A Review of China’s Anti-Monopoly Law

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The promulgation of the Chinese Anti-monopoly Law ("AML") has attracted global attention. International press and academics have already commented on this law based on various standards. Interestingly, though they consider it as a historical step for the development of the Chinese legal system, at the same time, they criticize it for its inadequacies and glitches. This paper intends to critically evaluate some negative comments and clarify some misperceived notions. Three main criticisms have been analyzed in this paper, namely (a) non-competition related objective; (b) uncertainty regarding the implementing of the AML; and (c) discrimination against foreign undertakings. This paper then undertakes a comparative analysis of the AML with EU competition law and US antitrust law. Finally, this paper puts forward relevant suggestions for enhancing the effectiveness of AML.

INTRODUCTION

According to an old Chinese adage, “Ta Shan Zhi Shi Ke Yi Gong Yu”, advice from others often helps one to overcome his shortcomings. This is what the authors have to say about China’s new Anti-monopoly law. China holds nearly one-sixth of the world’s population and is a growing economic force, considered to be one of the fastest growing economies in the world.¹ In 2009, China had a growth rate of 8.7%.² As a result of these achievements, China is attracting more and more attention from all over the world.

Regarded as the cornerstone of the market economy, the Anti-monopoly Law of the People’s Republic of China (“AML”),³ like the antitrust laws in most countries, is a comprehensive competition law⁴ passed by the Standing

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3. Hereinafter simply called the AML. The citations and translations provided in this paper are taken from the unofficial English edition (Aug. 27, 2009), available at http://www.zzdzx.com/Article_show.asp?news_id=30729#.
Committee of the Tenth National People's Congress on August 30, 2007 and has been in force since August 1, 2008. As the first comprehensive competition law, the AML is regarded as a landmark legislation acknowledging the existence of an idiosyncratic Chinese socialist-market economy because it illustrates both the achievement of Chinese economic reform and the allocation of resources in China, which is basically consistent with the spirit of market economy and fair competition. In short, the promulgation of the AML clearly suggests that the Chinese economic system has been significantly transformed from a centrally planned economy to a market economy.\textsuperscript{5}

The AML has received a great deal of attention both at its drafting stage and formal promulgation stage.\textsuperscript{6} International press and academics have commented on this law based on various standards. While some views are beneficial for the further improvement of the AML, others should be understood in accordance with the real situation of Chinese society. Therefore, this paper intends to facilitate a smooth dialogue for the purpose of enhancing the Chinese AML.

In Part II of this paper, the relevant views against the AML have been summarized into three main points. Each point will be analyzed by drawing comparisons to the similar questions in EU competition law and US antitrust law and how those questions were resolved in those jurisdictions. Finally, based on the aforesaid discussions, relevant suggestions have been made for the purpose of improving the AML.

I. CRITICAL REVIEW OF MAJOR VIEWS AGAINST THE AML

After over a decade of heated debate, China finally enacted its first national competition law. During the long and arduous process of drafting and discussion, there were many international conferences being held at home and abroad. Involved parties ranged from senior officials, to the staff directly in charge, experts and practitioners from China, the United States, EU, Japan, South Korea, Russia, international organizations and sectional associations.\textsuperscript{7}


The promulgation of the AML should be considered as a great achievement of international cooperation. On the other hand, it is not surprising to see many criticisms made by foreign scholars and professionals.

A. The Non-competition Related Objective of the AML

It is evident that the main objectives of the AML are aligned with the general policies underlying modern antitrust law. However, one objective as set out in Article 1 is “to promote the healthy development of the socialist market economy”, which has been regarded as a non-competition related objective having an overriding effect. Considering the nature of the objective, some international commentators hold the view that the AML does not promote unfettered market competition, and instead, it allows the authorities responsible for the enforcement of the AML to take into account the government’s objectives of maintaining a healthy socialist economy. According to them, it is unclear how the interest in maintaining a socialist economy will be reconciled with market competition when the AML is being implemented and enforced.

Another related concern is the anti-monopoly regulation of state-owned enterprises (hereinafter, “SOEs”). As a transitional socialist economy, the SOEs in China are important players in both the economic market and the everyday life of individual citizens. Because of this situation, a commentator believes that the major question is whether the government will seriously apply the AML to SOEs, which are one of the primary features of a socialist economic

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8. Wang, supra note 5, at 124.
9. AML, supra note 3, art.1.
10. For more than two decades, China has been pursuing what is called a “socialist market economy.” This concept is rooted in an ideological framework that generally minimizes the intrinsic value of competition. According to the author, competition is valued solely for its consequences, specifically its effectiveness in promoting economic development. For many people, “competition” also has negative associations because prior to 1979 it had long been considered antithetical to the goals of Chinese communism. “Competition” as a value is thus not only burdened with some negative associations, but even its positive valuations tend to be solely instrumental. As a consequence, this rhetorical scheme does not easily value a law that seeks to protect the process of competition other than for purely instrumental reasons. To the extent that this purely instrumental value of the view of competition law predominates, competition has no independent status, and it can thus easily be subordinated to other policy initiatives that may be considered more important for economic development at a particular time. For further information, see David J. Gerber, Economics, Law & Institutions: The Shaping of Chinese Competition Law, 26 Wash. U. J. L. & Pol’y 277, 291 (2008).
system. It is evident that Article 7 of the AML provides that the state shall protect those SOEs that are critical to the lifeline of the national economy and security and in which exclusive operations and sales is the norm in accordance with the law. Thus, it is suspicious whether the AML could effectively bolster fair competition in the markets currently dominated by SOEs. It is further suspected that there is a conflict between the socialist market economy and the traditional free market economy.

Unlike economically developed countries, the intensely condemned monopoly in China today is the administrative monopoly. "Administrative monopoly", which is widely used in China, refers to monopolistic activities initiated by government agencies at various levels by abusing regulatory or administrative power, including a wide variety of activities such as legalized monopolies and explicitly-prohibited ultra vires measures. So far, the rampant administrative monopoly takes mainly two forms: industrial (or sector) monopoly and regional monopoly.

Some commentators believe that administrative monopolies are the most anticompetitive and destructive economic restraints in the Chinese economy, which will hinder the development of Chinese markets. Although Article 8 of the AML provides that administrative monopolies are prohibited, the AML does not subject administrative monopolies to the jurisdiction of the

13. Jare A. Berry, Anti-monopoly Law in China: A Socialist Market Economy Wrestles With Its Antitrust Regime, 2 INT’L. L. & MKT. REV. 129, 145 (2005). Under a policy of seizing the larger SOEs and letting go of the small ones that was introduced in 1997, although the government transformed many SOEs into shareholding enterprises by issuing minority shares to investors, the central government continues to exercise effective control over their operations; hence, they are referred to as state-influenced enterprises. A Western economist described the privatization of the SOEs as more hype than reality. See DEYER, supra note 12, at 175. Thus, SOEs are still principal position in China’s economic system. Accurately speaking, the state-owned economy, i.e. the socialist economy with ownership by the people as a whole, is the leading force in the national economy. Article 7, Constitution of the People’s Republic of China, Beijing: China Legal Publishing House (Zhongguo Pazhi Chubanshe), 2001.

14. AML, supra note 3, art. 7.

15. Atleen Kaur, supra note 11.


18. Industrial monopoly in some cases refers to industrial conglomerates operating as monopolies or near monopolies (such as China Telecom) that have been authorized to fix prices, allocate contracts, and in other ways restrict competition among domestic and foreign suppliers. "Regional monopoly" refers to protectionism by provincial or local authorities to block efficient distribution of goods and services inside of China. See Hittinger & Huh, supra note 4, at 254.


20. Pate, supra note 7, at 196.

21. AML, supra note 3, art. 8.
AML enforcement authorities. There is no specific sanction established to punish such violations. Thus, the actual effect of these provisions remains to be tested. As a result, foreign media and academic and professional communities remain highly suspicious of the role of the AML in constructing free and fully competitive institutions in the Chinese market.

All these comments are useful because they could help to improve the AML in the near future. However, it must be noted that both US and EU have taken years to ascertain the objectives of their antitrust laws. As a matter of fact, serious academic debates pertaining to both US antitrust law and EU competition law have taken place concerning their multiple objectives and how to interpret the relevant rules in the process of enforcement. This is especially true in the United States. It is evident that US antitrust law contains multiple objectives. Among these objectives, political orientation plays an important role and the statement that modern antitrust law is economics-orientated is not based in history and is not realistic.

The legislative histories of the various antitrust laws fail to exhibit anything resembling a dominant concern for economic efficiency. No one, it appears, has even attempted to argue that Congress had “efficiency” in mind when it passed the Robinson-Patman Act in 1936, or the Celler-Kefauver amendments to Section 7 of the Clayton Act 1950.

Those statutes were designed to protect small businesses and to regulate law firms when engaging in takeover businesses. In Brown Shoe Co. v. United States, the majority recognized the significant aspect of the relevant merger, however, they followed “Congress’ desire to promote competition through the protection of viable, small, locally owned businesses” and disallowed the merger despite that “some of the results of large integrated or chain operations

22. Although Article 51 of the AML simply expresses that where an administrative development or an organization authorized by laws or regulations to perform the function of administering public affairs abuses its administrative power to eliminate or restrict competition, the department at a higher level shall instruct it to rectify; the leading person directly in charge and the other persons directly responsible shall be given administrative sanctions in accordance with law, no procedures are provided for parties that are substantively damaged by the abuse of administrative to secure relief. See AML, supra note 4, art.50.
23. Howell et al., supra note 7, at 84.
25. Tie Han, An Inquiry into the Cause for the Multiple Goals of the United States Antitrust Law from Historical Perspective (Meiguo Fanyuolaishi Fa Mubiao Duochong Xing Xingcheng Yuanjin de Lishi Tantao), 6 J. HISTORICAL SCIENCE (SHIXUE YUEKAN) 83 (2004).
are beneficial to consumers." In other words, the protection of consumers' interests was not a major objective at that time.

Although the US Congress could have rewritten the antitrust laws by emphasizing on economic efficiency, unfortunately this did not happen. Even today, economic efficiency is not the only objective of US antitrust laws. It is impossible for the legislators at the federal or the state level to totally exclude the consideration of political interests when enforcing the antitrust law. Fred McChesney pointed out the political dimension of antitrust law by stating that "factors other than a search for efficiency must be driving antitrust policy." More recently, in an article examining the AML from the standpoint of the United States, the authors pointed out that popular and political anxieties have manifested in U.S. antitrust policy. The general acknowledgement about the historical development of US antitrust laws is that politics mattered in antitrust decisions in 1890 and that it is continues to be the concern today.

It is also a common understanding that the primary objectives of European Community's competition policy at its initial stage was "to prevent trade between the Member States and the exchange of services in the widest sense being hampered either by distortions of competition, i.e., by differences in national regulations or administrative practices, or restricted by price agreements or the taking of improper advantage of economic power". The initial enforcement emphasized the integration objective when dealing with anti-competition cases and this has not changed even in the implementation of EC competition law in the 1990s. In fact, based on the history of the EC, it is possible to conclude that the integration element includes not only economic considerations but also political considerations, i.e., the ultimate goal for the integration of the European Community. That is to say that the balance of political interests is always the major focus of EC competition law.

Thus, based on the experience of the US and EU, it may be acceptable to include the non-competition related objectives in the AML even though its main purpose is to enhance economic efficiency, to promote free competition and to protect consumers' interests. In some special situations, it is reasonable and acceptable to protect national interests by giving special treatment to specific industrial sectors, which are so-called crisis cartels in both US and EU.

For example, in Europe in the 1970s against the background of the oil crises, the economic crisis and consequent problems for EC integration triggered the

30. Hovenkamp, supra note 27.
32. Howell, supra note 7, at 78.
35. Id. at 33.
protection of two specific industrial sectors from market competition. The crisis in the synthetic fibers and steel production sectors led major companies to conclude common agreements on production cuts, specialization and various other practices. Thus, competition was restricted. Although these two “crisis cartels” took different forms, and the restrictions on competition varied from one sector to the other, both “crisis cartels” constituted genuine cartels. In normal circumstances those “crisis cartels” would be regarded as per se violations of competition law. However, against the specific background, the EC exempted them. Similar situations occurred during the Great Depression of the 1930s in the United States. Therefore, it is unavoidable and necessary for legislators to consider political and national interests in the promulgation and implementation of competition law in their respective jurisdictions all over the world.

May be the State Action Doctrine in the United States and State Aid Doctrine in the EC could be regarded as good evidence to prove that western competition laws contain non-competitive objectives. One should not be surprised to see the same objectives behind the Chinese AML.

Certainly, it is legitimate to question whether the objective of promoting healthy development of the socialist market economy could be interpreted to mean the special protection of SOEs under Article 7. Firstly, the existence of SOEs have historical reasons. Through the economic reform for thirty years, only healthy SOEs have survived while other SOEs have disappeared because they were sold to private investors, made bankrupt or taken over by other enterprises. Statistics show that there are in total 122 SOEs directly controlled by the Central Government. Those enterprises exist long before the promulgation of the AML and numbers have been reduced. Secondly, like antitrust law in both the US and the EU, the AML mainly protects competition but not the competitors. In other words, those enterprises will not be protected

36. Id. at 38.
37. For example, the US antitrust law superceded the State laws.
38. For example, in the negotiation process of drafting the Community competition rules, there were some arguments about how to construct the Common market in the Europe between the France and the Germany. The former’s delegation was disinclined to participate in establishing a common market, which would mainly be governed by the market mechanism. Two motives for opposing the establishment of a common market on the basis of free competition were advanced. First, the French delegation was considered to have feared the loss of industrial policy power. Secondly, there was little confidence that French firms would be able to compete successfully with German firms and products in view of the supposed superiority of German products. The French delegation was not at all keen on opening up the French market to German business by reducing restrictions on trade. A common market would come into being, but in a form that could accommodate specific French interests. In other words, the French standpoint of competition rules in the Community was reflected her political and national interests rather than the common competition interests. See Richard T. Griffiths, Agricultural Pressure Groups and the Origins of the Common Agricultural Policy, 3 Eur. Rev. 233, 238 (1995).
39. For detailed information, please visit http://www.sasac.gov.cn/n1180/n1226/n2425/index.html (last visited 7 January 2011).
if they abuse their market power and engage in unfair competitions. Thirdly, in this globalized world, it is necessary to protect large SOEs so that they are able to compete with other giant enterprises in the international community.

Furthermore, it is legitimate to question whether the AML could effectively control administrative monopoly. Firstly, it must be noted that administrative monopoly is not a special phenomenon in China. However, it may be considered to have special Chinese characteristics due to the fact that the AML deals with administrative monopoly under a separate section. In the US, administrative monopoly has been seen from time to time. For example, in Cal. Liquor Dealers v. Midcal Aluminum, Inc., a California statute required all wine producers and wholesalers to file fair trade contracts or price schedules with the state. If a producer did not set prices through a fair trade contract, wholesalers had to post a resale price schedule, and were prohibited from selling wine to a retailer at other than the price set in a price schedule or fair trade contract. A wholesaler selling below the established prices would face fines or license suspension or revocation. The Court of Appeal ruled that the scheme restrains trade in violation of the Sherman Act, and granted injunctive relief, rejecting claims that the scheme was immune from liability under that Act under the “state action” doctrine of Parker v. Brown.

From the experience of the US, it is necessary to treat all administrative monopolies as regular monopolies and there is no need to deal with them separately. Thus, all the sanctions available for regular monopolies should be applied in order to cure the problem of no specific sanction to punish the violations.

B. Uncertainty of Implementing and Enforcing the AML

The AML was criticized for its lack of certainty in the aspects of implementation and enforcement because the AML fails to define terms and does not establish a “clear and credible enforcement mechanism.”

Firstly, many papers criticize the AML for using very broad language and undefined terms, which may limit the ability of enterprises and their legal counsels to predict their compliance, and may also create uncertainty in the implementation and enforcement of the AML. For example, Article 7 is perhaps considered a debatable provision because of its broad language. It appears to be in favor of SOEs that may significantly affect the national economy, security, and technological advancement and at the same time discriminates other regular enterprises, especially foreign enterprises. It is evident that the second paragraph of the provision requires relevant SOEs

41. 377 U.S. 341 (1943).
42. Howell et al., supra note 7, at 84.
43. Hittinger & Huh, supra note 4, at 251.
to “operate in accordance with the laws, be honest, faithful and strictly self-disciplined and subject to public supervision, and not harm the consumers’ interests by taking advantage of their position of control or their monopolistic production and sale of certain commodities.” However, this paragraph, according to their view, does create some doubt as to the role of Enforcement Authority in policing and deterring SOEs’ anticompetitive practices.

Similarly, Article 50 is uncertain regarding how to impose civil liabilities on undertakings that are found to be in violation of the AML. Instead, it generally states, “[W]here the monopolistic conduct of an undertaking has caused losses to another person, it shall bear civil liabilities according to law.” This sentence virtually does not provide any certainty and it leaves many important questions unanswered, such as where should private actions be filed; whether only directly injured plaintiffs are entitled to the private action, what the measure of damages would be, what costs and fees are recoverable for a successful lawsuit etc. These questions are similar to that under the antitrust laws of the United States.

Furthermore, there is ambiguity on how to reconcile the inconsistencies between intellectual property law (“IP”) and competition law because to some extent IP owners are given exclusive rights, which they may abuse through monopolistic conduct. Article 55 of the AML states, “[T]his Law is not applicable to undertakings who exercise their intellectual property rights in accordance with the laws and administrative regulations on intellectual property rights; however, this Law shall be applicable to the undertakings that eliminate or restrict market competition by abusing their intellectual property rights.” This provision only prohibits restraint of competition through “abuse” of IP rights. The IP monopoly granted by the relevant laws has always presented

44. AML, supra note 3, art.7(5).
45. Hittinger & Huh, supra note 4, at 258. Article 7 of the AML provides that “the State shall protect the lawful business operations of undertakings in these industries that are controlled by the State-owned economy.” However, considering §2 of this Article, it is unclear whether SOEs are subject to, exempt from or partially subject to the AML. They are not included in the list of exemption expressly set forth in Article 15. See Howell et al., supra note 7, at 82-3.
46. AML, supra note 3, art.50(4).
47. Hittinger & Huh, supra note 4, at 272.
48. Generally speaking, intellectual property rights are the product of, and are protected by, national systems of law. The essential characteristic of intellectual property rights is that they confer upon their owners an exclusive right to behave in a particular way. Because intellectual property rights confer exclusivity upon their owners, whereas competition law strives to keep markets open, there may be a conflict between these two areas of law, although this should not be over-stressed: competition law is as keen as intellectual property law to promote research and development and to encourage innovation. It is a complex matter to determine how to balance the amount of protection that needs to be afforded to inventors, plant-breeders or artists to encourage them in their endeavors on the one hand against the desirability of maintaining an open and competitive market on the other. See Richard Whish, Competition Law 734–35 (2003).
49. AML, supra note 3, art.55.
50. Kaur, supra note 11, at 36.
interesting questions for antitrust practitioners. However, what constitutes “abuse” by IP owners has not been further defined by the AML. Thus, it is believed that the normal business practices intended to protect IP owners may be found unlawful under the AML.51

Similar concerns have also been mentioned in Attorneys Harris and Ganske’s report. According to the report, the vagueness of the AML concerning issues relating to the abuse of IP rights have caused a serious problem as to whether the enforcement of this provision will result in loss or diminution of adequate protection of intellectual property in China. They urge that the AML shall precisely clarify what constitutes an “abuse” of IP rights by issuing specific guidelines in the near future.52

Secondly, with regard to the structure of implementation and enforcement mechanism of the AML, China’s overlapping bureaucracies may create a particular problem. According to the AML, three bureaus - Ministry of Commerce (MOFCOM), the State Administration for Industry and Commerce (SAIC) and the National Development and Reform Commission (NDRC) - are separately responsible for enforcing the AML, i.e., MOFCOM is responsible for merger review and administrative monopolies; SAIC is responsible for overseeing “monopoly agreements” and abuses of a dominant position; and the NDRC is responsibility for price collusion and bid-rigging.53 Considering that the complex characteristics of the anticompetitive actions, some commentators believe that these three agencies should be restructured in order to effectively enforce the AML.54 Otherwise, there will be a great risk of political clashes due to inconsistent decisions by the different authorities.55

In addition, Article 10 states that, “the Authority for enforcement of Anti-monopoly Law under the State Council may, in light of the need of work, empower the appropriate departments of the people’s governments of provinces, autonomous regions or municipalities directly under the Central Government to take charge of relevant enforcement of the Anti-monopoly Law in accordance with the provisions of this Law”.56 According to some, this provision may also create some confusion: it is not clear whether and to what extent this provision will be given effect, and it is possible that the AML enforcement authorities might delegate the relevant power to regional and local government officials unreasonably, and this in turn could result in inappropriate actions taken by local authorities, or improper influence made to the AML.

52. Citing from Mark S. Blodgett, China’s Competition Law, supra note 1, at 225-226.
55. Alleen Kaur, supra note 11, at 37.
56. Article 10(2) of the AML, supra note 3.
enforcement, or inconsistent legal rulings in different regions. Moreover, when facing the problems of local governments acting to further regional interests, local courts often make decisions, which were heavily influenced by local governments or Party officials or other well-connected individuals. This may create significant divergence between the written law and the law in action. At a deeper level, it may create a situation, where the statute looks “Western” on its face, but the underlying modalities of implementation remain distinctly Chinese.

By conducting further analysis of the abovementioned issues, some commentators find out three major “points of interest” concerning Chinese legal system, i.e., there is (1) the lack of a cohesive legal ‘system’; (2) pervasive vagueness in the language of statutes and administrative rules; and (3) difficulty of enforcing judgments once they are obtained. Thus, courts are incapable of playing a central role in enforcing the AML like that in the United States or in the Europe Union. The independence of many courts in China remains as a question mark, especially when the courts deal with politically or economically sensitive cases. To some extent, many competition law cases contain one or both of them.

All these criticisms deserve serious consideration. However, these problems may go with the initial development of anti-monopoly law in China. Interestingly enough, by examining the historical development of the implementation and enforcement of the antitrust laws in the United States, one could also find that there were heated debates concerning the application of Sherman Act between the Literalist and Rationalist in the United States Supreme Court. In the initial stage of implementation and enforcement there were many broad languages and undefined terms. Because of the heated debates, the implementation and enforcement of antitrust law in the first two decades after the passage of Sherman Act were not that effective. Thus, the enactment

57. Thomas R. Howell et al, supra note 7, at 94.
58. R. Hewitt Pate, supra note 7, at 203.
62. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 15-47 (1979). See also Bing Chen, Rule of Reason in the Implement of Antitrust Law in the United States (Jiedu Meiguo Fantuolasi Fa Shiyong Zhong de Heli Guize), 18 PACIFIC JOURNAL (Taipingyang Xuebao) 49, 61 (2010). The similar situation also happened in the initial stage of the EU competition law. The competition rules were formulated broadly and vaguely and the contracting states agreed on the inclusion of competition rules in the Treaty without necessarily being of the same mind as to the exact status of the provisions beyond their role in the market integration process. See WESSELING, supra note 34, at 15.
63. For a detailed discussion, see Bing Chen, On State Anti-trust Laws of the United States in the Second Half of 19th Century: Focused on the Statutes and Decision Laws 111-12 (unpublished
of antitrust law was considered as initially to ease the democratic movement rather than to truly regulate monopoly. In other words, the uncertainty of the US antitrust law is understandable because as a basic law to regulate economic activities it must virtually keep sufficient elasticity when dealing with the economic activities.

The example of protecting IP rights could also be used to explain the flexibility of implementing US antitrust law. In fact, the United States is the most earnest advocate of the protection IP rights in the world. During the time of twentieth century, intellectual property was viewed with deep skepticism and uncertainty. Between 1930 and roughly the mid-1970s, antitrust concerns commonly overrode patent rights in court decisions. In a recent article, the authors observe that during this anti-patent era...U.S. policy-makers and regulators remained largely suspicious of the power of big business. The courts generally viewed patents as automatic sources of monopoly power and measures were taken to weaken patent rights - a perspective not entirely dissimilar to that of Chinese officials who have expressed recent concerns about "monopoly" of intellectual property by multinational enterprises. The antipatent stance of the U.S. competition agencies culminated in the promulgation of the Justice Department's so-called "Nine No-No's," setting forth fee

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64. In the American academic circle, James Withrow had doubted whether the real intention of Senator John Sherman as the father of Sherman Act was to control the monster Trusts. He had further expressed that it seemed that the Sherman Act was anti-trust tool having no teeth. See James R. Withrow, Jr. Did Sherman want to break the "trusts" in 11 M.E. Sharpe, THE ANTITRUST IMPULSE: AN ECONOMIC, HISTORICAL, AND LEGAL ANALYSIS (Theodore P. Kovaleff ed., 1994).

65. To certain extent, the flexibility of antitrust law means uncertain, especially against this background the Chinese legal system strictly follows the mode of Civil Law family under which to define the concepts and clearly predict the direction of the Law mainly depend on the legislations and judicial interpretations. However the Chinese language is always meaningful, the discretion of the Judge in fact will play an important role in deciding a case. In the process of deciding, the Judge may be influenced by the factors including the circumstances lived in, the tendencies of political policies and economic developments, individual prefers etc., in particular the speed of development of the Chinese economy is so fast that to result in the frequent adjustment of the institutions.


67. Thomas R. Howell et al., supra note 7, at 79-82.

68. This situation continues until 2006 when the US Supreme Court ruled in the Illinois Tool Works Inc. v. Independent Ink, Inc. 547 U.S. 28 (2006) that the presumption of market power of a patent holder should be abolished and a plaintiff alleging an antitrust violation must establish evidence to show the defendant's market power in the patented product.
arrangements and contractual restraints that could not be legally incorporated in technology licensing agreements. Some of the Nine No-Nos are similar to the provision termed as "abuse" of IP rights under the Chinese AML. That is to say that the uncertainty of enforcement relating to the abuse of IP rights in China has once seen in the US at its initial stage of implementing the antitrust law. Is this a historical coincidence or an unavoidable phenomenon? This issue may deserve further research and discussion. While the US experience is useful, it is necessary to say that China should regulate the relationship between antitrust and protection of IP rights based on its own economic situation in order to be more effective.

In the EU, the uncertainty of implementing and enforcing the competition law at its initial stage was due to its double objectives, which have been described thus by one author:

On the one hand EEC competition law aimed to promote integration by guaranteeing the proper function of the free market mechanism. On the other hand, freedom of competition did not include those business practices which were capable of dividing the market along national lines, even if such behavior enhanced competition.

In this circumstance, it was very difficult and impossible for the agencies responsible for the enforcement of Community competition law to promise that the law would be enforced with certainty at its initial stage because its aims were not uniform in nature. In addition, to some extent the legal uncertainty for the implementation and enforcement may attribute to the lack of experience at its initial implementation period. One should be optimistic to see that implementation of the AML would be much enhanced in the near future.

It is a legitimate concern whether three bureaus could work effectively given the complex nature of monopolizing conducts. However, there is no unified answer as to whether one-organ-system (EU Commission) or two-organ-system (Department of Justice and the Federal Trade Commission) will be more efficient in dealing with relevant cases. In China, it may be too early to say that three-organ-system is not a workable system. May be a reasonable time period should be allowed to examine the real efficiency of this new system. Meanwhile, it is reasonable for the State Council to empower the appropriate

69. Id.
70. Wesseling, supra note 34, at 24-25. The leading cases in which these characteristics were reflected were the Consten & Grunding case and Omega case. See Consten & Grunding (1964) OJ 161/2545; Omega (1970) OJ L242/22.
71. Wesseling, supra note 34, at 17. This phenomenon was similar with the present state of the Chinese society. Competition law is new to China, and thus there are a few experiences for operating the AML, in particular for the administrative enforcement because of the residual influence of the traditional supervision mechanism under centrally planned economic system and the limited "competition culture" in China. For detailed discussion, see David J. Gerber, Economics, Law & Institutions: The Shaping of Chinese Competition Law, 26 Wash. U. J. L. & Pol'y 271 (2008). See also Mehra & Yanbei, supra note 6.
departments of the people’s governments of provinces, autonomous regions or municipalities directly under the Central Government to take charge of relevant enforcement of the AML (Article 10) since China is a large country and it is impossible for three organs to handle all anticompetitive cases. Certainly, the most important thing to ensure the smooth cooperation is to ask those departments to discharge their duties in a transparent manner and an effective supervision mechanism must be established to avoid local protectionism.

Finally, it is understandable that the international community wants to see an independent judiciary to be established very soon. In fact, remarkable progress has been made by Chinese judiciary. During the thirty years of economic reform and open-door practice, judicial reform has been conducted constantly and substantially. One commentator has summarized the achievements in the following two aspects: (1) a proper relationship between the Party and adjudication, between the People’s Congress and the judiciary, and between courts and governments, has been established externally in order to ensure judicial independence; (2) a proper relationship between lower courts and higher courts and a proper division of trying different cases has been established internally in order to ensure the effective and efficient adjudication. However, some people may still consider that courts are no longer trustworthy because there are too many cases of judicial corruption. According to Liang Huixing, among those who convicted bribery crimes, 32% of offenders were judges. The most shocking story was that the Deputy President of the Supreme People’s Court, Huang Songyou, was discovered to be engaged in corruption. Nevertheless, this paper would like to call attention to the vigilance of authorities in these cases. At least, this is a good sign to show that Chinese government takes serious action against judicial corruption in order to ensure the fairness of judiciary. Otherwise so many cases would not be possibly seen. Further, ample evidence has shown that the majority of judges are faithful in discharging their duties.

C. Discrimination against Foreign Undertakings

Most international concerns are relevant to the possible discrimination against foreign business entities and investors. Although the AML has

75. Hittinger & Huh, supra note 4, at 253. As China became a member of WTO on November 11, 2002, the event regarded as the milestone for China really joining the global trade and international competition market, many of China’s potential trading partners were quite skeptical that China would be able to abandon practices that discriminated in its own favor, or norms. After all, it was widely held that China has traditionally been suspicious of trade
incorporated many of the international communities’ suggestions including not to contain discriminatory clauses and to add a chapter specifically prohibiting administrative abuses or administrative monopoly, some commentators observe that the enforcement of the AML is, at least initially, likely to focus on foreign companies. Although the AML makes no distinction between domestic and foreign enterprises and Chinese officials have given extensive assurance to the effect that the new AML will not aim at foreign firms and/or investors. In the policy debating stage subsequent to the final drafting of the AML, the Chinese officials have often said that the AML is useful to serve as a foil against foreign multinational firms that are seeking to dominate or monopolize China’s market. Thus, according to a section of the foreign commentators, the AML may be seen as a weapon to protect domestic companies from being harmed by large and dominating foreign investor. Objectively speaking, the potential discrimination against foreign undertakings has become the focus of implementing and enforcing the AML. Among the possible discriminations, Article 31 of the AML, which is concerning the national security review, is more controversial in the eyes of many foreign commentators.

Indeed, foreign involved mergers and acquisitions (M&As) in recent years in China have given rise to the serious concerns of whether the disappearance of many Chinese famous brands would substantially affect the domestic economic security. In order to respond to these concerns, the AML contains provisions to regulate foreign M&As of Chinese enterprises and the law specifically requires that the M&As shall not harm China’s national security. However, many foreign commentators believe that the “national security” under Article 31 has not been clearly defined and the non-clarified “national security” clause

with the West, and has imposed substantial limits and regulations upon foreigners within the country. See Lindsay Wilson, Investors Beware: The WTO Will Not Cure All Ills with China, 2003 Colum. Bus. L. Rev. 1007, 1009-16 (2003).

76. Hittinger & Huh, supra note 4, at 254-55.

77. Harris, supra note 8, at 171. Some observers claim that global business may view it as an anti-foreign company act if the Chinese AML is not applied to SOEs. In this regard, the AML may serve to protect domestic firms at the expense of foreign companies. For a discussion on this, see Joel R. Samuels, "Taint’s What You Do": Effect of China’s Proposed Antimonopoly Law on State Owned Enterprises, 26 Penn St. Int’l L. Rev. 169, 200-201 (2007).

78. Howell et al., supra note 7, at 61. Cong Bin and He Yicheng, the members of the NPC Standing Committee, commented that the AML would be conducive to control transnational monopolies and crack down the various kinds of restrictive competition actions including abuse of market dominance, manipulating market price and product quality by transnational enterprises at the stage of the drafted AML. Cong Bin, He Yicheng, Speech Excerpts: Draft of the AML (Fayun Zhaideng Fanlongduan Fa Caoan), available at http://www.law-lib.com/f/fjt/newshwxjsyj%20%7200770830102634.htm (12 April 2010), 22nd Session of the 10th Standing Committee NPC, 27 June 2006.

79. Kaur, supra note 11


81. Pate, supra note 7, at 205.
may substantively prevent foreign investors from making their investment in China.\textsuperscript{82}

Although it is a common sense that many countries or regions reserve the right to reject foreign involved M&As based on national security concerns,\textsuperscript{83} Article 31 states that, "[W]here a foreign investor participates in the concentration of undertakings by merging and acquiring a domestic enterprise or by any other means, which involves national security, the matter shall be subject to review on national security as is required by the relevant state regulations, in addition to the review on the concentration of undertakings in accordance with the provisions of this law."\textsuperscript{84} According to the views of many commentators, the "national security" review clause may give Chinese authorities an unreasonable power to control multi-nationals operation in the Chinese market.\textsuperscript{85}

Furthermore, there is a question on whether a new national security review process has been created under Article 31. In fact, in practice, this kind of review occurred long before the promulgation of the AML. The question is whether business transactions with national security implications are likely to be continued under separate procedures as before.\textsuperscript{86}

One has to admit that it is impossible to absolutely eliminate different treatments in international trade and competition practices due to different national interests. By comparing and analyzing the historical development of the US antitrust law and the EC competition law, it is easy to find that the favorable treatments were/are often given to the fundamental industries, such as national lifeline sectors. This paper will not focus on the forms of discrimination; instead the emphasis on the existence of practices of discrimination against foreign undertakings in the US and EU in order to show what should be improved in the China AML.

Most countries, including the United States, have rules for screening incoming foreign investment based on national security grounds. In order to

\textsuperscript{82} We must acknowledge that without a clear definition for national security, the law can theoretically be applied to any industry the government wishes to insulate from international competition, and it is possible to create a list of the industries that will most likely be affected by the new legislation (the AML). By looking at both international standards and previous action taken by the Chinese government, it is possible to infer the strategic assets that the government is likely to protect against foreign national security threats. Meanwhile should we observe that any countries could not exactly define the concept of "national security" in her legislations, and "national security" issues have become extremely pervasive and far-reaching, permeating many aspects of the countries' politics, economy and culture etc. since World War II. See Bruce A. Khula, Antitrust at the Water's Edge: National Security and Antitrust Enforcement, 78 NOTRE DAME L. REV. 629, 632 (2003).


\textsuperscript{84} AML, supra note 3, art.31.

\textsuperscript{85} Blodgett, supra note 1, at 203.

\textsuperscript{86} Howell et al, supra note 7, at 91.
protect the fundamental national interests and prevent the lifeline industries from being controlled by foreign capital, the antitrust laws or competition laws often play an important role as the first safety-valve to prevent the foreign capital from controlling the important industries. In order to do so, the relevant authorities would consider those transactions based on the need for protecting national interests, such as national defense interests, political interests, economic competition interests. Thus, there exists no bright-line between the antitrust review and the national security review when dealing with mergers and acquisitions. Although the US antitrust law or EU competition law may not on its face discriminate the foreign investment, the discrimination actually exists in practice because there is a need of national security review.

For example, even though US antitrust policy is designed to promote competition regardless of the identity, size, or nationality of individual competitors, to some extent the US government will use economic and/or national security reasons to restrict some foreign commercial activities, which may possibly affect the US market. In the United States, there are many statutory regimes regulating international trade and competition in the form of foreign investment guidelines and national security reviews, and thus this kind of legal arrangement seems explicit and practicable.

However, this does not absolutely mean that there is a bright-line between reasonable and unreasonable application of competition reviews and national security reviews in the cases of M&As. For example, it is worth noting that the Exxon-Florio Amendments do not explicitly define the term “national security” anywhere in the legislation. The United States Congress intentionally left the term undefined so that it could be “interpreted broadly without limitation to a particular industry.” By using this mode, it is possible for the agencies responsible for supervising the foreign investment to cooperate with each other in order to successfully accomplish the task of preventing foreign capital from controlling the domestic enterprises in the key industries, and to invoke the provisions of national security against foreign capital in light of the needs for national interests due to the undefined term of national security. Ultimately discriminations against foreign enterprises are per se illegal if it is placed in the context of antitrust law or competition law, but it would be legitimised based on the national security.

There are similar regulations and practices in the EU too. In the 1970s, against the background of the oil crises, for example, in the specific area

87. Id. at 92.
of competition law there was a general trend to specially protect national industry.\textsuperscript{90} Recently, the EU allowed its Member States to apply merger and acquisition regulations referring to Regulation 139/2004 for the purpose of protecting national or public security interests.\textsuperscript{91} Under the Regulation, the national security interests of each Member State are preserved through the regulation of foreign mergers and acquisitions.\textsuperscript{92} The EU is allowed to consider the nationality or identity of a competitor when competition law is applied to anti-competitive actions (at least in special circumstances a proper balance must be struck between the nationality or identity and the national interests and/or others non-competitive interests because competition law has been characterized as national law in the context of the globalization of trade and competition).

Having said that different treatments are understandable based on the national security, it is necessary to point out that Article 31 does not deal with national security review and there is no need for this provision to define what is national security. Article 31 should not be misunderstood as it will deal with both merger review and national security review. Rather, it points out that the assessment of national security should be carried out in accordance with other laws and regulations. The national security review has long been existed before the promulgation of the AML and it is better to have separate laws with separate procedures.

CONCLUSION

It is understandable that the development of law in a particular country should follow the economy and legal culture of that country. In other words, the development of law must be compatible with the existing circumstance of a jurisdiction. Any law that is created without considering its situation will find it difficult to function smoothly. One would agree that to expect a child to behave like an adult is unrealistic. This would be regarded as to “help young shoots to grow (Ba Miao Zhu Zhang)”, which could never achieve an ideal result. To some extent, the AML is still at an infant stage and its development needs to be compatible with its social environment.

It is important to export or import a theory or ideology from one nation to another by employing a good methodology and process, to make it suitable to fit Chinese logic. But the methodology chosen should be proper, i.e., it is necessary to observe the similar stages of the development of the US antitrust law and the EU competition law rather than in their present stage, when the

\textsuperscript{90} Wesseling, supra note 34, at 36-37.


\textsuperscript{92} Sothmann, supra note 91, at 216.
AML is appraised. Certainly, to use higher standard to examine the AML for the purpose of improving it is based on good intent. At the same time, developing countries can benefit from the experiences of developed countries to enhance their own systems. However, it is important to know that the development of law may have different stages and these stages cannot be skipped. Sometime, it may be easy for China to adopt high standard in order to match today’s legal systems in developed countries, but the expected result may not be successfully achieved because the law is a historical and social product.

A social planner who seeks to design competition rules to maximize global economic efficiency would find it optimal to adopt tailor-made rules based on its local circumstance. To be sure, to some extent the comparative analysis between the AML and the Western modes of antimonopoly law (mainly referring to the laws of the US and the EU) will be beneficial to improve the AML.

It is submitted that there is still a big gap between the developed countries and China in terms of the capacity for constructing legal institutions including legal intellectualism, legislative technology, judicial environment, quantity and quality of professionals and other factors, which may influence the effect and direction of rule of law. Furthermore, from the standpoint of the purely normative school of legal science it is admitted that there are some drawbacks in the AML. These drawbacks may be caused by the following factors: the absence of traditional competition culture and institutions, the passing of the AML being to a large extent, due to the external intellectual and institutional pressure, the necessity of regulating administrative monopolies, and to balance economic development between the Eastern and Western parts of China. These shortcomings are a reflection of historical limits and can also

95. Mehran & Yanbei, supra note 6.
96. The term “institutional pressure” refers to situations in which one institution explicitly or implicitly sets performance criteria for the conduct of another institution and signals that it will reward fulfillment of these criteria and possibly punish the failure to achieve them. The extent of such pressure depends on factors such as, for example, the clarity and precision of the performance criteria, the means used in evaluating compliance, the probability that sanctions will actually be imposed or rewards provided, and the potential impact of such sanctions and rewards. The issue of competition law in China has elicited pressure from numerous foreign organizations. See David J. Gerber, supra note 7, at 260.
97. See Eleanor M. Fox, supra note 19.
98. One of the most important factors, such as the statement of Zheng Gongcheng, a member of the NPC Standing Committee, commented that “the formation of a unified market nationwide might be the most pressing issue to be addressed by this Law.” See Zheng Gongcheng, Speech Excerpts: Draft of the AML (Fazong Zhaideng Fanlongduan Fa Caizan), available at http://www.npc.gov.cn/87/servlet/PagePreviewServlet?siteid=&nodeid=306&articleid=950218&type=1 (2 April 2010), 22nd Session of the 10th Standing Committee NPC, 30 June 2006.
be seen in the early history of the US antitrust law and the EU competition law. Thus, to overcome those shortcomings may require a certain period of time.

In the past thirty years, China has made great progress in reforming its legal and economic institutions, but it still needs many more improvements. The Chinese policy-makers and regulators should be aware of the criticisms to the AML and they should strive to seriously take effective measures to amend the AML.

In fact, China is making concentrated efforts to improve the AML. Many detailed rules and regulations have been issued in order to eliminate broad languages and uncertainty of implementation. For example, on 3 August 2008, the State Council issued Provisions on Thresholds of Declaration When Engaging in Business Operations' Concentration. On 24 May 2009, the Anti-monopoly committee of the State Council issued Guide for the Definition of the Relevant Market. On 26 May 2009, the National Administration for Industry and Commerce issued Procedural Rules on the Investigation and Punishment of Monopoly Agreement Cases and Abuses of Dominant Market Position Cases. Of course, to publish relevant rules and guidelines is one thing, and it is another for the courts to properly adjudicate cases. Even though China does not follow the case law tradition, it is good to see that China is now implementing the Case Guiding System. The AML has been implemented for more than two years, and the need of the hour is to standardize the adjudication of antitrust cases through the Case Guiding System.

99. Since 2000, the Supreme People's Court has started the implementation of the Case Guiding System, under which many leading cases are announced or published for the purpose of guiding the courts below to handle the similar cases uniformly.