DAWN OF A NEW CONSTITUTIONAL ERA OR OPPORTUNITY WASTED? AN INTELLECTUAL REAPPRAISAL OF CHINA'S ANTI-MONOPOLY LAW

Oliver Q.C. Zhong

Abstract

Against the backdrop of a society with liberalizing but still firmly entrenched legal norms of collective ownership and economic planning, the government of the People's Republic of China enacted the Anti-Monopoly Law in 2007. This article will explain the history against which the AML was passed, followed by an analysis of the AML itself. This discussion will be divided into two parts: a description of the AML's statutory structure as promulgated, and a synopsis of subsequent regulatory enactments operating upon the law. In conclusion, the article will consider the implications of the AML for the China of today and tomorrow.

Author

Associate, Sidley Austin, Hong Kong. Research Fellow, U.S. Asia Law Institute (2009–2010), New York University School of Law. J.D., University of Michigan; M.P.A., University of Texas at Austin, Lyndon B. Johnson School of Public Affairs. The author would like to express his gratitude to Professor Jerome A. Cohen and the U.S.-Asia Law Institute at New York University School of Law, whose generous support and invaluable assistance made this article possible. The views expressed in this article are the author's only, and are not those of Sidley Austin LLP.

INTRODUCTION

Competition is self-determination. Under the central premise of liberal capitalism, individuals are better managers of their own properties, and an economic system organized around private competition generates greater good in the aggregate.

However, two problems may compromise this premise. First, human nature dictates that if the powerful can collude rather than compete with impunity, they will. Thus consumers will suffer, innovation will cease, and social mobility will stall. The state must therefore intervene, and in this context, competition law is indeed fundamental in preventing corruption and chaos in a system based upon free exchange. Second, there can be no exchange to begin with if individuals do not have property rights. Aggregate prosperity is a mirage if individual well-being is not established. An effective competition law may formally address the first problem, but a truly competitive society is unsustainable without strong institutional safeguards against the second problem. Not surprisingly, competition law has always been a prized concept of Western liberal democracy.

In this respect, one could be forgiven for finding the notion of a Chinese competition law oxymoronic, or at least perplexing. After all, the People's Republic of China ("P.R.C.") is still constitutionally organized on collective ownership of property and politically managed by one party. Even with the critical 2004 Amendment to the Constitution, which for the first time pronounced protection of private property,[1] and the passage of the 2007 Property Law,[2] the state still dominates the nation's affairs both in theory and in practice. In recent times, state involvement in property rights is waxing, not waning.[3]

It is against this background that China's Anti-Monopoly Law ("AML") was enacted, challenging commentators for an intelligent and coherent explanation.[4] This is because the underlying contradictions are so unyielding that there can be no avoiding the following difficult questions: Why was the AML passed? Will it be effective?

An answer to the first question can be easily formulated. As a leading U.S. antitrust expert observed, antitrust law is to developing countries in the early twenty-first century what the hydroelectric dam presumably was to developed

---

[1] "Citizens' lawful private property shall not be violated." 宪法 [CHINA CONST.] art. 13 (1982) (China).

[2] 中华人民共和国物权法 [Property Law] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007) (China).

[3] *See, e.g.*, Derek Scissors, *Deng Undone: The Costs of Halting Market Reform in China*, 88 FOREIGN AFF. 24, 24 (2009).

[4] 中华人民共和国反垄断法 [Anti-Monopoly Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) (China) [hereinafter AML].

countries in the twentieth century.[5] This fascination derives in equal parts from a material desire for glamorous abundance as well as a rather amorphous, almost adolescent aspiration toward liberalization. For example, in the early 1990s, Eastern European countries rushed to reopen stock markets, which in the eyes of their citizens were symbolic of market economy and freedom.[6] The West played no small part in nurturing these aspirations, notably under the ideological chapeau of the Washington Consensus, which required developing countries to undertake comprehensive liberalization measures before they could receive aid from or join multilateral institutions organized by Western countries. Indeed, in China's case, the accession to the World Trade Organization was an apparent catalyst for the AML to gain priority on the crowded legislative agenda.

The latter question requires a more developed analysis. The investigation begins from within the technical confines of competition law, that is, what legal structure does the law put in place and what reliable projections can be made about its positive future? A growing literature by internationally-minded academics and major law firms addresses exactly this issue.[7] Close monitoring of the AML is taking place both within and outside China, work that is both necessary and important.

However, competition law alone is not the answer because in an economy undergoing thirty years of the most remarkable market reform of our time, which at its core has been a profound struggle to decide who sets the terms of civil exchange, the arrival of canonical rules of competition must flourish as either a decisive victory for the market or a glaring prematurity. It also cannot be the answer because in a monolithic polity, a basic law regulating how discrete social units deal with one another either touches a constitutional dimension or remains a dead letter.[8] There may be half-hearted execution, but no doctrinal third way. Even from a strictly commercial viewpoint, any experienced practitioner in China knows that the AML will certainly not operate within a vacuum. Hence, current assessments and future predictions of the AML's importance can only be understood within the context of the

[5] Yee Wah Chin, Counsel, Ingram Yuzek Gainen Carroll & Bertolotti, LLP, Remarks as a Guest Speaker in Professor Jerome A. Cohen's Seminar, *Settling International Business Disputes with China*, at New York University School of Law (Apr. 27, 2009).

[6] Hungary reopened the Budapest Stock Exchange in 1990, Czechoslovakia reopened the Prague Stock Exchange in 1992, and Romania reopened the Bucharest Stock Exchange in 1995. China's Shanghai Stock Exchange and Shenzhen Stock Exchange both opened in 1990.

[7] *See, e.g.*, Eleanor Fox, *An Anti-Monopoly Law for China—Scaling the Walls of Protectionist Government Restraints*, 75 ANTITRUST L.J. 173 (2008); Bruce M. Owen et al., *China's Competition Policy Reforms: The Antimonopoly Law and Beyond* (John M. Olin Program in Law and Economics, Working Paper No. 339, 2007).

[8] The empowerment of individuals comes through in two ways: (1) by requiring the state to compete with individuals rather than ruling by fiat, and (2) by requiring individuals to compete with each other instead of seeking favors from the state.

country's fluttering contemporary political-legal fabric, and its historic and intellectual tradition.

In addition, it would indeed be disappointing if competition law alone was the answer because this law offers a unique opportunity to set a historic milestone on not only the country's economic transition, but also on the avowed path to the rule of law by creating, or at least laying the foundations for, a judicially-manageable constitutional relationship between the state and individuals.[9] If such a historic breakthrough fails to materialize, it would mean an opportunity wasted.

More than two years has passed since the AML became effective; it is time for a reappraisal. For those who may think more time is needed for a proper assessment, it must be underscored that the AML is an unusual piece of legislation in terms of its drafting process. It is the end product of an abnormally long legislative process,[10] adorned with abrupt, existential twists and turns—not at all surprising given the inherent difficulties outlined above.[11] For the outsider, it presents many urgent questions at commencement, and the answers, though perhaps not readily evident, are obtainable.

This does not mean that circumstances, even significant ones, will not change; they always do, and sometimes unexpectedly. Yet the possibility of revision is no reason to delay examination. On the contrary, considerable urgency lies in the fact that the AML's great potential will surely go unrealized if the law does not receive principled academic and public policy attention.

The idea of a reappraisal refers to the many commentaries made over the AML's long drafting process. When the law was finalized, there were already expectations, if not confident projections, of what it would look like. Therefore, it is the modest ambition of this article to illustrate how the discourse could be framed differently, specifically, from a higher level of abstraction. This means a focus on "ideas." While this article contains some illustrative discussion of specific rules, an economic-legal analysis of a technical nature is not the purpose of the article.

---

[9] In other words, there is an opportunity for a "breakthrough point of reform" (改革突破口).

[10] Drafting began as early as 1994 and took almost fourteen years to finish. This is unusual in China, where "important legislation usually can be marshaled through the legislative process very quickly, once the leadership reaches consensus on the legislation." Owen, *supra* note 7, at 2–3.

[11] For example, the chapter on "Administrative Monopolies," a focal point of contention, was removed in the penultimate draft, but miraculously reappeared in the final text. *See* 谢晓冬 [Xie Xiaodong], 《反垄断法》草案减负 "反行政垄断" 被整体删除 [*Anti-Monopoly Law Draft Downsizes: "Anti-Administrative Monopolies" Content Removed*], 新京报 [BEIJING NEWS], Jan. 11, 2006, *available at* http://www.people.com.cn/GB/54816/54822/4016799.html; 袁婷 [Yuan Ting], 反垄断法争议中前行: 行政垄断存废的利益博弈 [*Anti-Monopoly Law Marches on amid Controversy: Game of Interest Behind the Administrative Monopolies Debate*], 法制日报 [LEGAL DAILY], Aug. 30, 2007, *available at* http://mentougou.tax861.gov.cn/cyxx/display.asp?more_id=1174011. For a detailed discussion on administrative monopolies, see *infra* Part I.B.

In sum, this article aims to do three things: (1) to re-conceptualize the AML as promulgated, and identify major policy ambiguities; (2) to review official updates and developments since promulgation with an eye to clarify such ambiguities; and (3) to place the AML in China's intellectual tradition so as to ascertain what it signifies for the present and the future. The following parts of this article are organized accordingly.

I. ANTI-MONOPOLY LAW AS PROMULGATED: A CRITICAL REVIEW

The AML is not one but several laws. It resembles a multi-headed hydra, not in the sense that it encompasses, as competition laws frequently do, separate sets of rules governing separate categories of conduct (e.g., cartel, monopolization, and concentration), but in the sense that it conglomerates competition law proper with portions of what this article will call the law of central-local relations—constitutional and administrative law—and the law of foreign economic relations.

This fact should have been recognized or understood better. The reason it has not been is attributable to, at a high level of simplification, a matter of translation. The main discussion on this point is in Section III, yet a brief "interlocutory" explanation here is necessary since it is quite central to a good understanding of the issue.

Take *xian fa* (宪法), for example. "Constitution" is the unshakeable translation. There is no better or conceivable alternative as a matter of both syntax and usage. Yet it has been convincingly shown that the Chinese conception of *xian fa* is not quite equivalent to the word "constitution" in English.[12] Two points bear emphasis. First, the Chinese Constitution is not judicially operative. A radically different light is required when one attempts to read the *xian fa* in the mode of a constitutional document with all the customary accessories, ramifications, and implications. Second, it is not merely a "language problem."[13] "Fluency," in the conventional sense, is irrelevant as native Chinese speakers, including legal academics, are as fallible as native English speakers. Together, the caveat about translation represents not a matter of linguistic esoterica but a highest form of art in the science of comparative law.

The same can be said of many, if not most, key terms in Chinese law; one finds, however, in the AML a particularly pronounced case. At this juncture it suffices to point out that the translation *fan long duan fa* (反垄断法) and "Anti-Monopoly Law" do not convey identical meanings. It is not too tenuous for the AML to include contents that are not strictly "anti-monopoly" because such contents could be proper *fan long duan* (反垄断) concerns.[14]

---

[12] Donald C. Clarke, *Puzzling Observations in Chinese Law*, *in* UNDERSTANDING CHINA'S LEGAL SYSTEM 93, 103–09 (C. Stephen Hsu ed., 2003).

[13] This proposition will hold true unless one subscribes to the philosophy that all worldly matters can be reduced to language and grammar.

[14] Whether to do so would be desirable is another question not discussed in this article.

It is only wise, accordingly, to heed the functional separation and parse through the AML text separately. This section examines each of the three components in turn.

A. Antitrust Law Proper

1. Structural Formalism

However groundbreaking its subject matter, the AML remains a typical Chinese law, embodying a number of typical characteristics. First, in terms of the overall structure, it prizes formality. Since it is the controlling authority in a specialty area of law, it must be conclusive. Its success relies upon not only supplying right answers to current disputes but also upon being broad and structured enough to entertain all potential problems in an authoritative and organized way.

To this end, like other Chinese laws, it begins with a chapter of overarching "general principles" that explain the law's purpose, jurisdiction, definitions, and so on. Further down, Article 3 defines "monopolistic conduct" for the purpose of the AML as (1) monopolistic contracts; (2) abuses of a dominant market position; and (3) concentrations that restrain or potentially restrain competition.[15]

Chapters 2, 3, and 4, respectively, address each of these three categories of conduct. These categories must strike U.S. lawyers as familiar because they are roughly comparable to Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. Chapter 5 contains the unique provisions about administrative power, which this article discusses at length below. Chapter 6 describes the investigation process. Chapter 7 defines liabilities. Chapter 8, which is the "Appendix," concludes with specific provisions for intellectual property and agriculture.

2. Order of Priorities

Second, the law brims with aspirational language that seems stock and dispensable, yet may contain a surprising amount of significance. Nothing better epitomizes this than Article 1, which, in its entirety, provides that:

> [I]n order to prevent and stop monopolistic conduct, to protect fair competition of the market, to enhance efficiencies of economic operations, to safeguard consumer interests and public interests of the society, and to promote the healthy development of the Socialist market economy, this Law is hereby promulgated.[16]

---

[15] AML, *supra* note 4, art. 3.

[16] *Id.* at art. 1.

Prosaic as it may look, this is several storms in one small teacup and a rather contradictory mixture at that. On the positive side, the persistent use of the term "monopolistic conduct" in lieu of simply "monopoly," reveals a whole-hearted Chinese acceptance of a particularly American influence.[17] It has become only in recent decades the settled view in the United States itself that the role of antitrust law is to punish abusive conduct, not the status of monopoly that may have been obtained through hard work, innovation, or luck.[18] Indeed, obtaining the status of monopoly is exactly what antitrust law incentivizes businesses to aspire to. Also, the prominent position conferred on efficiencies—behind "competition" yet before "consumer interests"—is remarkably effortless and free of the historical baggage that has taxed more mature jurisdictions for decades.[19]

On the negative side, however, "fair" competition and "public interests" are both common codes for anti-competitive government intervention. In addition, "healthy development" is typical Chinese officialese for central planning of the economy, which is surely beyond the scope of any competition rules. One can easily see that the drafter took special care to insert "Socialist" before "market economy" to maintain the correct color of the document, even though the term managed to come up only at the bottom of the group.[20]

3. Substance Without Specificity

Third and most importantly, the law lacks specificity. An example can be made out of every article, but especially illustrative is the terse Article 50 in Chapter 7, the chapter on liabilities, which states that, "an undertaking whose monopolistic conduct has caused damages to another person, shall be responsible for *civil liabilities* according to the law."[21]

On the one hand, this language seems tantalizingly close to announcing a private cause of action, which would be highly significant, but it does not quite

---

[17] This is true not only with regards to the AML, but to all subsequent implementing regulations.

[18] *See, e.g.*, Verizon Commc'n Inc. v. Trinko, 540 U.S. 398 (2004); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

[19] For an overview of issues relating to the efficiencies in American law, see Thomas B. Leary, Commissioner, Fed. Trade Comm'n, Prepared Remarks at the ABA Section of Antitrust Law: Efficiencies and Antitrust: A Story of Ongoing Evolution (Nov. 8, 2002), *available at* http://www.ftc.gov/speeches/leary/efficienciesandantitrust.shtm.

[20] This is swiftly followed by a subtle reverse of order where more fleshed-out articles of the statute place state control before competition. *See* AML, *supra* note 4, at arts. 4, 5 ("The State promulgates and enforces competition rules that are compatible with the Socialist market economy, improves macroeconomic management, and establishes a market system that is integrated, open, competitive and orderly" and "[u]ndertakings may, through fair competition and voluntary union, lawfully effect concentration, expand operations and enhance competitiveness in the marketplace.").

[21] AML, *supra* note 4, at art. 50.

state it.[22] On the other hand, the law could be read to cap liabilities across-the-board in three ways (remember that this article governs the entire AML): (1) by requiring proof of *actual* damages with the burden likely on the plaintiffs; (2) by excluding any possibility of awarding punitive damages such as the U.S.-style treble damages (because punitive damages are not available under the rubric of "civil liabilities" as defined by China's prevailing civil law); and (3) by precluding criminal penalties since they are not specifically provided.[23] But again, none of these speculations are unequivocally supported by the text.

If, *in vacuo*, these doubts appear speculative and groundless, compare Article XX of the Anti-Unfair Competition Law (AUCL), the AML's less-storied predecessor that has been in place since 1993.[24] It provides, in two paragraphs:

> An undertaking who violated this Law shall, where such violation caused damages to the victim undertaking, pay compensatory damages; where such damages to the victim undertaking are difficult to compute, the compensation shall equal the amount of profits the offending undertaking has made from the violation for the duration of the violation, plus reasonable costs which the victim undertaking has incurred in investigating the improper competitive conduct of the offending undertaking which has infringed upon the victim undertaking's lawful rights.
>
> The victim undertaking, whose lawful interests have been infringed upon by improper competitive conduct, may bring an action to the People's Court.[25]

---

[22] Judicial practice later proved that the courts accepted some but not all claims, perhaps an example of the art of drafting. *See infra* Part II.A.3.

[23] Article 134 of the General Principles of Civil Law defines "civil liabilities" as cessation, damages, restitution, apology, restoration of reputation, and so on, none of which is of a punitive nature. 中华人民共和国民法通则 [General Principles of the Civil Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987), art. 134 (China). Technically, criminal sanctions could still be instituted by a direct insertion of such language into China's unified criminal code, but Chinese legislative custom is to authorize such sanctions first in the substantive specialty law by specifically including a trigger clause. The first draft of the AML did contain such language, but it was deleted in the second draft. *See* 时建中 [Shi Jianzhong], 反垄断法草案应进一步完善法律责任规定 [*Anti-Monopoly Law Draft Should Further Improve Liabilities Provisions*], 经济观察报 [ECON. OBSERVER] (Aug. 18, 2007), *available at* http://www.eeo.com.cn/Politics/eeo_special/2007/08/20/80797.html (citing similar clauses in recent specialty substantive laws, including the Company Law, art. 216, the Securities Law, art. 231, and the Property Law, art. 40.2).

[24] 中华人民共和国反不正当竞争法 [Anti-Unfair Competition Law] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 2, 1993, effective Dec. 1, 1993) (China) [hereinafter AUCL].

[25] *Id.* at art. 20.

This is a telltale reminder that many murky provisions in Chinese law are fruits of deliberation rather than carelessness. There can be no argument that Article 50 of the AML neglects to consider the issue of private remedies, because its predecessor, Article 20 of the AUCL, clearly provided a private cause of action and a two-step formula to calculate damages. Article 50 of the AML intentionally removed such certainties, while leaving the door open for other forms of damages in addition to actual compensation (such as, perhaps, restitution) and more importantly, suits by not only injured competitors, as under the AUCL, but also injured consumers. The only certainty it seems to add—this in itself remains unspoken—is a policy determination not to arm the AML with the teeth of criminal sanctions.[26]

Specificity is lacking because it is unfeasible, unnecessary, or undesirable. Unfeasible because, for reasons similar to those stated about formality, the law could be unmanageably bulky if technical details were intermingled with overarching principles. Unnecessary because in the Chinese legislative process the State Council and relevant ministries typically issue implementing regulations and rules in due order after the National People's Congress (NPC) promulgates a law. Undesirable because amending a law passed by the NPC is considerably more difficult than amending regulations passed at a lower level. Especially for a ground-breaking law like the AML, the NPC may have wanted to retain more flexibility on its part and let the trial and error occur below.

Brevity is not unusual, nor is vagueness *ipso facto* problematic. The Sherman Act, if anything, celebrates brevity to such an extreme that it cannot mean what it apparently says, and the vagueness could not be resolved by reading within its corners.[27] The difference, however, is one between brevity and systematic and persistent vagueness. The U.S. Congress specifically intended for the courts to develop doctrines to give substance to the Sherman Act, whereas under China's NPC-dominant legislative model, the courts play not even a remote second fiddle; follow-up rules are developed at technocratic ministries with jurisdiction given by the statute.[28] It is fair to ask whether this model is sufficient for supplying the kind of clarity that serves the interests of both the regulators and the industry.

4. Analysis

In sum, as far as antitrust law proper is concerned, the promulgation of the AML is the beginning, not the end: the weight-bearing walls are erected, but much else is a work in progress. This is not to say the law is utterly lacking

[26] Criminal penalties are present in two provisions in the AML. However, neither provision targets substantive antitrust violations. Each provision only addresses improprieties during investigation. AML, *supra* note 4, at arts. 52 (on parties who resist investigation or destroy evidence, etc.), 54 (on investigators who abuse their power or leak commercial secrets obtained during investigation, etc.).

[27] *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911).

[28] *Id.*

in substance. In fact, the AML sets out a reasonable three-prong regulatory structure and establishes basic rules and exceptions for each prong. But antitrust is an area where the clichéd devil is in the details. It may be easy to appreciate in principle that a monopolistic contract is prohibited unless an exception applies,[29] that a party wielding market power may not abuse such power,[30] or that eligible mergers and acquisitions must be approved in advance.[31] Yet it is quite impossible to apply such statements directly to any real-world fact pattern without running into legal uncertainties at every turn. The solutions of these ambiguities all depend on follow-up regulations that may define the many minute, but necessary, details.

An intriguing question here, from a technical standpoint, is whether China will be able to utilize a late-mover advantage and quickly adopt intelligent rules from more mature jurisdictions. There is strong reason for optimism because the Chinese is good at learning crafts, and competition law is after all, technical. The optimism also comes from the fact that China's administrative system can implement new rules without delay once it decides to. Administrators would rarely adopt a rule that has been proven unwise in practice.

At this stage, while one looks forward to follow-up regulations, the major doubts are not about technical soundness but policy commitment. Two questions can be raised. The more superficial one is about enforcement: are the authorities serious about not only having a well-drafted antitrust law on the books, but also seeing its effects played out in full? And if they are, will their institutional capacities allow them to do so?

The second and more fundamental question has to do with the profound contradiction raised in the introduction, that is, assuming the government fully understood that its domineering role in the economy would not coexist well with unbent competition rules, what decision, in enacting the AML, did it make in that regard? This is critical because the state is playing trio participation in economic life: in many industries as the setter of price, in many overlapping ones as a dominant player, and, in still more, as the ultimate planner of industrial organization. Therefore, how the Chinese government decides to treat itself will determine if the AML's core antitrust law is meaningful in all of its three prongs. This is because official price controls could easily be textbook price cartels as prohibited under Chapter 2, unilateral conduct by large state-owned monopolies could easily be abusive as against Chapter 3, and state-brokered industrial reorganizations could easily run afoul of merger rules in Chapter 4.

Of the first and third concerns, the AML speaks little in the relevant chapters. However, strong inferences can be drawn that the government did not intend radical change. For example, Chapter 2, if strictly enforced to the letter, aided by Articles 36 and 37 (which extend the prohibition to state action), would render a vast amount of governmental management over the

[29] AML, *supra* note 4, at arts. 13–16.

[30] *Id.* at arts. 17–19.

[31] *Id.* at arts. 20–31.

economy illegal, which is plainly unthinkable.[32] Moreover, as a formal legalistic matter, it would seem to run head-on against the Price Law, an equally powerful act by the legislature, which authorizes the government to control market prices in major ways.[33] As for Chapter 4, which covers mergers and acquisitions, there is no special reference to government action. Yet given the reality that major industry consolidations must win approval from a high-level planning authority, it is difficult to imagine that the deals could subsequently fail to consummate due to a failure to obtain AML clearance.

As for the second antitrust concern addressed in Chapter 3, the AML in Article 7 at least gives a glimpse of the government's thinking:

> With regard to state-dominated industries which bear on the lifeline of the national economy and national security and with regard to industries exclusively licensed *by law* to be run by the State, the State protects the undertakings' *lawful operations*, regulates and controls such undertakings' operations and the prices of the goods and services they provide according to the law, protect consumers' interests, and promotes technological progress.
>
> Undertakings in industries defined by the previous paragraph shall operate *in accordance with the law*, maintain honesty and trustworthiness, strictly self-discipline, and accept supervision by the public, and shall not exploit their controlling position or exclusive license to harm the consumers' interests.[34]

In other words, two kinds of industries are allowed to "self-regulate," which, given an absence of any liability provisions in Chapter 7, amounts to little restriction. The first group of industries refers to those dominated by state-owned enterprises *and* is important to the national economy and national security, while the second group includes those industries monopolized by the state by fiat. It is possible to read Article 7 expansively, with the implication that this article alone could effectively carve the heart out of the AML since the qualifications for the first group are malleable enough to accommodate major industries such as banking and finance, oil and gas, electricity generation and distribution, aviation, heavy industries, etc., and the second group obviously refers to classic anti-competitive industries such as commodities, mining, tobacco, and alcohol.

There are, however, several plausible alternative readings that would render the picture a little more hopeful. For example, despite the fact that Article 7 is in the General Provision, it could mean not a blanket exemption, but strictly a narrow immunity from monopolization prosecution in Chapter 3,

---

[32] *See infra* Part I.B.

[33] 中华人民共和国价格法 [Price Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1997, effective May 1, 1998) (China) [hereinafter Price Law].

[34] AML, *supra* note 4, at art. 7.

while other chapters would still apply.[35] Or the "lawful operations" language could be used as a backdoor to allow prosecution of any conduct that, if judicially determined, would indeed be "unlawful."[36] Alternately, the government could "release" an industry into AML jurisdiction by withdrawing the exclusive license or liberalizing entry requirements so that state involvement in the industry is no longer dominant.

These may seem a bit far-fetched, but far-fetched things do happen in China. The government retains the necessary flexibility in Article 7. Despite its austere appearance, the article contains enough flexibility that if the government intends to loosen its grip on an industry, it can do so without having to amend the law. The government could allow the AML, later in time, to override competing directives from the Price Law, and make the AML enforcement agency at least an equal peer to industrial planners. A critical observer, therefore, should focus attention on what the government's real zone of sensitivity is as regulatory updates begin to trickle in. While it seems certain that the government intended to shield certain industries for the time being, the very trouble it took to insert Article 7 to effect that political decision in law is welcome, and might reflect a still more welcome attitude to enforce the AML faithfully in other industries. In any event, one really cannot be certain what industries would be immune, to what extent, and for how long until after a few credible reports return from the field.

B. Law of Central–Local Relations

The controversy is well-known. Chapter 5 (led by Article 8 in the General Provisions) has been subject to intense debate because it is certainly not competition law. This is not to say that it does not bear on competition; on the contrary, it takes custody of a most essential kind of competition. Yet this component of the AML, popularly known as provisions against "administrative monopolies," is simply not within the ambit of competition law as conventionally known. It was once deleted in its entirety from the draft, precisely because critics argued, *inter alia*, that its inclusion would corrupt the formal integrity of the AML as a competition law.[37] It was added back to the final text on the strength of the rebuttal that without it, the AML would be unable to address the most egregious kind of restraint on competition in contemporary China, and the whole exercise would lose a great deal of meaning.[38]

---

[35] A textual argument could be made by making a comparison to agriculture, which is completely exempted in a separate chapter. AML, *supra* note 4, at art. 61.

[36] U.S.-trained lawyers should be familiar with this technique since similar reasoning is used in American cases stripping official immunity. *See, e.g.*, Ex parte Young, 209 U.S. 123 (1908) (holding that by violating federal law, state officials exceed their official power and are therefore not protected by the Eleventh Amendment).

[37] *See* Xie, *supra* note 11.

[38] *Id.*

"Administrative monopolies" is, however, a misleading name. It is easily confused with the kind of monopolies that Article 7 precludes from antitrust regulation just surveyed above: industries dominated by the state that are "too important" to be open to competition, and industries exclusively run by the state that are considered for policy reasons better to remain closed to competition. What Chapter 5 adds to regulation is not monopolies as *entities* but monopolies as governmental *power*. Surely, as a matter of economic theory, governmental power is accurately a form of monopoly. The law of central-local relations is a better term because it is what Chapter 5 is essentially about.

1. A Law Without Precedent

Chapter 5 curbs the excess of governmental administrative power in two typical manifestations: (1) "benefiting" local interests at the expense of foreign interests; and (2) benefiting the government itself and its friends at the expense of the public.

If the general rule set out in Article 8 in the General Provisions appears a little gratuitous ("abuse of power," after all, usually cannot be good), Chapter 5 is utterly convincing in its specifics.[39] Strictly speaking, the claim is untrue that the law is unprecedented; precedent could be found in the 1993 AUCL. But the provisions of the AUCL are simplistic and rarely enforced, where Chapter 5, by comparison, is a significant improvement. Where the AUCL lists conclusory prohibitions against public utilities,[40] instances of governments forcing consumers to buy from an exclusive vendor,[41] and against local governments impeding the flow of commerce in and out of areas they control, Chapter 5 contains provisions on the same subjects that are more polished, concrete, and up-to-date. For example, Chapter 5 enumerates as typical violations discriminatory levies,[42] discriminatory technical certification standards,[43]

[39] AML, *supra* note 4, at art. 8 ("Administrative agencies and entities authorized by law and regulation to perform a function of public administration shall not abuse their administrative power in precluding and restraining competition.").

[40] A concurrent State Administration of Industry and Commerce (SAIC) regulation, concerning public utilities is somewhat more specific, but there is no evidence that it is well-enforced, either. *See* 关于禁止公用企业限制竞争行为的若干规定 [Several Rules on Prohibiting Public Utilities from Conducts Restraining Competition] (promulgated by the State Administration for Industry and Commerce, Dec. 24, 1993, effective Dec. 24, 1993) (China). Note that "public utilities" is defined broadly to include "water, electricity, heating, gas, postal service, telephone and telegram, and transport and logistics." *Id.* at art. 2. It is interesting to also note whether the outdated concept of *dianxun* (电讯) (telephone and telegram services) would encompass the wide swath of the economy that is now wireless communications and Internet-based services.

[41] AUCL, *supra* note 24, at arts. 6, 7 § 1.

[42] *See* AML, *supra* note 4, at art. 33, § 1.

[43] *Id.* at art. 33, § 2.

discriminatory entry permits,[44] and physical road barriers[45] disfavoring goods from *wai di* (外地) (outside the area). It also prohibits discriminatory treatment of *wai di* businesses in participating in local biddings,[46] making direct local investments, and setting up local branches.[47] These provisions are clearly inherited from a controversial 2001 regulation against regional blockades set forth by the State Council under the reformist Premier Zhu Rongji.[48]

What makes Chapter 5 truly unprecedented, and in theory quite revolutionary, are Articles 36 and 37. These two articles provide that "administrative agencies and entities authorized by law and regulation to perform a function of public administration shall not abuse their administrative power in ordering undertakings to engage in monopolistic conduct defined by this Law,"[49] or "in promulgating regulations that contain contents which preclude or restrain competition."[50] These provisions resemble unheralded and unveiled assaults on administrative power. Unlike other articles of Chapter 5 where application is limited to discriminatory state action, Articles 36 and 37 review the legality of governmental actions generally. Together, the pair covers the field nicely: Article 36 curtails the government's ability to actually commandeer market participants *ex post*, whereas Article 37 invalidates *ex ante* government regulations on facial review even if no underlying transactional transgression has occurred.

2. Universal Problems Central to Constitutionalism

Chapter 5 is aimed at structural matters. The scale of its potential significance, therefore, is fully revealed only from a structural perspective. Two problems are at stake here, each immense in its own right.

The problem of local protectionism is as old as the human race. It is always a pleasure to consume superior foreign fare, but lasting enjoyment requires adequate means of payment, which presupposes good sales of the fruits of one's own labor. When trade prospers, credits and goods change hands willingly; however, in leaner times, some businesses invariably fall into difficulty, laden with inventory and wanting liquidity. Domestic political

---

[44] *Id.* at art. 33, § 3.

[45] *Id.* at art. 33, § 4.

[46] *Id.* at art. 34.

[47] *Id.* at art. 35.

[48] 国务院关于禁止在市场经济活动中实行地区封锁的规定 [State Council Regulation on Prohibition of Regional Blockades in Market Economic Activities] (promulgated by the State Council, Feb. 21, 2001, effective Feb. 21, 2001), P.R.C. State Council Order No. 303 [hereinafter Regional Blockade Regulation].

[49] AML, *supra* note 4, at art. 36.

[50] *Id.* at art. 37.

pressure always mounts, demanding a "crisis" reaction, which usually involves some breaking of promises and use of force. While capturing goods from overseas involves the risky adventure of fleets and gunpowder, mandatory purchase within one's own territory requires merely a domestic political consensus that foreigners are powerless to frustrate. Of course, isolationism makes everyone worse off. But truth has never prevented the recurrence of human follies and local protectionism has never been far from vogue.[51]

The problem of abusive administrative power is equally universal. What is an easier way to sell one's products at an elevated price than becoming the exclusive provider pursuant to an administrative order? Still better, what is a better way to guarantee demand than making the product a required purchase for every citizen? These are the worst offenses against competition because they are caused by the abuse of public power, and there is no easy remedy. The abuse is not accidental and cannot be hoped to disappear by self-discipline. When the government expands beyond supplying essential public goods, it necessarily interferes in the market, assuming some of the market's role in price discovery, and favoring some suppliers over others. Without an effective internal mechanism to promote accountability or a strong external system of checks and balances, there is no deterrence on businesses and government officials from abusing the process.

In the domestic context, the two problems are deeply connected.[52] The strength of local powers pitted against one another necessarily comes at the expense of the central government. At the same time, the problems often indicate unbridled executive power in each locality.

Governments have come up with solutions for both problems, invariably on constitutional terms for their gravity. After all, the very idea of a "constitution" is one that unites local interests into one national interest, and one that defines the collective power the people cede to their representatives. While different political traditions offer different experiences, the United States has supplied the ingenious two-in-one answer in the Commerce Clause of the Constitution and the related dormant Commerce Clause developed by the Supreme Court. [53] The Commerce Clause occupies a corpus of jurisprudence that is defined by two frontiers, resolving two problems at once. Positively, it demarcates the federal legislative power; anything that falls outside the field remains with the states.[54] Negatively, aided by the Supremacy

[51] A recent example is the "Buy American" clause in the United States economic stimulus program. *See* Editorial, *The Peril of "Buy American,"* N.Y. TIMES, June 3, 2009, at A26. China has quickly come up with its own version. *See* Ian Johnson, *Foreign Businesses Say China Is Growing More Protectionist*, WALL ST. J., Apr. 28, 2009.

[52] That is, inter-regional protectionism as opposed to the more familiar international protectionism.

[53] U.S. CONST. art. I, §8 ("Congress shall have power . . . to regulate commerce with foreign nations, and among the several States").

[54] U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

Clause, it allocates certain powers to the federal government, even if the federal government has not yet utilized it.[55]

3. A Commerce Clause for China?

The two problems of constitutionalism—local protectionism and unchecked administrative power—are acutely present in China. Regional rivalries have been a constant theme in Chinese history; the very fact that the Zhu Rongji government had to push through a rule against regional blockades provides written evidence that such problems had not become extinct as a habit of the past. Administrative abuses are widespread. Exemplary is the common practice of *tai pai* (摊派) (literally, "spread out and make designations"), which is the forced sale of commercial products within a certain administrative system. The two are often connected, as *tai pai* often involves a local product, and its artificial domination of the locality is often done for the purpose of, or having the effect of, rejecting *wai di* products. As such, the transactional victims are local consumers and *wai di* producers, but the central government is the victim from a constitutional perspective because these abuses dilute its supreme power.

As a matter of constitutional law, China has yet to respond with a unified answer in the form of a law of central-local relations. In theory, there is no need to do so, because the power of the state belongs collectively to the people, and among the people there can be minor internal contradictions (人民内部矛盾). The will of the central government has traditionally cascaded down to provincial, local levels by relays of internal circulars and directives. It has not been considered a possibility that this mechanism could be defined in law and put under the supervision of the judiciary.

It is doubtful that Chapter 5 will function like the Commerce Clause in the United States Constitution. Under Chapter 5, there is no enforcement. The

---

[55] A note must be made that, in the United States, the state action doctrine immunizes actions of state governments from antitrust laws. *See, e.g.*, Parker v. Brown, 317 U.S. 341 (1943). Also, the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36 (1984), shields many actions of local governments from antitrust damage liabilities, although it does not prevent injunctive relief. *See* Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985). It must be strictly distinguished, however, from the kinds of administrative abuses China has seen, as the state action doctrine is subject to a broad "market participant exception." *See* City of Columbia v. Omni Outdoor Adver., 499 U.S. 365 (1991); *see also* Linda Greenhouse, *Court Upholds Antitrust Immunity of Local Governments*, N.Y. TIMES, Apr. 2, 1991. More importantly, state actions are bound by constitutional limitations, mainly the Dormant Commerce Clause and the Privileges and Immunities Clause of Article IV of the Constitution, which prohibit restraints on interstate commerce and discrimination against out-of-state entities. For a thorough analysis, see 陈懿华 [Chen Yihua], 行政垄断：美国反托拉斯法的州行为论 [*Administrative Monopoly: The State Action Doctrine Under U.S. Antitrust Law*], *in* 反垄断立法热点问题 [HOT SPOTS OF CHINESE ANTIMONOPOLY LEGISLATION] 127-140 (王晓晔 [Wang Xiaoye] ed., 2007).

only remedies of a Chapter 5 violation are "rectification" at the request of the violator agency's higher authority, disciplinary sanction "according to the law" against officials directly responsible, and a recommendation, which the anti-monopoly enforcement agency "may" raise to "relevant higher authorities" with regard to a resolution "according to the law."[56] Similar to the AUCL and the rules in the Regional Blockade Regulation, these sanctions are insufficient.[57] How would a rectification order come about from the higher authority? Does every such authority now have the extra responsibility of constantly monitoring lower authorities for AML violations? Assuming that the higher authority will learn about the violation from a recommendation from the anti-monopoly enforcement agency, what incentive does it have to follow it up, especially when to do so would taint the integrity of the system? And what about decisions by the State Council where there is no higher authority? Given the breadth of the mandate, how large a bureaucracy will be necessary for handling the job? And according to what law should these sanctions by carried out? There is no evidence suggesting that the enforcement of Chapter 5 of the AML will be effective.

The dim prospect of effective enforcement reflects the deeper issue of weak legislative will. By deciding, in the last minute, to reinsert Chapter 5 into the AML, legislators have made an emphatic statement that the issue remains on the policy agenda. By not reinforcing the prohibition with sanctions any harsher than those already proven ineffectual, they have delivered an equally strong message that the issue is not a present priority.

C. Law of Foreign Economic Relations

The textual anchor of the third component of the AML is scattered among only a few articles of the statute. It encompasses rules that apply specifically to foreign entities. At promulgation, this part of the AML attracted tremendous attention, particularly from international businessmen and lawyers. Yet from a jurisprudential point of view, it is the simplest of the three components.

---

[56] AML, *supra* note 4, at art. 51.

[57] Pursuant to the Regional Blockade Regulation, local governments must correct their own mistakes. If they fail to do so, the directly higher level of government will intervene. Regional Blockade Regulation, *supra* note 48, at art. 6. If the directly higher level of government fails to take action, then the provincial government will intervene. *Id.* at art. 7. If the offense is committed by a provincial government, rectification will be ordered by the State Council. *Id.* at art. 8. If an offense is committed following directives from a State Council ministry or agency, rectification will be ordered by the State Council, even if the offense is committed at a local level. *Id.* at art. 9. A criticism bulletin relating to the offense will be circulated by the provincial government if the offender is a local government, or by the State Council if the offender is a provincial government. *Id.* at art. 21.

1. Article 2—Extraterritorial Jurisdiction

Article 2 defines jurisdiction for the entire law, which governs monopolistic conduct occurring in the territories of the P.R.C. and occurring where it "generates exclusive or restrictive effects" on P.R.C. domestic competition .[58] There is no doubt that the drafters of the AML aimed at creating an effect-based, broad extraterritorial jurisdiction.

But for nations to apply competition laws extraterritorially, merely stating legislative jurisdiction is not enough. It is essential that they have enforcement jurisdiction whereby their authorities can conduct investigations, collect evidence, serve process, and enforce penalties.[59] China's ability to regulate foreign transactions is necessarily limited by its enforcement jurisdiction, and most likely restricted to businesses with large operations within China and in relation to mergers and acquisitions. The reason Article 2 casts an expansive net may simply reflect the legislative habit to maintain a deliberate degree of ambiguity, which translates into desirable official discretion when pressured. The true extraterritorial reach of the AML will be immediately clear from field reports.

2. Article 31—National Security Review

Article 31 provides that "[f]oreign capital's acquisition of domestic enterprises or participation in concentration in other fashion, where they implicate national security, shall be subject to, in addition to ordinary concentration review provided by this Law, a national security review pursuant to relevant rules of the State."[60] When drafting this article, legislators may have had the *Unocal* case in mind.[61] In 2005, the third-largest Chinese oil and gas company's audacious bid for the then eighth largest U.S. counterpart famously fell apart due to resistance on Capitol Hill. The deal failed before reaching the Committee on Foreign Investment in the United States (CFIUS) for a national security review. The experience may have sparked legislative inspiration for China to equip itself with a similar mechanism.

The "relevant rules of the State" language in Article 31 is designed as a placeholder, which the State Council will later fill, which probably will involve a multi-ministry committee similar to CFIUS in the United States. Every country has a legitimate reason to install a national security review mechanism for foreign economic transactions. The only question is why include it in the AML instead of a stand-alone law or a State Council directive? Is it only a measure of convenience or does it reflect the idea that the AML should be used to fend off foreign economic aggression? A country's first basic competition law is too

---

[58] AML, *supra* note 4, at art. 2.

[59] ALISON JONES, BRENDA SUFRIN & BRENDA SMITH, EC COMPETITION LAW 1374 (2007).

[60] AML, *supra* note 4, at art. 31.

[61] *CNOOC Announces Withdrawal of Offer for Unocal*, PEOPLE'S DAILY, Aug. 3, 2005, *available at* http://english.peopledaily.com.cn/200508/03/eng20050803_199949.html.

important to be a vehicle for housing clauses that are irrelevant to competition proper. In addition, foreign-specific language damages the authority of the AML as a law of general application. More worrisome, however, is the realistic possibility that the drafters intended the AML to be used as a tool to promote the domestic economy rather than to protect strictly security-related interests. If this were the case, then it would violate the spirit of the law and cast doubt on the government's commitment to enforcing other parts of the AML seriously (i.e., regulations concerning purely domestic transactions).

3. Article 15, Section 6—Patriotic Export Cartel

Often overlooked is Article 15, Section 6, one of the several enumerated savings clauses from the general prohibition of anti-competitive contracts under Articles 13 and 14, which are generally considered egregious forms of private anti-competitive behavior and usually held *per se* illegal. This particular savings clause exonerates an otherwise illegal contract if it were made to "safeguard just interests in export trade and export economic cooperation."[62] It does not specify *whose* just interests, but one can presume it is referring to China's interests. In effect, this clause legitimizes export cartels. This is a glaring example of using the law as a tool to promote the national interest. However, it is uncertain whether this provision will be enforced. One thing worth following is this provision's potential spillover effect, as its specific inclusion may be taken as confirmation of a general, unspoken "spirit" of the AML to favor domestic businesses.

II. DEVELOPMENTS AND REGULATORY UPDATES SINCE PROMULGATION

The following summaries are organized into legislative, (executive) enforcement, and judicial categories. In China, separation of power does not exist. Actions taken by various branches of the government are generally consistent. It is important to note, however, that government agencies do sometimes pursue competing interests and political turf wars do occur. The fact that the AML is administered by several different agencies has had an impact on its implementation.

A. Antitrust Law Proper

1. Legislative

As a structural matter, the State Council has established an Anti-Monopoly Commission ("AMC"), whose responsibilities include "researching and formulating competition policies, evaluating overall market

[62] AML, *supra* note 4, at art. 15.6.

competitiveness and compiling reports, promulgating anti-monopoly guidelines, and coordinating anti-monopoly administrative enforcement."[63] During the drafting process some had proposed that this agency, which would be nested directly under the State Council, be more powerful and invested with concrete enforcement capabilities.[64] But as it turns out, the role of the Commission is settled on general policy formulation and enforcement coordination.

The composition of the AMC reflects this rather aloof role.[65] The Commission is chaired by Wang Qishan, the Vice Premier of the State Council in charge of the economy. The four vice-chairs are also heads of three enforcement agencies and a deputy chief-of-staff of the State Council.[66] The other fourteen members of the Commission are deputy ministers from fourteen ministry-level central agencies mostly in charge of key individual industries.[67]

The high-profile line-up embodies a prominent political status, but it also signals that detail is not the intention of the body. Indeed, the day-to-day functions of the AMC are explicitly carried out by the Ministry of Commerce (MOFCOM). Ma Xiuhong, a Deputy Minister at MOFCOM and a member of the AMC, doubles as the Commission's Secretary.[68]

Concrete enforcement responsibility is divided among three entities. MOFCOM is in charge of Chapter 4 and, in accordance with Article 32 of the Foreign Trade Law,[69] matters that occur in the course of foreign trade.[70] The

---

[63] 国务院办公厅 [General Office of the State Council], 国务院日前成立反垄断委员会具有四项主要职责 [*State Council Sets Up Anti-Monopoly Committee: Has Four Major Responsibilities*], Aug. 1, 2008, *available at* http://www.gov.cn/jrzg/2008-08/01/content_1062161.htm.

[64] *See* 国务院反垄断委员会将被明确为仪式协调机构 [*State Council Anti-Monopoly Committee Clarified to Be a Coordinator*], 新华社 [XINHUA], Aug. 29, 2007, *available at* http://politics.people.com.cn/GB/1026/6189012.html.

[65] *See* 国务院办公厅 [General Office of the State Council], 关于国务院反垄断委员会主要职责和组成人员的通知 (国办 104 号) [*Notice on Major Responsibilities of the State Council Anti-Monopoly Committee and Its Composition (Notice No. 104)*], Dec. 26, 2008, *available at* http://www.competitionlaw.cn/show.aspx?id=4487&cid=32 [hereinafter *State Council Notice No. 104*].

[66] The three vice-chairs who are heads of enforcement agencies are Chen Deming, Minister of Commerce; Zhang Ping, NDRC Director; and Zhou Bohua, SAIC Chief.

[67] Other ministries, in addition to the three mentioned above, include the Ministry of Industry and Information Technology, the Ministry of Finance, the Ministry of Supervision, the Ministry of Transportation, the Commission of State Assets, the Bureau of Intellectual Property, the Office of Legal Affairs, and Regulatory Commissions on Banking, Securities, Insurance, and Electricity.

[68] *See State Council Notice No. 104*, *supra* note 65.

[69] 中华人民共和国对外贸易法 [Foreign Trade Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 6, 2004, effective July 1, 2004) (China), *available at* http://www.gov.cn/flfg/2005-06/27/content_9851.htm.

State Administration of Industry and Commerce (SAIC) covers almost everything else, from monopolization and cartels to "administrative monopolies," except where "price" is involved, which falls under the jurisdiction of the National Development and Reform Commission (NDRC).

In theory, the tripartite division of authority could work, but in practice, it will certainly give rise to confusion. MOFCOM could dramatically increase its jurisdiction whenever a case contains a foreign element, which happens increasingly frequently as Chinese companies continue to pursue the "go out" strategy. More blurry is the boundary between SAIC and NDRC, which cannot be drawn with any principle, because any market dispute is essentially a matter of "price." Perhaps by design, this is where the AMC would interfere by arbitrating over internal disputes as they arise. Considering, however, that only the most important cases will attract the collective attention of the vice premier and the ministers, and that the Commission is staffed out of MOFCOM, it is foreseeable that the gray area between SAIC and NDRC will be poorly visited and when some action is considered necessary, but jurisdiction is unclear, MOFCOM will likely be the default fallback administrator.

MOFCOM and SAIC have set up new internal bureaus dedicated to AML enforcement—the Anti-Monopoly Bureau (AMB) and the Anti-Monopoly and Improper Competition Law-Enforcement Bureau ("Fair Competition Bureau"). The AMB contains six internal divisions.[71] The NDRC has designated the task to an existing office, the Division of Price Supervision and Inspection.

MOFCOM and SAIC have moved in a laudably rapid fashion to draft implementing rules, on both substance and procedure. MOFCOM has drafted a substantive regulation of reporting thresholds[72] and U.S.-style guidelines on market definitions.[73] Interestingly, these two sets of rules were promulgated

---

[70] The latter category can be expansive and potentially used by MOFCOM to significantly enlarge its AML jurisdiction in the future. MOFCOM has published a notice which declared that it will receive tips and information of potential violations in foreign trade situations. 商务部反垄断局 [Ministry of Commerce, Anti-Monopoly Bureau], 负责受理的涉嫌垄断行为的举报范围 [Notice on Reports Regarding Suspected Monopolistic Behavior the Anti-Monopoly Bureau Is Responsible for Receiving], Nov. 3, 2008, *available at* http://fldj.mofcom.gov.cn/aarticle/zcfb/200812/20081205930993.html.

[71] The divisions are the General Affairs Division, Competition Policy Division, two Investigation Divisions, Supervision and Law Enforcement Division, and Economic Analysis Division. *See* H. Stephen Harris, Jr. & Keith D. Shugarman, *Interview with Shang Ming, Director-General of the Anti-Monopoly Bureau under the Ministry of Commerce of the People's Republic of China*, 8 ANTITRUST SOURCE 3, 1–7 (2009), *available at* http://www.abanet.org/antitrust/at-source/09/02/02-09.html.

[72] *See* 国务院关于经营者集中申报标准的规定 [State Council Regulation on the Reporting Standards of Concentration of Undertakings] (promulgated by the State Council, Aug. 3, 2008, effective Aug. 3, 2008) [hereinafter Reporting Standard Regulation 2008].

[73] *See* 国务院反垄断委员会 [Bureau of Anti-Monopoly, Ministry of Commerce], 关于相关市场界定的指南 [Guidelines on the Determination of Relevant Markets] (2009), *available at* http://www.mofcom.gov.cn/aarticle/zhengcejd/bj/200907/20090706384131.html.

under the name of the State Council and the State Council AMC, placing them on a higher legal status. MOFCOM has also released for public comment drafts of two sets of procedural regulations, on reported[74] and unreported concentrations.[75] On SAIC's part, it has released two drafts of substantive rules, on Chapter 2 ("SAIC Chapter 2 Regulation") and Chapter 3 ("SAIC Chapter 3 Regulation"), for public comment.[76] SAIC has also formally promulgated two sets of procedural regulations on Chapters 2 and 3 ("SAIC Regular Procedure Regulation"),[77] and Chapter 5 prosecutions ("SAIC Chapter 5 Procedure Regulation").[78]

MOFCOM has carried out the extra, necessary step of harmonizing the new AML mandate with similar obligations under pre-existing foreign-related merger control regulations over which it shares jurisdiction with other central government agencies. Enacted in 2003, the prototype of such regulation

---

[74] *See* 商务部反垄断局 [Bureau of Anti-Monopoly, Ministry of Commerce], 关于公开征求对《经营者集中审查暂行办法 (征求意见稿)》意见的通知 [Seeking Commentary for Draft Provisional Measures of Review of the Concentration of Undertakings] (2009), *available at* http://fldj.mofcom.gov.cn/aarticle/zcfb/200901/20090106011511.html.

[75] *See* 商务部反垄断局 [Bureau of Anti-Monopoly, Ministry of Commerce],《关于对未达申报标准涉嫌垄断的经营者集中调查处理的暂行办法 (草案)》征求意见 [Seeking Commentary for Draft Provisional Measures for the Investigation and Disposal of Concentrated Undertakings Not Subject to Mandatory Reporting Yet Still Suspected of Monopolistic Violations] (2009), *available at* http://fldj.mofcom.gov.cn/aarticle/zcfb/200902/20090206031314.html.

[76] The drafts were published on the SAIC web page. 工商总局 [SAIC], 关于禁止垄断协议行为的有关规定 (草案) [Draft of Relevant Rules on Prohibiting Monopolistic Contracting Behaviors] (2009) [hereinafter SAIC Chapter 2 Regulation], *available at* www.saic.gov.cn/zwgk/zyfb/qt/fld/200904/P020090427545000463689.doc; 工商总局 [SAIC], 禁止滥用市场支配地位行为的规定 [Draft of Relevant Rules on Prohibiting Abuse of Dominant Market Power] (2009) [hereinafter SAIC Chapter 3 Regulation], *available at* http://www.saic.gov.cn/zwgk/zyfb/qt/fld/201005/P020100525613641569851.doc; 秦旭东 [Qin Xudong], 国家工商总局细化反垄断执法规则 [*SAIC Details AML Enforcement Rules*], 财经 [CAIJING], Apr. 28, 2009, *available* at www.caijing.com.cn/2009-04-28/110155612.html.

[77] 工商行政管理机关查处垄断协议、滥用市场支配地位案件程序规定 [SAIC Procedural Rules on Prosecuting Monopolistic Agreement and Abuse of Market Power Cases] (promulgated by the SAIC, May 26, 2009, effective July 1, 2009) [hereinafter SAIC Regular Procedural Regulation], *available at* http://www.gov.cn/gongbao/content/2010/content_1511010.htm. Recently, SAIC released for public comment a draft of Chapter 5 rules. 工商总局 [SAIC], 禁止滥用行政权力排除、限制竞争行为的规定 (征求意见稿) [Seeking Commentary on Draft Rules on Stopping Abuse of Administrative Power Excluding or Restraining Competition] (2010), *available at* http://www.competitionlaw.cn/show.aspx?id=5590&cid=32.

[78] 工商行政管理机关制止滥用行政权力排除限制竞争行为程序规定 [SAIC Procedural Rules on Stopping Abuse of Administrative Power Excluding or Restraining Competition] (promulgated by the SAIC, May 26, 2009, effective July 1, 2009), *available at* http://www.gov.cn/gzdt/2009-06/05/content_1333312.htm.

contained a conclusory prohibition against foreign acquisitions that would result in "undue concentration or exclusion or restraint of competition."[79] Three years later, it morphed into a full-blown chapter of "anti-monopoly review." Although notifications were filed under this chapter while it was in effect, there was scant evidence it was enforced seriously.[80] Now MOFCOM has repealed the moot chapter and integrated its antitrust review power under the unified rubric of the AML.[81]

From these implementing rules, three welcome features present themselves. First, these rules reflect a pragmatic open-mindedness on the part of the regulators. Where actual numbers or bright-line conditions are required, be it the determination of what roughly resembles "concerted behaviors" for Chapter 2, the definition of market power for Chapter 3,[82] or the reporting thresholds for Chapter 4,[83] the authorities have shown great openness in adopting international best practices and flexibility to adjustment after a trial period.[84]

---

[79] 外国投资者并购境内企业暂行规定 [Provisional Regulation on Foreign Investors' Acquisition of Domestic Businesses] (promulgated by the Ministry of Foreign Trade and Economic Cooperation, State Administration of Taxation, State Administration for Industry and Commerce, State Administration of Foreign Exchange, Mar. 7, 2003, effective Apr. 12, 2003), art. 3, *available at* http://tfs.MOFCOM.gov.cn/aarticle/date/i/s/200509/20050900366385.html.

[80] 外国投资者并购境内企业的规定 [Regulation on Foreign Investors' Acquisition of Domestic Businesses] (promulgated by Ministry of Commerce, Aug. 8, 2006, effective Sept. 8, 2006), arts. 51–54, *available at* http://tfs.mofcom.gov.cn/aarticle/zcfb/200608/20060802839438.html. Interestingly, details that recently emerged from a high profile corruption investigation shed light on how a MOFCOM "antitrust review" provided opportunities for corruption. According to the complaint against Guo Jingyi, a former official in the Treaties and Laws Division and Deputy Director of the MOFCOM Anti-Monopoly Investigation Office, an "anti-monopoly investigation" hearing was held in 2006 on the merger of two major home appliance companies. The parties declared a successful merger before MOFCOM issued any opinion on the competition issue. 商务部巡视员郭京毅被公诉 国家部委罕见窝案浮出水面 [*MOFCOM Official Guo Jingyi Prosecuted, Cluster Corruption in Central Government Agencies Surfaces*], 北京晚报 [BEIJING EVENING NEWS], Feb. 5, 2010, *available* at http://society.people.com.cn/GB/42733/10940102.html.

[81] *See* 中华人民共和国商务部令 2009 年第 6 号, 公布《关于外国投资者并购境内企业的规定》[MOFCOM Order No. 6 in 2009, Announcing Regulation on Foreign Investors' Acquisition of Domestic Businesses] (promulgated by MOFCOM, June 22, 2009, effective June 22, 2009), *available at* http://www.mofcom.gov.cn/aarticle/b/c/200907/20090706416939.html.

[82] SAIC Chapter 3 Regulation, *supra* note 76, at arts. 5–7.

[83] Reporting Standard Regulation 2008, *supra* note 72.

[84] *See, e.g.*, 国务院法制办解读关于经营者集中申报标准的规定 [Question and Answer with the State Council Office of Legal Affairs on the Reporting Standard of Undertaking Concentrations], 新华网 [XINHUA NET], Aug. 5, 2008, http://news.xinhuanet.com/fortune/2008-08/05/content_8956920.htm ("Note that no country in the world has come up with an absolutely reasonable and accurate *ex ante* reporting standard. The

Second, these rules do embody the advantage of China as a late-mover and a quick implementer of modern policy ideas. The best example is the leniency system written into both the substantive and procedural SAIC regulations,[85] which is in fact a relatively recent inclusion in U.S.[86] and E.C.[87] competition laws themselves.[88]

Third, these rules retain important enforcement authority over the central government level. This is as much an intelligent policy determination to enforce the new law cautiously and make it "right" the first time as a realistic assessment that provincial and local branches of the enforcement authorities lack the necessary expertise to carry out the work at all, much less maintain a desirable national uniformity. The expertise deficiency is more aggravated at SAIC than MOFCOM. A telling sign is that SAIC had waited a year after the law began to run to organize an "AML knowledge contest" for its employees nationwide, a common way for Chinese bureaucracies to implement a new idea internally via campaigning.[89]

---

common practice is to begin with an approximate range and readjust according to actual practice. After a period of application of this standard, if it turns out not a perfect fit, we will modify it in a timely fashion.").

[85] SAIC Chapter 2 Regulation, *supra* note 76, at arts. 12–13; SAIC Regular Procedural Regulation, *supra* note 77, at art. 20.

[86] The current U.S. corporate and individual leniency policies were set up in 1993 and 1994, respectively. The program is recognized as an important investigative tool for detecting cartel activity. *See* Scott D. Hammond & Belinda A. Barnett, *Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters*, U.S. Department of Justice, Nov. 19, 2008, http://www.justice.gov/atr/public/criminal/239583.htm.

[87] The E.C. leniency program was established in 1996, and recently modified in 2006. *See* Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases, Official Journal C 207, 4 (1996); Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, Official Journal C 298, 17 (2006). Philip Lowe, Director-General of the Antitrust Modernization Commission of the E.C. characterized it as "the most important investigative tool in the fight against cartels." Submission by the Directorate General for Competition of the European Commission, Antitrust Modernization Commission, COMP A/4 D (2006) 83, 6 (Apr. 4, 2006), *available at* http://govinfo.library.unt.edu/amc/public_studies_fr28902/international_pdf/060406_DGComp_Intl.pdf.

[88] Interestingly, both the U.S. and E.C. leniency programs contain the "first-in-door" rule, granting immunity to the first whistleblower only. The SAIC leniency program, by comparison, provides a more attractive and graduated bait, promising full immunity to the first responder, fifty percent immunity to the second, and thirty percent to the third. SAIC Chapter 2 Regulation, *supra* note 76, at art. 3.

[89] The questions are published in SAIC's publicly-circulated system newspaper. *See* 反垄断法律知识竞赛开赛 [*Knowledge Quiz on Anti-Monopoly Law*], 中国工商报 [CHINA INDUSTRY & COM. DAILY], July 30, 2009, at A4, *available at* http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/200908/t20090803_69566.html.

Compared with the other two agencies, NDRC is noticeably quiet. It has been slow to come up with its own implementing rules,[90] and it did not bother to create a special AML office like the others did.[91] This lack of initiative is strong evidence of a lack of interest. The NDRC's delay in developing implementing rules suggests that it does not envisage immediate hands-on enforcement actions, so it does not need self-guiding rules. The decision not to establish a special AML office means the NDRC has not seen the need to dedicate human resources for this new purpose. Perhaps for the same reason, the staffers in the Division of Price Supervision and Inspection (价格监督管理司), which handles AML work, have not diligently carried out their responsibilities as they otherwise should have. All of this is not surprising considering that the NDRC was the central planner of the past; it is the organ through which the central government implements its economic and industrial policies. The NDRC has always had its own ideas about its role in managing the economy, especially in the area of price control—since 1993 it has had its own rules on dealing with "price monopolies" which find an independent "legal" basis in the Price Law.[92] Assuming a share of the AML jurisdiction is for NDRC hardly empowerment at all, then little has changed from its vantage point. The NDRC never intended to transform itself into an active third enforcement agency.

In light of the above discussion, it would be fair to conclude that MOFCOM would eventually emerge as the principal and perhaps the only reliable enforcement agency of core antitrust law. This would carry both positive and negative implications. Judging from its track record and actual performance to date, MOFCOM is the most professional and competent among the three agencies. However, the AML could transform into a law that is applied rigorously only to foreign-related transactions despite official reassurances to the contrary.[93]

---

[90] The NDRC finally released, on August 12, 2009, its draft of implementing rules for public comment. 国家发展改革委 [NDRC], 国家发展改革委向社会公开征求《反价格垄断规定（征求意见稿）》意见的公告 [NDRC Seeking Commentary on Rules of Prohibiting Monopoly in Price Setting] (2009), *available at* http://www.sdpc.gov.cn/yjzq/t20090812_296056.htm. The draft lacks detailed provisions, and in various places, copies the AML verbatim. The comment period ended on September 6, 2009.

[91] Unconfirmed media reports as recent as July 1, 2010 claim that the NDRC will establish an anti-price monopoly sub-division under the Division of Price Supervision and Administration. 发改委将设立反价格垄断处，市场价格监管处 [*NDRC Will Establish Anti-Price Monopoly Subdivision, Market Price Monitor Subdivision*], 人民网 [PEOPLE'S NET], July 1, 2010, http://politics.people.com.cn/GB/1027/12030538.html.

[92] *See* 制止价格垄断行为暂行规定 [Provisional Rules on Prohibition of Price Monopolistic Behaviors] (promulgated by the NDRC, June 18, 2003, effective Nov. 1, 2003), *available at* http://tfs.mofcom.gov.cn/aarticle/date/i/s/200503/20050300028008.html.

[93] *See, e.g.*, Harris & Shugarman, *supra* note 71, at 3 ("It should be noted that the AML will be uniformly and equally applicable to both domestic and foreign enterprises of all types without any discriminatory treatment.").

2. Enforcement

Poor enforcement of the AML is not an exaggeration. There is increasing evidence that the law is to a large extent not enforced and worse, because the agencies do not seem to know how to enforce it, this trend will persist for the foreseeable future.

Take Chapter 2 on cartels. To get a good taste of the situation, one needs to look no further than newspaper periodicals dated around April 20, 2009. On the same day, the European Commission launched new investigations against the Star and Oneworld airline alliances for suspected unlawful collusive conduct,[94] five major Chinese airlines "coincidentally" raised domestic fares by equal averages of ten percent.[95] This latest act by the airlines' "price alliance" was again endorsed by the General Administration of Civil Aviation (CAAC), the ministry-level regulator of the industry.[96] "Under the civil aviation system that is uniquely Chinese," a CAAC official was quoted as justifying what looked like a naked price cartel, "it is true that [the airlines] must not charge prices so high as to reap all the profits at the expense of consumers; it is equally true, however, that they may not charge prices so low as to disrupt the market order."[97] This position is consistent with the CAAC Domestic Transportation Price Reform Plan, a CAAC official document that sets maximum and minimum fares often cited by the airlines to justify their conduct. Not only did the AML enforcement agency not prosecute the cartel, it acquiesced to the industry's argument that the non-prosecution was required by law, namely, Article 4 of the AML, which speaks of establishing an "orderly" market.[98]

Chapter 3, on monopolization, is an interesting area of the statute because it has aroused responses from a public excited about the new avenue to air grievances against dominant and state-backed corporations. Some people filed complaints to the agencies while others went to the courts directly. This reflects not only the AML's failure to carefully design and announce a mechanism for private causes of action, but also the public's perception that the enforcement agencies are not all that different from the courts. In the public's mind, the AML is simply another way to settle accounts with the government.

Chapter 4, on merger control, creates the appearance that the AML as a whole is actively enforced. However, the truth is more complicated. Although it is fair to state that MOFCOM has been the most diligent enforcement

---

[94] *See* Kevin Done, *Transatlantic Deals Highlight Divisions over Regulation*, FIN. TIMES, Apr. 22, 2009.

[95] 国内航空公司联手涨价 [*Domestic Airline Companies Link Hands to Raise Prices*], 广州日报 [GUANGZHOU DAILY], Apr. 22, 2009, http://gzdaily.dayoo.com/html/2009-04/22/content_544486.htm.

[96] *See* 谢良兵 [Xie Liangbing], 航空"价格联盟"分合志 [*A Chronicle of Airline "Price Alliances"*], 经济观察网 [ECON. OBSERVER ONLINE], May 2, 2009, http://www.eeo.com.cn/eeo/jjgcb/2009/05/04/136583.shtml.

[97] *Id.*

[98] AML, *supra* note 4, at art. 4.

agency, most of its critical decisions, including the three that are surveyed in the next section, concerning foreign-related transactions. Purely domestic transactions are seldom challenged. As of the end of June 2009, MOFCOM has received fifty-eight filings under Chapter 4, forty-six of which are now closed. Of the forty-six, there were two conditional approvals and one rejection—the same three foreign-related cases analyzed in Part II.C. All other cases were cleared.[99] Consider the Unicom/Netcom merger. On October 15, 2008, China Unicom and China Netcom, two massive telecommunications companies, merged as part of a state-brokered industrial reorganization. The deal far exceeded reporting thresholds yet was not reported to MOFCOM for AML clearance.[100] Similar incidents have occurred in a range of other industries.[101]

3. Judicial

Varying levels of enforcement intensity are only natural in a multiple-agency model, because the agencies necessarily differ in institutional tradition, expertise, and habit. The political process is one way to counteract prosecutorial lethargy, but a more effective counterbalance may be the court system. The AML has generated intense enthusiasm among the public, who seem to think that their grievances against dominant corporations, especially service providers, may be resolved by invoking the authority of the statute.

Comprehensive statistics are difficult to obtain, but individual cases are known to have been filed, and even accepted and tried, by the courts. On August 1, 2008, the day the AML went into effect, three complaints were filed

---

[99] 商务部反垄断局 [Bureau of Anti-Monopoly, Ministry of Commerce], 经营者集中反垄断审查案件最新统计情况 [Latest Statistics on Anti-Monopoly Investigation Cases], July 21, 2009, http://fldj.mofcom.gov.cn/aarticle/zcfb/200907/20090706409831.html.

[100] A deal must be pre-cleared by MOFCOM if the combined worldwide sales revenues of all parties from the previous fiscal year exceed 10 billion RMB, or combined China sales exceed 2 billion RMB, and at least two of the parties' China sales exceed 400 million RMB. Reporting Standard Regulation 2008, *supra* note 72, at art. 3; AML, *supra* note 4, at art. 21. In 2007, the year preceding the deal, Unicom's revenues reached 100.47 billion RMB, and Netcom's revenues reached 86.92 billion RMB. *See* 王毕强 [Wang Biqiang], 联通网通合并涉嫌违法 [*Unicom-Netcom Merger Could Violate AML*], 经济观察报 [ECON. OBSERVER], May 1, 2009, *available at* http://www.eeo.com.cn/industry/it_telecomm/2009/05/01/136645.shtml.

[101] Wang, *supra* note 100; *see also* Stephanie Wong, *China Bid to Rival Toyota May Trip on Local Politics*, BLOOMBERG NEWS, May 27, 2009, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aouUtlQ7nSMU ("The central government intends to combine the nation's 14 largest automakers into 11 by 2011 as part of plans to curb competition and create larger players able to invest in developing more sophisticated vehicles."); Wendy Leung, *China Eastern, Shanghai Air to Combine After Losses*, BLOOMBERG NEWS, June 8, 2009, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aBJVDBUYWO3c ("The combined group would have 306 planes and more than 600 routes, giving it a 50 percent share of air travel in China's financial capital [Shanghai].").

in Beijing courts.[102] One was an action against Netcom for discrimination on account of a customer's non-Beijing resident status.[103] Although the case was eventually dismissed for failure to meet the statute of limitations,[104] large telecommunications firms like Netcom, which with their high penetration and chronically poor service have antagonized a large portion of the population, have been sued on several other occasions. At least in one case, Netcom prevailed. The Xicheng District Court in Beijing ruled that it did not abuse its market power by terminating the Plaintiff's account after the contract period had expired.[105] China Mobile, the largest carrier in the world based on number of users, was sued by for charging, in addition to usage fees, monthly fees to maintain the account and for price discrimination. The case was accepted by the Dongcheng District Court in Beijing, removed to the Beijing No. 2 Intermediate Court due to a jurisdiction directive from the Beijing High Court, and settled out of court in October 2009 for a token 145 RMB.[106]

Another interesting case involves Baidu, China's leading Internet search engine. It was sued by a former client for allegedly removing the client from search results.[107] Interestingly, the Plaintiff first submitted a complaint with SAIC in October 2008, which resulted in no agency action.[108] The Plaintiff then filed a lawsuit with the Beijing No. 1 Intermediate Court in December 2008.[109]

---

[102] 国内首起反垄断诉讼案立案 网通成第一被告 [*First AML Litigation Accepted; Netcom Is Defendant*], 新华网 [XINHUA NET], Sept. 17, 2008, http://news.xinhuanet.com/internet/2008-09/17/content_10048543.htm.

[103] *Id.*

[104] 何春中 [He Chunzhong], 民间反垄断第一案立案 原告向网通索赔 1 元 [*First Civil AML Case Accepted; Plaintiff Asks for One Yuan*], 新华网 [XINHUA NET], Sept. 22, 2008, *available at* http://news.xinhuanet.com/internet/2008-09/22/content_10089169.htm. The later than required acceptance conferred no legal benefit to the plaintiff or disadvantage to the defendant. Courts in China do break rules.

[105] In this case, the plaintiff wanted to continue his telephone account under the conditions of the old contract, but Netcom had changed its service offerings and would only maintain the plaintiff's old number if he signed up for a different service. *See* 朱燕 [Zhu Yan], 小灵通包月取消网通被诉 "垄断" [*Netcom Sued Under AML for Halting Monthly Xiaolingtong Services*], 新京报 [BEIJING NEWS], Jan. 19, 2009, *available at* http://www.thebeijingnews.com/news/beijing/2009/01-19/042@081943.htm.

[106] *See* 秦旭东 [Qin Xudong], 法院受理中国移动被诉垄断案 [*AML Case Against China Mobile Accepted by Court*], 财经 [CAIJING], Mar. 31, 2009, *available at* http://www.caijing.com.cn/2009-03-31/110130848.html; 周泽 [Zhou Ze], 中国移动被诉垄断案原被告和解 [*Settlement Reached for Anti-Monopoly Case Against China Mobile*], 搜狐博客 [SOHU BLOG], Oct. 25, 2009, http://zhouze.blog.sohu.com/134885568.html.

[107] *See* 秦旭东 [Qin Xudong], 百度被诉垄断案一审开庭 [*First Trial of Baidu AML Case Held*], 财经 [CAIJING], Apr. 22, 2009, *available at* http://www.caijing.com.cn/2009-04-22/110151711.htm.

[108] *Id.*

[109] *See* 高健、郭京霞 [Gao Jian & Guo Jingxia], 北京法院受理反垄断纠纷第一案百度成被告 [*First AML Case Accepted in Beijing; Baidu Is Defendant*], 北京日报 [BEIJING DAILY],

The court ruled in Baidu's favor, holding that the Plaintiff did not present sufficient evidence to prove Baidu's market power.[110] Baidu had been sued earlier in Shenzhen on a similar claim, and was able to dismiss that case on jurisdictional grounds.[111]

One positive sign from these cases is that the courts, although hesitant at first, are willing to entertain private actions, at least in Chapter 3 cases. But with a court system unfamiliar with this new law and no guidance from the enforcement agencies, early popular enthusiasm for a judicial application of the AML must be tempered. In addition, one must be careful to distinguish the frivolous suits from those with merit. When meritless suits are turned down, public cynicism grows.

Another positive judicial development is the creation of a special "anti-monopoly division" (反垄断庭) by the Shanghai No. 2 Intermediate People's Court, the first of its kind in the country on December 23, 2008.[112] Most cases brought under the AML are pre-screened into two categories as a matter of docket administration: civil claims are handed over to the intellectual property law division and administrative claims to the administrative law division. The Shanghai experiment is a pilot program approved by the Supreme People's Court with the aim to promote judicial expertise in this specialty area. This is certainly a sign of progress.

B. Law of Central–Local Relations

1. Legislative

It is difficult to imagine that Chapter 5 will fulfill its high constitutional promise. There is no evidence that the SAIC has investigated any action by a central government ministry or a local government through either coercive

---

Apr. 17, 2009, *available at* http://news.xinhuanet.com/legal/2009-04/17/content_11198351.htm.

[110] *See* 反垄断第一案百度胜诉 专利保护和反垄断需平衡 [*Baidu Won the First Anti-Monopoly Case; Balancing Needed between Patent Protection and Anti-Monopoly*], 中国广播网 [CHINA BROADCASTING NETWORK], Dec. 19, 2009, http://media.people.com.cn/GB/40606/10614168.html.

[111] *See* 韦文洁 [Wei Wenjie], 百度遭遇中国网络反垄断调查第一案 [*Baidu Encounters China's First Internet Anti-Monopoly Investigation*], 法制日报 [LEGAL DAILY], Nov. 11, 2008, *available at* http://www.legaldaily.com.cn/ajzj/content/2008-11/09/content_978238.htm.

[112] *See* 潘已申 [Pan Sishen], 全国首个反垄断案件专项合议庭在沪成立 [*Country's First Special AML Division Set Up*], 中国法院网 [CHINA COURTS NETWORK], Dec. 23, 2008, http://goo.gl/kNWQ; 刘建 [Liu Jian], 上海成立反垄断案件专项合议庭; 创新民行审判"二合一"模式 [*Special AML Division Set Up in Shanghai; Innovative "Two-in-one" Model*], 法制日报 [LEGAL DAILY], Dec. 24, 2008, *available at* http://www.legaldaily.com.cn/bm/content/2008-12/23/content_1006069.htm.

behavior (Article 36) or general regulation (Article 37). This is not surprising because, judging from its slow progress of drafting implementation rules, SAIC does not intend to or seem ready to enforce the law in any serious manner.

As previously noted, the SAIC has only recently released substantive draft regulations for Chapter 5. Compared to Chapter 2 and 3's thirty-two detailed articles, Chapter 5 contains only eleven articles, mostly barebones and conclusory, copied verbatim from the AML itself. They do not resemble implementation rules. Based on the quality of these regulations, and with no substantive counterpart, the SAIC will likely be a weak enforcing agent.

Furthermore, the regulations make provincial-level SAIC offices responsible for carrying out the enforcement duty on government entities at the provincial-level and below; these offices would report any abuse and issue a recommendation to the violator's higher authority.[113] Enforcement will likely not happen. Imagine, for example, that a provincial government releases a document favoring a locally-made product over a foreign one. The idea that the SAIC branch in the same province, administratively inferior to and fiscally reliant on the "violator," would report such action to the State Council is doubtful, especially considering that its "recommendation" would have no coercive power, and it would only alienate itself in the local political microcosm.

2. Non-Enforcement: The Green Dam Case

SAIC's general absence from enforcement was particularly noticeable over the well-publicized Green Dam case. In early June 2009, China's Ministry of Industry and Information Technology released a "notice" requiring that, as of July 1, 2009, all computers manufactured, sold, or imported into China must be pre-installed with the Green Dam Youth Escort filtering software.[114] The government recognized that many important issues were at stake, but failed to thoroughly account for the requirement's AML implications. At a minimum, an investigation would have been warranted, but the SAIC never acted upon on the notice.

3. Judicial

The judiciary has been equally silent on this issue. Unlike core antitrust cases, the courts in this area have kept their doors firmly closed. An exemplary case is one filed by four digital verification technology companies against the

[113] SAIC Regular Procedural Regulation, *supra* note 77, at art. 4.

[114] *See, e.g., Dammed If You Do; Protecting China's Innocents from Smut, Violence and the Dalai Lama*, ECONOMIST, June 25, 2009, *available at* http://www.economist.com/node/13917484?story_id=13917484. Due to public opposition and international outcry, the implementation of the order has been suspended. *See* Michael Wines, *After Outcry, China Delays Requirement for Web-Filtering Software*, N.Y. TIMES, June 30, 2009, *available at* http://www.nytimes.com/2009/07/01/technology/01china.html?_r=2.

General Administration of Quality Supervision, Inspection, and Quarantine (AQSIQ).[115] The Plaintiff companies assisted clients, usually consumer-product manufacturers, in convincing their retail customers that the products they purchased were authentic. This was done by labeling each product with an identifying code, which consumers could verify by calling a service center or visiting a website. Plaintiffs' businesses were successful until AQSIQ, the national regulator of product quality, created its own commercial arm and started issuing notices compelling manufacturers of many categories of products to use its services. The Beijing No. 1 Intermediate Court ruled that it would not accept the case.[116]

The present case and the Green Dam are strikingly familiar. Both appear to involve administrative agents that operate outside the law. If anything, AQSIQ's alleged violation was more flagrant because it stood to gain directly from its actions. Chapter 5 was written to address exactly this sort of behavior. Unfortunately, the SAIC and the courts are unwilling to enforce the law.

C. Law of Foreign Economic Relations

1. Three Cases

To many, *Coca-Cola/Huiyuan* is the landmark AML case. On March 18, 2009, MOFCOM ruled that Coca-Cola's planned acquisition of Huiyuan, a leading Chinese producer of fruit juice, is prohibited under Chapter 4 of the AML.[117] *The Economist* noted:

> Last August, after 14 years of debate, the Chinese government at last imposed what was informally referred to as its 'economic constitution,' a broad anti-monopoly law for a country rife with state-imposed monopolies. In the subsequent months, people have wondered how the law would be applied, and whether it would advance China's transformation into a market economy, or serve as an impediment to genuine competition .... [A]n answer emerged with the rejection of the largest outright acquisition by a foreign company,

[115] 李红兵 [Li Hongbing], 反垄断第一案台前幕后 [*First AML Case: Behind the Curtain*], 南方周末 [S. WEEKEND], Aug. 21, 2008, *available at* http://www.infzm.com/content/16174.

[116] *See* He, *supra* note 104.

[117] 商务部 [MOFCOM], 中华人民共和国商务部公告、第 22 号 (商务部关于禁止可口可乐公司收购中国汇源公司审查决定的公告) [Public Announcement Regarding the Decision to Restrict Coca-Cola from Buying Hui Yuan, Bulletin No. 22] (2009), *available at* http://fldj.mofcom.gov.cn/aarticle/ztxx/200903/20090306108494.html.

a $2.4 billion offer by Coca-Cola for China Huiyuan, the country's largest juice company.[118]

Coca-Cola/Huiyuan was one of three high-profile cases that MOFCOM reviewed and either rejected or granted conditional AML clearance. On November 19, 2008, prior to its decision in *Coca-Cola/Huiyuan*, MOFCOM approved a merger between InBev Belgium and Anheuser-Busch, two of the largest brewers in the world, on the condition that both companies would not increase its holding in existing joint ventures with leading Chinese beer brands or seek new partners in the Chinese market.[119] On April 24, 2009, MOFCOM similarly approved the merger between Mitsubishi Rayon, a Japanese chemicals company, and Lucite International Group, a competitor, on a number of conditions, including the divestiture of Lucite's China division and both corporations agreement to stay away from further expansions in China for the next five years.[120]

2. Implications

One popular criticism of the three decisions is that they were too short and the reasoning in each decision was weak.[121] However, it is unrealistic for even a well-prepared debutante to perform like a seasoned hand. The relevant questions should be whether MOFCOM was well-prepared and has shown potential to adequately enforce the AML. One may argue that MOFCOM could have prepared better in each of the three cases, but there certainly was a trend of increasing sophistication in the decisions from *InBev/AB* to *Mitsubishi Rayon/Lucite*.[122]

---

[118] *Squeezed Out: China Indicates the Real Targets of Its Anti-Monopoly Law: Outsiders*, ECONOMIST, Mar. 18, 2009 [hereinafter *Squeezed Out*], *available at* http://www.economist.com/node/13315056.

[119] Anheuser-Busch owned twenty-seven percent of Tsingtao, China's second largest brewery, and InBev controlled 28.56% of Zhujiang Brewery, the fourth largest brewery in China. 商务部 [MOFCOM], 中华人民共和国商务部公告 (2008) 第 95 号 [MOFCOM Announcement NO. 95 (2008)], Nov. 18, 2008, *available at* http://fldj.mofcom.gov.cn/aarticle/ztxx/200811/20081105899216.html.

[120] 商务部 [MOFCOM], 中华人民共和国商务部公告 (2009 年第 28 号) [MOFCOM Announcement No. 28 (2009)], *available at* http://fldj.mofcom.gov.cn/aarticle/ztxx/200904/20090406198805.html; *see China Conditionally OKs Mitsubishi Rayon, Lucite Deal*, DOW JONES, Apr. 27, 2009; 王佑 [Wang You], 商务部有条件通过三菱丽阳并购璐彩特 [*MOFCOM Conditionally Approves Mitsubishi Rayon Acquisition of Lucite*], 第一财经日报 [CHINA FIRST FIN. DAILY], Apr. 27, 2009, *available at* http://www.competitionlaw.cn/show.aspx?id=4801&cid=42.

[121] *See Squeezed Out*, *supra* note 118.

[122] Anti-Monopoly Bureau Chief Shang Ming deserves credit for his good grasp of technical knowledge and transparent leadership style, as demonstrated by the press conference he gave shortly after the *InBev/AB* case. 商务部反垄断局 [Anti-Monopoly

Another criticism of the decisions is that they were decided as foreign economic relation cases. In each case, the interests of local Chinese competitors were given overwhelming consideration, which was duly reflected in the decision. There is irrefutable evidence of a protectionist mindset within the agency because, normally, the fear of competitors in merger cases is given less scrutiny. It is difficult to determine exactly how large a role nationalist sentiment played in these decisions, but it is important to appreciate that, partly due intense international attention, MOFCOM attempted to reach fair decisions.

III. THE GENESIS OF IDEAS: PAST, PRESENT, AND FUTURE

As mentioned in the introduction, many Chinese laws take into account more than merely rationality and policy considerations; their purpose often cannot be ascertained without understanding their place in the country's tradition. This part presents a summary discussion of the relevant tradition and its impact on the AML.

A. The Tradition

1. Mencius

It is generally recognized that the Chinese word for monopoly, *long duan*, was first used by Mencius (b. 372–289 B.C.). It would be a mistake, however, to assume that he also came up with the idea of opposing monopolies. The Mencian notion of *long duan* is actually the opposite of what monopoly means today. It is a misnomer confirmed by usage; examining its history is the first step in understanding the traditional background for the AML.

Long duan was mentioned twice in one allegorical conversation that supposedly took place between Mencius, who at the time had resigned from the court and was homeward-bound, and one of his disciples, Ch'an-tzu. At the request of a local prince, Ch'an-tzu attempted to persuade Mencius to return to the court by offering Mencius a generous stipend.[123] In response, Mencius explained that becoming rich was not what he desired. To illustrate his point, he told a story about a man named Tsze-shû, who was a social climber, repeatedly offering his services to his prince and repeatedly being turned away. Referencing Tsze-shû, an observer once noted to Menicus that, "[w]ho indeed is there of men but wishes for riches and honor? But he only,

---

Bureau, Ministry of Commerce], 商务部反垄断局负责人就经营者集中反垄断审查有关问题答记者问 [*MOFCOM Anti-Monopoly Division Head Answers Questions from Journalists Regarding Mergers and Anti-Monopoly Investigations*], Nov. 18, 2008, http://fldj.mofcom.gov.cn/aarticle/zcfb/200812/20081205935637.html.

[123] The spelling of the names follows that adopted by James Legge. *See infra* note 125.

among seekers of these, tried to monopolize the conspicuous mound."[124] The observer proceeded to explain what that curious phrase meant:

> Of old time, the market-dealers exchanged the article which they had for others which they had not, and simply had certain officers to keep order among them. It happened that there was this mean fellow, who made it a point to look out for a conspicuous mound, and get up upon it. Thence he looked right and left, to catch in his net the whole gain of the market. The people all thought his conduct mean, and therefore they proceeded to lay a tax upon his wares. The taxing of traders took its rise from this mean fellow.[125]

Was Tsze-shû a monopolist? Probably not. He was despised because he was different from the common folk. He did not make things nor was he a professional merchant; in modern terms, he would be called a trader, market-maker, or arbitrageur. There is no evidence that suggests that he "monopolized" the trades. In addition, the whole community probably benefited from his work; those who traded with him probably received good deals, be it lower prices or better choice of goods. The origin of the trader's bad reputation was probably Mencius himself. The Mencian notion of "trade," which he touted as a virtue, really meant bartering or making small exchanges for self-subsistence. His disdain for *long duan* bore no relation to the modern rationale against anti-competitive behavior; rather, he loathed the practice and those who dared to perpetrate it because it facilitated larger-scale commerce. In his mind, this was the cause behind the erosion of the peaceful morals of high. Mencius perceived the ancient equivalent of modern market abuse differently. He may not have opposed a price cartel, an abusive monopolist, or an undue concentration. For instance, if all the blacksmiths in a town conspired not to trade iron implements for less than a certain amount of grain, the easiest way to break up this cartel would involve a farmer standing on a mound and offering to buy more for less per unit. This man would be Mencius' disfavored man of *long duan*, but certainly not a monopolist.

2. State Monopolies in Han China: The Salt and Iron Policy

State monopolies of key industries were instituted in China as early as 117 B.C., and these monopolies remained an important policy component for many dynasties.[126] In 117 B.C., the Han Dynasty was experiencing a period of

[124] MENCIUS, THE WORKS OF MENCIUS, BOOK II(ii)(x) (James Legge ed. & trans., Courier Dover Publications 1990).

[125] *Id.* at 227-28.

[126] A comprehensive survey is beyond the scope of this article, but for a fascinating account of the state salt monopoly in the Song Dynasty, see CECILIA LEE-FANG CHIEN, SALT AND STATE: AN ANNOTATED TRANSLATION OF THE SONGSHI SALT MONOPOLY TREATISE,

relative prosperity under Emperor Wu. The Emperor had waged aggressive military campaigns against nomadic barbarians, depleting the state's treasury. To increase revenue, he instituted monopolies on at an empirical level. Iron and salt offices were set up empire-wide. A central bureaucracy was established to calculate and control output in order to stabilize prices, a policy known as "equalized transportation" (均输). The legendary statesman Sang Hongyang, who had been made the emperor's Palace Attendant at age thirteen because of his ability to do mental arithmetic, was appointed to oversee the program.[127]

In many ways, these monopolies were no different than modern monopolies. The failings were the same: inflated price, excess capacity, and poor quality. At times, prices were so high that some of the government illegally forced people to buy iron.[128]

The monopolies substantially increased the central government's revenues, but popular discontent was widespread. In 81 B.C., only a few years after Emperor Wu's death, a Grand Inquest on the effect of state intervention was held.[129] Representatives of provincial elites argued for the abolishment of the monopolies. Sang Hongyang, now the highest civilian official in the royal court (御史大夫), countered these arguments by emphasizing the monopolies' immense importance to not just the government's fiscal sustainability, but the political stability of a unified, centralized state.[130] The challenge to the monopolies eventually failed, but the debate was recorded in the book, *Yien-Tieh Lun* (The Discourse on Salt and Iron).[131]

MICHIGAN MONOGRAPHS IN CHINESE STUDIES (Center for Chinese Studies, Univ. of Michigan 2004).

[127] DONALD B. WAGNER, THE STATE AND THE IRON INDUSTRY IN HAN CHINA 10 (2002).

[128] *Id.* at 24.

[129] *Id.* at 81.

[130] For example, Sang Hongyang said,

> Now to give the people free rein to strive after power and profit and to end the salt and iron monopoly would be to give the advantage to the overbearing and aggressive in the pursuit of their covetous practices. All the evil-minded would come together, cliques would become parties—for the aggressive if not constantly curbed are ungovernable—and combines of disorderly persons would take form.

HUAN K'UAN, DISCOURSES ON SALT AND IRON: A DEBATE ON STATE CONTROL OF COMMERCE AND INDUSTRY IN ANCIENT CHINA, CHAPTERS I-XXVIII 31 (Esson M. Gale ed. & trans., Ch'eng-Wen Publishing Co. 1967) [hereinafter Gale].

[131] The American reader might be surprised to learn that it was even used in 1935 to attack Franklin D. Roosevelt's New Deal. Thomas T. Read, *Iron, Men and Governments*, 14 COLUM. U. Q. 141 (1935), *cited in* WAGNER, *supra* note 127, at 2.

3. The Great Debate: Confucians v. Legalists

It is important to note that the opposition to the salt and iron monopolies did not come from the industry. In fact, the Emperor relied on the industrialists to run the monopolies. He placed prominent industrialists in high public offices.[132] The political calculus, cited by Sang Hongyang, was indeed as important as the fiscal one. Instead, the opposition came from Mencius and other traditionalists of the Confucian School, the *Ru* School. They viewed the massive concentration of power, brought about by centralized revenue gathering and redistribution, as unfair and immoral. They advocated equalitarianism and redistribution, and wanted the society restored to a time when it "had markets but no coinage," and people "exchanged that which he had for that which he lacked."[133]

Sang Hongyang was a member of the School of Law—the *Fa* School. Although *fa* is the standard modern translation for "law," it meant "rule" in the ancient context. The Legalists believed that the state has the right to rule its subjects by promulgating regulations and orders.

Naturally, the Confucians and Legalists clashed over the Han Dynasty monopolies. The dispute was not framed as a competition issue; rather, it was viewed as a constitutional issue. The contention was over the limits of economic and political power of the state; the commercial values of competition—efficiency, consumer welfare, innovation, and social mobility—were not at issue. The Legalists rejected this latter issue because they viewed state dominance of commercial instrumentalities as imperative, foreclosing any discussion on the merits of competition versus private monopolization. The Confucians ignored the issue of commercial competition because they wanted to replace state monopolies with "simplicity" and "propriety." The Mencian word *long duan* was never used to describe the "monopolies" during the debate.

B. The Current

1. The Relevance of History

History's relevance to us, according to English legal historian F.W. Maitland, is in the hope that "[a]bove all, by slow degrees the thoughts of our forefathers, their common thoughts about common things, will have become thinkable once more."[134] Competition law is essential precisely because it stays close to these "common thoughts" about "common things." For the ordinary

[132] Dongguo Xianyang and Kong Jin, who had made fortunes in salt and iron respectively, were made Assistants to the Minister of Agriculture and took charge of the monopolies under the supervision of Sang Hongyang. *See* WAGNER, *supra* note 127, at 1.

[133] Gale, *supra* note 130, at 27.

[134] F.W. MAITLAND, DOMESDAY BOOK AND BEYOND: THREE ESSAYS IN THE EARLY HISTORY OF ENGLAND 520 (1907).

man, what products and services he is to consume to sustain his way of life and at what cost is a daily consideration. The law of supply and demand is always constant. History remains highly relevant to understanding the AML in several respects.

First, as a matter of substantive coverage, it was necessary to include the law on central-local relations in AML (i.e., Chapter 5). It may not be conventional competition law, but in order to achieve the ends of "conventional" competition law in China, unconventional means must be necessary. What is the purpose of competition law if it is not to curtail market power? In this respect, China comes from the opposite direction as the Western mainstream. While competition law was introduced to answer excessive private market power in many Western countries, the market power in China has always been in the hands of the state since the Salt and Iron Policy. If the AML did not tackle this concern, there would be little else to address and little extra competition to generate.

Note that by simply regulating state-dominated industries, which is exactly what Article 7 does, would be insufficient. The state's market power is abused when it uses administrative power to change market rules to serve its own interests, whether or not it is a direct participant. An exclusive license may create, but not maintain a state monopoly; however, *ad hoc* administrative power may maintain a monopoly by either coercion of private players or by general regulation. Chapter 5, Article 36, and Article 37, in particular, are perspicacious in identifying the crux of the problem.[135]

Furthermore, it is important to note that the law on foreign economic relations has no place in the AML. The national security review simply bears no relation to any competitive dynamism, unless one interprets the word "competition" to mean one against foreign nations. The nationalistic tendency, suggested by the three merger cases, and explicitly announced in the export cartel exemption, unfortunately tends to confirm this. The fact that foreign-related merger control has become the face of the AML is troubling.

Second, the popular enthusiasm, seen especially in court challenges, is not surprising. The public has traditionally had little influence on state affairs. In the collective subconscious, the anti-market Mencian term, *long duan*, has morphed into an all-encompassing banner that represents unfairness at the hands of state monopolies such as the oil companies, newly-formed oligopolies closely linked to the state such as China Mobile and Netcom, and up-and-coming private behemoths such as Baidu. This poses a thorny normative question for policymakers and academics. On the one hand, these concerns should be addressed because their solution is an important goal of competition law. On the other hand, these concerns pose the risk of turning the AML into a garden-variety consumer protection law, depriving it of any strategic thrust.

Third, as a matter of intellectual preparation, the AML will draw little support from Chinese traditions. The Legalists' principles are exactly what the competition law aims to overturn. The proper intellectual guidance to a

[135] *See supra* Part I.B.

competitive society is principles of the rule of law, which formally entered the Chinese Constitution only in 1999, and remain very much an open field. The lack of tradition is at once a curse and a blessing. The reform will not benefit from any established shortcuts, but it will encounter no insurmountable obstacles either. The result is a reform model heavily driven by policy priority, which at any given time is a scarce commodity and is highly path-dependent. This is true for China's reforms in general, but particularly so for competition law.

2. Why the Two-Track Model Would Not Work

The stock market makes strategic appearances in this article, because it provides an ideal counterpoint. Before China decided to open its stock exchanges in 1990, there was a fierce debate where traditionalists insisted on the ideological color of every reform proposal. The solution was one of incrementalism: some assets would float first, while the "untouchables"—large chunks of state assets representing collective ownership—would be restructured into controlling, "non-circulating" shares of holding companies above public arms, and enter circulation gradually. Today, the Shanghai Stock Exchange and Shenzhen Stock Exchange entertain large volumes of trade and are regularly followed by international investors.

This must have been what the leadership had in mind with regard to the AML. The plan was probably to have a first draft of the statute, implemented under select circumstances, closely controlled by administrators every step of the way. Why, indeed, cannot the AML be implemented this way? Incrementalism has brought China tremendous success. Why must the AML be different? The reason is competition law's special position in the market economy. Competition law is about the system and its basic rules. One cannot divide up the ground and make some fairer than others; it would result in no fairness at all. If state-controlled players do not compete, it makes no sense to compel only the private players to do so. The two-track model will not be able to repeat its success in the competition area.

3. If Not Now, When?

The kind of ground-revamping reform necessary for the AML to achieve effectiveness is not a possibility in the present or the foreseeable future. It would demand substantial liberalization of most industries currently owned or dominated by the state, an independent and competent judiciary to entertain and adjudicate claims, and new ways for all levels of government to exercise their power *vis-à-vis* enterprises and individuals; none of which is supported by political will or the underlying socio-economic reality.

The mismatch between high promise and reality may suggest that the AML was defective before the statute was even drafted. The AML is a product of an elite movement led by reform-minded politicians and academics. Unlike other areas of legal reform (e.g., criminal procedure reform), where a system

was already in place, the competition law reform requires new procedures and tremendous resources. This translates into two difficulties.

First, as a practical matter, it is far easier to tweak a system that is already in place than to erect a new one. Using criminal procedure reform as an example, despite tremendous objective difficulties in its own right, the courts and procuratorates needed only to modify their practices in certain ways. The AML, on the other hand, involves the establishment of an entirely new process, which requires significant resources. For example, the agencies need to hire and train a large number of new personnel.

Second, on an abstract level, it is easier to pass a law than to enforce it as faithfully as the drafters had originally intended. Enforcing a law requires the ability to change an ecosystem. One reason the agencies do not delegate enforcement authority to government levels lower than the provincial level is that government officials on the ground simply do not understand the rules or will not treat them seriously because of the negative impacts on the officials' existing interests.

This article has stayed a largely positivist course, but one final normative observation is due. The suggestion that the AML risks being a wasted opportunity is not meant as a criticism of China. Opportunities are different from obligations precisely because they could be foregone for the right reasons. Modern policymaking is shaped by multiple values, and every country's leadership has unique constituencies to cater to. Competition law is no panacea to unfair competition. It is a recurring issue in the developing world's waves of economic liberalization.

C. The Future

As such, the AML will soon cease to draw as much attention as it has in the three years after its promulgation in 2007. Although its future trajectory is largely predictable, a narrow band of opportunities exist.

1. General Assessment

The AML will likely become a specialty foreign merger control law because it has the prospect of regular and intelligent application. MOFCOM has demonstrated enough professionalism and transparency that international best practices will continue to be able to influence its policy and limit any nationalistic tendencies that the agency from time to time may be pressured to accommodate.

The rest of the AML will likely stay quiet. This article has already explained why the NDRC is inactive. SAIC, who controls enforcement jurisdiction of Chapters 2, 3, and 5, is the prime example of a bureaucracy entrenched in the traditional ways. It may organize campaigns within its system to give the impression that it is enforcing the new law. Yet, considering its current record of enforcing the AUCL, it will most likely treat the AML as an "AUCL-plus," and not seriously upgrade its methods.

2. Treatment by the Court

In the short term, real progress is more likely to come from the courts if they decide to accommodate a broader range of AML claims. If they are not quite prepared for Chapter 5, then they may at least be ready for Chapter 2 (for business plaintiffs) and Chapter 3 (for consumer plaintiffs).[136] Convincing the former class that the AML is a viable tool for suing state actors is critical. With more resources, business plaintiffs are more likely to obtain favorable verdicts. The key development to watch is whether the pilot program at the Shanghai No. 2 Intermediate People's Court will be considered a success and replicated widely. Once the capabilities are established, more private suits will likely follow.

The next question is whether the courts can actually adjudicate in a competent and capable way. The Baidu case was interesting because it was a rare example of a case between domestic parties with an alleged non-state monopolizer. It gave the courts an opportunity to interpret and enforce the law, to develop a good analysis, and to set a good precedent. Even though the court had a rather easy time disposing of the claim on evidentiary grounds because the plaintiff simply failed to provide enough evidence to support its argument, it was a step in the right direction and gave practitioners a roadmap of how to prepare for future cases.

3. Structural Matters

The more difficult parts of the AML—Chapter 4, as applied in major domestic consolidations, and Chapter 5—can hopefully be enforced after structural changes in the next stage of reform.

MOFCOM must first solidify itself as the most powerful enforcement agency and claim its full jurisdiction in domestic matters. A case to watch is the Unicom/Netcom merger. There is no suspense in the outcome; MOFCOM will not unravel a deal approved by the State Council. However, it will be interesting to see if MOFCOM, under the scrutiny of the public, the business community, and its own bureaucratic ranks, will be able to exercise its AML authority to some extent. This could be done by MOFCOM's granting special leave for the merging parties to make a late filing, which it will then approve. Decision makers must realize that if no measure is taken it could set a fatal precedent for the authority of the AML and the credibility of its most effective enforcer.[137]

Finally, as for Chapter 5, any push to enforce it must come from a high authority, probably the State Council or the AMC; SAIC is not the proper

---

[136] Although this is currently not an option under the statute, private suits would be a reasonable way to enforce Chapter 5.

[137] *See* 大国企的傲慢和反垄断法的弱势 [*The Arrogance of Big State-Owned Enterprises and the Weakness of Anti-Monopoly Law*], 经济观察报 [ECON. OBSERVER], May 1, 2009, http://www.eeo.com.cn/observer/pop_commentary/2009/05/01/136656.shtml.

enforcement agency because it is not powerful enough against high-level government violators and its interests are too intertwined with lower-level violators. Technically, the enforcement could be done internally by inserting a single line of reasoning in administrative orders invalidating local practices, listing a Chapter 5 violation as one of the justifications. However, it is difficult to image that the State Council will spend its finite capital acting as a special prosecutor. The more sensible enforcer would be the AMC, whose secretariat is housed in MOFCOM. A potential policy recommendation would be to make MOFCOM a "super-ministry," charged with enforcing the AML. This would transfer MOFCOM's technical expertise into other areas; elevating the agency one step closer to top decision makers would make its actions sufficiently powerful.

CONCLUSION

China's AML stands for many things; antitrust law is only one of them. It is best viewed as a critical episode in a much larger movement—the latest major installation in an accelerated institution-building process since the country's accession to the World Trade Organization. As a single piece of legislation, it has the most potential to leave an impact on China's constitutional structure. Yet, at this moment, the opportunity is being lost. It will likely become another item in the central government's macroeconomic toolbox, and because of its inherent conflict with other policies, will be seldom used. More likely, it will evolve into a specialty law on foreign-related merger review and perhaps as an enhanced consumer protection law enforced haphazardly.

The reality is that one cannot have a competition-law regime more advanced than the underlying economy is free. Competition law acts as the rules of the game. The rules can only help the game to a certain extent. In the end, it is the talent, industry, and teamwork of the players that decide whether they will leave the playground enriched, satisfied, and happy.