

Against Antitrust Functionalism: Reconsidering China's Antimonopoly Law

SALIL K. MEHRA* & MENG YANBEI**

Introduction.....	380
I. Antitrust Functionalism and the Background of the AML.....	384
A. Antitrust Functionalism.....	384
B. Social Background	386
C. Pre-2007 Chinese Competition Law	391
1. The Law Against Unfair Competition (1993)	391
2. The Pricing Law (1998) and the Law on Bid Invitation and Bidding (1999)	392
3. The Foreign Trade Law	393
4. The Administrative Rules and Regulations.....	394
a. Tentative Provision on Prohibition of Acts of Price Monopolization (2003)	394
b. Provision on Mergers and Acquisitions of Domestic Enterprises by Foreign In- vestors (2006)	395
5. Summary	396
D. The Antimonopoly Law (2007).....	396
1. The State Role: Administrative Monopoly.....	399
2. Institutional Design Issues.....	402
3. Legal Infrastructure Needs?	410

* Professor, Beasley School of Law, Temple University; 2008 Chair, Antitrust and Economic Regulation Section, Association of American Law Schools. Professor Mehra would like to thank Mo Zhang for helpful comments and Sarah Beth Mehra for her loving support and editing skills.

** Associate Professor, Renmin (People's) University (Beijing, China); Visiting Researcher, Georgetown University Law Center. Professor Meng is a native speaker of Mandarin Chinese and has verified all English translations of Chinese documents to be accurate.

II.	Local Protectionism as a Competition Problem	411
A.	The American Approach	412
B.	The European Approach.....	416
C.	Relevance for China	419
III.	The AML and Alternative Antitrust.....	423
A.	A Cooperative Solution to Regional and Local Protectionism?	424
B.	The Benefits of Voice and Loyalty, But No Exit	428
	Conclusion	429

INTRODUCTION

After more than a dozen years of drafting, the People's Republic of China finally enacted its first comprehensive competition law, the Antimonopoly Law (AML), in August 2007.¹ The law attracted a good deal of attention, which is not surprising. Creating the equivalent of the United States' Sherman Antitrust Act² or the analogous portions of the Treaty Establishing the European Community (EC Treaty)³ for the world's most populous and economically fastest-growing nation was bound to attract such attention.

Much of the discussion of the AML, both in its draft stage and subsequent to its enactment, however, focuses on its shortcomings. This is particularly true with respect to what is perhaps the law's most salient feature: its express effort to deal with anticompetitive state action. Commentators who are pessimistic about the law's chances of effecting positive change form a cottage industry.⁴ For the most part, these criti-

1. See Fan long duan fa [Antimonopoly Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 517-23 (P.R.C.), available at <http://english.peopledaily.com.cn/90001/90776/90785/6466798.html>. There have been prior laws and regulations addressing antitrust concerns, though in a less comprehensive fashion. See, e.g., Zhi zhi jia ge long duan xing wei zan xing gui ding [Tentative Provision on Prohibition of Acts of Price Monopolization] (promulgated by the Nat'l Dev. & Reform Comm'n, June 18, 2003, effective Nov. 1, 2003) ZHONGHUA RENMIN GONGHEGUO FA LU QUAN SHU [COLLECTION OF THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA] 1764 (P.R.C.), available at <http://www.competitionlaw.cn/show.aspx?id=399&cid=32>.

2. See Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (2000).

3. See Consolidated Versions of the Treaty Establishing the European Union and the Treaty Establishing the European Community arts. 81, 82 (formerly arts. 82, 86), 2006 O.J. (C 321 E) 1 [hereinafter EC Treaty].

4. See MARK WILLIAMS, COMPETITION POLICY AND LAW IN CHINA, HONG KONG AND TAIWAN 219-20 (2005) (describing China as weak with respect to several legal infrastructure

cisms do not stem from substantive disagreements about whether the practices that the AML proscribes inhibit competition. Rather, doubts surround the law's practical enforceability.⁵ Even those few supporters who applaud the AML's ambitious scope, including at least one of the law's drafters,⁶ think it will face significant enforcement hurdles.⁷

Many of these doubts are the premature fruit of a kind of "antitrust functionalism."⁸ The bulk of observers seem to have concluded that successful competition law looks a certain way and requires particular legal and institutional prerequisites—for example, an independent, pre-

criteria associated with successful competition law and hypothesizing that the AML may have been the wrong policy choice); Jared A. Berry, *The Anti-Monopoly Law in China*, 2 INT'L L. & MGMT. REV. 129, 130 (2005) ("[U]nless Beijing experiences major philosophical changes, China's attempts at regulating monopoly will be unsuccessful."); Youngjin Jung & Qian Hao, *The New Economic Constitution in China: A Third Way for Competition Regime?*, 24 NW. J. INT'L L. & BUS. 107, 108 (2003) ("[T]he design and future enforcement [of the then-draft AML will be] inevitably constrained by China's incomplete economic reform and weak legal institutions."); Bruce M. Owen et al., *Antitrust Law in China: The Problem of Incentive Compatibility*, 1 J. COMPETITION L. & ECON. 123, 133 (2005) (doubting that the law can have its intended effects because the "legal system in China has been created mainly to serve political purposes" rather than to serve as a guarantor of private rights to compete); Bing Song, *Competition Policy in a Transitional Economy: The Case of China*, 31 STAN. J. INT'L L. 387, 388 (1995) ("China needs many improvements in . . . formal legal structure and in the political realm of executive enforcement of the laws before a functioning antitrust policy can take shape."); see also H. Stephen Harris, Jr., *The Making of an Antitrust Law: The Pending Anti-Monopoly Law of the People's Republic of China*, 7 CHI. J. INT'L L. 169, 172 (2006) (noting "serious grounds for concern" with the draft AML in considering a prior draft that did not include provisions dealing with administrative monopolies).

5. See sources cited *supra* note 4.

6. See Xiaoye Wang, *Highlights of China's New Anti-Monopoly Law*, 75 ANTITRUST L.J. 133, 133–34 (2008) (stating that "one might easily predict there will be enforcement challenges facing China's new AML" but calling it a "milestone" that "demonstrates both the achievement of Chinese economic reform and that the allocation of resources in China is committed to market mechanisms and competition").

7. See Eleanor M. Fox, *An Anti-Monopoly Law for China—Scaling the Walls of Government Restraints*, 75 ANTITRUST L.J. 173, 175, 177 (2008) (observing that "the law contains foundations for control of anticompetitive and unnecessary government restraints" but stating that "[t]he remedy for [government] administrative abuse is so weak that the prohibitory language may be mere aspiration"); Paul Jones, *China's New Anti-Monopoly Law: An Economic Constitution for the New Market Economy?*, CHINA L. REP., Sept. 2007, at 3, 10 ("[I]nclusion of [prohibitions against government anticompetitive restraints] is both a major victory for competitive markets in China and a major enforcement problem."); R. Hewitt Pate, *What I Heard in the Great Hall of the People—Realistic Expectations of Chinese Antitrust*, 75 ANTITRUST L.J. 195, 196, 209 (2008) (observing that "[t]he AML's provisions aimed at local protectionism may garner relatively little attention from the international antitrust bar, but in terms of improving the Chinese economy for citizens throughout the country they must be the most important provisions of the AML" and pointing out that "China has no tradition of disagreement and discussion with private parties in government decision making backed by independent judicial review").

8. See *infra* Part I.A.

dictable judicial system. This may be the result of perceptions concerning what kind of antitrust law works to address the traditional ills of large developed economies. While the conventional legal infrastructure these critics have in mind may be desirable in its own right, its absence may not absolutely stunt the AML. It is far from certain that their assessment even accords with longstanding experience with competition law in developed nations,⁹ let alone predicts the course of a nascent law in a developing China.

At first glance, there appears to be reason to be concerned about the outlook for China's new antitrust law. China lacks the legal and institutional infrastructure to effect conventional antitrust enforcement as it proceeds in the United States and the European Union (EU).¹⁰ The lack of an independent judiciary is particularly cited by critics; they claim that independent high courts have played a significant role in supporting litigation against government-based anticompetitive restraints in the United States¹¹ and the EU.¹²

Moreover, confronting anticompetitive governmental restraints is a difficult problem even for established legal systems in developed economies.¹³ Critics question the ability of the AML to address the gov-

9. See, e.g., John O. Haley, *Antitrust Sanctions and Remedies: A Comparative Study of German and Japanese Law*, 59 WASH. L. REV. 471, 505–07 (1984) (describing how Japanese and German antitrust enforcers used modest fines and “adverse publicity” in lieu of imposing criminal penalties or facilitating private damage actions).

10. See *infra* Part I.D.3.

11. One of the chief ills that the law aims at, “local protectionism,” is dealt with in the United States at the state level by the Dormant Commerce Clause and at the local level by the federal antitrust laws. See Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 732 (1991) (noting this distinction). But as Judge (and antitrust professor) Frank Easterbrook has observed, the Dormant Commerce Clause does not appear in the U.S. Constitution. *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 849 (7th Cir. 2000). Judge Easterbrook was presumably alluding to the clause's origin in Supreme Court case law rather than constitutional text and did not seriously question the validity of Dormant Commerce Clause jurisprudence. See *id.* at 851–53 (considering the impact of the Dormant Commerce Clause on wine shipment regulations that discriminated against out-of-state producers).

12. The European Court of Justice (ECJ) has played a significant role in realizing the goal of Article 82 of the EC Treaty, dealing with anticompetitive government restraints. See ERIKA SZYSZCZAK, *THE REGULATION OF THE STATE IN COMPETITIVE MARKETS IN THE EU* 113–19, 131–33 (2007) (describing the ECJ's leading role in articulating rules under Article 82 of the EC Treaty); see also ALEC STONE SWEET, *THE JUDICIAL CONSTRUCTION OF EUROPE* 112 (2004) (describing the “rationale for delegating” the problem of trade protectionism by EU member states to the ECJ as the result of “a paradigmatic prisoners’ dilemma situation”).

13. See, e.g., Tibor Varady, *The Emergence of Competition Law in (Former) Socialist Countries*, 47 AM. J. COMP. L. 229, 252, 258 (1999) (noting the “serious procedural problems” and “sensitive questions regarding checks and balances” involved in trying to address the “economic heritage” of “legal (or even compulsory) monopolies” in post-socialist countries generally).

ernmental restraints that significantly distort China's economy. Because of China's socialist legacy, many anticompetitive restraints are actually state-imposed, particularly at the local and regional level.¹⁴ Commentators have specifically questioned the likely effectiveness of the AML's provisions aimed at eliminating these restraints, termed "administrative monopolies."¹⁵

Against the conventional pessimism, this Article argues that the AML may surprise its doubters. China does lack some prerequisites to effective antitrust enforcement in the traditional sense. The AML, however, is not a traditional antitrust law. Accordingly, it might achieve important successes despite the lack of a conventional legal infrastructure.¹⁶ In this regard, considering the AML in light of the World Trade Organization (WTO) may prove helpful. With respect to local and regional protectionism, the AML may represent a cooperative equilibrium between local and regional governments who might otherwise pursue beggar-thy-neighbor anticompetitive state controls. Additionally, the AML has the potential to spark a "competition culture"¹⁷—an appreciation of the value of promoting and safeguarding competition—that could positively impact central government competitive restraints as well.¹⁸ As a result, China's new antitrust law may yield a surprising level of success.

14. See *infra* Part I.D.1; see also John O. Haley, *Competition Policy for East Asia*, 3 WASH. U. GLOBAL STUD. L. REV. 277, 281 (2004) ("For China and other socialist-market economies in East Asia, the problem of anticompetitive state action is obviously even greater than pre- or post-war Japan or Germany. For China as a socialist-market economy, the state still remains the dominant economic actor. Without an extraordinarily strong commitment by the state to the creation of conditions for competition, exercises of monopoly power by state actors as well as the enforcement of regulatory regimes that enable or promote effective exercise of monopoly power seem inevitable.").

15. See WILLIAMS, *supra* note 4, at 145 (concluding that inclusion of administrative monopolies within the competition law will not work); Bruce Owen et al., *China's Competition Policy Reforms: The Anti-Monopoly Law and Beyond*, 17 ANTITRUST L.J. 231, 256 (2008) (noting that "prohibiting administrative monopolies in the AML may not yield many successes in the near future").

16. Federal Trade Commission Chairman (and antitrust law professor) William Kovacic has set forth a series of criteria for effective antitrust law in the traditional sense, including a corps of qualified personnel; transparency in decision making; a robust, independent legal system; adequate resources; and a public and government commitment to competition policy. See William E. Kovacic, *Designing and Implementing Competition and Consumer Protection Reforms in Transitional Economies: Perspectives from Mongolia, Nepal, Ukraine, and Zimbabwe*, 44 DEPAUL L. REV. 1197 (1995); William E. Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 BROOK. J. INT'L L. 403 (1997).

17. See *infra* notes 50–51, 84 and accompanying text.

18. See Meng Yanbei, *Shi chang jing ji zhong de qi ye neng fou zi zhu ding jia?* [Is There a Self-Pricing Right of Market Parties in a Market-Oriented Economy?], SHI DAI JING MAO

Part I provides some relevant background on the AML and the Chinese context to help explain why government action is so prominent within the AML's framework. Part II discusses how the United States and the EU have dealt with local protectionism and the relevance of this protectionism to China's new competition law. Part III explains how the AML can help address government anticompetitive restraints by promoting a cooperative solution to local and regional trade protectionism and discusses how the AML can have broader effects beyond the local and regional level.

I. ANTITRUST FUNCTIONALISM AND THE BACKGROUND OF THE AML

The AML emerged from China's economic, political, and social circumstances. Despite that, critics of the AML seem to assume that China's competition law must resemble that of Western, developed nations. A look at the AML's less comprehensive legal predecessors assists in understanding the AML and its goals.

A. *Antitrust Functionalism*

The many critics of China's AML share a feature common with the AML's drafters, namely, a focus on comparison with developed nation competition law.¹⁹ That is not surprising; the Chinese drafters openly solicited input from abroad, including the antitrust bar in the United States.²⁰ But, as a result, the criticisms of the AML rooted in China's

[ECONOMIC & TRADE UPDATE], Aug. 2005, at 56, 56–58 (P.R.C.), available at <http://www.competitionlaw.cn/show.aspx?id=4157&cid=53>; Wang Xiaoye, *Ju jiao fan long duan fa – Zhongguo jing ji ti zhi gai ge de li cheng bei* [Concentrating on AML – Milestone of China's Economic Reform], LEGAL DAILY (P.R.C.), Sept. 4, 2007, at 10, available at http://www.legaldaily.com.cn/dfjzz/2007-09/04/content_694134.htm; see also Shi Jianzhong, *Wo guo fan long duan fa de te se zhi du, liang dian zhi du ji zhong da bu zu* [Distinctiveness, Obviousness and Deficiency of China's AML], FA XUE JIA [JURIST], Feb. 15, 2008, at 14, 16–17 (P.R.C.), available at <http://www.competitionlaw.cn/show.aspx?id=3803&cid=17>.

19. See WILLIAMS, *supra* note 4, at 157 (considering it “noticeable” that Chinese research during the drafting of the AML “concentrate[d] on developed-country economies and ‘advanced’ systems of competition regulation”); Wang Xiaoye, Challenges in Enforcing Chinese Antimonopoly Law 3 (Apr. 4, 2008), at <http://www.abanet.org/intlaw/spring08/materials/aba2008springwangChallengesinEnforcingChineseAML.pdf> (discussing borrowings from developed nations' antitrust regimes).

20. See, e.g., Harris, *supra* note 4, at 181 (“[The] draft AML was the subject of the International Seminar on Anti-Monopoly Legislation, which was held in Beijing in May 2005 and hosted by the LAO [Legislative Affairs Office of the State Council]. Participants included leading academics and officials from antitrust agencies in the US, the European Community (EC), Germany, Japan, Korea, and Russia as well as representatives of the ABA [American Bar Association], the

lack of an independent judiciary and antitrust bar also reflect an undue assumption that the U.S. context, in particular, is the proper baseline for comparison.

In short, these critics have fallen victim to an “antitrust functionalism”—specifically, an unstated and unwarranted assumption about background similarities between China and elsewhere.²¹ Given the tremendous growth in competition law over the past two decades, it is not a stretch to view it as a universal regulatory impulse in developing and globalizing economies. After all, since the early 1990s, the world has seen the establishment of antitrust regimes in the Eastern European transitional economies,²² Latin America,²³ China,²⁴ and India.²⁵ Additionally, during this period, the EU established itself as a transnational competition law enforcer with particular vigor.²⁶ But even if these nations aim at similar results, there may be important contextual differences between the many countries with antitrust regimes.

These contextual differences can take several forms. First, even if different nations intend to use antitrust law to improve consumer wel-

International Bar Association, and NGOs [nongovernmental organizations] like UNCTAD [United Nations Conference on Trade and Development] and the OECD [Organisation for Economic Cooperation and Development].”); Pate, *supra* note 7, at 195 (“U.S. and European officials have often approached China like a recruiting prospect—as a new player to be won over to U.S. or European styles of antitrust. Practicing members of the international antitrust bar likewise offered detailed comments on earlier drafts of the AML, pointing out potential pitfalls at a micro level with reference to U.S. or European experiences.”).

21. The concept is a specific application of the broader notion of the perils of functionalism elsewhere in the law. See Annelise Riles, *Wigmore's Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT'L L.J. 221, 241–42 (1999) (describing the pitfalls of unstated assumptions of resemblances between another legal system and one's own, by, for example, focusing on the question, “What was the Tibetan law of torts?”); Teemu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179, 191, 230 (2002) (arguing that one's “conception of the rule of law must not be so closed and rigid as to categorically delegitimize all alternatives” and that one must be aware of hidden assumptions in the questions one asks, for example, such as asking whether, by the Han Dynasty, “the Chinese [had] developed promissory estoppel”).

22. See Varady, *supra* note 13, at 245–48.

23. See D. Daniel Sokol, *Order Without (Enforceable) Law: Why Countries Enter Into Non-Enforceable Competition Policy Chapters in Free Trade Agreements*, 83 CHI.-KENT L. REV. 231, 233 (2008) (describing how, in the 1990s, “[m]any [Latin American] countries included antitrust law within domestic reforms to encourage liberalization” of their economies).

24. See H. Stephen Harris, Jr. & Rodney J. Ganske, *The Monopolization and IP Abuse Provisions of China's Anti-Monopoly Law*, 75 ANTITRUST L.J. 213, 213 (2007).

25. See Eleanor M. Fox, *India: The Long Road to a Full-Function Competition Law*, 21 ANTITRUST 72 (2007).

26. See RICHARD WHISH, *COMPETITION LAW* 52 (5th ed. 2003) (describing “reform” and “modernization” of EU competition law during the past two decades aimed at creating more effective enforcement).

fare, they may embrace different regulatory models to reach that goal.²⁷ For example, while concern with private cartels may be at the heart of U.S. antitrust law,²⁸ government restraints may draw more attention in China given its transition from a state planning model.²⁹ Moreover, there is a difference in starting points, both in the form of the economy and in the preexisting legal and regulatory regimes.³⁰ Finally, there is an unstated assumption that a new antitrust law like the AML must necessarily function in the manner of the Sherman Antitrust Act—including a legalistic delegation of responsibility to enforcers, such as the courts or prosecutors—rather than possibly functioning in other ways, such as in the manner of an internal free-trade agreement.³¹

To appreciate why the AML might achieve important success, it is necessary to appreciate that, in important respects, it may represent a stage in an ongoing process of Chinese reform in competition law, rather than a beginning or end point. As a result, China's competition law's pathway to success may be quite different than that of the Sherman Antitrust Act.³²

B. *Social Background*

Prior to 1978, China operated under a centrally planned economic system. During this period, “competition” was an unfamiliar concept, and China had no policy or law regulating market competition as such.³³ State-owned enterprises (SOEs) dominated the economy and very few privately owned enterprises existed.³⁴ These SOEs were subordinated to

27. See Haley, *supra* note 9 (describing the implementation of antitrust through administrative regulation and adverse publicity in advanced nations lacking effective judicial systems and robust remedies).

28. See, e.g., R. Hewitt Pate, Acting Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Anti-Cartel Enforcement: The Core Antitrust Mission, Address Before British Institute of International Law and Comparative Law, Third Annual Conference on International and Comparative Competition Law, The Transatlantic Antitrust Dialogue (May 16, 2003), available at <http://www.usdoj.gov/atr/public/speeches/201199.pdf>.

29. See *infra* Part I.C.

30. See *infra* Parts I.B–C.

31. See *infra* Part II.

32. See *infra* Parts I.B–C; see also Pate, *supra* note 7, at 195 (acknowledging “fundamental aspects of Chinese culture and government that will make Chinese antitrust different from Western varieties”).

33. See Zhonghua Renmin Gongheguo guo wu yuan xin wen ban gong shi [State Council Information Office of the People's Republic of China], Zhongguo de fa zhi jian she [China's Constructing of the Rule of Law] (Feb. 2008), at http://www.gov.cn/zwgk/2008-02/28/content_904648.htm (P.R.C.).

34. See Li Rongrong, *Hong da de gong cheng bao gui de jing yan – ji guo you qi ye gai ge fa zhan 30 nian* [Grand Project and Precious Experience – On 30 Years of State-Owned Enterprises

governmental organs and undertook production in accordance with administrative directives, and enterprises had neither any autonomy nor the responsibility to bear losses.³⁵ Accordingly, Chinese society as a whole rejected market ordering and private contracting. Chinese scholars endorsed a system of production through administrative monopolies operating under direct government stipulations of prices and volumes of production.³⁶

In 1978, China began a process of market reform and globalization.³⁷ Pursuant to this policy, beginning in 1980, the State Council—the head of the nation's executive and the issuer of orders enforceable as law³⁸—

Reform and Development], 2008 QIU SHI 27, 27.

35. See Yiping Huang, Fang Cai & Ron Duncan, *Reform of State-Owned Enterprises in China: Key Measures and Policy Debate*, in REFORM OF STATE-OWNED ENTERPRISES IN CHINA: AUTONOMY, INCENTIVE AND COMPETITION 7 (Ron Duncan & Yiping Huang eds., 1998) (“First, [SOEs] were not independent economic identities. . . . Second, SOE managers were only executors of state plans. . . . Third, income distribution in SOEs was determined by the central government. There was little incentive, therefore, for employees and managers”); see also Luo Fangliang, *Guo qi gai ge ying jian chi shi chang hua qu xiang, fa hui zui da xiao yi cu fa zhan* [Reform of State-Owned Enterprises Should Insist on Market Orientation and Realize Efficiency to Promote Development], GUANGMING DAILY (P.R.C.), Dec. 6, 2006, at 10, available at http://www.gov.cn/zwhd/2006-12/06/content_462390.htm; Zhang Tianhong & Fan Xiaoyan, *Guo qi gai ge zhi zhong zheng que chu li zheng fu yu qi ye de guan xi* [Dealing with Relations Between Government and Enterprise in State-Owned Enterprise Reform] JINGJI WENTI [ECONOMIC ISSUES], Feb. 25, 2003, at 22 (P.R.C.), available at http://www.cel.cn/show.asp?c_id=121&c_upid=6&c_grade=2&a_id=1786.

36. See Guo Yong & Hu Angang, *Xing zheng long duan, xun zu yu fu bai: zhuan xing jing ji de fu bai ji li fen xi* [Administrative Monopolies, Rent Seeking and Corruption: An Analysis of Corruption Texture in the Transitional Economy], JINGJI SHE HUI TI ZHI BI JIAO [COMPARATIVE ECONOMICS AND SOCIAL SYSTEMS], July 3, 2005, at 61, 62 (P.R.C.), available at <http://www.competitionlaw.cn/show.aspx?id=312&cid=6>.

37. From December 18 to 22, 1978, the Communist Party of China convened the third plenary session of the Eleventh Central Committee in which the Party decided to stop the slogan of “class struggle as the center,” transferred the focus of work to the modernization drive, and adopted the policy of reform and opening up. Communiqué of the Third Plenary Session of the 11th Central Committee of the Communist Party of China (Dec. 22, 1978), at http://www.bjreview.com.cn/special/third_plenum_17thcpc/txt/2008-10/10/content_156226.htm; see also Donald C. Clarke, *What's Law Got to Do with It? Legal Institutions and Economic Reform in China*, 10 UCLA PAC. BASIN L.J. 1, 4 (1991) (“Economic reform in China dates from the watershed Third Plenum of the 11th Central Committee of the Chinese Communist Party (CCP) held in December, 1978 [when] the CCP announced that the central focus of its work would shift from class struggle to economic development.”).

38. See Peter Howard Corne, *Creation and Application of Law in the PRC*, 50 AM. J. COMP. L. 369, 381 (2002) (describing the State Council as the head of the nation's executive as well as the next tier in the legislative hierarchy below the National People's Congress, which elects the State Council); Michael W. Dowdle, *The Constitutional Development and Operations of the National People's Congress*, 11 COLUM. J. ASIAN L. 1, 54 (describing the State Council as “China's principal executive body” and having “broad legislative powers which allow it to draft and promulgate regulations on a wide variety of matters without requiring a parliamentary grant of legisla-

set forth three sets of provisional regulations aimed at incorporating competition concerns into these reforms. First, in 1980, the Provisional Regulations on Promoting Economic Coalition endorsed the right of enterprises to handle their own affairs and condemned unreasonable administrative interference.³⁹ In the same year, the Provisional Regulations on Developing and Protecting Socialist Competition nominally prohibited monopolistic acts, including those against administrative monopolies, and emphasized that China would benefit from the breakdown of trade barriers between regions and industry segments.⁴⁰ Finally, in 1990, the Notice on Breaking Local Market Blockades and Further Activating Commodity Circulation stated that all regions and branches should prohibit and rectify local blockades.⁴¹

These reforms helped spark a legislative and academic discussion about markets, trade, and competition. As a result, in 1993, at the Fourteenth National Congress of the Communist Party of China, the Chinese central government set forth a framework for China's economy in the form of the Decision on Some Issues of Establishing a Socialist Market Economic System, which was examined and passed by the Communist Party of China.⁴² In particular, this statement clarified that, in the view of China's one-party rulers, the ultimate goal of China's economic reform was the transition from a planned economy to a socialist market economy.

Generally, the goal of the reforms that began in 1978 was to provide a foundation for the transition to this new economic system. Today, af-

tive authority").

39. See *Guo wu yuan guan yu tui dong jing ji lian he de zan xing gui ding* [State Council Provisional Regulations on Promoting Economic Coalition] (promulgated by the State Council, July 1, 1980, effective July 1, 1980) *ZHONGHUA RENMIN GONGHEGUO FA GUI HUI BIAN* (1980) [COMPILATION OF LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA (1980)] 31–34 (P.R.C.), available at <http://www.competitionlaw.cn/show.aspx?id=2787&cid=32>.

40. See *Guo wu yuan guan yu kai zhan he bao hu she hui zhu yi jing zheng de zan xing gui ding* [State Council Provisional Regulations on Developing and Protecting Socialist Competition] (promulgated by the State Council, Oct. 17, 1980, effective Oct. 17, 1980, abolished Oct. 6, 2001) *ZHONGHUA RENMIN GONGHEGUO FA GUI HUI BIAN* (1980) [COMPILATION OF LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA (1980)] 35–38 (P.R.C.), available at <http://www.competitionlaw.cn/show.aspx?id=214&cid=32>.

41. See *Guo wu yuan guan yu da po di qu jian shi chang feng suo, jin yi bu gao huo shang pin liu tong de tong zhi* [State Council Notice on Breaking Local Market Blockades and Further Activating Commodity Circulation] (promulgated by the State Council, Nov. 10, 1990, effective Nov. 10, 1990) *ZHONGGUO FA LU NIAN JIAN* (1990) [LAW YEARBOOK OF CHINA (1990)] 312–13 (P.R.C.), available at http://news.xinhuanet.com/ziliao/2005-02/18/content_2591033.htm.

42. See *Zhong gong di shi si jie li ci zhong yang quan hui* [All Previous Plenary Sessions of the Fourteenth Central Committee of CPC], at http://www.gov.cn/test/2007-08/29/content_730569.htm (last visited May 25, 2008) (P.R.C.).

ter nearly thirty years of liberalization, China has reached the point where not only may private foreign-invested enterprises freely pursue profit maximization, but certain SOEs increasingly may also operate in the market largely free from government interference with specific transactions or management decisions.⁴³ With these changes, China has recognized the need for a more formalized and institutionalized competition law.

The creation of Chinese competition law has been complicated by the context of China's rapid development and economic progress. While observers may debate the degree to which China is today a market-oriented society, it is indisputable that China has become more economically open and free.⁴⁴ Already, China has the fourth largest gross domestic product (GDP) in the world at market exchange rates,⁴⁵ and its economic system continues to undergo rapid change. Because China has started from a very low base economically, however, it is still very much a developing country, albeit a very fast-growing one.⁴⁶ Moreover, the changes in China's economic system are not just quantitative, but also qualitative. China faces the competition law challenges of a transitional economy; indeed, China has the largest transitional economy in the world.⁴⁷ As such, its competition law does not address only private sector anticompetitive practices. In addition, China must also confront restraints inherited from a history of state control over the economy.

Meanwhile, China is also pressing forward with judicial and political reform.⁴⁸ Most relevant for competition policy, the government's role in

43. See Fan Hengshan, *Zhongguo jing ji ti zhi gai ge de li shi jin cheng he ji ben fang xiang* [Historical Process and Basic Orientation of China's Economic Reform], ZHONGGUO GAI GE [CHINA REFORM], Aug. 2006, at 8 (P.R.C.), available at <http://www.competitionlaw.cn/show.aspx?id=1559&cid=6>; see also Xianming Meng & Brian Dollery, *Institutional Constraints and Feasible Reform for State-Owned Enterprises in China* 11 (U. New Eng. Sch. Econ., Working Paper No. 2005-17, 2005) ("State-owned enterprises, collectively owned enterprises and other types of enterprises . . . all . . . compete in [a] market economy where only the 'fittest would survive.'").

44. Meng & Dollery, *supra* note 43, at 11.

45. Dong Zhixin, *GDP Expands 11.4 Percent, Fastest in 13 Years*, CHINA DAILY, Jan. 24, 2008, at http://www.chinadaily.net/china/2008-01/24/content_6418067.htm ("The country's Gross Domestic Product (GDP) grew . . . [marking] a fifth year of double-digit growth for the world's fourth largest economy . . .").

46. *Id.*

47. C. Simon Fan & Xiangdong Wei, *The Law of One Price: Evidence from the Transitional Economy of China*, 88 REV. ECON. & STAT. 682, 682 (2006) (stating that China's economy is "the largest transitional economy in the world").

48. See Hu Juntao, Report in the Seventeenth National Congress of the Communist Party of China, RENMIN RIBAO [PEOPLE'S DAILY] (P.R.C.), Oct. 25, 2007, at 3, available at <http://cpc.people.com.cn/GB/64093/67507/6429848.html>.

economic management remains important but is gradually receding amidst a wide-ranging debate. In particular, this discussion has drawn on historical experience concerning the government's control over production and sale⁴⁹ and comparative examples, including the role of industrial policy in so-called East Asian "developmental states."⁵⁰

Finally, China's own culture and commercial customs must be considered. China has lacked not only a comprehensive competition law, but also a competition culture.⁵¹ Chinese enterprises still do not fully understand the impact of prohibitions against cartel behavior. They seem genuinely uncertain about their rights in the context of price setting, particularly where there exists the possibility of being punished for dumping or price fixing on the export market.⁵² When faced with litigation abroad for anticompetitive practices, Chinese enterprises have expressed surprise at the nature of the claims against them.⁵³

China is embarking on a course for establishing competition law. This is a dramatic change for China's legal system, undertaken with a view towards the paths taken by other nations, especially the United States and the EU, but not necessarily following those paths. China's push towards the establishment of competition law has involved the enactment and amendment of many economic regulations over recent years. To the degree that there are identical issues of economic and social circumstances in China and in typical market-oriented economy countries, similar competition law provisions have been adopted. How-

49. See Fan Hengshan, *supra* note 43.

50. See Meng Yanbei, *Lun chan ye zheng ce yu fan long duan fa de chong tu yu xie tiao* [Research on Conflict and Harmony between Antitrust Law and Industrial Policy], SHE HUI KE XUE YAN JIU [SOCIAL SCIENCE RESEARCH], Mar. 15, 2005, at 78, 79–80 (P.R.C.), available at <http://www.competitionlaw.cn/show.aspx?id=894&cid=17>; see also Wang Xiaoye, *Jing zheng zheng ce you xian – ou gong ti chan ye zheng ce yu jing zheng zheng ce* [The Precedence of Competition Policy – Industrial Policy and Competition Policy in EU], GUO JI MAO YI [INTERTRADE], Oct. 20, 2001, at 32, 32–35 (P.R.C.), available at <http://www.competitionlaw.cn/show.aspx?id=1137&cid=16>.

51. See Meng Yanbei, *supra* note 18, at 57–58.

52. *Id.*

53. *Id.* For example, in 2005, four of China's vitamin enterprises were sued by Animal Science Products, Inc. and the Ranis Company, Inc. in California state court. The vitamin enterprises were accused of fixing the export price of vitamins. Putting aside the legitimacy of the claims and the result of the case, the reaction of the Chinese enterprises was notable for how it exemplified the lack of a competition culture. In particular, the enterprises expressed exasperation born of a lack of comprehension, complaining that if they sold their product at a low price, foreign governments or corporations would accuse them of dumping; while if they sold their product at a high price, the foreign governments or corporations could sue them for violating antitrust law. They genuinely did not seem to understand the importance that allegations of concerted action played in the dispute. *Id.*

ever, China's unique context has also led it to adopt distinctive formulations of competition law.

C. *Pre-2007 Chinese Competition Law*

While the AML has been heralded as a watershed, Chinese rules and regulations related to competition have been issued for the past two decades. The aforementioned adoption of a social market economy in 1993 provided the impetus for various enactments and amendments relevant to competition. An appreciation of the role of and experience with these laws provides some understanding of the AML as an evolutionary stage, rather than either an absolute beginning or final culmination.

1. *The Law Against Unfair Competition (1993)*

Prior to the AML, the Law Against Unfair Competition (LAUC) was the main law dealing with competition issues enacted by the Standing Committee of the National People's Congress—the supreme legislative organ in China.⁵⁴ That said, the LAUC regulates many issues that are not particularly relevant to antitrust concerns, including many activities that, from a U.S. perspective, are traditionally the subject of consumer protection law. For example, Chapter Two of the LAUC proscribes various acts of unfair competition, including passing off (Article 5), misleading advertising (Article 9), infringement of trade secrets (Article 10), improper sales with attached prizes (Article 13), and damage to goodwill (Article 14). Other sections do deal with acts usually subject to antitrust law, such as abuse of dominant position by public utility enterprises (Article 6), predatory pricing (Article 11), tie-in sales (Article 12), and bid rigging (Article 15).

To address the LAUC's goals, the Administration for Industry and Commerce (AIC) is charged with significant enforcement duties under the LAUC. The State Administration for Industry and Commerce (SAIC)—the highest, central government level of the AIC⁵⁵—in turn

54. See *Fan bu zheng dang jing zheng fa* [Law Against Unfair Competition] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 2, 1993, effective Dec. 1, 1993) ZHONGGUO FA LÜ NIAN JIAN (1994) [LAW YEARBOOK OF CHINA (1994)] 319–21 (P.R.C.), available at <http://www.competitionlaw.cn/show.aspx?id=133&cid=32>.

55. The term “central government” is used to distinguish the national government based in Beijing from local government authorities. See Donald C. Clarke, *China's Legal System and the WTO: Prospects for Compliance*, 2 WASH. U. GLOBAL STUD. L. REV. 97, 106–07 (2003) (employing this distinction and noting that “China suffers from numerous internal trade barriers that the central government is continually struggling, often unsuccessfully, to remove”).

has issued rules and regulations to interpret and clarify the role of the LAUC.⁵⁶ Additionally, judicial interpretations of the LAUC have been supplied to assist in understanding and enforcing the legislation. In January 2007, the Supreme People's Court promulgated judicial interpretations to define and explain certain provisions in the LAUC.⁵⁷ Interpretations such as these may be provided in response to a specific question asked by a lower court or as a general explanation of the law; once issued, the judicial interpretations become part of China's law and bind all courts.

2. *The Pricing Law (1998) and the Law on Bid Invitation and Bidding (1999)*

The Pricing Law regulates activities that limit price competition and improper pricing behavior including price fixing, predatory pricing, and price discrimination.⁵⁸ A recent example suggests its relevance to anti-trust concerns. In July 2007, acting on tips, the National Development and Reform Commission (NDRC) investigated a trade association (the

56. See Interim Provisions on Prohibiting Bid Rigging (promulgated by the State Admin. for Indus. & Commerce, Jan. 6, 1998, effective Jan. 6, 1998), at http://www.saic.gov.cn/english/laws%20and%20regulations/others/t20060303_14695.htm (P.R.C.); Interim Provisions on Prohibiting Commercial Bribery (promulgated by the State Admin. for Indus. & Commerce, Nov. 15, 1996, effective Nov. 15, 1996), at http://www.saic.gov.cn/english/laws%20and%20regulations/others/t20060303_14694.htm (P.R.C.); Certain Regulations on Prohibiting Infringement of Commercial Secrets (promulgated by the State Admin. for Indus. & Commerce, Nov. 23, 1995, effective Nov. 23, 1995), at http://www.saic.gov.cn/english/laws%20and%20regulations/others/t20060303_14693.htm (P.R.C.); Certain Regulations on Prohibiting Unfair Competition Activity Concerning Imitating Specific Names, Packaging or Decoration of Well-Known Commodities (promulgated by the State Admin. for Indus. & Commerce, July 6, 1995, effective July 6, 1995), at http://www.saic.gov.cn/english/laws%20and%20regulations/others/t20060303_14692.htm (P.R.C.); Certain Regulations on Prohibiting Unfair Competition in Prize-Attached Sales (promulgated by the State Admin. for Indus. & Commerce, Dec. 24, 1993, effective Dec. 24, 1993), at http://www.saic.gov.cn/english/laws%20and%20regulations/others/t20060303_14690.htm (P.R.C.); Certain Regulations on Prohibiting Anti-Competitive Practices of Public Enterprises (promulgated by the State Admin. for Indus. & Commerce, Dec. 24, 1993, effective Dec. 24, 1993), at http://www.saic.gov.cn/english/laws%20and%20regulations/others/t20060303_14691.htm (P.R.C.).

57. See *Zui gao ren min fa yuan guan yu shen li bu zheng dang jing zheng min shi an jian ying yong fa lü ruo gan wen ti de jie shi* [Judicial Interpretations of the Supreme People's Court on Certain Issues Related to the Laws Applicable to Civil Unfair Competition Cases] (promulgated by the Supreme People's Court, Jan. 12, 2007, effective Feb. 1, 2007) 2007 SUPREME PEOPLE'S COURT GAZ. 10-13 (P.R.C.), available at <http://www.court.gov.cn/lawdata/explain/civil/200701180013.htm>.

58. See *Jia ge fa* [Pricing Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1997, effective May 1, 1998) ZHONGGUO FA LÜ NIAN JIAN (1998) [LAW YEARBOOK OF CHINA (1998)] 272-75 (P.R.C.), available at http://jjs.ndrc.gov.cn/zcfg/t20050713_35213.htm.

Chinese branch of the International Ramen Manufacturers Association) and some of its members for collusion in raising the price of instant noodles. The NDRC preliminarily ascertained that the members of the association met three times to coordinate the price of instant noodles from late 2006 to mid-2007. As a result, the NDRC decided that the association members had violated the Pricing Law.⁵⁹

Similarly, the Law on Bid Invitation and Bidding regulates cartel activities that thwart competition in fields requiring bidding.⁶⁰ Notably, Article 4 of the Government Procurement Law makes special note of the priority in the Law on Bid Invitation and Bidding, stating, "Where public invitation or invited bidding is adopted for government procurement of construction, the Law on Bid Invitation and Bidding shall apply."⁶¹ The law has seen some enforcement in practice. For example, prominent bid rigging prosecutions have involved the construction of an electrical power distribution center in Jiangxin Island and of a school library building and school buildings in Zhixin and Guangzhou City.⁶²

3. *The Foreign Trade Law*

The Foreign Trade Law, which was updated in 2004, prohibits monopolistic behavior and unfair competition behavior in foreign trade activities.⁶³ Because this law essentially requires foreign traders to obey

59. See National Development and Reform Commission, Guo jia fa zhan gai ge wei dui fang bian mian jia ge chuan tong an diao cha qing kuang de tong bao [Bulletin of Price Collusion Investigations: Case of Instant Noodles], at http://www.sdpc.gov.cn/xwzx/xwtt/t20070816_154071.htm (last visited on May 26, 2008) (P.R.C.). These acts were also found to have violated Article 4 of the Tentative Provision on Prohibition of Acts of Price Monopolization. *Id.*

60. See Zhao biao tou biao fa [Law on Bid Invitation and Bidding] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 1999, effective Jan. 1, 2000) 2000 ZHONGGUO FA LÜ NIAN JIAN (2000) [LAW YEARBOOK OF CHINA (2000)] 259-63 (P.R.C.), available at <http://www.ccg.gov.cn/xgfg/zhaotoubiao.htm>.

61. *Id.*; see Government Procurement Law art. 4 (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2002, effective Jan. 1, 2003), 2002 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 228-36 (P.R.C.), available at http://english.gov.cn/laws/2005-10/08/content_75023.htm.

62. See Guangdong sheng jian she ting [Construction Department of Guangdong Province], Guang dong sheng jian she ting ni chu tai jian she gong cheng wei biao chuan biao xing wei ren ding chu fa ban fa [Construction Bureau of Guangdong Province, Identifying and Punishing Measures on Bid Rigging in Construction Project], at <http://www.gdcic.net/GdcicIMS/Front/Message/ViewMessage.aspx?ColumnID=7&MessageID=81212> (last visited Sept. 12, 2008) (P.R.C.).

63. Dui wai mao yi fa [Foreign Trade Law] (promulgated by the Standing Comm. Nat'l People's Cong., May 12, 1994, amended Apr. 6, 2004, effective July 1, 2004) ZHONGGUO FA LÜ NIAN JIAN (2005) [LAW YEARBOOK OF CHINA (2005)] 263-67 (P.R.C.), available at <http://tfs.mofcom.gov.cn/aarticle/date/i/k/u/200412/20041200320335.html>.

domestic antitrust laws, such as the LAUC, the authorities have seldom enforced it independently to punish violators. In practice, the Foreign Trade Law merely clarifies the jurisdiction of those laws.⁶⁴

4. *The Administrative Rules and Regulations*

The laws discussed above were not the only pre-AML competition laws. More often, competition issues have been directly addressed by the issuance of administrative rules and regulations. Administrative rules are sometimes used to address new issues that require a quick response. Other times, they provide more detailed interpretations of previously promulgated laws. In particular, two important administrative rules regarding competition issues deserve discussion: the Tentative Provision on Prohibition of Acts of Price Monopolization and the Provision on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors.

a. Tentative Provision on Prohibition of Acts of Price Monopolization (2003)

In 2003, the NDRC issued the Tentative Provision on Prohibition of Acts of Price Monopolization.⁶⁵ These administrative rules prohibit the abuse of “market dominance,” which is inferred through “market share in the relevant market, substitutability of relevant goods, and ease of

64. *See id.* art. 32 (“In foreign trade dealings, monopolistic behavior in violation of relevant provisions of anti-monopoly laws and administrative regulations is not allowed. In foreign trade dealings, any monopolistic behavior with the effect of eliminating market fair competition shall be disposed of in accordance with relevant provisions of anti-monopoly laws and administrative regulations. If any activities in violation of laws set forth in the former paragraph occur with the effect of impairing foreign trade order, the authority responsible for foreign trade under the State Council may take measures necessary to eliminate the impairment.”) (author’s translation); *id.* art. 33 (“In foreign trade activities, unfair competition activity such as selling the products at unreasonably low prices, colluding with other parties in a tender, producing and releasing false advertisements, and conducting commercial bribery is not allowed. Any unfair competitive practice conducted in the foreign trade activities shall be disposed of in accordance with relevant laws and administrative regulations against unfair competition. Where any illegal activities as provided in the previous paragraph occur with the effect of impairing foreign trade, the authority responsible for foreign trade under the State Council may take such measures to eliminate the impairment such as prohibiting dealers from importing and exporting relevant goods and technologies.”) (author’s translation).

65. Zhi zhi jia ge long duan xing wei zan xing gui ding [Tentative Provision on Prohibition of Acts of Price Monopolization] (promulgated by the Nat’l Dev. & Reform Comm’n, June 18, 2003, effective Nov. 1, 2003) ZHONGHUA RENMIN GONGHEGUO FA LÜ QUAN SHU [COLLECTION OF THE LAWS OF THE PEOPLE’S REPUBLIC OF CHINA] 1764 (P.R.C.), available at <http://www.competitionlaw.cn/show.aspx?id=399&cid=32>.

new entry.”⁶⁶ The rules also contain prohibitions against price coordination, supply restriction, bid rigging, vertical price restraint, below-cost pricing, and price discrimination, which are described as abuses of dominance.⁶⁷ The rules also prohibit government agencies from “illegally intervening” in market price determinations.⁶⁸

b. Provision on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (2006)

In 2006, six government agencies jointly issued the Provision on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (Foreign Merger Provision), which superseded prior interim provisions.⁶⁹

Most notably, Chapter Five (Article 51 through Article 54) of the Foreign Merger Provision sets forth notification requirements and the terms of an antitrust review for pending mergers.⁷⁰ Article 51 lays out the conditions that trigger required pre-merger notification to China's Ministry of Commerce (MOFCOM) and the SAIC: annual sales thresholds, the number of enterprises the foreign party has previously acquired in related industries within one year, and the merging parties' pre- and post-merger share of the market.⁷¹

66. *Id.* arts. 3, 5–8; *see also* Owen et al., *supra* note 4, at 140.

67. *See* Zhi zhi jia ge long duan xing wei zan xing gui ding [Tentative Provision on Prohibition of Acts of Price Monopolization].

68. *See id.*

69. Guan yu wai guo tou zi zhe bing gou jing nei qi ye de gui ding [Provision on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors] (promulgated by the Ministry of Commerce, State-Owned Assets Supervision & Admin. Comm'n of the State Council, State Admin. of Taxation, State Admin. for Indus. & Commerce, China Sec. Regulatory Comm'n & State Admin. of Foreign Exch., Aug. 8, 2006, effective Sept. 8, 2006) 2007 STATE COUNCIL GAZ. 29–36 (P.R.C.), available at <http://tfs.mofcom.gov.cn/aarticle/zcfb/200608/20060802839438.html>.

70. *Id.* arts. 51–54.

71. *Id.* art. 51. In March 2007, MOFCOM posted guidelines on its website to aid the implementation of the Foreign Merger Provision. For the most part, they resemble similar guidelines and procedures adopted by other jurisdictions to help parties understand when and what to file. *See* Wai guo tou zi zhe bing gou jing nei qi ye fan long duan shen bao zhi nan [Antitrust Filing Guidelines on Merger and Acquisitions of Domestic Enterprises by Foreign Investors] (promulgated by the Antimonopoly Investigation Office, Dep't of Treaty & Law, Ministry of Commerce, Mar. 8, 2007, effective Mar. 8, 2007), at <http://tfs.mofcom.gov.cn/aarticle/bb/200704/20070404597464.html> (P.R.C.).

5. Summary

As described above, there were several laws prior to the AML that regulated competition within China. Over the past two decades, via these laws and regulations, China has attempted to regulate acts that restrain competition, and these experiences have influenced the design of the AML. The AML emerged in part out of a demand for more centralized, systematic enforcement than had previously existed in China. Chinese authorities have accumulated both positive and negative experiences that have influenced the design of the AML.

D. *The Antimonopoly Law (2007)*

After a thirteen-year legislative process, China's AML was promulgated in 2007, and became effective on August 1, 2008.⁷² Rarely can a statute that spans more than a decade of drafting be called a surprise. But in some ways, China's AML does contain certain unexpected aspects. First, there is the fact that the Chinese government made competition law such a priority at all: the harms of monopoly power and anti-competitive restraints have often been considered a concern chiefly for advanced industrialized nations.⁷³ There is also the reality that the AML has been enacted without a final resolution of exactly how it will be enforced, raising the possibility that it will be an "aspirational" antitrust

72. Since 1994, when it was first formally listed in China's national legislative plan, the AML has travelled a long and difficult road. The legislative process of China's AML is as follows: (a) in 1994, the AML was listed in the legislative plan of the Eighth Standing Committee of National People's Congress; (b) in 1998, the AML was listed in the legislative plan of the Ninth Standing Committee of National People's Congress; (c) in 2003, the AML was listed in the legislative plan of the Tenth Standing Committee of National People's Congress; (d) in 2004, the AML was listed in the legislative plan of the State Council; (e) in 2005, the AML was listed in the legislative plan of the Tenth Standing Committee of the National People's Congress; and (f) in 2006, China's draft AML was discussed and passed in principle by the State Council in the Standing Conference of the State Council. Pursuant to this, (g) in June 2006, the draft AML was discussed and examined for the first time in the Twenty-Second Conference of the Tenth Standing Committee of the National People's Congress; (h) in June 2007, the draft AML was discussed and examined for a second time in the Twenty-Eighth Conference of the Tenth Standing Committee of National People's Congress; and finally, (i) in August 2007, the draft AML was discussed and examined for a third time in the Twenty-Ninth Conference of the Tenth Standing Committee of National People's Congress, and (j) on August 30, 2007, the AML was promulgated, with an effective date of August 1, 2008. Mao Xiaofei & Hu Jian, *Fan long duan li fa hui gu yu zhan wang* [Retrospect and Forecast of Antimonopoly Legislation], HUA DONG ZHENG FA DA XUE XUE BAO [JOURNAL OF THE EAST CHINA UNIVERSITY OF POLITICAL SCIENCE AND LAW], Mar. 2008, at 121, 122–23 (P.R.C.).

73. See, e.g., Haley, *supra* note 14, at 283 ("Until recently, few advocated the need for any competition legislation for less industrialized states.").

law.⁷⁴ Finally, and perhaps most notably, the AML as enacted contains explicit provisions targeting anticompetitive government action; that it would do so was not always free of doubt.⁷⁵

The stated legislative goal of the AML is to protect and promote competition. While this is a common goal of many nations' domestic competition laws, the AML also aims at the less common goals of perfecting a socialist market mechanism, encouraging better allocation of resources, and strengthening a developing legal system. As a result, the AML takes aim at traditional antitrust issues like price fixing, monopolization, and other harms to consumer welfare. It also seeks to promote the rapid development of a healthy and sustainable socialist market system by shaping government action in the market.⁷⁶ To a large degree, the AML's attention to state restraints is a product of the context in which it was designed to operate.

Although this Article focuses on these state restraints on competition, it should be noted that the AML also contains provisions addressing private restraints. The majority of the AML's fifty-seven articles resembles the provisions of antitrust laws in typical market-oriented economies.⁷⁷ Studies conducted during the AML's drafting process supported the conclusion that increased industry concentration was becoming a problem in China.⁷⁸ To address this issue, the AML's drafting drew on an in-depth consideration of the experiences of others, particularly the

74. See *infra* Part I.D.2.

75. Earlier drafts of the AML did not contain provisions targeting anticompetitive government action. See Harris, *supra* note 4, at 170 (describing absence of "a chapter prohibiting so-called administrative monopolies" in the November 2005 version of the law).

76. See Zhou Bohua, member of the Seventeenth CPC Central Committee, Director, State Administration of Industry and Commerce, *Zai fan long duan zhi fa guo ji yan tao hui kai mu shi shang de zhi ci* [Address at the International Symposium on Enforcement of Antimonopoly Law] (Dec. 13, 2007) (P.R.C.), at <http://www.cnki.com.cn/Article/CJFDTotal-GSXZ200802005.htm?un=emuch>.

77. *Id.*

78. One influential report was produced by the SAIC pursuant to an investigation into increasing industry concentrations, with particular attention paid to dominant positions held by foreign investors. The report identified a number of industries where free competition was possibly threatened by rising industry concentration, particularly by foreign multinational corporations operating within China. The report identified the software, mobile phone, camera, and soft packaging industries as industries vulnerable to increased industry concentrations. The report was essentially a warning that foreign business groups were beginning to establish monopolies in China due to significant advances in technology, skills, and capital. These advances have allowed foreign companies to achieve competitive advantages and monopoly power—to the possible detriment of local companies and consumers. See Antitrust Office of Fair Trade Bureau of SAIC, *Zai hua kua guo gong si xian zhi jing zheng xing wei biao xian ji dui ce* [*The Competition Restricting Behaviors of Multinational Companies in China and Countermeasures*], GONG SHANG XING ZHENG GUAN LI [ADMINISTRATION FOR INDUSTRY & COMMERCE], Mar. 2004, at 42, 43 (P.R.C.).

United States and the EU. The resulting provisions are aimed at the prohibition of price fixing, monopolization, and mergers that significantly concentrate industries within China.⁷⁹ Indeed, the influence of U.S. and EU competition law can be seen in the Chinese drafters' incorporation of leniency for cooperative violators⁸⁰ and for those who comply with administrative requests to cease anticompetitive practices.⁸¹

Because of China's socialist legacy, however, concern over the abuse of state administrative power in eliminating and restricting competition looms large within the AML's framework. For outside observers, the targeting of government action, particularly so-called "administrative monopolies," may form the most striking feature of the AML. Together with the continued operation of many SOEs that have significant market power, administrative monopolies form a serious barrier to the effective operation of competitive markets in China.

79. China's AML consists of eight chapters, and a total of fifty-seven articles. Chapter I describes the general principles of the AML, including objectives, applicability, coverage, and enforcement authorities; Chapter II describes which monopolistic agreements are prohibited and which are exempted; Chapter III prohibits firms with a dominant market position from abusing their position, provides methods to infer market dominance, and describes abusive behavior; Chapter IV provides for agency review of proposed concentrations of business operators, and describes the specific notification thresholds and exemptions, required documents, and review procedures necessary to trigger agency review; Chapter V regulates administrative organizations charged with the task of administering public affairs; Chapter VI regulates investigations into monopolistic conduct; Chapter VII describes legal liability for monopolistic acts and administrative monopolies as well as penalties for violating the AML; and Chapter VIII states that intellectual property rights are not to be regarded as a per se unlawful monopoly, but the abuse of such rights to restrict competition is subject to the AML. Chapter VIII also generally exempts agricultural activities. *See* Fan long duan fa [Antimonopoly Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 517-23 (P.R.C.), available at <http://english.peopledaily.com.cn/90001/90776/90785/6466798.html>.

80. Under Article 45, if the proposed Antimonopoly Law Enforcement Agency (AMLEA) investigates suspicious monopolistic conduct, and the business operators under investigation promise to eliminate the effects of that conduct through the use of concrete measures within a time limit prescribed by AMLEA, the agency may decide to suspend the investigation; the decision on suspending the investigation shall state the concrete measures as promised by the business operators under investigation. This provision is drawn to some extent from Article 9 on commitment in EC Regulation No. 1/2003. *See id.* art. 45; Council Regulation 1/2003, art. 9, 2003 O.J. (L 1) 1 (EC).

81. Under Article 46, where business operators committing a violation voluntarily report it and provide important evidence to AMLEA, they may receive a lesser punishment or be exempt from punishment altogether at the discretion of AMLEA. This provision draws on the leniency policy in U.S. law and practice. Fan long duan fa [Antimonopoly Law] art. 46. The influence of antitrust law in developed nations also stems in part from the Chinese drafters' seeking of input from abroad. *See* Wang Xiaoye, *supra* note 19, at 3 (describing, from the perspective of an AML drafter, the "[l]eniency policy in Art. 46" as inspired by "[t]he [e]xperiences of [d]eveloped [r]egimes").

1. *The State Role: Administrative Monopoly*

With respect to cartelization and monopolization, governments at various levels in China continue to impose barriers to free competition. These barriers, often specific to particular industries or firms, frequently foster administrative monopolies by buttressing firms' market power, an all-too-common scenario.⁸² This is not to say that administrative monopolies are the only instance of state action in the Chinese economy. For example, SOEs continue to play a significant economic role,⁸³ which the state justifies by arguments of social concerns in certain sectors.⁸⁴ The focus of this Article, and the more significant focus of the AML, however, is on administrative monopolies.

The less nefarious reasons for such local government restraints lie in the familiar siren song of mercantilism. Local governments use their power over markets to their own benefit. For example, barriers to external competition that bolster the income of local enterprises translate into higher levels of employment for the local population and more tax reve-

82. This is not to say that administrative monopolies represent the only instance of government anticompetitive action. Additionally, SOEs continue to hold dominant positions in key industries, including energy distribution, petroleum and chemical production, communication, and aviation, as well as strong roles in industries such as finance, petroleum, water, electricity, transportation, cable television, posts, and telecommunication. Such entities include China National Nuclear Corporation, China North Industries Group Corporation, China National Petroleum Corporation, State Grid Corporation of China, and China Three Gorges Project Corporation. See State-Owned Assets Supervision and Administration Commission of the State Council, Zhong yang qi ye ming lu [Directory of Central State-Owned Enterprises], at <http://www.sasac.gov.cn/n1180/n20240/n2454922/2459785.html> (last visited May 30, 2008) (P.R.C.). Whether the prevalence of SOEs will be impacted by the AML remains to be seen. Certainly, the text of Article 7 exhorts the SOEs to respect the goals of competition and consumer welfare. Some observers believe, however, that Article 7 creates limited statutory space for SOEs in which AML enforcement can depart from its main thrust of protecting and promoting competition. Yu Zhenming, *Gui fan xing zheng xing xian zhi jing zheng xing wei* [Regulating Administrative Restraints], LI LUN DAO KAN [JOURNAL OF SOCIALIST THEORY], Sept. 10, 2000, at 15, 16 (P.R.C.), available at http://www.cei.cn/show.asp?c_id=112&c_upid=110&c_grade=3&a_id=1431; see also Fox, *supra* note 7, at 178–79. Some Chinese academic commentators, however, believe that Article 7 can be read as a broader exemption for SOEs' anticompetitive acts. See Shi Jianzhong, *supra* note 18.

83. The government has had great influence over corporate market freedom and, consequently, industrialization itself as well. China's AIC has taken steps to address the administrative monopolies that have often resulted. From 1995 to 2005, China's AIC investigated and treated 6,073 cases of industry monopolies and 475 cases of administrative monopolies. See Sun Yubo & Chen Ji, *Quan guo ge ji gong shang ji guan 10 nian gong cha chu hang ye long duan an jian 6073 jian* [National All-level AIC Investigated and Treated 6073 Cases of Industry Monopolies in 10 Years], at http://www.gov.cn/jrzq/2006-05/30/content_295809.htm (last visited June 18, 2008) (P.R.C.).

84. See, e.g., Pan Jingcheng & Liu Wenhua, *JING JI FA* [ECONOMIC LAW] 169–72 (2d ed. 2005); Shi Jichun, *JING JI FA* [ECONOMIC LAW] 152–59 (2005).

nue for local government.⁸⁵ The need for tax revenue became acute after reforms that devolved not only economic control, but also fiscal responsibility to the local level.⁸⁶ As an existing political science literature details, the result was the effective creation of a “local developmental state” aimed at fostering economic activity at the regional and municipal levels.⁸⁷ Thus, local governments face a tremendous incentive to protect local enterprises in order to guarantee market demand for local production and labor and thereby increase their own revenue.⁸⁸

One prime motivator of administrative monopolies is corruption by local and regional officials. The use of administrative power to reward local industry creates tremendous opportunities for rent seeking.⁸⁹ Favored firms and industries can develop cozy relationships with local and regional officials.⁹⁰ Another reason why officials are willing to create administrative monopolies is their lack of appreciation for the resulting harm to competition. The government may have a similar lack of appreciation of a “competition culture.”⁹¹

85. Mark Williams, *The Supermarket Sector in China and Hong Kong: A Tale of Two Systems*, 3 COMPETITION L. REV. 251, 258 (2007) (“The draft ‘anti-monopoly’ law contains provisions in relation to abuse of dominance, collusive agreements and a merger control regime, none of which, superficially, discriminate against foreign investors. The law also has provisions to attempt to more effectively deal with a particular Chinese mischief—‘administrative monopoly’—this may be defined as: the abuse of national or local government power to protect producers from competition (whether from other domestic products or imports) by differential taxes or administrative charges; the misuse of administrative powers to compel procurement from favoured local suppliers; the erection of physical and non-financial barriers to domestic trade or the abuse of administrative power to procure economically unjustified advantages such as soft bank loans for favoured local or national champions; and the abuse of licensing or administrative approval powers for the same purposes.”).

86. See Jieming Zhu, *Local Developmental State and Order in China’s Urban Development During Transition*, 28 INT’L J. URB. & REGIONAL RES. 424, 427 (2004) (“[D]ecentralization [of revenue] has turned China’s provincial and municipal governments into an economic interest group preoccupied with local growth, and thus they have become the local developmental state.”).

87. *Id.*; see also Shaun G. Breslin, *China: Developmental State or Dysfunctional Development?*, 17 THIRD WORLD Q. 689, 696 (1996) (“The Chinese reform process has entailed the deliberate devolution of a significant degree of economic control to the provinces.”); Maria Edin, *Local State Structure and Developmental Incentives in China*, in ASIAN STATES: BEYOND THE DEVELOPMENTAL PERSPECTIVE 110, 112 (Richard Boyd & Tak-Wing Ngo eds., 2005) (“[It] is the local state that actively promotes enterprise development and, in the process, makes the economic policies.”).

88. Breslin, *supra* note 87, at 696.

89. Yong Guo & Angang Hu, *The Administrative Monopoly in China’s Economic Transition*, 37 COMMUNIST & POST-COMMUNIST STUD. 265, 279 (2004).

90. *Id.*

91. See Ye Weiping, *Jing zheng li fa yu jing zheng zhi xu jian gou* [On the relationship between Competition Law Legislation and Competition Order Construction], SHENZHEN DA XUE XUE BAO (REN WEN SHE HUI KE XUE BAN), [SHENZHEN UNIVERSITY JOURNAL OF HUMANITIES & SOCIAL SCIENCES], Nov. 2007, at 107, 110 (2007) (P.R.C.), available at

Given the harms that can result from administrative monopolies,⁹² the Chinese state tried its hand at mitigating abuses with a series of laws, regulations, and official statements even prior to the AML. As early as October 1980, the Provisional Regulations on Developing and Protecting Socialist Competition took aim at monopolies, especially administrative monopolies.⁹³ In November 1990, the State Council promulgated the Notice Concerning the Breaking of Local Market Blockades and Further Encouraging Commodity Circulation, which demonstrated the central government's desire to curtail administrative monopolies. Subsequently, in 1993, the previously discussed LAUC expressly prohibited administrative monopolies. Finally, in April 2001, the State Council promulgated the Regulation Prohibiting Regional Blockades in the Market Economy, the most comprehensive legal document to ban regional barriers to competition in China prior to the AML.⁹⁴

Pre-AML laws addressed administrative monopolies,⁹⁵ but local protectionism remained rampant.⁹⁶ These scattered provisions did not au-

http://www.legaldaily.com.cn/2007fxy/2007-10/22/content_723097.htm (reviewing pre-AML cases of administrative monopoly handled by the AIC and finding that a high degree of them involved claims of ignorance by local officials concerning existing competition law).

92. See WILLIAMS, *supra* note 4, at 276. Qingze Cao, Deputy Secretary of the Central Discipline Supervision Committee of the Chinese Communist Party, estimates that the amount of economic loss caused by 1.33 million cases from October 1992 to June 2001—which are mostly cases of petty corruption—is forty billion RMB, about 0.45% of China's GDP over the same time period. *Id.*

93. See Huang Xin & Zhou Yun, *Xing zheng long duan yu fan long duan li fa yan jiu* [Research on Administrative Monopoly and Antimonopoly Legislation], ZHONGGUO FA XUE [CHINESE LEGAL SCIENCE], June 2001, at 99, 102 (P.R.C.), available at http://www.cel.cn/show.asp?c_id=112&c_upid=110&c_grade=3&a_id=9122.

94. Guo wu yuan guan yu jin zhi zai shi chang jing ji huo dong zhong shi xing di qu feng suo de gui ding [State Council Regulation Prohibiting Regional Blockades in Market Economy] art. 4 (promulgated by the State Council, Apr. 21, 2001, effective Apr. 21, 2001) ZHONGGUO FA LÜ NIAN JIAN (2001) [LAW YEARBOOK OF CHINA (2001)] 312–13 (P.R.C.), available at <http://www.competitionlaw.cn/show.aspx?id=213&cid=32>

95. See Yu Zhenming, *supra* note 82, at 15.

96. From 1995 to 2004, China's SAIC investigated and treated 468 cases of administrative monopolies. See State Administration for Industry & Commerce, Gong shang bu men fan long duan cheng xiao xian zhu [SAIC Acquired Remarkable Effect of Antimonopoly], at http://www.saic.gov.cn/zwxq/zwdt/gsyw/zjyw/t20050530_3863.htm (last visited May 30, 2008) (P.R.C.). In 2006, the SAIC prohibited administrative monopolies in fifteen cases, which involved monopolistic acts such as regional blockades and local protectionism. See Zhou Ping, *Zhong Youping yao qiu gong shang ji guan jia qiang gong ping jiao yi zhi fa gong zuo, yan da ge zhong shang ye qi zha, ji ji kai zhan fan long duan zhi fa* [Zhong Youping Requests that SAIC Should Strengthen Enforcement of Fair Trade, Prohibit All Kinds of Commercial Deception and Promote the Enforcement of Antimonopoly Law], ZHONGGUO GONG SHANG BAO [CHINA INDUSTRY & COMMERCE NEWS], Apr. 12, 2007, at 1 (P.R.C.), available at http://www.saic.gov.cn/zwxq/zwdt/ldhd/dt/t20070515_25113.htm.

thorize a specialized and complete enforcement mechanism. The failure of these prior attempts generated the impetus for the AML's concern about administrative monopolies. While the chapter addressing administrative monopolies was at one point removed from a prior draft,⁹⁷ it was ultimately restored to the law as enacted.⁹⁸ Nonetheless, three key questions remain. First, there is a problem of *whom* to regulate: specifically, whether the AML will address not only the monopolistic enterprise, but also the government actions that enable the formation of monopolies, including especially government-imposed barriers to new entrants that might challenge the incumbent monopoly. While China has other provisions governing legislation and administration, such as the Constitution Law,⁹⁹ Legislation Law,¹⁰⁰ and Administrative Procedure Law,¹⁰¹ it is unclear how the AML will regulate administrative acts, specifically or in the abstract. Second, there is the problem of *what* to regulate: some local regulations that injure competition are unwritten rules, despite forming the legal foundation for specific administrative monopolies.¹⁰² As a result, even an empowered, capable enforcement agency would run into some difficulties in taking on administrative monopolies. Third, and the focus of the following Section, is the vexing question of *who* will regulate.

2. *Institutional Design Issues*

The chief problem of dealing with administrative monopolies is institutional design, specifically, how to shape an administrative agency that

97. See Harris, *supra* note 4, at 172 (describing omission of administrative monopoly from 2005 draft of the AML).

98. See Fan long duan fa [Antimonopoly Law] ch. 5 (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 517-23 (P.R.C.), available at <http://english.peopledaily.com.cn/90001/90776/90785/6466798.html>.

99. Xian fa [Constitution Law] (promulgated by the Nat'l People's Cong., Dec. 4, 1982, effective Dec. 4, 1982, amended Mar. 14, 2004) ZHONGGUO FA LÜ NIAN JIAN (2005) [LAW YEARBOOK OF CHINA (2005)] 252-62 (P.R.C.), available at http://www.gov.cn/gongbao/content/2004/content_62714.htm.

100. Li fa [Legislation Law] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 2000, effective July 1, 2000) ZHONGGUO FA LÜ NIAN JIAN (2001) [LAW YEARBOOK OF CHINA (2001)] 257-63 (P.R.C.), available at http://www.gov.cn/test/2005-08/13/content_22423.htm.

101. Xing zheng su song fa [Administrative Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 4, 1989, effective Oct. 1, 1990) ZHONGGUO FA LÜ NIAN JIAN (1990) [LAW YEARBOOK OF CHINA (1990)] 154-59 (P.R.C.), available at <http://www.chinalaw.gov.cn/jsp/contentpub/browser/contentpro.jsp?contentid=co1473031905&Language=CN>.

102. See Fan long duan fa [Antimonopoly Law] art. 37.

can successfully curb the state action that supports the monopolies. The AML's relevant provisions represent a kind of halfway position. The legislation sets forth that "when an offending authority abuses its administrative authority to eliminate or restrict competition, it shall be ordered to rectify the matter by the authority at the next higher level."¹⁰³ This creates the potential for conflict of interest; corrective action may thus require a superior authority to take the unlikely step of condemning regulation in which it may have acquiesced.¹⁰⁴ However, this is not the only method of addressing administrative monopolies. The AML also creates the Antimonopoly Law Enforcement Agency (AMLEA), which may offer suggestions to the relevant superior authority on how to address anticompetitive regulation.¹⁰⁵ The creation of AMLEA may lead to the generation of enforcement expertise, which can be used to issue recommendations and administrative admonitions. The concern, however, is that these recommendations and admonitions may be infrequently made, or, if they are made, will be simply toothless.

The other major reason for doubt about AMLEA stems from the potential for turf battles with other agencies. As discussed in the previous Section, prior to the AML, several different administrative organs enforced laws relating to competition in China. In 1994, the SAIC established an antitrust office under its Fair Trade Bureau, and set up fair trade enforcement institutions across China at the provincial-, district- and county-level offices of the AIC.¹⁰⁶ In 2008, the SAIC—the apex of the AIC at the central government level—set up the Law Enforcement Bureau for Antimonopolization and Anti-Unfair Competition to address monopoly agreements (excluding acts of price monopolization), abuse of market dominant positions, and the abuse of administrative power to exclude or restrict competition.¹⁰⁷ Besides the SAIC, in 2003, the

103. *Id.* art. 51.

104. Indeed, at least one commentator has pointed out the strangeness of this result. *See* WILLIAMS, *supra* note 4, at 183 ("The oddity of a monolithic, single party, non-democratic government having to issue a legal prohibition to prevent other parts of the same government from breaking or abusing its own administrative powers.").

105. Fan long duan fa [Antimonopoly Law] art. 51.

106. *See* Jiangxi sheng gong shang xing zheng guan li ju [Administration for Industry & Commerce of Jiangxi Province], Wo guo fan bu zheng dang jing zheng he fan long duan zhi fa cheng xiao xian zhu [Great Progress in Enforcing law of Anti-unfair Competition and Antimonopoly] (Nov. 19, 2004), at <http://www.jxaic.gov.cn/gsd/ShowArticle.asp?ArticleID=2737> (P.R.C.).

107. *See* Guo jia gong shang xing zheng guan li ju [State Administration for Industry & Commerce], Guo wu yuan ban gong ting guan yu guo jia gong shang xing zheng guan li zong ju zhu yao zhi ze, nei she ji gou he ren yuan bian zhi gui ding de tong zhi [The State Council Notice on Major Duties, Institution and Staff of the SAIC] (July 25, 2008), at <http://www.saic.gov.cn/>

NDRC issued the Tentative Provision Prohibiting Acts of Price Monopolization, claiming for the NDRC the power to regulate monopolistic conduct aimed at pricing.¹⁰⁸ Subsequently, in 2004, MOFCOM established its own office of antimonopoly investigation, staking out responsibility for international communications, legislation, and investigations related to antitrust law.¹⁰⁹ Beyond these three major entities, more than ten administrative organs or supervision institutions have some role or authority related to antitrust law.¹¹⁰ As a result, AMLEA will have to deal with established agencies with their own interests in competition law.

Despite these hurdles, there are reasons to be hopeful that AMLEA will produce positive results. The AML clearly proscribes administrative monopolies, dedicating an entire chapter to them and providing a basic structure by which administrative monopolies can incur legal liability. At least at the margin, the AML should provide some increased deterrence stemming from these provisions' existence, because local governments will now face the possibility that creating an administrative monopoly may directly violate the law. In addition, even if the AML's institutional design for enforcement is currently questionable, China has shown an ability to evolve in the context of antitrust enforcement. For example, the AML's scheme draws on the SAIC's years of experience in trying to rein in administrative monopolies.¹¹¹ The demonstrated ability to adapt and learn should be critical in developing effective enforcement. Furthermore, the AML's system need not operate in isolation; it can benefit by working together with other laws and regu-

zwxxq/zwdt/zyfb/t20080725_43236.htm (P.R.C.).

108. See *Zhi zhi jia ge long duan xing wei zan xing gui ding* [Tentative Provision on Prohibition of Acts of Price Monopolization] (promulgated by the Nat'l Dev. & Reform Comm'n, June 18, 2003, effective Nov. 1, 2003) ZHONGHUA RENMIN GONGHEGUO FA LÜ QUAN SHU [COLLECTION OF THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA] 1764 (P.R.C.), available at <http://www.competitionlaw.cn/show.aspx?id=399&cid=32>.

109. See Press Release, Ministry of Commerce, Vice Minister Yu Guangzhou: Antimonopoly Law to be Out in 2005 (Jan. 27, 2005), at <http://english.mofcom.gov.cn/aarticle/counselorsreport/asiareport/200501/20050100015882.html> (P.R.C.).

110. For example, in China, there are many authorities in charge of industries and organs of supervising industries, such as the Ministry of Information, the State Electricity Regulatory Commission, the China Banking Regulatory Commission, and the China Insurance Regulatory Commission. See Wang Xiaoye, *Lun fan long duan zhi fa ji gou yu hang ye jian guan ji gou de guan xi* [Research on Relation Between Enforcement Agency of Antimonopoly and Supervision Organs of Industries] ZHONGGUO JING JI SHI BAO [CHINA ECONOMIC TIMES] (P.R.C.), Aug. 14, 2006, at 5, available at <http://www.civillaw.com.cn/article/default.asp?id=28604>.

111. By the end of 2006, AIC had restrained and punished nationwide more than 530 cases of regional blockade and local protectionism. See ZHONGHUA RENMIN GONGHEGUO FAN LONG DUAN FA JIE DU [INTERPRETATION OF CHINA'S AML] 230 (Wu Jiong ed., 2007).

lations to prohibit administrative monopolies. The AML could be applied in concert with the Administrative Reconsideration Law¹¹² and the Administrative Procedure Law¹¹³ to stem administrative monopolies. While the AML prohibits certain administrative monopolies, the Administrative Reconsideration Law and Administrative Procedure Law set forth procedures and conditions for recourse for victims. Finally, political and economic system reforms are deepening in China. As a result, government supervision of lower-level administrative power is strengthening.¹¹⁴ Thus, the level of enforcement that the AML can achieve should increase rapidly.

As the basic law governing market competition, the AML is a form of behavior regulating legislation. While the focus of antitrust in many Western nations, such as the United States, is largely on private restraints, given China's background of state economic planning, it is logical that the AML proceeds from a different baseline assumption.¹¹⁵ The dominant view is that it should apply to all restrictive or monopolistic practices, without discrimination among subjects for their differences in ownership, legal form, or industry.¹¹⁶ As with the competition law of some other nations, such as the EU¹¹⁷—but in contrast to the United States—the AML has approached its subject matter with a wider lens, on its face applying not only to private enterprises but also to public entities that participate in or impact market economic activities.¹¹⁸

112. See Xing zheng fu yi fa [Administrative Reconsideration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 29, 1999, effective Oct. 1, 1999) ZHONGGUO FA LÜ NIAN JIAN (2000) [LAW YEARBOOK OF CHINA (2000)] 244–48 (P.R.C.), available at <http://www.chinalaw.gov.cn/jsp/jalor/disptext.jsp?recno=1&&ttlrec=1>.

113. See Xing zheng su song fa [Administrative Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 4, 1989, effective Oct. 1, 1990) ZHONGGUO FA LÜ NIAN JIAN (1990) [LAW YEARBOOK OF CHINA (1990)] 154–59 (P.R.C.), available at <http://www.chinalaw.gov.cn/jsp/contentpub/browser/contentpro.jsp?contentid=co1473031905&Language=CN>.

114. From January 2003 to June 2006, China's national all-level agencies of administrative reconsideration had received 291,821 cases of administrative reconsideration. Specifically, 75,918 cases in 2003; 81,833 cases in 2004; 90,624 cases in 2005; and 43,466 cases from January to June 2006. See Guo wu yuan ban gong ting [General Office of the State Council], Xing zheng fu yi gong zuo qu de xin jin zhan [Performance of Administrative Reconsideration Makes a New Progress] (Mar. 19, 2007), at http://www.gov.cn/ztzl/gclszfgzbg/content_554972.htm (P.R.C.).

115. See *supra* Part I.B.

116. See Wang Xianlin, *Lun zhongguo fan long duan fa de ping deng shi yong* [Research on Equal Application of China's AML], FA ZHI YAN JIU [LEGAL RESEARCH], Sept. 18, 2007, at 17, 17 (P.R.C.), available at <http://www.civillaw.com.cn/article/default.asp?id=34979>.

117. See EC Treaty, *supra* note 3, art. 82.

118. See Fan long duan fa [Antimonopoly Law] ch. 5 (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 517–23 (P.R.C.), available at <http://english.peopledaily.com.cn/90001/>

Taken together with China's economic reforms and its participation in globalization, particularly its accession to the WTO, the dominant view within China is that the AML seeks to apply equally to all violators and to all behavior that restricts competition, including natural monopoly industries, state-controlled fields, and SOEs.¹¹⁹ In the process of formulating China's AML, these two issues of who will enforce—and who will be the object of enforcement—have been discussed in depth, and yet the final conclusion is still indefinite.

During the drafting of the AML, there were duelling opinions about what sort of enforcement institution would best fit China's existing situation. One opinion was that China should set up an independent antimonopoly enforcement institution in order to guarantee uniformity and predictability in drafting guidelines, implementing competition policy, and handling cases.¹²⁰ In contrast, another opinion was that the AML enforcement institution should be located within the current Chinese administrative framework, operating under existing administrative procedures.¹²¹ Under this view, the AML would likely reach its goals by working through the system as it exists, rather than by trying to create a new competing power center.

The AML tries to straddle these two options by creating the potential for an independent enforcement authority, while also accommodating existing political realities. The AML provides for a two-layered enforcement system. The first layer is the Antimonopoly Commission (AMC), charged with organizing, coordinating, and guiding antimonopoly matters.¹²² Below that, the second layer is AMLEA, tasked with actual enforcement in specific cases.¹²³ Article 10 of the AML leaves

90776/90785/6466798.html.

119. See Wang Xianlin, *supra* note 116.

120. See, e.g., Wang Xiaoye, *Guan yu wo guo fan long duan zhi fa ji gou de ji ge wen ti* [Some Issues of Enforcement Agency of Antimonopoly in China], DONG YUE LUN CONG [DONGYUE TRIBUNE] (P.R.C.), Jan. 2007, at 30, 37, available at http://www.cel.cn/show.asp?c_id=112&c_upid=110&c_grade=3&a_id=10513.

121. See Zhonghua Renmin Gongheguo fan long duan fa jie du [Interpretation of China's AML], *supra* note 111, at 34–35.

122. See Fan long duan fa [Antimonopoly Law] art. 9 (“The State Council shall establish the Anti-monopoly Commission, which is in charge of organizing, coordinating, guiding anti-monopoly work, performs the following functions: (1) studying and drafting related competition policies; (2) organizing the investigation and assessment of overall competition situations in the market, and issuing assessment reports; (3) constituting and issuing anti-monopoly guidelines; (4) coordinating anti-monopoly administrative law enforcement; and (5) other functions as assigned by the State Council. The State Council shall stipulate composition and working rules of the Anti-monopoly Commission.”) (*People's Daily* translation).

123. *Id.* art. 10 (“The anti-monopoly authority designated by the State Council (hereinafter referred to as the Anti-monopoly Authority under the State Council) shall be in charge of anti-

some ambiguity as to the relative independence of AMLEA.¹²⁴ The State Council has established the AMC in accordance with the AML, and AMLEA is designed to coordinate with other agencies with antimonopoly responsibilities.

Considering the reality of the existing powerful administrative entities with which it will compete for authority, AMLEA will have to accommodate the current enforcement system. As a result, AML enforcement will be carried out by current law enforcement bodies and thus will be an amalgam rather than carried out by an independent, unified agency.¹²⁵ Admittedly, there is the small possibility that there will be a restructuring of governmental organs subsequent to China's Eleventh National People's Congress in March 2008.¹²⁶

Gradually over time, a unified, independent, and integrated enforcement agency could evolve from the initial organization of AMLEA together with the relevant portions of the SAIC, MOFCOM, and the NDRC. Such a development is not likely in the near future; these three powerful existing agencies will likely have a hand in how AMLEA conducts enforcement. This is not only due to their existing power, but also because of the differences in their current authority. As discussed above, the NDRC primarily regulates pricing,¹²⁷ and MOFCOM administers antitrust laws in international trade;¹²⁸ they supervise competition

monopoly law enforcement in accordance with this Law. The Anti-monopoly Authority under the State Council) [sic] may, when needed, authorize the corresponding authorities in the people's [sic] governments of the provinces, autonomous regions and municipalities directly under the Central Government to take charge of anti-monopoly law enforcement in accordance with this Law." (*People's Daily* translation).

124. *Id.*

125. The NDRC, the SAIC, and MOFCOM are the relevant enforcement agencies because the NDRC is in charge of applying the Pricing Law and Tentative Prohibition of Acts of Price Monopolization, the SAIC is in charge of applying the LAUC, and MOFCOM is in charge of applying the Foreign Trade Law and the Foreign Merger Provision. An institutional reform plan of the State Council, however, will have direct influence on the determination of AMLEA. For example, the NDRC will see its powers of micromanagement and specific approval reduced, with its focus shifting to macroeconomic regulation and control. *See* Xinhua tong xun she [Xinhua News Agency], Guo wu yuan ji gou gai ge fang an [Institutional Reform Plan of the State Council] (Mar. 15, 2008), at http://www.gov.cn/2008lh/content_921411.htm (P.R.C).

126. According to the Institutional Reform Plan of the State Council, there will be twenty-seven departments or committees, and no independent antimonopoly enforcement agency. *Id.* Certainly, there exists a broad range of institutional designs that China may choose, given the power of the State Council and the relatively low level of precommitment on this point under the AML's ambiguous provisions.

127. As discussed *supra* Part I.C.2, the NDRC is in charge of applying the Pricing Law and the Tentative Provision Prohibition of Acts of Price Monopolization.

128. As discussed *supra* Part I.C, MOFCOM is in charge of applying the Foreign Trade Law and the Provision on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors.

in these areas in tandem with their other administrative authority in the fields of economic development and international trade, respectively. By contrast, the SAIC takes a more holistic domestic view of competition law, but within the larger framework of consumer protection, including fraud and unfair trading.¹²⁹ The separation of enforcement power into three institutions not only wastes resources, but also inevitably creates conflict and friction between different agencies. Despite this, the fragmentation is likely to continue, because to yield antitrust authority to a new independent AMLEA would have implications for these agencies' remaining activities in their main fields.

Given these dynamics, it seems likely that, at least in the near term, China's antitrust enforcement will remain balkanized. Ideally, the State Council should use the AMC as a tool to coordinate the exercise of powers among different agencies and to mandate the adoption of one legal standard. In particular, clear delegations of power to the respective agencies, together with strong procedural regulations, can reduce the opportunities for turf battles and abuses of power. With this background, some observers believe that the AML's institutional design reflects a kind of legislative compromise between the ideal and the possible.¹³⁰ The benefits of a unified, independent AMLEA make it a good policy choice, but existing government agencies have strong and divergent interests. This legislative compromise may have been necessary, because it helped promote the promulgation of the AML and avoid an immediate fight with three existing agencies. Additionally, because a main theme of current institutional reform in China is to try to control the growth of government institutions, a new and independent AMLEA potentially could be a difficult sell.¹³¹

On August 1, 2008, the AML came into effect; this date was accompanied by a flurry of institution building and lawmaking. What this will mean in practice will only be clear once actual enforcement commences. On the same date, the State Council formally established the AMC, granting to it the functions of studying and formulating competition policies, evaluating and reporting on the state of overall market

129. As discussed *supra* Part I.C.1, the AIC is in charge of applying the LAUC.

130. See Shi Jianzhong, *supra* note 18.

131. See San shi nian jing li wu ci gai ge: zhe she Zhongguo xing zheng guan li ti zhi zou xiang [Five Times of Reform in Thirty Years: Reflecting trends of China's Administrative Management System], at http://www.gov.cn/2008lh/content_914828.htm (last visited June 18, 2008) (P.R.C.); see also Guo wu yuan ji gou gai ge fang an zhai yao [Abstract of the State Council Institutional Reform Plan], 2008 STATE COUNCIL GAZ. 35-36 (P.R.C.), available at http://www.gov.cn/2008lh/content_921582.htm (last visited June 18, 2008).

competition, creating and issuing guidelines, and coordinating the AML's enforcement.¹³² Also on the same day, four enterprises filed the first case under the AML against China's General Administration of Quality Supervision, Inspection, and Quarantine in the No. 1 Intermediate People's Court in Beijing—this first case takes aim at an administrative monopoly.¹³³

The AMC's own competitors, however, continue to jostle for authority. In particular, under a current SAIC proposal, subject to approval by the State Council, a new Antimonopoly and Anti-Unfair Competition Law Enforcement Bureau will be set up under the SAIC to "draft concrete measures concerning monopolies and unfair competition and to undertake law enforcement work related to monopolies."¹³⁴ The State Council would also confirm the SAIC's statutory responsibility for "AML enforcement related to monopolistic agreements, the abuse of market dominance, and the abuse of administrative power in order to exclude and restrict competition."¹³⁵

Even an AMLEA that is well-coordinated with existing institutions will face problems, at least with respect to traditional modes of antitrust enforcement, such as civil prosecutions. One problem is the harmonization of enforcement to avoid multiple standards and conflicting rules. This will be a challenge because the separation of enforcement power into three institutions will inevitably create conflicts and frictions between different agencies. In order to achieve effective enforcement, some mechanism needs to exist that coordinates the exercise of powers among different agencies and that encourages them to adopt the same legal standard. Also, China's antimonopoly agencies so far only have the power to regulate monopolistic conduct after the fact and cannot take positive steps to regulate entrenched administrative monopolies.¹³⁶

132. See Guo wu yuan ban gong ting [General Office of the State Council], Guo wu yuan cheng li fan long duan wei yuan hui, ju you si xiang zhu yao zhi ze [The State Council Established the Antimonopoly Commission with Four Main Functions] (Aug. 1, 2008), at http://www.gov.cn/jrzg/2008-08/01/content_1062161.htm (P.R.C.).

133. See Zhu Tao, *Zhi jian zong ju zao yu "dian zi jian guan men"* [The General Administration of Quality Supervision, Inspection and Quarantine Encounters "Electronic Regulation Door"], CAIJING, Aug. 18, 2008, at 110, 110–111 (P.R.C.).

134. Guo jia gong shang xing zheng guan li ju [State Administration for Industry & Commerce], Guo wu yuan ban gong ting guan yu guo jia gong shang xing zheng guan li zong ju zhu yao zhi ze, nei she ji gou he ren yuan bian zhi gui ding de tong zhi [The State Council Notice on Major Duties, Institution and Staff of the SAIC] (July 25, 2008), at http://www.saic.gov.cn/zwxq/zwdt/zyfb/t20080725_43236.htm (P.R.C.).

135. *Id.*

136. The AML grants the antimonopoly authority enforcement rights against monopolistic conducts; meanwhile, the AML defines the boundary of monopolistic conduct through Article 3,

An enforcement system aimed at administrative monopolies will need to gain some level of independence; how to do that remains a serious question. Finally, AMLEA's relationships with other institutions may be difficult to manage. Nonetheless, these links will be key to deciding the actual enforcement results of the AML.

3. *Legal Infrastructure Needs?*

Besides the issues specific to the AML's substantive provisions and practical enforcement, the current state of Chinese legal infrastructure will likely pose several obstacles. First, ideological commitment to anti-trust remains an issue. For example, it is not sufficient that economic theory supports the AML's enforcement; China will need to engender a competition culture, so that when judges and officials balance competing interests such as national security and development, they also have an appreciation for the value of economic competition. At a more concrete level, China's judges and officials will need to develop the necessary experience to handle antitrust cases. This can be assisted through the AMC and AMLEA's issuance of supporting regulations and guidelines; however, building the requisite experience will ultimately take time.

At the most basic level, the AML will encounter similar challenges that legal reform and development overall must face. China has recently embarked on a course to improve the quality of and remedy some institutional deficiencies in its judicial system with a view towards better handling of civil litigation;¹³⁷ competition law will pose an additional challenge. Additionally, lawyers in China lack experience with antitrust law. This concern can be alleviated, but not fully resolved, with training and guidelines. Thus, traditional antitrust law enforcement through ei-

clearly stipulating that monopolistic conduct does not include administrative monopolies. Article 3 states that monopolistic conduct under the AML includes: (1) monopoly agreements between undertakings (business operators); (2) abuse of dominant market position by undertakings; (3) concentration of undertakings that has or may have the effect of eliminating or restricting competition. *Compare* Fan long duan fa [Antimonopoly Law] art. 3 (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 517-23 (P.R.C.), available at <http://english.peopledaily.com.cn/90001/90776/90785/6466798.html>, with *id.* ch. 6.

137. It is difficult to inquire about accurate and authoritative figures on the number of judges and overall judicial capacity in China; however, inquiries made to the Judiciary Office of the Supreme People's Court provide a relatively modest total. See Mo Zhang, *International Civil Litigation in China: A Practical Analysis of the Chinese Judicial System*, 25 B.C. INT'L & COMP. L. REV. 59, 61-62 (2002) (supplying statistics on China's judges and courts at the turn of the twenty-first century).

ther public or private means will likely face serious legal infrastructural challenges.

II. LOCAL PROTECTIONISM AS A COMPETITION PROBLEM

Despite significant impediments to reaching its goals, the AML deserves to be greeted with some optimism. In particular, local protectionism as a competitive restraint currently looms larger in the Chinese context than it does in the EU or the United States.¹³⁸ As a result, the AML is a two-for-one deal: it is an antitrust law that also doubles as a free-trade agreement for China's national-level market. In this respect, it may succeed because it actually possesses important advantages at its birth, such as recourse to a binding central enforcer—China's central government. This is an advantage that other free-trade agreements such as the WTO, the General Agreements on Tariffs and Trade (GATT), and the EC Treaty did not possess at their incipiency.¹³⁹ If the AML does manage to succeed at challenging internal market barriers, the AML's enforcement may spark a dialectic concerning competition and regulation that could have effects beyond local protectionism.

To understand why China's AML might succeed, it is worthwhile to consider how the EU and the United States have dealt with the interplay between competition law and government restraints. This has been a difficult area in which courts have had to come up with legal tests for when politics is allowed to displace economic efficiency. Legal scholars have diverged on how to explain and shape these tests. Some focus on the need to "harmonize" economic goals of competition with countervailing social (noneconomic) goals.¹⁴⁰ Others contend that the distinctions in this area are better explained positively and guided normatively with a focus on process and motive, with the self-interest and accountability of the parties involved in state-authorized restraints serving as touchstones.¹⁴¹

In both the United States and Europe, courts have taken a legal role in setting forth prohibitions on protectionism by states and member states, respectively.¹⁴² Because of the leading role played by the U.S.

138. *See supra* Part I.C.1.

139. *See infra* Part II.B.

140. *See infra* notes 153–56 and accompanying text (discussing harmonization with political decisions to displace economic competition).

141. *See infra* notes 157–58 and accompanying text (discussing emphasis on process and motive).

142. *See infra* Parts II.A–B.

Supreme Court and the European Court of Justice (ECJ), it is tempting to believe that such institutions are prerequisites to tearing down anti-competitive barriers, and commentators on China's AML have tended to argue that it cannot succeed in the absence of an independent judiciary.

This belief that China's AML must operate through an independent judiciary is wrong. First, the fact that courts in the United States and Europe played such a prominent role in dealing with local protectionism does not actually demonstrate that judicial intervention is absolutely indispensable. It may be tempting to assume that observed judicial action is the cause of change, rather than the reflection of underlying change. In reality, judicial adoption of rules against internal trade barriers may in fact be a confirmation of the inherent stability of such rules.¹⁴³ Given the experience with international trade treaties such as the EC Treaty and the GATT/WTO treaties, it may be the case that the win-win logic of such agreements can be realized without judicial intervention.

A. *The American Approach*

American jurisprudence dealing with internal trade barriers does appear on its face to be a judicial creation. To understand why China's AML may succeed, it is useful to understand how American antitrust law treats state anticompetitive restraints and also how it deals with similar local government-imposed obstacles. In particular, thinking about how and why these rules endure without firm foundations can be helpful.

U.S. antitrust law concerning state anticompetitive action is a judicial innovation. In *Parker v. Brown*, the Supreme Court ruled that action by a state government itself is immune from federal antitrust law due to state sovereignty.¹⁴⁴ This doctrine, called *Parker* immunity, does not explicitly appear within the Sherman Antitrust Act; rather, the Court found it to be fairly implied given constitutional guarantees of federalism.¹⁴⁵ This immunity is not without its critics; the most notable of these may be Justice Antonin Scalia, who stated in his concurrence in *FTC v. Ticor Title Insurance Co.* that he is "skeptical about the *Parker v. Brown* exemption for state-programmed private collusion"¹⁴⁶

143. See *infra* Part II.C.

144. See *Parker v. Brown*, 317 U.S. 341 (1943).

145. *Id.*

146. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 641 (1992) (Scalia, J., concurring) (citation omitted).

Despite states' *Parker* immunity from the federal antitrust laws, there continue to be checks on anticompetitive behavior by government at the state and local levels. First, states do receive scrutiny for actions that may burden interstate commerce under the so-called "Dormant Commerce Clause" Doctrine. The Commerce Clause of the U.S. Constitution expressly grants to Congress the authority to enact legislation affecting interstate commerce.¹⁴⁷ The Dormant Commerce Clause stems from a judicial reading of the same provision to imply that states may not pass legislation that improperly burdens or discriminates against interstate commerce.¹⁴⁸ As pointed out by its opponents, including Justices Scalia and Clarence Thomas, the Dormant Commerce Clause is arguably a judicial creation without solid textual foundation.¹⁴⁹ Indeed, Justice Scalia

147. See, e.g., Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1472 (2007) ("Article I's Commerce Clause grants Congress affirmative power to 'regulate Commerce . . . among the several States.'"); James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 285 (2004) ("[S]ince the early nineteenth century the Court has 'interpreted' the Commerce Clause—which grants Congress the power to regulate interstate commerce—as directly prohibiting state laws that burden interstate commerce.").

148. See *In re State Freight Tax*, 82 U.S. 232, 249 (1872) (formally adopting the Dormant Commerce Clause as a holding of the Supreme Court); see also *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319 (1852) (alluding to and endorsing *Gibbons'* adoption of the Dormant Commerce Clause in dicta); *Gibbons v. Ogden*, 22 U.S. 1 (9 Wheat.) 1, 209–10 (1824); *id.* at 226–29, 235–39 (Johnson, J., concurring in judgment) (adopting the Dormant Commerce Clause). While there are exceptions to this general rule, they are not germane to this Section of the Article, which discusses how states can institutionalize rules that limit local protectionism. See *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 97 (1984) (limiting the market participant exception to allow states to impose burdens on commerce within the market the state is participating in, but prohibiting the states from imposing conditions that have a substantial regulatory effect outside that market); see also *Western & Southern Life Ins. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 652–53 (1981) (explaining that if Congress regulates the area in question, then the analysis does not proceed under the Dormant Commerce Clause, but rather follows the question of whether Congress acted within its Commerce Clause authority and whether it authorized concurrent state regulation of the area); *Reeves, Inc. v. William Stake*, 447 U.S. 429, 436–39 (1980) (outlining a test for when states are exempt from the Dormant Commerce Clause, because they are acting as market participants rather than regulators).

149. See *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 1799 (2007) (Thomas, J., concurring) ("The negative Commerce Clause has no basis in the Constitution Because this Court has no policy role in regulating interstate commerce, I would discard the Court's negative Commerce Clause jurisprudence."); *Tyler Pipe Indus. v. Dept. of Revenue*, 483 U.S. 232, 265 (1987) (Scalia, J., dissenting in part and concurring in part) (stating of the Dormant Commerce Clause that "the Court for over a century has engaged in an enterprise that it has been unable to justify by textual support or even coherent nontextual theory"). The Dormant Commerce Clause also has had eminent nonjudicial critics, such as the late David Currie. See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888*, at 168–81, 222–36, 330–42, 403–16 (1985).

has also questioned whether the Dormant Commerce Clause can draw support from “coherent nontextual theory.”¹⁵⁰

Given the fairly vocal doubts about the Dormant Commerce Clause, it may be worth wondering why it has endured. While vestigial legal doctrines do sometimes survive, given the strong economic logic supporting them, if the Supreme Court had not legally arrived at the combination of *Parker* immunity and the Dormant Commerce Clause, some other institution could have, and probably would have, emerged to foster a national market. The combination of the Dormant Commerce Clause with *Parker* immunity means that states can replace market results with political judgments.¹⁵¹ They cannot do so in a way, however, that impedes interstate commerce generally or that privileges intrastate commerce over interstate commerce.¹⁵² Thus, states are constrained from preventing the development of a national market, but otherwise retain the ability to address dissatisfaction with market ordering, including through the use of anticompetitive acts.

While the Supreme Court may have been useful in formulating and clarifying this result, it has its own intrinsic logic. Beggar-thy-neighbor state trade barriers would make all states worse off. Thus, they have an inherent interest in driving towards equilibrium where states tend to refrain from local protectionism, rather than engage in it.¹⁵³ But permitting states to take actions that alter the market’s judgments allows politics to diffuse dissatisfactions—whether they be those of producers or consumers.¹⁵⁴ It also, of course, provides opportunities for rent seeking,

150. *Tyler Pipe Indus.*, 483 U.S. at 265; see also *United Haulers Ass’n*, 127 S. Ct. at 1799 (Thomas, J., concurring) (stating that the Dormant Commerce Clause “has proved unworkable in practice”).

151. See Jim Rossi, *Political Bargaining and Judicial Intervention in Constitutional and Antitrust Federalism*, 83 WASH. U. L.Q. 521, 536–38, 556–58 (describing judicial deference to states under antitrust immunity based on federalism concerns and explaining judicial action to safeguard interstate commerce based on the Dormant Commerce Clause as a “safeguard” against “bargaining failure” among states trying to create a national free trade area).

152. *Id.*

153. See, e.g., Christopher R. Drahozal, *Preserving the American Common Market: State and Local Governments in the United States Supreme Court*, 7 SUP. CT. ECON. REV. 233, 236 (1999) (arguing that “state and local governments that challenge statutes of other states under the dormant Commerce Clause serve as fire alarms” and preserve free trade within the United States).

154. See, e.g., Note, *Application of the Sherman Act to Attempts to Influence Government Action*, 81 HARV. L. REV. 847, 848–49 (1968) (“[*Parker* is] founded upon the Court’s interpretation of the Sherman Act as an economic measure, based upon the assumption that individual economic conduct is best governed by the mechanism of a competitive market. There is no corresponding assumption that government policy decisions should also be governed by the competitive price system; they are the products of a fundamentally different decisional process, in which influence is ultimately measured by votes rather than dollars.”).

some of which are thwarted by the Dormant Commerce Clause. This logic should be as compelling in China as it is in the United States.

Interestingly, the American legal academic debate over the scope of *Parker* immunity for anticompetitive behavior by local—that is, county and municipal—governments foreshadows the challenges that face China. As creatures of state law, local governments are similarly covered by the Dormant Commerce Clause's prohibitions.¹⁵⁵ As for *Parker* immunity, the tests that the Supreme Court has developed to decide when it exempts state-authorized municipal or private anticompetitive conduct focus on whether or not the action involved is truly authorized by the state.¹⁵⁶ If it is, then it is judged to be immune under *Parker*.¹⁵⁷ John Wiley and Judge Merrick Garland have each tried to explain the contours of this analysis by pointing to the need to reconcile federal policies against restraining competition with state policies to displace competition.¹⁵⁸ By contrast, Einer Elhauge has contended that the scope of *Parker* can better be explained with a less substantive, more process-focused view that contrasts less financially interested, politically accountable parties (such as states) with more financially interested, unaccountable parties (such as private actors working under a state umbrella)—with local governments in between, but closer to states.¹⁵⁹ Indeed, the Supreme Court has applied a similar view of process as a touchstone for when state action is immune from antitrust prosecution.¹⁶⁰

155. See, e.g., Daniel J. Gifford, *Federalism, Efficiency, the Commerce Clause, and the Sherman Act: Why We Should Follow a Consistent Free-Market Policy*, 44 EMORY L.J. 1227, 1229 (1995) (“Under the dormant commerce clause, the municipal restraint imposed in a cross-border market is invalidated in order to vindicate the national interest in free trade among the states.”); Shelley Ross Saxer, *Eminent Domain, Municipalization and the Dormant Commerce Clause*, 38 U.C. DAVIS L. REV. 1505, 1524 (2005) (“Courts limit the power of state and local governments to regulate by using the dormant Commerce Clause to strike down state and local legislation or action that impermissibly burdens interstate commerce.”).

156. See *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 39–40 (1985) (requiring municipal restraint to be reasonably foreseeable from state grant of authority); *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (requiring private restraint to be “clearly articulated” by state grant of authority).

157. *Town of Hallie*, 471 U.S. at 39; *Midcal Aluminum*, 445 U.S. at 105.

158. See John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713 (1986); see also Merrick B. Garland, *Antitrust and Federalism: A Response to Professor Wiley*, 96 YALE L.J. 1291 (1987).

159. Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 746 (1991) (arguing that the financial interest or disinterest of the actor who controls the terms of a challenged restraint is the basic determinant of the scope of antitrust process).

160. See *City of Columbia v. Omni Outdoor Adver.*, 499 U.S. 365, 370 (1991) (“We have recognized . . . that a municipality’s restriction of competition may sometimes be an authorized

This logic is compelling. If local governments, like state governments, are going to second-guess market results, they are allowed to do so to the extent that they have authority to do so and to the extent that they do not impede a nationwide free market. Because courts have enunciated this doctrine in the United States, it is tempting to think a nation must have strong courts to do so. It is possible, however, that China may be able to provide administrative checks, rather than judicial ones, to reach the same end.

B. *The European Approach*

In order for the institutions founded under the EC Treaty to create a European Common Market, they necessarily had to dismantle the member states' respective protectionist barriers.¹⁶¹ That they succeeded in doing so encourages the view that established local protectionism can be made to yield to the economic logic of a larger, freer market. But the European experience also shows that an established independent judiciary may not be required. It is widely accepted that the United States had an independent judiciary many years prior to the late nineteenth-century judicial adoption of the Dormant Commerce Clause and the Sherman Antitrust Act and the twentieth-century adoption of *Parker* immunity.¹⁶² By contrast, the EC Treaty simultaneously adopted the substantive standards under which the member states would reduce local protectionism and adopted the institutions—particularly the European Commission (the EC's administrative arm) and the ECJ—that would administer the free trade program.¹⁶³ That relatively new institutions could accomplish

implementation of state policy, and have accorded *Parker* immunity where that is the case.”).

161. See, e.g., Albert Breton & Pierre Salmon, *External Effects of Domestic Regulations: Comparing Internal and International Barriers to Trade*, 21 INT'L REV. L. & ECON. 135, 150 (2001) (describing as “central to the Treaty of Rome itself . . . the obligation for member states to dismantle all barriers to trade or more generally all obstacles to mobility between themselves”).

162. The origins of judicial independence in the United States are perceived as intertwined with the 1803 case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). See, e.g., David E. Marion, *Judicial Faithfulness or Wandering Indulgence? Original Intentions and the History of Marbury v. Madison*, 57 ALA. L. REV. 1041, 1041 (2003) (“There can be little doubt that *Marbury* is the premiere legitimating case when it comes to judicial independence and power in the United States.”); Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2710 (2003) (“*Marbury* stands instead for constitutional supremacy, judicial independence, interpretive coordinacy, and the personal responsibility of all who swear an oath to support the Constitution to be guided by their best understanding of the Constitution and not pliantly to accede to violations of the Constitution by other governmental actors.”).

163. See Joseph A. Conti, *The Good Case: Decisions to Litigate at the World Trade Organization*, 42 L. & SOC'Y REV. 145, 149 (2008) (contrasting the novelty of the WTO relative to the trading system it governs with the ECJ's authorization under “the Treaty of Rome in 1957” pur-

this goal suggests that the goal itself was compelling for the member states, apart from the power of the institutions. In other words, the Commission and the ECJ may well have been confirming—not charting—the course that the member states had already set.

To apply the relevant treaty articles to discourage protectionism within the Common Market, the ECJ had to confront the established legal order of member states—and it had to do so while still in its formative stage.¹⁶⁴ Indeed, the landmark case of *Van Gend & Loos v. Nederlandse administratie der belastingen* reached the ECJ only ten years after its establishment and only four years after the EC Treaty entered into effect in 1958.¹⁶⁵ *Van Gend & Loos* is often deemed the *Marbury v. Madison* of EU jurisprudence for the way in which the ECJ claimed for itself the role of final arbiter of the treaty's protections and enlisted the member states' national courts into enforcing the treaty.¹⁶⁶ The ECJ accomplished both legal changes because, combined with the close-in-time decision in *Costa v. E.N.E.L.* holding that Community law had supremacy over member state law, the ECJ effectively grafted the EC Treaty's requirements onto member states' legal systems.¹⁶⁷

suant to which “the ECJ has emerged through the preliminary ruling process into a ‘symbiotic’ relationship with national judiciaries”).

164. The ECJ was established in 1952 under the European Coal and Steel Community (ECSC) and was incorporated into the institutions of the EC under the EC Treaty in 1958. *See* Daniel Halberstam, *Constitutionalism and Pluralism in Marbury and Van Gend*, in *THE PAST AND THE FUTURE OF EU LAW: REVISITING THE CLASSICS ON THE 50TH ANNIVERSARY OF THE ROME TREATY* (M.P. Maduro & L. Azoulay eds., forthcoming 2008) (unpublished manuscript at 3, on file with the Virginia Journal of International Law) (“Adjudication under the old European Coal and Steel[] Treaty had been trickling along without much distinction for the better part of a decade” and “[n]o watershed case challenging conventional wisdom about the relationship between national and international legal orders was to be found in the over 70 reported judgments on the ECSC from 1954 to 1961.”).

165. *See* Case 26/62, *N.V. Algemene Transport –en Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der belastingen*, 1963 E.C.R. 1; *see also* Halberstam, *supra* note 164 (manuscript at 7) (describing *Van Gend & Loos* as proceeding under the “then-novel”—and now critical—“preliminary reference procedure”).

166. *See, e.g.*, ERIC STEIN, *THOUGHTS FROM A BRIDGE: A RETROSPECTIVE OF WRITINGS ON NEW EUROPE AND AMERICAN FEDERALISM* 472 (2000) (likening *Van Gend & Loos* to *Marbury*); Enzo Cannizzaro, *The European Constitutional Framework*, 55 AM. J. COMP. L. 767, 791 n.21 (2007) (calling the analogy between the two cases “striking,” because “*Van Gend en Loos* is indeed the case that paved the way for a constitutionalist conception of European integration”); Koen Lenaerts, *Some Thoughts About the Interaction Between Judges and Politicians*, 1992 U. CHI. LEGAL F. 93, 98 n.22 (“One might refer to *Van Gend & Loos* as the ‘*Marbury v. Madison*’ of European Community constitutional law, in the sense that without it, not much of Community law would exist.”); *see also* Halberstam, *supra* note 164 (manuscript at 2) (adopting this interpretation but also describing *Van Gend & Loos* as having started a discussion over time about this role between the member states and the ECJ).

167. Joseph Weiler, *Proceeding Comments*, 89 AM. SOC'Y INT'L L. PROC. 525, 544 (1995)

While *Van Gend & Loos* and *Costa* rightly figure in the canon of EU case law for their groundbreaking declarations of the priority of the EC Treaty, both also address protectionism within the Common Market. *Van Gend & Loos* involved an alleged attempt to raise trade barriers between member states in violation of the EC Treaty; *Costa* involved an attempt to create a government-supported electrical monopoly within a member state.¹⁶⁸ These landmark decisions confronted forms of internal protectionism that would be at home on the Chinese competitive landscape. These decisions also opened the door to the Commission's vigorous enforcement of competition laws against both private and state anti-competitive restraints.¹⁶⁹ The ECJ also has managed to articulate a fairly coherent framework for determining when state anticompetitive restraints may be allowed based on when they carry indicia of being aimed at social solidarity—such as certain forms of pension funds and insurance—rather than for anticompetitive purposes.¹⁷⁰ Such decisions

(“The *Marbury v. Madison* of European law is not *Costa v. ENEL* nor *Van Gend en Loos*, it's the decision of the national courts accepting *Costa v. ENEL*, accepting *Van Gend en Loos*. . . . The European Court [of Justice] makes the offer, but it's the member states' courts that seal the acceptance.”); Halberstam, *supra* note 164 (manuscript at 5) (“The drama of supremacy, for instance, which soon unfolded in *Costa v. Enel*, was not the assertion that national law must yield to Community law. This would have been true with regard to international law as well. The drama lies in the fact that, as an institutional matter, ‘superior’ Community law is directly infused into the national process of adjudication. All this flows naturally from *Van Gend*.”) (citation omitted).

168. *Van Gend & Loos*, 1963 E.C.R. at 3 (alleging violation of Article 25, formerly Article 12, requiring member states to refrain from increasing any then existing customs duties on imports); Case 6/64, *Costa v. Ente Nazionale per l'Energia Elettrica (E.N.E.L.)*, 1964 E.C.R. 585 (alleging violation of Article 88, formerly Article 93, which provides for review of state aids to industry provided by member states to determine compatibility with the common market).

169. See, e.g., Case C-189/95, *Criminal Proceedings Against Harry Franzén*, 1997 E.C.R. I-5909 (identifying which aspects of the Swedish government's monopoly on domestic alcohol sales violated treaty competition laws); Case 85/76, *Hoffman-LaRoche & Co. v. Comm'n*, 1979-2 E.C.R. 461 (providing definition of dominant position by an undertaking and explaining how conduct at issue by a private enterprise amounted to a violation of Article 82 prohibitions on monopolization); Case 48/69, *Imperial Chem. Indus. v. Comm'n*, 1972 E.C.R. 619 (concluding that concerted action by private competitors amounted to price fixing in violation of Article 81); Case 41/69, *ACF Chemiefarma v. Comm'n*, 1970 E.C.R. 661 (finding defendants had formed a cartel controlling the sale of quinine in violation of Article 81).

170. See, e.g., Case C-205/03P, *Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental (FENIN) v. Comm'n* 2005 E.C.R. I-6295 (delineating state public activity from state economic activity and stating that the former, marked by social solidarity interests, such as provision of health care free of charge, does not represent state anti-competitive conduct); Case C-67/96, *Albany Int'l BV v. Textile Industry Pension Funds*, 1999 E.C.R. I-5751 (ruling that a pension fund with exclusive government-granted rights to manage textile industry pensions did not violate treaty restrictions on state anticompetitive restraints where the funds displayed indicia of “high levels of [social] solidarity.”); see also *Commission Communication, Services of General Interest in Europe*, at 13, COM (2000) 580 final (Sept. 20, 2000) (observing that in such cases “[the member state] is not seeking to engage in gainful activ-

provide a basis for allowing political decisions to remedy dissatisfactions with economic results, while limiting such decisions so they will not impede the Common Market project.

The fact that the ECJ set forth these rulings defending the Common Market from member states' backsliding away from their commitments, however, does not mean that the ECJ was the principal force driving the breakdown of competitive restraints. For example, in the same year as *Van Gend & Loos*, the Council, made up of representatives chosen by member state governments, passed Regulation 17 implementing the EC's competition policy.¹⁷¹ Notably, for certain offenses, including price fixing and monopolization, the Commission reserved to itself the exclusive jurisdiction to declare those provisions inapplicable to the conduct at issue—thus precluding member state governments from greenlighting such conduct.¹⁷² Thus, the ECJ assisted the member states in realizing a goal—a continental market providing for increased gains from trade and economies of scale—whose logic was compelling in and of itself. To be sure, the ECJ helped reach that cooperative equilibrium. That conclusion, however, does not mean that other institutions besides courts could not do so; that a nascent ECJ succeeded suggests that emerging courts elsewhere might be able to play the same role.

C. *Relevance for China*

The AML's strong attention to public restraints has attracted significant attention. The AML differs from U.S. antitrust statutes with its provisions that explicitly focus on government-sponsored restraints. Such attention may not look so unusual from a European perspective; the EC Treaty contains explicit guidance on state and state-authorized

ity but is fulfilling is [sic] duty towards its own population in the social, cultural and educational fields"). See generally SZYSZCZAK, *supra* note 12, at 114–17 (describing that "the competition rules apply only to behavior which is, in the widest sense, of an economic nature" and that the ECJ "is willing to take certain regulatory behavior" such as modern social protection programs "out of the scope" of treaty prohibitions).

171. See EEC Council, Regulation 17, art. 9, 1959–1962 O.J. SPEC. ED. 87, 89, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31962R0017:EN:HTML>; see also Roger P. Alford, *Subsidiarity and Competition: Decentralized Enforcement of EU Competition Laws*, 27 CORNELL INT'L L.J. 271, 275 (1994) ("Under Regulation 17, the Commission has a general duty to enforce the competition laws Regulation 17 also gives the Commission exclusive power to grant an Article 85(3) exemption. Thus, under Regulation 17, the Commission wields real executive powers to enforce and implement the EU competition laws.") (citations omitted).

172. EEC Council, Regulation 17, art. 9.

monopolies.¹⁷³ And indeed, despite the predominant focus of U.S. anti-trust law on private action, American commentators also have often noted the interrelatedness of public and private actors in restraining trade.¹⁷⁴

As discussed previously, of particular interest are the AML's specific provisions aimed at administrative monopolies. Much as nations have had "national champions" (i.e., private entities favored by the national government due to their perceived strategic importance, political clout, or other reasons), China's so-called administrative monopolies are favored by local or regional governments.¹⁷⁵ Previous drafts of the AML had omitted proscriptions against the local and regional government action enabling administrative monopolies,¹⁷⁶ but the final enacted version contains such provisions.

Some commentators doubt whether rules against local or regional government action should be located within an antitrust regime. Commentators have argued that China's competition law—like other nations'—should focus on private barriers,¹⁷⁷ and question whether including administrative monopolies in the AML will have any practical effect on public actors.¹⁷⁸ Just because trade regimes tend to focus on either public or private anticompetitive restraints, however, does not mean they must always be so compartmentalized.¹⁷⁹ Indeed, all else being equal, one might expect that, in a regime such as China's, where the his-

173. See EC Treaty, *supra* note 3, art. 82.

174. See Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 335–58 (1974) (detailing and analyzing the many theories of government regulation of the economy); see also Fox, *supra* note 7, at 173–75.

175. See, e.g., Nicholas Veron, *Farewell National Champions* (Bruegel, Pol'y Brief No. 4, 2006), available at http://aei.pitt.edu/8331/01/PB200604_NationalChamps.pdf.

176. See Harris, *supra* note 4, at 172 (noting "serious grounds for concern" with the draft AML, which did not include provisions dealing with administrative monopolies).

177. See WILLIAMS, *supra* note 4, at 142–44. But see Fox, *supra* note 7, at 177 n.9 ("[M]arket-blocking public abuses have a natural home in antitrust.").

178. See WILLIAMS, *supra* note 4, at 142–44, 219–20; Nathan Bush, *Chinese Competition Policy: It Takes More Than a Law*, 32 CHINA BUS. REV. 30, 31 (2005) (observing, based upon review of an earlier draft of the AML, that "rooting out administrative monopoly may prove to be the most formidable challenge facing PRC competition authorities").

179. For example, while the WTO for most of its history focused on public restraints, in the Doha Round the WTO has considered harmonization of competition laws primarily aimed at private restraints—though with limited results. See Brendan J. Sweeney, *Global Competition: Searching For a Rational Basis For Global Competition Rules*, 30 SYDNEY L. REV. 209, 215–23 (2008); ABA Section of Antitrust Law and Section of Int'l Law & Practice, Comments and Recommendations on the Competition Elements of the Doha Declaration (May 2003) (submitted to the U.S. Trade Representative), at <http://www.abanet.org/antitrust/at-comments/2003/05-03/doha.pdf>.

tory of state-controlled markets means that public institutions and private parties are often intertwined in economic activity, effective competition policy must aim at both public and private action.¹⁸⁰

Transitional economies have found it particularly necessary to address public and private restraints in tandem. As Tibor Varady has pointed out, “The single most important differentiating factor influencing competition policies in ‘Western’ and in former socialist countries respectively, is their economic heritage.”¹⁸¹ As a result, the problem of dealing with numerous inherited legal monopolies is central to their competition regimes.¹⁸² Such an approach is somewhat alien to the American experience.¹⁸³ Post-socialist nations have had to deal with not only the desire to prevent unlawful monopolization, common with U.S. law, but also the goal of dismantling widespread existing monopolization.

Like other nations with socialist histories, China faces the problem of how to deal with state-fostered monopolies. While China may not consider itself explicitly post-socialist,¹⁸⁴ like its Eastern European counterparts, China has decided to address public monopolies with competition

180. The more difficult objection is that it will be difficult for one branch of government in China to address the anticompetitive actions of another branch. Additionally, under this view, antitrust law will be limited by private parties' inability to count on the rule of law and independent courts to guarantee their freedom from unaddressed anticompetitive restraints. Thus, according to this view, the imposition of competition law in China will be thwarted by the lack of an independent judiciary that can guarantee evenhanded enforcement. See WILLIAMS, *supra* note 4, at 217–18 (arguing implementation of the AML will be problematic and pointing to China's weak legal infrastructure); Owen et al., *supra* note 4, at 133 (asserting that the AML is seriously flawed because the “legal system in China has been created mainly to serve political purposes”); Song, *supra* note 4, at 388 (arguing functioning antitrust policy in China will require “many improvements in . . . formal legal structure”).

181. Varady, *supra* note 13, at 252.

182. See *id.* at 253–55 (describing three major approaches in the former Soviet bloc during the 1990s, including forced breakup where monopolies abuse their dominant position, forced breakup regardless of abuse, and foregoing attempts to break up monopolies via antitrust laws).

183. For example, in *Verizon Communications Inc. v. Trinko*, Justice Scalia addressed the Sherman Antitrust Act's relationship to America's own legacy of state-sponsored telecommunications monopolies—a rather unique case in the American context. 540 U.S. 398 (2004). Pointedly, Justice Scalia emphasized that the communications law at issue in that case was “much more ambitious than the antitrust laws,” because it “attempt[ed] to eliminate the monopolies enjoyed by the inheritors of AT&T's local franchises,” while “Section 2 of the Sherman Act, by contrast, seeks merely to prevent unlawful monopolization.” *Id.* at 415. In Scalia's view, “[i]t would be a serious mistake to conflate the two goals.” *Id.*

184. See *Caught Between Right and Left, Town and Country*, ECONOMIST, Mar. 10, 2007, at 23, 23 (“[A] vocal body of intellectuals and retired officials has denounced the [recently enacted private] property law as a betrayal of the country's socialist principles.”).

law. While that may sound logical, the challenge is to fashion a law that governs government. Specifically, Article 51 of the AML states:

Where any administrative organ or organization empowered by a law or administrative regulation to administer public affairs abuses its administrative power to eliminate or restrict competition, the superior authority thereof shall order it to make correction and impose punishments on the directly liable persons(s)-in-charge and other directly liable persons. The anti-monopoly authority may put forward suggestions on handling according to the law to the relevant superior authority.¹⁸⁵

That is, the law directs superior governing bodies to correct the anti-competitive acts of subordinate bodies with the counsel of a specialized antitrust authority. To that end, Article 52 of the AML provides for the possibility of significant fines for entities and individuals.¹⁸⁶ It would follow that a provision such as Article 52 would be limited to those anticompetitive acts that a government body's superiors did not authorize and do not sympathize with.¹⁸⁷ In that case, the law would be less a tool to improve competition and more a disciplinary device for rogue bureaucrats. Article 51 of the AML even contains a carve-out: in situations where other law or regulation provides for a different method of addressing an administrative monopoly, the AML yields.

With respect to the Article 51 carve-out, the devil is in the details. As discussed above, in the U.S. and EU contexts, it has been possible to establish strong prohibitions against local protectionism while preserving latitude for government to second-guess market results subject to certain limiting principles.¹⁸⁸ China will probably also face this task; the difficulty will be in drawing the line between social welfare and improperly burdensome protectionism.

Domestically, the AML presents an opportunity for the harmonization of both public and private actors. Article 51 and related provisions set forth an aspiration of eliminating administrative monopolies. If actively pursued through enforcement, such an aim should reduce uncertainty due to disparities in competition policy across different regions.

185. Fan long duan fa [Antimonopoly Law] art. 51 (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 517-23 (P.R.C.), available at <http://english.peopledaily.com.cn/90001/90776/90785/6466798.html>.

186. See *id.* art. 52.

187. See Fox, *supra* note 7, at 177, 190.

188. See *supra* Parts II.A-B.

Such enforcement need not necessarily take the form of litigation; the AML enforcement authorities could use their power to provide information on the costs of administrative monopolies, thereby “shaming” local governments.¹⁸⁹ As a result, discovering and revealing information could supply a means of enforcement, apart from any need for formal injunctions or damages.¹⁹⁰

III. THE AML AND ALTERNATIVE ANTITRUST

Many AML critics argue that the AML will fail because China lacks strong legal infrastructure. We argue, however, that the AML can succeed despite that weak infrastructure. In particular, China's plan for dealing with local and regional administrative monopolies offers an important first step towards an efficiency-oriented national competition policy for both private and public restraints. While it is far from a certain event, it is quite possible that, as in the case of international trade, the AML could lead to a cooperative solution to the prisoner's dilemma—a dynamic characterized by conflict between individual and collective rationality—that local protectionist restraints present.¹⁹¹ Additionally, considering the situation under Albert Hirschman's exit-voice-loyalty framework of analysis,¹⁹² the Chinese regime is in some ways more amenable to a cooperative solution to protectionism than was the EC Treaty or the GATT/WTO trade system. And to the extent that provinces and localities within China exercise their voice vis-à-vis the central government, it may ignite a dialectic that could create positive overspill of competition-based thinking in other state activity in the market.

189. See Fox, *supra* note 7, at 190–91 (arguing that this role could be important in China as it was in the EU).

190. Cf. Haley, *supra* note 9, at 505–07 (describing the power of adverse publicity, as a method of antitrust enforcement).

191. See Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401, 1405 (1994) (“The articulated reasons for legal barriers against protectionism usually assign a major role to economic gains that cannot be achieved by the individual decisions of local units. The argument resembles a solution to a prisoner's dilemma.”).

192. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 4–5 (1970).

A. *A Cooperative Solution to Regional and Local Protectionism?*

A staple of understanding contemporary international trade law is the repeated prisoner's dilemma model.¹⁹³ Both in the EU and GATT/WTO context, commentators have pointed out that cooperation among trading partners possesses an inherent logic. Because the parties to trade are made better off by cooperation, they have an incentive to work towards lowering trade barriers. At first blush, it might appear that one nation's government might benefit (at least politically) by surreptitiously raising barriers to its own markets while its trading partners remain free. Evidence such as economic experimentation and actual empirical experience with trade agreements, however, suggests that the possibility of retaliation in the future for such behavior fosters cooperation.¹⁹⁴ As Alan Sykes has written of the GATT, "[E]ven when third-party enforcement to ensure compliance is unavailable, there is reason to be optimistic that strategies designed to elicit compliance from other countries will allow the gains from compliance to be realized."¹⁹⁵ Prior to the establishment of the WTO, the GATT relied on this dynamic, and not a third-party en-

193. Many scholars have discussed the prisoner's dilemma in the free trade context. See José E. Alvarez et al., *It's a Question of Market Access*, 96 AM. J. INT'L L. 56, 57 (2002); José E. Alvarez & Steve Charnovitz, *Triangulating the World Trade Organization*, 96 AM. J. INT'L L. 28, 36–37 (2002); Robert Bird & Daniel R. Cahoy, *The Impact of Compulsory Licensing on Foreign Direct Investment: A Collective Bargaining Approach*, 45 AM. BUS. L.J. 283, 324–25 (2008); John H. Jackson, *Interdisciplinary Approaches to International Economic Law*, 10 AM. U. J. INT'L L. & POL'Y 595, 603 (1995); Donald H. Regan, *What Are Trade Agreements For?—Two Conflicting Stories Told by Economists, with a Lesson for Lawyers*, 9 J. INT'L ECON. L. 951, 956 (2006); Christopher A. Whytock, *A Rational Design Theory of Transgovernmentalism: The Case of E.U.—U.S. Merger Review Cooperation*, 23 B.U. INT'L L.J. 1, 25 (2005).

194. ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 7–13 (Penguin Books 1990) (1984) (describing how cooperation evolves in a repeated prisoner's dilemma situation).

195. Alan O. Sykes, *Constructive Unilateral Threats in International Commercial Relations: The Limit Case for Section 301*, 23 LAW & POL'Y INT'L BUS. 263, 276 (1992); see also JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 145 (2005) ("[I]nternational trade is . . . a collective action problem, that is, a large-*n* prisoner's dilemma."); Andrew T. Guzman, *The Promise of International Law*, 92 VA. L. REV. 533, 542 (2006) (reviewing GOLDSMITH & POSNER, *supra*) ("[T]here are many ways in which the GATT/WTO system addresses multilateral prisoner's dilemmas."); John H. Jackson, Remarks, *The Limits of International Trade: Worker's Protection, the Environment, and Other Human Rights*, 94 AM. SOC'Y INT'L L. PROC. 222, 223 (2000) ("In the economic area, [the WTO] addresses the so-called 'prisoner's dilemma.' In other words, if governments 'go it alone' they actually create problems for everyone, including themselves."); Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations*, 17 NW. J. INT'L L. & BUS. 398, 453 (1997) (describing trade as an iterated prisoner's dilemma, in which both states have substantial incentives to cooperate, but may need to develop mechanisms to coordinate their behavior). *But see* Farber & Hudec, *supra* note 191, at 1405 ("The articulated reasons for legal barriers against protectionism usually assign a major role to economic gains that cannot be achieved by the individual decisions of local units. The argument resembles a solution to a prisoner's dilemma.").

forcer, to coax signatory states to comply with the treaty.¹⁹⁶ That is to say, experience with international trade agreements where there is no judge who can order compliance shows that the benefits of cooperation and the threat of retaliation can help participants reach a mutually beneficial equilibrium. Besides its employment in the GATT/WTO context, the repeated prisoner's dilemma concept has gained popularity in explaining the EU's success in reducing member state trade barriers.¹⁹⁷ Key to the emergence of such compliance is that the gains from compliance be significant and that trading partners be capable of retaliating for noncompliance.¹⁹⁸

As a result, it is premature to believe that the AML will fail completely without such requisites as an independent judiciary or a developed antitrust bar. As discussed previously, this kind of "antitrust functionalism" assumes implicitly that Chinese antitrust must look like and work like antitrust elsewhere.¹⁹⁹ The AML starts from a different point and is aimed at issues that are distinct from conventional Western antitrust law. To the extent that the AML takes aim at local protectionism through administrative monopolies, it may well succeed given the evidence that trade liberalization agreements can become self-enforcing.

It might be argued that the repeated prisoner's dilemma proves too much, in the sense that if the logic is so compelling, why does the cooperative equilibrium not result in every circumstance? Because the cooperative solution is not the product of good will, but instead the result of threats of punishment, it requires that the players—be they American

196. While the WTO is often described as relatively "hard" international law because of its dispute resolution system, scholars often continue to refer to the repeated prisoner's dilemma to explain compliance by signatory states, because the WTO dispute resolution panels cannot formally enforce their orders against national governments using injunctions or other means in the manner of national courts. *See, e.g.*, Robert E. Scott & Paul B. Stephan, *Self-Enforcing International Agreements and the Limits of Coercion*, 2004 WIS. L. REV. 551, 592 (2004) ("Only parties to the agreement (that is, states) can invoke the process, and the dispute settlement body has no coercive powers beyond a capacity to declare whether actions do or do not comply with the agreement."); G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 851 (1995) (describing how a WTO ruling winner nonetheless might have to bargain with a recalcitrant loser).

197. *See* SWEET, *supra* note 12, at 7–8 (discussing the judicial role in the EU's success in reducing member state trade barriers); J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991) (discussing success in creating a barrier-free continental market).

198. *See* Petersmann, *supra* note 195, at 453.

199. *See* Riles, *supra* note 21, at 239 (1999) (describing the pitfalls in method and purpose of comparative law scholars that lead to comparisons too concerned with "minutely detailed factual inquiries"); Teemu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179, 230 (2002) ("[O]ur conception of the rule of law must not be so closed and rigid as to categorically delegitimize all alternatives.").

states, EU member states, or Chinese provinces—have the ability to detect each other’s “cheating” on the deal and retaliate accordingly. For this possibility to exist, there must be cross-border trade links and institutions useful to determine defections from the free trade norm. Certainly, the current existence of administrative monopolies suggests that the potential for cross-border trade and the power to block it, do exist. After all, it is rational to create barriers when they are needed. Thus, if movement toward a cooperative equilibrium can be started, it may become self-reinforcing. This also suggests that detection could be an important role for AMLEA. Even if it cannot formally enforce its orders with injunctions or fines, merely becoming a credible reporter of the occurrence of cheating could provide the foundation for the cooperative construction of a freer market.

Several factors actually make a cooperative solution to the repeated game in China more likely. First, in contrast to the United States and the EU, local and regional political actors in China are not as directly accountable via elections to the often vocal minority of citizens who would lose from freer trade.²⁰⁰ As Daniel Farber and Robert Hudec have pointed out in the free trade context, agreements to rein in protection “can improve the welfare of all of the individual states,” but some mechanism for enforcement may be necessary, “not because it is in the interest of each state to defect from the agreement . . . but because the mercantilist perspective that prevails in most political debate makes it seem so.”²⁰¹ That is, the disproportionate weight that producers seeking protection have in electoral politics can undermine the cooperative equilibrium in nations such as the United States. This is much less the case in China, where politicians are not directly subject to electoral calculations.²⁰² While local and regional governments create administrative monopolies to maintain employment and revenue, the harm to producers is a more indirect threat, and should not be a long-term problem if gains from trade are realized. Second, due to the high level of state ownership of industry, the harm to a province or locality can be more directly understood and compensated in China.²⁰³ Consequently, there is less of an agency problem in retaliating for defection from free trade, since the

200. See, e.g., WILLIAMS, *supra* note 4, at 183 (describing China as still a “monolithic, single party, non-democratic government”).

201. Farber & Hudec, *supra* note 191, at 1405.

202. See WILLIAMS, *supra* note 4, at 183 (describing China’s government as being “non-democratic”).

203. See *supra* Part I.B.

province or locality may be cooperating with another province or locality, both of which own industries that can suffer retaliation.

Finally, and perhaps most importantly, the Chinese context involves a reality that neither the EC Treaty nor the GATT/WTO envisioned: the immediate possibility of actual enforceability.²⁰⁴ The central insight of the repeated prisoner's dilemma model of free trade is that states can cooperate in a system without a powerful arbiter that can order them to comply. They can generate order spontaneously through cooperation and punishment for defection. While the Chinese provinces and local governments can do that too, there is also the possibility that, if need be, the central government can encourage compliance. Although the uncertainty of such effective enforcement has been discussed in Part I.D.2, it remains as a potential check on defection, which may become useful if the cooperative, free trade result is reached. Central government encouragement of liberalization may not, in fact, look like traditional anti-trust enforcement but can have procompetitive benefits just the same.

This suggests a prescription for effective Chinese antitrust enforcement: the reasons and bases for enforcement should be clear and informative to local and regional officials, even if carrying out the direct enforcement itself may not occur. In particular, giving these officials clear information about the occurrence and harms of administrative monopoly both in their jurisdictions and elsewhere may foster cooperation. There is evidence that Chinese officials at the local level were not well aware of pre-AML competition law.²⁰⁵ In the language of the prisoner's dilemma, this means it could be crucial to clarify the payoffs cooperative

204. While the WTO now has a relatively hard system via the Dispute Settlement Understanding (DSU), its predecessor GATT relied on more or less voluntary compliance with the treaty. Indeed, there is some debate now about how and to what extent WTO signatory states are bound by dispute settlement panels' rulings, as noted by John Jackson, the "Father of the WTO." See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 126 (2d ed. 1997) ("One interesting question arising in the context of the DSU is whether a party that has been the subject of a complaint for a violation case has an international legal obligation to follow the recommendations or determinations of the panel report or appellate report that results from the process. Unlike other international tribunal proceedings, such as the World Court, the DSU does not make this entirely explicit.").

205. One study has suggested that out of five hundred administrative monopoly cases investigated by the AIC prior to the AML, the government official or bureaucrat at issue did not know of the wrongfulness of his action under existing Chinese competition law. See Weiping Ye, *Structuring of Competition Law and Competition Order—from Necessity of Regulating Administrative Monopolies*, at http://www.legaldaily.com.cn/2007fxy/2007-10/22/content_723097.htm (P.R.C.) (claiming that ninety percent of such cases involved officials who were not aware of their acts being illegal under existing competition law). To the extent that this observation proves accurate, a significant number of administrative monopolies may be self-corrected when competition enforcement agencies begin to teach through legal action.

officials face and the actuality of whether their counterparts are cooperating or defecting.

B. The Benefits of Voice and Loyalty, But No Exit

The potential positive impact of the AML can also be seen by examining the AML's likely consequences under Hirschman's classic exit-voice-loyalty paradigm.²⁰⁶ Hirschman elaborated the concept as applied on understanding organizational decline. Participants had two basic choices for members: they can exit²⁰⁷ (withdraw from the organization) or they can voice their dissent²⁰⁸ (attempt to repair or improve the organization by communicating their dissatisfaction). Additionally, the possibility of loyalty to the organization alters how and whether a dissatisfied member will use its voice rather than choosing to exit. There is a tension between voice and exit, which is mediated by the degree of loyalty to the organization at issue.

The exit-voice-loyalty framework has been applied beyond the context of organizational decline to explain the relative success of trade liberalizing organizations such as the EU and the GATT/WTO.²⁰⁹ In particular, J.H.H. Weiler has used the Hirschman framework to explain how the European Community moved from an institution where member states could more easily exit and lacked voice to one in which exit was foreclosed, but in which they gained increased voice in EC matters.²¹⁰ Similarly, Joost Pauwelyn has utilized the exit-voice-loyalty paradigm to help explain how the GATT/WTO moved from a combination of high exit and low voice at its origin to a combination of low exit and high voice currently.²¹¹

This framework also explains how the AML can improve competition by functioning as an internal free trade agreement. In particular, the AML can address local protectionism as well as start a discussion about efficiency in economic policy generally. This is because, in the Chinese context, the possibility of exit from the cooperative agreement will be constrained in three ways. First, as discussed in the prior Section, incentives for cooperation plus punishment for defection from the free trade

206. See HIRSCHMAN, *supra* note 192, at 21–43, 76–105.

207. *Id.* at 22–23.

208. *Id.* at 33–43.

209. Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1, 5 (2005); see also Thomas Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631, 672 (2005) (applying exit-voice-loyalty in the WTO adjudication context).

210. Weiler, *supra* note 197, at 2411–12.

211. See Ginsburg, *supra* note 209; Pauwelyn, *supra* note 209.

equilibrium should lock in participants. Second, the central government's own power should constrain provincial and local government exit. Third, China's external commitments, including those stemming from its WTO accession, make exit from trade liberalization more difficult. Even if these commitments do not absolutely require the breakdown of local protectionism, they make its reestablishment more difficult.

Lacking realistic exit options, provincial and local governments should turn toward exercising their voice by starting to communicate their dissatisfactions with economic policy and liberalization. Moreover, at a slightly higher level, they should begin trying to build channels for such communication with both the central government and each other. Thus, the Hirschman framework suggests an addendum to the prescription in the previous Section concerning AML enforcement: it should also try to build in the potential to evolve based on the "voice" of different levels of government. One possible outcome from this is a discussion about competition as a value in economic policy. Given the current lack of a "competition culture" within China, this could prove quite important.²¹²

CONCLUSION

Observers have come to bury China's AML in its infancy. This is unfortunate. China may lack prerequisites for traditional antitrust enforcement as it currently exists in the West. Nonetheless, the AML has been constructed to deal with government restraints, especially widespread local protectionism, in a large transitional economy. As a result, there is a real possibility that the AML may provide China with an internal free trade agreement that, while not perfect, can address several serious existing competition problems. Such a result, however, is not inevitable. China deserves support from its existing institutions and encouragement from its trading partners in developing mechanisms to help reach this procompetitive, cooperative outcome and instill a "competition culture" as part of the system of values underpinning its economic policies.

212. See *supra* notes 51–53, 91 and accompanying text.