

# A Tiger without Teeth: The Antitrust Law of The People's Republic of China

*Zhengxin Huo*\*

I. INTRODUCTION .....	32
II. LEGISLATIVE HISTORY .....	34
III. COMMENTS ON THE IMPORTANT ISSUES OF THE ANTITRUST LAW .....	40
A. <i>A Brief Summary</i> .....	40
B. <i>Constitutional Challenge to the Law</i> .....	41
C. <i>Objectives of the Law</i> .....	44
D. <i>Prohibition of Monopoly Agreement</i> .....	46
E. <i>Administrative Monopolies</i> .....	49
F. <i>Antitrust Enforcement Authority</i> .....	52
G. <i>National Security Review</i> .....	54
H. <i>Concentration and Notification Procedure</i> .....	57
IV. CONCLUSION .....	60

## I. INTRODUCTION

On August 30, 2007, the Standing Committee of the Tenth National People's Congress adopted China's first Antitrust Law.<sup>1</sup> The new law, which spent more than two decades in the drafting stages, goes into effect on August 1, 2008.<sup>2</sup> Since the largest developing country in the world can now claim to have a systematic antitrust law, the law's passage is a historic moment in China's legal history.<sup>3</sup> The actual substance of the law, however, has aroused suspicion and even criticism.<sup>4</sup> The clamor

---

\* Zhengxin Huo is an Assistant Professor of Law of the School of International Law, at the China University of Political Science and Law; Member of the China Law Society; Visiting Faculty of University of Minnesota Law School (2007); S.J.D., Wuhan University, P.R.C. (2005). The author would like to thank Thomas La Grua, current Ph.D. candidate at the China University of Political Science and Law, for his invaluable support and editorial work.

<sup>1</sup> Zhonghua Renmin Gongheguo Zhuxi Ling [Order of the President of The People's Republic of China, No. 68], [http://www.gov.cn/flfg/2007-08/30/content\\_732591.htm](http://www.gov.cn/flfg/2007-08/30/content_732591.htm).

<sup>2</sup> See Quanguo Renda Changweihui Gonggao [Bulletin of Standing Comm. Nat'l People's Cong., Aug. 30, 2007] (P.R.C.), [http://www.npc.gov.cn/wxzl/gongbao/2007-10/09/content\\_5374672.htm](http://www.npc.gov.cn/wxzl/gongbao/2007-10/09/content_5374672.htm).

<sup>3</sup> ZHONGHUA RENMIN GONGHEGUO FANLONGDUANFA SHIYI [COMMENTARY ON THE ANTITRUST LAW OF P.R. CHINA] preface (Wu Gaosheng ed., 2007).

<sup>4</sup> Hu Jian, *Fanlongduanfa Shishi de Xi yu You* [The Application of The Antitrust Law], 17 FAZHI YU SHEHUI [RUE OF LAW AND SOCIETY] 6, 6 (2008).

comes mainly from within China's legal and business communities, and stems from a view that the law's final draft is merely a compromise to appease China's powerful vested interests, especially the huge state-owned enterprises.<sup>5</sup> The law is laden with defects that will hinder implementation and enforcement and will result in law that, metaphorically speaking, is like "a tiger without teeth."<sup>6</sup>

One defect is the law's failure to achieve its stated aim to benefit both domestic and foreign companies by monitoring anti-competitive behaviors and regulating China's rapidly emerging market economy.<sup>7</sup> Faced with enormous pressure from government departments and state owned monopolies, legislators failed to outlaw administrative monopolies,<sup>8</sup> and failed to include the term, "administrative monopoly," under the definition of "monopolistic acts."<sup>9</sup> Administrative monopolies are arguably the greatest hindrance to fair competition in China today; thus, leaving the term "administrative monopoly" undefined is a fundamental flaw.<sup>10</sup>

Another controversial issue concerns the "national security review" provision. Article 7 of the Antitrust Law of the People's Republic of China states that, industries related to national interests and national security should be protected by the state, provided their business activities are legal.<sup>11</sup> Unfortunately, the law fails to name the types of industries that relate to national interests and offers no definition for the terms

---

<sup>5</sup> See Huangyong, *Renshi Zhongguo Fanlongduanfa* [A Look at China's Antitrust Law], 17 CAIJING ZAZHI [JOURNAL OF FINANCE AND ECONOMY] 140, 140-42 (2008).

<sup>6</sup> Wang Xiaoye, *Fanlongduanfa Pingjing* [The Implementation of the Antitrust Law Is Doomed to Be Difficult], 110 CAIJING ZAZHI NIANKAN [YEARBOOK OF JOURNAL OF FINANCE AND ECONOMY] (2008), <http://www.caijing.com.cn/2007-12-06/100040501.html>.

<sup>7</sup> See Yang Jingyu, *Zhonghua Renmin Gongheguo Fanlongduanfa Shiyi (Cao'an) de Shuoming* [Interpretation on the Antitrust Law of the P. R. C. (draft) at the Twenty-ninth Session of Tenth National Standing Comm. Nat'l People's Cong., Aug. 29, 2007], [http://www.npc.gov.cn/npc/zt/2007-08/29/content\\_1382616.htm](http://www.npc.gov.cn/npc/zt/2007-08/29/content_1382616.htm).

<sup>8</sup> "Administrative monopoly" in Chinese context refers to the acts of the government and their subordinate agencies that abuse administrative power to eliminate or materially restrict competition. FALV CIDIAN [LAW DICTIONARY] 760 (Xin Chunyin ed., 2004).

<sup>9</sup> See *Zhonghua Renmin Gongheguo Fanlongduanfa* [Anti-Trust Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) Art. 1, translated in LAWINFOCHINA (last visited Nov. 12, 2008) (P.R.C.) [hereinafter Anti-Trust Law (P.R.C.)].

<sup>10</sup> Shi Jianzhong, *Xingzhenglongduan Zhege Tifa Daodi Taoshuixian?* [Who hates the term of administrative monopoly?], available at <http://www.competitionlaw.cn/n2290c16.aspx> (Chinese text).

<sup>11</sup> Anti-Trust Law (P.R.C.), *supra* note 9, at art. 7.

“national interests” and “national security.”<sup>12</sup> In addition, a provision that requires mergers and acquisitions of domestic firms by foreigners to undergo “national security” reviews is of particular concern to foreign investors.<sup>13</sup>

In addition to numerous substantive defects, the law is plagued with enforcement problems. For instance, the Antitrust Committee that is set up by the law lacks substantive enforcement authority.<sup>14</sup> Instead, multiple government agencies with overlapping antitrust duties have enforcement authority.<sup>15</sup> Because no unified and autonomous antitrust enforcement agency with established powers and sufficient resources exists, implementation and enforcement problems are inevitable. The situation is as the Chinese say, “nine dragons in charge of water.”<sup>16</sup>

Ultimately, China’s first antitrust law reflects the complexities and imperfections of a transitioning legal system. Through careful inspection and systematic review, the law’s benefits and drawbacks will be understood. This paper seeks to provide an objective and comprehensive assessment of the law by tracing its history, scrutinizing its most important provisions, and drawing a conclusion.

## II. LEGISLATIVE HISTORY

A modern competition law system is vital to a country’s economy because it is the basic framework to safeguard and promote fair competition and economic efficiency.<sup>17</sup> The newly established People’s Republic of China (“P.R.C.”), however, did not realize the benefits of a competition law system for three decades after the P.R.C. was founded because it adopted a communist ideology.<sup>18</sup> The evolution of the P.R.C.’s Constitution indicates that the P.R.C. abandoned a market economy and

---

<sup>12</sup> Duan Hongqin, “*Jingji Xianfa*” *Dianji* [The Foundation for “Economic Constitution”] 17 *CAIJING ZAZHI* [JOURNAL OF FINANCE AND ECONOMY] 136, 136-37 (2008), <http://magazine.caijing.com.cn/20070902/28867.shtml> (last visited Nov. 1, 2008).

<sup>13</sup> Anti-Trust Law (P.R.C.), *supra* note 9, at art. 31.

<sup>14</sup> Anti-Trust Law (P.R.C.), *supra* note 9, at art. 9.

<sup>15</sup> Anti-Trust Law (P.R.C.), *supra* note 9, at art. 10.

<sup>16</sup> Dragon is a totem in Chinese culture. In ancient times, Chinese believed that the dragon was in charge of water, including rivers, lakes and oceans. “Nine dragons in charge of water” in this context is a metaphor which means that if there are too many administrators, effective administration will be impossible and the situation will fall into chaos. *GU DAI HANYU DACIDIAN* [DICTIONARY OF ANCIENT CHINESE] 1985 (Xu Fu, ed., 2000).

<sup>17</sup> *FALV CIDIAN*, *supra* note 8, at 361.

<sup>18</sup> *XIANFAXUE* [CONSTITUTIONAL LAW] 158 (Yu Ziqing ed., 2004).

practiced a planned economy, similar to the former Soviet Union's model.<sup>19</sup> As such, the competition law was initially discarded and it was not until the early 1980s when P.R.C. leaders realized the significance of establishing a competition law system.<sup>20</sup>

The legislative history of the Antitrust Law goes back to August 1987, when the Legislative Affairs Office of the State Council of the P.R.C. established a group in charge of drafting an antitrust code.<sup>21</sup> Given the political and economic situation in the late 1980s, legislators considered adopting an antitrust code too risky. Consequently, the National People's Congress decided to enact an act against unfair competition because they considered this less sensitive than enacting an actual antitrust law. The result was the adoption of an Anti-Unfair Competition Act by the Third Session of the Standing Committee of the Eighth National People's Congress on September 2, 1993.<sup>22</sup> Although the Act is against unfair competition, its effect is limited because the law fails to repress various monopolies, which have become the greatest menace to fair competition in China.<sup>23</sup> In the meantime, during the 1990s, China accelerated and deepened its economic reform process. The 1993 Amendment to the Constitution of the P.R.C. unambiguously demonstrates that "the State practices socialist market economy" and "strengthens economic legislation."<sup>24</sup> To develop a market economy, the Eighth National

---

<sup>19</sup> *Id.* at 158. The Chinese Communist Party established the P.R.C. on October 1, 1949, and has had one interim constitution and four formal constitutions. See LIN FENG, CONSTITUTIONAL LAW IN CHINA 12-18 (2000). The Interim Constitution is the Common Program of 1949 enacted by the National Political Consultative Conference of China. *Id.* The four formal constitutions were enacted by the National People's congress in 1954, 1975, 1978 and 1982 respectively. *Id.* The 1982 Constitution has been amended in 1988, 1993, 1999 and 2004, and remains in effect today. *Id.* Since the 1988 amendments, the provisions of the Constitution gradually switched from a planned economy to market economy. *Id.*

<sup>20</sup> Wang Xianlin, *Fanlongduanfa de Chutai yu Woguo Jingzhengfa Tixi de Xietiaowanshan* [Enactment of the Antitrust Law and the Improvement of China's Competition Law System] 2, HUADONGZHENGFA DA XUE XUEBAO [JOURNAL OF CHINA EASTERN UNIVERSITY OF POLITICAL SCIENCE AND LAW] 117, 117-20 (2008).

<sup>21</sup> The State Council is the official name of the Central People's Government of the P.R.C.. The Central People's Government of The People's Republic of China, [http://english.gov.cn/2008-03/16/content\\_921792.htm](http://english.gov.cn/2008-03/16/content_921792.htm) (last visited Nov. 1, 2008).

<sup>22</sup> Zhonghua Renmin Gongheguo Fanbuzhengdang Jingzhengfa [Law of the People's Republic of China Against Unfair Competition] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 2, 1993), translated in LAWINFOCHINA (last visited Nov. 12, 2008) (P.R.C.) [hereinafter Unfair Competition Law (P.R.C.)].

<sup>23</sup> Wang Fayuan, *Lun Fan Buzhengdang Jingzhengfa de Quexian yu Wanshan* [On the Defects and Improvement of the Act Against Unfair Competition], 11 ZHONGGUO GONGSHANGGUANLI YANJIU [STUDY ON CHINA'S BUSINESS MANAGEMENT] 32, (2000).

<sup>24</sup> XIAN FA XIUZHENG'AN [AMENDMENT TO THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA], art. 7 (1993) (P.R.C.), <http://english.gov.cn/2005->

People's Congress included the enactment of an antitrust law in the five-year legislative plan in 1994.<sup>25</sup> In May 1994, a drafting group was established that included officials and experts from the State Economic and Trade Commission<sup>26</sup> and State Administration of Industry and Commerce.<sup>27</sup> At that time, some Chinese scholars were so optimistic about the legislative project that they predicted that the first antitrust law of the P.R.C. would soon pass.<sup>28</sup>

To their disappointment and surprise, however, the passage of an antitrust law would have to wait another twelve years.<sup>29</sup> Pressure from powerful interest groups constantly threatened work to draft an antitrust law.<sup>30</sup> Fearing the loss of the "legal" status of their vested interests and monopolies, government departments and state-owned enterprises spared no resource to delay the legislative process.<sup>31</sup> Although China has pledged

---

08/05/content\_20813.htm (last visited Oct. 24, 2008). Article 7 of the Amendment provides as follows: Article 15 of the Constitution, which reads, "The State practises planned economy on the basis of socialist public ownership. It ensures the proportionate and coordinated growth of the national economy through overall balancing by economic planning and the supplementary role of regulation by the market." "Disturbance of the socio-economic order or disruption of the State economic plan by any organization or individual is prohibited", is revised to read, "The State practises socialist market economy." "The State strengthens economic legislation, improves macro-regulation and control, and prohibits in accordance with law any organization or individual from disturbing the socio-economic order."

<sup>25</sup> The National People's Congress is elected for a term of five years. Usually the National People's Congress of each term has a five-year legislative plan to lay down the schedule of legislative process for each five-year period of national economic and social plan. The five-year legislative plan needs the final endorsement of the Political Bureau of the Central Committee of the Chinese Communist Party. LIN, *supra* note 19, at 111.

<sup>26</sup> In the administrative reform of 1998, the State Economic and Trade Commission was cut off. Luo Changping & Yang Binbin, Dabuzhi Zhengyi [The Essence of Super ministries] 6 CAIJING ZAZHI [JOURNAL OF FINANCE AND ECONOMY] 42, 52 (2008), available at <http://magazine.caijing.com.cn/20080315/52554.shtml> (last visited No. 4, 2008). It is worth mentioning that from 1982 to 2008, five reforms of the organizational structure of the State Council have been undertaken. *Id.* The major objectives of these reforms were to reduce the number of administrative organs and to separate the governmental administration from enterprise management. The reforms, however, failed to reach these objectives.

<sup>27</sup> Duan Hongqin, "Jingji Xianfa" Dianji [The Foundation for "Economic Constitution"], 17 CAIJING ZAZHI [JOURNAL OF FINANCE AND ECONOMY] 136, 136-37 (2008).

<sup>28</sup> See ZHU YIKUN, CONCISE CHINESE LAW 245-46 (2004).

<sup>29</sup> A Ji, *Fanlongduanfa, Zaochan'er haishi Nanchaner?* [Antitrust Law, Premature birth, or Dystocia?], 11 [RULE OF LAW AND SOCIETY] 6, 6-8 (2008).

<sup>30</sup> *Id.*

<sup>31</sup> For a long time, private and foreign companies have not been allowed to run business in these sectors so that these large state-owned enterprises can dominate the

to institute a market economy and promote fair competition, Chinese governments at various levels still control many economic sectors such as telecommunications, natural resources, education, finance, and transportation.<sup>32</sup> This is one of the major reasons why the United States and the European Union still refuse to recognize China as a country with a market economy, even if China has been a member of the World Trade Organization for nearly seven years.<sup>33</sup>

Monopolies exercised by governments or “administrative monopolies” are the greatest hindrance to fair competition in China today.<sup>34</sup> Therefore, it is no coincidence that some government departments as well as large state-owned enterprises have stood in the way of the legislative process. In light of the public will, and historic trends, they are reluctant to flagrantly thwart the legislative process of the Antitrust Law; instead, they resort to arguments that, on the surface appear reasonable. One of their loudest arguments has been that the enactment and the enforcement of an antitrust law at this stage may be detrimental to China’s economy.<sup>35</sup> Some scholars representing these interests stress that the enactment of an antitrust law is the product of a full-fledged market economy, however, China is still in the transitional period.<sup>36</sup> Furthermore, instead of enacting an antitrust law to guard against monopolies, they stress that China should encourage domestic companies to expand as fast as possible to meet the challenges of global competition.<sup>37</sup> The interests

---

market and obtain huge profits with few competitors. In this light, it is natural that state-owned enterprises which are actually controlled by the government oppose the passage of the law whose object is to guard against monopolistic conduct, safeguard and promote the order of market competition. *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *EU to reject China as market economy: FT*, ASIAN ECONOMIC NEWS, July 6, 2004, [http://findarticles.com/p/articles/mi\\_m0WDP/is\\_2004\\_July\\_6/ai\\_n6280474](http://findarticles.com/p/articles/mi_m0WDP/is_2004_July_6/ai_n6280474). China became the 143rd member of the WTO on December 11, 2001. See U.S.-China Economic and Security Review Commission, Testimony of Carolyn Bartholomew, Commissioner U.S. China Economic and Security Review Commission hearing on China’s Influence in Africa, July 28, 2005, [http://www.uscc.gov/testimonies\\_speeches/testimonies/2005/05\\_07\\_29\\_bartholomew.php](http://www.uscc.gov/testimonies_speeches/testimonies/2005/05_07_29_bartholomew.php). See World Trade Organization, WTO Ministerial Conference Approves China’s Accession, Nov. 10, 2001, [http://www.wto.org/english/news\\_e/pres01\\_e/pr252\\_e.htm](http://www.wto.org/english/news_e/pres01_e/pr252_e.htm).

<sup>34</sup> See XU SHIYING, JINGZHENGFA XINLUN [A NEW STUDY ON COMPETITION LAW] 24 (2007).

<sup>35</sup> *Id.* at 21.

<sup>36</sup> Chen Qinlan, *Fanlongduan Fa Youhaiwuyi* [Antitrust Law is Injurious] 8 QINNIAN QUANHENG [JUDGEMENT OF YOUTH] 16, (2006), <http://finance.sina.com.cn/review/zlhd/20060811/09422813304.shtml> (lasted visited Nov. 2, 2008).

<sup>37</sup> See Huangyong, *Renshi Zhongguo Fanlongduanfa* [A Look at China’s Antitrust Law], 17 CAIJING ZAZHI [JOURNAL OF FINANCE AND ECONOMY] 140, 140-42 (2008).

of government departments and state-owned enterprises are so powerful that they even have a spokesperson in the National People's Congress, Yang Jingyu, the Chief Secretary of the Law Committee of the Tenth National People's Congress, who openly states that "Administrative monopolies do not exist in China, and it is unscientific to use the term 'administrative monopolies.'"<sup>38</sup> Although his statements are widely criticized, it reflects the prevailing influence of vested monopolistic interests of government departments and state-owned enterprises.

Besides the influence of government departments and state-owned enterprises, there is also a bitter struggle to claim exclusive control over the national enforcement authority.<sup>39</sup> In addition to good legal doctrine, it is also necessary to have efficient enforcement mechanisms that ensure compliance with the law.<sup>40</sup> Therefore, establishing an antitrust authority with uniform enforcement powers and sufficient resources is vital to efficiently operate the antitrust competition law system.<sup>41</sup> Chinese legislators recognize the importance of establishing an authoritative enforcement agency; however, they question how to do establish an enforcement agency and cannot decide which government department should exercise such authority.<sup>42</sup> In addition, authorities and the functions of respective government departments are not clearly defined;<sup>43</sup> therefore, Chinese legislators face the complicated problem of deciding what authority to assign to different branches of the government.<sup>44</sup>

Currently, the National Development and Reform Commission, the Ministry of Commerce, and the State Administration of Industry and

---

<sup>38</sup> See Yang Jingyu, *Administrative monopolies do not exist in China*, XINHUA (China), [http://news.xinhuanet.com/legal/2007-09/30/content\\_6816174.htm](http://news.xinhuanet.com/legal/2007-09/30/content_6816174.htm) (last visited Nov. 2, 2008).

<sup>39</sup> See *Sanbuwei Qiang Zhengli Fanlongduanfa* [Three Departments are struggling to claim exclusive control over the Antitrust Law], SINA (China), <http://finance.sina.com.cn/roll/20050111/06181283920.shtml> (last visited Nov. 5, 2008).

<sup>40</sup> RICHARD A. POSNER, *ANTITRUST LAW* 266 (2d ed. 2001).

<sup>41</sup> Qiu Chen, *Lun Fanlongduanfa de Zhifajigou* [On the Enforcement], 9 SHANXI GAODENG XUEXIAO SHEHUIKEXUE XUEBAO [SOCIAL SCIENCES JOURNAL OF COLLEGES] (2008).

<sup>42</sup> See Cao Taikang, *Guanyu Zhonghua Renmin Gongheguo Fanlongduanfa* (Cao'an) de Shuoming [Interpretation of the Antitrust Law of P.R.C. (draft) at the 22nd Session of Tenth National People's Congress Standing Committee], June 24, 2006, [http://www.npc.gov.cn/npc/zt/2006-06/24/content\\_1382613.htm](http://www.npc.gov.cn/npc/zt/2006-06/24/content_1382613.htm).

<sup>43</sup> See Luo Changping & Yang Binbin, *supra* note 26, at 58-59. This type of *status quo* inevitably leads to the following consequence: when an issue concerns matters that may produce benefits, departments scramble for the lion's share; whereas when it comes to matters that may produce troubles, government departments run for the doors. *Id.*

<sup>44</sup> Li Moyan, *Rang Fanlongduanfa Shao xie Yihan* [Making Antitrust Law less Defects] 7 DA JINGMAO [ECONOMICS AND TRADE] 24, 24 (2006).

Commerce, maintain that they dominate the Antitrust Enforcement Agency. The fight for control over Antitrust Enforcement Agency among these three departments is so fierce that legislators find themselves caught in the crossfire.<sup>45</sup> The underlying tensions mentioned above are some of the main reasons that the legislative process has stagnated for more than one decade.

With China's accession to the WTO, the situation is beginning to change.<sup>46</sup> With the opening of the Chinese market, foreign companies have flooded in, and foreign takeovers of Chinese companies have been on the rise.<sup>47</sup> Under such a circumstance, Chinese leaders are beginning to realize that indefinitely postponing the enactment of an antitrust law would be detrimental to China's dream of reviving itself in the world.<sup>48</sup> Judging the situation in China and abroad comprehensively, Chinese leaders decided to reach a compromise as soon as possible to settle the controversial debate.<sup>49</sup>

With a renewed determination, a task force was created by the Legislative Affairs Office of the State Council to create a draft bill of an antitrust law and submitted it to the Standing Committee of the Tenth National People's Congress for deliberation in June 2006.<sup>50</sup> This bill did not outlaw administrative monopolies; instead, a clause was inserted to make it illegal to abuse administrative power by restricting competition.<sup>51</sup> Moreover, the Antitrust Committee was established only as a coordination body that lacked any substantial enforcement authority.<sup>52</sup> In addition, during the following year, the legislature approved the bill with barely any amendments because the bill used ambiguous verbiage and sensitive issues were avoided.<sup>53</sup> Among the 152 members of the Tenth National

---

<sup>45</sup> WANG XIAOYE, JINGXHENGFA XUE [COMPETITION LAW] 400 (2007).

<sup>46</sup> See Leqi, *Shinian Mojian Zhonglou Jianjianjiao [More Than Ten years of Drafting, The Antitrust Law is Taking Shape]*, 3 JINRI ZHONGGUO LUNTAN [FORUM ON CHINA TODAY] 63, 63-66 (2005).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Cao Taikang, *supra* note 42. Under the Legislation Law of the P.R.C., a bill which has been put on the agenda of the Standing Committee session shall in general be deliberated three times in the current session of the Standing Committee before being voted on. See Li fafa [Law on Legislation] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 2000, effective July 1, 2000), art. 27 *translated in* LAWINFOCHINA (last visited Nov. 12, 2008).

<sup>51</sup> Duan, *supra* note 12, at 137.

<sup>52</sup> *Id.* at 136-37.

<sup>53</sup> Press Conference of the National People's Congress on the Passage of Four New Laws including the Antitrust Law, XINHUA (China), *available at* <http://www.xinhuanet.com/zhibo/20070830b/wz.htm> (last visited Nov. 5, 2008).

People's Congress Standing Committee that attended the 29th Session, 150 voted in favor of adopting the law and only two voted against the law.<sup>54</sup>

### III. COMMENTS ON THE IMPORTANT ISSUES OF THE ANTITRUST LAW

#### A. *A Brief Summary*

China's Antitrust Law contains eight chapters and fifty-seven articles.<sup>55</sup> Chapter one, "General Provisions" states the Law's objectives, guidelines, terminology, and scope of application.<sup>56</sup> Chapter two, "Monopoly Agreements" lists types of prohibited agreements, distinguishes between horizontal and vertical monopolies, and details when monopoly agreements may be exempt from the Law.<sup>57</sup> Chapter three, entitled "Abuse of a Dominant Market Position," seeks to prohibit "abuse" of dominant market positions.<sup>58</sup> Chapter four, "Concentration" deals with concentration, as its title suggests.<sup>59</sup> Most significantly, this chapter sets forth procedures relating to submission of notification of concentration.<sup>60</sup> Foreign companies are directly impacted by Article thirty-one of this Chapter because it requires foreign companies to pass a national security test before acquiring a company that may affect China's "national security."<sup>61</sup> Chapter five, "Prohibition of Abuse of Administrative Powers to Exclude or Restrict Competition," appears to prohibit administrative monopolies; however, a systematic analysis of the specific provisions suggests otherwise, which will be discussed in more detail later.<sup>62</sup>

Chapter six, "Investigation of Suspicious Monopoly Behaviors," details the measures the antitrust enforcement authority may take to investigate suspected monopolies to ensure effective enforcement.<sup>63</sup> Chapter seven, "Legal Liability," provides for a number of potential penalties that may apply when the law is violated.<sup>64</sup> Chapter eight, "Supplemental Provisions," exempts conduct dealing with intellectual

---

<sup>54</sup> *Id.*

<sup>55</sup> Anti-Trust Law (P.R.C.), *supra* note 9.

<sup>56</sup> Anti-Trust Law (P.R.C.), *supra* note 9, at Chapter 1.

<sup>57</sup> Anti-Trust Law (P.R.C.), *supra* note 9, at Chapter 2.

<sup>58</sup> Anti-Trust Law (P.R.C.), *supra* note 9, at Chapter 3.

<sup>59</sup> Anti-Trust Law (P.R.C.), *supra* note 9, at Chapter 4.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Anti-Trust Law (P.R.C.), *supra* note 9, at Chapter 5.

<sup>63</sup> Anti-Trust Law (P.R.C.), *supra* note 9, at Chapter 6.

<sup>64</sup> Anti-Trust Law (P.R.C.), *supra* note 9, at Chapter 7.

property rights and the agricultural sector from the Antitrust Law, and stipulates the effective date of the law.<sup>65</sup>

China's first Antitrust Law represents a milestone for the Chinese legal system because it demonstrates Chinese economic reform and China's commitment to market mechanisms and competition. Furthermore, the drafting process of the law reflects the open and cosmopolitan attitude of Chinese legislators.<sup>66</sup> For example, foreign institutions were invited to participate in the drafting process and the experts responsible for drafting the law were encouraged to rely on the experiences and doctrines from western countries, including the United States Department of Justice, the United States Federal Trade Commission, and the European Commission.<sup>67</sup> As such, many provisions from other established antitrust laws have been incorporated in to the Chinese Antitrust Law.<sup>68</sup>

The Antitrust Law, however, is far from perfect. In light of its flaws, the Chinese legal system, and the Chinese political environment, this law faces many challenges. The following analysis discusses possible challenges to the law.

#### B. *Constitutional Challenge to the Law*

The first challenge concerns whether the Standing Committee of the National People's Congress can usurp the legislative authority of the National People's Congress. The Standing Committee of the National People's Congress ("SCNPC") approved the first Antitrust Law of the P.R.C., not the National People's Congress ("NPC"). Therefore, the question is whether the SCNPC enjoys the legislative authority to adopt such an important law.

Although both the NPC and the SCNPC are the legislative authorities under the 1982 Constitution, their legal status and respective authorities are somewhat distinct.<sup>69</sup> Pursuant to the 1982 Constitution, the

---

<sup>65</sup> Anti-Trust Law (P.R.C.), *supra* note 9, at Chapter 8.

<sup>66</sup> Wang Xiaoye, *Highlights of China's New Anti-monopoly Law*, 75 ANTITRUST L. REV. 133, 134 (2008).

<sup>67</sup> *Id.*

<sup>68</sup> Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. §6 (2008). For instance, from the experience of the United States, we find "domestic effects doctrine," "consent decrees" and a "leniency policy." *Id.*

<sup>69</sup> Under the 1982 Constitution, The NPC is the highest organ of state power. XIAN FA [CONSTITUTION] art. 57, 58 (1982) (P.R.C.). Nevertheless, unlike the parliament in western countries, the NPC is in session for only a very short time of less than 20 days a year; therefore the NPC has a standing committee exercising almost all the powers of the NPC while it is not in session. *Id.* Hence both the NPC and the SCNPC exercise the legislative power of the state. *Id.*

NPC has the power to amend the Constitution.<sup>70</sup> The Constitution is the supreme legislative authority; therefore, the entity allowed to amend the Constitution also enjoys supreme status in the legal system. Therefore, only the NPC may amend the Constitution.<sup>71</sup> The Constitution also authorizes the NPC to enact and amend basic laws pertaining to criminal offenses, civil affairs, state organs and other matters.<sup>72</sup>

The SCNPC has the authority to enact laws, except those that must be enacted by the NPC.<sup>73</sup> When the NPC is not in session, the SCNPC can also partially supplement and amend laws enacted by the NPC as long as the basic principles of these laws are not disregarded.<sup>74</sup>

The Constitution distinguishes between basic national laws and ordinary national laws.<sup>75</sup> The authority to enact and amend the basic national laws is exclusively enjoyed by the NPC. On the other hand, national laws are regarded as ordinary laws, which should be enacted by the SCNPC.<sup>76</sup> Neither the Constitution nor any national legislation has ever clarified the exact difference between basic and ordinary laws.<sup>77</sup> Generally, Chinese scholars agree that basic national laws are those that relate to the fundamental aspects of the legal system, such as state organs, civil and economic affairs, and criminal offenses.<sup>78</sup> These basic laws are considered fundamental laws and enjoy an important status in the whole legal system.<sup>79</sup>

Accordingly, whether the Antitrust Law is classified as basic

---

<sup>70</sup> *See Id.*, at art. 62.

<sup>71</sup> ZHANG QIANFAN, *XIANFAXUE DAOLUN* [AN INTRODUCTION TO CONSTITUTIONAL LAW] 149 (2004).

<sup>72</sup> *See* XIAN FA, *supra* note 69, at art. 62 § 3.

<sup>73</sup> *See* XIAN FA, *supra* note 69, at art. 67 § 2.

<sup>74</sup> *See* XIAN FA, *supra* note 69, at art. 67 § 3.

<sup>75</sup> ZHANG QIANFAN, *supra* note 71, at 81-82. Another issue is the SCNPC has the authority to partially supplement and amend laws enacted by the NPC, provided that the changes do not contravene the laws' basic principles. *See* LIN, *supra* note 19, at 82-3. In this instance, the exact meaning of "partially supplement or amend" is ambiguous. To what extent will a supplement or amendment constitute only a partial supplement or amendment? What is the exact meaning of the requirement of non-contravention of the basic principles of the law by the SCNPC's supplement or amendment? So far, there is no legal criterion for the SCNPC to follow, and in practice, it is common knowledge that the SCNPC often makes not only fundamental changes to existing basic national law but also in large quantity in the case of the amendment of the 1979 Criminal Law.

<sup>76</sup> *See* CAI DINGJIAN, *ZHONGGUO RENMIN DAIBIAO DAHUI ZHIDU* [THE CHINESE PEOPLE'S CONGRESS SYSTEM] 273-78 (1998).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

national law or ordinary national law is important. The classification of antitrust law is important because it determines which entity enjoys the authority to enact this law, or to be more specific, between the NPC, and the SCNPC, which one possess the authority of the antitrust law. If the Antitrust Law is classified as a basic law, the law would be invalid because the SCNPC adopted the law and would exceed its authority. On the other hand, if the Antitrust Law is classified as an ordinary law, the law would be valid because law's adoption by the SCNPC would not exceed its authority.

Fostering economic liberty and competition is crucial to a market economy; therefore, the vital importance of antitrust law has been widely recognized.<sup>80</sup> For example, the United States' Sherman Antitrust Act<sup>81</sup> is considered an authority for economic liberty, and its importance is comparable to the United States' Bill of Rights with respect to personal freedom.<sup>82</sup> Chinese leaders have also attached great importance to the role of antitrust law and have unanimously labeled the Antitrust Law as China's "economic constitution," or "the constitution of the marketplace."<sup>83</sup>

The classification of the Antitrust Law as basic law can be further conformed by studying legislative intent. On June 24, 2006, during the Twenty-Second Session of the Tenth SCNPC, Cao Kangtai, the Director of the Legislative Affairs Office of the State Council, delivered an interpretation of the Bill. In his speech he stressed the importance of the Antitrust Law stating that the:

Antitrust Law is of vital importance to protect fair competition and sound economic order, and to ensure the proper exercise of the fundamental functions of market, which enjoys the reputation of "economic constitution." It is a very important device for a country practicing market economy to appropriately intervene in the economy. This is especially true in the time of globalization; countries around the world attach great importance to the antitrust policies to prevent the monopolistic conducts from abroad and home, and to promote innovations and economic

---

<sup>80</sup> See PHILLIP AREEDA AND LOUIS KAPLOW, *ANTITRUST LAW: PROBLEMS, TEXTS, AND CASES* 5-12 (5th ed. 1997).

<sup>81</sup> Monopolies and Combinations in Restraint of Trade Act, 15 U.S.C. §§ 1-38 (2008).

<sup>82</sup> GARY B. BORN, *INTERNATIONAL CIVIL LITIGATION IN THE UNITED STATES COURTS* 349 (3d ed., 1996).

<sup>83</sup> See, e.g., The State Council Approved the Antitrust Law (draft), XINHUA (China), [http://news.xinhuanet.com/legal/2006-06/08/content\\_4661181.htm](http://news.xinhuanet.com/legal/2006-06/08/content_4661181.htm) (last visited Nov. 5, 2008); WANG, *supra* note 45, at 21-22.

efficiency. Hence it is of great necessity for China to enact a comprehensive and systematic antitrust law.<sup>84</sup>

Cao Kangtai characterized the Antitrust Law as a “basic law,” not an “ordinary law.” Chinese lawyers and scholars also recognize this characterization.<sup>85</sup> As Mr. Zhao Xiaoguang notes, “the antitrust law should be classified as one of the basic laws of the state which is vital to safeguard and promote the sound development of market economy.”<sup>86</sup> The NPC, thus, possessed the exclusive authority to adopt antitrust law not the SCNPC. Under the Constitution of the P.R.C., the SCNPC does not have the authority to adopt an antitrust law. Therefore, China’s first Antitrust Law lacks constitutionality. Given the political and legal circumstance of China, however, a constitutional challenge is extremely unlikely.

### C. Objectives of the Law

To avoid diluting the law and jeopardizing its enforcement, the law should not promote vague concepts or legal uncertainty.<sup>87</sup> The law’s objectives, however, promotes several vague concepts.

Article one provides the objectives of the Antitrust Law which states that:

This Law will be enacted for the purpose of guarding against or ceasing monopolistic conduct, safeguarding and promoting the order of market competition, improving economic efficiency, protecting consumers’ interest, protecting public interest, and promoting healthy development of the socialist market economy.<sup>88</sup>

There are at least two points worthy of debate. First, to avoid diluting the law and jeopardizing its enforcement, the law should not promote vague concepts or legal uncertainty.<sup>89</sup> The law’s objectives, however, use a very vague concept, *i.e.*, “public interests”. As we know, the concept of “public

---

<sup>84</sup> Cao Taikang, *supra* note 42.

<sup>85</sup> See Xu, *supra* note 34, at 21-22.

<sup>86</sup> Zhao Xiaoguang, *Fanlongduanfa de Xingzhi Diwei Tezheng Jiqi Zhuyao Zhidu Linian [The Nature, Status and Structure of the Antitrust Law]*, 9 ZHONGGUO JIAGE JIANDU JIANCHA [SUPERVISION OVER PRICE OF CHINA] 7, 12 (2008).

<sup>87</sup> International Bar Association Antitrust Committee Working Group on the Development of Competition Law in the People’s Republic of China, *Comments on the Draft Antitrust Law of The P.R.C.*, July 27, 2005, <http://www.antitrustchina.com/>.

<sup>88</sup> Anti-Trust Law (P.R.C.), *supra* note 9, at art. 1.

<sup>89</sup> International Bar Association Antitrust Committee Working Group on the Development of Competition Law in the People’s Republic of China, *supra* note 87.

interest” suffers from vagueness, amorphousness, and uncertainty in its application so that no attempt to define the concept precisely has ever succeeded.<sup>90</sup> As a matter of fact, given the characteristics of the concept, neither the Law itself nor other national legislation provides a definition for it.<sup>91</sup> Therefore, the Chinese government will have much discretion when it interprets the concept in practice. What merits particularly strong emphasis is that under the relevant provisions of the law, “the public interests” may provide justifiable grounds by which monopoly agreements and concentration<sup>92</sup> may be exempted from the Law.<sup>93</sup> Under such circumstance, a dangerous situation may arise, *i.e.*, the Chinese government may misuse the concept of public interest at its pleasure to favor the state-owned enterprises. In other words, the danger of a concept so vague as this is that it may be interpreted by the government to provide the state-owned enterprises with an easy excuse for the exemption of application of the Law and thus defeating the underlying purpose of the Law.

Indeed, there are various provisions in the Law that clearly favors large state-owned enterprises. Article 7, for instance, provides as follows:

Industries controlled by the state-owned economy and relied upon by the national economy and national security or industries implementing exclusive operation and sales in accordance with the law shall be protected by the State to conduct lawful operation by the undertakings.<sup>94</sup>

This provision invites a lot of debate and criticism. As one economist sarcastically retorts, “If there is a conflict between the protection of these state-owned enterprises and the promotion of fair competition, which one shall prevail? I am really afraid that the Law will undermine fair competition in the name of protecting it.”<sup>95</sup>

In addition to the concept of “public interests”, the reference to the protection of “the consumer’s interest” in Article 1, as one of the

---

<sup>90</sup> See Yongping Xiao & Zhengxin Huo, *Ordre Public in China’s Private International Law*, 53 AMERICAN JOURNAL OF COMPARATIVE LAW 653-54 (2005).

<sup>91</sup> Anti-Trust Law (P.R.C.), *supra* note 9, at art. 15 § 4.

<sup>92</sup> Anti-Trust Law (P.R.C.), *supra* note 9, at art. 28.

<sup>93</sup> See WANG, *supra* note 6, at 110.

<sup>94</sup> Anti-Trust Law (P.R.C.), *supra* note 9, at art. 7.

<sup>95</sup> Shen Minggao, *Fanlongduan Fa Ying Ruhe Fanlongduan? [How does Antitrust Law Fight against Monopoly?]* CAIJING WANGLUOBAN [JOURNAL OF FINANCE AND ECONOMY], Sept. 5 2007, <http://www.caijing.com.cn/home/column/smg/2007-09-05/29296.shtml>.

objectives of the Law, also sends a confusing message.<sup>96</sup> Competition law should contribute to consumer welfare, but it should not be directly associated with the protection of particular rights that individuals enjoy as consumers of certain products or services. For example, a prohibition of dumping by a dominant enterprise may be perceived as being against consumer's interests in the short term (as a measure that prevents the lowering of prices for certain goods or services); however, the prohibition of dumping benefits consumers in the long run by encouraging fair competition in the market place leading to lower prices.<sup>97</sup> Therefore, the value of listing the protection of "the consumer's interest" as one of the objectives of the Antitrust Law is indeed questionable. Hence, adding the word "ultimate" or a similar expression before the word "interest" would have been preferable.

#### D. *Prohibition of Monopoly Agreement*

The first task of China's Antitrust Law is to prevent monopoly agreements. The Antitrust Law defines "monopoly agreements" as agreements, decisions, or other concerted behavior that eliminates or restricts competition. The law defines a list of prohibited agreements based on the experience of western countries and distinguishes between horizontal and vertical monopoly agreements. Article 13 prohibits horizontal monopoly agreements, including the following:

- (1) Fixing or changing the price of products;
- (2) Restricting the output volume or sales volume of products;
- (3) Dividing the sales market or the raw material purchasing market;
- (4) Restricting the purchase of new technology or new facilities or the development of new technology or new products;
- (5) Jointly boycotting transactions; and
- (6) Other monopoly agreements confirmed by the Anti-Monopoly Enforcement Authority under the State Council.

Article 14 prohibits vertical monopolies, which includes fixing the price for resale to a third party, restricting the minimum price for resale to a third party, and creating other monopoly agreements confirmed by Anti-Monopoly Enforcement Authority under the State Council. Generally, vertical restrictions have less distortive effects on competition compared to

---

<sup>96</sup> Anti-Trust Law (P.R.C.), *supra* note 9, at art. 1.

<sup>97</sup> International Bar Association Antitrust Committee Working Group on the Development of Competition Law in the People's Republic of China, *supra* note 87, at 7.

agreements between competitors. Vertical agreements may be regulated through primacy legislation, secondary measures, and case law.<sup>98</sup> Therefore, it is reasonable for the law to make a distinction between horizontal and vertical monopoly agreements.

There are criticisms of the specific content of article 13 and 14. First, the definition of monopoly agreements under Article 13 merits debate because “restricting competition” is a low standard that may extend the scope of agreements targeted for regulation to include harmless agreements.<sup>99</sup> Thus, to avoid any future abusive or disproportionate reliance on the Antitrust Law, behaviors with extremely limited restrictive effect on competition should not be regulated. As such, it is preferable to add language that limits the scope of this provision to only agreements that “substantially,” “materially,” or “appreciably” prohibits or restricts competition.

Second, the categories of prohibited agreements included in Article 13 should be revised.<sup>100</sup> Article 13, Section 4, which prohibits “[r]estricting . . . the development of new technology or new products,” is easy to justify and is consistent with similar prohibitions in other competition laws, insofar as restricting the development of new technology or new products constitutes the improper impediment to the technological innovation.<sup>101</sup> This is not the case, however, with the first part of the sentence, which effectively prohibits restrictions on “the purchase of new technology or new facilities”.<sup>102</sup> Such a provision may allow compulsory licensing and other disproportionate restrictions on intellectual property. For example, in a license between competitors, it is usual for a licensor to limit the scope of licenses to certain uses, such as in horizontal agreements covered by Article 13. Typically, such a restriction would not raise any competitive concerns. Under the current law, however, agreements that “limit the purchase of new technology or new facilities” are prohibited which may discourage the enterprises to grant technology licenses to others.<sup>103</sup>

Article 55 provides a safeguard against excessive regulation on monopolies.<sup>104</sup> The provision, however, may be insufficient to alleviate

---

<sup>98</sup> *Id.* at 15.

<sup>99</sup> Anti-Trust Law (P.R.C.), *supra* note 9, at art. 13.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> International Bar Association Antitrust Committee Working Group on the Development of Competition Law in the People’s Republic of China, *supra* note 87, at 14.

<sup>104</sup> Article 55 is as follows: This Law is not applicable to conducts by undertakings to protect their legitimate intellectual property rights in accordance with the

such fears.<sup>105</sup> A legislative text that specifically targets the refusal to sell (or license) new technology as a form of anticompetitive conduct may act as a disincentive against the grant of technology licenses to Chinese enterprises, as any restriction of the scope or other terms of such licenses, however innocuous, could be legally vulnerable under Chinese competition law. Regulating anticompetitive conduct that effects intellectual property rights, however, is already covered by the remaining provisions of Article 13. There is no need for a specific reference to restrictions on the purchase of new technology or new facilities as a distinct category of monopoly agreements.

Consistent with guidelines that require “prohibition in principle, exemption as exception,”<sup>106</sup> Article 15 lists the conditions under which horizontal and vertical monopoly agreements may be exempt.<sup>107</sup> Section 5 and 6 of Article 15 raise serious concerns. The wording of sections 5 and 6 endorses the “crisis cartel” which refers to a cartel formed for the purpose of mitigating serious decreases in sales or excessive overstock during economic depressions. It is true that the authorization of crisis cartels under certain circumstances may have a precedent in the antitrust laws of some countries.<sup>108</sup> However, as a matter of policy, it is highly

---

IP law and relevant administrative regulations; however, this Law is applicable to the conduct of undertakings to eliminate or restrict market competition by abusing intellectual property rights stipulated in the IP law and administrative regulations. See Anti-Trust Law (P.R.C.), *supra* note 9, at art. 55.

<sup>105</sup> See Wang Xianlin, *Zhishichanquan Xinwei Xingshi de fanlongduan Guizhi* [Antitrust Regulation on the Exercise of Intellectual Property Rights], 1 FAXUEJIA [JURISTS] 25, 26-28 (2008).

<sup>106</sup> See ZHONGHUA RENMIN GONGHEGUO FANLONGDUANFA SHIYI, *supra* note 3, at 36.

<sup>107</sup> Article 15 provides as follows: “Monopoly agreements between undertakings that can be proven to fall under any of the following cases shall be exempt from the application of Articles 13 and 14: (1) For the purpose of improving techniques, researching, and developing new products; (2) For the purpose of upgrading product quality, reducing costs, improving efficiency, unifying product models and standards, or carrying out professional labor distribution; (3) For the purpose of improving operational efficiency and enhancing the competitiveness of small and medium-sized enterprises; (4) For the purpose of maintaining the public welfare such as conserving energy, protecting the environment, providing disaster relief, and etc.; (5) For the purpose of mitigating the severe decrease of sales volume or excessive overstock during economic recessions. (6) For the purpose of protecting the legitimate interests of international trade and foreign economic cooperation; or (7) Other cases stipulated by the law or the State Council.” In the case that the monopoly agreement falls under any of the cases from (1) to (5), the undertakings shall also prove that the agreement will not substantially restrict competition in its relevant market and can enable the consumers to share the benefits provided by the agreement in order to be exempt from Articles 13 and 14 of this Law. See Anti-Trust Law (P.R.C.), *supra* note 9, at art. 15.

<sup>108</sup> See De Brauw Blackstone Westbroek, *Competition Overview*, March 2005, [http://www.debrauw.com/debrauw/Templates/Frameset\\_EN.aspx?content=http%3A//ww](http://www.debrauw.com/debrauw/Templates/Frameset_EN.aspx?content=http%3A//ww)

questionable whether the grant of exemptions to such “crisis cartels” has had the desired effects of salvaging the industries concerned. Many scholars believe that a cartel formed during economic depressions should not be permitted, because economic downturns are necessary to the efficient operation of a free market; and competition during an economic depression may be benefited by the adjustment of market and product structure.<sup>109</sup>

Under certain circumstances, these provisions could protect an exporting cartel, that is to say, Chinese exporting companies may legitimately join together to control a product’s production or price under these provisions. On the other hand, it could create tension in the global competition arena. Although it may be justifiable for Chinese companies to organize price cartels to avoid price wars among them or anti-dumping suits from foreign countries, these provisions may be in conflict with the laws of other countries. For instance, many countries including China<sup>110</sup> have antitrust laws that apply abroad when the effects of the conduct affect the commerce of the country at issue.<sup>111</sup> Chinese exporting companies have been targeted in at least two antitrust suits in the United States<sup>112</sup>; therefore, the exemption for an exporting cartel may not provide Chinese exporting companies any real legal protection.<sup>113</sup>

#### E. *Administrative Monopolies*

In the past two decades since the 1980s, China has witnessed astonishing economic development. The World Bank reported that China would surpass Japan in the coming decade to become the world’s second largest economy.<sup>114</sup> The economic boom, however, has generated a

---

w.debrauw.com/debrauw/International/Practice+areas/CompetitionEU\_main.htm (last visited Nov. 6, 2008).

<sup>109</sup> WANG, *supra* note 45, at 137.

<sup>110</sup> Article 2 of the Antitrust law of P.R.C. provides as follows: This Law is applicable to monopolistic conduct in economic activities within the territory of the People’s Republic of China. *See* Anti-Trust Law (P.R.C.), *supra* note 9, at art. 2. This Law is applicable to monopolistic conduct outside the territory of the People’s Republic of China that eliminates or has restrictive effects on competition in the domestic market of the People’s Republic of China.

<sup>111</sup> *See, e.g.*, California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) (state action); Parker v. Brown, 317 U.S. 341 (1943) (state action); Keogh v. Chicago & Nw. Ry. Co., 260 U.S. 156, 163 (1922) (filed rate doctrine).

<sup>112</sup> *See, e.g.*, F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (discussing the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (2008)).

<sup>113</sup> WANG, *supra* note 45, at 137.

<sup>114</sup> Fu Jin, *China may become 2nd largest Economy in a Decade*, CHINA DAILY, July 30, 2007, [http://chinadaily.com.cn/bizchina/2007-07/30/content\\_6003723.htm](http://chinadaily.com.cn/bizchina/2007-07/30/content_6003723.htm).

rapidly growing gap between the rich and poor in China. Research by the Chinese Academy of Social Science shows that China has the biggest divide between urban rich and rural poor in the world.<sup>115</sup> Although reasons for this economic and social problem are multifaceted, there is a close association between Chinese monopolies and its poverty gap. Nowadays, ordinary Chinese citizens are disappointed with monopolies in various sectors. Within such a setting, the adoption of an antitrust law is of great significance and necessity. However, the Law does not undercut government's control of industries that it considers crucial to national interests, including natural resources, telecommunications, postal services, airlines and railways. Additionally, it fails to outlaw administrative monopolies, notwithstanding the fact that the Law has devoted an entire chapter to the "prohibition of abuse of administrative powers to exclude or restrict competition".<sup>116</sup> To analyze this paradox we look at the following aspects.

First, Chapter 5 covers the issue of administrative monopolies, but it is Article 3 in Chapter 1 that precisely defines "monopolistic conduct".<sup>117</sup> Worthy of note is that Article 3 fails to include the acts of the governments and their subordinate agencies that abuse administrative power, to eliminate or restrict competition.<sup>118</sup>

Until July 2005, regulating administrative powers that eliminate or restrict competition was in the list of "monopolistic conduct" proposed for regulation in the legislative draft.<sup>119</sup> Government departments and state-owned enterprises, however, realized the definition would encroach on their long-term monopolistic interests.<sup>120</sup> Thus, in December 2005, legislators decided to delete administrative powers for regulation from the final version and even eliminate the entire chapter on administration monopolies.<sup>121</sup> The complete elimination of regulating administrative

---

<sup>115</sup> Richard Spencer, *China Rich-poor Gap is the World's Worst*, Feb. 27, 2008, <http://www.telegraph.co.uk/education/main.jhtml?xml=/education/2004/03/26/tegAwchin a27.xml>.

<sup>116</sup> Anti-Trust Law (P.R.C.), *supra* note 9, at art. 5.

<sup>117</sup> Anti-Trust Law (P.R.C.), *supra* note 9, at arts. 32-37.

<sup>118</sup> Article 3 provides that "monopolistic conduct" includes the following: "(1) Monopoly agreements made between undertakings; (2) Abuse of dominant market position by undertakings; and (3) Concentration conducted by undertakings that may have the effect of eliminating or restricting competition." See Anti-Trust Law (P.R.C.), *supra* note 9, at art. 3.

<sup>119</sup> The Entire Chapter on Administration Monopolies was Eliminated from the Draft of the Antitrust Law, RENMINWANG, Jan. 11, 2006, <http://www.people.com.cn/GB/54816/54822/4016799.html>.

<sup>120</sup> Li Moyan, *Rang Fanlongduanfa Shao xie Yihan [Making Antitrust Law less Defects]* 7 DA JINGMAO [ECONOMICS AND TRADE] 24, 24 (2006).

<sup>121</sup> In the Draft of July 27, 2005, Article 3 defines "Monopolistic Conduct" as

powers backfired, however, due to the public's widespread uproar that urged that the provision be resurrected.<sup>122</sup>

Due to the uproar, legislators decided to strike a balance. On the one hand, legislators decided to exclude "the abuse of administrative powers that eliminate or restrict competition" from the definition of the "monopolistic conduct" to ensure the law's passage. On the other hand, legislators enacted Chapter 5 entitled "Prohibition of Abuse of Administrative Powers to Exclude or Restrict Competition," to appease the public. The path of this legislative process was similar to "an oscillation on the seesaw" and reflects the inner tensions of today's Chinese society.<sup>123</sup>

Although the provisions in Chapter 5 prohibit the abuse of administrative powers and exclude or restrict competition, the law does not define penalties for the violators. Chapter 7 provides for a number of serious penalties that may be applied when the law is violated, including administrative sanctions,<sup>124</sup> civil liability,<sup>125</sup> and criminal penalties.<sup>126</sup> Article 51, however, provides an exception to administrative monopolies, which provides that:

The administrative agencies or organizations authorized with administrative powers of public affairs by laws and regulations shall be admonished by the superior authorities if they abuse their administrative powers, to eliminate or restrict competition. The individuals in charge of this matter or any others who are directly responsible shall be punished in accordance with the law. Antitrust Enforcement Authority may provide advice towards a legal settlement, to its superior authorities.<sup>127</sup>

---

the following activities that eliminate or restrict competition: (1) agreements, decisions or other concerted actions among undertakings that eliminate or restrict competition; (2) abuse of dominant market positions by undertakings; (3) concentration of enterprises that eliminates or restricts Competition; (4) abuse of administrative powers by administrative organs or organizations authorized by law or regulations to administer public affairs that eliminates or restricts competition. *See* Anti-Trust Law (P.R.C.), *supra* note 9, at art. 3.

<sup>122</sup> Li Moyan, *supra* note 120.

<sup>123</sup> Wang Lei, *Fanlongduanfa: Pinghengmu Shang De Yaobai* [Antitrust Law: An Oscillation on the Seesaw], ZHONGGUO QINGNIAN BAO [CHINA YOUTH DAILY], June 14, 2006, [http://zqb.cyol.com/content/2004-06/14/content\\_887580.htm](http://zqb.cyol.com/content/2004-06/14/content_887580.htm).

<sup>124</sup> Anti-Trust Law (P.R.C.), *supra* note 9, at arts. 46-48.

<sup>125</sup> Anti-Trust Law (P.R.C.), *supra* note 9, at art. 50.

<sup>126</sup> Anti-Trust Law (P.R.C.), *supra* note 9, at art. 52.

<sup>127</sup> Anti-Trust Law (P.R.C.), *supra* note 9, at art. 51.

Contrary to the law's intent, this provision indicates that the law does not affect administrative monopolies because the Antitrust Enforcement Authority lacks the authority to impose sanctions on the administrative agencies or organizations. The Antitrust Enforcement Authority can only provide advice regarding legal settlement to its superior authorities. Considering the *status quo* of the Chinese administrative system, it will be difficult for a superior authority to maintain an independent and impartial stance if conflicts arise between agencies or organizations it oversees and foreign companies or enterprises the state does not own.<sup>128</sup> Therefore, the law effectively exempts government agencies from legal liabilities. This is the reason that the law is "a tiger without teeth" in the face of administrative monopolies.

#### F. Antitrust Enforcement Authority

The establishment of a unified enforcement authority that is independent and has sufficient substantive powers and resources is critical for the effective operation and implementation of the Antitrust Law. While China's Antitrust Law was drafted, the legal and business communities anticipated that the law would establish a single enforcement agency that would uniformly exercise enforcement authority.<sup>129</sup> The original draft provided for such an enforcement agency.<sup>130</sup> In 2005, however, a bitter struggle ensued regarding the establishment of a single enforcement agency between three departments, which included the National Development and Reform Committee, Ministry of Commerce, and State Administration of Industry and Commerce, and ended in a deadlock.<sup>131</sup> As a result, a compromise was reached to set up an Antitrust Committee ("the Committee"); however, the Committee lacks substantial powers. For instance, Article 9 states that the Antitrust Committee under the State Council performs the following functions:

- (i) Making competition policies;
- (ii) Organizing the investigation and assessment of the market competition status as a whole and publicizing an

---

<sup>128</sup> Wang, *supra* note 6, at 111.

<sup>129</sup> Lin Liming, *Shilun Woguo Fanlongduanfa De Zhixingjigou* [On the Antitrust Enforcement Authority of China] in 206 FANLONGDUANFA YANJIU [A STUDY ON ANTITRUST LAW] (You Quanrong ed., 2006).

<sup>130</sup> International Bar Association Antitrust Committee Working Group on the Development of Competition Law in the People's Republic of China, *supra* note 87, at 54.

<sup>131</sup> See Sanbuwei Qiang Zhengli *Fanlongduanfa* [Three Departments are struggling to claim exclusive control over the Antitrust Law], SINA (China), <http://finance.sina.com.cn/roll/20050111/06181283920.shtml> (lasted visited Nov. 5, 2008).

- assessment report;
- (iii) Making and publishing the antitrust guidelines;
- (iv) Coordinating the antitrust administrative enforcement work; and
- (v) Other functions assigned by the State Council.<sup>132</sup>

The structure and protocol of the Antitrust Committee shall be developed by the State Council.<sup>133</sup>

Article 9 reflects that the Committee is not the leading government body in charge of antitrust enforcement. Instead, the Committee is merely an advisory government body responsible for governing China's national strategy and framework regarding antitrust matters and reconciling conflicts among various departments.

Article 10 stipulates that:

The Antitrust Enforcement Authority designated by the State Council is responsible for the enforcement of the antitrust law. The Antitrust Enforcement Authority, if appropriate, may empower corresponding government agencies at the provincial level, autonomous region, and municipal level to be responsible for anti-monopoly enforcement activities in accordance with this Law.<sup>134</sup>

Article 10 delegates to the State Council the authority to designate the Antitrust Law Enforcement Authority. It is not clear, however, what institution should be designated as the Antitrust Law Enforcement Authority. The State Council's explanation to the SCNPC in 2006 regarding the draft Antitrust Law indicated that antitrust enforcement would continue to be divided among different institutions.<sup>135</sup> Currently, the authorities for antitrust related functions are the Price Supervision Department of National Development and Reform Committee, the Antitrust Bureau of the Ministry of Commerce, and the Antitrust and Against Unfair Bureau of the State Administration of Industry and Commerce.<sup>136</sup> Because the Law has not classified their respective powers,

---

<sup>132</sup> Anti-Trust Law (P.R.C.), *supra* note 9, at art. 9.

<sup>133</sup> *Id.*

<sup>134</sup> Anti-Trust Law (P.R.C.), *supra* note 9, at art. 10.

<sup>135</sup> Wang, *supra* note 6.

<sup>136</sup> See *Zhong Guo Shangwu Bu Chengli Fanlongduaju* [Commerce of Ministry of China Establishes an Antitrust Bureau], Aug. 23, 2008, XINHUANET, [http://news.xinhuanet.com/newscenter/2008-08/23/content\\_9651448.htm](http://news.xinhuanet.com/newscenter/2008-08/23/content_9651448.htm); *Gongshang Zongju Chengli Fanlongduan yu Buzhengdang Jingzhengju* [State Administration of Industry and Commerce Establishes an Antitrust and Against Unfair Bureau], July 27, 2008, XINHUANET, [http://news.xinhuanet.com/legal/2008-07/27/content\\_8781235.htm](http://news.xinhuanet.com/legal/2008-07/27/content_8781235.htm).

scope, and relationships among each other, these three institutions, therefore, have parallel authority to enforce the Antitrust Law have equal authority to enforce the Antitrust Law.<sup>137</sup> Allowing multiple entities to form the Enforcement Agency is inefficient and may encourage conflict among the agencies.<sup>138</sup> The arrangement of multiple agencies with overlapping antitrust-related duties is the Achilles' heel of China's new Antitrust Law and will greatly impact the enforcement of the Law.<sup>139</sup>

#### G. National Security Review

The national security provision of the Antitrust Law has evoked worldwide concern because it marks the first time that such national security reviews have been enshrined in the Chinese legal system, bringing together various rules and guidelines enacted as early as 2002.<sup>140</sup> Article 31 states that:

In the case that national security is concerned, besides the examination on concentration in accordance with this Law, the examination on national security according to the relevant regulations of the State shall be conducted as well on the acquisition of domestic undertakings by foreign capital or other circumstances involving the concentration of foreign capital.<sup>141</sup>

This provision regarding foreign investments could affect China's national security because foreign investment must undergo a national security review and an antitrust review. Essentially, the provision establishes the Chinese government as the final decision-maker on mergers and acquisitions involving foreign capital. The provision is a tool to safeguard the national interest of China; on the other hand, the concept of "national security" is vague and may defeat the underlying purpose of the Antitrust Law by unduly restricting normal foreign mergers and acquisitions.

The national security provision did not surface in the legislative draft until June 2007.<sup>142</sup> After the Bill was submitted for the second time

---

<sup>137</sup> Wang, *supra* note 6.

<sup>138</sup> Anti-Trust Law (P.R.C.), *supra* note 9, at art. 51.

<sup>139</sup> Wang, *supra* note 6.

<sup>140</sup> *National Security Checks for Foreign Investments get Tougher Under New Chinese Law*, INTERNATIONAL HERALD TRIBUNE, Aug. 30, 2007, <http://www.ihf.com/articles/ap/2007/08/30/asia/AS-GEN-China-Anti-Monopoly-Law.php>.

<sup>141</sup> Anti-Trust Law (P.R.C.), *supra* note 9, at art. 31.

<sup>142</sup> *Falongduanfa Caoan Tuchu Guojia Anquan Shencha* [New Draft of the Antitrust Law Highlights the National Security Reviews], Aug. 24, 2007, CAIJING WEB, <http://finance.sina.com.cn/china/hgjj/20070824/22023915115.shtml>.

to the SCNPC on June 25, 2007, a new article was added that provided that “where national security is concerned, an examination on national security, according to the relevant regulations of the State shall be conducted on the acquisition of domestic undertakings by foreign capital or other circumstances involving the concentration of foreign capital.” During deliberation, Article 31 was revised into the current wording.<sup>143</sup>

Including the national security provision is justified. First, foreign takeovers of Chinese companies rose since China’s accession to the WTO. Takeovers occurred in important economic sectors, such as steel and transportation. Critics complained that this trend could threaten China’s economic security. Thus, the government was prompted to take measures to stop foreign takeovers immediately.<sup>144</sup> On February 12, 2002, the State Council issued Regulations for Guiding Foreign Investments.<sup>145</sup> Pursuant to Article 7, foreign investment projects that may impair national security or jeopardize the socio-public interests were prohibited.

Second, Chinese companies have faced obstacles from foreign governments when they attempt to takeover companies in other countries due to their national security concerns. Under these circumstances, Chinese leaders have realized the value of preparing for foreign countries’ national security concerns. One example concerns the China National Offshore Oil Corporation’s (CNOOC) aborted bid to takeover U.S. Unocal Corp. in 2005. In that year, CNOOC, one of China’s largest state-controlled oil companies, made an unsolicited bid of \$18.5 billion for to takeover Unocal, a large independent American oil company. This transaction was considered a normal business transaction by the Chinese government; however, American lawmakers believed the deal could jeopardize U.S. security. In the end, the U.S. Congress forced CNOOC to abandon the takeover bid.<sup>146</sup>

This case has produced hot debate in China, and more importantly, has led Chinese leaders to evaluate the consequences of foreign takeovers. In 2006, China’s government promulgated the Administrative Measures for Acquisition of Listed Companies (AMALC),<sup>147</sup> and Provisions on

---

<sup>143</sup> Duan, *supra* note 27, at 137.

<sup>144</sup> *National Security Checks for Foreign Investments get Tougher Under New Chinese Law*, *supra* note 140.

<sup>145</sup> Zhidao Waishang Touzi Fangxiang Guiding, Zhonghua Renmin Gongheguo Guowuyuan Ling No. 346 [Regulations for Guiding Foreign Investments, Order of the State Council of the People’s Republic of China. No. 346], Feb. 27, 2002 (P.R.C.).

<sup>146</sup> *CNOOC’s bid for Unocal essentially business*, XINHUANET, June 30, 2005, [http://news.xinhuanet.com/english/2005-06/30/content\\_4553825.htm](http://news.xinhuanet.com/english/2005-06/30/content_4553825.htm).

<sup>147</sup> Shangshi Gongsi Shougou Guanli Banfa, Zhongguo Zhengquan Guanlijianhu Weiyuanhui Ling Di 35 Hao Lin [Administrative Measures for Acquisition of Listed Companies, Order No. 35 of China Securities Regulatory Commission], July 31, 2006 (P.R.C.).

Merger and Acquisition of Domestic Enterprises by Foreign Investors (PMADEFI),<sup>148</sup> both of which contain national security provisions. Article 4 of AMALC stipulates that the “[a]cquisition of listed companies and [a] change of equity interests may not jeopardize national security.”<sup>149</sup>

Article 12 of PMADEFI states as follows:

In cases where a foreign investor merges and acquires a domestic enterprise, and obtains the *de facto* controlling power; if it involves the key industries, has the factors which influence or may influence the national economic security, or may result in the transfer of the *de facto* controlling power of any domestic enterprise which owns famous trademark or China time-honored brands, the parties shall report it to the Ministry of Commerce.

If the concerned parties fail to report their merger and acquisition which causes or may cause significant influence on the national economic security, the Ministry of Commerce may, together with the relevant departments, require the concerned parties to terminate the trading, transfer the relevant assets, or adopt other effective measures to eliminate the influence of the merger and acquisition in terms of national security.<sup>150</sup>

Under such a background, a national security provision was inserted into the draft of the Antitrust Law in 2007. Most Chinese scholars and business people welcomed the provision. Shi Jianzhong, a professor at the China University of Political Science and Law stated, “I believe this is in keeping with the practices of other countries.”<sup>151</sup>

Foreign investors, however, expressed worries regarding the national security provision. The European Chamber stated that its members were concerned that the provision would require foreigners

---

<sup>148</sup> Guanhu Waiguo Touzizhe Binggou Jingnei Qiye de Guiding, Zhonghua Renmin Gongheguo Shangwubu, Guowuyuan Guoyou Zichan Guanli Weiyuanhui, Guojia Shuiwuzongju, Guojia Gongshang Guanlizongju, Zhengquan Guanlijiandu Weiyuanhui Ling Di 6-2006 Hao Ling [Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors, Order No. 6-2006 of Ministry of Commerce; State-owned Assets Supervision and Administration Commission of the State Council; State Administration of Taxation; State Administration of Industry and Commerce; China Securities Regulatory Commission; State Administration of Foreign Exchange], Aug. 8, 2006 (P.R.C.).

<sup>149</sup> Administrative Measures for Acquisition of Listed Companies, *supra* note 147, at art. 4.

<sup>150</sup> Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors, *supra* note 148, at art. 12.

<sup>151</sup> Duan, *supra* note 27, at 136-37.

interested in mergers and acquisitions of Chinese firms to undergo “national security” reviews. Joerg Wuttke, president of the European Union Chamber of Commerce in China said “It is not clear how such a national security review will be applied, especially given that “public interest” is not defined in the Law.”<sup>152</sup>

This concern is further underlined by the law’s emphasis on safeguarding certain state-dominated industry sectors.<sup>153</sup> Thomas E. Jones, a partner of a British law firm, Allen & Overy, which has a long history of working with mergers and acquisitions by foreign entities, commented that the definition of national security was unclear and would produce significant uncertainties to foreign investors. In their investment projects, investors may worry about whether their investments in certain industries in China would be disapproved by the Chinese government due to the national security review.<sup>154</sup>

A national security review is not unique to China’s Antitrust Law. The United States has implemented the most sophisticated antitrust laws. In the United States, relevant laws require that business operators be subject to the antitrust reviews by the Department of Justice, the Federal Trade Commission, and national security review by the Committee on Foreign Investment in the United States (CFIUS). Antitrust laws of Germany, Japan, and France also impose these requirements. Therefore, it is justified that the Chinese Antitrust Law contains a national security provision. However, such national security examination should not be implemented as further restricting foreign mergers and acquisitions in China, unless the foreign mergers and acquisitions concern military or other sensitive industries where China intends to set strict limitation to foreign investors; otherwise it defeats the purpose of the Antitrust Law.

More detailed regulations are needed to specify the content and procedure of the national security review. As Thomas E. Jones put it, “the national security review on foreign investments is undoubtedly a sovereign issue. However, foreign investors seek transparency, consistency, and guidance in the law’s implementation. In addition, national security review policies must be specific and authorities should establish detailed implementation plans in the near future.”<sup>155</sup>

#### H. *Concentration and Notification Procedure*

Chapter 4 deals with concentration and sets forth procedures for

---

<sup>152</sup> *West Cautious on China's Monopoly Law*, REUTERS, Aug. 31, 2007, <http://archive.gulfnews.com/articles/07/08/31/10150283.html>.

<sup>153</sup> *National Security Checks for Foreign Investments get Tougher Under New Chinese Law*, *supra* note 140.

<sup>154</sup> Duan, *supra* note 27, at 136-37.

<sup>155</sup> *Id.* at 136.

the submission of notification to the Antitrust Enforcement Authority regarding concentration under the State Council.<sup>156</sup> There are two issues worthy of discussion here. The first is the definition of concentration. Article 20 provides a list of situations of “concentration,” which stipulates the following:

- (1) Mergers conducted by undertakings;
- (2) Controlling other undertakings by acquiring their shares or assets or through other means; and
- (3) Acquiring control over other undertakings by contract or other means, or by obtaining the ability to exercise decisive influence over other undertakings by contract or other means.<sup>157</sup>

From the language of this article, the above list seems to be exhaustive. Though this list contains the overwhelming majority of concentrations, given the complexity of merger control in practice, it cannot cover all categories. Whereas the legislative draft contained a general definition of “concentration” it is quite strange that in the final draft, that definition is missing.<sup>158</sup>

The second issue worthy of discussion is the pre-merger notification procedure because the provision may present a conflict of laws. According to Article 21, parties must notify the Antitrust Enforcement Authority regarding concentrations that reach a threshold established by the State Council.<sup>159</sup> The concept of pre-merger notification is not new in China. This article, however, overlaps the existing pre-merger notification requirements mandated by the Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors (PMADEFI) law.<sup>160</sup> Therefore, the relationship between Article 21 and PMADEFI requires a comprehensive review.

As of August 8, 2006, the PMADEFI began to dramatically effect mergers and acquisition transactions involving China. Article 53 of PMADEFI provides the following:

Where an overseas merger and acquisition falls into one of

---

<sup>156</sup> Anti-Trust Law (P.R.C.), *supra* note 9, at Chapter 4.

<sup>157</sup> *Id.*

<sup>158</sup> See International Bar Association Antitrust Committee Working Group on the Development of Competition Law in the People’s Republic of China, *supra* note 87, at 34.

<sup>159</sup> Anti-Trust Law (P.R.C.), *supra* note 9, at art. 21.

<sup>160</sup> Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors, *supra* note 148.

the following situations, the parties of merger and acquisition shall submit the program of merger and acquisition to the Ministry of Commerce and the State Administration of Industry and Commerce before they publish the program of merger and acquisition, or when they submit the program to the competent department of the host country. The Ministry of Commerce and the State Administration of Industry and Commerce shall examine whether or not the merger and acquisition will result in excessive amassment of domestic market, harming domestic fair competitions and damaging the interests of the domestic consumers, and they shall make a decision on approval or disapproval:

- (1) Where one party of the overseas merger and acquisition, owns assets of over RMB 3 billion within the territory of China;
- (2) Where the business turnover in Chinese market of one party of the overseas merger and acquisition in the year is over RMB 1.5 billion;
- (3) Where the market share in Chinese market occupied by one party of the overseas merger and acquisition and the affiliated enterprises thereof has reached 20%;
- (4) Where due to the overseas merger and acquisition, the market share in Chinese market of one party of the overseas merger and acquisition and the affiliated enterprises thereof may reach 25%;
- (5) Where due to the overseas merger and acquisition, the number of the foreign-invested enterprises of the domestic related industries in which one party of the merger and acquisition directly or indirectly holds shares will exceed 15.<sup>161</sup>

Many foreign companies view PMADEFI as a turning point in China's legal history. It is in this administrative regulation, that for the first time the Chinese government is reaching beyond its borders, by making notification a requirement. However, such global reach was not mentioned in the Antitrust Law. For foreign companies, whether such requirement will continue after the coming into effect of the Antitrust Law is a critical question, as it will determine the decision of whether or not to file pre-merger notification under the Antitrust Law.<sup>162</sup>

---

<sup>161</sup> Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors, *supra* note 148, at art. 53.

<sup>162</sup> See Tanxu, *Binggou Fanlongduan Shenchaxize jiang Zhiding*

Procedures for pre-merger notification under the Antitrust Law are less detailed than the PMADEFI's procedures. The Antitrust Law includes, however, broad language regarding "other information required by the Antitrust Enforcement Authority under the State Council" for notification.<sup>163</sup> Adopting further requirements, therefore, is possible, including those currently listed in PMADEFI. Because there are some differences between the notification procedure contained in the Antitrust Law and that in PMADEFI, conflict of laws should be addressed.

Before the Antitrust Law is implemented on August 1, 2008 and its rules regarding procedures for notification of concentration is drafted and passed, the pre-merger notification must be valid and enforced.

Second, after August 1, 2008, the provisions on concentration in the Antitrust Law must prevail over any conflicts with PMADEFI's provisions. The Antitrust Law is a national law adopted by the SCNPC; the PMADEFI are administrative rules adopted by administrative departments. Thus, under the Legislation Law of the P.R.C., the Antitrust Law is a higher authority because Article 79 provides that national law is a higher legal authority than administrative regulations, local decrees and administrative or local rules.<sup>164</sup> Administrative regulations have higher legal authority than local decrees and administrative or local rules.<sup>165</sup>

#### IV. CONCLUSION

After China joined the World Trade Organization on December 11, 2001, Chinese economics has become increasingly integrated with the world economy. Concurrently, China's enormous market potential and rapidly-growing domestic economy have become increasingly attractive to foreign companies and investors. It is necessary to analyze the law because the promulgation of the Antitrust Law has drawn attention around the world.

The past two decades have generated legislation designed to regulate the market economy in China. The chairman of the American Chamber of Commerce-China, James Zimmerman, stated that the law's passage is a "defining moment in the development of China's legal system, which establishes a basic framework to build a fair, uniform and national competition law system that benefits consumers by recognizing and preserving the incentives to compete."<sup>166</sup> The Antitrust Law

---

[*Implementation Rules of Antitrust Law will be Issued*], 7 CAIJING ZAZHI [JOURNAL OF FINANCE AND ECONOMY] 120, 120-22 (2008).

<sup>163</sup> Anti-Trust Law (P.R.C.), *supra* note 9, at art. 23(5).

<sup>164</sup> Law on Legislation, *supra* note 50, at art. 79.

<sup>165</sup> *Id.*

<sup>166</sup> *Landmark Anti-Monopoly Law Passed*, CHINA DAILY, Aug. 31, 2007, [http://www.chinadaily.net/china/2007-08/31/content\\_6070127.htm](http://www.chinadaily.net/china/2007-08/31/content_6070127.htm).

represents a move away from China's state-planned economy to a market-driven economy. In addition, the law sets out a comprehensive competition law framework.

Building a modern legal system, however, will require more regulation because the Law is far from perfect. SCNPC's enactment of the law may not be constitutional. The law's substantive issues and enforcement problems without a unified antitrust authority also burden the law. How this "tiger without teeth" will prey on monopolies that plague China remains uncertain.

Symbolically, China's experience in enacting the Antitrust Law sends an important message to the world that the reforms in China are reaching a critical stage. The Antitrust Law is one legislation that works to overcome the obstacles of a fair and efficient market economy in China. Overcoming all monopolies in China however, will require more legislation.