or other measures involving anti-competitive factors under paragraph (1), the chief-officer of the competent administrative authority shall give notice to the Fair Trade Commission regarding the contents of the approval concerned or other measures.

In relation to notice under paragraph (2), where it is recognized that rules or regulations to be enacted or amended contain anti-competitive provisions, the Fair Trade Commission may give advice to the chief-officer of the competent administrative authority as to the modification of such anti-competitive provisions. This paragraph shall also apply to enactments made or amended without to the Fair Trade Commission as prescribed by paragraph (1), Acts and subordinate statutes enacted or amended without notice, approvals or other measures given without notice.



Regarding regional monopolies, federal or quasi-federal entities (such as in the United States and European Union, respectively) have employed potent legal instruments other than competition law to cope with regional monopoly. The United States has regulated regional monopolies undertaken by States by virtue of the so-called "Dormant Commerce Clause."<sup>155</sup> In the European Union, the nondiscrimination principle within the region has greatly contributed to integrating a single market across the European Union.<sup>156</sup> In other words, these federal or quasi-federal entities have cracked down on regional monopolies primarily in reliance on trade policy tools within the region rather than on a competition law framework. Competition laws addressing regional monopolies are very limited.

By contrast, since China lacks federal or quasi-federal structures and there are no trade policy tools within the country, the Chinese government needs to devise an instrument by which the rampant administrative monopoly could be addressed. One could understand the provisions to address administrative anticompetitive activities mentioned above only in terms of the extraordinary circumstances that require measures beyond ordinary legal instruments. As mentioned above, the biggest challenge China is facing toward realizing effective competitive market is intransigent administrative anticompetitive activities.

For these reasons, China assigns an extraordinary role to its competition law in combating government anticompetitive actions. Unlike the United States and European Union, where antitrust and anti-competition laws only apply vertically to regulatory activities by lower-level government entities, the Draft also attempts to address competition barriers within certain industries imposed by departments or ministries with equal legal status in the eyes of the competition authority.<sup>157</sup>

The Draft also distinguishes between violations committed by individual enterprises and government agencies. It imposes sanctions against government agencies separately from the enterprises that acted on their mandate or support. In other countries such as the United States, antitrust enforcement against private companies whose violations are based on government actions might only entail invalidating the disputed regulation. In

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<sup>155</sup> Robert Howse, *Managing the Interface Between International Trade Law and the Regulatory States: What Lessons Should (and Should Not) Be Drawn from the Jurisprudence of the United States Dormant Commerce Clause*, in REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW 139-166 (Thomas Cottier and Petros C. Mavrodís eds., 2000).

<sup>156</sup> Piet Eeckhout, *After Keck and Mithouard: Free Movement of Goods in the EC, Market Access, and Non-Discrimination*, in REGULATORY BARRIERS, *supra* note 155, at 191-206.

<sup>157</sup> According to Article 33 of the Draft, "The government and its subsidiary departments shall not abuse their administrative power to compel business operators to take actions to eliminate or restrict market competition that are prohibited under articles 2, 4 and 4 of this law." The Draft, *supra* note 6, at Art. 33.

some countries, competition law regulates state monopolies or enterprises to reduce possible anticompetitive actions by the State. For example, the German GBW is applicable to undertakings “entirely or partly in public ownership . . . [which] are managed or operated by public authorities.”<sup>158</sup> Article 31 of the EC Treaty deals with State monopolies in relation to goods. According to the Draft, public and private enterprises are liable for violations such as abuse of dominant position or concerted actions, while at the same time, the responsible government actions will also induce liabilities stipulated by the law.

Another noteworthy comparison is that the proscribed administrative monopolistic activities often do not originate in the normal process of government regulation. The above-mentioned provisions in the EC Treaty target state-sponsored regulations or measures. In Japan, industrial policy fostered by the government is viewed as conducive to the economy. However, in China administrative power is abused, therefore obstructing rather than advancing state policies. This raises major concerns. For example, Chinese policy makers have attempted to reduce departmental and regional fragmentation since the early 1980s. The persisting fragmentation problem finally led to Articles 32 and 33 of the Draft in order to undermine the forces entrenching the fragmentation. In many cases, the government actions are plainly *ultra vires*. A recent case in point involves local education authorities in Hancheng requiring all local school students to purchase milk from a designated producer.<sup>159</sup> While such abuse of public office is normally addressed in other countries by administrative law, ethics and disciplinary rules, it falls within the scope of anti-monopoly law in China.

Such broad scope and strict rules against administrative anticompetitive activities, in a wider perspective, reflect China’s governance crisis while still a transitional economy. Although the government is urged to regulate the economy by enforcing and complying with the law, there are still no functional mechanisms to offer necessary constraints or incentives. Old institutions and mentalities encourage rent-seeking by turning administrative power into a profitable resource. Government agencies are subject only to self-discipline since no external constraints, such as effective judicial review or public election, have been developed. As a result, private competition has been smothered by suppressive and irregular government practice. In this sense, the enforcement of administrative monopoly provisions is primarily the creation and preservation of the basic conditions for a competitive market order, a vital mission that is not needed in developed market economies.

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<sup>158</sup> GBW, *supra* note 123, § 130(1).

<sup>159</sup> See Shui Huo, *Three Thousand Students In Haicheng were Poisoned by Milk Products*, DA LIAN WAN BAO (April 8, 2003), available at <http://news.sina.com.cn/s/2003-04-08/0220985265.shtml>.

Similar conditions and problems in other transitional economies have produced the same type of competition law provisions to prevent state bodies from taking actions harmful to market competition.<sup>160</sup> The Ukraine, with the broadest competition provisions on state actions, is the closest analog to China.<sup>161</sup> Article 6 of Ukraine's Law on Monopolism addresses seven types of regulatory discrimination against enterprises by government agencies or officials. Such illegal conduct is strikingly similar to the administrative monopoly opposed by the Draft, covering entry barriers, forced transactions, prohibition on goods or movement among regions, restraints on specific enterprises, and other such activities.<sup>162</sup>

The ambitious goal of prohibiting administrative monopoly, however, may not be so easily achieved. Since most of the anticompetitive actions can be considered abuse of administrative power by definition and are already prohibited by law, simply putting them under the antimonopoly law does not automatically lead to a cessation of anticompetitive activity. In fact, the inclusion of administrative monopoly in the competition regime is an indicator of the low efficacy of the other laws, particularly of the general administrative law.

However, the sanctions refer to authorities outside the competition law for enforcement. Other than the power of the AMAB to stop violations under Article 48, other remedies rely on internal administrative procedure (cancellation of illegal action or demotion and discharge) or criminal prosecution, provided it is available by criminal law. AMAB, as the competition law enforcement agency, cannot initiate or be part of either of those processes. The enforcement of Chapter Five in the Draft can only expect to encounter more resistance. This is because, unlike the drastic political and economic transformation in former socialist countries including Ukraine, China's transition has been steering a gradual course, mainly in the eco-

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<sup>160</sup> See Roger Alan Boner, *Antitrust and State Action in Transition Economies*, 43 ANTITRUST BULL. 71 (1998).

<sup>161</sup> See Roger Alan Boner & William E. Kovacic, *Antitrust Policy in Ukraine*, 31 GEO. WASH. J. INT'L L. & ECON. 1 (1997).

<sup>162</sup> Some differences between the two systems are evident. Ukraine's Article 6 lists seven forms of specific conduct, while Article 35 in the Draft on anticompetitive regulation is framed in general terms and subject to stretches in application. Furthermore, Article 6 also provides exemption on the grounds of national security, defense and other public interests, while the Draft does not allow for any exemption under Chapter Five. In the enforcement of Article 6 in the Ukraine competition law, the usual remedy is simply a cease-and-desist order. By contrast, the Draft devises multiple sanctions: under Article 47, for department monopolies, violation will be cancelled by a superior organization, responsible officials will be demoted or discharged, and criminal sanctions may be evoked. For all other administrative monopolies, Article 48 of the Draft authorizes the Anti-Monopoly Administration Body (the "AMAB") to stop the violation in addition to the possibility of imposing internal administrative and criminal penalties. Rules on government actions in the Draft appear even stricter than that of Ukraine.

conomic sphere. The intact political institutions pose a formidable resistance to the economic reforms.

A difficult prospect, however, should not undermine the significance of Chapter Five in the Draft. Strictly speaking, it will be the first piece of legislation that sets direct limits on administrative power in economic regulation. It also openly condemns administrative monopolies to appease public discontent, which is exemplified by the unusual move by the drafters to assure the public that “administrative monopoly” had been indeed included in the Draft.<sup>163</sup> This will in turn enhance the public consciousness on the competition cause and help with enforcement in the long run.

### 3. *Prohibition of Cartels*

#### (a) Application

Following the models of most jurisdictions, Chapter Two of the Draft appears to enunciate that business operators entering into a “monopoly agreement,” broadly defined as any contract, agreement, or other collective conduct to exclude or limit competition, are acting illegally. A combination of specific categories and general proscription is used to set the parameters of the prohibition. Six types of monopoly agreements are identified according to Article 8, including price fixing of products; collusion in a tender; limitation on production quantity; market allocation; limitation of the purchase of new technology or new facilities; and joint hindrance of transactions. They are followed by a general catchall provision to prohibit “other agreements with the effect of limiting competition.”<sup>164</sup> However, the broad range of exemption from cartel regulations gives rise to misgivings about China’s real commitment to uprooting hard-core cartels such as price-fixing and market division.

In addition, problems may arise due to the application only to “business operators.” Article 4 of the Draft defines a business operator as a “legal entity, other organization or individual that engages in product production and sales or provision of services.” Associations that do not en-

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<sup>163</sup> *Administrative Monopoly Will Be Target in Antimonopoly Law Being Drafted*, INTERNATIONAL FINANCE, Aug. 7, 2002, at <http://www.china.com.cn/chinese/law/184667.htm>.

<sup>164</sup> The Draft, *supra* note 6, at art. 8. According to Article 8, the following agreements are exempted: “1. Joint action taken by business operators to improve technology, upgrade product quality, improve efficiency, lower costs, unify product specifications and models and to study in order to create products or markets; 2. Joint action taken by small and medium size enterprises to improve operational efficiency and to enhance their competitiveness; 3. Joint action taken by business operators to adapt to market changes, to stop seriously decreasing sales volumes or obvious productions surplus; 4. Joint action taken by business operators to promote the rationalization of production operations, division of labor or the development of specialization; 5. Other activities that may eliminate or limit competition, but benefits national economic development and the public interest.”

gage in economic activities directly do not fall under the scope of the Draft. In many other jurisdictions, associations are also forbidden to play any role in the formation of anticompetitive agreements. Under section 1 of the German GWB, “decisions by associations of undertakings” fall under the rules on the prohibition of cartels. The competition laws of Korea, Japan and Taiwan include “trade association” in their definitions of “enterprise”<sup>165</sup> or set up separate provisions for “trade associations.” Therefore, “trade associations” are clearly subject to the competition laws.<sup>166</sup> Trade and industry associations are exerting increasing influence over the economic life of China, notably in orchestrating concerted actions among enterprises. Furthermore, many specialized ministries formerly supervising industries will be transformed into national industry associations as part of the government restructure. They are expected to retain substantial capacity to continue anticompetitive practice but will not be subject to administrative monopoly rules. It remains to be seen whether AMAB will regulate business associations by way of interpretation of the statutes.

Following the traditions of most countries, the Draft does not draw a distinction between horizontal and vertical agreements as does the German competition law. The favorable treatment for vertical agreements based on economic theory is unlikely to influence AMAB, at least in the foreseeable future. It is more likely to be explained below that AMAB will take more seriously factors other than the competition element as defined by economic theory. In some Central and Eastern European countries (“CEE countries”),<sup>167</sup> competition authorities have preferred to insure their ability to attack certain vertical agreements in a market without dominant firms or in a situation where dominance is hard to prove.<sup>168</sup> However, authorities in some of those countries, such as the Czech Republic, Slovakia, and Poland, distinguish between horizontal and vertical agreements in their enforcement.<sup>169</sup> In China’s case, when the economic reality demands it in the long run, the provisions might be interpreted and tailored further to differentiate the two types of relationships in enforcement because the statutory languages are created to be open-ended.

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<sup>165</sup> Republic of China Fair Trade Law, art. 2, *translated at* <http://www.qis.net/chinalaw/roclaw13.htm>.

<sup>166</sup> *Id.* at arts. 7, 14-17.

<sup>167</sup> See Russell Pittman, *Competition Law in Central and Eastern Europe: Five Years Later*, 43 ANTITRUST BULL. 179 (Spring 1998).

<sup>168</sup> *Id.* at 184.

<sup>169</sup> *Id.* at 185.

(b) Exemption

The second part of Article 8 in the Draft provides exemptions for agreements between enterprises.<sup>170</sup> In setting forth prohibitions and exemptions in Article 8, the Draft does not explicitly declare any agreements to be illegal *per se*, as the U.S. law does in prohibiting certain horizontal agreements such as price-fixing and market division.<sup>171</sup>

The structure of Article 8 suggests that competition authorities always consider and weigh all applicable anticompetitive effects and overriding efficiencies and benefits of any agreement, particularly since both the proscription and exemption are codified in a single provision. There is no indication in the statutory language other than the word “exemption” that elements enumerated under the name of “exemption” are really an exception to the general prohibition of cartels. In particular, one of the elements for which exemption is to be made is open-ended, such that any activities benefiting national economic development and the public interest could be adjudged legal.

Some jurisdictions such as Germany, Korea and Japan provide for the employment of several factors to invoke exemption from cartel regulations. However, these countries do not use narrowly-tailored language to circumscribe the discretion of enforcement authorities or at least make clear that invocation of exemption is allowed in exceptional and unusual situations. The way the prohibition of cartels is enunciated in the Draft runs the risk of subjecting all cartels or collusive behaviors to an open-ended requirement to take into account any “other” factors. This case-by-case approach is similar to the “rule of reason” application of which is entirely in the hands of AMAB. Indeed, in many CEE countries, which similarly do not treat naked cartels as illegal *per se* by statutory language, there has been a movement toward more serious treatment for blatant cartel agreements. There is, in fact, some such treatment of cartels in countries as Russia and Hungary.<sup>172</sup> Nevertheless, the way the Draft treats cartels sends an ambiguous signal to

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<sup>170</sup> Those are joint actions that: (1) are taken to improve technology, upgrade product quality, improve efficiency, lower costs, unify product specifications and models and to study in order to create products or markets; (2) by small and medium size enterprises to improve operational efficiency and to enhance competitiveness; (3) to adapt to market changes to stop seriously decreasing sales volumes or obvious productions surplus; (4) to promote the rationalization of production operations, division of labor or the development of specialization; and (5) other activities that may eliminate or limit competition but benefits national economic development and the public interest.

<sup>171</sup> See, e.g., U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940) (Supreme Court upheld the lower court’s instruction to the jury, in which price fixing or creating a price floor under market was considered illegal *per se*); see also U.S. v. Topco Assoc. Inc., 405 U.S. 596 (1972) (Supreme Court held that in imposing territorial restrictions upon its members for their selling of its products, the appellee’s actions constituted horizontal restraints on trade and were *per se* violations).

<sup>172</sup> See Pittman, *supra* note 167, at 45.

business operators under its control, which would greatly undermine the effective enforcement of a nascent Chinese competition regime.

It is not clear from the language of the various laws whether parties to an agreement must apply for exemptions. Under the German GWB, those cartels and decisions under sections 2 to 4(1) “*must* be notified to the cartel authority” in order to be exempted.<sup>173</sup> Agreements and decisions under sections 5-8 “*may*,” upon application, be exempted by the cartel authority, which means the notification is not a required obligation. Compared with the clear language of the GWB, Article 9 of the Draft states that business operators “*can*” apply to AMAB to determine whether agreements fall within exemptions of Article 8. The interpretation of the term “*can*” is significant. According to Article 44 of the Contract Law,<sup>174</sup> whenever the law requires such procedures as approval or registration, a contract shall not take effect before such a procedure is completed. If the notification is considered an obligation, then non-compliance renders the agreement ineffective even if it would have been exempted. If it is not a required obligation, the failure to notify AMAB of an agreement which later upon challenge is found to qualify for exemption is not dispositive; the agreement is considered to have taken effect when it was concluded between the parties.

To apply for an exemption, business operators must submit required information to the AMAB within 15 days of the date of the conclusion of the agreement.<sup>175</sup> The AMAB should make a decision on whether to approve it within 60 days of receipt of the application; failure to reply within this period is considered approval.<sup>176</sup> In granting an approval, the AMAB can impose restrictive conditions to the agreement.<sup>177</sup> It is stipulated that the approval should be of a limited term, but the length of the term or whether such a term is renewable is not specified, like the practice in Germany.<sup>178</sup> The AMAB is granted significant power to revoke or modify the agreement under certain circumstances.<sup>179</sup> However, the law does not provide the mechanics for the ongoing supervision necessary for the exercise of this power.

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<sup>173</sup> GWB § 9 (1), *supra* note 123, at 19.

<sup>174</sup> See Contract Law of the People’s Republic of China (Oct. 1, 1999), *translated at* <http://www.cclaw.net/download/contractlawPRC.asp>.

<sup>175</sup> The Draft, *supra* note 6, at art. 8.

<sup>176</sup> *Id.* at art. 11.

<sup>177</sup> *Id.*

<sup>178</sup> GWB § 10(4), *supra* note 123, at 21.

<sup>179</sup> See The Draft, *supra* note 6, at art. 12. The power applies to circumstances where (1) major changes of economic situation occur; (2) the reason for the approval is invalidated; (3) the business operators fail to observe additional obligations of the approval; (4) the agreement is approved based on incorrect or misleading information; and (5) there is abuse of the exemption. If the last three conditions apply, the revocation is retroactive. *Id.*

(c) Sanctions

Upon finding a violation of the prohibitions of the monopoly agreement under Article 8, the AMAB can order the parties to stop the violation, and it may decide to fine the offender between one hundred thousand to five million RMB.<sup>180</sup> In addition, according to Article 52 (5) of the Contract Law, "violation of mandatory provisions of laws or administrative regulations" renders the contract null and void. Therefore, another significance of Article 8 is that it provides an important basis to nullify a contract or any part thereof that entails anticompetitive effects.

4. Prohibition Against Abuse of a Dominant Position

(a) Prohibition

Chapter 3 of the Draft prohibits abuse of a dominant position. According to Article 14, "a business operator shall not abuse its dominant marketing position, obstruct the activities of other business operators, eliminate or limit competition." The Draft adopts a standard similar to those used in Germany and the European Union, as opposed to the U.S. standard, to address monopolization. Article 14 follows a similar line as Section 19(1) of the German GWB, which provides that "the abusive exploitation of a dominant position by one or several undertakings shall be prohibited." Similarly, the EC Treaty targets "any abuse by one or more undertakings of a dominant position" that is "incompatible with the common market."<sup>181</sup> As mentioned earlier, this position is understandable because Chinese corporations are so small and the market is so fragmented that the government may target the abuse of corporations rather than the size of corporations as such.

However, it should be noted that U.S. antitrust law also does not condemn a monopoly *per se*. Despite the language of Section 2 of the Sherman Act, the judicial gloss on the section indicates that for there to be a violation of the Section, a company must not only possess monopoly power, but also commit a certain exclusionary act. In *Grinnell*, the U.S. Supreme Court has required a second element: "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."<sup>182</sup> Nevertheless, there are significant differences between the two systems in their applications.<sup>183</sup> In the United States, the courts would find there to be an exclusionary act only when such an act has reduced economic efficien-

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<sup>180</sup> The Draft, *supra* note 6, at art. 44.

<sup>181</sup> EC Treaty, *supra* note 151, at art. 82.

<sup>182</sup> U.S. v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

<sup>183</sup> Eleanor M. Fox, *supra* note 87 at 343-44. See also RENÉ JOLIET, MONOPOLIZATION AND ABUSE OF DOMINANT POSITION: A COMPARATIVE STUDY OF AMERICAN AND EUROPEAN APPROACHES TO THE CONTROL OF ECONOMIC POWER (1970).



cies by either raising prices or reducing output.<sup>184</sup> In contrast, in the European Union, the courts and enforcement agencies could find abuse of a dominant position even though there has not been an increase in price and reduction in output.<sup>185</sup> They would look at factors other than economic efficiencies so that they could take account of the “process” of competition. As a result, the criterion “abuse of dominant position” is likely to result in a more rigorous enforcement against exclusionary practices that hamper competition there.<sup>186</sup>

Furthermore, the types of remedies available to enforcement authorities differ in the two systems. In the United States, as seen in *Standard Oil v. United States*,<sup>187</sup> *United States v. AT&T Co.*,<sup>188</sup> and in the recent attempt by the district court in *United States v. Microsoft*,<sup>189</sup> enforcement authorities can seek to divest a single company.<sup>190</sup> In contrast, in Germany or the European Union, such a divestiture of single company is not allowed. Given the lack of authority to divest “existing” single companies, it is safe to conclude that the Chinese Draft follows the European Union or German model. This means an enterprise may acquire and maintain a dominant position and use such a position in a nonabusive manner. It must be noted that the GWB also opposes acquisition of market-dominating position in its provisions of merger control; however, the concern over concentrations that

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<sup>184</sup> Fox, *supra* note 87.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> See *Standard Oil v. U.S.*, 221 U.S. 1 (1911). For further historical accounts of the dissolution of the corporation, see GEORGE SWEET GIBB & EVELYN H. KNOWLTON, HISTORY OF STANDARD OIL COMPANY (NEW JERSEY): THE RESURGENT YEARS 1911-1927 7-10 (1956).

<sup>188</sup> *U.S. v. AT&T Co.*, 552 F. Supp 131 (D.D.C. 1982), *aff'd sub nom. Md. v. U.S.*, 460 U.S. 1001 (1983). For the disintegration of the Bell System, see generally STEVE COLL, THE DEAL OF THE CENTURY: THE BREAKUP OF AT&T (1987).

<sup>189</sup> *U.S. v. Microsoft Corp.*, 97 F. Supp. 2d 59, 64-74 (D.D.C. 2000), *vacated by* 253 F.3d 34 (D.C. Cir. 2001) (per curiam) (holding that if the district court finds a causal connection between divestiture exclusionary conduct and the company's position in the operating systems market, divestiture is still proper).

<sup>190</sup> For a description of disappointment with decentralization policy, see POSNER, *supra* note 84, at 101-117. The similar line of assessment of decentralization policy includes William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1105 (1989) (“To most students of antitrust, the history of Sherman Act deconcentration endeavors is largely a chronicle of costly defeats and inconsequential victories.”). See also WALTER ADAMS & JAMES W. BROCK, THE BIGNESS COMPLEX: INDUSTRY, LABOR, AND GOVERNMENT IN THE AMERICAN ECONOMY 198 (1987) ([T]he “government has since 1890 attacked and defeated monopolies in courtrooms across the country. Yet despite some notable successes, American monopoly policy in practice has fallen short of its promise.”); Frederick M. Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 GEO. L.J. 1511, 1537 (1984) (“Antitrust’s Big Case is doomed to a tragic cycle: by the time the barbecue is fit for carving, the pig is gone.”)

are expected to “create or strengthen a dominant position” in GWB<sup>191</sup> finds no parallel anywhere in the Draft. A dominant market position is a given, pre-existing fact which Article 14 and Chapter 3 presume in addressing the anticompetitive acts facilitated by such a position.

In China, nearly all the monopolies or oligopolies now in dominating position are those of large SOEs, most of which are in the process of privatization, mostly in key infrastructure sectors such as public utility enterprises, public transport, and telecommunications. In fact, a predecessor provision on dominant position traced back to the LCUC more explicitly targets “public utility” companies.<sup>192</sup> Although Chapter 3 avoids singling out those SOEs in order to have a broader application, currently no private firms have been able to obtain monopoly power to warrant deliberation on the desirability of certain monopolies. Similarly, none will be able to attain such power in the foreseeable future. It is anticipated that any private firms with dominant market power will be former state monopolies. The acquisition of dominant market power is therefore a political decision beyond the legal purview in China. Given the current economic situations there, the provisions of abuse of dominant position are essentially expected to be used to regulate anticompetitive acts of the monopolies or oligopolies present in converted state firms. The AMAB is empowered to stop violations and impose a fine between RMB ten thousand to ten million. The possibility of criminal sanctions is not discussed.<sup>193</sup>

### (b) Defining “Dominant Position”

What constitutes a dominant position for competition law purposes in China is a complex and important threshold question. The Draft’s definition provides that a “dominant market position” is “one or several business operators control[ing] a specific market.” A “specific market” means the territorial area affected during a specified time period by the sales of particular products by business operators.<sup>194</sup> A business operator is deemed to have a dominant market position if any one of several listed conditions exist.<sup>195</sup> The Draft looks mainly at the number of enterprises and the extent of competition in a market to determine market position. To establish dominance and abuse, the relevant market (the product and geographic market) should be defined. Given the lack of experience of defining a relevant mar-

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<sup>191</sup> GWB § 36(1), *supra* note 123, at 73.

<sup>192</sup> Law of the People’s Republic of China for Countering Unfair Competition, *supra* note 103, at art. 6.

<sup>193</sup> The Draft, *supra* note 6, at art. 45.

<sup>194</sup> *Id.* at art. 4.

<sup>195</sup> Those conditions are: (1) it is the sole business operator in a specific market and makes it difficult for other business operators to enter into the market; (2) it occupies a superior status in a specific market and it is difficult for other business operators to enter into the market; (3) despite the existence of more than two business operators in a specific market, there is no actual competition among them. *Id.* at art. 15.

ket, the AMAB will greatly benefit from operation of the Provisional Rules currently in force on mergers and acquisitions because the issue of market definition is similar in the two areas.

It remains to be seen how AMAB will interpret "dominant position." As mentioned earlier, dominant position is different from monopoly power. The concept of dominant position is less the economist's concept of power over price than a legal concept.<sup>196</sup> In *United Brands v. Commission*, the European Court of Justice held that a dominant position is "a position of *economic strength* enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers."<sup>197</sup> In Europe, it is understood that economic strength is not necessarily synonymous with power over price. The market share threshold, an important indicator for market dominance, is substantially lower than in monopolization cases in the U.S.<sup>198</sup>

To alleviate the administrative difficulties of determining market dominance, the Draft follows the model of competition laws in countries such as Germany, Korea, and Japan, and sets up statutory presumptions of market dominance triggered by certain market shares. Market dominance is presumed in cases where: (1) one business operator has a market share of over one-half; (2) two business operators have a market share of over two-thirds; or (3) three business operators have a market share of over three-fourths. Yet the presumption is not automatic; AMAB has discretion to presume market dominance.

The Draft's standards are comparatively high. Under the GWB, the market share standards used are thirty-three percent for one undertaking, fifty percent for three or fewer undertakings or sixty-six percent for five or fewer undertakings.<sup>199</sup> Many CEE countries, which normally have inherited from socialist systems higher industry concentration than China, have adopted thirty percent as the market share criterion for dominance.<sup>200</sup> While this may raise fears in those countries that firms are unnecessarily subject to competition office scrutiny and regulation,<sup>201</sup> China's decentralized economy and the high market share threshold will lead to a high mar-

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<sup>196</sup> KORAH, *supra* note 86.

<sup>197</sup> 27/76 [1978] E.C.R. 207, ¶ 65.

<sup>198</sup> In *AKZO Chemie BV v. Comm'n* (case C-62/86, 1991 ECR I-3359), the European Court of Justice held that a 40% market share in the presence of significant barriers to entry can constitute dominance, and a firm with 50% of a market or more is presumed to have dominance. In the United States, for there to be market power, approximately a two-thirds or more relevant market share is required.

<sup>199</sup> GWB, *supra* note 123, § 19(3).

<sup>200</sup> Pittman, *supra* note 167.

<sup>201</sup> *Id.*

ket share threshold and lead to rare application and reduced strength of the dominance-related provisions.

(c) Specific Types of Abusive Practices

Articles 17 to 24 specify eight forbidden abusive practices.<sup>202</sup> An important question is whether those Articles are meant to be an exclusive list; in other words, the parameters of the prohibitions will have important effects on China's economy. The German GWB subdivided abuses of market dominant position into a more general provision and various examples.<sup>203</sup> Abusive conduct not expressly mentioned in the examples, such as tying practice, is still subject to scrutiny under the general provision to control abuses and maintain an open market. Ambiguous as it may be, the Draft's enumerated list should be viewed as exhaustive despite the general prohibition of abusive behaviors by business operators in dominant positions.<sup>204</sup> Because Article 45 only places legal liabilities on eight specified abusive behaviors, many types of abuses of dominant position will be placed outside the scope of the Draft.

Most abusive behaviors enumerated in the Draft are recognized as unlawful in many jurisdictions.<sup>205</sup> However, it should be noted that some specified abusive behaviors are more commonly classified as collusive behaviors. For instance, prohibitions of resale price maintenance and territorial market division are subsumed under vertical arrangements.<sup>206</sup> Such conduct without a dominant position may still be regulated by the provisions prohibiting monopoly agreements in Section 2. It remains to be seen, for example, how AMAB will treat resale maximum price maintenance by an enterprise without a market dominant position.

It will also be interesting to see how AMAB will interpret a predatory pricing provision, defined as selling products at prices below cost, as there is no clear standard for "cost." Since even "average variable cost"—the so-called Areeda-Turner standard<sup>207</sup>—is hard to obtain,<sup>208</sup> how AMAB will

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<sup>202</sup> They are: monopolistic high prices, predatory prices, discriminatory treatment, refusal to deal, forced transactions, imposition of unreasonable transaction terms, exclusive agreement, and fixing re-sale price.

<sup>203</sup> GWB, *supra* note 123, §19. According to the Draft's Article 19(1), the abusive exploitation of a dominant position by one or several undertakings shall be prohibited. The GWB's section 19(4) contains examples of abusive conduct, including obstruction, exploitation, discrimination, and denying access to essential facilities.

<sup>204</sup> The Draft, *supra* note 6, at art. 14 (a business operator shall not abuse its dominant marketing position, obstruct the activities of other business operators, eliminate or limit competition).

<sup>205</sup> A.B.A. Section Of Antitrust Law, 1 COMPETITION LAW OUTSIDE THE UNITED STATES (2001), at 48-49.

<sup>206</sup> *Id.*, at Vol. 2, at 32-34.

<sup>207</sup> Phillip Areeda and Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975).

conduct investigation into a predatory pricing case remains a question because it has little experience with complicated economic inquires.

The other interesting point is the way in which unilateral refusal to deal is structured. Unlike other abusive behaviors enumerated in the Draft, the provision on unilateral refusal to deal allows derogation when a business operator has "valid reasons." It is unclear why the drafters accord a special treatment to unilateral refusal to deal and how this statutory difference will affect inquiry of unilateral refusal to deal. Because unilateral refusal to deal has to do with the "essential facility doctrine,"<sup>209</sup> how AMAB will assess the legality of a unilateral refusal to deal is of great importance.

### 5. Concentration

Until recently, industry concentration has posed little concern in China. As discussed earlier, Chinese firms are generally small and in industries separate from those monopolized by the state; thus, concentration is lacking or low. The government has long fostered an official policy of encouraging mergers and all forms of combinations, with the conviction that increased scale enhances competitiveness and breaks up market fragmentation.<sup>210</sup> At the same time, against the high tides of international merger in most parts of the world, mergers and acquisitions only made up six percent of the total FDI in China by early 2002,<sup>211</sup> mainly due to legal uncertainty caused by a vacuum in regulation. However, as foreign companies intensify their efforts to penetrate further into China's market, mergers and acquisitions are rapidly gaining momentum. Chapter Four of the Draft sets out basic rules to address concentration control as a general matter. Most notably, both to facilitate and regulate growing demand of mergers and acquisitions by foreign investors, the Provisional Rules on Merger with and Acquisition of Domestic China Enterprises by Foreign Investors<sup>212</sup> ("Provisional Rules") was adopted on March 7, 2003. It includes important and more detailed provisions on merger control, which constitute the first sections enacted into law under the emerging competition legal regime. The Provisional Rules also diverge from the Draft on some substantial points; this reflects a

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<sup>208</sup> See A.B.A. Section Of Antitrust Law, *Predatory Pricing*, 1996 A.B.A. ANTITRUST SEC. MONOGRAPH 22, at 57-60.

<sup>209</sup> U.S. v. Terminal R.R. Assn., 224 U.S. 383 (1912). See generally HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 305-311 (2d ed. 1999).

<sup>210</sup> See, e.g., Provisions of the State Council on Several Issues Concerning Further Promoting Horizontal Economic Combinations (Mar. 23, 1986), State Council (1986) 36; State Economic & Trade Commission: Guidelines of the Industry Structure Adjustment for the Tenth Five-Year Plan, October 2001.

<sup>211</sup> See Gu Lizhi, *Regulations on Merger by Multinational Firms Will be Enacted Soon*, ZHONG GUO JIYING BAO, Apr. 5, 2003, available at <http://www.people.com.cn/GB/jinji/20020405/703060.html>.

<sup>212</sup> The Draft, *supra* note 6, at Ch. 4.

widely-understood urgency to prevent expansion of foreign investment into dominance, while encouraging the growth of domestic firms.<sup>213</sup> The Draft reserves much discretion for the enforcement authorities while the Provisional Rules adopt stricter rules that are also comparatively easier to enforce. As the concentration control provisions in the Provisional Rules can, with minor changes, still be in force as a special regulation after the enactment of the general antimonopoly law, the dichotomy will likely continue to enforce different policies toward enterprises, depending on the nationality of their investors. The regulations on concentration will attract the most immediate attention from foreign countries and multinational corporations because large scale multi-jurisdictional merger activities might be impeded or thwarted by the newly-minted merger standards stipulated in the Draft.

(a) Scope of Application: the Definition of Concentration

By replacing the term “merger” in an earlier draft with a much more broadly defined “concentration,” the drafters intended to target a wide spectrum of measures that result in enterprise integrations and combinations. These include merger, control through purchase of shares or assets, and agreement to form a control relationship through agency, joint venture or any other method.<sup>214</sup> The Company Law defines a merger very narrowly: a merger occurs when one or more enterprises merges into an existing enterprise or more than two enterprises combine to become a new enterprise.<sup>215</sup> In each case, at least one of the pre-merger enterprises totally loses economic independence. But other measures of concentration, which are more difficult to judge, are afforded no clue beyond “control” either in the Draft or in any other law currently in force. For example, there is so far no legal standard to decide what constitutes a “holding” or “controlling” relationship.

Some countries set forth a clear standard to assess “control.” For instance, in section 37 of the German GWB, “control” is explained as “constituted by rights, contracts or any other means” that “confer the possibility of exercising decisive influence on an undertaking” through rights to use assets or composition, voting, or decisions of the organs of the undertaking. In the case of the acquisition of shares, concentration happens if the shares reach 50% or “25% of the capital or the voting rights of the other undertaking.”

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<sup>213</sup> See Editorial, *Anti-monopoly: Promoting Competition by Legislation*, CHINA 21ST CENTURY BUS. HERALD (Mar. 26, 2003), available at <http://www.nanfangdaily.com.cn/jj/20030327/jd/200303260705.asp>.

<sup>214</sup> The Draft, *supra* note 6, at art. 25.

<sup>215</sup> See P.R.C. Company Law, 7 TRANSNAT'L LAW 386, at art. 184 (Yabo Lin trans., 1994). The Company Law was adopted on Dec 29, 1993 at the fifth meeting of the Standing Committee of the 8th NPC and was amended on Dec 25, 1999, at the thirteenth meeting of the Standing Committee of the 9th NPC.

The Provisional Rules, on the other hand, apply even when the foreign investor is not the controlling shareholder after the merger or acquisition. As long as there is foreign investment involved in the merger or acquisition, it must comply with the requirements of the Provisional Rules, including prohibitions on “excessive concentration,” “exclusion of or limitation on competition,”<sup>216</sup> and the substantive requirements contained in Articles 19 to 22.<sup>217</sup> Under Article 2, foreign investors can directly purchase the stock of a “domestic company,”<sup>218</sup> establish a foreign investment enterprise that buys the assets of an enterprise seated in China, or directly buy the assets of an enterprise seated in China to establish a foreign investment enterprise.

### (b) Obligation to Apply for Approval

The Draft requires business operators to apply for approval for enterprise concentration if certain conditions are met. This means that a concentration cannot be consummated without approval from the competition authorities. This is a stricter rule than those in jurisdictions where the obligation is to notify rather than to apply for approval. A rather common practice in other countries is to impose a waiting period after which the merger can proceed absent objections from the competition authorities. In the United States, the Hart-Scott-Rodino Act requires a transaction be delayed for thirty days (or fifteen days in the case of a cash tender offer). If antitrust agencies take no action, the transaction can be consummated when the waiting period has expired.<sup>219</sup> In the European Union, notification of concentration must be made within a week of conclusion of the proposed agreement, announcement of the public bid, or the acquisition of a controlling interest.<sup>220</sup> As in the Draft, concentration with a Community dimension may not be consummated before obtaining Commission clearance.<sup>221</sup> The Draft allows ninety days for the AMAB to make a decision, but it also allows extension of the review period “under special circumstances,” which may be subject to wide interpretation.

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<sup>216</sup> Provisional Rules, *supra* note 6, at art. 3.

<sup>217</sup> *Id.* at art. 4. (where, according to the Foreign Investment Industries Guideline, “in industries where Chinese parties must remain the controlling shareholders or comparative controlling shareholders, after enterprises thereof have been merged or acquired, the Chinese parties will remain the controlling or comparative controlling shareholder”)

<sup>218</sup> Although the original Chinese phrase used here was “company seated inside China,” the language suggests that it refers to an enterprise in China without foreign investment before the merger or acquisition. *See, e.g.*, Provisional Rules, *supra* note 6, at art. 2.

<sup>219</sup> Clayton Act, 15 U.S.C. § 18a (1994).

<sup>220</sup> European Commission Merger Relations, art. 4, 1989 O.J. (L 395) 4 available at [http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&nundoc=31989R4064&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&nundoc=31989R4064&model=guichett) (last visited Jan. 3, 2004).

<sup>221</sup> Commission Decision on Dec. 1, 1997, Kirch/Bertelsmann, Case IV/M.993, available at [http://europa.eu.int/comm/competition/mergers/cases/index/by\\_nr\\_m\\_9.htm/#m\\_993](http://europa.eu.int/comm/competition/mergers/cases/index/by_nr_m_9.htm/#m_993).

The Provisional Rules set out somewhat different rules for cases involving foreign investors. Investors are required to notify the Ministry of Foreign Trade and Economic Cooperation ("MOFTEC") and SAIC<sup>222</sup> about the intended merger or acquisition and about certain conditions under Article 19. The language of this provision seems not to require approval, but as the two government agencies are in charge of approval and registration of foreign investment enterprises, the merger or acquisition cannot be legally consummated without their approval. In fact, from the perspective of enforcement alone, this arrangement is much more effective, since a separate independent AMAB does not have the same leverage and power on the merger or acquisition participants. The notification obligation arises under one of the four specified circumstances.<sup>223</sup> Furthermore, even if none of these conditions are met, upon request of domestic competitors, relevant administrative agencies or trade associations, MOFTEC and SAIC may require notification from the foreign investors if they believe the merger or acquisition gives rise to important considerations such as large market share, or if it seriously affects market competition, national livelihood, and national economic security.<sup>224</sup> Therefore, the notification obligation in a merger or acquisition involving foreign investors is triggered by multi-pronged and more easily met conditions.

Even more notable is Article 21<sup>225</sup> on mergers and acquisitions conducted outside China. This provision is obviously not in tune with the ap-

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<sup>222</sup> MOFTEC is in charge of approving establishment and mergers of foreign investment enterprises; SAIC is responsible for registration or changes of registration of foreign investment enterprises. According to a new restructuring plan of the State Council approved in the tenth meeting of the tenth NPC on March 10, 2003, a new Ministry of Commerce has been established that will take over the functions of MOFTEC, and MOFTEC will soon cease to exist completely.

<sup>223</sup> See the Draft, *supra* note 6, at art. 1 (obligation to notify arises when (1) any participant has a turnover of more than 1.5 billion RMB in the Chinese market in the same year; (2) foreign investors have merged or acquired more than ten enterprises in domestic related industries within one year; (3) any participant has a market share of twenty percent in the Chinese market; (4) the proposed M&A will enable any of the participants to obtain a market share of twenty-five percent in Chinese market. The M&A participants are deemed to include affiliated enterprises of the foreign investors.)

<sup>224</sup> *Id.*

<sup>225</sup> According to Article 21 of the Provisional Rules, *supra* note 6, participants must submit their proposed merger plan to MOFTEC and SAIC for review before publicizing the plan or at the same time they notify the authorities in their residing countries if any of the following conditions are met: (1) any participant has total assets of more than three billion RMB in China; (2) any participant has a turnover of more than 1.5 billion RMB in the Chinese market in the same year; (3) any participant together with its affiliated enterprises has a market share of twenty percent in the Chinese market; (4) the extraterritorial merger or acquisition will enable any participant and its affiliated enterprises to obtain a market share of twenty-five percent; and (5) because of the extraterritorial merger or acquisition, any participant will hold shares directly or indirectly in fifteen foreign investment enterprises in related domestic industries.



plication scope of the Provisional Rules, but it falls in line with the extraterritoriality principle in the Draft, which stipulates that the law shall apply to behavior outside the territory of China that violates the provisions of the law and limits or affects market competition in China.<sup>226</sup>

With regard to the territorial scope of the merger regulations, as mentioned earlier, Article 2 of the Draft contains a provision to recognize the extraterritorial application of the law. The Provisional Rules sets out special provisions on mergers and acquisitions abroad, which are different from the general rules in the Draft. Even under the same Provisional rules, Article 21 on extraterritorial mergers contains a standard that differs slightly from Article 19 on mergers inside China. Since procedural rules for approval set in Article 20 only apply "when any of the circumstances specified in Article 19 in a merger with or acquisition of domestic enterprises by foreign investors," it does not apply to mergers abroad. This is important because this structure in effect only spells out the threshold to trigger the notification obligation, with no other corresponding provisions on related substantive or procedural matters, such as required filing information, review period, or consequences for failure to notify, which are necessary to meaningfully effectuate control on foreign merger.

One could argue that the general provisions in the Draft, once adopted, would apply to extraterritorial merger by the absence of special rules. However, tensions would ensue in this situation for two reasons. First, the problem of different enforcement institutions would need to be solved before this could take place. MOFTEC and SAIC are merger control institutions, but not strictly competition institutions, which under the Draft are to be established under the State Council. Without proper harmonization, the rules enforced by the AMAB cannot apply to merger participants who are obliged to notify MOFTEC and SAIC. Second, it would also create an anomaly in which mergers and acquisitions involving foreign investors in China are governed by specially-tailored rules, while those happening outside China that bear more special features, would be given the same treatment as purely domestic mergers. Thus, control of extraterritorial mergers, as embodied only in Article 21, is far from complete or successful.

### (c) Approval

If any of the following three conditions under Article 29 is found, a concentration will not be permitted: (1) eliminating or limiting market competition; (2) hindering the healthy development of the national economy; and (3) damaging the public interests. To determine whether the proposed transaction eliminates or limits market competition, one should define a relevant market (i.e., a product and geographic market). But under the other two requirements, a method used to define a relevant market

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<sup>226</sup> Provisional Rules, *supra* note 6, at art. 2.

would practically determine the outcome of substantive merger review. As seen in U.S. Merger Guidelines, the determination of a relevant market requires highly-sophisticated economic analysis. It remains to be seen how AMAB will define a relevant market.

The standards for substantive merger review in the Draft depart from the EC or German Merger Regulations. These regulations adopt the criterion called "dominant position." EC Merger Regulation prohibits any proposed merger "which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it."<sup>227</sup> In the first condition, "eliminating or limiting market competition," the Draft standard would appear to be closer to the U.S. standard, which states that the effect of the proposed acquisition "may be substantially to lessen competition, or to tend to create a monopoly."<sup>228</sup> The rationale behind this standard is unclear but since the previous draft followed a "dominant position" standard, the drafters must have fully understood what different standards mean for merger review. According to U.S. Merger Guidelines, U.S. enforcement agencies are concerned with merger transactions that would enhance the likelihood of collusion, actual or tacit. Although the "unilateral effects doctrine," heavily influenced by the so-called "Post-Chicago School,"<sup>229</sup> was added in its 1992 revision, the predominant concern U.S. agencies have over merger activities is collusive (cartel-like) anticompetitive behavior after consummation of the merger.

As explained in the previous section, a "dominant position" test tends to take into account not only price or output effects as in the United States, but also other factors that could affect the structure of the market and competitive process in the post-merger. As seen in the recent GE/Honeywell case,<sup>230</sup> different standards among countries concerned might create significant tensions and lead to diminishing international business transactions.

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<sup>227</sup> European Commission Merger Regulations, *supra* note 220, at art. 2.

<sup>228</sup> Clayton Act, *supra* note 219.

<sup>229</sup> See Jonathan B. Baker, *Recent Developments in Economics that Challenge Chicago School View*, 58 ANTITRUST L.J. 645 (1989); Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257 (2001); Symposium, *Post-Chicago Economics*, 63 ANTITRUST L.J. 445 (1995). See generally Jonathan B. Baker, *A Preface to Post-Chicago Antitrust*, POST-CHICAGO DEVELOPMENTS IN ANTITRUST LAW 60 (Antonio Cucinotta et al. eds., 2002).

<sup>230</sup> Case COMP/M.2220, Gen. Elec./Honeywell v. Comm'n (2001), *appeal pending* available at [http://europa.eu.int/comm/competition/mergers/cases/decisions/m2220\\_en.pdf](http://europa.eu.int/comm/competition/mergers/cases/decisions/m2220_en.pdf). Action Brought on Sept. 12, 2001 by the General Electric Company against the Commission, 2001 O.J. (C 331) 24. For an excellent account of this case, see Eleanor M. Fox, *Mergers In Global Markets: GE/Honeywell and the Future of Merger Control*, 23 U. PA. J. INT'L ECON. L. 457 (2002). For an account defending the EC's decision, see Götz Drauz, *Unbundling GE/Honeywell: The Assessment of Conglomerate Mergers Under EC Competition Law*, 25 FORDHAM INT'L L.J. 885 (2002).

Although the first standard in the Draft is similar to that of the United States, the other two elements—hindering the healthy development of the national economy and damaging the public interests—are likely to create a great deal of uncertainty with respect to the merger review of the AMAB. Clearly only the first element is grounded in competition theory, while the other two are socioeconomic considerations. “Public interests,” used as a Chinese legal term, is a catch-all routinely subject to wide interpretations to the fullest possible degree. The likelihood that China will clash on merger policies with the countries concerned is much greater.

Some other countries such as Germany, Korea, and Japan allow a proposed merger based on non-competition grounds. For instance, Article 42 of the GWB states that the government shall authorize a concentration prohibited by the Federal Cartel Office (“FCO”) if the restraint of competition is outweighed by the “advantages to the economy as a whole following from the concentration, or if the concentration is justified by an overriding public interest.” Yet in those countries non-competition elements can act only as “an exception”—not as an element with equal weight as competition elements—in extremely rare cases.

Under the Provisional Rules, clearer standards are employed although they will still need substantial interpretation in enforcement. For mergers and acquisitions involving foreign investors both inside and outside of China, authorities must base their decision on a determination of whether the proposed merger or acquisition will “result in excessive concentration,” “hamper fair competition,” or “harm the interests of consumers,”<sup>231</sup> none of which are explained. When antimonopoly concerns arise, MOFTEC and SAIC may separately or jointly hold public hearings and make a decision within 90 days upon receipt of all required information (not specified by the Provisional Rules). No extension of the review period is allowed.

The Draft authorizes AMAB to grant “special approval” when a concentration found to eliminate or limit competition within a specified area is advantageous to the national economy and the public interests.<sup>232</sup> Unlike the draft, the GWB does not explicitly recognize the advantages of increased competition resulting from the concentration. One might argue it falls into the broader categories of “national economy” or “public interests.” However, under the criteria to appraise concentration in Article 29, “national economy” and “public interests” are parallel and separate considerations to “market competition”; it is thus hard to incorporate market competition into either of the criteria. The fact that the “competition” factor is not included in the exemption provision seems to deliberately exclude it from consideration.

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<sup>231</sup> Provisional Rules, *supra* note 6, at arts. 20 and 21.

<sup>232</sup> The Draft, *supra* note 6, at art. 30.

By contrast, the Provisional Rules provide a clearer and close-ended exemption checklist under Article 22.<sup>233</sup> Any participants in mergers and acquisitions may apply to MOFTEC and SAIC for “review exemption” if the intended merger or acquisition falls into any of the categories. Interestingly, not only are “improvements of competition condition” listed, but the other factors the authorities may consider in granting an exemption are defined much more narrowly.

#### (d) Sanctions

According to Article 46 of the Draft, when a business operator violates Article 26 by carrying out a concentration without prior approval, the AMAB can order the parties to terminate the concentration, revert to the original business operations within a deadline, or pay a fine between RMB one hundred thousand and ten million. Since Article 26 imposes the obligation to notify, this sanction can be understood to apply to that obligation or consummation of a concentration despite a prohibition by the AMAB. Compared with other provisions on sanctions where the termination of a violation and a fine may be imposed, use of the term “or” here suggests that a fine can be used as an alternative to dissolution. A fine may be preferred because it is understandably easier to implement than dissolution either by AMAB or the court upon application by the AMAB; a failure to enforce dissolution would undermine the deterrence effect of the sanction, especially to the larger concentrations.

No remedy or sanction is set out by the Provisional Rules for the merger control provision in Articles 19-22. Realistically, this is not a problem for most mergers inside China covered by this regulation. The required application and review for merger control reasons is part of the approval and registration process<sup>234</sup> for foreign investment enterprises. Without approval from MOFEC and SAIC, no merger or acquisition can be legally consummated and protected. There is still a loophole, however, which may arise if a merger is never subject to review due to the failure to notify the authorities upon consummation by the participants. This is possible because some of the standards used to trigger the obligation to notify are susceptible to different applications. For example, the participants and the authorities may disagree on whether the market share standard has been met. When a merger or acquisition has been consummated which the authorities believe should have been subject to prior scrutiny, uncertainty arises as to whether and how to impose sanctions. In addition, for mergers

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<sup>233</sup> Parties can apply for exemption if the concentration (1) may lead to improvements of conditions of market competition, (2) restructures enterprises with loss and ensures employment, (3) introduces advanced technology and management and enhances international competitiveness of the enterprises, (4) may improve the environment. See Provisional Rules, *supra* note 6, at art. 27.

<sup>234</sup> *Id.* at art. 5.

and acquisitions realized abroad under Article 21, MOFTEC and SAIC have no regulatory power to enforce merger control. The only factor that may induce voluntary compliance is that at least one of the participants under Article 21 has substantial business inside China. Their overall stake in the Chinese market may help to encourage compliance with Chinese law and avoid confrontation with government agencies.

### 6. Enforcement Mechanism

One of the most difficult issues in drafting the antimonopoly law is to establish a competent institutional enforcement system which has contributed to the lawmakers' lingering hesitation to complete the work.<sup>235</sup> Relevant provisions in the Draft on institutional arrangements leave many questions unanswered, especially in light of the Chinese legal system as a whole. From a comparative law perspective, the Draft itself provides for relatively strong enforcement tools: unlike Korea and Japan, but similar to the United States and Germany, it allows private citizens to file a civil suit without waiting for the administrative procedures to be finished by the enforcement agency. Unlike the European Union and Germany, but similar to the United States, Korea, and Japan, it provides for criminal prosecution. Notably, the Draft stipulates "social supervision" of anticompetitive behaviors stating that "[the] State encourages, supports and protects social supervision of monopoly by all organizations and individuals."<sup>236</sup> According to Article 36 under Chapter Six on the 'anti-monopoly administration body', the AMAB of the State Council shall investigate and impose administrative sanctions on illegal monopolistic conduct. Article 53 of the Draft provides affected parties the opportunity for recourse in a court. An interested party can file an application for review of any penalty decision to AMAB, and further appeal to a court. In the alternative, the party may choose to appeal to the court directly. At the same time, Articles 49 and 50 provide for private litigation and rights for compensation.<sup>237</sup> In cases involving administrative monopoly, the injured parties will be able to invoke administrative suits against the government or its officials. In addition, Articles 45 and 47 leave open the possibility of criminal prosecution for abuse of dominant market position and officials engaging in administrative monopoly. The Draft endeavors to establish the administrative enforcement mechanism by creating an administrative enforcement institution, while other proceedings must rely on pre-existing proceedings not specific to antimonopoly cases.

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<sup>235</sup> See, e.g., Tang Wenhong, *Discussion on Setting Up Competent Anti-Monopoly Authority in China* (working paper), available at <http://www.jftc.go.jp/e-page/about/apec/capacitybuilding/China1.pdf> (last visited May 20, 2003).

<sup>236</sup> The Draft, *supra* note 6, at art. 7.

<sup>237</sup> These articles are under Chapter 7 on "Legal Liabilities." See *id.*

(a) Administrative Enforcement Agency

The Anti-Monopoly Administration Body of the State Council is expected to play a major role in administering the antimonopoly law. The Draft confers on the AMAB a variety of responsibilities under Article 37, including the ability to issue antimonopoly policies and rules, investigate matters relating to antimonopoly provisions under the antimonopoly law, resolve all matters requiring its approval provisions under this law, investigate market competition conditions, investigate and dispose cases that violate the antimonopoly law, and maintain reports of offenses. But the Draft fails to specify which institution will serve as the AMAB, leaving the issue for later legislation. Two options have been under consideration during the drafting process: the establishment of a new agency and the authorization of SAIC as the enforcement institution.<sup>238</sup> Each option entails difficulties and considerations.

To establish a new government agency would be preferable if the disadvantages of SAIC can be overcome by optimally designing the institution to improve the efficacy of enforcement. In other jurisdictions, competition enforcement authorities are afforded different legal safeguards to ensure their independence and authority.<sup>239</sup> Similar measures would be hard, if not totally impossible, to imitate in China. Under the current organizational structure of the State Council, only the Auditing Bureau is directly under the Premier, a unique status guaranteed explicitly by the Constitution.<sup>240</sup> A centralized administrative responsibility system requires that the Premier assume all responsibility for the work of the State Council and that ministers assume all responsibility of the work of their respective ministries and commissions.<sup>241</sup> In each ministry or commission, only the nomination of the head official by the Premier is subject to approval by the National People's Congress (NPC) or its Standing Committee.<sup>242</sup> Even those approvals are essentially procedural and are always granted due to the absence of opposing forces in the NPC. The government officials are selected by a uni-

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<sup>238</sup> People's Republic of China, *supra* note 7.

<sup>239</sup> In the United States, the FTC consists of five commissioners, nominated by the President and confirmed by the Senate, each serving a seven-year term. No more than three commissioners can be of the same political party. See <http://www.ftc.gov/bios/commissioners.htm>. In Japan, the Fair Trade Commission is charged with similar powers as that of the AMAB and is administratively attached to the Prime Minister. (Chapter VIII § 27-2). Its members, one chairman and four commissioners, are appointed by the Prime Minister with consent of both Houses (§ 29(2)). The Korean FTC serves under the Prime Minister. In Germany, the FCO, according to law, is an independent higher federal authority. See *GWB* 51(1). The members of the ten-decision divisions of the FCO are servants appointed for life with qualifications to serve as judges or senior civil servants. *Id.* at *GWB* 51(4).

<sup>240</sup> Xianfa, at art. 91 [Constitution of the People's Republic of China(1982)], available at <http://www.qis.net/chinalaw/lawtran1.htmart>.

<sup>241</sup> *Id.* at art. 86, 90.

<sup>242</sup> *Id.* at arts. 62 § 5; 67 § 9.

form examination requiring no special knowledge or experience.<sup>243</sup> Their appointment, promotion, salary and term of office are subject to internal discretion, ultimately with the approval of CCP's personnel department. Under such a system, even if by future legislation the AMAB is granted special status directly under the Premier, the lack of independence and qualification of its workers will undermine its strength and capability.

The main argument for authorizing the SAIC as the AMAB is that it has accumulated certain experience in dealing with antimonopoly cases under LCUC.<sup>244</sup> However, as explained earlier, the lack of independence of the SAIC and its branches have caused serious problems even in enforcing the limited antimonopoly provisions under the LCUC. In April 2001, the government had to establish a separate ad hoc working group directly under the State Council in order to administer the intensified national campaign against administrative monopoly.<sup>245</sup> To charge all the antimonopoly work to SAIC would seem highly unadvisable. In addition, under its current organizational structure, it is also not feasible to transform the SAIC into an independent antimonopoly agency. SAIC is charged with a wide range of functions including enterprise registration, trademark administration, consumer rights protection, and advertisement regulation.<sup>246</sup> Only one of its twenty-eight divisions, the Fair Trade Bureau, oversees market order and administers competition policy.<sup>247</sup> Furthermore, SAIC also heads the AICs at the various local levels, which makes it a bureaucracy too large to reform.

Another thorny problem is determining the number of necessary levels of the AMAB, which remains an open question, as the Draft only states that the AMAB may "according to the needs of fulfilling its responsibilities, establish dispatch offices."<sup>248</sup> It is a common practice to establish multilevel enforcement institutions.<sup>249</sup> However, China's concern is that one level of local office under the AMAB would not be enough.<sup>250</sup> The rampant local protectionism and fragmented market set China in a very different situation than most other countries with an open and unified national market. The large number of violations, the majority of which are small and local, re-

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<sup>243</sup> See Provisional Rules, *supra* note 6.

<sup>244</sup> Wenhong, *supra* note 235.

<sup>245</sup> State Council, *supra* note 37.

<sup>246</sup> For the functions and organizational structure of SAIC, see <http://www.saic.gov.cn>.

<sup>247</sup> *Id.*

<sup>248</sup> The Draft, *supra* note 6, at art. 43.

<sup>249</sup> In the United States, the FTC maintains a regional presence with offices in seven geographical areas across the country. See <http://www.ftc.gov/ro/romap2.htm>. In Germany, the Federal Ministry of Economics, and FCO, together with sixteen state cartel offices, enforces antitrust law through administrative proceedings (ABA G-8). The General Secretariat of Japan's Fair Trade Commission includes seven local offices. Sec. 35-2, available at <http://www.jftc.go.jp/e-page/about/role/q-2.htm>.

<sup>250</sup> Wenhong, *supra* note 235.

quires routine antimonopoly enforcement at a grassroots level. In the anti-monopoly campaign of 2001, more than 127,000 cases of monopoly were recorded across the country from April to November alone.<sup>251</sup> This would seem to require multilevel branches under the AMAB; on the other hand, too many levels of branches under the AMAB would inevitably lead to the dependence of local governments just as is the case with the AICs, and the anti-monopoly mission would fall prey to administrative interference.<sup>252</sup>

### (b) Judicial Review of AMAB's Decision

An interested party can appeal to the court directly for review of any penalty decision rendered by the AMAB. As the penalty decision involves imposing administrative sanctions, by using this provision the interested party invokes the general judicial review system of administrative actions in China.

Judicial review was built into the Chinese legal system in 1989 when administrative *su song* (litigation) was allowed in the Administrative Litigation Law ("ALL").<sup>253</sup> According to Article 2 of the ALL, any individual or entity whose interests or rights have been deemed infringed by a specific action of an administrative organ (*zu zhi*) or the personnel thereof, can bring a suit before a court according to the law. Article 5 set up administrative divisions inside the courts at all levels in order to exercise jurisdiction on administrative suits.

The Chinese judicial review system is ill-suited to protect individual rights from abuse of administrative power. Despite improvements in recent years, the judiciary lacks independence and has been under increasing criticism for corruption. The courts are especially powerless in administrative litigation because the current structure of China's court system and the system for the selection and promotion of judges subject the courts to the influence of local governments regarding personnel as well as financial and material resources, making interference with the courts by local governments inevitable. The special nature of the defendant in administrative litigation has predetermined that interference and obstacles in handling administrative cases will be even greater than for other types of adjudication. Often, the trial of administrative cases is subject to illegal interferences by local governments, local people's congresses, and local

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<sup>251</sup> See Geng Zhensong, *Antimonopoly Law and Regulations to Combat Local Protectionism Expected*, BEIJING QING NIAN BAO (Dec 12, 2001), available at <http://www.people.com.cn/GB/shizheng/3586/20011212/625037.html>.

<sup>252</sup> Wenhong, *supra* note 235.

<sup>253</sup> Adopted at the Second Session of the Seventh National People's Congress Standing Committee on April 4, 1989, promulgated by Order No. 16 of the President of the People's Republic of China on April 4, 1989, and effective as of October 1, 1990. Some people also translate it as Administrative Procedural Law.



Communist Party committees, compromising fairness in trying and deciding administrative cases according to law.

The difficulty of enforcing court judgments and orders has been a daunting problem, and is particularly serious in administrative cases. As the courts lack authority and independence, administrative agencies as defendants often defy their judgments and orders. Methods of enforcement stipulated by the ALL, such as “fining” and “providing judicial recommendations to administrative agencies,”<sup>254</sup> are far from being effective to solve the enforcement problems.<sup>255</sup>

Compounding the reality of the unequal powers of the litigants in the administrative cases are the inadequate provisions and outdated underlying philosophy of the ALL. With respect to important issues such as the scope of review, jurisdiction, standing of parties and sanctions, the ALL provides minimal checks on administrative agencies exercising their power.<sup>256</sup> The public discontent and the defects of the current ALL and judicial review system have finally led to a legislative overhaul. A working group organized by the National People’s Congress is finalizing a draft to comprehensively rewrite the ALL. However, the final product remains to be seen, and some of the problems, such as the lack of independence of the judiciary, will not be solved simply by creating a new ALL.

### (c) Private Civil Suit

Article 49 of the Draft provides, “if the legal rights and interests of business operators or consumers are damaged by any monopolistic behavior, they can file a petition with the People’s Court.” Article 50 affords injured parties the right to sue a business operator who violates the antimonopoly law for damages. The injured party is compensated with actual losses and forecasted profits, or if such losses are difficult to calculate, the profit gained by the violator plus reasonable expenses incurred in investigation and litigation.

The civil suit based on Articles 49 and 50 presents two salient features on its face. First, it allows private parties to bring a suit in court to recover loss directly upon discovering anticompetitive actions that are harmful to them. Unlike the laws in Korea and Japan, the Draft does not require a decision from the competition law enforcement institution as a prerequisite. Private suits can be initiated totally independent of administrative proceed-

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<sup>254</sup> WORKING GROUP ON REVISING THE ALL, REPORT (2003) (on file with the author).

<sup>255</sup> Interview with Professor Ma Huaide, Professor, China University of Political Science and Law, in New Haven, Conn. (Jan. 20, 2003). In one case, the court found the administrative sanction imposed by the defendant government agency illegal and ordered it to make a new decision in accordance with the law. However, the defendant made the same decision again and again, forcing the plaintiffs to go to the court four times.

<sup>256</sup> *Id.*

ings. It also appears less restrictive than the German system, which requires specific legislative intent: the violated provision must “serve to protect another” and the violator must have “acted willfully or negligently.”<sup>257</sup> In granting a cause of action, Chinese legislation hardly ever requires intent, although intent may be considered by the judges in deciding cases. Having no requirement of willfulness or negligence, as in tort actions, undoubtedly makes it easier for the private parties to recover loss. The provisions seem to readily permit damage actions, and thus appear more similar to the U.S. system.

Second, Articles 49 and 50 do not permit private suits for injunctive relief; it only allows damages. In contrast, Section 16 of the U.S. Clayton Act authorizes private parties to sue for injunctions. In other civil law jurisdictions such as Germany,<sup>258</sup> Japan,<sup>259</sup> and Taiwan,<sup>260</sup> injunctive relief is also available in private actions. Injunctive relief is an alien notion in China’s legal system, which follows the civil law tradition. However, the Draft authorizes the AMAB to issue “cease and desist” orders.<sup>261</sup> Such orders, when unheeded, are subject to enforcement by the court on the AMAB’s application.<sup>262</sup>

In the United States, some scholars are of the view that the private right of action increases the efficiency of antitrust enforcement, as it enlists the participation of parties closest to the information and affords a safeguard against lax public enforcement without expanding public enforcement bureaus.<sup>263</sup> Others, however, are more skeptical.<sup>264</sup> In China, the formidable mission to combat anticompetitive activities, the shrinking state power, and ineffective institutions all make the supplement of public enforcement with suits by members of a mobilized public desirable. In fact, public discontent has provided the primary momentum in recent antimonopoly campaigns; public participation has been encouraged and has proved instrumental. However, as the experience of some other countries demonstrates, the efficacy of the private action is subject to various contingencies and for a country with a developing legal system as China, many hurdles

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<sup>257</sup> Haley, *supra* note 140.

<sup>258</sup> Gesetz gegen Wettbewerbsbeschränkungen [GWB] §33 (F.R.G.) available at <http://www.iuscomp.org/gla/>.

<sup>259</sup> <http://www.jftc.go.jp/dokusen/4/index.htm> (June 10, 2003)

<sup>260</sup> Fair Trade Act, at art. 30 (Taiwan).

<sup>261</sup> The Draft, *supra* note 6, at arts. 44-46.

<sup>262</sup> *Id.* at art. 52.

<sup>263</sup> Ernest Gellhorn & William E. Kovaicic, ANTITRUST LAW AND ECONOMICS 462-463 (2d ed. 1994).

<sup>264</sup> See Posner, *supra* note 84, at 275 (observing that “students of the antitrust laws have been appalled by the wild and woolly antitrust suits that the private bar has brought—and won. It is felt that many of these would not have been brought by a public agency and that, in short, the influence of the private action on the development of antitrust doctrine has been on the whole a pernicious one.”).

are to be expected. Certain difficulties are predictable in the use of private civil actions in China.

The first difficulty faced by plaintiffs in a civil action is the competency of the court. Before the Judge's Law in 1995, no uniform credentials were required of judges, and formal legal training was not a prerequisite.<sup>265</sup> It was not until 2001 that all junior judges were required to pass a national judicial exam to meet minimum qualifications.<sup>266</sup> In addition, most courts are overloaded with cases. In 1999, the total number of cases across the nation amounted to 6.23 million. By the end of July 2002, 1.85 million cases had been accumulated, to be handled by the 170 thousand judges nationally.<sup>267</sup> The Chinese Civil Procedural Law imposes time limits on trials, which must be completed within six months, although the limit may be extended upon approval.<sup>268</sup> The capability of the ill-prepared, overworked judges who are under constant pressure to beat time limits in dealing with normally-complicated antimonopoly cases is highly doubtful.

Although Article 50 seems to encourage damage actions, the civil suits have to follow the general civil procedural rules and are subject to their constraints. An important uncertainty remains regarding the ability of private antitrust plaintiffs to have standing to obtain relief. Article 50 requires the plaintiff to be one whose "rights and interests" have been violated. Article 108(1) of the Civil Procedural Law sets a substantive test that the plaintiff must show a "direct interest" in the case. Both provisions are similarly vague and general, offering little guidance in setting up standards. In the United States, the federal courts have developed rules to narrow the set of plaintiffs who have standing to attack antitrust violations. Such restrictions include proof of injury to "business or property," allegations of "antitrust injury," and proximity to the source of harm.<sup>269</sup> Such limitations and standards are necessary and needed, especially in China, as it has no precedent, Chinese judges have limited power to interpret law and the ambiguity of the provisions' language will lead to confusion and inconsistency.

Compared with the U.S. antitrust system, private actions in civil law countries such as Germany and Japan have been portrayed as ineffective

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<sup>265</sup> Zhonghua Renmin Gong He Guo Guo Wu Yuan Guong Bao, People's Republic of China State Council Published Report [Guowuyuan Gongbao] art. 9(6) (P.R.C.) (stating that anyone with a college degree other than in law, but with "legal knowledge," after working in the court for two years, can be qualified to be a judge).

<sup>266</sup> *Id.* at art. 12.

<sup>267</sup> See He Bing, *Workload Crisis Under the Current Court System and Its Solution*, LEGAL FORUM, available at [http://211.100.18.62/fzdt/pl\\_jdft.asp?id={F5A9EAA0-6B27-40F8-8D3A-7104CB63399F}](http://211.100.18.62/fzdt/pl_jdft.asp?id={F5A9EAA0-6B27-40F8-8D3A-7104CB63399F}) (last visited May 31, 2003).

<sup>268</sup> Article 135 of the Civil Procedure Law, Apr. 9, 1991, President's Order 44. The time limit is renewable for another six months with permission from the head of the court. If still more time is needed, the judge can apply to the higher court for extension.

<sup>269</sup> Gellhorn & Kovaicic, *supra* note 263, at 463.

and rarely used.<sup>270</sup> The paucity of civil actions has been attributed to several causes, most importantly to the lack of class actions, a discovery system, and treble damages.<sup>271</sup> In China, unlike in Japan and Korea, the class action is generally allowed in a civil action.<sup>272</sup> Thus far, there is no prohibition to exclude its use in any particular case. However, the lack of a discovery system will pose a problem to the Chinese private parties in proving that they deserve damages.

The problem is exacerbated by the current evidentiary rules applied in civil suits. In an effort to transform the litigation structure from an inquisitional to an adversarial system, the 1991 Civil Procedural Law adopted a new principle that the party that raises the claim has the burden of producing the evidence.<sup>273</sup> While judges in the past had to conduct the investigation and gather most of the evidence, today the plaintiff will lose the case if he fails to provide sufficient evidence, with the exception of certain explicit stipulations, which shift the burden of proof to the defendant.<sup>274</sup> Although the law requires judges to gather evidence that the plaintiffs are not able to obtain,<sup>275</sup> judges' heavy workload makes this option impracticable. Because plaintiffs in an antimonopoly civil case do not enjoy the benefit of a discovery system, and because they have a short time to present evidence, they are bound to find it extremely difficult, if not impossible, to prove their damages successfully.

Treble damages, as are found in U.S. antitrust law, serve as an important incentive to bring private suits. In China, although the losing defendant may have to pay processing fees and reasonable fees incurred in investigation by the plaintiffs, the substantial lawyer's fees in many cases are not necessarily included. Therefore, there is little incentive for the prospective plaintiff to pursue a case, especially with so many other difficulties involved in civil litigation.

There is, however, no theoretical barrier to treble damages themselves. According to the Law on the Protection of the Rights and Interests of Consumers ("Consumers' Law"),<sup>276</sup> consumers are entitled to double damages against fraudulent practices of business operators.<sup>277</sup> This provision has

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<sup>270</sup> Haley, *supra* note 140.

<sup>271</sup> *Id.*

<sup>272</sup> See Civil Procedural Law art. 55 (P.R.C.), available at <http://www.isinolaw.com>, and Rules 58-64 of the Supreme Peoples' Court's Interpretation On the Application of Civil Procedural Law.

<sup>273</sup> Civil Procedural Law art. 64. (P.R.C.), available at <http://www.isinolaw.com>.

<sup>274</sup> The Supreme People's Court of China, *supra* note 272, at art. 74.

<sup>275</sup> See Civil Procedural Law art. 64 (P.R.C.), available at <http://www.isinolaw.com>; see also Rule 73 of the Supreme Peoples' Court's Interpretation.

<sup>276</sup> Adopted and promulgated on Oct. 31, 1993 by the Fourth Session of the Standing Committee of the Eighth National People's Congress (NPC).

<sup>277</sup> Article 49 of the Consumers' Law states that "[a] business operator that practices fraud in providing a commodity or a service must, at the request of the consumer, increase

proven to be a powerful incentive, exemplified by a series of highly-publicized suits brought by Wang Hai, who knowingly bought fake products in order to bring civil suits in court. The attitudes towards Wang are divided. The public generally considers him a fighter for consumer rights, while the courts and some scholars are concerned that he abuses the legal system and thus is not part of the protected category of "consumers."<sup>278</sup> However, double damages would not pose a problem in an antimonopoly case, even if concerns over their use under the Consumers' Law are valid. If the drafters are concerned that too much monetary incentive may induce frivolous suits, double damages or the discretionary treble damages available under Taiwanese competition law<sup>279</sup> may be considered. The lack of such a provision is therefore an obvious pitfall in the Draft.

#### (d) Administrative Suit Against The Government

Article 49 of the Draft not only allows civil actions among private parties (as in the United States and Germany), but it also empowers injured parties to invoke administrative litigation when their rights are infringed by government agencies or officials because of administrative monopoly. If the target defendant is a government agency or official, as in administrative monopoly cases, the injured private party will have to go through administrative litigation to subject the anticompetitive administrative action to judicial review for remedy.

As explained earlier, the administrative litigation system in China affords plaintiffs very little help. The injured party who invokes Article 49 is bound to find himself particularly helpless in an administrative suit. Regardless of the weaknesses of administrative trial and enforcement, a threshold issue arises as to the scope of judicial review, which in most cases excludes private parties from challenging administrative monopolistic behaviors in court.

According to the ALL, certain administrative actions are precluded from administrative litigation, including actions against administrative rules and regulations or decisions and orders with general binding force that are formulated and announced by administrative organs.<sup>280</sup> According to Chinese legal theory, these are called "abstract administrative actions" as opposed to "specific" administrative actions that are actionable.<sup>281</sup> According

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the compensation for losses incurred by such consumer. The amount of the increase in compensation shall be the price of the commodity purchased or the fee for the service received by the consumer."

<sup>278</sup> See "Hero Lost in Court", YAN ZHAO DU SHI BAO (Sept. 4, 2000), available at <http://www.people.com.cn/GB/channel4/977/20000904/215371.html>.

<sup>279</sup> Taiwan Fair Trade Law, art. 32 (Taiwan), available at <http://www.qis.net/chinalaw/roclaw23.htm>.

<sup>280</sup> Administrative Litigation Law, art. 12 (P.R.C.) available at <http://www.isinolaw.com>.

<sup>281</sup> See generally *id.* at art. 2.

to a 1997 Supreme Court Judicial Interpretation,<sup>282</sup> the “decisions and orders with general binding force” exemption from judicial review pertain to repetitively-applicable normative documents towards non-specific parties.<sup>283</sup> Typically, administrative monopolistic behaviors are continuous actions that take the form of normative documents (administrative regulations, rules, circulars, decisions, notices, etc.), because they are not targeted against specific parties. Instead, they perpetuate certain anticompetitive activities (for example, protecting local products from competition from other areas). While such violations damage the interests of many business operators and individuals, they are not subject to judicial review under the ALL.

Some plaintiffs may be able to base their suit on suitable “specific action,” such as the imposition of a fine by the government agency for non-compliance with an anticompetitive administrative regulation. The question of whether the court should grant standing to the parties in such a case has been subject to much debate and is far from settled.<sup>284</sup> In practice, some courts have taken these cases. But even in holding the specific action (such as a fine) illegal, judges avoid commenting on the legality of the regulation on which it is based. They either remain silent on the issue or base their judgment on laws or statutes of higher authority and pass over the regulation.<sup>285</sup> In both cases, the “abstract action” (i.e., the anticompetitive normative document) remains unchallenged. Even in the rare case where an individual party wins an administrative suit, it does not serve as a deterrent to administrative monopoly.

#### (e) Criminal Prosecution

The Draft shows the government’s preference to leave the issue of criminal sanctions open. Criminal prosecutions are mentioned only in two articles of the Draft. Noticeably, cartel activities under Chapter 2 are not subject to criminal prosecution. The European Union and German competition laws do not provide for criminal prosecution for all anticompetitive behaviors. Yet in countries such as the United States, Korea, and Japan, cartelization is the primary target of criminal antitrust enforcement.

Each criminal provision in the Draft states that if a criminal offense is committed, the offender is to be “prosecuted and penalized accordingly.” It is possible that the drafters are still undecided over which criminal sanctions to adopt, given their continuing focus on the establishment of administrative proceedings. But a more important reason is that the division of authorities requires that only the Criminal Code impose criminal sanctions.

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<sup>282</sup> Supreme People’s Court, Interpretations on Certain Issues Related to the Administrative Litigation Law, Nov 24, 1999.

<sup>283</sup> *Id.* at art. 3.

<sup>284</sup> Interview with Gan Wen, Judge of the Supreme People’s Court, Administrative Section, in New Haven, Conn. (Mar. 12, 2002).

<sup>285</sup> *Id.*

The new 1997 Criminal Code adopted the principle that only one who commits an offense explicitly defined by law as a criminal act can be prosecuted and convicted.<sup>286</sup> To preserve the uniformity of criminal law, the government has made amendments to the Criminal Code to clearly define criminal acts.<sup>287</sup> The NPC and its Standing Committee also issued special decisions or decrees to clarify or interpret certain provisions of the Criminal Code.<sup>288</sup> The government has not allowed any other statute to impose criminal sanctions, so it is impossible to include a criminal provision in the antimonopoly law, as was done in Taiwan<sup>289</sup>

Article 47 allows for the prosecution of responsible government officials involved in an administrative monopoly. This provision does not address antimonopoly criminal sanctions directly. Rather, it targets those criminal offenses connected with an abuse of power in public office that have motivated the officials' engagement in or support of anticompetitive activities. The existing crimes include, for example, acceptance of a bribe<sup>290</sup> and malpractice in office.<sup>291</sup>

Article 45 states that abuse of dominant market position may be subject to criminal prosecution. As such specific language is not included in sanctions on restrictive agreement or unauthorized concentrations, the Draft appears to exclude those other anticompetitive activities from criminal sanctions. In contrast with Article 47, no existing crime covers abuse of dominant market position. In order to apply this provision, a new crime and corresponding penalties will have to be added to the current criminal law; otherwise, this provision will remain toothless.

The Draft envisions criminal prosecution as independent from administrative proceedings. In the current criminal system, the Prosecutor's Office is charged with exclusive authority to prosecute crime in China. Unlike the law in Japan and Korea, the prosecutor's decision to prosecute will not be contingent on decisions of the administrative authorities. Depending on the circumstances in each case, investigation is conducted by the procuracy or the police. Like the courts, however, the procuracy and the police lack expertise and experience in antimonopoly cases. Considering the open-ended provisions, narrow application of criminal sanctions, and low enforcement capability, it is likely that criminal sanctions will take a long time to develop and remain rarely used after the adoption of the antimonopoly law.

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<sup>286</sup> Criminal Code art. 3 (P.R.C.), available at <http://www.isinolaw.com>.

<sup>287</sup> Amendments were passed on Dec. 25, 1999, Aug. 31, 2001, Dec. 29, 2001, and Dec. 28, 2002.

<sup>288</sup> For example, NPC Standing Committee's Decision Concerning Punishment of Criminal Offenses Involving Fraudulent Purchase (Dec. 20, 1998).

<sup>289</sup> See Taiwan Fair Trade Law arts. 35 and 37 (Taiwan), available at <http://www.qis.net/chinalaw/roclaw23.htm>.

<sup>290</sup> Criminal Code, *supra* note 286 at art. 385.

<sup>291</sup> *Id.* at ch. 9.

## V. CONCLUSION

The Draft reflects the strong desire of the Chinese government to implement an economic constitution denoting the ideal competitive market. To meet the extraordinary challenges that China is confronting, the Chinese government introduces idiosyncratic provisions within the Draft, including provisions on administrative monopoly. Its use of the AMAB to oppose other governmental entities and prosecute governmental officials is also an innovation. Similarly, the inclusion of socioeconomic standards in merger review symbolizes an ambitious resolve to balance the market system with collective values. The determination of the Chinese government to realize an effective competitive market is also well-reflected in its multiple enforcement instruments. With the possible exception of the United States, China, through the legal text of the Draft, provides for the most diverse range of antimonopoly enforcement tools of any competitive regime. Furthermore, exemptions to the basic obligations under the Draft are rarely allowed relative to the competition laws of other jurisdictions.

However, the body of China's competition law suffers as part of the whole Chinese legal dispensation. Without an adequate legal infrastructure, as has been illustrated, the ambitious initiatives for an effective competitive market might fall into disrepute. Most notably, since enforcement actions against an administrative monopoly will often conflict with industrial policies enforced by other government agencies, the aspirations for vigorous enforcement of competition law will be greatly circumscribed. As a result, for a country like China, whose primary objective is economic development, a consistent and coherent competition policy is difficult to achieve. In this respect, private enforcement should deserve particular attention. Unlike countries such as Korea and Japan, China allows for individuals to get direct access to a court when a cause of action arises. Nonetheless, successful private enforcement of competition law might be greatly hampered by the lack of a sophisticated legal mechanism for gathering evidence and the lack of pecuniary incentives such as treble damages. A matter of further importance, as explained in cartel regulations and merger review, the Draft accords the AMAB too much discretion in eradicating anticompetitive behaviors.

Notwithstanding the foregoing shortcomings in China's competition law, the Chinese government should be commended for its attempts to synthesize a long-standing dichotomy between deregulation and competition policy against private anticompetitive behaviors. It is a matter of policy in each jurisdiction to curb administrative behaviors that in many cases legalize large-scale and gross violation of the spirits of competition law. There is no question that the Chinese model integrates the programs that address public and private anticompetitive behaviors, and presents the most direct way of realizing a competitive market. This synthesis is predominantly driven by China's extraordinary circumstances, but it may incidentally provide "a third way" of framing competition law that provides a tremendous



example particularly for developing countries in which legal and administrative monopolies are rampant. China is still charged with the task of building up a systemic integration that allows the competition law to effectively implement deregulation.

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