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ANTI-MONOPOLY LAW IN CHINA: A SOCIALIST MARKET ECONOMY WRESTLES WITH ITS ANTITRUST REGIME

*Jared A. Berry**

I. INTRODUCTION

In many ways, it appears that 2008 will be a momentous year for China. For a few weeks that summer, Beijing will become the focal point of the world, as athletes, media, and sports fans from around the world converge on the capital city for the Olympic Games. While the excitement surrounding the Beijing Olympics is well-founded, the Chinese business and legal community eagerly anticipates 2008 for another, less obvious, reason—the possible implementation of China’s proposed antitrust regime. For well over ten years, China has worked on developing its first set of comprehensive antitrust laws. Finally, in late 2004, legislative drafters took the first crucial step towards enactment by submitting a draft Anti-Monopoly Law to the State Council’s Legislative Affairs Office. This submission has many Chinese politicians, lawyers, and judges feeling optimistic that an anti-monopoly law will be in place when the world comes to China in 2008.

This note describes the long, arduous process that China has faced in attempting to enact an antitrust regime and analyzes the current antitrust landscape in Communist China. Part II provides an overview of the evolution of China’s economy and legal system, including a detailed examination of events that have influenced the creation and submission in 2004 of the new proposed Anti-Monopoly Law. Part III addresses the likely effects of the proposed Anti-Monopoly Law and analyzes the probability of it successfully accomplishing its stated goals of regulating multinational corporations and reforming state-owned enterprises and administrative monopolies. Part III also emphasizes challenges,

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both external and internal, that could emasculate the proposed law's ability to reach its stated goals and suggestions that could facilitate effective implementation of antitrust reform in China. Finally, Part IV summarizes the author's concerns with communist China's ability to effectively implement antitrust. The author concludes that unless Beijing experiences major philosophical changes, China's attempts at regulating monopoly will be unsuccessful.

II. BACKGROUND: CHINA AND ANTITRUST LAW

A. Evolution of the Modern Chinese Legal System

During the past century, the role of the judiciary within the Chinese legal system has experienced significant changes. In fact, throughout history, judicial institutions in China have struggled to find their identity. Traditional Chinese notions of justice emphasize informal means of settling disputes and imposing sanctions.¹ As a consequence, the philosophies of Confucianism often trumped the law.² In 1949 the Chinese Communist Party (CCP) ousted the Nationalist government and took control of China. The leaders of the CCP had struggled for many years against local warlords, Nationalist strife, and foreign imperialism.³ As a result, CCP leaders neither respected the traditional court system nor considered the rule of law necessary to create a just, fair, and stable society.⁴ Moreover, the traditional communist ideology, to which they adhered, rejected notions of an impartial and fair judiciary.⁵ Instead, communist ideologues viewed the judicial system as an institution of the bourgeois used primarily to oppress and exploit workers and peasants.⁶ Accordingly, when the CCP gained control of China, traditional ideas about law quickly became subordinate to the CCP's communist philosophy.⁷

¹ See DANIEL C.K. CHOW, *THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA IN A NUTSHELL* 42–44, 163 (2003).

² *Id.*

³ JUNE TEUFEL DREYER, *CHINA'S POLITICAL SYSTEM: MODERNIZATION AND TRADITION* 163 (2d ed. 1996).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

Chinese legal systems further deteriorated under Mao Zedong⁸ as his regime attempted to violently change China's settled routine.⁹ The CCP believed that existing legal institutions were remnants of the "old society" of "bourgeois-capitalists."¹⁰ As a result, China's formal laws and structures were all essentially destroyed over the course of nearly twenty years.¹¹ This legal purging occurred because CCP leaders believed that only by ridding itself of these organs would China become as "red" as they desired.¹²

A few years later, the role of the judiciary experienced another change, this time on a basic, constitutional level. Although China's constitution characterized the judiciary as an independent body, different agencies frequently usurped the functions and powers of the judiciary at various times throughout Chinese history. Following the communist revolution, a wide-ranging group of organizations, such as revolutionary committees, military control groups, CCP committees, and public security organs, repeatedly assumed judicial roles and undermined the judiciary's constitutional independence.¹³ Finally, in 1975 the National People's Congress adopted a new constitution and officially abolished the independence of the judiciary by placing it under the control of CCP rather than state leadership.¹⁴

⁸ Regarding names, this note adopts China's official system for romanizing Chinese—the *pinyin* style. Exceptions apply for names of individuals from Taiwan, Hong Kong, or Singapore, which, for various reasons, use different systems of romanization. Additionally, all Chinese names in this note generally follow the Chinese convention of surname first, followed by the given name. Thus, for example, President Hu Jintao is properly referred to as President Hu or Mr. Hu, not President Jintao or Mr. Jintao. In cases where the individual primarily uses an English name, however, English naming conventions are used, e.g. Jackson Guo is properly referred to as Mr. Guo. Finally, in some situations, context leaves it unclear as to which is the individual's surname. For improper name usages within this note, the author apologizes.

⁹ DREYER, *supra* note 3, at 164.

¹⁰ *Id.* at 168.

¹¹ *Id.*

¹² *Id.* (explaining that some went as far as advocating the destruction of the entire legal and constitutional structure in order to purge the CCP of bourgeois leaders).

¹³ DREYER, *supra* note 3, at 168–69.

¹⁴ *See id.* at 169. The Chinese communist system, much like that of the former Soviet Union, divides the CCP and the State or government into separate but parallel systems. *Id.* at 87–89. For example, the highest legislative body in the CCP is the National Party Congress, with various CCP committees functioning at the local level. *Id.* at 90. It is mirrored by the government's highest legislative body, the National People's Congress, with people's congresses also functioning at the local level. *Id.* at

In 1978 when Deng Xiaoping ascended to power, China experienced another shift in its legal system. Unlike previous shifts, Deng Xiaoping's influence moved China closer to a formalized legal system. Prior to 1978, China had molded into a "societal legal" system¹⁵ focused upon widely accepted norms and values of Chinese society.¹⁶ Deng Xiaoping changed the societal legal system into a more predictable jural system, emphasizing formal, codified rules enforced by a regular judicial body.¹⁷

Like its judicial system, China's constitution also evolved, placing increasing value upon independence and equality.¹⁸ In 1978 the constitution was changed to affirm the principles of judicial independence and guaranteed equality before the law for every social class.¹⁹ In 1982 China adopted yet another constitution, which further strengthened the people's courts' independence.²⁰ The 1982 constitution also characterized China as a "people's democratic dictatorship" rather than a "dictatorship of the proletariat."²¹ These and many other changes made by the 1982 constitution have since taken root, and China's legal system today is largely a conglomeration of the principles embodied in the 1978 and 1982 constitutions.²²

Despite the many constitutional improvements of the 1970s and 1980s, many challenges remain. For example, one critical and defining feature of the current government system is its lack of a separation of powers.²³ China's political-legal system (*zhengfa xitong*) consists of lawmaking, regulatory, and administrative

87–90. Generally, the National Party Congress will convene and enact policies previously formulated by the politburo Standing Committee, and then the National People's Congress will convene and endorse the decisions of the CCP's congress. *Id.* at 90.

¹⁵ *Id.* at 167–69. The initial development of the "societal" versus "jural" dichotomy in describing the development of Chinese law is attributed to Shaochuan Leng and Hungdah Chiu. *Id.* at 185 n.1 (citing SHAOCHUAN LENG & HUNGDAH CHIU, CRIMINAL JUSTICE IN POST-MAO CHINA: ANALYSIS AND DOCUMENTS (1985)).

¹⁶ DREYER, *supra* note 3, at 164.

¹⁷ *Id.* at 169.

¹⁸ *Id.* at 170.

¹⁹ *Id.*

²⁰ *See id.* at 171. The independence, however, is limited because the CCP may still interfere with the people's courts. *Id.* In addition, the courts at each level are dependent on the people's congresses or other bureaucratic agencies for funding, staffing, and appointments. CHOW, *supra* note 1, at 195–97.

²¹ DREYER, *supra* note 3, at 171.

²² *See id.* at 169–72.

²³ CHOW, *supra* note 1, at 142–43.

entities, as well as courts and police.²⁴ All of these entities possess overlapping legislative, administrative, and judicial authority.²⁵ The system's highest level consists of the National People's Congress, the National People's Congress Standing Committee, and the State Council. Together, these bodies have supreme legislative authority. However, the myriad of ministries, administrations, bureaus, agencies, and departments below this level often possess authority to legislate within their own jurisdictions.²⁶ As a result, consistent legal standards have been difficult to achieve.²⁷

While China has made progress in developing its legal system, it can still make many improvements that would allow the rule of law to exert a more significant guiding influence.²⁸ These improvements include insulation of the judiciary from political controls,²⁹ reduction of corruption,³⁰ and the establishment and enforcement of laws in basic areas.³¹

B. The Creation of China's "Socialist Market Economy"

In the pre-Deng era, the central government managed almost every aspect of China's economy, which often led to an unproductive workforce and a stagnant economy.³² In accordance with the Soviet model, China's system ensured that government ministries controlled and managed every major industry.³³ The creation of such ministries eliminated the need to establish regulatory measures because the state already controlled each major

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ See, e.g., *Of Laws and Men*, ECONOMIST, Apr. 7, 2001, at 15.

²⁹ See *id.*

³⁰ See *Landlords of the World Unite!*, ECONOMIST, Mar. 23, 2002, at 69.

³¹ See *Beyond a Bail-Out*, ECONOMIST, Jan. 10, 2004, at 13.

³² See generally DREYER, *supra* note 3, at 138–47; MARK BORTHWICK, *PACIFIC CENTURY: THE EMERGENCE OF MODERN PACIFIC ASIA* 405–10 (2d ed. 1998).

³³ BORTHWICK, *supra* note 32, at 406. Interestingly, the CCP did not immediately expropriate all private enterprises upon proclaiming the People's Republic. DREYER, *supra* note 3, at 143–44. Initially, the CCP targeted enterprises that either the Nationalist regime or individuals in the Nationalist Party ran. *Id.* at 143. The CCP then initiated a policy that consolidated remaining private firms into joint state-private ventures according to industry with the state-appointed management taking the dominant role. *Id.* at 144. Finally, in 1955, the CCP began buying out the remaining capitalist shares in enterprises, thus creating a system of state-owned enterprises. BORTHWICK, *supra* note 32, at 406.

industry. Under Mao Zedong's egalitarian policies, urban workers, who tended to neglect the quality and marketability of the items they produced, received an "iron rice bowl,"³⁴ thereby leaving state enterprises generally overstaffed and underproductive.³⁵

Upon his emergence in 1978, Deng Xiaoping instigated tremendous economic reforms that put China on the path of modernization. He began by reestablishing proper incentives in agriculture.³⁶ Next, he opened China's light industry to foreign investment and created special economic zones in the southern coastal provinces.³⁷ Perhaps Deng's most important reform was allowing state enterprises to retain profits (subject to taxation) rather than continuing to require that they forfeit all their profits to the central government.³⁸ Deng also initiated a bankruptcy law to remove failing businesses from the economy.³⁹ As a result of the changes implemented by the Deng regime, China's economy has experienced a remarkable expansion, averaging approximately nine percent annual growth during the last twenty years.⁴⁰

Despite these reform efforts, many state enterprises continued to lose money and drain the economy.⁴¹ China's bankruptcy law, for example, continues to be largely ineffectual because the government is reluctant to apply the law to state enterprises for fear of the political consequences that could result from the economic

³⁴ The "iron rice bowl," or *tie fan wan*, refers to the Communist practice of providing workers and their families with their essential needs, such as employment in state enterprises, housing, schooling, and health care, for the rest of their lives. WILLIAM VAN KEMENADE, CHINA, HONG KONG, TAIWAN, INC. 26, 28 (Diane Webb trans., Alfred A. Knopf 1997) (1996); DREYER, *supra* note 3, at 150. The idea is that the workers and their families do not have to worry because an iron rice bowl will never break.

³⁵ DREYER, *supra* note 3, at 146–47.

³⁶ Philip Bowring, *The Next Phase*, 2 CAP. TRENDS No. 4, at 3–4 (1997). For example, Deng allowed farmers who produced more than the set quota to sell the excess on the free market. DREYER, *supra* note 3, at 148.

³⁷ Bowring, *supra* note 36, at 3–4.

³⁸ DREYER, *supra* note 3, at 151. These reforms resulted in an increase in the quantity, quality, and variety of goods produced, as factories worked hard to meet consumer demand. *Id.* Additionally, workers worked harder and were rewarded with increased spending power. *Id.* at 152.

³⁹ *Id.* at 151.

⁴⁰ Shi Ting, *FDI Shows 15pc Growth Despite Measures to Stop Overheating*, S. CHINA MORNING POST (H.K.), Aug. 20, 2004, at 6.

⁴¹ See James McGregor, *Closing of China's Bright Moon Plant Stands Out as a Sunny Day in the Annals of Beijing Reform*, ASIAN WALL ST. J. WKLY., Mar. 25, 1991, at 5. In 1991, Chinese economists reported that almost two-thirds of China's 102,000 state-owned enterprises were losing money. *Id.*

displacement often associated with bankruptcies.⁴² Consequently, despite their failure to produce profits, technically insolvent state enterprises continue to receive credit from state-controlled financiers.⁴³ Beijing's overall reluctance to act against state enterprises reflects the fear that disassembling China's iron rice bowls would create a reactionary movement, which could threaten national unity and ultimately undermine the CCP's dominance.⁴⁴ In addition, close ties between the management of state enterprises and the CCP, combined with a stifling government bureaucracy, make it harder for the State to instigate the needed reforms.⁴⁵

Despite the obvious economic problems associated with state-owned enterprises, they are only a small part of an even larger economic problem in China—administrative monopolies.⁴⁶ Generally, the term “administrative monopolies” refers to state-owned or state-run holding companies that gain market power through legitimate legislative or administrative means.⁴⁷ A common form of administrative monopoly occurs in China when state-owned enterprises have direct affiliation with a regulatory ministry that receives preferential treatment.⁴⁸ Another particularly damaging form of administrative monopoly occurs when administrative regions or localities enact local protectionist measures by creating barriers for the entrance of goods, services, and raw materials into their regions.⁴⁹ These administrative

⁴² James Kynge, *Beijing Urged to Adopt Bankruptcy Law*, FIN. TIMES (London), Mar. 22, 2001, at 11. In fact, while insolvent state enterprises survive on continued financing, the bankruptcy law does not offer similar protection to foreign-owned firms. *Beyond a Bail-Out*, *supra* note 31, at 13.

⁴³ Kynge, *supra* note 42, at 11.

⁴⁴ Bowring, *supra* note 36, at 6–7.

⁴⁵ *Id.*

⁴⁶ See Daniel S. Mason & Athena Hou Jiangxiao, *China's Proposed Anti-Monopoly Law: The US and European Perspectives*, ASIA L., Nov. 2004, at 11, available at http://www.zelle.com/sub/C_monop.pdf.

⁴⁷ Jijian Yang, *Market Power in China: Manifestations, Effects and Legislation*, 21 REV. INDUS. ORG. 167, 171–72 (2002).

⁴⁸ *Id.*

⁴⁹ *Id.*; see also *Shi nian yi jian xian ming feng mang fan long duan fa zheng shi bu ru li fa cheng xu* 十年一剑显锋芒反垄断法正式步入立法程序, ZHONGGUO GONG YE BAO 中国工业报 [CHINA INDUSTRIAL REPORT], June 13, 2005 [hereinafter *Shi nian*]. These protectionist measures are widespread and can result in inter-provincial trade wars. For example, Mr. Yang cites a trade war between the Hubei Province and the Shanghai Municipality. Hubei imposed an RMB 70,000 (US\$8,464) duty on residents purchasing Shanghai-produced cars. Shanghai responded by imposing an RMB 80,000 (US\$9,674) licensing fee for all Hubei-produced cars. Jijian

monopolies often damage the economy through welfare-reducing practices such as boycotting, discriminatory pricing, compulsory purchasing, and price collusion.⁵⁰

C. The Development of Antitrust Regulations in China

The liberalization movement of the 1980s and 1990s created the need for governmental economic regulation if China was to maintain the stability of its self-proclaimed “socialist market economy.”⁵¹ Consequently, in addition to bankruptcy law, China began developing laws to regulate real estate, securities, and mergers and acquisitions.⁵² By the mid-nineties, the rise of consumerism and the influx of activity and investment from large foreign corporations hastened the call for antitrust laws to keep the market functioning smoothly.⁵³

Chinese legal scholars offer several justifications for antitrust law in China. One approach argues that antitrust law is necessary to prevent economic monopolization of the market and to provide a governmental check over multinational corporations.⁵⁴ A second approach asserts that antitrust law is necessary to maintain consumer welfare.⁵⁵ Notably, to achieve this objective, anti-monopoly regulations must be applied across the board to all state-created monopolies, multinational corporations, and domestic firms.⁵⁶ A third approach suggests that antitrust law is necessary to prevent abuse of power by government administrative

Yang, *supra* note 47, at 172 (citing *Monopoly: The Government Seems to be the Culprit*, BEIJING YOUTH DAILY, Dec. 22, 2002).

⁵⁰ Jijian Yang, *supra* note 47, at 172–73.

⁵¹ See DREYER, *supra* note 3, at 155–57.

⁵² See, e.g., Xiannian Ye, *China Real Estate Market - Laws and Regulations Concerning Land and Real Estate*, CHINA WINDOW, Aug. 1, 2004, http://www.china-window.com/china_market/china_real_estate/china-real-estate-market--7.shtml; ZHIWU CHEN, CAPITAL MARKETS AND LEGAL DEVELOPMENTS: THE CHINA CASE 6–9 (2003), <http://www.som.yale.edu/faculty/zc25/chinastudytrip/capitalmarketsandlegaldevelopment.pdf>.

⁵³ See Rebecca Buckman, *China Hurries Antitrust Law; Multinationals Worry They Will Become Measure's First Targets*, WALL ST. J. (E. ed.), June 11, 2004, at A7.

⁵⁴ Wang Xiaoye, *Report: Anti-Monopoly Law Vital*, CHINA DAILY, Aug. 20, 2004, available at http://www.chinadaily.com.cn/english/doc/2004-08/22/content_367692.htm.

⁵⁵ Zhu Qiwen, *Anti-Monopoly Law Crucial for Consumers*, CHINA DAILY, July 12, 2004, available at http://www.chinadaily.com.cn/english/doc/200407/12/content_347593.htm.

⁵⁶ *Id.*

monopolies.⁵⁷ This approach is based on the assertion that, in terms of distortion of transaction behavior and preclusion of market competition, administrative monopolies are more damaging to China's economy than economic monopolies.⁵⁸

Despite such justifications, the development of Chinese antitrust laws has thus far been a piecemeal effort.⁵⁹ For example, in 1993 China adopted the Law for Countering Unfair Competition as its first attempt at antitrust-like regulation.⁶⁰ This law is akin to a simple consumer protection law with provisions against price fixing or bid rigging, bribery, deceptive advertising, and coercive sales.⁶¹

In 2003 China adopted a set of new merger and acquisition laws entitled the Interim Provision for Foreign Investors to Merge

⁵⁷ Jijian Yang, *supra* note 47, at 175.

⁵⁸ *Id.* Some of the damaging effects referred to include: (1) harm to consumers (most of the complaints made to the Chinese Consumers' Association were related to services of monopolized sectors, particularly postal services and utilities); (2) increased prices (state monopolies are less efficient and therefore charge higher prices); (3) inadequate investment (highly profitable sectors are monopolized by the state, denying firms access to potentially profitable investment opportunities); and (4) increased corruption (corrupt officials are able to earn excessive profits from monopoly earnings). *Id.* at 175–76.

⁵⁹ See generally Peter Neumann and Jackson Guo, *The Slow Boat to Antitrust Law in China: An Examination of New Regulations on Monopoly Pricing*, CHINA LAW & PRAC., Sept. 1, 2003, at 1, available at http://www.faegre.com/articles/article_1220.aspx (outlining the step-by-step developments in China antitrust law from 1980 to 2003).

⁶⁰ Law for Countering Unfair Competition (1993) (P.R.C.), available at <http://apecweb.apeccp.org.tw/doc/China/Competition/cncom2.html> [hereinafter 1993 Unfair Competition Law]. The 1993 Unfair Competition Law had little practical impact on firms' practices because it failed to create a systematic and comprehensive anti-monopoly framework and it lacked a regulatory or enforcement agency. Jijian Yang, *supra* note 47, at 179.

⁶¹ See 1993 Unfair Competition Law, *supra* note 60. Article 1 of the 1993 Unfair Competition Law declares that the law is enacted “[w]ith a view to safeguarding the healthy development of the socialist market economy, encouraging and protecting fair competition, stopping acts of unfair competition, and defending the lawful rights and interests of operators and consumers.” *Id.* (emphasis added). Specific provisions of the law include article 5, which prevents the unauthorized use of trademarks, enterprise names, and names or packaging of well-known goods. Article 7 prevents local government agencies from using administrative power either to force others to buy goods or to prevent entry of outside goods. Article 8 outlaws the use of bribery as a means to buy or sell goods. Article 9 prohibits engagement in false advertising. Article 11 prevents the below-cost sale of goods for the purpose of excluding competitors. Chapter 4 (comprising articles 20 through 32) stipulates the penalties, including damages and fines, for engaging in a prohibited action. *Id.*

Domestic Enterprises.⁶² Under these rules, which are directed specifically at foreign firms, a foreign investor must seek approval from the relevant government bureau prior to conducting a merger when (1) one party's annual sales in China are above RMB 1.5 billion (about US\$180 million), (2) the foreign firm has acquired more than ten Chinese firms in the same industry in a single year, (3) either party has a domestic market share greater than twenty percent, or (4) the post-merger domestic share is over twenty-five percent.⁶³ The rules also specify under what conditions foreign investors must report offshore mergers to the Ministry of Commerce (MOFCOM) and the State Administration of Industry and Commerce (SAIC).⁶⁴ In addition, the rules provide exemptions

⁶² Interim Provision for Foreign Investors to Merge Domestic Enterprises (promulgated by the Ministry of Foreign Trade & Econ. Cooperation/ State Admin. of Indus. & Commerce/ State Bureau of Taxation/ State Admin. of Foreign Exch., Mar. 7, 2003, effective Apr. 12 2003) CHINALAWINFO (last visited Oct. 28, 2005) (P.R.C.) (subscription limited source on file with author) [hereinafter 2003 M&A Rules]. As indicated by their title, the purpose of these rules is to fill a regulatory void until the government enacts a more comprehensive antitrust law. Thomas E. Jones & Adam J. Kearney, *New Chinese Merger Control Rules with Worldwide Transactional Implications: The Third Major Antitrust Jurisdiction?*, in PLC GLOBAL COUNSEL COMPETITION LAW HANDBOOK 2003/04 103, 103 (7th ed. 2004), available at <http://www.practicallaw.com/jsp/article.jsp?item=32501>. Jones and Kearney, of Freshfields Bruckhaus Deringer LLP, indicate that the delay in the adoption of the submitted draft of the Anti-Monopoly Law, combined with the adoption of Provisional Rules for Mergers and Acquisitions and Provisional Rules for Prevention of Monopoly Pricing, has led to speculation that the drafting process has been delayed by vested interests. *Id.* These interests may include the "recently corporatized state enterprises... projected by policy makers to become the first Chinese multinationals." *Id.*

⁶³ 2003 M&A Rules, *supra* note 62, art. 19.

⁶⁴ *Id.* art. 21. The offshore transaction triggers are: (1) a party owns assets within China which exceed RMB 3 billion (about US\$263 million), (2) the sales turnover of the foreign firm that merges with the domestic party exceeds RMB 1.5 billion in that year, (3) either party has a domestic market share of over twenty percent, (4) the post-merger domestic share is over twenty-five percent, or (5) a party will either directly or indirectly hold equity in more than fifteen Chinese firms in the relevant industry as a result of the merger. *Id.*

from antitrust investigations⁶⁵ but do not provide sanctions and remedies.⁶⁶

In late 2003, China also adopted the Interim Provisions on Preventing the Acts of Price Monopoly.⁶⁷ These rules prevent entities from achieving market dominance as inferred by a firm's "market share in the relevant market, substitutability of relevant goods, and ease of new entry."⁶⁸ Additionally, the rules prevent price coordination and supply restriction, and prohibit government agencies from illegally intervening in price determinations.⁶⁹ However, like the 2003 rules regarding mergers and acquisitions, the 2003 monopoly pricing rules fail to create civil causes of action for violations.⁷⁰

⁶⁵ *Id.*; see Jones & Kearney, *supra* note 62, at 108. Transactions offering any of the following benefits are exempt from antitrust investigation: (1) improvement of fair competition of the market, (2) restructuring of a loss-making enterprise with guaranteed employment, (3) introduction of advanced technology and management talent, or (4) environmental improvement. 2003 M&A Rules, *supra* note 62, art. 22.

⁶⁶ See 2003 M&A Rules, *supra* note 62; Jones & Kearney, *supra* note 62, at 108. Despite China's attempts to enact antitrust measures through the 1993 Unfair Competition Law and the 2003 M&A Rules, Neumann and Guo note that the following factors limit the regulatory effectiveness of the measures: (1) the dominant interpretation and enforcement role of administrative agencies "in an economy with significant state ownership" raises conflict-of-interest concerns; (2) the failure of the regulations to create private causes of action for injuries resulting from anti-competitive behavior forces individuals to go through the relevant administrative agency to get relief; (3) "Chinese courts have very limited authority to decide competition- and antitrust-related disputes;" and (4) the Chinese courts' limited role will cause them to continue to lack the expertise and experience necessary to be effective in complex economic and business litigation. Neumann & Guo, *supra* note 59.

⁶⁷ Interim Provisions on Preventing the Acts of Price Monopoly (promulgated by the State Dev. Planning Comm'n, June 18, 2003, effective Nov. 1 2003) CHINALAWINFO (last visited Oct. 25, 2005) (P.R.C.) [hereinafter 2003 Monopoly Pricing Rules]. Robert Lewis, managing partner of Lovells' Beijing office, believes that the adoption of the predatory pricing rules indicates that the drafted anti-monopoly rules are politically sensitive. Bei Hu, *China Unveils Competition Rules; Observers Fear Political Resistance May Delay Implementation of the Country's First Antitrust Law*, S. CHINA MORNING POST (H.K.), July 2, 2003, at 1. Hans Au, also an attorney at Lovells Beijing, recognizes that the adoption of temporary monopoly pricing rules demonstrates a "turf war" among different CCP departments and localities. *Id.*; see also Yong Zhao, *Will Protectionists Hijack China's Competition Law?*, INT'L FIN. L. REV. (London), Jan. 1, 2004, at 21.

⁶⁸ 2003 Monopoly Pricing Rules, *supra* note 67.

⁶⁹ *Id.*

⁷⁰ See *id.*; Neumann & Guo, *supra* note 59. Neumann and Guo argue that the 2003 Monopoly Pricing Rules fail to address the basic problems under the previous monopoly provisions. *Id.* To be effective, said pricing rules must be implemented and

D. Drafting of the Anti-Monopoly Law

In 1987 China's State Council Legislative Department established a drafting team to develop anti-monopoly law.⁷¹ Nevertheless, drafting on the law did not actually begin until the early 1990s.⁷² During the drafting process, the drafting committee distributed unofficial drafts on a limited basis to groups and individuals for comment and recommendation.⁷³ These drafts gave business and legal professionals a glimpse of the anti-monopoly provisions under consideration.

The 2002 Draft of the Anti-Monopoly Law (2002 Draft) organizes China's anti-monopoly law into chapters. Chapter 4 regulates market concentration and prevents mergers that eliminate or limit competition, hinder development of the national economy, or damage the public interest.⁷⁴ Chapter 5 addresses administrative monopolies by preventing certain governmental practices, including forced purchases and abusive regional measures that hinder the flow of goods and services.⁷⁵ Chapter 5 also prohibits the formation of industry monopolies that interfere with competition or bar entry into particular markets.⁷⁶ Chapter 6 calls for an independent

enforced by Chinese regulators and courts, which is a difficult task considering that the rules do not significantly expand the procedural rights of aggrieved market actors.
Id.

⁷¹ Jijian Yang, *supra* note 47, at 180.

⁷² Shi Ting, *Breaking Down the Barriers to Progress; Taskforce Sent to 28 Jurisdictions to Inspect Efforts Against Protectionism*, S. CHINA MORNING POST (H.K.), Nov. 10, 2004, at 7 [hereinafter *Breaking Down the Barriers*]; Shi Ting, *Watchdog Excluded in Law to Stop Trade Abuses; Anti-Monopoly Legislation Weakened by Lack of Such an Agency, Expert Warns*, S. CHINA MORNING POST (H.K.), Nov. 8, 2004, at 7 [hereinafter *Watchdog Excluded*]. Initially, the primary responsibility for introduction of the law rested with the State Economic and Trade Commission and the State Administration of Industry and Commerce (SAIC), but that role now rests with the recently instituted Ministry of Commerce (MOFCOM). Yong Zhao, *supra* note 67.

⁷³ Yong Zhao, *supra* note 67. See, for example, YEE WAH CHIN ET AL., AM. BAR ASS'N, JOINT SUBMISSION OF THE AMERICAN BAR ASSOCIATION'S SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW AND PRACTICE ON THE PROPOSED ANTI-MONOPOLY LAW OF THE PEOPLE'S REPUBLIC OF CHINA 1 (2003), <http://www.abanet.org/intlaw/divisions/regulation/chin715II.pdf>, for the American Bar Association's (ABA's) Antitrust and International Law and Practice Sections' recommendations regarding the available draft of the Anti-Monopoly Law.

⁷⁴ Fan long duan fa (zheng qiu yi jian gao) 反垄断法 (征求意见稿) [Anti-Monopoly Law (Draft for Seeking Recommendations)] ch. 4 (2002) (P.R.C.) [hereinafter 2002 Draft].

⁷⁵ *Id.* ch. 5; see Mason & Hou, *supra* note 46; Shi nian, *supra* note 49.

⁷⁶ 2002 Draft, *supra* note 74, ch. 5.

administrative organ to oversee the implementation and enforcement of anti-monopoly laws.⁷⁷

In addition, the 2002 Draft defines a “dominant market position” as one firm having over half of the market, two firms having over two-thirds of the market, or three firms having over three-fourths of the market.⁷⁸ This provision has caused many multinational corporations in China to worry that their business affairs may become subject to heavy regulation.⁷⁹

After nearly ten years of drafting, the committee took the first step towards enacting legislation. On October 27, 2004, it submitted its version of the anti-monopoly laws (Submitted Draft) to the State Council’s Legislative Affairs Office.⁸⁰ According to

⁷⁷ *Id.* ch. 6.

⁷⁸ 2002 Draft, *supra* note 74, ch. 3, art. 16. Conversely, the ABA defines “monopoly” and “dominant market position” in terms of status—whether a firm has the ability to set its prices in strategic reaction to other firms’ pricing decisions—and then specify what conduct would be against the law. YEE WAH CHIN ET AL., *supra* note 73, at 11.

⁷⁹ Andrew K. Collier, *Antitrust Raises Abuse Fears; Mainland Companies Could Exploit New Monopoly Rules to Make It Harder for Foreigners to Compete in the Market*, S. CHINA MORNING POST (H.K.), Jan. 13, 2004, at 1. Companies with particular fears include Eastman Kodak, who recently purchased ownership interests in Lucky Film, China’s largest film manufacturer; Proctor & Gamble, whose Pantene, Head & Shoulders, and Rejoice shampoos are the top three brands in China; and L’Oreal, whose acquisition of the Chinese skincare company Mininurse catapulted L’Oreal to second in terms of market share. *Id.* In addition, a recent report by the SAIC specifically singled out Microsoft and Tetra Pak (a Swedish manufacturer of packaging for beverages) as a threat to domestic firms in China. Buckman, *supra* note 53, at A7; see also Mure Dickie, *Pressure for Anti-Monopoly Law Grows: Beijing is Urged to Act Faster on Introducing Legislation to Prevent Competition Being Stifled by Market Domina*, FIN. TIMES (Asia ed.) (London), May 26, 2004, at 12.

⁸⁰ Zhang Yi 张毅, *Wo guo fan long duan fa song shen gao yi xing cheng* 我国《反垄断法》送审稿已形成 [China’s Anti-Monopoly Law Submission Draft Already Formed], XINHUA FA ZHI SHI XIAN 新华法治视线 [XINHUA LEGAL WIRE] (Beijing), Oct. 27, 2004, available at http://news.xinhuanet.com/legal/2004-10/27/content_2146394.htm [hereinafter *Anti-Monopoly Law Submission*]; *Watchdog Excluded*, *supra* note 72. The draft law will probably come under discussion at the national legislators’ meeting in March of 2006 and during the 10th National People’s Congress, which ends its session in 2008. *Breaking Down the Barriers*, *supra* note 72; see *Watchdog Excluded*, *supra* note 72. Reports speculate that the main reason for the delay in drafting is major infighting among the responsible agencies as to who should actually oversee the implementation of the new law. Alysha Webb, *Antimonopoly Flap in China Doesn’t Worry Tire Makers*, TIRE BUS., Jan. 3, 2005, at 1; Buckman, *supra* note 53; Yong Zhao, *supra* note 67; Bei Hu, *supra* note 67. While MOFCOM has taken over drafting responsibilities, the SAIC, which oversees the 1993 Unfair

official reports, the Submitted Draft does not provide for an independent agency to oversee implementation or to report violations of anti-monopoly law.⁸¹ The Submitted Draft, according to some reports, also fails to include definitions for important terms such as “dominant market share.”⁸² Notwithstanding these deficiencies, the architects of the Submitted Draft devoted a whole chapter to regulating administrative monopolies. This chapter includes provisions designed to prevent government departments from coercing people into buying and selling products, as well as provisions to counter local protectionist measures like restrictive regional trade zones.⁸³ As Chinese companies begin to develop increasingly significant market share in certain industries, Beijing has gradually shifted its primary focus away from the prevention of foreign dominance in the Chinese marketplace to other areas of economic concern.⁸⁴ This change of emphasis may explain the differences between the previous drafts and the Submitted Draft.

Despite the appearance of progress and unity in moving the proposed antitrust laws forward, Chinese bureaucracy has once again proven to be inhospitable to the initial development of much needed antitrust laws. At the end of 2004, many expected the National People’s Congress to pass the anti-monopoly laws in 2005.⁸⁵ However, in early 2005 MOFCOM, the SAIC, and the National Development and Reform Commission (NDRC) each released independent and conflicting suggestions relating to the

Competition Law, also has power in some areas relating to antitrust law. *Watchdog Excluded*, *supra* note 72.

⁸¹ *Anti-Monopoly Law Submission*, *supra* note 80. There is a noted concern that the absence of an independent agency will make the laws less effective against both administrative and economic monopolies possessing strong lobbying power. *Id.*; *see infra* notes 86–87 and accompanying text.

⁸² Webb, *supra* note 80. Xiong Weihua, chief secretary of the China Rubber Industry, believes that the way the anti-monopoly laws define monopolization will be key to the laws’ effectiveness as an industry regulator. *Id.* According to Shanghai attorney Victor Gu, a senior associate at the law firm Boss & Young, agreement on a definition for terms such as “market” and “dominant market position” is being frustrated by infighting between MOFCOM, the SAIC, and the National Development and Reform Commission (NDRC) over which bureau has primary jurisdiction of the new law. *Id.*; *see infra* notes 86–87 and accompanying text.

⁸³ *Watchdog Excluded*, *supra* note 72.

⁸⁴ Webb, *supra* note 80. As Boss & Young attorney Victor Gu states, “Beijing is looking into the possibility that some domestic companies may have monopoly power in the future.” *Id.*

⁸⁵ See Cory Huang, *NPC Set to Pass Anti-Monopoly Law; A Raft of Legislation Covering Commercial Activities Is Likely to Be Enacted Next Year*, S. CHINA MORNING POST (H.K.), Dec. 31, 2004, at 13.

structural framework of the legislation.⁸⁶ MOFCOM promptly responded by denying reports that differences regarding the anti-monopoly legislation existed among the ministries.⁸⁷ Thus, China must iron out some serious administrative wrinkles in its legislative system before enacting its anti-monopoly laws in a manner flexible enough to remain responsive to its rapidly growing markets.

III. CHINA'S ANTI-MONOPOLY LAW, THOUGH EFFECTIVE AS A PROTECTIONIST MEASURE, WILL NOT LIKELY MAKE CHINA THE WORLD'S NEXT MAJOR ANTITRUST JURISDICTION

A. An Anti-Monopoly Law as a Basis for Economic Nationalism and Control of Non-State Enterprises

Economic development in China is characterized by the trade-off between improving the economic system through implementation of liberalizing measures and retaining the centralized communist political system.⁸⁸ Any increase in economic freedom through market liberalization, such as lowering local participation requirements in joint ventures or reducing government ownership in state industries, represents a loss of control by the central government.⁸⁹ However, increasing globalization encourages the implementation of liberalizing measures such as the World Trade Organization (WTO) entry agreement. Over the next ten years, China must honor its obligations to the WTO, which include continued tariff reductions and increased intellectual

⁸⁶ Zhang Liming 张黎明, *Zhong yang san bu wei zheng li fan long duan fa jin nian chu tai wu wang* 中央三部委争立《反垄断法》今年出台无望 [Three Central Government Ministries Conflict, Anti-Monopoly Law Has No Hope of Being Introduced This Year], XINHUA NEWS AGENCY (Beijing), Jan. 11, 2005, available at http://news.xinhuanet.com/fortune/2005-01/11/content_2442715.htm; see David Fang, *Bureaucrats Stall Anti-Monopoly Law; Three Ministries' Efforts to Support the Legislative Process Have Hindered Progress*, S. CHINA MORNING POST (H.K.), Jan. 12, 2005, at 8; Webb, *supra* note 80, at 1.

⁸⁷ Zhang Liming, *supra* note 86. Peking University law professor Sheng Jiemin believes that the bureaucratic infighting could lead to bureaucratic duplication and overlap with no single organization filling the role of an independent anti-monopoly watchdog agency. *Id.* Without such independent agency, Professor Sheng believes it is unlikely that the legislation will pass this year. *Id.*

⁸⁸ See *supra* notes 42–44 and accompanying text.

⁸⁹ See *supra* note 44 and accompanying text.

property protections.⁹⁰ Thus, centralized government's hold upon the economy will continually loosen. Viewed in such a light, the proposed Anti-Monopoly Law appears less as a means of promoting competition than as a tool for protecting narrow, bureaucratic interests.

Early justifications for enacting anti-monopoly laws focused on preventing multinational corporations from monopolizing the newly liberalized Chinese markets.⁹¹ These justifications were not driven by worries of multinational corporations acquiring enough market power to cause harm to consumers or to cause inefficiencies in market production and resource allocation; rather, Beijing's policy makers feared that sophisticated foreign corporations would simply push un-savvy local competitors out of business.⁹²

Protecting the presence of many local producers in a competitive market is beneficial to the CCP in two crucial ways. First, it allows local producers to participate in an evolving and innovative market, thereby increasing the possibility of capturing technological expansions domestically. Allowing Chinese firms to take advantage of protectionist measures that facilitate their growth into large worldwide firms would also further the CCP's interest. The CCP could then gain prestige for having Chinese companies as world players. Second, the CCP would benefit from dramatic increases in corporate tax revenue and enhanced stability in Chinese labor markets via a strong presence of Chinese, rather than foreign, corporate entities.

Although larger Chinese corporations might present the CCP with control problems, skillful application of the Anti-Monopoly Law can solve these challenges. Through selective application of the Anti-Monopoly Law, the Chinese government could break up domestic corporations that reach such levels of power that they could begin to threaten state interests.

Likewise, the CCP must consider the possibility of a multinational corporation acquiring enough power to rival or threaten the CCP's stability.⁹³ By providing the government with a mechanism for limiting the size of multinational firms, the CCP can

⁹⁰ See generally *Intellectual Property Theft in China and Russia: Hearing Before the Subcomm. On Courts, the Internet and Intellectual Property of the H. Comm. of the Judiciary*, 109th Cong. (2005), available at http://commdocs.house.gov/committees/judiciary/hju21217.000/hju21217_0.htm.

⁹¹ See *supra* notes 54–55, 57 and accompanying text.

⁹² See *supra* note 54 and accompanying text.

⁹³ See *supra* note 79 and accompanying text.

maintain its control over the market as well as ensure its role as the preeminent societal and political power in China.⁹⁴

B. Strategic Amputation: Applying Anti-Monopoly Laws Against State-Owned Enterprises

Several important considerations affect the anti-monopoly regulation of state-owned enterprises and administrative monopolies. As a transitional communist economy, the state sector in China is an important player in both the economic market and the everyday life of individual citizens.⁹⁵ Nevertheless, reforming the state enterprise system is probably the most pressing issue facing the Chinese economy in the twenty-first century, and the new anti-monopoly laws represent a tool to accomplish such reform.⁹⁶ Unfortunately, China's track record on reforms is less than encouraging. Inconsistent application of bankruptcy laws to reform state enterprises illustrates Beijing's reluctance to enforce laws that bear against what are virtually its own organs.⁹⁷

The major question is whether the government will apply the anti-monopoly laws to state-owned enterprises, which are primary characteristics of a communist economic system. Because China has no separation of powers among the various government departments, individual departmental interests are difficult to ascertain.⁹⁸ Moreover, the historical interplay between a centralized government system, state-owned enterprises, and Chinese society suggests that the varied interests regarding such enterprises may not favorably unify.⁹⁹

An analogy that is particularly illustrative of the conflicts involved is that of self-amputation. Self-amputation is a difficult proposition to face and occurs only when the interest in preserving the appendage is severely outweighed by the probability that removing the appendage would be necessary for the survival of the individual. Similarly, with respect to any single state enterprise, it is difficult to argue that reform of that enterprise is *necessary* to the survival of any single bureau or the bureaucracy as a whole.

⁹⁴ See *supra* notes 43–44 and accompanying text.

⁹⁵ See *supra* note 35 and accompanying text.

⁹⁶ See *supra* notes 41–45 and accompanying text.

⁹⁷ See *supra* notes 38, 40–42 and accompanying text.

⁹⁸ See *supra* note 23.

⁹⁹ See *supra* note 33 and accompanying text.

Additionally, to the extent that state-operated enterprises provide stable employment to a large number of workers, any reforms that have significant detrimental effects on employment may serve to undermine the government's control.¹⁰⁰

On the other hand, reform is likely in cases where one agency has particularly strong interests in conducting reform while the other agencies harbor only minute interests in preserving state-owned enterprises. Under such conditions, the agency with strong interests could act unilaterally to instigate reform where no other agency would likely have an incentive to intervene. This fact holds particularly true in instances where high transaction costs prevent effective coordination. Notably, the aforementioned conditions do not presently exist in China's bureaucracy. Instead, the current Chinese bureaucracy can be characterized as existing at two levels. The higher level consists of an elite group with vast authority (the Politburo and National People's Congress). Below it, the lower level of Chinese bureaucracy consists of many bureaus and departments, each possessing equal powers vis-à-vis the others.¹⁰¹ This arrangement allows elite authorities to maintain power via the time-honored divide and conquer strategy of pitting potential challengers against one another.

Therefore, while the Chinese government is likely to use anti-monopoly law to regulate foreign firms and possibly even domestic firms as a means of maintaining its supremacy, it remains to be seen whether Beijing will be willing to use anti-monopoly law to cut off its own appendages for the sake of preserving and developing the body.¹⁰²

C. Effectiveness of the Anti-Monopoly Law in Achieving the Stated Goals

Given China's historical suspicion of foreigners and foreign entities in general, Beijing's willingness to use an anti-monopoly law against super-corporations, such as Microsoft and Kodak, is largely unquestioned.¹⁰³ The more important question is whether such a law will be an effective tool by which the government can prevent foreign dominance. Beijing's effective application of the

¹⁰⁰ See Jijian Yang, *supra* note 47.

¹⁰¹ See CHOW, *supra* note 1, at 142-43.

¹⁰² See discussion *supra* Part II.B.

¹⁰³ See *supra* note 79 and accompanying text.

Anti-Monopoly Law against firms hinges on two critical factors: (1) the way the drafters choose to define key terms like “monopoly,” “monopolize,” “dominant position,” and “market share,”¹⁰⁴ and (2) the ability of the relevant bureaucracies—MOFCOM, the SAIC, and the NDRC—to harmonize their interests enough to administer and enforce the law in a consistent and singular manner.¹⁰⁵

1. Properly defining key terms enables effective enforcement

Early drafts of the anti-monopoly laws incorporate bright-line rules for determining whether to classify a firm as a monopoly. According to the drafts’ rules, a monopoly exists when a single firm controls one-half or more of the relevant market, two firms control two-thirds or more of the relevant market, or three firms control three-fourths or more of the relevant market.¹⁰⁶ Setting aside for a moment the otherwise critical issue of defining relevant markets, such bright-line rules have many benefits. For example, the rules are easily applied to determine which firms wield unlawful economic power.¹⁰⁷ Once the relevant market is defined, determining a violation is merely a matter of calculating a firm’s market share and comparing it to the maximum levels allowed under the anti-monopoly laws. Because of the ease of calculation and measurement, firms could determine *ex ante* and to a high degree of certainty whether their actions violate anti-monopoly laws.¹⁰⁸ Furthermore, if China’s government desires to regulate monopolies in order to prevent corporate power concentrations that could eventually undermine its own power, then bright-line anti-monopoly rules provide a simple approach for restraining foreign corporations that may gain too much economic or social power.

Notwithstanding the early drafts’ apparent benefits, closer analysis of the bright-line market-share approach reveals several weaknesses. First, properly defining a firm’s relevant market may be extremely problematic; how the drafters define a firm’s relevant market can determine whether it is a monopoly because a firm’s market share in any given market depends primarily on the level of

¹⁰⁴ See *supra* notes 82–84 and accompanying text.

¹⁰⁵ See *supra* note 86 and accompanying text.

¹⁰⁶ See *supra* notes 72–79 and accompanying text.

¹⁰⁷ See *supra* note 79 and accompanying text.

¹⁰⁸ See *id.*

specificity used to define the market.¹⁰⁹ For example, the company L'Oréal can be properly characterized as both a general producer of cosmetics and a specific producer of mascara, lipstick, or fingernail polish. Corporations like L'Oréal that are both general and specific producers may hold a dominant position in the overall industry (cosmetics, etc.), but may not hold a dominant position in the market for any given individual product (mascara, etc.). Thus, in determining whether a monopoly exists under the bright-line market-share approach, the focus shifts from measuring market power to the key issue of defining the relevant market.¹¹⁰

In theory, determination of a monopoly market share in a certain industry involves relatively simple calculations—either a firm has reached the threshold levels or it has not. In practice, however, any firm accused of exceeding the requisite level of market power will likely respond with the argument that regulators have improperly defined the firm's true market. The L'Oréal example is particularly illustrative of this trend. A hypothetical complaint might allege that L'Oréal's cosmetics sales amount to over fifty percent of the cosmetics market in China. L'Oréal could respond that the relevant market is actually that of beauty products, which would also include other products such as hair products in addition to cosmetics. Under that definition, L'Oréal's sales might then amount to only thirty-seven percent of the market. The potential for regulated parties to play with definitions ultimately places the burden of determining proper definitions on the judiciary—a burden that bright-line rules are specifically designed to avoid.

Furthermore, even if the Chinese government were to establish an easy-to-apply rule for defining a market, the bright-line approach will likely be over-inclusive and, therefore, ineffective in accomplishing the CCP's goals. For example, assuming that Beijing's true goal is to prevent large concentrations of power in the hands of foreign corporations, the bright-line approach might prove counterproductive because its application could implicate many corporations that pose no threat to the CCP's power.¹¹¹ Admittedly, if an international computer operating system manufacturer were to capture eighty percent of the Chinese market,

¹⁰⁹ See *supra* notes 79, 82.

¹¹⁰ See *supra* note 82 and accompanying text.

¹¹¹ See *supra* notes 79–82 and accompanying text.

it could pose a significant threat to the CCP's power.¹¹² On the other hand, it is difficult to imagine an international company with eighty percent market share in the yellow wooden pencil industry as having the capability to pose an equivalent threat.

Consequently, it is essential that the legislature clearly define the key terms to enable effective enforcement of the anti-monopoly laws and to avoid confusion. Further, legislation must include practical definitions for relevant markets that are not over-inclusive.

2. To be effective, the bureaucracies must work together

Within any regulatory scheme, establishing an effective enforcement mechanism is vital to achieving the regulation's purposes. The complex structure of China's government morphs regulation and enforcement into complex issues of coordination among a dizzying array of bureaus with overlapping authority.¹¹³

With regard to anti-monopoly laws, China's overlapping bureaucracies pose a particularly acute problem.¹¹⁴ For instance, three bureaus—MOFCOM, the SAIC, and the NDRC—have already claimed responsibility over all or part of the Anti-Monopoly Law.¹¹⁵ There are some indications that bureaucratic infighting plays a factor in the legislation's delay.¹¹⁶ If these indicators are credible, it is unlikely that these three agencies will be able to come together to effectively regulate or otherwise enforce the Anti-Monopoly Law.¹¹⁷ Therefore, unless Beijing establishes an independent agency to oversee anti-monopoly regulations, it is likely that the three agencies will maintain their jurisdictional claims over anti-monopoly enforcement, thus creating a compliance nightmare for both the government and businesses.

For businesses, dealing with several regulating agencies could prove very difficult and costly. With three different agencies independently creating guidelines for anti-monopoly regulation, businesses would have no choice but to negotiate all three sets of inevitably constricting and conflicting guidelines. Businesses

¹¹² See *supra* note 81 and accompanying text.

¹¹³ CHOW, *supra* note 1, at 142–43.

¹¹⁴ See *supra* notes 81–84, 87 and accompanying text.

¹¹⁵ See *supra* note 81 and accompanying text.

¹¹⁶ See *supra* notes 81–84 and accompanying text.

¹¹⁷ See *supra* note 87 and accompanying text.

would sit in the unsavory position of following one agency's set of guidelines at the expense of another's. As a result, firms would inevitably run the risk of incurring non-compliance sanctions. Firms would also likely face a stifling level of combined oversight from all three independent agencies, each zealously regulating and pursuing its own unique brand of antitrust violations.

Having three agencies regulate monopolies also presents the government with its own set of vexing issues. Multiple agencies independently propagating regulations will inevitably generate inconsistencies in interpretation and, ultimately, in enforcement of anti-monopoly regulations.¹¹⁸ Such inconsistencies could undermine the purposes for originally enacting the law. Conversely, the three monopoly-regulating agencies could create a free-rider problem. In such a scenario, each of the agencies would expect the other two agencies to enforce the anti-monopoly laws and none would take action. The resultant free-riding would engender under-enforcement of anti-monopoly laws.

One arguable weakness of the free-rider scenario is its underlying assumption that individual agencies derive utility from not enforcing the law. A more realistic approach recognizes that individual agencies derive utility from increases in bureaucratic power gained through enforcement. Under this paradigm, the three competing bureaucracies would tend to over-enforce anti-monopoly regulations, effectively stifling market growth and stemming the tide of crucial foreign investment.

Given the potential problems with bureaucratic overlap and free-riding, the most efficient regulatory remedy would be to establish a single, independent agency charged with enforcing anti-monopoly regulations.¹¹⁹ A single, independent agency could effectively eliminate competitive enforcement problems by consolidating enforcement powers into a centralized entity. Such consolidation would also eliminate inconsistent anti-monopoly guidelines and facilitate the kind of predictable regulatory environment upon which economic growth depends.

3. Consumers must enter the equation

It is troubling to note that consumer interests play such an insignificant role in the development of Chinese anti-monopoly

¹¹⁸ See *supra* note 87 and accompanying text.

¹¹⁹ See *supra* notes 81–84, 87 and accompanying text.

law. Because the Chinese government is not popularly elected, its responsibility to the general public is tenuous. Accordingly, consumer interests rarely translate into policy. Moreover, Chinese consumers have little recourse since they cannot remove officials who do not act in the consumers' best interests.

This is not to say, however, that consumers have nothing to gain from China's proposed antitrust law. Indeed, one of the primary purposes of antitrust law is to increase consumer welfare by making the market more efficient.¹²⁰ The ultimate effects of monopolies on the market are lower output and higher prices, both of which directly impact consumers—whether individuals, businesses, or even government.¹²¹

China must develop a means of ensuring that individual consumer interests—especially those outside of government and business interests—are adequately represented in the processes of developing and enforcing anti-monopoly laws. The most obvious method of protecting consumer interests is to give consumers a democratic voice in China's government. However, as the Chinese government has ruled out true democratization as a matter of policy, this solution does not seem feasible. Another possible solution involves the formation of a consumer protection agency dedicated to representing consumer interests in the adoption and enforcement of China's Anti-Monopoly Law. Such an agency could work as a coequal with the agency that possesses jurisdiction over antitrust laws to ensure that antitrust law enforcement serve consumers' best interests. In order for the consumer protection agency to be effective, it must be directly responsible to consumers. Agency accountability, whether accomplished through elections of non-partisan representatives or other means, must establish the agency's primary duty to consumers and should include remedies for violations of that duty. In the absence of such public accountability mechanisms, the agency would quickly become like any other Chinese government bureau—acting in its own bureaucratic self-interest with little incentive to act otherwise.

IV. CONCLUSION

China has taken great steps towards reforming its legal and economic systems, but it still needs many more reforms. Although

¹²⁰ See *supra* notes 54–55, 57–58 and accompanying text.

¹²¹ See *supra* notes 56, 57–58 and accompanying text.

it is slowly progressing towards adopting a comprehensive and workable antitrust law, effective antitrust regulation is one step that has thus far eluded China. While it seems inevitable that China will pass the Submitted Draft, it is unclear whether that law will effectively achieve the government's complex and often conflicting antitrust goals.

As China inches closer to passing antitrust legislation, multinationals must continue their vigilance as the law will likely reflect the CCP's historically protectionist tendencies and will probably be designed to maintain government control over multinationals. Therefore, companies wishing to do business in China should expect to face significant legal compliance costs and to incur penalties for possible antitrust violations.

Just as it is foreseeable that Beijing will use the Chinese Anti-Monopoly Law to restrain multinationals, it is equally foreseeable that Beijing will be disinclined to use the Anti-Monopoly Law as a tool for reforming state-owned enterprises, particularly where reformation could lead to unemployment. Such selective enforcement may allow certain large firms to earn and cultivate favor with the government and thus escape regulation. As a result, China would continue to have large enterprises with significant government ties—a situation the antitrust regulation is supposed to alleviate.

The Anti-Monopoly Law's effectiveness in achieving any of the government's intended purposes depends largely on how it defines key terms in the provisions and whether China's burgeoning bureaucracy can unite in enforcing the law. For China to become a significant antitrust jurisdiction, it must adopt a regime that applies equally to all enterprises (domestic and foreign) in theory and in practice. An independent agency with the power to tackle violations when and where they occur must also administer the law. Ultimately, the drafting and implementation of antitrust laws must be guided by the goal of promoting consumer welfare and economic efficiency. Unfortunately, China's forthcoming anti-monopoly laws do not appear to be such a regime.