

THE IMPACT OF CHINA'S ANTITRUST LAW AND OTHER COMPETITION POLICIES ON U.S. COMPANIES¹

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The House Judiciary Committee, Subcommittee on Courts and Competition Policy, held a hearing on July 13, 2010, to address the impact of Chinese antitrust law on American businesses.³ International competition law and enforcement raise serious policy issues. Congressional attention is appropriately focused on these important questions. The Chinese Anti-Monopoly law is now two years old, having gone into effect on August 1, 2008. Since its adoption, three separate agencies have been organized to enforce various aspects of the law, to issue a variety of rules, regulations, and procedures, and to investigate and make rulings on individual cases. Importantly, a number of these decisions have involved (and affected) American businesses operating in China.

In assessing the impact of the Chinese Anti-Monopoly

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³ Also testifying were Thomas O. Barnett, partner with Covington & Burling, LLP and former Assistant Attorney General for Antitrust, U.S. Department of Justice (testifying in his personal capacity); Abbot B. Lipsky, Jr., partner with Latham & Watkins, LLP; Shanker Singham, partner with Squire Sanders, LLP and Chair of the International Roundtable on Trade and Competition Policy (testifying on behalf of the U.S. Chamber of Commerce).

Law, it is appropriate to begin with the words of American Justice Oliver Wendell Holmes, as written in *The Common Law*.⁴ He explained the following:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy. . . have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.⁵

The 'experience' of Chinese antitrust law encompasses the language of the statute, agency interpretations and decisions, and judicial rulings, which have all been made against the backdrop of history. This experience reveals in microcosm the challenges of a jurisdiction in the process of moving from legal and economic theory to enacted statutory law, rules of implementation, construction of an efficient apparatus to enforce those rules, and then, finally, to actual enforcement within a system that has grown very quickly, potentially outstripping its administrative capacity. With that in mind, this article highlights the following key trends in the development and application of the law:

1. The Chinese Anti-Monopoly Law ("AML") is not a radical departure from mainstream competition law; covering the same categories of business conduct as the American Sherman⁶ and Clayton Acts⁷: horizontal cartels, anticompetitive mergers, monopolization, and unreasonable restraints on distribution. In its specific language, the AML is more directly modeled on the European competition articles, which also reach

⁴ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Boston, Little, Brown & Co. 1881).

⁵ *Id.*

⁶ Sherman Act, 15 U.S.C. §§1-2 (2004). Section 1 states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade ... is declared to be illegal." Section 2 provides that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize ... shall be deemed guilty of a felony ..."

⁷ Clayton Act 15 U.S.C. § 12 *et seq.* Clayton Act, 15 U.S.C. § 18 (1994), specifically discusses mergers and acquisitions.

cartel behavior, abuses of dominant position, horizontal and vertical agreements, and anticompetitive mergers.⁸ However, diverging from the American model of enforcement,⁹ three government agencies are responsible for enforcing separate provisions of the AML.¹⁰ In another departure from American antitrust policy, the Chinese antitrust law explicitly incorporates additional, non-competition factors into the analysis.¹¹

2. American businesses may be particularly affected by the Chinese merger control provisions because the law and its regulations require pre-merger notification based on the parties' total sales in China (not solely the nexus of the transaction to China).¹² During the first year of the AML, more than fifty

⁸ Treaty on the Functioning of the European Union, art. 101-102, 2004 O.J. (C 83) 88-89 [hereinafter *Treaty*], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:P> DF. Art. 101 discusses agreements and Art. 102 concerns abuses of dominant market position. See Council Regulation 139/2004, Jan. 20, 2004, O.J. (L 24) 1 – 22.

⁹ The American federal antitrust laws are enforced by two federal agencies: the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission (“FTC”). Both agencies are empowered to enforce the anti-merger provisions of the Clayton Act, § 7. Clayton Act, 15 U.S.C. § 18 (2010). The Antitrust Division also has jurisdiction to investigate and enforce Sherman Act, 15 U.S.C. §§ 1, 2, and 3, civilly for damages or equitable relief or, where authorized, with criminal penalties. The FTC has jurisdiction under the Federal Trade Commission Act, 15 U.S.C. § 41. The relevant coordinate trade regulation provision, § 5(a)(1), 15 U.S.C. § 45, provides that the FTC has the “power to prohibit . . . [u]nfair methods of competition . . .” including by administrative adjudication, enforcement in federal court, or in the exercise of its rulemaking powers, 15 U.S.C. §§ 45, 46.

¹⁰ Anti-monopoly Law of the People’s Republic of China [hereinafter AML], art. 10, available at http://www.china.org.cn/government/laws/2009-02/10/content_17254169.htm. Article 10 of the AML provides that “The anti-monopoly law enforcement agency designated by the State Council (hereinafter referred to as the Anti-monopoly Law Enforcement Agency under the State Council) shall be responsible for the anti-monopoly law enforcement work.” Three separate entities have been empowered to enforce the provisions of the AML: The Ministry of Commerce (“MOFCOM”) is responsible for merger review, the State Administration for Industry and Commerce (“SAIC”) is responsible for abuse of dominance, non-price agreements, and abuses of administrative power, and the National Development and Reform Commission (“NDRC”) is responsible for enforcing the provisions concerning price agreements.

¹¹ *Id.*

¹² The Decree of the State Council of the People’s Republic of China No. 529, Rules of the State Council on Notification Thresholds for Concentrations of Undertakings (promulgated by the P.R.C State Council, Aug. 1, 2008) available at

transactions were reviewed.¹³ Of that total number, one proposed merger was prohibited and five were approved with conditions.¹⁴ All of these latter six transactions involved at least one foreign firm: Coca-Cola/Huiyuan, InBev/Anheuser Busch, Mitsubishi Rayon/Lucite, Pfizer/Wyeth, GM/Delphi and Sanyo/Panasonic.¹⁵ The agency guidelines and language of the available decisions employ mainstream analytic concepts, but also may import non-economic factors such as “national economic development”¹⁶ and “national security” in mergers involving foreign investors.¹⁷ Greater transparency in the analysis would facilitate business planning and international investment.

3. American antitrust law prohibits monopolization,¹⁸ and, as has been described, the equivalent European provision prohibits abuse of a dominant market position.¹⁹ The AML prohibits abuse of dominant market positions and “monopoly agreements,” which do not require market power as a prerequisite.²⁰ Recent draft regulations issued by the State

<http://fldj.mofcom.gov.cn/column/print.shtml?c/200903/20090306071501> (China) providing: “Where a concentration of undertakings meets any of the below thresholds, a pre-merger notification shall be filed with the competent commercial authority under the State Council, and no concentration shall be implemented without a notification: The total worldwide turnover of all undertakings to the concentration in the previous fiscal year exceeds RMB 10 billion, and the PRC turnover of at least each of two undertakings in the previous fiscal year exceeds RMB 400 million; The total PRC turnover of all undertakings to the concentration in the previous fiscal year exceeds RMB 2.0 billion, and the PRC turnover of at least each of two undertakings in the previous fiscal year exceeds RMB 400 million.”

¹³ Xinzhu Zhang & Vanessa Yanhua Zhang, *Chinese Merger Control: Patterns and Implications*, 6 J. COMPETITION L. & ECON. 477, 478 (2009). The article reports that MOFCOM had “received” 58 merger notifications and reviewed and closed 46 of them.

¹⁴ Hannah C.L. Ha, et al., *China's Anti-Monopoly Law Merger Control Regime – 10 Key Questions Answered (part 1)*, Mayer-Brown JSM (Mar. 2, 2010), available at http://www.mayerbrown.com/public_docs/Client-Update_China.pdf.

¹⁵ *Id.*

¹⁶ AML, *supra* note 10, at art. 27(5).

¹⁷ AML, *supra* note 10, at art. 31.

¹⁸ Unlawful monopolization requires more than merely a large share of a market. The elements of the offense are (1) monopoly power and (2) predatory or anticompetitive conduct. Sherman Act §1 also prohibits horizontal and vertical conspiracies and agreements in restraint of trade. A discussion of such agreements is beyond the scope of this article.

¹⁹ See *Treaty* note 8, *supra*. The relevant provision of the AML is linguistically identical to this article.

²⁰ AML, *supra* note 10, at art. 13 and art. 14.

Administration for Industry and Commerce (“SAIC”) may be so broad that they could limit the ability of large firms to compete; for example, by choosing to deal, or refusing to deal, with particular firms in future business transactions, under the first provision,²¹ or prohibit purely parallel behavior under the latter.²² The Abuse of Dominance regulations also appear to include a non-competition factor into the analysis, requiring consideration of the “impact of relevant actions on the economic operation efficiency, social public interests and economic development.”²³ The Chinese agencies have not yet brought cases charging abuse of dominance and the private cases to date have not involved American firms. Further experience is needed to know whether

²¹ Regulations on the Prohibition of the Abuse of Dominant Market Positions by Industrial & Commercial Administrative Authorities (Draft for Comments) (promulgated by the SAIC, May 25, 2010) unofficial translation by Freshfields Bruckhaus Deringer LLP (on file with author) [hereinafter *Abuse of Dominant Market Positions*]. Article 4 prohibits firms with a dominant market position from a variety of activities, absent justification, including, for example, “suspending current transactions” with a firm (Art. 4(2)), “refusing to enter into new transactions” with the firm (Art. 4(3)), or “making it difficult for the counter-party to continue transactions with it by setting restrictive conditions” (Art. 4(4)).

²² Regulations on the Prohibitions of Actions Involving Monopoly Agreements by Industrial & Commercial Administrative Authorities (Draft for comments) (promulgated by the SAIC, May 25, 2010) unofficial translation by Freshfields Bruckhaus Deringer LLP (on file with author). Article 2 prohibits monopoly agreements, including “other concerted actions to eliminate or restrict competition.” The term “other concerted actions” is defined to include “virtually existing concerted actions among undertakings even though there are no expressly concluded written or oral agreements or decisions.” Article 3 sets out the relevant factors necessary to find these concerted actions. Communication among the parties, consistency of their actions, and the presence or absence of business justifications are listed among these factors. However, the Article does not specifically require an actual agreement, express or implied. The United States Supreme Court stated more than 50 years ago that, ‘conscious parallelism’ has not yet read conspiracy out of the Sherman Act entirely.” *Theatre Ent., Inc. v. Paramount Film Dist. Corp.*, 346 U.S. 537, 541 (1954) (noting that “this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense.”); *Interstate Cir. v. U.S.*, 306 U.S. 208, 225 (1939) (finding that a variety of factors including proposed agreements communicated to all parties, actions against individual self interest but beneficial if taken in concert, and failure to explain the circumstances, “when uncontradicted and with no more explanation ... justify the inference that the distributors acted in concert, and in common agreement.”).

²³ *Abuse of Dominant Market Positions*, *supra* note 21.

the application of Chinese competition law in these areas is consistent with mainstream analysis.

4. Even after decades of liberalization and privatization, thousands of State Owned Enterprises (“SOEs”) may account for as much as half the economy.²⁴ These Chinese firms include traditional utilities as well as industrial sectors of the economy. Although SOEs meet the definition of “business operators” under the AML, they may be subject to different standards and sectoral regulations, even if they possess a dominant share of the market.²⁵

5. In the field of intellectual property, dual policy concerns should be promoted. First, legitimate intellectual property rights (“IPR”) are entitled to protection against infringement. Second, the mere exercise of an IPR should not be deemed to be unlawful monopolization. The first concern is addressed under Chinese laws on patents, copyrights and trademarks, and in international agreements which China has joined. Second, the AML, consistent with U.S. antitrust law, apparently provides that exercising intellectual property rights is not prohibited; patents, for example, are not unlawful abuses of dominance in and of themselves.²⁶

Background and Structure of the Chinese Competition Law

Globally, competition laws have been developing at a rapid pace over the past several decades. These laws are supported by technical assistance and recommendations from a diverse collection of organizations, including: the Organisation for Economic Co-operation and Development (“OECD”),²⁷ the

²⁴ See Joel R. Samuels, “*Tain’t What You Do*”: *Effect of China’s Proposed Anti-Monopoly Law on State Owned Enterprises*, 26 PENN ST. INT’L L. REV. 169 (2007).

²⁵ AML, *supra* note 10, at art. 7 (providing that “[w]ith respect to the industries controlled by the State-owned economy and concerning the lifeline of national economy and national security ... the State shall protect the lawful business operations conducted by the business operators therein, and shall supervise and control the business operations of and the prices of commodities and services provided by these business operators, so as to protect the consumer interests and facilitate technological progress.”).

²⁶ AML, *supra* note 10, at art. 55 (providing that it “shall not apply to the conduct of business operators to exercise their intellectual property rights in accordance with the laws and relevant administrative regulations on intellectual property rights; however, this Law shall apply to the conduct of business operators to eliminate or restrict market competition by abusing their intellectual property rights.”).

²⁷ See generally ORGANISATION FOR ECONOMIC CO-OPERATION AND

United Nations Conference on Trade and Development (“UNCTAD”),²⁸ and the International Competition Network (“ICN”).²⁹ China adopted the AML, its first comprehensive antitrust law of general application, in 2007, and it became effective on August 1, 2008.³⁰ It was part of important legal reforms that began as early as the “reform and opening up” of 1978, and implementation of the “socialist market economy” in 1992.³¹

Antitrust law is comprised of distinct types of trade restraints, including the following: horizontal agreements, which cover hardcore cartels³² and other pro-competitive price³³ and non-price cooperation agreements;³⁴ vertical price and non-price distribution restraints,³⁵ including resale price maintenance³⁶ and tying arrangements;³⁷ monopolization;³⁸ and mergers.³⁹ Overall,

DEVELOPMENT, <http://www.oecd.org>.

²⁸ See generally U.N. CONFERENCE ON TRADE & DEV., COMPETITION LAW AND POLICY, <http://www.unctad.org>.

²⁹ See generally INT’L COMPETITION NETWORK, <http://internationalcompetitionnetwork.org>.

³⁰ AML, *supra* note 10. The AML was under development for more than a decade before it was adopted.

³¹ Zhenguó Wu, *Perspectives on the Chinese Anti-Monopoly Law*, 75 ANTITRUST L.J. 73 (2008); Donald C. Clarke, CHINA: CREATING A LEGAL SYSTEM FOR A MARKET ECONOMY (2007), available at <http://ssrn.com/abstract=1097587>. These articles provide a valuable description of the history and developments culminating in Chinese law reform, including adoption of the first antitrust law of general application.

³² Price fixing is a *per se* violation of the Sherman Act. See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) (“Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*.”). Horizontal market allocation is also *per se* illegal. See, e.g., *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 48 (1990) (*per curiam*).

³³ See, e.g., *Broadcast Music, Inc. v. Columbia Broad. Sys.*, 441 U.S. 1 (1979); *Cal. Dental Ass’n v. Fed. Trade Comm’n*, 526 U.S. 756 (1999); *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006).

³⁴ See, e.g., *Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co.*, 472 U.S. 284 (1985).

³⁵ *Cont’l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

³⁶ *Leegin Creative Leather Prod., Inc. v. PSKS Inc.*, 551 U.S. 877 (2007) (holding that vertical price agreements must be evaluated under the rule of reason).

³⁷ *Illinois Tool Works, Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir.), cert denied, 534 U.S. 952 (2001).

³⁸ *Verizon Commc’n, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540

the touchstone of antitrust law is the protection of consumer welfare and promotion of competition, but not special deference for particular competitors.

There is a general consensus worldwide about many antitrust issues, but others are marked by divergent views in different jurisdictions. These differences may arise from the unique and economic-specific national policies each country's antitrust laws are designed to promote. For example, there is widespread agreement that horizontal cartels are among the most harmful practices and should be prohibited. However, there is less agreement on the precise contours of where the outside boundaries lie. For example, whether the appropriate enforcement mechanism should be limited to governmental actions or should also provide private rights of action, and whether criminal or civil remedies are appropriate. Importantly, there are divergent views with respect to some vertical restraints and distribution practices.⁴⁰ Monopolization, or abuse of a dominant position, is another substantive area where there is general agreement about the competitive harm, but some divergence about other issues (i.e. whether and under what circumstances the law can deal with oligopolistic market structures and where, precisely, the boundary lies between vigorous competition and unlawful conduct).⁴¹

Merger control laws fall within a different category of antitrust enforcement in several respects. Most significantly, modern merger statutes speak in predictive terms. Mergers may be prohibited if they "tend substantially to restrict competition" in

U.S. 398 (2004).

³⁹ See U.S. DEP'T OF JUSTICE AND THE FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES (2010), <http://ftc.gov/os/2010/08/100819hmg.pdf> (last visited Sept. 27, 2010) [hereinafter *Horizontal Merger Guidelines*].

⁴⁰ *Leegin*, 551 U.S. 877. See also *Treaty*, *supra* note 8. But see Tribunal de Commerce [Commerce Tribunal] Brussels, July 3, 1985, European Court Reports 2015 [Eur. Ct. Rep.] 1985, Case 243/83, 2015 (Belg.) (vertical price agreement entitled to an Article 101(3) exemption in some situations).

⁴¹ *E.I. Du Pont De Nemours & Co. v. Fed. Trade Comm'n*, 729 F.2d 128 (2d Cir. 1984) (without more, section 5 does not condemn an oligopolistic industry structure); and *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, O.J. (C 45), Feb. 24, 2009, available at [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009XC0224\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009XC0224(01):EN:NOT) (stating in section III.A.14 that "dominance" is unlikely if a firm's market share is less than 40% of a relevant market).

a properly defined relevant market.⁴² In a globalized world, many large transactions cross national borders and are thus subject to review by more than one national antitrust agency. Some acquisitions may involve key national industries or may tread upon national security interests or ‘national champion firms.’⁴³ Finally, government enforcement agencies investigating proposed mergers do not have the luxury of lengthy investigations.⁴⁴ Time is of the essence in a proposed merger and failure to prohibit a transaction before it is consummated makes any future challenge as difficult as unscrambling eggs. If countries operate on different timetables, require merging firms to produce variant information, or apply different substantive standards, then the ability to compete cross-border may be hampered and global economy substantially frustrated.

It is unsurprising that global competition laws diverge in substance, process, analysis, and fundamental approach to a greater or lesser degree. The AML follows the approach of the majority of antitrust laws, dealing separately with agreements in restraint of trade, monopolization, and mergers.⁴⁵ The prohibitions of anticompetitive agreements and monopolization borrow heavily from the language of Articles 101 and 102 of the European Union treaty.⁴⁶ There are special provisions covering SOEs and Administrative Monopolies, both of which are especially relevant in the Chinese economy.⁴⁷ The American standards on pre-merger notification and substantive analysis have been influential worldwide; they are clearly the ancestor of the Chinese merger law.

However, AML Articles 1 and 4 diverge from the traditional model of antitrust analysis that is based solely on competition principles.⁴⁸ These provisions suggest that interpretation and application of Chinese antitrust law may differ in some important respects from American standards. Article 1

⁴² Clayton Act § 18, *supra* note 7. Modern merger statutes may even block potential agreements even before consummation.

⁴³ INT’L COMPETITION NETWORK, *supra* note 29.

⁴⁴ *Id.*

⁴⁵ Damien Geradin, *The Perils of Antitrust Proliferation – The Process of ‘Decentralized Globalization’ of Antitrust and the Risk of Over-Regulation of Competitive Behavior*, CHI. J. INT’L L. 189, 189 (2009).

⁴⁶ *See Treaty, supra* note 8, at art. 101 and art. 102

⁴⁷ AML, *supra* note 10, at ch. I. art. 7 (concerning State-owned enterprises), art. 8 (prohibition of abuse of administrative authority) and ch. V (abuse of administrative power)

⁴⁸ AML, *supra* note 10, at ch. I art. 1 and art. 4.

provides that “[t]his law is enacted for the purpose of preventing and curbing monopolistic conduct, protecting fair market conditions, enhancing economic efficiency, maintaining the consumer interests and the public interests, and promoting the healthy development of socialist market economy.”⁴⁹ Article 4 authorizes the State to promulgate and implement competition rules suitable for the socialist market economy, perfect the macroeconomic control,⁵⁰ and improve a united, open, competitive, and well-ordered market system.⁵¹

Since 2008, three separate government agencies have been established and assigned responsibility for individual antitrust issues under the AML: the Ministry of Commerce Anti-Monopoly Bureau (“MOFCOM”), the SAIC, and the National Development and Reform Commission (“NDRC”). The MOFCOM is responsible for reviewing proposed mergers (referred to as “concentrations” in the AML) and enforcing the anti-merger articles of the law; the SAIC has responsibility for enforcing the prohibitions against abuse of dominant positions, monopoly agreements, and anti-administrative monopoly regulation; and the NDRC is responsible for price agreements and has issued regulations on anti-pricing monopoly regulation. These categories are not airtight, so it is important that the regulations are consistent and applied transparently.

The agencies have been busy drafting and adopting rules and regulations, reviewing mergers, including transactions involving multinational firms, and rendering decisions in the nearly two years since the AML became operational. Some of the proposed regulations have invited comments from interested parties, including the American Bar Association (“ABA”), Sections of Antitrust Law, and International Law.⁵² The American Chamber of Commerce – People’s Republic of China (“AmCham”) provided extensive analysis and recommendations that have been reflected in some revised regulations.

Most recently, SAIC disseminated three regulations on May 25, 2010, concerning monopoly agreements, abuse of a dominant market position, and abuse of administrative powers.⁵³ Comments were invited and provided by the ABA Sections of

⁴⁹ AML, *supra* note 10, at ch. I art. 1.

⁵⁰ AML, *supra* note 10, at ch. I, art. 4.

⁵¹ *Id.*

⁵² *Comments of the ABA Section of Antitrust Law*, available at <http://www.abanet.org/antitrust/at-comments/comments.shtml>

⁵³ *Abuse of Dominant Market Positions*, *supra* note 21.

Antitrust Law and International Law, among other parties.⁵⁴ These documents were revisions of earlier drafts and reflect some of the previous recommendations.⁵⁵ On July 5, 2010, the MOFCOM released a set of provisional rules concerning divestitures in merger cases, but did not seek comments at this stage.⁵⁶ The openness of the Chinese enforcement agencies to considering views and recommendations of international competition experts is salutary. International benchmarking and promulgation of recommended practices have become features of effective antitrust enforcement in this era of global competition. Much of the networking now occurs in organizations such as the International Competition Network, but there is an important place for bilateral consultation and sharing of expertise among agencies, and with non-governmental advisors. Future consultation on these and other draft regulations should be encouraged and should involve a variety of experts. Ultimately, clear rules based on sound economic principles will benefit the agencies enforcing the law, businesses seeking to comply, and the ultimate consumer. Beyond agency regulation, investigation, and enforcement, Chinese courts have rendered a number of decisions in private actions under the dominance articles of the AML, none involving U.S. businesses.

In a 2010 Policy Brief, the OECD reported on the positive economic developments and challenges that China faces.⁵⁷ The report praises the growing competitive market economy, increased privatization, and new antitrust policy, stating that “market forces are now generally the main determinant of price formation and economic behaviour.”⁵⁸ It recommends lowering barriers to private competition and promoting foreign investment by limiting government intervention in markets, including

⁵⁴ *Joint Comments of the American Bar Ass’n Section of Antitrust Law and Section of Int’l Law on the SAIC Draft Regulations on the Prohibition of Acts of Monopoly Agreements, of Abuse of Dominant Market Position and of Abuse of Administrative Powers* (July 2, 2010) [hereinafter *Joint Comments*], available at http://www.abanet.org/antitrust/at-comments/2010/07-10/comments_2010_sil_saic.pdf.

⁵⁵ *Id.* at 7, 9.

⁵⁶ Ministry of Commerce of the People’s Republic of China, *Provisional Rules on the Implementation of Acquisition or Divestiture of Assets or Businesses for Concentrations of Business Operators*, Notice No. 41, 2010 (July 5, 2010) [hereinafter *Provisional Rules*].

⁵⁷ OECD Policy Brief, *Economic Survey of China, 2010*, Feb. 2010, available at <http://www.oecd.org/dataoecd/22/19/44468723.pdf>.

⁵⁸ *Id.*

SOEs.⁵⁹

The trend toward a market economy in China carries the promise of continuing harmonization with modern antitrust analysis, but the AML's application of non-economic factors, undefined national security considerations in merger review, and potential special treatment of SOEs all indicate that there may be some important divergences. American businesses operating in China are subject to the Chinese antitrust law for the "conduct [of] economic activities within the People's Republic of China" and for extraterritorial activities that effectively eliminate or restrict competition in China.⁶⁰ Indeed, American firms that meet the threshold turnover in China are subject to the mandatory pre-merger notification requirements for transactions that may, or may not, have a significant impact in China.

1. Legal Standards Include Non-Economic Factors

The stated legislative purposes of the AML include traditional theories of consumer welfare, including: protecting competition; enhancing efficiency; and prohibiting monopolization.⁶¹ Article 1 of the law goes further, however, and also seeks to advance the "healthy development of [a] socialist market economy" and promote "public interests."⁶² These public policy goals are not defined in the statute, but Article 4 empowers the State to "make and implement" regulations "suitable for the socialist market economy, [to] perfect the macro control, and improve a united, open, competitive and well-ordered market system."⁶³

The *SAIC Regulations on the Prohibition of the Abuse of Dominant Market Positions* (draft for comments, May 25, 2010), Article 8, may have incorporated one such non-economic consideration into the list of justifications for firms charged with abusing a dominant market position. These listed factors include competitive effects and business justifications (both traditional economic considerations), but also the effect on "social public interests and economic development."⁶⁴ This provision is in accord with the AML's legislative purposes, but is not generally

⁵⁹ *Id.*

⁶⁰ AML, *supra* note 10, at ch. I, art. 2.

⁶¹ AML, *supra* note 10, at ch. I, art. 1, 4.

⁶² AML, *supra* note 10, at ch. I, art. 1.

⁶³ AML, *supra* note 10, at ch. I, art. 4.

⁶⁴ *Abuse of Dominant Market Positions*, *supra* note 21.

within the mainstream of modern antitrust analysis.

2. Merger Regulations and Decisions

Even before the AML, the MOFCOM promulgated guidelines for foreign acquisitions of Chinese firms. The *Provisions on Acquisition of Domestic Enterprises by Foreign Investors* law (foreign mergers & acquisition rules) provides that “foreign investors shall comply with the [Chinese] laws...and adhere to the principles of fairness, reasonableness, compensation for equal value, and honesty and good faith...and shall not . . . disturb the social economic order or harm the societal public interests . . .”⁶⁵ Article 12 requires “parties involved in acquisitions of domestic firms by foreign investors” to obtain approval if the “acquisition involves any major industry, or has or may have an impact on the state economy security, or may result in transfer of the actual controlling right of the domestic enterprise owning any famous trademarks or traditional Chinese brands.”⁶⁶ This concept was transplanted, in part, to AML Article 31, which provides for additional review of transactions between foreign buyers and domestic firms if “national security” is implicated.⁶⁷ The term “national security” is undefined in the AML and has not yet been explicated in regulations, so the breadth of the concept is unclear. It is ambiguous whether this term includes economic interests of the state or solely national defense. As discussed above, the potential consideration of non-economic factors could inhibit competition and decrease consumer welfare, a result antithetical to the generally recognized goals of antitrust.

Since 2008, the MOFCOM has supplemented the AML with a series of regulations that set monetary thresholds for pre-merger notification, describe the filing requirements in more detail, define relevant markets, and establish standards for investigations of transactions below the filing thresholds.⁶⁸ These regulations were first produced in draft form and, in accord with the best practices recommended above, comments were solicited

⁶⁵ *Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* (promulgated by the Ministry of Commerce, June 22, 2009), China.

⁶⁶ *Id.*

⁶⁷ AML, *supra* note 10.

⁶⁸ Susan Beth Farmer, *The Evolution of Chinese Merger Notification Guidelines: A Work in Progress Integrating Global Consensus and Domestic Imperatives*, 18 TULANE J. INT’L L. & COMP. L. 1, 49 (2009).

and provided by a number of sources including American antitrust experts.⁶⁹

Adding to the body of regulatory law, the MOFCOM distributed new rules on divestiture standards and procedures on July 5, 2010.⁷⁰ These regulations are concrete and practical, applying to any divestiture of assets required by the agency or agreed by the parties as a condition for approval of the proposed merger. Generally, the parties are required to maintain any such assets, operate them independently, and provide information and assistance to prospective buyers.⁷¹ The rules require appointment of a trustee to monitor the entire process and, if the parties cannot find an appropriate buyer, require another trustee to do so.⁷² There was no opportunity to comment on the specifics of the regulation, but preservation of assets and efficient divestiture practices appear sound and within the mainstream of antitrust practice.

The reputation of merger enforcement will depend on transparent analysis based on sound principals and equitable treatment of all proposed transactions and whether they involve foreign or domestic firms. This process has the additional effect of protecting the competitive process rather than individual firms, and ultimately benefits consumers by offering more choice in the competitive market. As Justice Holmes' observation about the life of laws suggested, the life of the AML, supplemented by its rules and regulations, is revealed most clearly by experience in the cases.⁷³ At the time this article was published, updated official statistics were unavailable, but it had been reported that the MOFCOM reviewed fifty-two proposed transactions during the first year of the AML (August 2008 to July 2009) and approved forty-six of them without conditions.⁷⁴ The Ministry of Commerce provided updated statistics on August 12, 2010, reporting that, as of the end of June 2010, it had reviewed more than 140 proposed mergers "and approved 95 percent of them

⁶⁹ *Id.*

⁷⁰ *Provisional Rules*, *supra* note 56.

⁷¹ *Id.*

⁷² *Id.* at ch. I, art. 5, 8-10.

⁷³ *See* Holmes, *supra* note 4, at 1.

⁷⁴ Mayer-Brown JSM, *China's Anti-Monopoly Law Merger Control Regime - 10 Key Questions Answered (Part 1)* (Mar. 2, 2010), available at http://www.mayerbrown.com/public_docs/Client-Update_China.pdf.

Assuming a fairly constant stream of transactions, it is possible that the MOFCOM has reviewed nearly twice that number at the 2-year anniversary of the law.

‘with no strings attached.’⁷⁵ The prohibited transaction, Coca-Cola/Huiyuan, involved a foreign buyer seeking to acquire a well-known domestic firm. The five transactions approved with conditions all involved foreign firms and, according to the same source, no transaction involving two domestic firms was rejected outright or approved subject to conditions.⁷⁶ The Ministry of Commerce has recently confirmed that one transaction was prohibited and five were approved with conditions, and that all of these six cases involved one or more foreign firms.⁷⁷ A recent briefing paper commented that the AML merger articles generally do not reflect “inherent bias” against non-domestic firms, while expressing concern about Article 31 and the specific transaction discussed below.⁷⁸

The prohibited merger of Coca-Cola/Huiyuan is an early but instructive example of the merger control process. Huiyuan, the Chinese target firm, was founded in 1992, in Shandong Province and, by the date of the proposed transaction, had a national distribution network.⁷⁹ It was the largest privately owned juice-producer in China, selling juice, water, tea, dairy, and nectar drinks, and was one of the leading twenty-five domestic brands, according to a survey by the China Brand Union Association.⁸⁰ The acquirer, Coca-Cola, had marketed carbonated soft drinks in China since 1976, and Minute Maid juice since 2007.⁸¹ The proposed transaction, made in 2008, was a \$2.4 billion all cash offer.⁸² The reaction of Chinese citizens to the

⁷⁵ Ding Qinfen, *Anti-trust law treats ‘all firms equally’*, CHINA DAILY, Aug. 13, 2010, available at http://www.chinadaily.com.cn/bizchina/2010-08/13/content_11148199.htm. The Director-General of the MOFCOM Anti-Monopoly Bureau, Mr. Shang Ming, stated that “a high ratio” of foreign firms were among those seeking approval of proposed mergers. The merger review process is a three-stage process, and more than 60% of the reviews were completed during the first phase, requiring less than a month. He predicted that further rules and regulations will be forthcoming in the merger area.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Mayer-Brown JSM, *supra* note 74.

⁷⁹ *Coke Offer for Huiyuan Triggers Widespread Worry for Famous Domestic Brand in China*, XINHUA (Sept. 4, 2008), available at <http://english.sina.com/business/2008/0904/184005.html> [hereinafter *Coke Offer Triggers Worry*].

⁸⁰ *Id.*

⁸¹ *Coke Offer for China’s Huiyuan Could Face Difficulties Winning Approval*, XINHUA (Sept. 3, 2008), available at <http://english.sina.com/business/2008/0903/183751.html>.

⁸² See Zhang and Zhang, *supra* note 13, at 3.

proposed acquisition was strongly negative: a contemporaneous Sina.com poll found that 80% of 229,000 responders voted against the proposed merger because foreign firms should not take over Chinese “pillar brands.”⁸³

The first step in merger analysis, both in the United States and under the AML, is a determination of the product and geographic markets.⁸⁴ Huiyuan was the largest juice firm in China, with slightly less than half of the 100% pure juice market.⁸⁵ If the merger had been approved, the merged firm would have possessed approximately 37% of a market defined as “juice drinks,” but only 18% of a market defined as “carbonated soft drinks.”⁸⁶ Coke itself had 16.3% of the “carbonated soft drink” market pre-merger, less than the 17.9% market share of the largest firm in the market, Groupe Danone.⁸⁷

The parties to the transaction notified the MOFCOM under the pre-merger notification requirement and the review proceeded through a second stage review, which stated that the investigation was proceeding under the AML and not the foreign anti-monopoly law.⁸⁸ On April 18, 2009, the MOFCOM prohibited the transaction and published a brief analysis finding that there was a threat to competition, which was not offset by any justification in the AML.⁸⁹ The decision does not provide a

⁸³ *Coke Offer Triggers Worry*, *supra* note 79.

⁸⁴ See, e.g., *Horizontal Merger Guidelines*, *supra* note 39. The MOFCOM has not promulgated a full set of merger guidelines at this time; however, it published Draft Guidelines for the Definition of Relevant Market, on Jan. 7, 2009, available at <http://fldj.mofcom.gov.cn/aarticle/zcfb/200901/20090105993492.html>. An unofficial translation is available at <http://www.abanet.org/antitrust/at-comments/2009/01-09/translation-china-mofcom.pdf> and comments by the ABA Sections of Antitrust Law and International Law (Jan. 30, 2009) are available at <http://www.abanet.org/antitrust/at-comments/2009/01-09/comments-china-mofcom.pdf>.

⁸⁵ *Coca-Cola Puts New Takeover Law to the Test*, CHINA DAILY (Sept. 5, 2008), available at <http://english.sina.com/business/2008/0904/184124.html>.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Zhang & Zhang, *supra* note 13 at 480.

⁸⁹ *China's Statement Blocking Coca-Cola Huiyuan Deal*, The Wall Street Journal online (Mar. 18, 2009), available at <http://blogs.wsj.com/chinarealtime/2009/03/18/china%e2%80%99s-statement-blocking-coca-cola-huiyuan-deal/>; See also *Coca-Cola in China: Squeezed Out*, THE ECONOMIST (Mar. 18, 2009), available at http://www.economist.com/daily/news/PrinterFriendly.cfm?story_id=1331505 6 (on file with author); *Coke Bid for Juice Maker Turns Sour*, CHINA DAILY (Mar. 19, 2009), available at

detailed economic analysis of the product market, defined as “fruit juice.”⁹⁰ The threatened anticompetitive harm, according to the decision, was Coca-Cola’s power to use its dominance in the carbonated soda market to limit competition in the juice market, resulting in higher prices and fewer choices for consumers; effectively, a monopoly leveraging theory.⁹¹ In an official statement, the agency stated: “If the acquisition went into effect, Coca-Cola was very likely to reach a dominant position in the domestic market and consumers may have had to accept a higher price fixed by the company as they would not have much choice.”⁹² Additionally, the decision found that power of the brands in the transaction would raise barriers to entry and threaten small and medium juice firms⁹³. The Foreign Ministry rejected concerns that the decision was based on national protectionism.⁹⁴ The case raises several issues not yet clearly answered under the AML and the merger regulations. Did the transaction implicate national security? Does acquisition of a famous domestic brand threaten economic security?

3. Abuse of Dominant Market Position/Monopolization

In the first two years of the AML, standards for the offense of abuse of dominance have been developed through SAIC rules and private enforcement actions. There have been a number of private actions, but no reported dominance cases involving U.S. firms. The important policy considerations in the monopolization cases are both procedural and substantive.

Abuse of dominance cases are complex, requiring the decision-maker to apply sophisticated economic analysis to distinguish between lawful competition and unlawful predation.

<http://english.sina.com/business/p/2009/0318/226909.html>.

⁹⁰ *China’s Statement Blocking Coca-Cola Huiyuan Deal*, *supra* note 89.

⁹¹ *Id.*

⁹² See generally Fei Deng, Adrian Emch, Gregory K. Leonard, *A Hard Landing in the Soft Drink Market – MOFCOM’s Veto of the Coca-Cola & Huiyuan Deal*, GCP – Global Competition Policy at 3 (Apr. 2009), available at <https://www.competitionpolicyinternational.com/a-hard-landing-in-the-soft-drink-market-mofcoms-veto-of-the-coca-cola--huiyuan-deal/>.

⁹³ *Id.* See also Huyue (Angela) Zhang, *Problems in Following E.U. Competition Law: A Case Study of Coca-Cola/Huiyuan*, PEKING UNIVERSITY J. LEGAL STUD. (forthcoming 2010) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1569836.

⁹⁴ *Coke Bid Ruling “Not Protectionist”*, CHINA DAILY (Mar. 3, 2009), available at <http://english.sina.com/business/2009/0322/227849.html>.

The SAIC itself is responsible for investigation and enforcement in cases alleging abuse of dominance or monopoly agreement. It has broad authority to decide whether to initiate and decide a case at the SAIC level, or, where appropriate, to delegate the matter to one of the provincial, autonomous regional or municipal agencies.⁹⁵ The need for judicial expertise is also appreciated, and cases are likely to be directed to the Intellectual Property sections of lower courts or to the Intermediate Courts because of their experience in handling complex cases. This is a positive development that should give litigants confidence in the quality and efficiency of the decisions.

4. State Owned Industries, Administrative Monopolies

AML Article 7 provides that:

[W]ith respect to the industries controlled by the State-owned economy and concerning the lifeline of national economy and national security . . . the State shall protect the lawful business operations . . . and shall supervise and control the business operations of and the prices of commodities and services . . . to protect the consumer interests and facilitate technological progress.”⁹⁶

Further, it requires that SOEs “be honest, faithful and strictly self-disciplined, and accept public supervision, and shall not harm the consumer interest by taking advantage of their controlling or exclusive dealing position.”⁹⁷

Articles 32 through 37 prohibit the abuse of administrative power.⁹⁸ These strong provisions prohibit public agencies from abusing their power to limit competition or benefit particular firms, prohibit discrimination among national regions, and prohibit special consideration for local firms in public purchasing

⁹⁵ See generally, *Procedural Rules by Administration of Industry and Commerce Regarding Investigation and Handling of Cases Relating to Monopoly Agreement and Abuse of Dominant Market Position* (unofficial translation by Jones Day) (2009), at art. 2 and art. 5, available at http://www.globalcompetitionforum.org/regions/asia/China/SAIC_PR_11.pdf (referred to as Administration of Industry and Commerce [AIC] authorities).

⁹⁶ AML, *supra* note 10, at ch. I, art. 7.

⁹⁷ *Id.*

⁹⁸ AML, *supra* note 10, at c. V, arts. 32-37.

and bidding.⁹⁹ These sections, as supported by the July 2010 SAIC regulations, are not typically found in antitrust laws, but they are appropriate and pro-competitive in the highly regulated Chinese context. If enforced, these sections are both pro-consumer - because they promote competition - and pro-private enterprise, including American businesses that wish to operate in China.

5. Intellectual Property

AML Article 55 provides that the mere exercise of intellectual property rights is not prohibited and is not a violation of the antitrust law, but “abuse” of intellectual property rights that restrains competition does violate the statute.¹⁰⁰ This provision has the potential to advance the dual considerations important to intellectual property: legal protection of intellectual property as property rights and the recognition that the intellectual property, including patents, does not necessarily give the owner the kind of “power” prohibited by the abuse of dominance provisions.¹⁰¹

While a detailed discussion of the Chinese laws and international agreements protecting intellectual property rights is beyond the scope of this comment, the legal infrastructure, including creation of special intellectual property courts, is in development.¹⁰²

Conclusion

Chinese antitrust law, interpretation, and enforcement have undergone significant reform in the two years since the

⁹⁹ *Id.*

¹⁰⁰ AML, *supra* note 10, at ch. VIII, art. 55.

¹⁰¹ This is in accord with a recent Supreme Court decision. *See*, Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006). Although the case concerned a tying arrangement and not a monopoly, the issue presented was whether market power should be presumed when a product is patented. The Court rejected the presumption of power and held that proof of power was required.

¹⁰² For brief summaries, *see* Kristina Sepetys & Alan Cox, *Intellectual Property Rights Protection in China: Trends in Litigation and Economic Damages*, National Economic Research Associates, Inc., (2009), available at http://www.ipeg.eu/blog/wp-content/uploads/NERA-IP-Protection_China_2009.pdf; *see also* Richard S. Gruner, *Intellectual Property in the Four Chinas*, 37 INT’L L. NEWS 7 (ABA Section of Int’l Law, Spring 2008).

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AML came into effect. The organization and staffing of the enforcement agencies and the publication of numerous procedures, guidelines, and regulations suggest that capacity building is important and ongoing. The Holmesian 'life' of this law shows consideration of international best practices and a trend towards the consumer welfare model of antitrust thought, mediated by domestic approaches to national policy and governance. Moreover, the AML and regulations include certain non-economic considerations and other provisions, such as treatment of SOEs and administrative monopolies that are specific to the national history and development of the Chinese market economy.