

ARTICLE

CHINA'S ANTI-MONOPOLY LAW: HISTORY, APPLICATION, AND ENFORCEMENT

By Thomas Brook*

CITED: (2011) 16 Appeal 31-48

I. INTRODUCTION

The growth of a competitive market economy is straining the socialist ideologies upon which the People's Republic of China was founded.¹ Nothing illuminates this tension better than China's recent struggle to implement its Anti-Monopoly Law (AML).² This struggle has created a unique Chinese structure behind the AML's pro-competition facade.³

The AML promotes a market economy on China's terms. Vague concepts in its articles, such as the protection of "public interest" give government agencies significant deference on when and how to enforce decisions.⁴ The text of the AML also indicates that China will continue to promote socialist ideologies while attempting to strengthen its market economy.⁵ But perhaps the most striking differences between the AML and competition legislation in other market economies come from outside the text itself. These differences only become apparent once the legal environment surrounding the AML is illuminated. As such, this paper explores the AML through two of these environmental influences: the lack of an independent and experienced judiciary, and the political influence of State Owned Enterprises (SOEs). It is hoped that this exploration will determine whether the AML rep-

* Thomas Brook is a Law Student in the University of Victoria's JD program. He completed an engineering degree with distinction at the University of Victoria and has worked as a professional engineer and business manager for 10 years prior to entering law school. He has summered at Fasken Martineau Dumoulin LLP in Toronto and will be articling with Faskens starting in the summer of 2011.

1. The People's Republic of China is abbreviated as "China" throughout.
2. Anti-Monopoly Law of the People's Republic of China (AML), Presidential order No. 68 (Approved by the Standing Committee of the National People's Congress on Aug. 30, 2007 and effective Aug. 1, 2008), online: Ministry of Commerce of the People's Republic of China <http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/BasicLaws/P020071012533593599575.pdf>
3. Bruce Owen, Su Sun, and Wentong Zheng, "China's Competition Policy Reforms: The Anti-monopoly Law and Beyond" (2008-2009) 75 Antitrust LJ 233, at page 237; and Zhenguo Wu, "Perspectives On The Chinese Anti-Monopoly Law" (2008-2009) 75 Antitrust LJ 73, at page 77.
4. See for example: AML, *supra* note 3 at Articles 1, 15, and 28.
5. See: AML, *supra* note 3 at Articles 1 and 4.

resents a sword bravely defending competition or a twig bending at the whim of the Chinese Communist Party (CCP).

This exploration is divided into four sections. Following this introduction, the legislative history, in regards to competition law in China, is discussed to elucidate the origins of the AML. The AML is then summarized and five areas where it has diverged from competition law in Western democracies are explored. This divergence is further investigated through the review of civil cases and government agency decisions. Finally, this exploration is concluded with an assessment of the AML's enforceability.

II. HISTORICAL DEVELOPMENT OF THE AML

To understand the AML and its application it is important to understand the legal environment in which the AML was created. Law in China is often seen as a tool for organizing government activity rather than as a method of balancing the interests of citizens with the interests of the State.⁶ A majority of articles within China's Constitution⁷, for example, simply describe the structure of state agencies.⁸ Traditionally, the protection of private interests, whether personal or business, has not been a priority within Chinese law. This contextual background is important to keep in mind when considering how the AML, which focuses on the protection of private interests, was created. As stated by Salil Mehra and Meng Yanbei, the AML "is a dramatic change for China's legal system [. It has been] undertaken with a view towards the paths taken by other nations [but does not] necessarily [follow] those paths."⁹

China's path originated with Deng Xiaoping's (邓小平) reformation of the country's planned economy soon after his rise to power in 1978. Early reforms included the implementation of a "'responsibility system' [that] allowed farmers to privately retain and sell agricultural products."¹⁰ This limited allowance for competition reignited a long history of Chinese commercialism and quickly led to the creation, by the mid 1980's, of thousands of local enterprises.¹¹

Perhaps more importantly, Deng Xiaoping created a series of special economic zones that allowed foreign companies to form joint ventures with SOEs in designated geographic locations.¹² This, in turn, led to a significant increase in foreign investment and trade.¹³

As investment grew and competition became entrenched within the Chinese economy, concern increased over anticompetitive practices. This concern gave rise to discussion within the CCP, beginning as early as the mid 1980's, of the need for a comprehensive competition law.¹⁴ Although the drafting of the AML began in the mid 1990's it was not until

6. Jianfu Chen, *Chinese Law: Context and Transformation* (Leiden, the Netherlands: Brill 2008), at 77.

7. *Constitution of the People's Republic of China* (中华人民共和国宪法)(Adopted December 4, 1982, amended March 14, 2004), online: National People's Congress <http://www.npc.gov.cn/englishnpc/Constitution/node_2825.htm>.

8. Chen, *supra* note 7 at 77.

9. Salil Mehra and Meng Yanbei, "Against Antitrust Functionalism: Reconsidering China's Antimonopoly Law", (2008) 49 *Virginia Journal of International Law* 379, at 390.

10. Mark William, "Foreign Investment in China: Will the Anti-Monopoly Law be a Barrier or a Facilitator" (2010) 45 *Texas Int'l L J* 127, at 128.

11. *Ibid.*

12. William, *supra* note 11 at 128-130.

13. *Ibid.*

14. H. Stephen Harris, "The Making of an Antitrust Law: The Pending Anti-Monopoly Law of the People's Republic of China" (2006) 7 *Chi J Int'l L* 169, at 174.

2002, with China's accession to the World Trade Organization (WTO), that the impetus would exist for China to commit to enacting the AML.¹⁵

The legislative history of the AML can be traced back to 1987. In 1987 the State Council set up a legislative committee tasked with implementing anti-trust Legislation.¹⁶ According to Shang Ming, Director General of the Anti-Monopoly Bureau at the Ministry of Commerce, the committee established an early foothold into competition legislation with the *Regulation on the Administration of Advertisement of the People's Republic of China*.¹⁷ This regulation states that "monopolies and unfair competition in advertising activities are prohibited."¹⁸ After the introduction of this regulation, however, efforts to expand the use of competition law slowed. During the late 1980's several government officials, who vehemently opposed economic reform, resisted attempts to introduce new legislation.¹⁹

Competition law did not take hold in China until 1993 when the *Anti-unfair competition Law (AUCL)* came into force.²⁰ Although the AUCL prohibited tied selling, price fixing and bid rigging, it failed to address other anticompetitive activity including the formation of monopolies.²¹ Some observers have described the AUCL as a combination between a consumer law and intellectual property law rather than true competition legislation.²²

During the 1990's and into the early 2000's several laws, regulations, and administrative rules touched on some aspect of competition law.²³ This legal apparatus, however, focused on specialized features of individual industries. It did not provide a structure which could form the basis for a comprehensive competition law in China.²⁴ As Zenguo Wu stated, there are four main issues with China's pre-AML legislation:

First, there is no unified and complete anti-monopoly law and system. Second, the content of the existing rules is relatively general and impractical. Third, the actual impact of the existing rules is likely to be relatively low, and at this point the rules are not perceived as authoritative. Fourth, there are insufficient penalties and other consequences for violations.²⁵

15. *Ibid* at pages 176 and 177.

16. Zhengxin Huo, "A Tiger Without Teeth: The Antitrust Law of The People's Republic of China" (2008) 10 Asian-Pacific L & Pol'y J 32, at 35.

17. Shang Ming, "Antitrust in China – a constantly evolving subject" (February 2009) *Competition Law International*, at 4.

18. *Ibid*.

19. Youngjin Jung and Qian Hao, "The New Economic Constitution in China" (2003) 24 NW J Int'l L & bus 107, at 112.

20. *Anti-Unfair Competition Law of the People's Republic of China (AUCL)* (approved by the Standing Committee of the National People's Congress on Sept. 2, 1993 and effective Dec. 1, 1993), online: Supreme Court of the People's Republic of China <<http://en.chinacourt.org/public/detail.php?id=3306>>.

21. AUCL, *supra* note 21 at Chapter 2- Activities of Unfair Competition.

22. Yvonne Chua and Grace Wong, "New judicial interpretation of PRC Anti-Unfair Competition Law issued" (2007) 2(7) J. Intell Prop Law & Pract 443, at 444.

23. See: Owen *et al*, *supra* note 4 at 233-234.

24. See: *The Law of Commercial Banking of the People's Republic of China* (effective May 10, 1995, and amended on Dec. 27, 2003), online: China Securities Regulatory Commission <<http://www.csrc.gov.cn/n575458/n4001948/n4002075/n4002315/4059118.html>> ; *The Price Law of the People's Republic of China* (approved by the Standing Committee of the National People's Congress on Dec. 29, 1997 and effective May 1, 1998), online: China Cultural Industries <<http://en.cnci.gov.cn/Law/LawDetails.aspx?ID=6024>>;

25. Wu, *supra* note 4 at 76.

The first comprehensive attempt to regulate monopolies did not occur until the *Regulations for Merger and Acquisition of Domestic Enterprises by Foreign Investors* (RMADE)²⁶ was passed on September 8, 2006.²⁷ RMADE resembles similar laws in the United States and Canada. For example, Article 51 states that if any party has an annual turnover of more than RMB 1.5 billion, and has over 20% of the pre-merger market share or will have more than 25% of the post merger market share then the parties must notify the Ministry of Commerce (MOFCOM) and the State Administration of Industry and Commerce (SAIC).²⁸ This legislation, as Sun Su suggests, may have been implemented to simply “study” the effects of merger review in China.²⁹ It contains no provisions detailing how mergers are evaluated or judgments are enforced. The legislation simply states that if MOFCOM and SAIC believe there will be an over-concentration then hearings will be held.³⁰

Although the People’s Congress included the enactment of a comprehensive competition law in their 1994 five-year legislative plan,³¹ it was not until just before the Beijing Olympics on August 1, 2008 that the AML would be enforced.³² An initial draft of the AML materialized slowly. It was completed only after China became a member of the WTO in 2002.³³ This draft was reviewed by a small number of individuals, heavily revised, and then submitted to the State Council Legislative Affairs Office in March 2004.³⁴ It was not until 2005 that MOFCOM, the principle drafter of the AML, would distribute the law for wider review and not until 2007 when a final version of the AML would be available.³⁵

The drafting process was not public or transparent but it did take into account comments from a small group of international anti-trust experts.³⁶ These comments, particularly those from US and European anti-trust enforcement agencies, and the American Bar association, are widely considered to have shaped the final form of the AML.³⁷

During this period of international consultation, conflicts over the content and scope of the AML raged within the Chinese government.³⁸ Several factions in the State Council provided significant resistance to the law’s implementation.³⁹ Some of the most powerful of these opponents were the representatives of SOEs. One such person, Yang Jingyu was not only a representative for SOEs but also a member of the National People’s Congress and the Chief Secretary of the Law Committee.⁴⁰ At one point, while rejecting the need to contain

26. *Regulations for Merger and Acquisition of Domestic Enterprises by Foreign Investors* (effective September 8, 2006), online: Foreign Affairs office of the People’s Government of Yunnan Office <<http://www.yfao.gov.cn/Enshow.aspx?id=172>>.

27. Owen *et al*, *supra* note 4 at 235.

28. *Regulations for Merger and Acquisition of Domestic Enterprises by Foreign Investors*, at Article 51. See note 29.

29. Su Sun, “Antitrust Review in China’s New Merger Regulation” (2007) *Economists Ink*, Winter 2007, online: *Economists Ink* <http://www.ei.com/ink/Winter_2007.pdf>.

30. *Regulations for Merger and Acquisition of Domestic Enterprises by Foreign Investors*, at Article 52. See note 29.

31. Huo, *supra* note 19 at 35 and 36.

32. AML, *supra* note 3 at Article 57.

33. As a member of the WTO, China was not required to create a competition law but they were obligated “to avoid distortions to market competition.” See: David J. Gerber, “Economics, Law & Institutions: The Shaping of Chinese Competition Law” (2008) 26 *Journal of Law & Policy* 271 at page 281.

34. Owen *et al*, *supra* note 4 at 236.

35. *Anti-Monopoly Law of the People’s Republic of China*: Draft for Comment (Apr. 8, 2005), online: International Bar Association <http://www.ibanet.org/LPD/Antitrust_Trade_Law_Section/Antitrust/DevCompLaw_PRC.aspx>.

36. Owen *et al*, *supra* note 4 at page 237.

37. Owen *et al*, *supra* note 4 at page 237.

38. Huo, *supra* note 19 at pages 36 and 37.

39. *Ibid*.

40. Huo, *supra* note 17 at 38. Note that the Law Committee was tasked with implementing the AML.

government monopolies, Yang Jingyu boldly stated that “administrative monopolies do not exist in China.”⁴¹ Yang Jingyu’s appointment and his ability to shape the AML by, for example, minimizing its impact on administrative monopolies exemplifies the political influence wielded by SOEs in China. It is this conflict, between established, and often monopolistic, business entities and China’s new found desire for consumer protection that has produced the AML’s unique character.

III. SUMMARY OF THE AML

The AML contains eight chapters.⁴² In Chapter One, the law’s objectives are stated, its scope is explained and various terms are defined. Chapter Two explains the type of monopoly agreements that are prohibited and details exceptions to these prohibitions including agreements that improve dynamic or productive efficiencies. Factors used to determine market dominance of a “business operator” and prohibited abuses of a “dominant market position” are detailed in Chapter Three.⁴³ Chapter Four contains notification procedures for mergers and acquisitions. Article 31 of this chapter introduces the “national security” test which appears to allow significant discretion for the Chinese government to decide if and when foreign entities can acquire interests within China.⁴⁴ One of the most interesting and unique aspects of the AML is its apparent prohibition of administrative monopolies in Chapter Five.⁴⁵ This prohibition appears to be a radical departure from Chinese socialist ideology but may prove to be unenforceable, as will be explored below. Approved investigation procedures are included in Chapter Six and Chapter Seven allows for specific penalties. Finally, Chapter Eight excludes the lawful exercise of intellectual property rights and monopolies within the agricultural sector from prosecution under the AML.

The following analysis focuses on the unique aspects of the AML that have differentiated it from similar legislation in Western democracies. A brief discussion of the prohibition of monopoly agreements, merger notification requirements and the national security provision will be followed by a more detailed discussion of the areas that show a significant contrast to Western competition law. This detailed discussion will explore the AML’s potential for restricting administrative monopolies and the muted impact of the AML as it is implemented through enforcement agencies and the Chinese judicial system.

A. Prohibition of Monopoly Agreement

The prohibition of monopoly agreements in Chapter Two of the AML is similar to the prohibitions listed in s.45 and 90.1 of Canada’s *Competition Act*.⁴⁶ A non-exhaustive list of prohibited horizontal monopoly agreements is presented in Article 13.⁴⁷ A similar list of prohibited vertical agreements is listed in Article 14.⁴⁸ Finally, Article 15 provides defences to prosecution.⁴⁹

41. Interview with Yang Jingyu, Xinhua News Net, 30 Sept 2007, online: Xinhua News Net <http://news.xinhuanet.com/legal/2007-09/30/content_6816174.htm>.

42. AML, *supra* note 3.

43. AML, *supra* note 3 at Articles 17, 18 and 19.

44. AML, *supra* note 3 at Article 31.

45. AML, *supra* note 3 at Chapter 25.

46. *Competition Act*, R.S. 1985, c. C-34, at s.45 and s. 90.1.

47. AML, *supra* note 3 at Article 13.

48. AML, *supra* note 3 at Article 14.

49. AML, *supra* note 3 at Article 15.

Two features differentiate this Chapter of the AML from the *Competition Act*. First, the AML does not refer to lessening competition “substantially”⁵⁰ but rather applies a lower standard of “restrict[ing] competition.”⁵¹ It has been argued that this lower standard will increase the discretionary power of the AML’s enforcement agencies and hence increase the potential for misapplication of the law on harmless agreements.⁵² Secondly, ss. 4, 5 and 6 of Article 15, unlike the *Competition Act*, allow the creation of a monopoly when it is formed in the “public interest”, during times of “economic recession” or for the purpose of “safeguarding the justifiable interests of foreign trade.”⁵³ As with much of the AML, “[i]t falls to the enforcement process to articulate (or dissemble) China’s substantive policy” on these provisions.⁵⁴ This provides government agencies with a vast amount of discretion when enforcing the AML.

Merger Notification Requirements

Article 20 provides a basic definition of “concentration”, stipulating a concentration consists of either:

- (1) Mergers conducted by undertakings; (2) Controlling other undertakings by acquiring their shares or assets or through other means; [or](3) Acquiring control over other undertakings by contract or other means, or by obtaining the ability to exercise decisive influence over other undertakings by contract or other means.⁵⁵

This definition is certain to cover a majority of merger situations but does not follow the expansive definitions provided by legislation in the United States and Canada.⁵⁶

The AML’s merger notification procedures are not unique. Articles 23 through 30 present a procedure that is very similar to the one adopted by Part IX of the *Competition Act*.⁵⁷ Likewise, the AML’s *Regulation on Notification Thresholds for Concentrations of Undertakings* (RNTCU) has similar notification thresholds to the ones detailed in the *Competition Act*.⁵⁸

One criticism that has been raised about the notification requirements, in the RNTCU, is that they “may leave some room for the Chinese authorities to deliberately block a merger that affects only a foreign market when a Chinese firm in the same market would be disadvantaged.”⁵⁹ Although this is possible it is more likely that differential enforcement will be exercised through reference to the “public interest”, as discussed above, or through the “national security” provision.

50. *Competition Act*, *supra* note 47 at s. 45 and s. 90.1.

51. AML, *supra* note 3 at Article 13.

52. Huo, *supra* note 17 at 47.

53. AML, *supra* note 3 at s. 4, 5 and 6, Article 13.

54. Nathan Bush, “Constraints on convergence in Chinese antitrust” (2009) 54 *The Antitrust Bulletin* 87 at 137.

55. AML, *supra* note 3 at Article 20.

56. *Competition Act*, *supra* note 47 at s. 91; and *Clayton Act*, U.S.C. Title 15, Chapter 1, § 12 (1914), at s. 7.

57. AML, *supra* note 3 at Articles 23-30.; and *Competition Act*, *supra* note 47 at Part IX.

58. AML, *supra* note 3 at Article 21; and *Competition Act*, *supra* note 47 at s. 110.

59. Christopher Hamp-Lyons, “The Dragon in the Room: China’s Anti-Monopoly Law and International Merger Review” (2009), 62 *Vand. L. Rev.* 1577 at 1607.

B. The National Security Provision

Article 31 of the AML provides that:

besides the examination on concentration in accordance with this Law, the examination on national security according to the relevant regulations of the State shall be conducted as well on the acquisition of domestic undertakings by foreign capital.⁶⁰

The concept of “national security” is not defined within the AML and there is no limitation placed on the application of this provision. This again leaves the Chinese enforcement agencies with a significant amount of discretion.

This type of national security review, however, is not uncommon in competition legislation throughout the world. For example, the *Investment Canada Act*⁶¹ has recently undergone a revision where a new ground for review of foreign investment has been added. Part IV.1 of this act prevents foreign investment that would be “injurious to national security.”⁶² It is interesting to note that, like the AML, the term “national security” is also left undefined in the *Investment Canada Act*.

The concern from the perspective of foreign entities investing in China seems to stem from the uncertainty surrounding the national security review process and the lack of an adequate means of appeal within the Chinese legal system. As Thomas Jones, a partner in Allen & Overy, who has significant experience with foreign acquisitions of Chinese companies, stated:

the national security review on foreign investments is undoubtedly a sovereign issue. However, foreign investors seek transparency, consistency, and guidance in the law’s implementation. In addition, national security review policies must be specific and authorities should establish detailed implementation plans in the near future.⁶³

C. Administrative monopolies

i. State Owned Enterprises

Prior to the reforms begun by Deng Xiaoping in the late 1970’s nearly all economic activity within China was controlled by SOEs.⁶⁴ These SOEs are China’s largest administrative monopolies and continue to have a significant effect on its economic and political climate.⁶⁵ To understand the potential effect of the AML, it is essential to understand the role played by these state sponsored monopolies.

China currently has the greatest economic separation between rich and poor of any nation.⁶⁶ This separation has been fostered by the continued distortion of the labour market

60. AML, *supra* note 3 at Article 31.

61. *Investment Canada Act*, R.S. 1985, c. 28 (1st Supp.).

62. *Investment Canada Act*, *supra* note 62 at Part IV.1.

63. Huo, *supra* note 17 at page 57.

64. Sun Han and Clifton Pannell, “The Geography of Privatization in China, 1978-1996” (1999) 75(3) *Economic Geography* 272, at pages 276 and 291.

65. Owen, *supra* note 4 at 232-234.

66. Richard Spencer, “China Rich-poor Gap is the World’s Worst”, February 27, 2008, online: Daily Telegraph <<http://www.telegraph.co.uk/education/main.jhtml?xml=/education/2004/03/26/tegAwchina27.xml>>.

by SOEs.⁶⁷ As stated by the United Nations in its China Human Development Report, this widening wage differential, between rich and poor, has mainly arisen due to the effect of monopolistic industries turning higher profits into higher wages for workers.⁶⁸ This issue is a focal point for proponents of the AML who see the law as a method of introducing competition and balancing this wage differential.

SOEs have retained significant if not strengthened control of many industries despite attempts by the Chinese government to introduce competition.⁶⁹ On December 18, 2006, the State Assets Supervision and Management Commission announced that the national defence, electrical power infrastructure, petroleum, petrochemicals, telecommunications, coal, civil aviation and waterway transportation industries are to be absolutely controlled by SOEs.⁷⁰ Despite this policy competition has been actively introduced into these “strategic industries.”⁷¹ For example, there are currently four private airlines that are allowed to operate within the Chinese market.⁷² Likewise, SOEs have been broken up to increase competition.⁷³ These efforts, however, are often thwarted by blatant anticompetitive behaviour.

The best example of this behaviour was seen when China Telecom and China Netcom, both the result of the forced breakup of an SOE in 1999, signed a two year “gentleman’s agreement” that stated they would not compete for customers in each other’s territory.⁷⁴ Likewise, China’s petroleum providers have entered into similar written non-competition agreements.⁷⁵ Due to their political influence, lack of accountability and ready financing by China’s well established banks,⁷⁶ SOEs are seen as more likely than private monopolies to aggressively pursue anticompetitive behaviour.⁷⁷

The struggle between reigning in of the anticompetitive behaviour of SOEs and their dominant position in China can be observed in the AML. Article 7 provides that the government will regulate SOEs to “operate lawfully, be honest and faithful, be strictly self disciplined [and] accept social supervision.”⁷⁸ Yet, as discussed below, the AML explicitly excludes SOEs from penalty or sanction. Although the AML appears to be the perfect mechanism for reducing the economic power of SOEs, and protecting consumers within China, it is reasonably clear that the AML will have little impact on these monopolies.

-
67. Knight, John, and Li Shi, “Wages, Firm Profitability and Labor Market Segmentation in Urban China” (2004) 16(3) *China Economic Review* 205, at 206.
 68. United Nations Development Programme, and China Development research Department “China Human development report 2005”, online: United Nations Development Programme <http://www.undp.org.cn/downloads/nhdr2005/NHDR2005_complete.pdf> at 45.
 69. For a summary of the efforts taken by the Chinese government to force competition on sectors traditionally dominated by SOE’s see: Owen *et al*, *supra* note 4 at 242-244.
 70. State Assets Supervision and Management Commission, “Guidance on the Restructuring of State Capital and State Owned Enterprises”, December 18, 2006, online: State Assets Supervision and Management Commission <<http://www.sasac.gov.cn/n1180/n1566/n258252/n258659/1728074.html>> .
 71. *Ibid*.
 72. Owen *et al*, *supra* note 4 at 245.
 73. David Dollar, “Economic Reform and Allocative Efficiency in China’s State-Owned Industry” (1990) 39 *Economic Development and Cultural Change* 89 at 91-95.
 74. Jiao Likun, “China Telecom and China Netcom Reaching Agreement Not to Compete for Landline Customers”, *Beijing Morning Daily*, Feb. 27, 2007, online: SINA <<http://tech.sina.com.cn/t/2007-02-27/01011391578.shtml>>.
 75. Master’s thesis, Jiamin Liu, Simon Fraser University, Department of Economics, Masters of Arts, “The Introduction of Competition to China’s Petroleum Sector: A Policy Analysis”, Spring 2008.
 76. Robert Cull, Lixin Xu, “Who gets credit? The behavior of bureaucrats and state banks in allocating credit to Chinese state-owned enterprises” (2003) 71 *J of Development Economics* 533.
 77. David E.M. Sappington & J. Gregory Sidak, “Competition Law for State-Owned Enterprises”, 71 *Antitrust LJ* 479 (2003).
 78. AML, *supra* note 3 at Article 7.

Exempting SOEs from prosecution under the AML is certain to greatly diminish the effectiveness of this legislation. As Eleanor Fox states, “[t]he exemption of state monopolies in strategic sectors could drive a huge hole in China’s efforts to help the market work.”⁷⁹

ii. Administrative Monopolies Provision

Although SOEs are the largest and most prominent example of an administrative monopoly, threats to the enforcement of the AML come from all levels of government in China. Administrative monopolies at the local or regional level are particularly difficult to reign in due to the corruption of officials.⁸⁰ The use of administrative power at this level of government to favour one business over another creates many opportunities for anticompetitive behaviour to flourish. Despite significant opposition from consumer groups and officials in Beijing, administrative monopolies remain prevalent in China.⁸¹

A brief history of the Chapter governing “abuse of administrative powers to exclude or restrict competition” is key to understanding its application.⁸² Early drafts of the AML contain a chapter that prohibits the restriction of competition by administrative agencies and provides appropriate legal remedies.⁸³ This chapter was expunged from the AML by December of 2005.⁸⁴ The elimination of this Chapter can be directly linked to the political influence of SOEs, who felt threatened by its prohibition of administrative monopolies.⁸⁵ This move, by legislators, was swiftly met with significant public opposition.⁸⁶ Thus, Chapter Five, which was edited and reintroduced into the AML, became a compromise between consumers’ desire to limit administrative monopolies and the SOEs’ drive to maintain their monopolistic position.

On its face, Chapter Five appears to outlaw administrative monopolies. Article 33 prohibits anticompetitive behaviour by an entity “empowered by the law”⁸⁷ and Article 37 explicitly prevents administrative bodies from using their powers to “eliminate or restrict competition”.⁸⁸ On closer inspection, however, it is clear that this Chapter is a “tiger without teeth.”⁸⁹ No penalties are provided in Chapter Five and Article 51, which provides legal remedies for violations of the AML, explicitly excludes administrative monopolies from penalty or sanction.⁹⁰

Article 51 provides, in regards to administrative monopolies, that the “Anti-Monopoly Authority may put forward suggestions ... to the relevant superior authorities.”⁹¹ Currently these “superior authorities” have shown little interest in restricting administrative monopolies.⁹² As Wang Ye comments, restricting administrative monopolies in China is par-

79. Eleanor Fox, “Symposium: The Anti-Monopoly Law of The People’s Republic of China: An Anti-Monopoly Law for China—Scaling the Walls of Government Restraints” (2008) 75 *Antitrust ABA* 173 at 178.

80. Mehra and Yanbei, *supra* note 10 at page 400.

81. Yong Guo and Angang Hu, “The Administrative Monopoly in China’s Economic Transition” (2004) 37 *Communist & Post-Communist Stud.* 265 at 279.

82. AML, *supra* note 3 at Chapter 5.

83. Harris, *supra* note 15 at 187-188.

84. Owen *et al*, *supra* note 4 at 254.

85. Harris, *supra* note 15 at 172.

86. *Ibid.*

87. AML, *supra* note 3 at Article 33.

88. AML, *supra* note 3 at Article 37.

89. Huo, *supra* note 17.

90. AML, *supra* note 3 at Article 51.

91. *Ibid.*

92. Wang Ye, “Four bottlenecks facing the implementation of anti-monopoly law”, online: *Cajing* <<http://www.cajing.com.cn/2007-12-06/100040501>>

ticularly difficult because this requires not only economic but political reform.⁹³

It is unclear, given China's current political realities, if Chapter Five will be used to limit administrative monopolies. Any strengthening of Chapter Five will not only depend on the political influence of large SOEs within China but also on China's age old struggle between enforcement agencies, operating out of the central government in Beijing, and local or regional governments.⁹⁴

D. Enforcement

Eleanor Fox has commented that China faces “enormous practical and political limitations on enforcement” of the AML.⁹⁵ Enforcement in China is fundamentally different from enforcement in Western democracies. As Nathan Bush points out:

China lacks a strong tradition of judicial review, and Chinese judges are loath to second-guess agency interpretations of complex laws. In many respects, agency implementation of new antitrust rules will matter more than the legislative process.⁹⁶

Though it was anticipated that a single authority would be responsible for enforcement of the AML it became apparent, in 2005, that this would not occur due to a bitter rivalry between the National Development and Reform Committee (NDRC), MOFCOM and SAIC.⁹⁷ This struggle resulted in the formation of an “Anti-Monopoly Commission” (AMC). Currently, Vice Premier Wang Qishan (王岐山), heads the AMC which contains officials from the NDRC, SAIC and MOFCOM.⁹⁸ The AMC's authority is described in Article 9 of the AML.⁹⁹ This article leaves the commission with an advisory role rather than one focused on enforcement.

Article 10 clarifies that enforcement should be carried out by an “Anti-Monopoly Enforcement Authority” which is appointed by “state council.”¹⁰⁰ The enforcement authority is given investigatory power under Article 39 but, interestingly, must get approval from the “person in charge” for each step in the investigation.¹⁰¹ Moreover, it appears that the state council has continued to divide enforcement authority among multiple agencies.¹⁰² This has created a situation where anticompetitive activity is investigated through multiple agencies that have conflicting agendas and regulations.¹⁰³

Enforcement by NDRC, SAIC and MOFCOM also presents the potential for significant conflicts of interest. These regulators all have ties to SOEs and continue to protect the SOEs'

93. *Ibid.*

94. Owen *et al*, *supra* note 4 at 257.

95. Eleanor Fox, *supra* note 80 at Abstract.

96. Nathan Bush, “Chinese Competition Policy: It takes more than law” (2005), online: The China Business Review <<http://www.chinabusinessreview.com/public/0505/bush.html>>

97. See: Sanbuwei Qiang Zhengli Fanlongduanfa [Three Departments are struggling to claim exclusive control over the Antitrust Law], SINA (China), <<http://finance.sina.com.cn/roll/20050111/06181283920.shtml>>.

98. Joel Mitnick, Yang Chen and Adrian Emch, “The Dragon Rises: China's Merger Control Regime One Year On” 23(3) *Antitrust* 53 at 53.

99. AML, *supra* note 3 at Article 9.

100. AML, *supra* note 3 at Article 10.

101. AML, *supra* note 3 at Article 39.

102. Fox, *supra* note 80 at 178.

103. *Ibid.*

monopoly position.¹⁰⁴ Whether or not the state council retreats from this position and provides a truly independent enforcement agency remains to be seen.

The most significant challenge to the enforcement of Chinese law is the lack of *stare decisis* or an equivalent system that binds authorities to their prior decisions. Although Article 44 states that decisions will be publicized, it is uncertain whether publication is mandatory or voluntary, or whether courts are required to review prior cases.¹⁰⁵

From several recent decisions, discussed below, it appears that publication does occur but with minimal information that often does not include the reasons for the judgement. Given the limited information provided by these decisions, it is questionable whether enforcement agencies will develop the transparency necessary to even-handedly apply the AML. This transparency, however, is critical to the AML's success. It is the only way that the power of enforcement agencies can be properly monitored and uncertainty can be removed for individuals pursuing new businesses in China.¹⁰⁶

In addition, it is almost certain that even handed enforcement of the AML will be hindered by the structure of China's legal system. As Lindsay Wilson wrote, China has:

(1) [a] lack of a cohesive legal "system;" (2) pervasive vagueness in the language of statutes and administrative rules; and (3) difficulty ... enforcing judgments once they are obtained.¹⁰⁷

Furthermore;

since the enforcement of antitrust law is a relatively new phenomenon [for China], judges may not have the requisite level of knowledge to produce decisions that conform to international practice and reflect micro-economic analysis, an observation admittedly common to many jurisdictions.¹⁰⁸

Though China has recently embarked on several initiatives to improve the quality of its judicial system, in regards to civil litigation, it is clear that the AML will pose a significant and unique challenge for judges and lawyers with limited experience in competition law.¹⁰⁹ As Bruce Owen, Su Sun and Wentong Zheng point out, "[i]t would be inappropriate to evaluate the AML as if it were a set of instructions intended for the judiciary to interpret."¹¹⁰ The absence of this judicial oversight is perhaps the most significant issue facing the AML.

Without the direction provided by previous decisions or the availability of an appeal process within the Chinese legal system, the AML may not be appropriately equipped to defend competition in China.

104. Owen *et al*, *supra* note 4 at 240.

105. See: Owen *et al*, *supra* note 4 at 263; and Fox, *supra* note 80 at 177.

106. Owen *et al*, *supra* note 4, at page 264.

107. Lindsay Wilson, "Investors Beware: The WTO Will Not Cure All Ills in China" (2003) Colum. Bus L Rev 1007, at page 1009.

108. Subrata Bhattacharjee, "The Merger Review Process under the New PRC Anti-Monopoly Law: Selected Issues" (2008) A.B.A. Sec. Antitrust 9.

109. Mehra and Yanbei, *supra* note 10 at 410.

110. Owen *et al*, *supra* note 4 at 264.

IV. APPLICATION OF THE AML

A brief overview of civil cases and agency enforcement decisions in regards to the AML is included below. Analysis of these cases is constrained by the limited reasons for judgment that have been given by Chinese courts and government agencies. As will be explored below, these decisions illustrate that the AML is yet to become a sword protecting consumers in China.

A. Civil Cases

Article 50 of the AML,¹¹¹ like s. 36 of the *Competition Act*,¹¹² allows plaintiffs to obtain judgments against companies that are pursuing anticompetitive practices. This monopolistic conduct, as described in Article 3, includes monopoly agreements, abuse of dominant position and concentrations that may restrict competition.¹¹³ As of June 2010, there were ten reported cases prosecuted under Article 50.¹¹⁴ Nine have involved allegations of “abuse of market dominance, including three involving discriminatory pricing, four involving restrictions on the freedom to trade, and only one involving a monopoly agreement.”¹¹⁵

As stated by Yang Xun and Jessica Su, Chinese courts have begun to set civil litigation standards in regards to the AML.¹¹⁶ This includes the determination of a burden of proof that is to be accepted in courts throughout the country.

For actions that involve abuse of dominant position, it appears the courts have settled on splitting the burden of proof between the plaintiff and defendant.¹¹⁷ Courts require the plaintiff to define the market under consideration, demonstrate the defendant’s market dominance and monopolistic conduct, and prove damages and causation.¹¹⁸ It is then the responsibility of the defendant to either rebut the presumption of dominant market position, as described in Article 19, or justify the anticompetitive conduct through, for example, the public interest provisions in Article 15, as discussed above.¹¹⁹

This continued effort to define civil procedure in regards to the AML demonstrates that the implementation of this law has been taken seriously. The extent of AML’s application, however, remains unclear, as is demonstrated by the following five cases.

i. China Mobile Case

This action was filed by Mr. Zhou Ze an activist lawyer who sought to have a discriminatory charge on his mobile phone bill removed. As commented by Kirstie Nicholson, “[i]t is interesting that ... the complaint [was] brought directly [to] Court rather than” being addressed by the SAIC.¹²⁰ According to Gerry Obrien, taking this action directly to court

111. AML, *supra* note 3 at Article 50.

112. *Competition Act*, *supra* note 47 at s. 36.

113. AML, *supra* note 3 at Article 3.

114. Lester Ross, “Litigation under China’s Anti-Monopoly Law” (November 17, 2010) Competition Policy International 1 at 2.

115. *Ibid* at pages 2 and 3.

116. Yang Xun and Jessica Su, “Risks from China anti-monopoly lawsuits increase” (October 2009) China Law & Practice 42, at page 42; Note that the AML prescribes the activities which constitute abuse of dominant market position in Article 17. See AML, *supra* note 3 at Article 17.

117. *Ibid*.

118. *Ibid*.

119. Xun and Su, *supra* note 117 at 42; and AML, *supra* note 3 at Articles 15 and 19.

120. Editorial, “China Mobile sued on anti-monopoly grounds” (April 2009) China Law & Practice 32 at 32.

was not surprising given the SAIC's focus during this period on "drafting implementation rules and ... enforcement procedures" which left little capacity at the SAIC to deal with consumer complaints.¹²¹

Mr. Zhou was the only one being charged this discriminatory "monthly rental charge."¹²² As China Mobile is a SOE, this case had the potential to test the administrative monopoly provisions. It was, however, settled out of court and therefore did not provide additional information on how the AML would apply to SOEs.¹²³

ii. Shanda Case

After several false starts the Shanda case became the first AML case to have a decision entered within a court. On October 23, 2009, the plaintiff's action was dismissed on the grounds that Beijing Shusheng Electronic Technology (Shusheng) failed to prove that Shanda Interactive Entertainment Limited, a subsidiary of Shusheng, abused its dominant market position. Instead, Shanghai No. 1 Intermediate People's Court found that Shanda was protecting their IP rights when they prevented the plaintiff from publishing a book that misled the public into believing that this unauthorized sequel was written by the same author as the original.¹²⁴

According to Michael Han, this judgement should be "welcomed as an early indication that courts will be reluctant to uphold AML claims which do not meet the necessary evidential standards."¹²⁵ Han has commented that consumers, who have long been unhappy with business conduct of certain SOEs, have used the AML as "a fresh means of taking action" without understanding the requirements for proving monopolistic conduct.¹²⁶ According to Han, Chinese courts are clearly willing to accept many marginal cases in order to "develop their expertise and ... supplement the work carried out by" the SAIC and MOFCOM but are unwilling to find anticompetitive activity unless a heavy evidentiary burden has been met.¹²⁷

iii. Baidu Case

As with the China Mobile case, the Baidu case was initiated after a complaint was received but ignored by the SAIC.¹²⁸ On December 18, 2009, this action against Baidu, China's largest internet search engine was dismissed. The plaintiff, Tangshan Renren Information Services Co. (TRISC), alleged that, after reducing their spending on Baidu advertising, Baidu took active steps to limit access to the plaintiff's website.¹²⁹

The court found that the relevant market under consideration included "search engine services in China" rejecting Baidu's claim that these "free services" did not represent a mar-

121. *Ibid.*

122. *Ibid.*

123. *Ibid.*

124. *Ibid.*

125. Editorial, "Shanghai court dismisses Shanda anti-monopoly lawsuit" (November 2009) *China Law & Practice* 36, at page 36.

126. *Ibid.*

127. *Ibid.*

128. Editorial, "Baidu is latest to be sued under Anti-monopoly Law" (May 2009) *China Law & Practice* 20, at page 20.

129. Hannah Ha, John Hickin and Gerry O'Brien, "Civil Actions Under China's Anti-Monopoly Law - Five Major Cases, Five Major Lessons (Part I)" (February 8, 2010), online: Mayer Brown JSM <http://www.mayerbrown.com/public_docs/Client%20Update_Civil.pdf>.

ket.¹³⁰ The court then went on to find that there was insufficient evidence of Baidu's dominant market position.¹³¹ This is an interesting finding given that when this case was heard Baidu maintained a market share of over 75%.¹³² The court stated that market share could not be determined because there was a lack of "scientific and objective analysis" and an underlying methodology was not provided.¹³³ Lastly, the court found that Baidu was justified in down-ranking the plaintiff's website due to TRISC's "hyperlink cheating."¹³⁴

According to Nathan Bush, rulings, such as those in the Baidu, Shanda and China Mobile cases "may signal the judiciary's wariness ... [in] undermining critical industrial policies or economic reforms with a liberal approach to abuse of dominance claims."¹³⁵

iv. Beijing Netcom Case

On December 26, 2009, a similar decision was handed down by Beijing's No.2 Intermediate People's Court. The plaintiff, Mr. Li Fangping, accused Beijing Netcom of discriminatory pricing practices in regards to the mobile phone services of non-Beijing residents. In dismissing the plaintiff's claim for damages, the court found that the Beijing Netcom was involved in legitimate debt collection procedures. Beijing Netcom's policies for non-residents were found to be similar to their policies for residents with a history of overdue payments.¹³⁶

The court, in the Beijing Netcom case, held that the plaintiff bore the burden of defining the market and proving that the defendant held a dominant position.¹³⁷ As with several other civil cases, the court considered the plaintiff's evidence insufficient to determine the existence of a dominant market position.¹³⁸ The court also accepted China Netcom's defence that discrimination towards non-residents of Beijing was justified to counter a valid "operational risk."¹³⁹

v. Chongqing Insurance Association Case

The Chongqing Insurance Association (CIA) Case was the first case to address price fixing. This case was filed on August 1, 2008, the same day the AML came into effect.¹⁴⁰ CIA is an insurance industry association that was in the practice of setting automotive insurance prices for its members.¹⁴¹ The Falin Law Firm, in Chongqing, claimed the actions of

130. Nathan Bush, "Section 3: Country Chapters China: Antimonopoly Law" (2010) *The Asia-Pacific Antitrust Review*, online: [Global Competition Review](http://www.globalcompetitionreview.com/reviews/25/sections/90/chapters/942/china-antimonopoly-law/) <<http://www.globalcompetitionreview.com/reviews/25/sections/90/chapters/942/china-antimonopoly-law/>>.

131. *Ibid.*

132. Owen Fletcher, "China Says No to Bing: Baidu Ups Lead Over Google" (August 5, 2009), online: PC World: Business Center <http://www.pcworld.com/businesscenter/article/169717/china_says_no_to_bing_baidu_ups_lead_over_google.html>

133. Bush, *supra* note 131.

134. Hyperlink cheating is a practice whereby website operators embed hidden or irrelevant contents in their pages to manipulate page rankings.

135. *Ibid.*

136. Ha, *supra* note 130.

137. Susan Ning, Angie Ng and Ding Liang, "China: Li Fangping vs China Netcom - Abuse of Dominance Case Dismissed" (20 September 2010), online *Mondaq* <<http://www.mondaq.com/article.asp?articleid=110490>>.

138. *Ibid.*

139. *Ibid.*

140. Ross, *supra* note 115 at 3.

141. *Ibid.*

the CIA constituted price fixing as under the AML. They claimed only nominal damages of one RMB but sought an order preventing CIA from continuing the practice.¹⁴²

The CIA discontinued the practice which was the subject of the proceedings causing the plaintiff to withdraw and the court to dismiss this action.¹⁴³ Even without a ruling, it appears the availability of civil action under the AML provided a tool to consumer groups who were intent on modifying anticompetitive behaviour.

vi. Conclusion to Civil Cases

It is difficult to pass judgement on the effectiveness of the AML given the limited number of decided cases.¹⁴⁴ These cases, however, do demonstrate the difficulty that individuals or small businesses face when pursuing an action under Article 50.

The courts look to the plaintiffs alone to satisfy a significant evidentiary burden. No assistance in meeting this burden is given by the government agencies responsible for AML's enforcement, regardless of the validity of the claim. That being said, there is some indication, even with consumers' limited ability to successfully sue under the AML, that businesses are "compelled [, at least to some degree,] to adjust their practices [and] conform to competition requirements."¹⁴⁵

B. Government Agency Decisions

i. Dismantling Cartels

The NDRC and the SAIC have recently been active in the enforcement of the AML against several cartels. These cartels have demonstrated significant economic strength within small geographic regions.¹⁴⁶

The most aggressive enforcement action taken thus far has been against several manufacturers of rice noodles in Guangxi.¹⁴⁷ On March 30, 2010, the NDRC published its first administrative enforcement action against this group of rice noodle manufacturers.¹⁴⁸

A group as large as 33 producers had agreed on a price increase just before Chinese New Year. This price increase prompted significant protest from the public and the municipal governments of Nanning and Liuzhou.¹⁴⁹ In response to the consumers' concerns, the NDRC launched an investigation which concluded with an order to "stop illegal activities, correct their faults, and formulate [an] emergency proposal for stabilising ... prices and ... supply."¹⁵⁰ While some participants were given fines up to RMB 100,000 and were subject to criminal prosecution, others, who had cooperated with the NDRC, took advantage of the leniency provided by Article 46 of the AML and were given a simple warning.¹⁵¹

143. *Ibid.*

144. Some commentators have passed judgment on the effectiveness of civil actions under the AML. See for example: Ha, *supra* note 130.

145. Ross, *supra* note 115 at 6.

146. Sébastien Evrard, *et. al.*, "China Takes First Action Against Price Cartel Under New Anti-Monopoly Law" (April 19, 2010) Jones Day, online: Martindale < http://www.martindale.com/government/article_Jones-Day_983798.htm>.

147. *Ibid.*

148. *Ibid.*

149. Bush, *supra* note 131.

150. *Ibid.*

151. Bush, *supra* note 131; and Evrard *et. al.*, *supra* note 147.

Interestingly, the actions taken by the NDRC do not appear to have been directed towards restoring competition. Rather, the focus of the NDRC's action appears to center upon the immediate correction of the price imbalance and the proffering of these producers as an example of the NDRC's power to dismantle other cartels.

ii. Merger Review

MOFCOM has taken the lead in regulating mergers under the AML with their recent establishment of a Chinese Anti-Monopoly Bureau.¹⁵² The Bureau has provided a consistent system for notification and review.¹⁵³ The Bureau, however, still lacks the authority to apply remedies without approval from the state council.¹⁵⁴

Article 27 of the AML establishes the factors which the Bureau must use to assess a merger application.¹⁵⁵ The Bureau can also take into consideration, as part of these factors, an applicant's efficiency defence.¹⁵⁶ This defence mimics the defence available in s. 96 of Canada's *Competition Act*¹⁵⁷ but provides far less detail. The Bureau is then tasked with determining whether, given these factors, competition will be "restricted."¹⁵⁸ As mentioned previously this standard departs from the more onerous standard of "substantially" restricting competition that has been adopted in Canada.¹⁵⁹

If the Bureau finds that a restriction is likely they can prohibit the merger, through Article 28, or provide "restrictive conditions" through Article 29.¹⁶⁰ To illustrate how these Articles have been applied, MOFCOM's decisions in the proposed mergers of Coca-Cola - Huiyuan and Mitsubishi Rayon - Lucite International are reviewed.

a. Coca-Cola Huiyuan

On March 18, 2009 MOFCOM published its decision rejecting Coca-Cola's acquisition of the Chinese juice producer Huiyuan.¹⁶¹ This was the first time an acquisition was prohibited under the AML.¹⁶² This prohibition is described in a brief two page decision that has been published by MOFCOM.¹⁶³ Its brevity demonstrates that the requirement to publish decisions under Article 26 and 44 has been applied in a limited fashion.¹⁶⁴

Within this decision there is an indication of which AML provisions were utilized, but no reasons for the decision are given. It suggests that MOFCOM found anticompetitive harm based on reasoned principles but does not mention the principles which may have been

152. Mitnick *et al*, *supra* note 99 at 53.

153. Stephen Harris and Keith Shugarman, "Interview with Shang Ming, Director General of the Anti-Monopoly Bureau Under the Ministry of Commerce of the People's Republic of China" (February 2005), online: The Anti-Trust Source <<http://www.abanet.org/antitrust/at-source/09/02/Feb09-ShangIntrvw2-26f.pdf>>.

154. *Ibid*.

155. AML, *supra* note 3 at Article 27.

156. AML, *supra* note 3 at Article 27(3).

157. *Competition Act*, *supra* note 47 at s. 96.

158. AML, *supra* note 3 at Article 28.

159. *Competition Act*, *supra* note 47 at s. 92.

160. AML, *supra* note 3 at Articles 28 and 29.

161. *The People's Republic of China Ministry of Commerce Announcement No. 22 [2009]*, "Ministry of Commerce decision notice on the Prohibition of Coca-Cola's acquisition of China Huiyuan", online: MOFCOM <<http://fldj.mofcom.gov.cn/aarticle/ztxx/200903/20090306108494.html>>

162. Mitnick *et al*, *supra* note 99 at 53.

163. *The People's Republic of China Ministry of Commerce Announcement No. 22*. See note 169.

164. AML, *supra* note 3 at Articles 44 and 26.

used.¹⁶⁵ Regardless, the Coca-Cola decision demonstrates that the AML is having a significant impact on companies operating within the Chinese market.

Three anticompetitive issues were identified in this case. First, MOFCOM determined that Coca-Cola had the potential to participate in tied selling or bundling of products resulting in restricted competition.¹⁶⁶ Second, increasing the Coca-Cola portfolio of products, which presently included the “Minute Maid” juice brand, would, according to MOFCOM, significantly increase the barriers to entry in a market which is highly reliant on product branding.¹⁶⁷ Third, MOFCOM determined that the merger would adversely affect the ability of small and medium sized firms in this market to innovate effectively.¹⁶⁸

It is impossible to tell within the limited text of MOFCOM’s decision which of the three issues led to the rejection of this merger. It is interesting to note, however, that the proposed acquisition was by all accounts a conglomerate merger,¹⁶⁹ rather than a horizontal merger, and one that may not have been subject to this level of scrutiny in Canada. There is, unfortunately, no mention of an analysis of market size, market concentration or relative market power of the competitors within the domestic juice market.¹⁷⁰ Likewise, there are no reasons given for the rejection of Coca-Cola’s efficiency defence.¹⁷¹ This leaves open the question of whether the bundling, provided by the merger, might have had a positive effect on competition.¹⁷²

It is unclear whether the foreign ownership of Coca-Cola had any effect on the Bureau’s decision. There are, however, commentators that believe there is, within China, a new wave of “economic patriotism” that has created negative views of foreign entities acquiring businesses in China.¹⁷³

b. Mitsubishi Rayon - Lucite International

MOFCOM released their two page decision on the merger of Mitsubishi Rayon and Lucite International on April 24, 2009.¹⁷⁴ According to MOFCOM’s decision, Mitsubishi Rayon is predicted to control 64 percent of the methyl methacrylate (MMA) market in China after its acquisition of Lucite.¹⁷⁵ This mainly horizontal merger is set to create a market share that is significantly greater than that of the second and third place competitors. From the vertical perspective, the merged entity will have the ability to block competition in upstream markets where MMA is distributed and utilized. It was held, by MOFCOM, that this merger had the potential for significant anticompetitive impacts both horizontally and vertically.¹⁷⁶

165. *Supra* note 162.

166. *Ibid.*

167. *Ibid.*

168. *Ibid.*

169. Freshfields Bruckhaus Deringer, “China’s MOFCOM prohibits Coca-Cola’s acquisition of Huiyuan” (March 2009), online: Freshfields Bruckhaus Deringer, <<http://www.freshfields.com/publications/pdfs/2009/mar09/25486.pdf>>.

170. *Supra* note 162.

171. *Ibid.*

172. Mitnick *et al*, *supra* note 99 at 58.

173. Kim, Joongi, “Fears of Foreign Ownership: The Old Face of Economic Nationalism” (2007) 27 SAIS Review 167, at 167.

174. *The People’s Republic of China Ministry of Commerce Notice No. 28* [2009], “Ministry of Commerce decision notice on Japan’s Mitsubishi Rayon Corporation proposed acquisition of Lucite International, Inc.”, online: MOFCOM <<http://fldj.mofcom.gov.cn/aarticle/ztxx/200904/20090406198805.html>>.

175. *Ibid.*

176. *Ibid.*

Instead of blocking the merger, however, a negotiated settlement was reached that allowed the merger to proceed with restrictive conditions. First, Lucite China is required to sell 50% of its annual production, at cost, to unaffiliated purchasers for a period of not less than five years.¹⁷⁷ Second, Lucite China and Misubishi Rayon were required to operate separately. Each would retain their own officers and directors for six months. During this time no sharing of information was permitted.¹⁷⁸ Lastly, the merged entity is prohibited from acquiring any domestic MMA product manufacturer or building a new plant for manufacturing MMA products in China for a period of not less than five years.¹⁷⁹

iii. Conclusion to Agency Decisions

Some argue that the interpretation of the AML by MOFCOM, NDRC and SAIC is out of step with competition law in other jurisdictions.¹⁸⁰ A bigger concern, however, which is echoed by several observers, is that these decisions are effectively opaque.¹⁸¹ Without greater access into the reasoning of these agencies, significant uncertainty will remain for businesses operating in China.

Addressing this type of uncertainty, however, is not a new concept for businesses in China. The AML, at a minimum, has provided a regulatory structure with published rules and a consistent process for merger review. As these decisions show, the AML is having a significant effect on transactions and will alter how business opportunities in China are approached.

V. CONCLUSION

Given the immaturity of competition legislation in China, it is uncertain whether the AML will provide an effective barrier to anticompetitive activity. Substantial obstacles to effective enforcement remain prevalent. These obstacles include inadequate judicial review, a lack of transparency in the decision making process and the exemption of administrative monopolies from prosecution under the AML. As one observer has stated, the implementation of the AML is “doomed to be difficult.”¹⁸²

The development of the AML cannot, however, be considered in the same terms as the development of the laws or the economies of Western democracies. China is moving quickly. Over 300 million people have escaped poverty in less than a generation. Capitalism has found a new home and people now “talk openly about wanting to get rich, a desire once verboten.”¹⁸³ Though many government officials continue to support the development of the AML, calling it China’s “economic constitution,”¹⁸⁴ it is the rapidly expanding power of consumers in China that is poised to drive the future development of the AML. With improved access to the judicial system and increased transparency the twig now in the hands of the CCP might soon be fashioned into a protective sword in the hands of the Chinese consumer.

177. *Ibid.*

178. *Ibid.*

179. *Ibid.*

180. Mitnick *et al*, *supra* note 99 at 58.

181. See for example: Mitnick *et al*, *supra* note 99; and Freshfields, *supra* note 170.

182. Wang Xiaoye, “The Implementation of the Antitrust Law Is Doomed to Be Difficult” (2008) 110 *Caijing Zazhi Niankan* [Yearbook of Journal of Finance and Economy], online: <http://www.caijing.com.cn/2007-12-06/100040501.html>.

183. Felicia Lee, “Ted Koppel Tours a China Brimming With Dreams and Consumerism” (July 8, 2008) *New York Times*, online: <http://www.nytimes.com/2008/07/08/arts/television/08kopp.html?page-wanted=print>.

184. Huo, *supra* note 17 at 43.