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Note

China's New Anti-Monopoly Law: Addressing Foreign Competitors and Commentators

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Chinese lawmakers made news with the passage of China's first comprehensive antitrust law, known as the Anti-Monopoly Law (AML),¹ scheduled to take effect on August 1, 2008. While the AML is a milestone in Chinese economic policy, its substance has been particularly newsworthy for alleged weaknesses which may have a negative impact on foreign firms and investors doing business in China. The Chinese government, however, is legitimately concerned about the negative effects that foreign activity may have on local interests if the activities of foreign entities operating within the country are unchecked. Thus, China's dilemma lies in phrasing and interpreting the provisions of the AML to strike the right balance between fostering its domestic firms while avoiding imposing undesirable consequences on domestic activity by foreign firms and investors.

Specifically, this Note seeks to determine the optimal administrative policy in implementing the AML that would

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1. Fan Longduan Fa [Anti-Monopoly Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) (P.R.C.), available at http://www.gov.cn/ziliao/flfg/2007-08/30/content_732591.htm, translated at <http://fortunelegalpad.files.wordpress.com/2007/09/anti-monopoly-law-translated-by-td-2007-8-31.doc> (unofficial English translation courtesy of T&D Associates).

allow China's domestic firms to compete effectively with their foreign counterparts in China. Part I of this Note outlines the unique economic history of China and its impact on the ability of present day Chinese firms to compete with firms that evolved in different economic environments. Part I also describes some of the major points of the AML and highlights certain criticisms made by Western commentators. Part II consists of a comparative analysis of the circumstances that exist in China warranting the concern on the part of Chinese lawmakers regarding foreign competition in China, followed by evidence of such concern in the provisions of the AML and a reply to the Western critics. This Note closes with a pragmatic proposal in Part III to address China's dilemma, with the aim of recognizing and accommodating all interests involved: Chinese firms, foreign firms, and Chinese consumers.

I. BACKGROUND

A. A COMPARATIVE SKETCH OF THE U.S. AND CHINESE ECONOMIES

1. *China's Current Market Structure*

To fully understand the current state of the Chinese market, it is first necessary to examine the historical experience which continues to shape the state of its economy. Since 1978, China's economic policy has shifted "pragmatically" from a centrally planned, Marxist-Leninist model,² to one in which competitive markets have evolved to a limited extent.³ Before the Maoist era, China did not have an extensive commercial economy or the corresponding legal structures.⁴ In Maoist China, industries were centrally planned and developed. In the farming sector, for example, individual farmers were organized into communes⁵ which were directed what to grow, how much to

2. Bruce M. Owen et al., *Antitrust in China: The Problem of Incentive Compatibility*, 1 J. COMPETITION L. & ECON. 123, 124 (2005) (describing the model as the "Marxist-Leninist-Maoist Model," placing Chairman Mao Zedong and his political revolution alongside the original communists and their revolution which took place decades earlier).

3. *Id.*

4. *Id.* at 126.

5. *Id.* (explaining that farms were first organized as cooperatives until 1958,

grow, and were paid a set price by a central planning agency.⁶ Similar central planning occurred in the industrial sector, where the focus was on heavy industry.⁷ This system was equally wasteful.⁸

Reform began in 1978 in the rural regions, where the commune system had obviously failed.⁹ In 1992, reform accelerated quickly under the initiative of Deng Xiaoping.¹⁰ To date, the reform has been a boon to the Chinese population, which has seen its standard of living rise by more than a factor of ten.¹¹

China is a transitional economy, a term used to refer to an economy transitioning from a socialist, planned system to a market-based system.¹² It shares this classification with other countries such as Vietnam and the former Soviet states.¹³ However, China's economy is unique even relative to many other transitional economies.¹⁴ Unlike Poland, which was left with an economy characterized by high industrial concentration (a common legacy of the command structure),¹⁵ industrial concentration in China differed in two respects. First, the geographic concentration of industry across China was, and still is, evenly distributed.¹⁶ Second, concentration within a given industry is relatively low.¹⁷ Both of these phenomena are due in part to previous central planning policy decisions favoring local self-sufficiency and the corresponding regional separation of

when they began to be organized into communes).

6. *Id.* (explaining that because the market price mechanism was not in place to ensure efficiency, and because the farmers had little incentive to work hard, this system did not work well, as evidenced by the millions of Chinese who subsequently died from starvation).

7. *Id.* at 126–27.

8. *Id.* at 127.

9. *Id.*

10. *Id.* at 128. This followed Xiaoping's "inspection tour" of the southern regions and the official declaration of the 14th Congress of the Chinese Communist Party that the central goal of economic reform was to establish a "socialist market economy." *Id.*

11. CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK: CHINA (Feb. 7, 2008), <https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html>.

12. See, e.g., Bing Song, *Competition Policy in a Transitional Economy: The Case of China*, 31 STAN. J. INT'L L. 387, 388 (1995).

13. *Id.*

14. See, e.g., *id.* at 394–95 (discussing the nature of the Polish experience).

15. *Id.* at 394.

16. *Id.* at 396. This distribution is due, in part, to the fact that China has not taken advantage of the benefits of regional specialization. *Id.*

17. *Id.* at 397.

industry.¹⁸ The inefficiencies of this market structure include a lack of regional specialization¹⁹ as well as repetitive investments at low levels.²⁰

In comparison to China, industrial and geographical concentration levels are significantly higher in other national economies—both transitional and developed—including the United States.²¹ The Chinese motor vehicle and machine tool manufacturing industries, for example, are representative of Chinese industry as a whole,²² and illustrate this international contrast. In the Chinese motor vehicle industry, more than 110 Chinese manufacturers each produce less than 10,000 units, a relatively small output next to many American manufacturers, such as Saturn (a division of GM), which is slated to produce at least 200,000 cars per year.²³ The nations' respective machine tool manufacturing industries exhibit the same pattern, with the top five American firms accounting for sixty-nine percent of U.S. production, compared to China where the top five firms account for only twenty percent of production.²⁴

2. *Emergence of Both Capitalist Economies on the Timeline of Globalization*

Another important difference between the U.S. and Chinese economies is the point at which each capitalist economy began its development with respect to the timeline of economic globalization. The Chinese economy underwent state-controlled development until 1978.²⁵ Thereafter it began to have contact with a world economy that was more globalized, in terms of transportation and communication technologies, than the

18. *Id.* at 395. This regional separation has only been exacerbated recently due to the emphasis on local economic development since 1979. *Id.* The policy reasoning behind the geographic partition of the Chinese economy was due in part to Mao's military strategy of regional self-sufficiency, so in the event of foreign invasion, each region could continue autonomously. Mark Williams, *Wal-Mart in China: Will the Regulatory System Ensnare the American Leviathan?*, 39 CONN. L. REV. 1361, 1365 (2007).

19. Song, *supra* note 12, at 396.

20. Owen, *supra* note 2, at 132.

21. As Poland began transition in 1989, it had to deal with a highly concentrated economy, a remnant of its old command structure. Song, *supra* note 12, at 394. The market economy of Japan is likewise characterized by levels of industrial concentration which significantly exceed those in China. *Id.* at 397.

22. *Id.*

23. *Id.*

24. *Id.*

25. Owen, *supra* note 2, at 126.

economy which existed when the competitive marketplace of the United States first began to develop over two centuries ago.

In December 2001, China joined the World Trade Organization (WTO), agreeing to follow the WTO's rules and lower trade barriers.²⁶ This meant "more foreign competition pressuring China's most vulnerable industries, such as the country's steel smelters, coal producers and 120 carmakers."²⁷ Chinese industries dealing in "immaterial products" are also vulnerable to competition in a world of instant and low-cost communication technology.²⁸

Presently, the Chinese economy has been opened up to a world economy in the midst of the "third industrial revolution," the current shift toward knowledge-based economies.²⁹ With today's communication and transportation technologies, multinational corporations increasingly search the globe for the most profitable places to produce and sell their goods.³⁰ It is within this context of knowledge-based, global economic activity that the Chinese free market is being established.

The United States, however, was born—and witnessed its own discrete economy begin to emerge independent of Britain's—during what has been coined as the "first industrial revolution."³¹ This first revolution began in Britain,³² but the technologies developed there were quickly diffused into the

26. Toby D. Merchant, *Recognizing ILO Rights to Organize and Bargain Collectively: Grease in China's Transition to a Socialist Market*, 36 CASE W. RES. J. INT'L L. 223, 228 (2004).

27. *Id.* (citing Matthew Forney, *Workers' Wasteland*, TIME ASIA, Nov. 1, 2002, available at <http://www.time.com/time/asia/covers/1101020617/cover.html>).

28. Edward E. Leamer & Michael Storper, *The Economic Geography of the Internet Age*, 32 J. INT'L BUS. STUD. 641, 642 (2001) (offering examples of such "immaterial products" including the intellectual and information-based products in the areas of accountancy, finance, marketing, and legal work.). For a noteworthy examination of legal outsourcing, see generally Jayanth K. Krishnan, *Outsourcing and the Globalizing Legal Profession*, 48 WM. & MARY L. REV. 2189 (2007).

29. Lester C. Thurow, *Globalization: The Product of a Knowledge-Based Economy*, 570 ANNALS AM. ACAD. POL. & SOC. SCI. 19, 20 (2000). The first and second industrial revolutions were the steam- and electricity-driven revolutions, respectively. *Id.*

30. *Id.*

31. See Nicholas F.R. Crafts, *The First Industrial Revolution: A Guided Tour for Growth Economists*, 86 AM. ECON. REV. 197, 197 (1996) (citing Thomas Ashton's original coinage of the phrase "first industrial revolution"). This first industrial revolution is characterized by the important technological changes that occurred between 1760 and 1830. *Id.* at 197–98.

32. See generally Nicholas F.R. Crafts, *Industrial Revolution in England and France: Some Thoughts on the Question, "Why was England First?"*, 30 ECON. HIST. REV. 429 (1977).

economies of Western Europe and the United States.³³ The principal factors behind this rapid diffusion appear to have been market orientation and accessibility to Britain.³⁴

B. OVERVIEW OF THE HISTORY OF ANTITRUST POLICY IN CHINA AND THE UNITED STATES

1. China

Prior to the passage of the AML, Chinese legislation only partially dealt with anti-competitive practices related to market conduct.³⁵ The main example of such legislation was the Act Against Unfair Competition, passed by the National People's Congress in 1993.³⁶ Despite its name, the Act barely touched upon monopoly and cartel activities;³⁷ it focused instead on narrowly defining such anti-competitive practices as false advertising, unauthorized use of trademarks, and the theft of commercial secrets.³⁸ The Chinese legislature explained the absence of traditional Western antitrust regulations, such as those on monopoly, merger, and cartel activity, by claiming that other Chinese laws such as the Product Quality Act and the Consumer Protection Act adequately protected consumer interests.³⁹ These acts, however, are primarily product liability laws, not antitrust laws.⁴⁰ Between 1993 and the recent passage of its AML, China made a few minor additions to this antitrust regulatory scheme, although the sum of these other acts and the 1993 Act Against Unfair Competition did not add up to the comprehensive schemes in place in countries with more experience with antitrust issues,⁴¹ such as the United States.

33. Rondo Cameron, *The Diffusion of Technology as a Problem in Economic History*, 51 *ECON. GEOGRAPHY* 217, 221 (1975).

34. *Id.* Specifically, diffusion was fostered by American merchants and other entrepreneurs with frequent contact to the British markets. *Id.*

35. Song, *supra* note 12, at 412.

36. Agencies of the State Administration of Industry and Commerce began working on the Act in 1987, followed by a lengthy period of drafting, before the final version was passed in 1993. *Id.* at 413.

37. In the legal context of the United States, these sorts of activities are synonymous with "unfair competition."

38. Song, *supra* note 12, at 412.

39. *Id.* at 414.

40. *Id.*

41. Such legislative actions include: the Commercial Banking Law of 1995 (which forbids banks from taking part in "improper conduct"); the Provisional Rules for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (which

2. United States

The United States has two key pieces of federal antitrust legislation in place. Prior to 1890, the United States had an antitrust common law tradition inherited from England, and this body of law addressed familiar issues such as monopoly power and restraints on trade.⁴² The Sherman Act of 1890⁴³ borrowed much of the language and rules of the common law, codifying the illegality of monopolies and contracts, combinations, and conspiracies in restraint of trade.⁴⁴ The Clayton Act of 1914⁴⁵ is the other major piece of Federal antitrust legislation in the United States, which serves in large part to clarify and supplement the Sherman Act.⁴⁶

A large body of case law has been developed interpreting and applying the provisions of these two acts, especially on the subjects of combinations among competitors, monopoly power, and merger activity.⁴⁷ Explicit cartel activity among competitors has been essentially eliminated from U.S. markets via Section 1 of the Sherman Act.⁴⁸ Similar success has been achieved via the Sherman and Clayton Acts in regards to monopoly and merger activities. The relatively brief statutes, especially the Sherman Act, are notably general and broad-reaching, and have given the courts a significant role in the development of the law.⁴⁹ Also notable are the effective enforcement procedures in place. Actions may be brought by the Federal Trade Commission, the Department of Justice, or private parties,⁵⁰ and offenders may be subject to criminal penalties or treble damages.⁵¹

apply only to foreign companies); and the provisional Rules for Prevention of Monopoly Pricing (which leave key definitions and prohibitions overly vague). Owen, *supra* note 2, at 139–40.

42. PHILLIP AREEDA ET AL., *ANTITRUST ANALYSIS* 32–33 (6th ed. 2004).

43. Sherman Act, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1–7 (2004)).

44. AREEDA ET AL., *supra* note 42, at 35.

45. Clayton Act, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12–27 (2002)).

46. See AREEDA ET AL., *supra* note 42, at 44. Unlike violations of the Clayton Act, violations of the Sherman Act are considered criminal acts and are punishable by imprisonment. *Id.* at 45.

47. See generally *id.*

48. *Id.* at 113.

49. *Id.* at 3.

50. *Id.* at 46–58.

51. *Id.*

C. CHINA'S 2007 ANTI-MONOPOLY LAW

1. Description and Comparison with the Sherman Act

On August 31, 2007, the National People's Congress passed the AML, after it was pending in one form or another for thirteen years.⁵² The law is set to take effect on August 1, 2008.⁵³ A main motive for the legislation had been the high rate of foreign acquisition of Chinese firms (including state-owned enterprises), which had raised concerns in China about its economic security.⁵⁴

The main provisions of the AML run roughly parallel to the main provisions of the Sherman Act. Chapter 2 of the AML (Prohibition of Monopolistic Agreements) is analogous to Section 1 of the Sherman Act.⁵⁵ Both prohibit, in general terms, firms from taking part in coordinated activities aimed at, or that result in, the elimination or restriction of competition.⁵⁶ One notable caveat in Chapter 2 of the AML is Article 11, authorizing a competent anti-monopoly authority to approve exemptions from Article 8 if certain agreements among the operators are beneficial to "the development of the national economy and the social and public interests."⁵⁷

52. Keith Bradsher, *World Business Briefing; China: Antimonopoly Law Approved*, N.Y. TIMES, Aug. 31, 2007, available at <http://query.nytimes.com/gst/fullpage.html?res=9502E3DC1531F932A0575BC0A9619C8B63>.

53. *Id.*

54. *China Passes New Anti-Trust Law*, RTT NEWS, Aug. 30, 2007, available at <http://www.rttnews.com/sp/todaystop.asp?date=08/30/2007&item=40&vid=0>; see also Stanley Lubman, *Looking for Law in China*, 20 COLUM. J. ASIAN L. 1, 59 (2006) ("[A]t the annual meeting of the Chinese retailers' association in February 2004, participants expressed their 'widespread anger . . . at the speed foreign companies have gained market share, through legal and illegal means.'"). One aspect of the Anti-Monopoly Law is especially worth mentioning. Previously, only mergers and acquisitions worth more than \$100 million needed Ministry of Commerce approval. Now, foreign investors will need to apply for approvals from the Ministry if their purchases of domestic companies affect national economic security, take place in key sectors, or cause a transfer of the operating rights of famous domestic brands. *China Passes New Anti-Trust Law*, *supra*.

55. H. Stephen Harris, Jr. & Kathy Lijun Yang, *China: Latest Developments in Anti-Monopoly Law Legislation*, 19 ANTITRUST 89, 91 (2005).

56. Chapter 2 of AML Article 8 prohibits "coordinated activities which intend to eliminate or restrict competition or in fact have the effect of eliminating or restricting competition." *Id.* The Sherman Act declares illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." Sherman Act, 15 U.S.C. § 1 (2000).

57. Harris & Yang, *supra* note 55, at 91-92 (listing the specific exemptions,

Like Section 2 of the Sherman Act, Chapter 3 of the AML (Prohibition of Abuse of Dominant Market Position) prohibits anti-competitive use of monopoly power.⁵⁸ An important difference between the Chinese and American versions of this area of antitrust regulation is in the level of market share that must be commanded by a firm in order to trigger a presumption of monopoly power. U.S. courts have traditionally set that threshold at seventy percent of the relevant market (and only very rarely below fifty percent), while Chapter 3 of the AML triggers the monopoly presumption at eleven percent.⁵⁹

2. Recommendations for and Criticisms of the AML

In 2005 the Antitrust Law and International Law and Practice Sections of the American Bar Association submitted comments on the 2005 Revised Draft of the AML.⁶⁰ The recommendations included de-emphasizing the national economy and the public good as the interests to be protected, and a refocus on the protection of consumer welfare as the policy goal behind the AML.⁶¹ The comments also suggested deemphasizing any non-competition related considerations

which allow “adapt[ing] to economic distress,” joint activities by small and medium sized firms aimed at improving efficiency and competitiveness, and “other activities . . . that are beneficial to the development of the national economy and the social and public interests”).

58. *Id.* at 92.

59. *Id.* This low market share requirement reflects a rule already observed by Chinese courts: in January of 2007, a Shanghai court heard evidence in a case brought against Sony by a Chinese company, despite the fact that Sony only had a twenty-percent market share of the digital camera market. Roger Parloff, *Sony's China Problem: Will a Lawsuit Against Sony in China Set a Scary Precedent?*, FORTUNE, Feb. 22, 2007, available at http://money.cnn.com/magazines/fortune/fortune_archive/2007/03/05/8401275/index.htm.

60. JOINT SUBMISSION OF THE AMERICAN BAR ASSOCIATION'S SECTIONS OF ANTITRUST LAW, INTELLECTUAL PROPERTY LAW AND INTERNATIONAL LAW ON THE PROPOSED ANTI-MONOPOLY LAW OF THE PEOPLE'S REPUBLIC OF CHINA 1 (2005) [hereinafter *ABA Comments 2*], available at http://www.abanet.org/intlaw/committees/business_regulation/antitrust/chinacommentisantimonopoly.pdf. The May 2005 Joint Comments are intended to supplement the July 2003 Joint Comments. *Id.*; see also 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 (2003) [hereinafter *ABA Comments 1*], available at http://www.abanet.org/intlaw/committees/business_regulation/antitrust/chinacommentisantimonopoly.pdf (as appendix starting at page 45 of the file).

61. *Id.* at 2 (noting that promoting the welfare of the “national economy” and the “public interest” are worthy goals, but inappropriate for an antitrust regulatory scheme).

when reviewing mergers and acquisitions, including foreign acquisitions of domestic firms.⁶²

Commentators have also focused on how the AML should treat the administrative monopolies in China.⁶³ The 2004 draft of the AML included a chapter⁶⁴ specifically prohibiting administrative monopolies, a prohibition lauded by Professor Stephen Harris as potentially an "extremely important tool in the establishment of a free competition regime in China."⁶⁵ Professor Harris has since expressed concern toward the reduction (in 2005) of this chapter to a single, general provision of "limited practical value,"⁶⁶ although he did note that in the 2006 draft of the AML, certain protective provisions against administrative monopolies which had previously been removed were reintroduced.⁶⁷

II. ANALYSIS

A. TWO ECONOMIC ASSUMPTIONS

The thesis of this Note relies on the reasoning set forth in Part II.B below, as well as two general economic presumptions noted here.

The first assumption is that free international trade is generally economically beneficial, and protectionist measures are likewise economically harmful. Academic commentators and passive viewers of CNN alike can note a definite discontent with, if not a proper rejection of, this claim.⁶⁸ However, most

62. *Id.* at 5.

63. The Chinese Administrative Monopoly is the phenomenon of state-owned monopolistic enterprises, which often have the incentive to abuse their local monopoly power in order to extract direct profits from the enterprises as well as to levy taxes on those profits. Williams, *supra* note 18, at 1365.

64. Harris & Yang, *supra* note 55, at 93 (The chapter was "Chapter 5: Prohibition of Administrative Monopoly.").

65. *Id.*

66. H. Stephen Harris, Jr., *Recent Developments in Asia*, 21 ANTITRUST 79, 80 (2006).

67. *Id.* at 80. Harris nevertheless expresses doubts as to the effectiveness of the provisions, given the lack of clarity in the AML as to the ability of private parties to directly enforce the provisions against local administrative abuse. *Id.* at 81.

68. See, e.g., Jagdish Bhagwati, *Free Trade: Old and New Challenges*, 104 ECON. J. 231, 232 (1994) (noting that fear has grown in developed countries, and certainly the United States, that free trade with developing countries will drive down the wages of domestic unskilled labor); *Lou Dobbs Tonight* (CNN, broadcasting nightly at 7 p.m. ET) (news program that routinely portrays American free trade

economists believe that free trade is likely to improve the affected population's economic welfare.⁶⁹

One relevant aspect in which free trade is economically beneficial is its effect on innovation. It is generally accepted that technological innovation can be discouraged by protectionist policies because such protection increases a domestic firm's profits, which would otherwise be enjoyed by a more efficient foreign firm; while at the same time creating a disincentive to invest in new technologies to compete with the more efficient foreign firm.⁷⁰ This is the general rule, although the benefits to domestic innovation which may stem from protectionist measures in certain contexts are legitimately debatable.⁷¹ Nevertheless, the idea that national protectionist policies generally tend to hinder innovation will be presumed, along with the broader proposition that such policies tend to have a negative effect on a given economy.

The second assumption at work in this analysis is that domestic consolidation of separate business entities is less of an antitrust concern where the marketplace of buyers and sellers is larger than the national economy, and thus more firms, foreign and domestic, are in competition with each other. This assumption follows from the antitrust principle that market concentration is a significant indicator of the likely anticompetitive effect of a merger.⁷² Indeed, such domestic consolidation in the face of foreign competition, rather than raising antitrust concerns, can promote efficiency as the resultant consolidated enterprise can close inefficient plants, eliminate redundancy, and combine the complementary

policies in a negative light).

69. Larry Karp, Sandeep Sacheti & Jinhua Zhao, *Common Ground Between Free-Traders and Environmentalists*, 42 INT'L ECON. REV. 617, 617 (2001) (considering the negative environmental effects which may result from open international trade).

70. Kaz Miyagiwa & Yuka Ohno, *Credibility of Protection and Incentives to Innovate*, 40 INT'L ECON. REV. 143, 143 (1999).

71. *Id.* at 143, 160 (arguing that *temporary* protection can be an effective stimulant of innovation, in the context of infant industries, for example, if the domestic firm believes, first, that the protection will not be removed early should innovation take place before the initial terminal date of the protection, and second, that the protection will not be renewed after termination should no innovation occur).

72. AREEDA ET AL., *supra* note 42, at 712 (citing the Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, which set forth an interval schedule of hypothetical post-merger market concentrations and the corresponding administrative review each interval will receive).

advantages of the former separate entities.⁷³

The logic of this second assumption speaks not only to domestic merger activity, but also to domestic cartel activity, that classic antitrust example of an "arrangement in restraint of trade."⁷⁴ In a global marketplace, the "malevolent cartels that are so worrisome to free marketers can seldom withstand the winds of international competition."⁷⁵ Although there is good reason to be suspicious of cartel activity based on past bad behavior,⁷⁶ this activity can provide economic benefits by way of consolidation and "pooling" of assets and efforts, much the same way merger activity can.

B. WHY CONCERN ON THE PART OF CHINESE POLICYMAKERS IS JUSTIFIED

1. *Globalization Aspect*

One of two chief reasons that China's concerns for its economy are justified, as the nation continues to develop a market economy, is China's place in relation to the modern global economy. In absolute terms, China's market economy is emerging in a world where transportation and communication costs are lower than ever before.⁷⁷ This presents a special competitive challenge to Chinese firms dealing in immaterial products and services, as the distances between supply and demand become more irrelevant and less of an added cost.⁷⁸ The economic advantages and insulation that physical distance provided in the past are disappearing, and if a Chinese client

73. Robert Pitofsky, *Antitrust and Problems of Adjustment in Distressed Industries*, 55 ANTITRUST L.J. 21, 24 (1986).

74. Joseph L. Bower & Eric A. Rhenman, *Benevolent Cartels*, HARV. BUS. REV., July-Aug. 1985, at 124, 124.

75. *Id.* at 130.

76. Reasons for the bad reputation of the cartel include: in most democracies, cartels have been used to unfairly exploit nonmembers that are deliberately excluded; the natural propensity, noted by economist Adam Smith, for people of the same trade to "conspir[e] against the public" or form some agreement to raise prices where possible. *Id.* at 126.

77. See Leamer & Storper, *supra* note 28, at 642.

78. *Id.* Thus the intellectual activities that comprise immaterial products and services are "amenable to procurement at a distance: the design in Detroit, advertising in New York and strategy in Chicago." *Id.* Of course, equally possible, given instant communication technology and multinational corporations, is a business plan involving design in the Beijing, advertising in the Tokyo, and strategy in Chicago.

can just as easily acquire the services of an American investment bank as it can a Chinese investment bank, the Chinese investment bank will have to compete directly with its American counterpart.

This challenge is not limited to the immaterial services sector. Decreasing transportation and communications costs aside, China is opening up its markets at a moment in history when the ever-integrating world economy spares little time before entering a fresh market to do business. And what better place to set up shop than in the midst of more than 1.3 billion potential shoppers?⁷⁹ China's entry into the the WTO in 2001⁸⁰ and acceptance of the WTO's attendant rules,⁸¹ coupled with the fact that China's population is gaining affluence and maintaining a stronger middle-class base,⁸² raised the lure of doing business in China to new levels. This lure has enticed foreign entrepreneurs seeking to invest in China by, among other methods, establishing foreign-brand chain stores and offering plenty of material goods and services to compete with those of Chinese companies.⁸³

The rise of the multinational corporation has undoubtedly been a driving force behind the modern⁸⁴ trend of globalization. The relationship between the multinational corporation and the process of globalization is self-reinforcing. Such conglomerates are nurtured by the growing integration of world product and capital markets, and in turn, contribute further to the growth of those markets.⁸⁵ The business conducted by such firms has

79. CENT. INTELLIGENCE AGENCY, *supra* note 11 (estimating the population of China as of July 2007 to be 1,321,851,888).

80. Merchant, *supra* note 26, at 228.

81. *Id.* Such rules have done much to alleviate fears of foreign enterprise investors. Michele Lee, *Franchising in China: Legal Challenges when First Entering the Chinese Market*, 19 AM. U. INT'L L. REV. 949, 952 (2004).

82. Lee, *supra* note 81, at 951.

83. *Id.* (noting that the China Chainstore and Franchise Association predicts that franchising will comprise over thirty percent of retail sales by 2010). Lee also notes that the entrance into the Chinese market is as much a pull from within China, as a push from, in the case of American businesses, the U.S.-brand-saturated markets of the United States. *Id.*

84. "The multinational corporation . . . is neither a new development in the world economy nor an unknown phenomenon in economic history, but its effect on the international economic system is truly revolutionary." Lawrence B. Krause, *The International Economic System and the Multinational Corporation*, 403 ANNALS AM. ACAD. POL. & SOC. SCI. 93, 93 (1972).

85. *Id.* Writing in 1972, Professor Krause noted the need then, to say nothing of the need now, of policies which can "ensure a competitive environment and to reconcile the activity of multinational corporations with national interests and

increased significantly in the past half century. For example, between 1950 and 1970, U.S. direct investment abroad increased from \$11.8 billion to \$78.1 billion, a sevenfold increase, while corporate investment within the United States increased by less than fivefold over the same time period.⁸⁶ This data indicates the early days of a shift toward an international market and away from a relatively self-contained national economy. There is no doubt that domestic firms in China, especially in vulnerable industries, struggle to compete with recently arriving multinationals.⁸⁷ One can only imagine the issues China's 120 domestic automakers⁸⁸ must address in competing with the likes of Toyota, which has created enormous difficulties for even well-established U.S. automakers.⁸⁹

In addition to China's place in the world economy as measured against an absolute historical timescale, globalization presents difficulties that are largely unique to China, and that are best understood in relative terms. Not only is China's infant market economy developing at a later stage of globalization than the infant market economy of the United States developed, but relative to its own place on that timescale, China's economy is less equipped than the U.S. economy was to face the competition that existed in its own respective historical setting.

The economy of the new United States was an extension and transplant of the economy of Great Britain and Western Europe. The "first industrial revolution" was born in Britain, but the technological advances made there spread quickly to the rest of Western Europe and the United States.⁹⁰ Thus, any lag in technology between Britain and the United States did not amount to such an advantage for Britain that international American firms were left significantly less able to compete with their British counterparts.⁹¹ While the first industrial

welfare." *Id.*

86. *Id.* at 95.

87. See, e.g., Youngjin Jung & Qian Hao, *The New Economic Constitution in China: A Third Way for Competition Regime?*, 24 NW. J. INT'L L. & BUS. 107, 120-23 (2003).

88. Merchant, *supra* note 26, at 228.

89. *America's Car Industry: Shape up or Ship out*, ECONOMIST, Oct. 9, 2003, available at http://www.economist.com/business/globalexecutive/reading/displayStory.cfm?story_id=2119229 (noting that General Motors, which commanded sixty percent of the auto market in 1960, now has less than half of that, and in August of 2003, Toyota outsold Chrysler for the first time in the American market).

90. Cameron, *supra* note 33, at 220-21.

91. As professor Krause notes, multinational corporations are nothing terribly new. As one author notes, "The start of this institution can be traced back more

revolution⁹² left the British economy as the dominant force in the world economy by the mid to late nineteenth century,⁹³ little time passed before Britain began to feel the pressure from foreign competition—originating mostly from continental Europe and the United States⁹⁴—as these foreign economies quickly absorbed British technological advances, and in turn initiated advances of their own.⁹⁵ This ability of U.S. firms to compete with British firms was due to the market orientation of the U.S. economy as well as the accessibility to U.S. firms of the British marketplace.⁹⁶

Turning to China's relative place in today's international economy, it is clear that the ease of foreign technological integration which kept the United States on an even playing field since the beginning with the British hegemony does not characterize prior Chinese experience, due to both the past market orientation of the Chinese economy as well as the past lack of accessibility to foreign economic activity. Under the central planning system which dominated the economy until 1978, and which continues to exert significant,⁹⁷ albeit decreasing, control over the Chinese marketplace, the natural economic incentives to innovate or adopt foreign innovations were lacking.⁹⁸ True, the Chinese government did attempt to modernize quickly, beginning with its first five year plan in

than a hundred years: the first foreign factory of the Singer Sewing Machine Company, for example, was established in 1867. By World War I, several companies like General Electric, Ford, and Unilever had substantial international manufacturing organizations." John Fayerweather, *The Internationalization of Business*, 403 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 2 (1972).

92. This revolution included, among other things, "seven decades of intense capital investment in productive capacity" (i.e., technological innovation). Bernard Elbaum & William Lazonick, *The Decline of the British Economy: An Institutional Perspective*, 44 J. ECON. HIST. 567, 569 (1984).

93. *Id.*

94. *Id.* at 571.

95. The efficient corporate methods of mass production being developed at the time in Germany, Japan, and the United States were the product of innovation in the areas of industrial relations, industrial organization, and enterprise management. *Id.*

96. *Id.*

97. "According to a national census, among [three] million enterprises that existed on December 31, 2001, [state-owned enterprises] and enterprises with a controlling share held by the State accounted for 56.2% in capital and 49.6% in annual revenue." Owen, *supra* note 2, at 128.

98. Andrei Shleifer, *State Versus Private Ownership*, J. ECON. PERSP., Fall 1998, at 133, 135 (explaining that "private ownership is the crucial source of incentives to innovate and become efficient").

1953,⁹⁹ which provided large subsidies for certain industrial activity.¹⁰⁰ But the result of this program was economic waste and inefficiency.¹⁰¹ The incentive to the individual would-be entrepreneur did not exist. This unfortunate story was mirrored in the Chinese agricultural industry,¹⁰² and both serve as evidence of the fact that market orientation plays a crucial role in a given market's incentives to innovate or adopt foreign innovation.

Similarly, China's historical policy¹⁰³ toward foreign trade shows a lack of accessibility to foreign economic activity, which, like China's market orientation, has negatively influenced the economy's ability to keep up with foreign advances. Between 1949 and 1978, the Chinese economy was closed off from the rest of the world.¹⁰⁴ The gradual opening of the economy since then has made up a great deal of ground.¹⁰⁵ But contrasted with the fact that at no time in its history has the U.S. economy been so isolated from foreign economic activity, China's years spent removed from the international economy create a significant handicap. In addition to China's historically less efficient adoption of new technology, the nation's lack of exposure to market conditions means fewer Chinese firms have evolved in the demanding context of competition, where inefficient firms

99. Genevieve C. Dean, *Science, Technology and Development: China as a "Case Study"*, 51 CHINA Q. 520, 523 (1972).

100. For example, "people were encouraged to build furnaces all over the country to produce iron and steel." Owen, *supra* note 2, at 127.

101. *Id.*

102. *Id.*

103. Indeed, in the 1960s and 1970s, "self-reliance" [was] a keynote to Chinese policies for ten years." Dean, *supra* note 99, at 520.

104. Ewan Rose, *Will China Allow Itself to Enter the New Economy?*, 11 DUKE J. COMP. & INT'L L. 451, 452 (2001). Looking even further back, China has had a long history of isolation from the rest of the world:

China is one of the oldest nation-states in the world. For thousands of years, China was ruled by successive dynasties. Long closed off to the rest of the world, it was forced open by the British in the 1840 Opium War. It became a republic for the first time in 1912. In 1949, after years of fighting, communist forces ultimately defeated nationalist forces and took control of the country. The new government, modeled after the Soviet Union's, was called the People's Republic of China. Under the new government, China was once again closed off from the rest of the world. China finally began to open up again with the implementation of its recent "open door" reforms.

Id. at 451-52 (internal citations omitted).

105. Since 1978 the GDP of China has risen tenfold. CENT. INTELLIGENCE AGENCY, *supra* note 11.

are driven out of business. This efficiency gap alone presents another challenge to Chinese firms.

In both absolute and relative terms, China's place within the progression of globalization presents the country's policymakers and private business owners with considerable challenges as China joins the field of foreign competition.

2. Market Concentration and Segmentation

Another cause for worry about the ability of Chinese firms to compete at the international level is the segmented nature of its economy. As noted above, the Chinese economy is characterized by low levels of geographic concentration and low levels of intra-sector concentration,¹⁰⁶ both a result of central planning rather than economic force.¹⁰⁷ This market structure impedes competition for a number of reasons. One, the Maoist idea of "local self-sufficiency"¹⁰⁸ meant a trade off: a defensive military strategy at the expense of regional specialization. The similarity in the local market structures throughout China suggests that the country "has not taken advantage of the benefits of regional specialization,"¹⁰⁹ which may be great as the segmented "provinces have considerable capacity to exploit regional comparative advantages."¹¹⁰ Regional specialization within a large economy such as China is beneficial from a competitive standpoint because it allows regions to realize their respective comparative advantages, thereby decreasing production costs and increasing efficiency.

This "cellular"¹¹¹ market structure has also exacerbated the dual problems of repetitive investment and a corresponding lack of scale economies. Chinese policy-makers have noticed the repetitive investments at low levels made by too many small Chinese firms, resulting in what has been called "suicidal competition."¹¹² Should a winner emerge from such competition,

106. Song, *supra* note 12, at 395-97. These levels are "low" relative to similar industries in developed countries. *Id.* at 397.

107. *Id.* at 395.

108. *Id.*

109. *Id.* at 396.

110. *Id.* at 400.

111. *Id.* at 395 (referring to the specialization that existed at the provincial and local levels in China, as opposed to specialization at a regional level).

112. Owen, *supra* note 2, at 132. The government has even taken measures prohibiting such forms of competition that it considers harmful to the national economy. *Id.*

the victor may not be able to attain the sort of return its capital would garner in a non-segmented national economy, and the full potential benefits of scale economy production will not be realized. Indeed, the Chinese government has noticed the problem and has encouraged "enterprise groupings"—groupings of large and medium-sized enterprises,¹¹³ "to promote interregional . . . integration and achieve economies of scale[.]"¹¹⁴ The government has hoped that such groupings "will enable Chinese enterprises to compete more effectively in international markets."¹¹⁵

Another layer in this segmented-market problem is the existence of the "administrative monopoly," that is, the government-created monopoly.¹¹⁶ Such entities attribute their existence to different causes,¹¹⁷ yet these monopolies "invariably share two traits: First, they are empowered to carry out [some] governmental function such as the allocation of [resources or] the approval of infrastructural projects Second, directorships of [such] companies are often held by incumbent party or government officials" or otherwise politically connected individuals, whose influence in the government has exploited to gain economic benefits for their company.¹¹⁸ Administrative monopolies at "provincial [or] local levels are well known for creating and maintaining barriers to competition from other localities[.]"¹¹⁹ furthering the inefficient segmentation of the national economy. "For example, many local governments force dealers of beer, fertilizer, and medicines to only sell goods that are produced within their own jurisdictions."¹²⁰

Such segmentation is a reasonable cause for worry for Chinese officials considering the prospect of foreign firms competing with those Chinese firms shaped by a segmented marketplace. In fact, "[t]he Chinese government realized in the early 1980s that low industrial concentration and market

113. Song, *supra* note 12, at 399.

114. *Id.*

115. *Id.* at 399–400.

116. Owen, *supra* note 2, at 130.

117. "Administrative monopolies are found mostly in three areas. First, in the industries where government ministries have been converted to industrial associations Second, in the sectors where the government has retained its regulatory presence, and use such presence" to give "affiliate companies" preferential treatment. *Id.* at 130. Third, governments at local levels which create and maintain barriers to competition from other localities. *Id.* at 130–31.

118. Song, *supra* note 12, at 407.

119. Owen, *supra* note 2, at 130–31.

120. *Id.* at 131.

segmentation across provinces were causing economic inefficiency[,] and has since "actively encouraged industrial combinations of various types."¹²¹

C. PROVISIONS OF THE AML EVINCING SUCH CONCERN

As noted earlier, a significant force behind the adoption of the AML legislation was worry over the economic security of China as foreign competition entered its markets.¹²² These concerns have increased, understandably, since China's accession to the WTO six years ago, after which China began to enact rules designed to help local companies compete.¹²³ Certain provisions of the AML, criticized by western commentators, demonstrate this concern.

The AML outlines the policy objectives of the Act in Articles 1, 3, 8, 29, and 30.¹²⁴ Western commentators have taken issue with language indicating as policy goals of the Act such things as protecting consumers, the national economy, the public interest, and in some instances, business operators, claiming that such objectives are not proper goals of antitrust regulation because they do not lend themselves to economic analysis, and reflect social and political goals best pursued via separate legislation.¹²⁵ The commentators advise that the proper objective of antitrust regulation is to "promote competition," an objective requiring, and amenable to, economic analysis.¹²⁶

Regarding "business operators" specifically, the commentators lay out the conventional explanation for why it is economically undesirable for a government to grant business operators special consideration in the administration of antitrust laws.¹²⁷ They reason that competition is a process that

121. Song, *supra* note 12, at 397. For example, the government has since "promoted both mergers and enterprise groupings to create 'horizontal cooperation' in the hope of breaking down the segmentation artificially imposed in the Maoist era." *Id.* at 397-98.

122. *China Passes New Anti-Trust Law*, *supra* note 54.

123. *Id.* "The country increased control of foreign takeovers this year as Chinese critics claimed overseas companies had gained dominance in some industries. China has attracted over \$300 billion in foreign investment since joining the WTO." *Id.*

124. *ABA Comments 1*, *supra* note 60, at 7 ("Articles 1 (Objectives), 3 ('Monopoly'), 29 (Conditions for Disapproval), and 30 (Special Approval) of the proposed law, together with the second part of article 8 (Prohibiting Monopoly Agreements), contain provisions that outline the policy objective of the proposed law.").

125. *Id.* at 9.

126. *Id.*

127. *Id.* "The consideration of rival business operators may reflect social and

produces winners and losers, and that the experience in "the [United States] and other countries with market economies and established competition law regimes is that it is usually better to permit the competitive process to occur unimpeded rather than to favor some business operators over others, even when some business operators may appear more deserving than other."¹²⁸ This surely is an easier strategy to accept as a policy-maker when the losing firms and employees do not disproportionately outweigh the winners, as has been characteristic of the U.S. experience. China's inclusion of such objectives, while not antitrust goals properly considered, evidences reasonable apprehension of a laissez-faire marketplace complete with efficient foreign competitors.

Equally troublesome is the potential inter-industry composition of winners and losers. The comparative advantage of the United States has been, and continues to be, in the areas of science and technology,¹²⁹ attributable in large part to education.¹³⁰ China's comparative advantage, on the other hand, has been in the area of cheap-labor.¹³¹ Thus, in the United States, the globalization "losers" have largely been in industries which utilize unskilled or less skilled labor, such as the manufacturing and textile industries, rather than high-tech and knowledge-based industries utilizing a more educated labor pool.

This experience invites the following question to the policy-makers and commentators who supposedly favor letting the market operate freely for the sake of an *overall* gain in economic efficiency:¹³² is not the fact that the "winning" U.S. companies tend to be in industries employing high-skill labor, while the "losing" companies tend to be in industries employing low-skill and inexpensive labor, also an influential piece in U.S. competition policy?¹³³ Understandably, China might not be so

political considerations that are not necessarily consistent or coherent with the consumer welfare or efficiencies objectives." *Id.*

128. *Id.*

129. Stijepko Tokic, *Examining the Big Picture Regarding the Importance of the No Child Left Behind Act: Is It Worth Giving a Chance?*, 32 T. MARSHALL L. REV. 311, 318 (2007).

130. *See id.* (stating the relationship between education and science- and technology-based industries).

131. *Id.*

132. The costs, of course, are concentrated disproportionately on a subset of the general population.

133. *See, e.g.,* Tokic, *supra* note 129, at 331 ("At the early stages of globalization, economists claimed that the United States benefited from globalization because

content with its own comparative advantage in cheap and unskilled labor.¹³⁴

Further evidence of Chinese policy-makers' concern for the possible negative effects of foreign competition can be found in the AML's treatment of mergers and acquisitions by foreign investors. Government review of these activities is warranted for various non-economic reasons,¹³⁵ but such reviews should be done separately from *antitrust* reviews of such business activities.¹³⁶ Prior to the AML, foreign merger and acquisition activity in China was governed by the Provisional Rules for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (Provisional Rules), the stated non-competition policy goals of which include, among other things, securing employment and maintaining the economic security of the state.¹³⁷ The commentators have noted that the AML contains certain duplicative and conflicting non-competition policy goals, and have recommended that the AML deal only with competition-related aspects of a proposed merger or acquisition, and limiting the Provisional Rules to non-economic considerations.¹³⁸ The inclusion of such redundant considerations in the AML in the context of mergers and acquisitions suggests the importance that China places on ensuring that its domestic markets are not overwhelmed by foreign companies.¹³⁹

higher-skilled, higher paid jobs remained in America, while labor intensive lower-skilled jobs were moved to cheap labor countries, mostly China and India.”)

134. See *id.*, however, for a study of the current shift underway in national comparative advantages as the Chinese workforce and the workforces of other developing countries become more educated. This shift has led economic observers to notice a “new trend in the American economy: increased global competition for ‘white-collar’ jobs that used to seem well-insulated and secure.” *Id.*

135. For example, the Exon-Florio Act in the United States “applies national security considerations to foreign investments in the [United States].” *ABA Comments 1, supra* note 60, at 33. Likewise, Canada’s Investment Canada Act applies various non-competition policy considerations to foreign investments. *Id.*

136. *Id.* at 32–33 (explaining that a bifurcated approach avoids “the potential of some transactions being required to satisfy the disparate competition policy standards of two different laws”).

137. *Id.* at 32.

138. *Id.*

139. Note, for example, the recent antitrust suit against Sony in the Chinese courts. Parloff, *supra* note 59.

III. HOW CHINA SHOULD PROCEED

Given the assumptions stated in Part II.A.,¹⁴⁰ and in light of its justifiable apprehension toward foreign competition, how should China proceed? Chinese policy-makers recognize the problems attendant to an economy without adequate antitrust regulation.¹⁴¹ They also realize, however, that for the vast majority of China's small and medium-sized firms little if any antitrust enforcement is necessary and may indeed be harmful in the presence of foreign competition.¹⁴² Further, the extent to which China can benefit from outside advice¹⁴³ is debatable, as the implementation of a competition policy will differ from country to country because economic circumstances can vary greatly.¹⁴⁴

Despite the threat that foreign competition may pose to China's domestic firms, the American Bar Association (ABA) commentators expound a legitimate countervailing consideration in their explanation of why consumers benefit when the competitive process is allowed to play out without government interference.¹⁴⁵ The upshot of this consideration is

140. Again, those two assumptions are: 1) unrestricted international trade is generally economically beneficial, and protectionist measures are likewise economically harmful; and 2) domestic consolidation of separate business entities is less of an antitrust concern where the marketplace of buyers and sellers is larger than the national economy, and thus there are more firms, foreign and domestic, in competition with each other.

141. Problems specific to China include abuse of administrative monopoly power and acquisitions of domestic firms by multinational corporations. Owen, *supra* note 2, at 131.

142. *Id.* at 131-32.

143. As outlined in *ABA Comments 2*, *supra* note 60. See also *ABA Comments 1*, *supra* note 60.

144. Song, *supra* note 12, at 394 (explaining, first, that "the emphasis of antitrust law in a transitional economy should be to *create* a competitive market, a goal notably different from the aim of *maintaining* an existing competitive environment in established market economies," and second, that even between transitional economies, the ideal competition policy will vary due to other economic factors such as industrial concentration and structure). Consider also the following:

Competition policy is not shaped by economic theory alone. The goal, scope, and nature of a country's competition policy is closely tied to the underlying industrial organization and regulatory structure of the country, and is to a large extent determined by the perception of the role of competition by the country's political and economic culture. This is particularly so in the case of China[.]

Owen, *supra* note 2, at 126.

145. *ABA Comments 1*, *supra* note 60, at 9 (explaining that competitive business practices which damage other operators—Chinese firms in this case—benefit

that erecting barriers to foreign firms, while providing immediately enjoyed protection for Chinese firms, will in the longer run work to hurt Chinese consumers.¹⁴⁶ Protectionist measures are equally harmful on the local and regional levels. Decentralization¹⁴⁷ of the economy since 1978 has created the problem of administrative monopolies abusing local protectionist measures to gain economic benefit, in part by creating larger tax bases from which to extract income.¹⁴⁸ As noted above, “[r]egional protectionism has had a large effect on the low degree of industrial concentration and the absence of inter-regional competition.”¹⁴⁹ Because there is a “huge potential for inter-regional competition”¹⁵⁰ within China, the removal of local trade barriers should be a key antitrust policy goal for China, in addition to a goal of open international competition.

A more viable alternative to enforcing protectionist measures is to focus on fostering the competitiveness of Chinese firms. The ABA commentators did not directly address this alternative, although they were critical of the language of the policy objectives,¹⁵¹ which might serve as justification to treat wholly domestic mergers and acquisitions more deferentially than those involving a foreign firm as dominant party. The commentators were correct in disapproving of the stated purpose of the law as protecting, among other things, the interests of “business operators” and the “national interest,”¹⁵² insofar as such language includes non-competition considerations beyond the appropriate reach of an antitrust law

consumers as a class because such competition provides consumers with lower prices, and in the long run, creates incentives for other firms to increase their own efficiency to cut costs, resulting in an overall more efficient market).

146. The negative effects will also be felt to a lesser extent by foreign consumers.

147. The Chinese model of gradual transition adopted a program of transferring ownership and autonomy to provincial and local governments, thereby decreasing the role of the central government entities in commanding the economy. Song, *supra* note 12, at 405.

148. *Id.* (explaining that “[o]ne means of enlarging tax revenue is to prevent local resources from moving to other provinces and barring the entry of products from other provinces”).

149. *Id.* at 406.

150. *Id.* at 410.

151. *ABA Comments 1, supra* note 60, at 8–9.

152. Specifically, the commentators take issue with such language as “protecting the legal rights of business operators and consumers, and the public interest, and to ensure the healthy development of the socialist market economy,” “the healthy development of the national economy,” and “damage the public interest.” *Id.* at 8 (citing Articles 1 and 30, respectively).

and confuses the analysis, especially given the coexistence of the Provisional Rules.¹⁵³ However, insofar as such language could be used as the statutory basis for differentiating between merger or acquisition activities involving only domestic parties and those involving at least one foreign party—in economic terms familiar to antitrust analysis—an overall antitrust plan may be appropriately designed to differentiate between two classes of merger/acquisition activities and to provide differing standards.

If there ever was a time and place to promulgate this type of antitrust plan, it is in China today. The Chinese government has been aware “that low industrial concentration and market segmentation [has been] causing economic inefficienc[ies]” since the early 1980s.¹⁵⁴ “It has promoted both mergers and enterprise groupings to create ‘horizontal cooperation’ [to break] down the segmentation . . . imposed during the Maoist era.”¹⁵⁵ The Chinese government has exercised little merger control.¹⁵⁶ With the increasing presence of foreign competition in China’s uniquely vulnerable economy, the impetus for encouraging domestic mergers rises as well, for two reasons. First, risk of anticompetitive merger effects decreases as foreign competition increases. The degree to which domestic consolidation of market power will have anticompetitive effects depends on, among other factors,¹⁵⁷ the share of the market commanded by the merging firms. Foreign competition decreases this market share. Second, foreign competition puts economic pressure on less efficient domestic firms. An illustration of this phenomenon

153. *See id.* at 32.

154. Song, *supra* note 12, at 397.

155. *Id.* at 397–98.

156. *Id.* at 399.

157. Two other critical elements of market power, besides market share, at least for the purposes of U.S. antitrust analysis, include 1) elasticity of demand and 2) barriers to entry. *See, e.g.*, *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394–95 (1956) (reasoning that in defining the relevant market, which in turn is used to determine market power, consideration must be given to available substitutes for the product at issue); *United States v. Microsoft Corp.*, 253 F.3d 34, 54–55 (D.C. Cir. 2001) (noting that barriers to market entry are an element of market power); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 425–26 (2d Cir. 1945) (stating that “[t]here are indeed limits to [the monopolist’s] power; substitutes are available for almost all commodities, and to raise the price enough is to evoke them”). The lower the elasticity of demand, the less consumers will respond to higher prices by lowering consumption—gasoline is a prime example of an inelastic product. The greater the barriers to entry, the more power a firm has to charge price above costs, as it is more difficult for would-be entrants to enter the market and drive down the price to the equilibrium value.

in the United States is found in the proposed 1986 legislation entitled "The Promoting Competition in Distressed Industries Act," which would have relaxed restrictions on domestic mergers where a sufficient degree of foreign competition was present.¹⁵⁸

The Act failed to pass and was roundly criticized—although at least one critic saw problems in the details, rather than the underlying economic theory.¹⁵⁹ Professor and former chairman of the Federal Trade Commission Robert Pitofsky, in commenting on the proposed piece of legislation, noted that in theory at least, it is in the best interest of competition that a given legal system allows the domestic industry to adjust efficiently to import challenges, and furthermore that an important instance of such adjustment to foreign competition involves long-term supply contraction through consolidation or cooperation.¹⁶⁰ Short of implementing a distinct piece of legislation along the lines of the Distressed Industries Act, Chinese policymakers may utilize the broad scope of the AML's stated objectives to promote the relative competitiveness of its domestic firms without sacrificing the overall competitiveness of its markets. This could protect both the consumer and business interests of the country, and would do so without hurting foreign business interests.

IV. CONCLUSION

The ABA's comments on the AML may be another example of foreign imports which China finds difficult to embrace. China's economic history is vastly different than that of the United States and other western nations. Those differences are just beginning to break down, and their effects are ever-present and ever-important. China still has to deal with the low levels of industrial concentration and the high degree of market segmentation which are the unnatural artifact of the Maoist era, and it must do so within the demanding context of modern globalization, which brings with it low transportation and

158. AREEDA ET AL., *supra* note 42, at 133 n.41. Such a relaxation of merger restrictions would have occurred in lieu of import restrictions such as quotas and tariffs. *Id.*

159. *See generally* Pitofsky, *supra* note 73.

160. *Id.* at 24. Specific details of the Act which Professor Pitofsky took issue with included: an absolute exemption on merger activity once it was found that foreign competition had caused distressed conditions, the fact that mergers are permanent while foreign trade tends to fluctuate with exchange rates, and the lack of political checks on the administration's power to grant exemptions. *Id.* at 26.

communication costs, a great increase in the number of multinational corporations, and the evolution of technology-based immaterial products.

This situation is the reason for understandable apprehension about allowing the global economy full reign within China's markets; hence those aspects of the AML which either allow for or require greater scrutiny of foreign merger and acquisition activities. While this concern is justified to a certain extent, protecting Chinese firms from the competition of efficient foreign firms will only end up hurting Chinese consumers. An alternative solution in administering the AML in a way to dampen the harm foreign activity may inflict on their Chinese counterpart is a continuation of a policy which the Chinese have implemented since the early 1980s—the encouragement of domestic enterprise consolidation. This can be accomplished by applying a more lenient standard to domestic consolidations than to mergers and acquisitions involving foreign parties. The language of the AML's policy objectives creates room for such a practice, and doing so would not hinder foreign economic activity any more than if a single strict standard were applied to all business consolidations. This would accomplish the goal of fostering the competitiveness of Chinese businesses while at the same time still serving the traditional purpose of any antitrust law: protecting the consumer interest.